No. 18-370

In the Supreme Court of the United States

MARLON HAIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the District of Columbia offense of reckless assault with a deadly weapon, in violation of D.C. Code § 22-402 (LexisNexis 2001), is a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 892 F.3d 1271.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2018. The petition for a writ of certiorari was filed on September 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1); conspiracy to distribute and possess with intent to distribute 28 grams or more of cocaine base, cocaine, and marijuana, in violation of 21 U.S.C. 846; possession with intent to distribute 28 grams or more of cocaine base, in violation of

21 U.S.C. 841(a)(1) and 841(b)(1)(B)(iii); possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C); possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(D); and possession of a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). C.A. App. 209-210. He was sentenced to 152 months of imprisonment, to be followed by five years of supervised release. *Id.* at 211-212. The court of appeals affirmed petitioner's convictions, vacated his sentence, and remanded for further proceedings. Pet. App. 1a-18a.

1. In 2014, the Metropolitan Police Department of Washington, D.C., received a tip from a long-time police informant that a man known as "Boo" was selling crack cocaine. Pet. App. 2a. The informant provided Boo's cell phone number, which the police determined belonged to petitioner, and confirmed that a picture of petitioner showed the man he knew as Boo. *Id.* at 3a. Under police supervision, the informant made three controlled purchases of crack cocaine from Boo. *Ibid.*

Police officers obtained and executed a search warrant at the apartment from which Boo had sold the crack cocaine. Pet. App. 3a. When they arrived at the apartment, a police officer observed a man, whom he later identified with "90 percent" certainty as petitioner, jump from a window and run away. *Ibid.* Another individual, who remained in the apartment during the search, later acknowledged that he had allowed petitioner to process and sell crack cocaine from his apartment. *Ibid.* In the apartment, officers found cocaine and cocaine base, crack cocaine in small plastic bags, drug paraphernalia, marijuana, a loaded handgun, ammunition, cash, and a cell phone with a picture of peti-

tioner on its home screen. *Id.* at 3a-4a. They also observed that the screen to one of the bedroom windows had been pushed out; a cell phone sitting on the bedroom window sill was later determined to have been purchased by petitioner. *Id.* at 4a.

After locating and arresting petitioner, police observed his girlfriend leave his apartment carrying a backpack. Pet. App. 4a. They eventually searched the backpack, which contained several pounds of marijuana, petitioner's employment documents, and handwritten papers with rap lyrics and a skit script that included petitioner's name and expressed his desire to deal drugs. *Ibid.* Police officers then obtained a warrant to search petitioner's apartment, where they found another gun and more ammunition. *Ibid.*

2. A federal grand jury indicted petitioner on various drug charges and, as relevant here, possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). C.A. App. 30-34. After a trial, a jury found petitioner guilty of six of the eight counts in the indictment: the felon-in-possession charge; conspiracy to distribute and possess with intent to distribute 28 grams or more of cocaine base, cocaine, and marijuana, in violation of 21 U.S.C. 846; possession with intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B)(iii); possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C); possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(D); and possession of a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). C.A. App. 209-210.

A conviction for possession of a firearm by a felon, in violation of 18 U.S.C. 922(g), typically exposes the offender to a statutory sentencing range of zero to ten years of imprisonment. See 18 U.S.C. 924(a)(2). If, however, the offender has three or more convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another," then the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), specifies a statutory sentencing range of 15 years to life imprisonment. 18 U.S.C. 924(e)(1); see *Custis* v. *United States*, 511 U.S. 485, 487 (1994). The ACCA defines a "'violent felony'" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii)is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B).

The first clause of that definition is commonly referred to as the "elements clause," and the portion beginning with "'otherwise'" is known as the "residual clause." *Welch* v. *United States*, 136 S. Ct. 1257, 1261 (2016). In *Curtis Johnson* v. *United States*, 559 U.S. 133 (2010), this Court defined "physical force" under the ACCA's elements clause to "mean[] violent force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis omitted).

At sentencing in this case, the government argued that petitioner was subject to the ACCA's 15-year statutory-minimum sentence because he had three

prior qualifying convictions, including a Maryland conviction for assault in the first degree; a District of Columbia conviction for distribution of cocaine; and a District of Columbia conviction for assault with a deadly weapon, in violation of D.C. Code § 22-402 (LexisNexis 2001). Pet. App. 11a; Presentence Investigation Report 5, 11-16. Petitioner objected that his D.C. assault conviction did not qualify as a conviction for a violent felony because it could be committed with a mens rea of recklessness. See Pet. App. 33a-35a.

The district court took the view that "recklessness is not enough" for an assault to qualify as a violent felony under the ACCA, although the court predicted that the court of appeals "will soon decide the question." Pet. App. 36a. The district court sentenced petitioner to concurrent terms of 92 months of imprisonment on the felon-in-possession and cocaine convictions, a concurrent term of 60 months of imprisonment on the marijuana conviction, and a mandatory consecutive term of 60 months of imprisonment on the Section 924(c) conviction, for a total sentence of 152 months of imprisonment, to be followed by five years of supervised release. C.A. App. 211-212.

3. Petitioner appealed his convictions, and the government cross-appealed his sentence. The court of appeals affirmed petitioner's convictions, vacated his sentence, and remanded for resentencing under the ACCA. Pet. App. 1a-18a.[1] As relevant here, the court rejected petitioner's contention that reckless assault with a dangerous weapon does not categorically require the use of violent force "against the person of another" within the

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[1] The court of appeals also remanded petitioner's claim that his trial counsel had been ineffective, with instructions that the district court consider it in the first instance. Pet. App. 10a-11a.

meaning of the ACCA, 18 U.S.C. 924(e)(2)(B)(i). See Pet. App. 12a-17a.

The court of appeals relied on this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), which interpreted the phrase "use of physical force" in the definition of "'misdemeanor crime of domestic violence'" in 18 U.S.C. 921(a)(33)(A)(ii). See Pet. App. 15a-17a. *Voisine* held that a "person who assaults another recklessly 'uses' force, no less than one who carries out that same action knowingly or intentionally." 136 S. Ct. at 2280 (brackets omitted). The "dominant formulation" of recklessness, this Court explained, requires a person "to 'consciously disregard' a substantial risk that the conduct will cause harm to another." *Id.* at 2278 (brackets and citation omitted). Accordingly, the Court determined that "reckless behavior" involves "acts undertaken with awareness of their substantial risk of causing injury" and that "[t]he harm such conduct causes is the result of a deliberate decision to endanger another." *Id.* at 2279.

The court of appeals explained that, because "[t]he statutory provision at issue in *Voisine* contains language nearly identical to ACCA's violent felony provision[,] * * * *Voisine*'s reasoning applies" here. Pet. App. 16a (citation omitted). The court observed that, although the "ACCA requires a defendant to use violent force 'against the person of another'—a phrase that does not appear in the statutory provision that the Supreme Court considered in *Voisine*," the "provision at issue in *Voisine* still required the defendant to use force against another person—namely, the 'victim.'" *Ibid.* (quoting 18 U.S.C. 921(a)(33)(A)(ii)). The court also noted that it was "agree[ing] with four other courts of appeals that have addressed the issue either in the

ACCA context or in the equivalent [Sentencing] Guidelines 'crime of violence' context." *Id.* at 17a (citing *United States* v. *Mendez-Henriquez*, 847 F.3d 214, 220-222 (5th Cir.), cert. denied, 137 S. Ct. 2177 (2017); *United States* v. *Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017), cert. denied, 139 S. Ct. 63 (2018); *United States* v. *Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017); *United States* v. *Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017)). The court acknowledged that "the First Circuit has reached a contrary conclusion," but it "respectfully disagree[d] with that court's decision." *Ibid.* (citing *United States* v. *Windley*, 864 F.3d 36 (1st Cir. 2017) (per curiam)).

ARGUMENT

Petitioner contends (Pet. 11-25) that his prior conviction for assault with a deadly weapon under D.C. Code § 22-402 (LexisNexis 2001) does not qualify as a violent felony under the ACCA, on the theory that a reckless assault does not include as an element the "use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i). The court of appeals correctly rejected that contention, as have most of the other circuits to consider it under either the ACCA or similarly worded provisions of the Sentencing Guidelines. Although the First Circuit recently reached the opposite conclusion, that shallow conflict does not warrant this Court's review in this case. Indeed, because the full Court would presumably not be available to decide this case, it would be a poor vehicle for considering the question presented.

1. a. The court of appeals correctly determined that petitioner's conviction for assault with a deadly weapon involves the "use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C.

924(e)(2)(B)(i), and thus qualifies as a violent felony under the ACCA's elements clause. That determination follows from this Court's decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016). In *Voisine*, the Court held in the context of 18 U.S.C. 921(a)(33)(A)(ii) that the term "use . . . of physical force" includes reckless conduct. 136 S. Ct. at 2278 (citation omitted). Although *Voisine* had no occasion to decide whether its holding extends to other statutory contexts, *id.* at 2280 n.4, the court of appeals correctly recognized that "*Voisine*'s reasoning applies to ACCA's violent felony provision," Pet. App. 16a.

This Court explained in *Voisine* that the word "'use'" requires the force to be "volitional" but "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." 136 S. Ct. at 2279; see *ibid.* (concluding 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"); see also Pet. App. 16a. Moreover, the Court noted, "nothing in *Leocal* v. *Ashcroft*," 543 U.S. 1 (2004), which addressed the mens rea requirement for a statutory "crime of violence" definition similar to the one at issue here, see 18 U.S.C. 16(b), "suggests a different conclusion—*i.e.*, that 'use' marks a dividing line between reckless and knowing conduct." *Voisine*, 136 S. Ct. at 2279 (citation omitted). Rather, the Court indicated, the key "distinction [was] between accidents and recklessness." *Ibid.* Thus, as the court of appeals correctly observed, "[a]s long as a defendant's use of force is not accidental or involuntary, it is 'natu-

rally described as an active employment of force,' regardless of whether it is reckless, knowing, or intentional." Pet. App. 16a (quoting *Voisine*, 136 S. Ct. at 2279).

b. Petitioner suggests (Pet. 22-23) that the phrase "against the person of another" in the ACCA renders inapplicable *Voisine*'s discussion of recklessness. But the court of appeals correctly rejected that proposed distinction. Pet. App. 16a. As the Sixth Circuit has explained, "*Voisine*'s key insight is that the word 'use' refers to 'the act of employing something' and does not require a purposeful or knowing state of mind." *United States* v. *Verwiebe*, 874 F.3d 258, 262 (2017) (citing *Voisine*, 136 S. Ct. at 2278-2279), cert. denied, 139 S. Ct. 63 (2018). "That insight does not change if a statute says that the '*use* of physical force' must be 'against' a person, property, or for that matter anything else." *Ibid.* Rather, the phrase "against the person of another" in the ACCA merely identifies the object of the use of force.

In fact, *Voisine* itself took as a given that the object of the recklessness would be another person, defining recklessness to require a person "to consciously disregard a substantial risk that the conduct will cause *harm to another*." 136 S. Ct. at 2278 (emphasis added; brackets, citation, and internal quotation marks omitted); see *id.* at 2279 (explaining that "reckless behavior" involves "acts undertaken with awareness of their substantial risk of causing injury," such that any "harm such conduct causes is the result of a deliberate decision to *endanger another*") (emphasis added). *Voisine*'s analysis of volition thus already incorporates the premise that the "use" of force is against another person.

Voisine's incorporation of that premise is unsurprising. As the court of appeals here observed, "the provision at issue in *Voisine* still required the defendant to use force against another person—namely, the 'victim.'" Pet. App. 16a (quoting 18 U.S.C. 921(a)(33)(A)(ii)); *ibid.* ("In the words of the Supreme Court in *Voisine*, the phrase 'misdemeanor crime of domestic violence' is 'defined to include any misdemeanor committed *against a domestic relation* that necessarily involves the 'use . . . of physical force.'") (quoting *Voisine*, 136 S. Ct. at 2276) (emphasis added). In other words, whereas the ACCA requires the use of physical force "against the person of another," 18 U.S.C. 924(e)(2)(B)(i), the provision in *Voisine* requires the use of physical force against a "victim" with whom the perpetrator shares a specified relationship, 18 U.S.C. 921(a)(33)(A)(ii). The fact that the ACCA and Section 921(a)(33)(A)(ii) each contain functionally equivalent language limiting the "use of physical force" to crimes against another person refutes petitioner's assertion that reckless conduct qualifies as "use" in one context but not the other.

Petitioner next faults the court of appeals (Pet. 23) for focusing on whether District of Columbia assault with a deadly weapon requires the use of physical force against the person of another, as opposed to focusing more broadly on "the meaning of the phrase 'violent felony.'" According to petitioner, the "violent felony" context "suggests the intention to apply force to another person." *Ibid.* But that argument lacks merit for several reasons. First, it overlooks *Voisine*'s observation that someone who acts recklessly does, in fact, intend his conduct; the only thing he may not have as a "conscious object" is the specific result of his volitional acts.

Voisine, 136 S. Ct. at 2278-2279 (citation omitted) (referring to reckless conduct as "volitional conduct" that involves "a deliberate decision to endanger another"). Second, petitioner's argument proves too much: If the term "violent felony" requires "intention" as to the result of one's conduct, Pet. 23, then even knowing assaults would not qualify as ACCA violent felonies. See *Voisine*, 136 S. Ct. at 2278-2279 (observing that someone who acts knowingly need not intend or have as a "conscious object" the result of his actions, but rather acts with knowledge that the result is likely to happen). And third, petitioner in any event fails adequately to explain why intentionally employing physical force in conscious disregard for the harm it may cause another person cannot fairly be described as "violent." See *Random House College Dictionary* 1469 (rev. ed. 1980) (defining "violent" to include "characterized by or arising from injurious or destructive force"); *Webster's New Collegiate Dictionary* 1297 (1981) (defining "violent" to include "marked by extreme force or sudden intense activity").

Finally, petitioner contends (Pet. 24) that the court of appeals "failed to consider whether any ambiguity in the scope of [Section] 924(e)(2)(B) triggers the rule of lenity." But petitioner never raised that argument in the court of appeals. See Pet. C.A. Reply & Opp. Br. 14-22. In any event, the rule of lenity applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014) (citation omitted). No such grievous ambiguity exists here. Petitioner correctly observes (Pet. 24) that, before *Voisine*, most courts of appeals had concluded that recklessness was insufficient

to constitute the "use" of force; after *Voisine*, many have come to the opposite conclusion. See p. 12, *infra*. But that "change of course" (Pet. 25) does not warrant application of the rule of lenity. "A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of America Nat'l Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring).

2. Petitioner asserts (Pet. 11-19) that the courts of appeals have divided over the application of *Voisine* to the ACCA. Although petitioner correctly notes that the First Circuit has recently departed from the prevailing view, that shallow disagreement does not warrant this Court's review in this case.

The majority of the courts of appeals to address the issue have applied *Voisine*'s reasoning to the ACCA or to similarly worded provisions of the Sentencing Guidelines, as the court of appeals did here. See Pet. App. 15a-17a; *United States* v. *Reyes-Contreras*, No. 16-41218, 2018 WL 6253909 (5th Cir. Nov. 30, 2018) (en banc) (Sentencing Guidelines); *Verwiebe*, 874 F.3d at 262 (6th Cir.) (Sentencing Guidelines); *United States* v. *Fogg*, 836 F.3d 951, 956 (8th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017) (ACCA); *United States* v. *Pam*, 867 F.3d 1191, 1207-1208 (10th Cir. 2017) (ACCA); see also *United States* v. *Benally*, 843 F.3d 350, 354 (9th Cir. 2016) (noting in dicta that *Voisine* suggested that reckless conduct may constitute a "crime of violence" under 18 U.S.C. 16, but declining to reach the issue where the challenged statute required "only gross negligence").[2]

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[2] This Court has recently denied review of this issue in several cases, all of which addressed the Sentencing Guidelines. See *Harper* v. *United States*, 139 S. Ct. 53 (2018) (No. 17-7613); *Verwiebe*,

Petitioner is correct (Pet. 12-16), however, that the First Circuit has departed from the approach followed by the other courts of appeals. Although the scope of earlier First Circuit decisions was uncertain, that court recently made clear that its precedent "forecloses the argument that crimes with a mens rea of recklessness may be violent felonies under the [ACCA's] force clause." *United States* v. *Rose*, 896 F.3d 104, 109 (2018).

By contrast, petitioner's suggestion (Pet. 17) that the Fourth Circuit "will eventually side with the First Circuit" remains speculative. In *United States* v. *Middleton*, 883 F.3d 485 (2018), the Fourth Circuit concluded that the South Carolina crime of involuntary manslaughter, which proscribes killing another person unintentionally while acting with "reckless disregard of the safety of others," is not a violent felony under the ACCA. *Id.* at 489 (citation omitted). The court noted that the statute had been applied to a defendant who sold alcohol to high school students who then shared the alcohol with another person who drove while intoxicated, crashed his car, and died. *Ibid.* The Fourth Circuit concluded that conduct leading to bodily injury through so "attenuated a chain of causation" did not qualify as a use of violent force. *Id.* at 492. Otherwise, it reasoned, "any illegal sale" could "trigger the ACCA's force clause, simply because physical pain or injury eventually results." *Ibid.*

Petitioner relies (Pet. 16-17) on language in a separate opinion. In a concurrence in part and in the judgment, one judge—joined in relevant part by one of the judges in the majority—wrote that he would have in-

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supra (No. 17-8413); *Ramey* v. *United States*, 139 S. Ct. 84 (2018) (No. 17-8846).

stead concluded that "South Carolina involuntary manslaughter cannot serve as an ACCA predicate" because "the ACCA force clause requires a higher degree of mens rea than recklessness." *Middleton*, 883 F.3d at 500 (Floyd, J.) (emphasis omitted). It is not yet clear what precedential effect, if any, the Fourth Circuit will give that two-judge portion of a separate opinion.[3]

The shallow and recent conflict between the First Circuit and the several other circuits to have decided the question does not warrant this Court's review in this case. Other circuits are currently considering the question. See, *e.g.*, *United States* v. *Santiago*, No. 16-4194 (3d Cir.) (reh'g en banc ordered June 8, 2018). And this case does not present an ideal vehicle for resolving it. Because then-Judge Kavanaugh wrote the opinion for the court of appeals, see Pet. App. 2a, the full Court

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[3] In *United States* v. *Hodge*, 902 F.3d 420 (2018), a subsequent panel of the Fourth Circuit noted that the United States had conceded that "Maryland reckless endangerment constitutes a 'violent felony' only under the ACCA's [now-defunct] residual clause," and cited the *Middleton* concurrence for the proposition that "the ACCA force clause requires a higher degree of mens rea than recklessness." *Id.* at 427 (quoting *Middleton*, 883 F.3d at 498 (Floyd, J., concurring in part and concurring in the judgment)) (brackets and emphasis omitted). But although the United States had conceded that Maryland reckless endangerment is not a violent felony under the ACCA, it did not concede that the *Middleton* concurrence's reasoning controlled. Such a concession was unnecessary, as Maryland reckless endangerment likely does not satisfy the ACCA's elements clause regardless of whether other crimes involving a mens rea of recklessness can constitute violent felonies. In particular, Maryland reckless endangerment does not require proof of "contact [that] was not consented to by the victim," *Manokey* v. *Waters*, 390 F.3d 767, 772 (4th Cir. 2004) (citation and internal quotation marks omitted), cert. denied, 544 U.S. 1034 (2005).

would presumably not be available to decide this case. As petitioner notes (Pet. 4), the question presented arises with some frequency. Thus, the Court will have other opportunities to consider the question presented should it wish to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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