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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES BORDEN, JR.,)

Petitioner,)

v.) No. 19-5410

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, November 3, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:30 a.m.

APPEARANCES:

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on behalf of the Petitioner.

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P R O C E E D I N G S

(11:30 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 19-5410, Borden versus United States.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

This case concerns the interpretation of the Armed Career Criminal Act's force clause. The most natural reading of that clause is that it reaches only uses of force that are intentionally or knowingly aimed at another person.

The force clause, therefore, does not reach a person who uses force recklessly because such a person is indifferent as to whether the force used falls on another person or on no one at all.

Such an interpretation not only is compelled by the text of the force clause but is supported by its broader context, namely, to define the phrase "violent felony" and to

1 identify those repeat offenders who are likely
2 to point a gun at someone in the future and thus
3 warrant a minimum of 15 years in prison.

4 Until recently, our interpretation was
5 the uniform interpretation of the courts of
6 appeals, which relied on the text of the force
7 clause and this Court's decision in Leocal
8 construing it. That was seemingly settled law,
9 and it gave rise to no apparent problems with
10 the statute's reach.

11 But, in the wake of this Court's
12 decision four years ago in *Voisine*, some courts
13 of appeals, including the court below, reversed
14 course and adopted a contrary interpretation.
15 Those courts were mistaken.

16 In *Voisine*, this Court was
17 interpreting different statutory language in a
18 wholly different context, and it expressly
19 reserved the question presented here.

20 The government advocates an
21 interpretation of the force clause that is
22 grossly overinclusive, sweeping in offenses such
23 as reckless driving, and thereby dramatically
24 expanding the scope of the Act.

25 The text of the force clause does not

1 support that interpretation, and it certainly
2 does not unambiguously dictate it. At a
3 minimum, given that every court of appeals had
4 until recently rejected the government's
5 interpretation, this Court should apply the rule
6 of lenity and hold that the force clause
7 excludes reckless offenses.

8 Whether as a matter of plain text or
9 as a matter of lenity, the judgment of the court
10 of appeals should be reversed.

11 I welcome the Court's questions.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Shanmugam.

14 You -- you rely heavily on Leocal and
15 its statement, just to quote, that "it's not
16 natural to say that a person actively employs
17 physical force against another person by
18 accident."

19 I'm not sure I understand that. If
20 I'm, you know, at a sports event and jump up and
21 wave my arms cheering and hit the person next to
22 me, haven't I employed physical force against
23 that person by accident?

24 MR. SHANMUGAM: Perhaps, Mr. Chief
25 Justice, because, in that hypothetical, the use

1 of force is volitional. But we're really
2 relying on a separate aspect of Leocal's
3 reasoning, that is, that the "against" phrase is
4 the critical and key phrase that limits the use
5 of physical force and that defines the necessary
6 degree of intent.

7 And that's really how to reconcile
8 Leocal with Voisine. In Voisine, the Court was
9 interpreting a statute that lacked that limiting
10 language, and the Court appropriately relied on
11 the aspect of Leocal's reasoning to which you
12 point in holding that the unlimited language
13 reaches more broadly.

14 CHIEF JUSTICE ROBERTS: Well, what
15 about something that's in -- in recklessness?
16 You know, if I'm -- as part of a prank, I'm
17 swing -- swinging a bat at -- at someone, of
18 course, meaning not to hit them, but, you know,
19 the bat slips and it does hit them.

20 You'd certainly say that the conduct
21 was reckless, and you'd say that it's directed
22 against another person. So why isn't
23 recklessness enough under that standard?

24 MR. SHANMUGAM: I would certainly say,
25 in that hypothetical, Mr. Chief Justice, that

1 you have used physical force. But I would not
2 say that you have used physical force against
3 the person of another.

4 And the government's alternative
5 interpretation, I would respectfully submit,
6 really reads the "against" phrase out of
7 context.

8 We're not disputing that --

9 CHIEF JUSTICE ROBERTS: Well, I don't
10 --

11 MR. SHANMUGAM: -- substantial --

12 CHIEF JUSTICE ROBERTS: -- understand
13 that. If I'm swinging the bat at him, I'm
14 certainly -- and it -- and it ends up hitting
15 him, I'm using physical force. I'm doing the
16 swinging. And it's against him. I'm looking at
17 him and swinging the bat at him.

18 MR. SHANMUGAM: Well, if you're
19 looking at him and swinging the bat at him, that
20 is much closer to intent, but I think what I
21 would say if you do it recklessly --

22 CHIEF JUSTICE ROBERTS: No, no, I
23 don't mean to hit him. I have no intent to hit
24 him. It's a joke, and -- but -- but,
25 unfortunately, the bat slips.

1 MR. SHANMUGAM: Well, I would say that
2 in that circumstance, you've used physical force
3 and the force has fallen on the other person.
4 And, again, if you accept the government's
5 reasoning, I think it really would include not
6 just reckless offenses but also negligent
7 offenses.

8 And, of course, that was the whole
9 point of the relevant reasoning in Leocal. The
10 Court made quite clear that it was excluding not
11 just accidental offenses but also negligent
12 offenses and that it was relying on the
13 "against" phrase.

14 Now, if you don't accept --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas.

18 JUSTICE THOMAS: Thank you, Mr. Chief
19 Justice.

20 Counsel, I'd like you to go back to
21 your reliance on the "against" phrase and your
22 efforts to distance this case from Voisine. I
23 thought that in Voisine, that the statute there
24 covered the use of force by a person with whom
25 the victim shares a child in common, by a person

1 who is cohabit -- cohabiting with or has
2 cohabited with the victim as a spouse.

3 So it seems that even though it
4 doesn't use the -- the term "against," it does
5 strongly suggest that the absence of that word
6 makes absolutely no difference to the analysis.

7 MR. SHANMUGAM: So I don't think that
8 that's true, Justice Thomas, for two reasons.

9 First, in the opinion in *Voisine*
10 itself, the Court, at page 2279 of the Supreme
11 Court Reporter, quoted the exact language I was
12 relying on with the Chief Justice; that is to
13 say, it quoted the language from *Leocal* relying
14 on the phrase "against the person or property of
15 another." So I think the Court was very
16 sensitive to that.

17 But, second, to go to the reference in
18 Section 922(g)(9) to "a victim," I don't think
19 that the government can get very much purchase
20 out of that, and, indeed, the government really
21 doesn't try to rely on that, but I do think that
22 some lower courts have been somewhat misled by
23 it.

24 And let me explain, if I can, why I
25 think that reference isn't tantamount to the

1 inclusion of a phrase like "against the person
2 of another." Section 922(g)(9) does not require
3 the use of force against the victim. It --
4 instead, it only refers to the victim in
5 defining the offender.

6 And it was really for that reason that
7 this Court, in a case called United States
8 versus Hayes, in an opinion written by Justice
9 Ginsburg, concluded that the relationship with
10 the victim is not even an element under
11 Section 922(g)(9).

12 And so, again, some lower courts have,
13 I think, looked to that reference. But I think
14 that those lower courts have not focused on the
15 fact that this Court in Hayes really rejected
16 the notion that this was equivalent to a phrase
17 "requiring the use of force against a victim."

18 JUSTICE THOMAS: One final question.
19 If this -- if Johnson -- if we had not held that
20 the residual clause was unconstitutionally
21 vague, would this be the type of case that would
22 have fallen under -- or statute that would have
23 fallen under the residual clause rather than
24 this clause?

25 MR. SHANMUGAM: Well, perhaps, but

1 with one caveat, Justice Thomas, and I'll be
2 brief.

3 In Begay and then in Sykes, this Court
4 had a very vigorous back and forth on whether
5 the residual clause extended to reckless
6 offenses. And I think, by the end of Sykes, the
7 Court had effectively restricted the residual
8 clause to intentional offenses. And, of course,
9 it would be highly anomalous to take a broader
10 view of the force clause here.

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer.

14 JUSTICE BREYER: Thank you.

15 My one question for you is, suppose we
16 take what I think is the best definition of
17 recklessness, that a person's reckless when he
18 consciously disregards a substantial and
19 unjustifiable risk that the bad result will
20 follow.

21 So, to take the Chief Justice's
22 example, I have my baseball bat I'm swinging
23 around. I know I am the worst baseball player
24 in history. I know that this baseball bat is
25 likely to slip out of my hands and bump somebody

1 on the head.

2 There's a person standing in front of
3 me. I think: Oh, God, that person may be hit.
4 I don't want him to, but he might be because I'm
5 so bad. And then I swing it, and he's hit.

6 All right. What's the difference
7 really between that and my committing a crime
8 knowing that that result is likely to follow or
9 desiring it intentionally, purposely, that it's
10 likely to follow?

11 MR. SHANMUGAM: Sure. So, Justice
12 Breyer, I would make two points in response to
13 that.

14 The first is that this is a familiar
15 and meaningful distinction in the law. It's a
16 distinction that the model penal code itself
17 described as important.

18 And that is simply the distinction
19 between an action that is intended to cause harm
20 and an action that is not intended to cause harm
21 but merely involves the substantial risk of it.

22 And that is the distinction that we
23 think that the language of the force clause
24 captures.

25 But I would make one additional point

1 that I have not made to date, and that is that
2 even if you think that the "against" phrase
3 doesn't do all of the work, I would submit that
4 this Court's decisions, and particularly its
5 decision in *Begay*, do the remainder of the work
6 because they make clear that the relevant
7 language must be understood in its statutory
8 context, which is to provide a definition of the
9 phrase "violent felony."

10 And where someone acts recklessly,
11 even though the law obviously attributes to that
12 person a substantial degree of moral
13 culpability, that action simply doesn't fall
14 within the ordinary meaning of "violent felony."

15 And the second point I would make,
16 Justice Breyer, is that whatever you might think
17 about sort of the fine gradations in particular
18 hypotheticals, I would respectfully submit that
19 it would be a lot harder to draw the line
20 between recklessness and criminal negligence
21 because negligence itself in the model penal
22 code is defined as being a -- a -- a situation
23 in which an actor should be aware of, once
24 again, a substantial and unjustifiable risk.

25 As the government recognizes in

1 Footnote 5 of its brief, states often define
2 criminal negligence in recklessness terms. And
3 as Professor Whitman's amicus brief recognizes,
4 the line between those two categories is fuzzy.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: Suppose a particular
7 defendant has three prior convictions for second
8 degree murder in a jurisdiction like federal
9 court, I believe, where the minimum mens rea
10 required for that is a form of recklessness.

11 You would say that that person does
12 not qualify under the Armed Career Criminal Act,
13 is that correct?

14 MR. SHANMUGAM: Not necessarily,
15 Justice Alito, and that is because, when you're
16 talking about second degree murder, whether
17 under federal law or under state law, typically,
18 the state of mind that's required is the state
19 of mind that we learned about in law school, a
20 so-called depraved heart or extreme
21 recklessness.

22 And I think probably the better view
23 is that extreme recklessness still doesn't
24 qualify under our textual interpretation. But I
25 would acknowledge that there are good reasons

1 potentially to treat extreme recklessness
2 differently from ordinary recklessness.

3 The model penal code itself appears to
4 equate that state of mind with intent or
5 knowledge. It equates depraved heart murder
6 with --

7 JUSTICE ALITO: Well, a typical
8 definition for depraved heart murder simply
9 requires a very high degree of risk and an
10 extreme disregard of life. And -- and you just
11 acknowledged it would be pretty hard for us to
12 say that's okay, but ordinary recklessness is
13 not.

14 MR. SHANMUGAM: Yeah, I'm happy to
15 acknowledge that, Justice Alito. And, again,
16 it's because, as you say, we're talking about
17 extreme indifference to human life, such as
18 shooting into a crowd. And I think courts have
19 pretty consistently treated that as tantamount
20 to acting intentionally or knowingly.

21 JUSTICE ALITO: All right.

22 MR. SHANMUGAM: Now --

23 JUSTICE ALITO: Suppose the person
24 shooting into a crowd -- suppose a person looks
25 at a crowd of people or just looks at a single

1 person, and this person's got a lot of -- has
2 got a hairdo that sticks up quite a bit, and on
3 top of the hairdo there is a hat.

4 And the person says: Oh, you know, I
5 don't know how great a shot I am, but I'm going
6 to try to pick off that hat without touching a
7 hair on the person's face -- person's head.

8 That would -- would -- would it be a
9 stretch to say that that is the -- the use of
10 force against the person of the vic -- of -- of
11 the target?

12 MR. SHANMUGAM: I think it would be a
13 stretch to say that, though, as you say, if the
14 hat is on the person, it sort of feels as if the
15 hat is part of the person.

16 But, you know, again, I'm going to
17 recognize that there may be close cases. There
18 are close cases when prosecutors make charging
19 decisions as to all of these states of mind.

20 I think our principal submission,
21 Justice Alito, is simply the -- the point that
22 you made on the Third Circuit in the Oyebanji
23 case, and that is that a reckless offense, an
24 offense involving ordinary recklessness,
25 although involving a substantial degree of moral

1 culpability, does not fall within the ordinary
2 meaning of violent crime, much less the ordinary
3 meaning of violent felony.

4 JUSTICE ALITO: Well, you know, I was
5 -- I was on a court of appeals at the time, and
6 I acknowledged that I had to follow Supreme
7 Court opinions, and the latest opinion there was
8 -- was Leocal.

9 Let me see if I can sneak in one more
10 question. Suppose a statute referred to the
11 reckless use of force against the person of
12 another. Would that be an incoherent statement?
13 Would that be gibberish?

14 MR. SHANMUGAM: I think, in that
15 hypothetical, the explicit use of recklessness
16 might override what would otherwise be the plain
17 meaning of the phrase "use of force against the
18 person of another." But I would respectfully
19 submit that that's just not how a person would
20 ordinarily speak.

21 And if Congress was trying to convey
22 that meaning, it would have said something like
23 the use of physical force that recklessly causes
24 injury to another person.

25 JUSTICE ALITO: All right. Thank you.

1 MR. SHANMUGAM: Congress didn't --

2 JUSTICE ALITO: Thank you. My time is
3 up.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, I -- I --
7 I accept that there are reckless uses of force
8 that come close to intentional. The Chief, Sam
9 -- Justice Alito, have given you examples of
10 that.

11 But, as I look at the charging
12 statutes that encompass recklessness, many of
13 them, including in Tennessee, where this crime
14 was committed, involve conduct that -- that's
15 hard to think of as reckless and more as
16 negligent, for example, the individual who was
17 charged with recklessly causing injury who was
18 blinded by the sun, and there are other examples
19 of that.

20 Isn't that the whole point of this
21 exercise, that because recklessness is -- is not
22 necessarily an act directed against another
23 person, that's why it cannot qualify as a -- as
24 a crime of violence?

25 MR. SHANMUGAM: Yes, that's correct,

1 Justice Sotomayor. And I think it's important
2 for the Court to keep in mind here that we're
3 not talking about individual cases. We're
4 talking about state statutes.

5 And state statutes ordinarily draw a
6 meaningful distinction between intent and
7 recklessness. Indeed, the Tennessee statute at
8 issue here separately defines intentional
9 aggravated assault and reckless aggravated
10 assault. Not surprisingly, Tennessee imposes
11 stricter penalties on the former.

12 And so, you know, to the extent,
13 again, that we're talking about extreme
14 recklessness, which tends to come up primarily
15 in the context of murder, I think it would be
16 entirely appropriate for the Court either to
17 reserve that question or even to indicate that
18 extreme recklessness is tantamount to intent or
19 knowledge.

20 The second point I would make is,
21 again, looking at state statutes, I really do
22 think that once you start drawing the line
23 between recklessness and negligence, that these
24 are really fine distinctions that involve the
25 degree of risk, the extent of awareness of risk.

1 And, of course, our fundamental
2 submission to the Court today is that if you
3 agree, as I think one respectfully must, that
4 this Court in *Leocal* indicated that negligent
5 offenses are excluded, there's simply no way
6 from this statutory language to treat reckless
7 and negligent offenses differently.

8 JUSTICE SOTOMAYOR: Thank you,
9 counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: Mr. Shanmugam, I'm
12 again interested in your textual argument about
13 the "against the person of another" phrase, and
14 I guess what some of these hypotheticals that
15 have been thrown your way make me think is that
16 that phrase really just doesn't have anything to
17 do with *mens rea*.

18 What it has something to do with is
19 the *actus reus*. You know, it has something to
20 do with defining what the act is, that it's an
21 act directed at the person of another but is
22 sort of indifferent to what the person's intent
23 is. So I was wondering whether you could
24 respond to that.

25 MR. SHANMUGAM: I would make two

1 points in response to that, Justice Kagan.

2 The first, picking up on something I
3 said earlier, is that, in Leocal itself, the
4 Court made clear that it viewed that language as
5 defining the degree of intent.

6 And I think that it's easiest to sort
7 of understand that when you think about against
8 not in isolation, as the government would have
9 you do, but, again, when you think about using
10 force against the person of another.

11 Again, if I throw a plate at a wall to
12 try to hit a spider and the plate hits my wife
13 instead, I think an ordinary English speaker
14 would say that you're using physical force
15 against the spider and not against my wife.

16 JUSTICE KAGAN: Well, let me -- let me
17 give you a -- a couple different hypotheticals,
18 and this is a paired set. So the first one
19 should be easy.

20 The first one, I'm a bank robber and
21 I'm running out of the bank and I really have to
22 get out in a hurry and my car is in a parking
23 lot, and I see that there's a man right behind
24 my car, and I know that when I get out, I'm
25 going to run him over.

1 Is that the use of physical force
2 against the person of another?

3 MR. SHANMUGAM: Yes, it is, because
4 you're certain or practically certain that
5 you're going to run over the man.

6 JUSTICE KAGAN: Absolutely. So now
7 exact same facts, except the person is eight
8 feet away from the car, so there's a very
9 substantial risk that when I back up I'm going
10 to hit him. But it's possible that if the guy
11 is looking just my way and if he's fast enough,
12 he's going to escape.

13 Is that the use of physical force
14 against a person of another?

15 MR. SHANMUGAM: I don't think so. And
16 I -- I -- and I think that it's true -- I think
17 that's true for the reason that we have been
18 discussing. Again, I think that when you're
19 using physical force against a person, that
20 suggests that the force is being directed at
21 that person.

22 JUSTICE KAGAN: But I know that this
23 guy is standing six feet in back of me and he's
24 going to have to be really lucky to get out of
25 the way of my car. He's got to be, you know,

1 very fleet of foot, and otherwise I'm going to
2 hit him.

3 MR. SHANMUGAM: Yes.

4 JUSTICE KAGAN: I guess I'm just
5 thinking, like, okay, there's a difference in
6 risk level, but I don't see why we should say
7 that one is the use of physical force against
8 another and the other is not.

9 MR. SHANMUGAM: I -- I think because
10 you in that hypothetical are conscious of the
11 risk, and the risk may be very high, but that is
12 a meaningful distinction at law.

13 And to respond just very briefly to
14 your point about the actus reus, Justice Kagan,
15 I think that if that were all that phrase were
16 doing, it's really impossible to make any sense
17 out of Leocal because, there, the phrase was
18 "against the person or property of another."
19 And if you were simply defining the actus reus,
20 that language would have been superfluous.

21 JUSTICE KAGAN: Thank you, Mr.
22 Shanmugam.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch.

25 JUSTICE GORSUCH: Good morning,

1 counsel. I -- I -- I appreciate that you want
2 us to draw a firm and clear line between
3 recklessness and negligence, as the model penal
4 code does, but I've been kind of curious about
5 some of your responses which blur the line
6 between recklessness and other mens rea, higher
7 up, knowledge and intent, which the model penal
8 code also treats as distinct and importantly so.

9 And I guess I'm curious where -- where
10 you think the -- the statute draws the line.
11 Would a knowledge crime trigger the ACCA under
12 your view? It seems like, in the reply brief,
13 you concede that almost, but I'm not clear why.

14 MR. SHANMUGAM: Yes, I believe that it
15 would. And so let me just walk very briefly if
16 I may, Justice Gorsuch, through these different
17 states of mind.

18 Knowledge doesn't, frankly, tend to
19 come up as often with these sorts of offenses.
20 But the law generally treats intent and
21 knowledge as effectively equivalent.

22 JUSTICE GORSUCH: Well, no, no, no,
23 that -- that's where you're wrong. It certainly
24 does in tort, but the model penal code draws a
25 firm distinction between them. And it's true

1 that sometimes a jury can infer intent from
2 knowledge because very few defendants will admit
3 they secretly harbored a nefarious intention.
4 And it's also true that in tort and other areas
5 we sometimes collapse the two.

6 But the model penal code treats them
7 as distinct. So --

8 MR. SHANMUGAM: Well, Justice --

9 JUSTICE GORSUCH: -- let -- let's
10 assume I'm right about that for just -- for just
11 argument's sake. Then what?

12 MR. SHANMUGAM: Justice Gorsuch, let
13 me make one quick point in response to that,
14 which is that --

15 JUSTICE GORSUCH: Actually, please,
16 please, with my limited time --

17 MR. SHANMUGAM: Yeah.

18 JUSTICE GORSUCH: -- just answer the
19 question.

20 MR. SHANMUGAM: When you're talking
21 about knowledge of the result, as opposed to
22 knowledge of some specific fact, I think the law
23 does treat the two as effectively equivalent.

24 When you act with knowledge that your
25 conduct will cause a certain result --

1 JUSTICE GORSUCH: All right. Counsel,
2 I really don't want to get involved in that
3 argument with you, okay?

4 Assume that intent and knowledge are
5 distinct mental elements, and it can be -- it --
6 it may be -- it may be the statute depends on,
7 you know, what the -- an object of -- of the
8 mens rea may be different, okay, whether the --
9 the consequences that you have to have a mens
10 rea attached to or not. Forget about that,
11 okay? Forget about all of that.

12 Why wouldn't we, if we're taking the
13 statute seriously, and -- and looking at the
14 rule of lenity, start with the assumption that
15 until Congress tells us otherwise, this has to
16 be an intent statute?

17 MR. SHANMUGAM: I think, with regard
18 to offenses such as assault, murder, rape, and
19 the like, the offenses that Congress seemingly
20 intended to cover, that what you're really
21 talking about is intent with the exceptions that
22 we have been talking about today.

23 But I would say that the distinction
24 between intent and knowledge on the one hand and
25 recklessness is a meaningful one for the reason

1 I suggested earlier. It's the distinction
2 between an action that is intended to cause
3 harm --

4 JUSTICE GORSUCH: All right.

5 MR. SHANMUGAM: -- or that is known to
6 cause harm.

7 JUSTICE GORSUCH: Thank you. Thank
8 you. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh.

11 JUSTICE KAVANAUGH: Good morning, Mr.
12 Shanmugam. If the statute said "use of physical
13 force," period, would that cover reckless
14 offenses?

15 MR. SHANMUGAM: That would be
16 textually equivalent to the statute in *Voisine*,
17 but I would have my --

18 JUSTICE KAVANAUGH: So -- so, again --

19 MR. SHANMUGAM: -- fallback argument
20 regarding the context.

21 JUSTICE KAVANAUGH: Okay. But -- but,
22 if we follow *Voisine*, then yes. So it's because
23 it says "use of" -- if it said "use of force,"
24 it covers reckless offenses. If it says "use of
25 force against another," it does not cover

1 reckless offenses.

2 And I guess I'm just thinking that's a
3 very strange line to draw. Judge Sutton in
4 Verwiebe -- he's a very wise judge, as you know
5 -- said sometimes the simplest explanation is
6 the best explanation.

7 And it seems like, if you're trying to
8 make sense of Leocal and Voisine together, the
9 simplest and I think potentially the best
10 explanation, I want to get your reaction, is
11 negligent conduct is not use of force and
12 reckless conduct is use of force for purposes of
13 these statutes because -- I think to pick up on
14 what Justice Thomas said -- it would be a bit
15 wild to say reckless crimes are covered by "use
16 of force" statutes but not by "use of force
17 against another" statutes.

18 So can you respond to that?

19 MR. SHANMUGAM: Justice Kavanaugh,
20 here's why I think the two statutes have to be
21 interpreted differently. It's because of
22 negligent offenses.

23 I think that under the reasoning of
24 Voisine, if you were dealing with that statute,
25 Section 922(g)(9), which, again, came up in a

1 very different context, then a negligent offense
2 would qualify as the use of force because the
3 use of force in a case involving negligence is
4 volitional.

5 By contrast, it is clear that under
6 the different language at issue here, in the
7 wake of this Court's decision in *Leocal*,
8 negligent offenses would be excluded.

9 And I think, with respect, I would
10 rely on the reasoning of not Judge Sutton but
11 Judge Kethledge, relying on this distinction in
12 the text and relying on the very important
13 distinction of the context.

14 JUSTICE KAVANAUGH: Well, on the -- on
15 the textual point, I think you're making a
16 point, I think, that ordinary usage of "against
17 the person of another" is itself what excludes
18 recklessness.

19 But then, if you look at the *Voisine*
20 opinion -- and I don't mean this as a gotcha
21 point at all but just kind of an -- an example
22 of ordinary usage -- it describes the offense
23 there even though it didn't -- the statute
24 didn't say "against another," on page 1, as "any
25 misdemeanor committed against a domestic

1 relation"; on page 4, "recklessly assaulting a
2 domestic relation"; on page 7, "the harm such
3 conduct causes as the result of a deliberate
4 decision to endanger another"; page 8, "who
5 assaults another"; page 9, referring to the main
6 statute, "to recklessly injure another"; on page
7 12, "federal law applies to those with prior
8 convictions for the use of physical force
9 against a domestic relation."

10 The point being, in explaining the
11 ordinary use of the phrase "use of force," it
12 was describing it indistinguishable from "use of
13 force against another." Can you respond to
14 that?

15 MR. SHANMUGAM: Yes, Justice
16 Kavanaugh, very briefly. I think that that is
17 simply reflective of the fact that the force
18 falls on the victim when you're dealing with a
19 reckless offense like a negligent offense. And,
20 again, the Court went on for pages about the
21 distinct context of Section 922(g)(9), which was
22 to serve the public safety purpose of taking
23 guns out of the hands of anyone who has engaged
24 in domestic abuse, even misdemeanors.

25 JUSTICE KAVANAUGH: Thank you very

1 much.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 JUSTICE BARRETT: Good morning,
5 Mr. Shanmugam. A few minutes ago, you said that
6 Congress -- you described the heartland of
7 crimes of violence as murder, rape, assault. I
8 -- I have a question about assault.

9 Many statutes include recklessness in
10 the definition of assault. So wouldn't the
11 categorical approach mean that if recklessness
12 isn't included, assault's out?

13 MR. SHANMUGAM: Good morning, Justice
14 Barrett. I would say two things about assault.

15 First, I think it's important to keep
16 in mind that we're talking here about felony
17 assault and not about misdemeanor assault. And,
18 in Voisine, to the extent that the Court talked
19 about misdemeanor assault, that was simply
20 because that statute covered felonies and
21 misdemeanors.

22 With regard to felony assault itself,
23 the government correctly notes that in a number
24 of states -- it's around half of them -- there
25 are reckless felony assault offenses. But, in

1 the majority of those states, there are discrete
2 assault offenses that could be committed
3 intentionally or knowingly. Indeed, that's true
4 in Tennessee, as the law at issue here reflects.

5 And the fundamental problem with the
6 government's effort to turn this into a state
7 counting exercise like the one at issue in
8 *Voisine* is that, here, there's no evidence that
9 Congress sought to sweep in every variant of
10 offenses, such as robbery and felony assault, as
11 opposed to the most serious versions of those
12 offenses, those that are committed intentionally
13 or knowingly.

14 And in *Voisine*, the Court attached
15 significant weight to the fact that if the
16 defendant's interpretation were adopted,
17 Section 922(g)(9) would be affirmatively
18 inoperative in a majority of the states.

19 That's clearly not true here. And,
20 indeed, for more than a decade, we lived with
21 our interpretation without any evident
22 difficulties of underinclusiveness or
23 difficulties of administration. It's only
24 really --

25 JUSTICE BARRETT: Mr. Shanmugam, let

1 me just interrupt so I don't run out of time. I
2 have another question. So the word "against" --
3 let me just read you this definition -- can mean
4 into contact or collision with, toward, upon.

5 In Justice Kagan's hypothetical where
6 the bank robber is pulling out and she sees in
7 the rearview mirror that someone is standing
8 eight feet behind the car, why doesn't that
9 definition fairly encompass harm -- a use of
10 force that is toward, in collision with someone,
11 or conscious disregard of the risk of someone?
12 It doesn't seem to me a stretch of the English
13 language to use it that way.

14 MR. SHANMUGAM: We don't dispute,
15 Justice Barrett, that in isolation, "against"
16 could define the object of force. But, here,
17 the word "against" is being used with "use of
18 force."

19 And that makes all the difference.
20 The government in its brief talks about the
21 application of force. It certainly would be
22 true that if you hit a baseball against a
23 windshield, that the ball has hit the
24 windshield. But you wouldn't say that you've
25 used force against the windshield if your intent

1 is not for the ball to land on the windshield.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Shanmugam,
4 a minute to wrap up.

5 MR. SHANMUGAM: Thank you, Mr. Chief
6 Justice.

7 As the government prepares to present
8 its argument, I would respectfully submit that
9 there are really two fundamental problems with
10 its position.

11 The first is the one that we've been
12 discussing, which is that the government's
13 position really fails to come to grips with how
14 this Court construed the materially identical
15 statutory language in *Leocal*. And, again, I
16 think there's simply no way that that language
17 can be construed to encompass reckless offenses
18 but not negligent ones, never mind
19 unambiguously, as the rule of lenity would
20 require.

21 I think the second problem is that the
22 government's interpretation would sweep in a
23 host of unintentional and nonviolent offenses,
24 particularly reckless driving offenses, which
25 the United States Code itself breaks out from

1 crimes of violence. And a mom who fails to
2 buckle in her child and then gets into an
3 accident is not the sort of offender who is
4 likely to point a gun at someone in the future.

5 Again, our interpretation was the
6 interpretation of the lower courts, with no
7 evident difficulties for more than a decade, and
8 the court of appeals here should have followed
9 suit.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Feigin.

14 ORAL ARGUMENT OF ERIC J. FEIGIN
15 ON BEHALF OF THE RESPONDENT

16 MR. FEIGIN: Thank you, Mr. Chief
17 Justice, and may it please the Court:

18 The reasoning of this Court's decision
19 in *Voisine* resolves this case. As Justice
20 Kavanaugh pointed out, *Voisine* described
21 recklessly causing injury to a domestic relation
22 as the "use of physical force against a domestic
23 relation."

24 It necessarily follows that recklessly
25 causing injury to the person of another is the

1 use of physical force against the person of
2 another. It makes no difference that in *Voisine*
3 the phrase "against a domestic relation" was the
4 Court's own descriptive language, while, here,
5 the phrase "against the person of another" is
6 Congress's descriptive language.

7 No matter who says it, as Justice
8 Kagan pointed out, it's a natural way to refer
9 to the object of the actus reus of the crime.
10 Petitioner, nevertheless, insists that the word
11 "against" indirectly cuts out reckless offenses
12 on the theory that it necessarily imposes a
13 targeting requirement.

14 But, if that targeting theory were
15 correct, then, as Justice Gorsuch pointed out,
16 even offenses with a mens rea of knowledge and
17 certainly offenses with a mens rea of extreme
18 recklessness would be excluded, a result the
19 Petitioner himself disavows.

20 In this Court's decision in *Voisine*,
21 background principles of criminal law as the
22 default state of liability and common sense all
23 group "knowingly causing injury" with
24 "recklessly causing injury," which, by
25 definition, involve the knowing disregard of a

1 substantial and unjustifiable risk that an
2 injury will occur.

3 That very line is reflected in the
4 felony assault offenses of approximately 30
5 states, the robbery offenses of approximately 11
6 states, and the murder offenses of approximately
7 36 states in 1986 the Petitioner's reading would
8 apparently have excluded at least a form of and
9 a very core form of.

10 CHIEF JUSTICE ROBERTS: Counsel, it
11 seems to me that you're putting an awful lot of
12 weight on Voisine. The "against domestic
13 relation" there was used in a sort of colloquial
14 manner, I -- I think certainly not as a
15 technical statutory interpretation.

16 MR. FEIGIN: Well, Your Honor, I heard
17 my friend on the other side to say that he
18 thinks, when you add "against," the meaning
19 changes because it's plain that you couldn't
20 possibly use this language to mean what the
21 majority of courts of appeals have interpreted
22 it to mean since Voisine.

23 And I think this Court's use of the
24 phrase in its own language in the opinion in
25 Voisine on page 2282 illustrates that that plain

1 meaning argument that he's making can't possibly
2 be right. It shows the language can be used in
3 this way, and Congress did use the language that
4 way.

5 CHIEF JUSTICE ROBERTS: Recklessness
6 does cover a -- a fairly broad range. You know,
7 it does cover my swinging the baseball bat that
8 slips, but, as I think your friend on the other
9 side just noted, it can also cover things like,
10 you know, failing to buckle in the child in the
11 -- in the car seat or texting while driving.

12 And I don't think in any of those
13 situations you would say that that's using force
14 against that -- those -- those individuals.

15 MR. FEIGIN: Well, I -- a couple of
16 points, Your Honor.

17 First of all, as to the driving
18 example, we're not really talking about reckless
19 driving in the abstract. We're talking about
20 cases in which someone's been charged with
21 felony assault based on his or her conduct with
22 a car. And -- and I think --

23 CHIEF JUSTICE ROBERTS: Well, don't --

24 MR. FEIGIN: -- another --

25 CHIEF JUSTICE ROBERTS: -- people get

1 -- maybe I'm wrong, but don't people get charged
2 with that in some instances when they're doing
3 something like, you know, texting while driving
4 or -- or that sort of thing?

5 MR. FEIGIN: Your Honor, I'm not going
6 to say it's never happened, but I think we
7 describe at pages 41 to 42 of our brief the --
8 I'm sorry, pages 38 to 40 of our brief, we
9 describe the examples of reckless assault based
10 on conduct with a car that they've been able to
11 come up with, and they're all much more extreme
12 than that.

13 These are people who are vastly
14 exceeding the speed limit through neighborhoods,
15 running various stop signals. Then they T-bone
16 someone, they head-on collide with someone, or
17 they kill someone.

18 CHIEF JUSTICE ROBERTS: Well, you're
19 comfortable describing that activity as a crime
20 of violence?

21 MR. FEIGIN: The activity I just
22 described, yes, Your Honor. And -- and as to
23 the label, I think while the courts looked at
24 that as to the degree, of course, it doesn't
25 make much sense to look at it as to the mens

1 rea.

2 There's reckless conduct like shooting
3 into a crowded house that I think everyone would
4 describe as violent. And there's intentional
5 conduct like in Agatha Christie-style sedate
6 murder by poisoning someone's tea that I don't
7 think anyone would really describe as violent
8 but that everyone agrees is covered.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas.

12 JUSTICE THOMAS: Thank you, Mr. Chief
13 Justice.

14 Counsel, just briefly if you could.
15 There seems to be a bit of tension between
16 Voisine and Leocal. Could you just comment on
17 that and then also spend a little bit of time
18 explaining why Leocal doesn't sort of -- doesn't
19 imperil your case?

20 MR. FEIGIN: Sure, Your Honor.

21 I think that Voisine itself resolves
22 any tension between Voisine and Leocal because
23 Voisine explains that the reasoning of Leocal is
24 simply a distinction between accidental
25 offenses, which would include negligent crimes,

1 and non-accidental offenses, which Voisine makes
2 clear include reckless crimes.

3 And it doesn't focus at all on the
4 linguistic distinctions between the two
5 statutes. And -- and I'll get to that in one
6 second, why -- why those shouldn't matter, but
7 the -- the reason we know that -- the reason
8 Voisine doesn't focus on that is because Voisine
9 accepted that even under the statute at issue in
10 that case, that force against a victim was
11 required.

12 And that can be shown from the Court's
13 own example of someone who recklessly throws a
14 plate at a wall. It wasn't enough that the
15 person knew or intended to use force against the
16 plate. The critical question for whether the
17 main assault statute was covered was whether the
18 person was reckless, that a shard from that
19 plate might hit the domestic victim.

20 And the reason that the additional
21 language doesn't matter is because it has
22 independent weight. My friend on the other side
23 suggests that it has no meaning if it doesn't
24 impose the targeting restriction that he would
25 impose, but it actually does two things.

1 First of all, it makes sure that the
2 injury is to a person and not to property. But
3 even as to similarly worded statutes that
4 include both persons and property, the
5 requirement that it be against another is a
6 significant limitation.

7 It's why arson does not qualify as a
8 crime of violence under 18 U.S.C. 16(a) or
9 924(c)(3)(A), because you can commit it by
10 burning down your own house for the insurance
11 money. So we can't include that crime under
12 phrases like this.

13 JUSTICE THOMAS: The -- if -- if the
14 residual clause were still in use and had not
15 been done away with as unconstitutionally vague,
16 wouldn't that be a more natural place for this
17 particular case or this charge?

18 MR. FEIGIN: Your Honor, there's
19 substantial overlap between the residual clause
20 and the elements clause, but they each have
21 their distinct role.

22 And to the extent that my friend on
23 the other side is suggesting that the residual
24 clause might have excluded this or might not
25 have, I think the elements clause here focuses

1 on crimes that actually involve the use of
2 force, where someone is, in this case, actually
3 injured.

4 And in those circumstances, I think
5 reckless crimes were clearly crimes Congress
6 would want to cover, because we know that they
7 wanted the elements clause to reach things like
8 robbery, felony assault, and, certainly, second
9 degree murder.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: In going back to the
14 statute itself, what it does is it takes, say,
15 possession of a firearm or ammunition, which is
16 illegal, and it changes the sentence from no
17 minimum up to 10 years to a 15-year minimum
18 sentence up to life. And that happens where you
19 have three prior crimes that fit the definition.
20 That's a pretty serious consequence.

21 So this Court, I think, has struggled
22 to try to make sure the really bad things are in
23 those three priors and not things that are not
24 quite so bad. So that's why I find Leocal and
25 Begay pretty much on point.

1 Now Begay, we had drunk driving. And
2 dozens -- quite a few states make drunk driving
3 -- they put in that recklessness. All right.
4 We had it and we said in the residual clause,
5 you have to have the -- the residual clause is
6 closer to what you want, and it talks about a
7 serious potential risk of physical injury. And
8 we said there has to be conduct in those three
9 priors that is violent, aggressive, and
10 purposeful.

11 Now we add a residual clause and you
12 have words that are much closer to here. And
13 we're trying to get out drunk driving because it
14 just isn't the right category, given the
15 statute. Why isn't this case a fortiori?

16 MR. FEIGIN: Well, Your Honor, in
17 Begay, this Court was considering a drunk
18 driving statute that didn't have a mens rea
19 requirement at all, and it didn't reach the
20 question whether reckless felony assault, which
21 is what these cases that are -- we're talking
22 about here, would be covered by the residual
23 clause.

24 The second thing that I would say is
25 the Court never resolves whether the residual

1 clause covers reckless offenses, and it -- it --
2 and so it -- it really mattered whether it did.
3 I don't think that necessarily cuts in
4 Petitioner's favor.

5 But the third thing I would say is
6 even if you thought it didn't, I think that
7 actually makes our case stronger because, if we
8 can't get in things like reckless murder under
9 the residual clause, then Congress surely wanted
10 to include them under the elements clause.

11 As I was saying to Justice Thomas, the
12 elements clause is more restricted in that it is
13 directed at occasions where force is actually
14 used, whereas the residual clause and ultimately
15 to its doom was focused on possibilities and
16 whether or not something might ultimately result
17 in the use of force.

18 JUSTICE BREYER: One last thing --

19 MR. FEIGIN: Here, we're talking --
20 I'm sorry, Justice Breyer.

21 JUSTICE BREYER: Is -- I mean, what --
22 is there a difference between the words you just
23 used, which were reckless murder with a car, and
24 the words I'm going to call drunk driving? I
25 mean --

1 MR. FEIGIN: I guess --

2 JUSTICE BREYER: -- is that a big
3 difference?

4 And, as after all, it was because we
5 thought there wasn't that those -- that word
6 "purposeful" appears in Begay, so that was the
7 basic reason. So what do you think about that?

8 MR. FEIGIN: Again, Your Honor, the
9 drunk driving statute in Begay didn't have a
10 mens rea requirement at all. And so the Court
11 didn't --

12 JUSTICE BREYER: Well, the word
13 "purposeful" did not -- did not purport to be an
14 interpretation just about driving. It purported
15 to be an interpretation of the residual clause,
16 which is relevant here insofar as for the
17 reasons I said.

18 MR. FEIGIN: Yes, Your Honor, but I --

19 JUSTICE BREYER: "Purposeful" was
20 across the board. "Purposeful" was across the
21 board.

22 MR. FEIGIN: Well, Your Honor, first,
23 the other -- another thing the Court was trying
24 to do in that case, and it ultimately abandoned
25 this project, was to grope for a standard that

1 applies to the residual clause in particular.

2 And what it did in that case was it
3 looked to the enumerated offenses clause that
4 directly precedes the residual clause, and it
5 tried to figure out some way to group those four
6 particular offenses together.

7 We don't have that issue --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Alito.

11 JUSTICE ALITO: Well, it's always a
12 pleasure to have another case involving the
13 Armed Career Criminal Act. It is a real -- it
14 is a real favorite.

15 Do you think that Leocal allows us to
16 say that the "against" -- that the phrase
17 "against the person of another" does not speak
18 at all to the question of mens rea?

19 MR. FEIGIN: Your Honor, I think it
20 may have some kind of contextual influence on
21 mens rea but no more so than it had in Voisine
22 because, in Voisine, as I was saying earlier in
23 -- in response to Justice Thomas, you had a
24 similar context where you needed somebody who
25 was injured.

1 And I want to be quite clear that we
2 really are only talking today about crimes that
3 require the actual causation of injury, somebody
4 actually was hurt, and then we're -- and then
5 the defendant was reckless as to whether someone
6 would get hurt.

7 Because those are the set of crimes
8 that the Court has in front of it today. And
9 only in crimes that involve the actual causation
10 of injury would we even be able to prove that --
11 that force capable of causing pain or injury, in
12 -- in fact, took place.

13 JUSTICE ALITO: You -- you point out
14 that if we adopt Petitioner's interpretation,
15 crimes like second degree murder and a lot of
16 assault offenses will not qualify as ACCA
17 predicates.

18 And the Petitioner responds that if we
19 adopt your interpretation, drunk driving
20 offenses and other less serious offenses
21 involving reckless conduct will qualify.

22 So which of these two parades of
23 horrors is more horrible?

24 MR. FEIGIN: I -- I -- if horribleness
25 is a good thing, then I think our parade of

1 horribles is more horrible. And let me give you
2 two concrete reasons why.

3 First of all, we've done a -- a survey
4 and these numbers are a bit approximately -- a
5 bit approximate, but we're only aware of maybe a
6 maximum of approximately 10 or 12 states that
7 have separate driving-specific offenses that we
8 think might even qualify as ACCA predicates, and
9 most of those states label those crimes
10 vehicular assault or vehicular homicide. And so
11 they treat them much more seriously than they do
12 kind of regular drunk driving.

13 And I guess the second and related
14 point I would make about that is, to the extent
15 that my friend's position depends on these kind
16 of isolated examples of seemingly innocuous
17 conduct that might in theory be covered by one
18 of these statutes, this Court in -- in Quarles
19 may recall that one of the major arguments made
20 there was that there were seemingly innocuous
21 ways to commit certain forms of burglary.

22 And the Court looked at what Congress
23 was trying to do as a categorical matter, and
24 just because that can happen once doesn't mean
25 it's going to happen three times to someone such

1 that they're classified under the ACCA.

2 And if you look at the set of offenses
3 that they would cut out, which are felony
4 assault by injury, second degree murder, and
5 common law robbery, which the Court described in
6 Stokeling as the paradigmatic elements clause
7 offense, I think it's quite clear that our
8 reading is much better than theirs.

9 JUSTICE ALITO: All right. Thank you,
10 counsel.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

13 JUSTICE SOTOMAYOR: Counsel, in terms
14 of the parade of horrors, I -- I do think it's
15 important to remember that judges always have
16 the ability to decide somebody -- or to hold
17 that reckless conduct doesn't qualify you for an
18 ACCA enhancement but that the crime you
19 committed, all the horrors that you describe,
20 do command a greater sentence. So it's not as
21 if these people are going to get away scot --
22 scot-free.

23 I -- I also point to something that
24 the government said in its response brief in
25 *Voisine*, and that responsive brief made an

1 opposite point than the one you advanced today.

2 I'm quoting from your Voisine brief:

3 "While both provisions contain the phrase use of
4 physical force, the domestic violence provision,
5 and ACCA, the misdemeanor crime of violence
6 definition omits the remainder of the Leocal's
7 provision Section 16 definition, which qualifies
8 that the force is against the person or property
9 of another."

10 You said the "against" phrase was
11 crucial to Leocal's holding, which required a
12 higher mens rea. And yet today you're telling
13 us that that "against" -- "force directed
14 against the person" has no meaning, that the
15 only meaning is was your conduct reckless and
16 did it happen to cause physical injury.

17 Were you wrong then and right now?

18 MR. FEIGIN: Your Honor, I don't think
19 that we placed that amount of weight on the
20 phrase in -- in that case. I think we noted
21 that Leocal had relied on it, but I don't think
22 we were placing dispositive weight on it.

23 But even if you see some tension
24 between our position in Voisine and our position
25 here today, there's been a significant

1 intervening event, which is the decision in
2 Voisine, which I think clears up the
3 misimpression that the courts of appeals have
4 been laboring under, as Justice Alito referred
5 to in my friend's part of the argument, that
6 Leocal actually controlled the question of
7 reckless conduct.

8 And Voisine did so in a way that
9 didn't rely on those linguistic distinctions.
10 Voisine makes clear that what Leocal was really
11 about is the difference between accidental and
12 reckless conduct. And that's the exact line
13 that the criminal law draws.

14 And there's a really good reason why
15 the criminal law draws that line. It's because
16 the distinction between knowledge and
17 recklessness is simply one of degree, and the
18 distinction --

19 JUSTICE SOTOMAYOR: So, counsel --

20 MR. FEIGIN: -- between recklessness
21 and negligence --

22 JUSTICE SOTOMAYOR: Counsel, since my
23 time is limited --

24 MR. FEIGIN: Sorry.

25 JUSTICE SOTOMAYOR: -- in Leocal, we

1 said that a DWI cannot be a crime of violence
2 because it does not require the use of force
3 against the person of another. And it didn't --
4 it happened to be negligence, but its entire
5 focus was, was the force directed at another
6 person.

7 It seems to me that since Tennessee
8 and many other states are putting drunken
9 driving in their assault statutes like this one,
10 that what we're doing is sub silentio overruling
11 Leocal. Maybe not sub silentio, but that's what
12 our intent is. And that's what you're asking us
13 to do.

14 MR. FEIGIN: No, Your Honor. Leocal
15 expressly reserved the question of reckless
16 offenses, so it didn't consider this here. It
17 was like, as -- as in Begay, considering an
18 offense that didn't have a mental state at all.

19 So I -- I don't think that what we're
20 asking you to do today would sub silentio
21 overrule Leocal. We -- we don't think that the
22 mere crime of drunk driving as such is included
23 within the ACCA. It would not be an ACCA
24 predicate.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Kagan.

3 JUSTICE KAGAN: Mr. Feigin, as -- as
4 you know, Voisine expressly reserves this
5 question, just as Leocal expressly reserved the
6 recklessness question. And -- and in that
7 footnote where it does reserve it, it says the
8 context and purposes of the statutes may be
9 sufficiently different to require a different
10 reading.

11 And -- and this, I suppose, goes back
12 to Justice Breyer's questions, because I think
13 the argument might go, or at least part of the
14 argument might go, that in ACCA, one is defining
15 what it means to be a violent felon for purposes
16 of imposing an extremely significant punishment,
17 whereas, in this statute, one is talking about
18 misdemeanors and applying only a prophylactic
19 rule about gun possession.

20 And, further, I mean, Voisine spends
21 as -- as much time talking about the effects of
22 coming out the other way than it does about the
23 text. In other words, it basically says, if we
24 don't hold the way we are holding today, this
25 entire federal scheme will be rendered

1 inoperative.

2 And -- and that seems very different
3 no matter if you can come up with, you know, 13
4 robbery statutes or -- or something like that,
5 that seems an extremely different consequence of
6 a ruling.

7 So I guess I would ask you to respond
8 to that set of things that might serve to
9 distinguish this case from Voisine.

10 MR. FEIGIN: Sure, Your Honor. Let --
11 let me say three -- three things about that.

12 First of all, I -- I think the
13 different contexts actually cut in our direction
14 because, first of all, they removed the Second
15 Amendment concerns that Justice Thomas voiced in
16 his dissenting opinion in Voisine.

17 And -- and, second -- the second point
18 I would make is that, here, you require three
19 serious felony offenses, whereas, there, a
20 single misdemeanor crime would have sufficed.

21 And as I was suggesting earlier, we're
22 talking about cases where people have been
23 charged with felony assault or -- or murder or
24 robbery or a serious offense like that, and
25 we're not simply talking about cases where one

1 crime makes all the difference.

2 And the third -- the third thing I
3 would say is that, if you hold for Petitioner in
4 this case, I think you're going to reintroduce
5 the exact same anomaly that you avoided in
6 Voisine.

7 As we explain on page 36 of our brief,
8 the similarly worded elements clause in 18
9 U.S.C. 16, which defines crime of violence, is
10 incorporated into the Immigration and
11 Nationality Act's definition of crime of
12 domestic violence.

13 And if these reckless crimes are
14 excluded, then the 35 state misdemeanor assault
15 offenses that the Court focused on in Voisine
16 wouldn't qualify under the Immigration and
17 Nationality Act either.

18 And I think it would be quite
19 surprising to Congress to find that a fairly
20 subtle change of wording, one statute requiring
21 that the crime be committed by domestic relation
22 and the other statute requiring that it be
23 against the person of another, make that big a
24 difference as to whether the scheme works as it
25 was intended to.

1 JUSTICE KAGAN: Thank you, Mr. Feigin.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch.

4 JUSTICE GORSUCH: Good morning,
5 Mr. Feigin.

6 I -- I guess one other possible
7 distinction textually between this and Voisine,
8 of course, is that we don't have the phrase
9 "against the person or property of another."
10 And I know -- in that case and we do here.

11 And in Leocal, I guess I'm still
12 stuck. You don't seem to want us to read very
13 much into that phrase, but Leocal says whether
14 or not the word "use" alone supplies a mens rea
15 element, the parties' primary focus on that word
16 is too narrow. Then it goes on to say, "the key
17 phrase -- 'use of physical force against the
18 person or property of another' -- most naturally
19 suggests a higher degree of intent than
20 negligent or merely accidental." Suggesting
21 that phrase has some work to do in mens rea.

22 And I guess I'm still struggling with
23 how, if we're to take our precedent seriously,
24 we ignore that construction, which isn't present
25 in Voisine, irrelevant in Voisine.

1 MR. FEIGIN: Sure, Your Honor. We're
2 not asking you to ignore it. I think you could
3 say the same thing here, that it's of course
4 informed by the context of a requirement to use
5 force against the person of another. We --

6 JUSTICE GORSUCH: But that answer,
7 that it just relates to the object of the force,
8 runs directly counter to Leocal's express
9 instruction that it has something to say about
10 mens rea.

11 And it also renders, as your friend
12 pointed out, that phrase, "person of another or
13 property of another," superfluous in Leocal
14 itself. What do we do about that?

15 MR. FEIGIN: Well, Your Honor, let me
16 say just -- I appreciate the chance to clear
17 this up. But let me clarify that I think
18 grammatically under the last-antecedent rule,
19 the phrase just modifies physical force. So it
20 refers to the object of physical force.

21 JUSTICE GORSUCH: Yeah, but that --
22 that doesn't work because of Leocal's express
23 instruction that it has something to say about
24 mens rea. So that -- assume I just --

25 MR. FEIGIN: Right.

1 JUSTICE GORSUCH: That doesn't work as
2 a matter of precedent, if we're taking our
3 precedent seriously.

4 MR. FEIGIN: So I think what Leocal
5 recognizes is that when you're interpreting the
6 clause as a whole, you take the words in
7 context, and you take the word used in the
8 context of that language.

9 But the -- the critical point I would
10 make here is that I think Voisine is
11 interpreting it in the same type of context
12 because --

13 JUSTICE GORSUCH: That phrase isn't in
14 Voisine, is your problem. Let me ask you
15 another question if we're not going to get more
16 progress there.

17 What do we do about the rule of
18 lenity? And this statute is supposed to provide
19 notice not to nine judges on the Supreme Court
20 who are struggling with it, but to -- to
21 ordinary Americans. And if -- if we can't make
22 heads or tails of it and every circuit to have
23 addressed it up until recently came out against
24 you, why shouldn't we -- if Congress wishes to
25 legislate here further, and of course it may,

1 why shouldn't we here say the tie goes to the
2 defendant, the presumptively free defendant?

3 MR. FEIGIN: Well, Your Honor, the
4 rule of lenity, of course, requires grievous
5 ambiguity. And Voisine found the result there
6 to be plain, notwithstanding that the circuit
7 consensus was against it.

8 And I -- I think it would be quite
9 anomalous to say that here, as the rule of
10 lenity -- application of the rule of lenity
11 would require that the Court is left to do
12 nothing more than guess as to what Congress
13 intended. I -- I think it's particularly clear
14 after Voisine what Congress intended to do here.

15 JUSTICE GORSUCH: Thank you, counsel.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Good afternoon,
19 Mr. Feigin.

20 I want to pick up on Justice Gorsuch's
21 point about precedent because we have two
22 precedents we have to make sense of, Leocal and
23 Voisine. And in your brief, I -- I thought the
24 answer that you were giving about the
25 distinction of Leocal, and this is page 13 of

1 your brief, "The Court in Voisine accordingly
2 made clear that the critical distinction
3 recognized in Leocal itself is between accidents
4 and recklessness, not recklessness and knowledge
5 or intention."

6 In other words, that Leocal stands for
7 the idea that negligence doesn't come within
8 this kind of language. Is that right?

9 MR. FEIGIN: That's -- that's right,
10 Your Honor. And I would -- as I was saying
11 earlier, I think the reason why that is true --
12 and it comports with traditional criminal law
13 principles where, under the Model Penal Code on
14 which my friend has been relying, recklessness
15 is the default mens rea. And the reason why
16 that is, is that --

17 JUSTICE KAVANAUGH: Exactly. Well, so
18 -- so I'm sorry to interrupt, but the -- the
19 point being that Leocal recognizes the
20 distinction that's traditional: Negligence,
21 out; recklessness and above, per Model Penal
22 Code, is usually considered more important. But
23 you don't have to guess because you have
24 Voisine, I guess, that draws that distinction.

25 And so that's what I thought the

1 distinction was between Leocal and Voisine, but
2 -- as your brief said.

3 The other thing I wanted to get to is
4 the notice point has been raised here. And it
5 seems to me that the notice in this kind of
6 statute is a little bit different, but -- and
7 this is more of a comment, and you can fill in
8 the gaps of it.

9 But we're not talking about notice for
10 committing reckless assault under Tennessee law.
11 What we're talking about is someone who's been
12 convicted three times for separate offenses
13 under Tennessee law, or other state law, who
14 then after being convicted of three violent
15 felonies, knowing they shouldn't possess
16 firearms, nonetheless possesses firearms on
17 notice they shouldn't possess firearms because
18 they've been convicted of these prior offenses.

19 So you actually have to four times
20 have committed some pretty significant violation
21 before you fall into this statute. Is that -- I
22 mean, that's my understanding. And I think
23 that's the important point on notice, but you
24 can elaborate if you wish.

25 MR. FEIGIN: Your Honor, I think

1 that's exactly right. And I think it's --
2 another point I would emphasize here is, of
3 course, the defendant knows if he has at least
4 one conviction, he is undertaking a criminal
5 act. And so I think he -- he is -- clearly is
6 sufficiently on notice here.

7 And I think the Court has understood
8 this phrase, "use of physical force against the
9 person of another," to encompass the type of
10 reckless conduct that we're talking about here.
11 I think one example is the Court's own recent
12 decision in Stokeling. Stokeling recognized
13 that a typical robbery offense involving a
14 struggle for an item satisfies the elements
15 clause.

16 Now, we wouldn't really say that the
17 force applied by a victim pulling on one end of
18 a suitcase is targeted -- sorry, the force
19 applied by a defendant pulling on one end of a
20 suitcase is targeted at the victim, who's
21 pulling on the other end, as opposed to being
22 targeted at the suitcase itself. But
23 Stokeling's holding reflects that the offense,
24 nevertheless, involves the use of force against
25 the person of another because the defendant's

1 force acts against the victim.

2 That's the way Congress meant the
3 language. That's the way the Court understood
4 it in Stokeling. And I think it provides a
5 person who understands English with fair notice
6 of the -- of what's covered here, just like page
7 2282 of the Court's decision in Voisine does.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Barrett.

11 JUSTICE BARRETT: Good morning,
12 Mr. Feigin.

13 I -- I have a question about the
14 language "attempted or threatened." So, you
15 know, the statute -- "to qualify as a crime of
16 violence must have as an element the use,
17 attempted use, or threatened use of physical
18 force," suggesting that the kind of use of
19 physical force is the kind that can be attempted
20 or threatened.

21 Does that have any significance here?
22 Do those terms, "attempted" and "threatened,"
23 make sense when applied to reckless conduct?

24 MR. FEIGIN: Your Honor, I think
25 traditionally under the criminal law, you can

1 have an attempt to commit a crime with
2 recklessness. It's going to -- the elements of
3 the attempt crime and the mens rea for the
4 attempt crime are going to look somewhat
5 different than the crime that actually achieves
6 its completed result.

7 But I don't see any reason why, and
8 they haven't really given any reason why, the
9 mens rea for all three of these things has to
10 track one another. And even if it did,
11 threatening doesn't actually require intent to
12 use force. A simple bluff would suffice in
13 those circumstances.

14 I also think it would be quite
15 anomalous to include crimes that involve only
16 the threatened use of force, like bluffs, or the
17 attempted use of force that the criminal law and
18 the Sentencing Guidelines traditionally treat as
19 less culpable as ACCA predicates, but not cases
20 in which someone has actually injured someone in
21 knowing disregard of a substantial and
22 unjustifiable risk of doing so, in gross
23 deviation from the standard of conduct that an
24 ordinary person would follow under those
25 circumstances.

1 JUSTICE BARRETT: The --

2 MR. FEIGIN: A defendant who has --
3 I'm sorry.

4 JUSTICE BARRETT: No, I was going to
5 ask you a question about Johnson and vagueness.
6 So one of the amici argues that including
7 recklessness in ACCA is going to drag us into
8 some of the same problems that we had under the
9 residual clause. And this is picking up a
10 thread that you started to touch on earlier.

11 Is that true? You know, in -- in
12 requiring courts to try to gauge what it means
13 to pose a conscious disregard of a known risk,
14 you know, how risky is the risk?

15 MR. FEIGIN: Well, Your Honor, I
16 really don't think so, because we're just
17 talking about the standard definition of
18 recklessness.

19 It's the exact same inquiry that
20 courts are already doing under *Voisine*. And the
21 court's adopting our interpretation appear -- of
22 the ACCA appear to have no difficulty doing.

23 And that also implies something this
24 Court said at the end of *Quarles*, which is that
25 at the end of the *Quarles* opinion it makes clear

1 that what's really required under the Taylor
2 categorical approach is some kind of rough
3 correspondence and that we don't look at these
4 very minute curly Qs of -- of particular state
5 laws.

6 And so I think the combination of all
7 those three things, in particular, the practical
8 evidence that there hasn't really been any
9 problem with this shows that there's really no
10 practical concerns here.

11 JUSTICE BARRETT: Thank you, counsel.

12 CHIEF JUSTICE ROBERTS: A minute left,
13 Mr. Feigin.

14 MR. FEIGIN: Thank you, Mr. Chief
15 Justice.

16 Even Petitioner doesn't really believe
17 that the ACCA's language requires targeting or
18 else he'd limit it solely to specific intent
19 crimes, and he wouldn't include knowledge or
20 behedging about extreme recklessness.

21 And this Court should reject his
22 gerrymandered constriction of the ACCA to
23 exclude crimes involving recklessness. Harming
24 someone by knowingly disregarding their physical
25 safety is a serious crime.

1 It forms the core of numerous
2 aggravated assaults, common law robbery, and
3 murder offenses, and cutting those crimes out of
4 the ACCA would defy both common sense and
5 Congress's clear intent as expressed in the
6 statutory text.

7 All of those crimes involve physical
8 force against a person of another, and Voisine
9 holds that the word "use" encompasses
10 recklessness.

11 Petitioner doesn't challenge that
12 holding and the Court should adhere to it.
13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Three minutes for rebuttal, Mr.
17 Shanmugam.

18 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
19 ON BEHALF OF THE PETITIONER

20 MR. SHANMUGAM: Thank you, Mr. Chief
21 Justice.

22 This case really boils down to one
23 proposition. Our interpretation faithfully
24 reconciles Leocal and Voisine; and the
25 government's doesn't.

1 As to the text, both in Leocal and
2 Voisine, this Court made clear that the word
3 "use" is synonymous with active employment. And
4 it would be very odd to say that someone
5 recklessly actively employs force against
6 another person.

7 And the government's effort today for
8 the first time in the case to suggest that
9 "against the person of another" modifies "force"
10 and not "use of force" is simply grammatically
11 incorrect.

12 But, more generally, the government's
13 position is breathtakingly. The government
14 itself today acknowledges that it would cover
15 reckless driving, which a provision of the
16 Immigration and Nationality Act Section 1101(h)
17 treats as a discrete category from crimes of
18 violence.

19 And as to the legislative history, if
20 Congress had wanted to cover every variant of
21 robbery and assault, and there's no evidence to
22 that effect, it surely would have enumerated
23 those offenses.

24 And it bears repeating that under our
25 interpretation, intentional or knowing variance

1 of those offenses would still be fully covered.
2 The government's argument today really boils
3 down to an argument that the Court resolved in
4 *Voisine*, a question that it expressly left open,
5 and that the Court should effectively overrule
6 *Leocal*, at least as to negligent offenses.

7 In *Castleman*, this Court already held
8 that the statute at issue here and the statute
9 at issue in *Voisine* should be construed
10 differently in light of their different
11 contexts. And it is deeply ironic that the
12 government is here today saying that the two
13 statutes should be construed the same way.

14 In *Voisine* the government included a
15 seven-page section in its brief, seven pages
16 arguing that the statute should be construed
17 differently. Indeed, at oral argument in *Begay*,
18 the lawyer for the government conceded that even
19 reckless homicide would not qualify under the
20 force clause.

21 It's only been since the government --
22 Court's decision in *Voisine* that the government
23 has been pushing the envelope and trying to do
24 under the force clause what it can no longer do
25 under the residual clause now that it has been

1 invalidated.

2 As this Court has said time and again
3 in its many ACCA cases, this is a recidivist
4 statute that should be construed narrowly. If a
5 defendant is not subject to the ACCA, he or she
6 can still be subject to a sentence of up to ten
7 years in prison.

8 And, finally, this is the paradigmatic
9 case for the Rule of Lenity which Justice
10 Kavanaugh applies in the sentencing context no
11 less than it does in the substantive criminal
12 context.

13 Where every court of appeals has
14 construed a statute one way for more than a
15 decade, a defendant should not be subjected to a
16 15-year mandatory minimum based on a decision
17 involving a different statute that the
18 government itself said should be interpreted
19 differently.

20 The court of appeals' interpretation
21 rests entirely on an overreading of this Court's
22 decision in *Voisine* and an under-reading of this
23 Court's decision in *Leocal* and its judgment
24 should be reversed.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:42 p.m., the case
3 was submitted.)

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