No. 13-7120

In the Supreme Court of the United States

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the residual clause in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be * * * be deprived of life, liberty, or property, without due process of law.

The pertinent statutory and regulatory provisions are set forth in the appendix to the United States' opening brief. U.S. Br. App. 2a-32a.

STATEMENT

1. In 1984, Congress enacted the Armed Career Criminal Act (ACCA). See Pub. L. No. 98-473, 98 Stat. 2185. The statute provided at that time that a person who "receives, possesses, or transports" a firearm in commerce and who had three or more con-

victions for "robbery or burglary" in federal or state courts would be subject to a mandatory sentence of at least 15 years. 18 U.S.C. App. 1202(a) (Supp. II 1984). Robbery and burglary were defined as offenses containing particular elements. 18 U.S.C. App. 1202(c)(8) and (9) (Supp. II 1984).

In 1986, Congress amended the ACCA twice. In May, Congress recodified the ACCA at its current location of 18 U.S.C. 924(e). See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 458-459. It also changed the triggering offense to a violation of 18 U.S.C. 922(g), which makes it unlawful for certain individuals, including felons, to ship, transport, possess, or receive any firearm or ammunition with a specified connection to interstate commerce. Absent the ACCA enhancement, Section 922(g) imposes a penalty of up to ten years of imprisonment. 18 U.S.C. 924(a)(2).

In October 1986, Congress enacted the Career Criminals Amendment Act as a subtitle of the Anti-Drug Abuse Act of 1986. See Pub. L. No. 99-570, § 1402, 100 Stat. 3207-39. That statute substantially expanded the range of ACCA predicate offenses. Rather than limiting the ACCA to specifically defined generic crimes, the amendments made any "violent felony" or "serious drug offense" an ACCA predicate, and it defined those terms broadly to capture a range of federal and state crimes. The term "serious drug offense" was defined to include both specified violations of federal drug laws and "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" for which a maximum sentence

of ten years or more is prescribed by state law. 18 U.S.C. 924(e)(2)(A).

Similarly, a "violent felony" was defined to capture an array of federal and state offenses:

> 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). Subsection (i) of that definition has been called the "elements clause" because it encompasses crimes that include one of the three specified elements. The first nine words of Subsection (ii) has been called the "enumerated-crimes clause" because it lists four generic crimes that correspond to various federal and state offenses. This Court has referred to the second part of Subsection (ii) as the "residual clause."

The October 1986 amendments reflected Congress's view that, as enacted in 1984, the ACCA did not identify all individuals who are properly characterized as "career criminals" and who thus should face heightened penalties for illegal firearm possession. See *Taylor* v. *United States*, 495 U.S. 575, 583-584 (1990). As particularly relevant here, what has come to be known as the residual clause was, along with the elements clause, the principal solution that Congress devised to address that problem. As originally passed out of the Subcommittee on Crime of the House Judi-

ciary Committee, the bill's definition of "violent felony" included only an elements clause and a standalone "residual" clause: "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) involves conduct that presents a serious potential risk of physical injury to another." H.R. 4885, 99th Cong., 2d Sess. 3 (1986); see *Taylor*, 495 U.S. at 586. The Committee's report indicated that the second clause would include "burglary, arson, extortion, use of explosives and similar crimes." H.R. Rep. No. 849, 99th Cong., 2d Sess. 5-6 (1986).

The text from that bill was folded into the House bill that became the Anti-Drug Abuse Act of 1986. See H.R. 5484, 99th Cong., 2d Sess. 203-205 (introduced Sept. 8, 1986). After the House sent that bill to the Senate, the Senate passed an amended bill that included a different formulation of a standalone residual clause, which encompassed crimes posing a risk either to persons or property ("by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), mirroring the Criminal Code's general definition of "crime of violence," 18 U.S.C. 16(b) (Supp. II 1984). See 132 Cong. Rec. 27,206, 27,252 (Sept. 30, 1986); cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 6-12 (2004) (construing 18 U.S.C. 16(b)). The conference then added the enumerated-crimes clause to the House version of the residual clause. See 132 Cong. Rec. 29,649 (Oct. 8, 1986). That addition clarified that certain property crimes like burglary and arson—which would unequivocally have been included in the Senate version of Subsection (ii)—

would also be included in the House's version, despite that version's exclusive focus on risk to persons.

In 1988, Congress amended the ACCA to include certain acts of juvenile delinquency as predicate offenses and to provide that prior offenses must have been committed on different occasions to count as separate predicate offenses. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 6451, 7056, 102 Stat. 4371, 4402. Since 1988, Congress has made only minor or technical changes to the ACCA.[1]

2. In the 28 years since Congress expanded the ACCA, this Court has decided four cases involving the residual clause, in addition to ten cases involving other applications of the statute.[2]

In *James* v. *United States*, 550 U.S. 192 (2007), this Court set out the general framework for determining whether a particular offense falls within the residual clause and concluded that attempted burglary under Florida law qualifies. First, the Court held, under the "categorical approach" that this Court has employed for statutes that focus on "convictions" rather than conduct, a court must identify the conduct encompassed by the elements of the offense. *Id.* at 201-202.

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[1] See Crime Control Act of 1990, Pub. L. No. 101-647, § 3529(2) and (3), 104 Stat. 4924; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 110510(a), 330003(f)(2), 108 Stat. 2018, 2141; Criminal Law Technical Amendments Act of 2002, Pub. L. No. 107-273, § 4002(d)(1)(E), 116 Stat. 1809.

[2] See *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *McNeill* v. *United States*, 131 S. Ct. 2218 (2011); *Johnson* v. *United States*, 559 U.S. 133 (2010); *United States* v. *Rodriquez*, 553 U.S. 377 (2008); *Logan* v. *United States*, 552 U.S. 23 (2007); *Shepard* v. *United States*, 544 U.S. 13 (2005); *Daniels* v. *United States*, 532 U.S. 374 (2001); *Caron* v. *United States*, 524 U.S. 308 (1998); *Custis* v. *United States*, 511 U.S. 485 (1994); *Taylor*, *supra*.

Second, a court must ask "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.* at 208-209. The Court explained that the "ordinary case" focus was necessary given that "even a prototypically violent crime might not present a genuine risk of injury" on a particular occasion—for example, extortion conducted by an "anonymous blackmailer." *Id.* at 208. The Court found that attempted burglary presents the requisite risk because it poses at least as much risk as completed burglary. See *id.* at 203-209. The Court did not decide whether offenses less risky than any of the enumerated offenses could also qualify under the residual clause.

James rejected a "suggestion" by Justice Scalia in dissent that under the Court's interpretation, "the residual provision is unconstitutionally vague." 550 U.S. at 210 n.6. The Court held that the clause "is not so indefinite as to prevent an ordinary person from understanding what conduct it prohibits," citing other federal and state laws using similar risk-based formulations. *Ibid.* Justice Scalia, joined by two other Justices, argued in favor of a limiting construction that he believed would avoid vagueness concerns: that a residual-clause predicate offense must pose at least as much risk as the least risky enumerated crime (in his view, burglary). See *id.* at 219 (Scalia, J., dissenting). Unlike the majority, he concluded that attempted burglary is categorically less risky than burglary. *Id.* at 225-227 (Scalia, J., dissenting).

In two of the three residual-clause cases it has decided since *James*, the Court applied the same analysis: It asked whether the conduct encompassed by the elements of the offense, in the main, presented a seri-

ous risk of physical injury to other people. In *Chambers* v. *United States*, 555 U.S. 122 (2009), the Court, relying in part on the conclusions of the Sentencing Commission, held that the Illinois offense of failure to report to prison does not pose a sufficiently serious risk. See *id.* at 128-130. And in its most recent decision, *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), the Court, after examining available empirical evidence and comparing the risk posed by the offense to the risk presented by the enumerated offenses, held that the Indiana offense of intentional vehicular flight from a law-enforcement officer qualifies as an ACCA predicate. *Id.* at 2271.

The Court conducted a different analysis in *Begay* v. *United States*, 553 U.S. 137 (2008), which held that felony drunk driving under New Mexico law does not fall within the residual clause. See *id.* at 148. The Court assumed that the crime was sufficiently risky, but held that it was too different in kind from the enumerated crimes to qualify because it does not involve "purposeful, violent, and aggressive conduct." *Id.* at 145. In its later decision in *Sykes*, however, the Court clarified that *Begay*'s requirement that a crime be "'purposeful, violent, and aggressive,'" was used only to "explain the result" in a case that "involved a crime akin to strict liability, negligence, and recklessness crimes." 131 S. Ct. at 2275-2276. The Court stated that outside of that class of offenses, "risk levels provide a categorical and manageable standard" for courts to apply. *Ibid.*

Justice Scalia dissented in *Sykes*, arguing that the residual clause "is a drafting failure" that is "void for vagueness." 131 S. Ct. at 2284. The majority rejected that argument, reaffirming its holding in *James*.

"Congress," the Court explained, "chose to frame ACCA in general and qualitative, rather than encyclopedic, terms" by "stat[ing] a normative principle." *Id.* at 2277. The Court again concluded that the statute "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.'" *Ibid.* (quoting *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999) (opinion of Stevens, J.)). "Although this approach may at times be more difficult for courts to implement," the Court held, citing similarly phrased federal statutes, "it is within congressional power to enact." *Ibid.*

3. In the period since the ACCA's residual clause was enacted in 1986, lower courts have held that a range of dangerous offenses fall within its compass. Those offenses include:

- child abuse, *United States* v. *Wilson*, 568 F.3d 670, 672-674 (8th Cir. 2009);
- enticing and inviting a child into a house to commit sodomy, *United States* v. *Williams*, 120 F.3d 575, 578-579 (5th Cir. 1997), cert. denied, 522 U.S. 1061 (1998);
- larceny from a person, *e.g.*, *United States* v. *Howze*, 343 F.3d 919, 922-924 (7th Cir. 2003);
- attempted rape, *e.g.*, *Dawson* v. *United States*, 702 F.3d 347, 351-352 (6th Cir. 2012);
- sexual assault, *e.g.*, *United States* v. *Terrell*, 593 F.3d 1084, 1089-1091 (9th Cir. 2010), cert. denied, 131 S. Ct. 2094 (2011);
- attempted kidnapping, *e.g.*, *United States* v. *Kaplansky*, 42 F.3d 320, 323-324 (6th Cir. 1994) (en banc);

- compelling a person to act as a prostitute, *United States* v. *Brown*, 273 F.3d 747, 749-751 (7th Cir. 2001);
- false imprisonment, *e.g.*, *United States* v. *Schneider*, 681 F.3d 1273, 1280-1282 (11th Cir. 2012);
- solicitation to commit aggravated assault, *United States* v. *Benton*, 639 F.3d 723, 731-732 (6th Cir.), cert. denied, 132 S. Ct. 599 (2011);
- assault with intent to commit murder, *United States* v. *Jones*, 673 F.3d 497, 505-508 (6th Cir.), cert. denied, 133 S. Ct. 350 (2012);
- stalking involving constraining or restraining the victim, *e.g.*, *United States* v. *Meherg*, 714 F.3d 457, 461 (7th Cir.), cert. denied, 134 S. Ct. 256 (2013);
- resisting arrest, *United States* v. *Weekes*, 611 F.3d 68, 72-73 (1st Cir. 2010) (Souter, J.), cert. denied, 131 S. Ct. 3021 (2011);
- attempted arson, *United States* v. *Rainey*, 362 F.3d 733, 735-736 (11th Cir.) (per curiam), cert. denied, 541 U.S. 1081 (2004);
- malicious discharge of a firearm at an occupied dwelling or vehicle, *United States* v. *Ford*, 613 F.3d 1263, 1270-1273 (10th Cir. 2010);
- rioting at a correctional institution, *United States* v. *Johnson*, 616 F.3d 85, 87-94 (2d Cir. 2010), cert. denied, 131 S. Ct. 2858 (2011);
- possession of a loaded weapon with intent to use it unlawfully against another person, *e.g.*, *United States* v. *Lynch*, 518 F.3d 164, 172-173 (2d Cir. 2008), cert. denied, 555 U.S. 1177 (2009); and
- possession of a weapon in a prison, *e.g.*, *United States* v. *Boyce*, 633 F.3d 708, 711-712 (8th Cir. 2011), cert. denied, 132 S. Ct. 1002 (2012).

4. As required by statute, the United States Sentencing Guidelines have always included a "career offender" guideline, § 4B1.1; see 28 U.S.C. 994(h). That guideline imposes greater penalties on adult defendants for a third felony conviction for a "crime of violence" or "controlled substance offense." As originally promulgated, "crime of violence" was defined using the Criminal Code's general definition of that term at 18 U.S.C. 16. See Sentencing Guidelines § 4B1.2 (1987). In 1989, the Sentencing Commission amended the definition to generally track the ACCA, except that instead of "burglary," the enumerated-crimes clause says "burglary of a dwelling." See Sentencing Guidelines Manual App. C, Amend. 268 (effective Nov. 1, 1989).

The commentary to Section 4B1.2 sets forth crimes that the Commission has determined to meet the standards for a "crime of violence" or a "controlled substances offense." For example, the commentary states that the basic felon-in-possession offense does not qualify, but that possession of a weapon regulated by the National Firearms Act, see 26 U.S.C. 5845(a), such as a "sawed-off shotgun or sawed-off rifle, silencer, bomb, or machinegun," does qualify. § 4B1.2, comment. (n.1).

5. Petitioner pleaded guilty in the United States District Court for the District of Minnesota to one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2-A3. The district court concluded that petitioner had three prior convictions that qualified as violent felonies under the ACCA. One of petitioner's predicate offenses was a Minnesota conviction for unlawful possession of a short-barreled shotgun, which the court

held to fall within the residual clause. *Id.* at A3-A4. The court therefore sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at B2-B3. The court of appeals affirmed. *Id.* at A1-A7. In both the district court and the court of appeals, petitioner preserved an argument that the residual clause of the ACCA is unconstitutionally vague, although he did not seek certiorari on that question. See Pet. Supp. Br. 2.

SUMMARY OF ARGUMENT

This Court correctly held in *James* v. *United States*, 550 U.S. 192 (2007), and *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), that the ACCA's residual clause is not unconstitutionally vague.

A. Because the ACCA is a sentencing statute that does not regulate constitutionally protected activity, the standard for holding it unconstitutionally vague is exceptionally demanding. To be invalidated, the residual clause must be "impermissibly vague in all of its applications," *Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 495 (1982), even for the myriad offenses that uncontroversially involve substantial risks of physical injury, see, *e.g.*, pp. 8-9, *supra*. And as a provision that prescribes only the sentencing range for clearly illegal conduct, the ACCA implicates neither of the vagueness doctrine's core concerns: advising law-abiding citizens about what conduct is criminal and preventing arbitrary or discriminatory enforcement by law-enforcement officers, prosecutors, and juries. *Skilling* v. *United States*, 561 U.S. 358, 402-403 (2010).

B. *James* and *Sykes* correctly held that the text of the residual clause states a sufficiently clear sentencing principle. The key phrase—"serious potential risk

of physical injury to another"—mirrors the language in over two hundred federal and state criminal statutes. And the distinguishing features of the residual clause make the statute's enforcement more uniform and predictable than the typical risk-based criminal statute, under which liability depends entirely on a factfinder's later case-specific determination of whether particular conduct posed a sufficiently substantial risk. Petitioner, moreover, has failed to identify any practicable alternative formulation that would eliminate the asserted vagueness problems while achieving the same congressional purpose of keeping firearms out of the hands of individuals who have repeatedly committed crimes that put other people in harm's way.

C. This Court's decisions interpreting the residual clause enable its principled application. Those decisions require a court to determine whether, in the ordinary case, the commission of the offense entails a serious risk of physical injury to other people. In identifying the ordinary case and determining whether it poses the requisite risk, federal judges can draw on their vast body of experience adjudicating criminal convictions and can test their judgments against reported case law, legislative findings, the views of the Sentencing Commission, and available empirical data. And although this Court has been called upon to resolve circuit conflicts over classes of offenses that present hard questions, this Court's docket can produce a skewed impression of the difficulty of applying the residual clause in the run of cases. Many offenses have not given rise to circuit conflicts because "the severity of the risk [is] obvious," *Begay* v. *United States*, 553 U.S. 137, 154 (2008) (Scalia, J., concurring in the judgment).

D. *Stare decisis* considerations militate strongly against invalidating the residual clause. Federal prosecutors have made numerous charging decisions in light of this Court's holding in *James* in 2007 that the residual clause is not unconstitutionally vague. And it would reduce confidence in the integrity of the judicial process for this Court now to declare the residual clause—a statute that it has itself interpreted and applied on four occasions—to be hopelessly indeterminate.

E. The residual clause is not vague as applied to petitioner. Under an analysis focused on risk levels and the nature of the offense, the illegal possession of a short-barreled shotgun—a weapon that in the ordinary case is unlawfully acquired to intimidate, maim, and kill human beings—clearly qualifies as an ACCA predicate.

ARGUMENT

THE RESIDUAL CLAUSE OF THE ACCA IS NOT UNCONSTITUTIONALLY VAGUE

The ACCA's residual clause classifies as a predicate offense any federal or state offense punishable by more than one year in prison that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Courts must conduct a two-step analysis to decide whether a prior conviction satisfies the residual clause. First, a court must identify the conduct encompassed by the elements of the offense generally, without regard to the particular facts underlying the defendant's conviction. See *Sykes* v. *United States*, 131 S. Ct. 2267, 2272 (2011). Second, a court must determine whether that conduct, "in the ordinary case, presents a serious

potential risk of physical injury to another." *James* v. *United States*, 550 U.S. 192, 208 (2007). In making that risk assessment, a court must rely principally on its own "commonsense conclusion" about whether in the ordinary case the offense poses a serious risk of physical injury—for example, because in the course of committing the offense an individual risks provoking a violent confrontation with another person. *Sykes*, 131 S. Ct. at 2274. That judgment, informed by the federal bench's deep experience adjudicating criminal cases, can be tested against reported case law, legislative findings, the views of the Sentencing Commission, and any available empirical data. In the typical case involving a crime with a scienter element, and not a crime based on strict liability, negligence, or recklessness, that risk assessment completes the analysis under the ACCA. *Id.* at 2275-2276. As so interpreted by the Court, the residual clause is not unconstitutionally vague.

A. The Standard For Declaring The Residual Clause Void For Vagueness Is Exceptionally Demanding

The Due Process Clause bars enforcement of a criminal statute on vagueness grounds only if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Skilling* v. *United States*, 561 U.S. 358, 402-403 (2010). A statute is not void for vagueness because its applicability is unclear at the margins, *Williams*, 553 U.S. at 306, or, contrary to petitioner's view (Supp. Br. 56), because reasonable jurists might disagree on where to draw the line be-

tween lawful and unlawful conduct in particular circumstances, *Skilling*, 561 U.S. at 403.

Rather, the Court has struck down a criminal provision as void for vagueness only when it is so indeterminate as to have no "ascertainable standard." *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). The Court found that test met in a law forbidding "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," 41 Stat. 297, noting that it left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." 255 U.S. at 89. Similarly, the Court has "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306 (citing *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971), and *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 870-871 & n.35 (1997)). But a statute is not void for vagueness merely because "it may be difficult in some cases to determine whether [its] clear requirements have been met," *ibid.*, or because it produces close legal questions. After all, "[c]lose cases can be imagined under virtually any statute," and this Court regularly resolves circuit conflicts over the meaning of criminal statutes. *Ibid.*

Two additional principles are particularly relevant to the residual clause's constitutionality.

First, a statute that does not regulate constitutionally protected conduct may be declared "facial[ly]" void for vagueness "only if the enactment is impermissibly vague in all of its applications." *Hoffman Es-*

tates v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494-495 (1982); see *id.* at 497; see also *Williams*, 553 U.S. at 306; *Chapman* v. *United States*, 500 U.S. 453, 467 (1991); cf. *Kolender* v. *Lawson*, 461 U.S. 352, 358 & n.8 (1983) (facially invalidating statute implicating "First Amendment liberties" and "constitutional right to freedom of movement") (internal quotation marks and citation omitted)). Accordingly, to establish that the residual clause is void for vagueness, petitioner must demonstrate that it could not intelligibly be construed to apply to *any* offenses, *i.e.*, that no offense could be deemed to involve a "serious potential risk of physical injury to another" with sufficient clarity. See *Hoffman Estates*, 455 U.S. at 497.

The Court could not reach that conclusion without overruling the statutory holdings of *James* and *Sykes*—and repudiating the views of even the two dissenting Justices in *Sykes* who believed that the statute clearly encompasses certain vehicular-flight offenses. See 131 S. Ct. at 2288 (Kagan, J., dissenting); see also *id.* at 2277 (Thomas, J., concurring in the judgment). Indeed, all four of this Court's residual-clause decisions presumably relied on the threshold determination that the statute's text is sufficiently clear to be interpreted. Particularly given that "*stare decisis* in respect to statutory interpretation has special force," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (internal quotation marks omitted), holding the residual clause to be facially vague would, at minimum, require an extraordinary showing.

The burden on petitioner is even heavier in light of the range of state and federal crimes in which "the severity of the risk [is] obvious," such as "inciting to

riot[] and the production of chemical weapons." *Begay*, 553 U.S. at 154 (Scalia, J., concurring in the judgment) (citations omitted); see also pp. 8-9, *supra* (listing court of appeals decisions addressing various offenses). To declare the residual clause void, the Court would have to first conclude that not a single one of those offenses falls within the statute's compass with the requisite clarity.

Of course, a defendant may argue that a statute is vague as "applied to the facts of [his] case." *Chapman*, 500 U.S. at 467. But with a statute like the ACCA, which sets out a general standard that applies to a range of offenses, any "grievous ambiguity or uncertainty" about its application to a particular offense would simply be resolved in favor of the defendant under the rule of lenity, *Dean* v. *United States*, 556 U.S. 568, 577 (2009) (citation omitted), the "junior version of the vagueness doctrine," *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (citation omitted). See *Begay*, 553 U.S. at 148 (Scalia, J., concurring in the judgment); cf. p. 51, *infra*.

Second, although this Court has indicated that "vague sentencing provisions may pose constitutional questions," *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979), it has made clear that the standard to invalidate a sentencing provision as vague is, at minimum, much more demanding than the standard that applies to a statute defining criminal conduct (a principle that petitioner acknowledges, see Pet. Supp. Br. 41). See *Chapman*, 500 U.S. at 467-468 (finding vagueness claim "particularly" without merit, despite any plausible argument against the Court's statutory interpretation, "since whatever debate there is would center around the appropriate sentence and not the

criminality of the conduct"). Indeed, petitioner has not identified a single noncapital case in which this Court has held that a provision graduating the penalty for clearly illegal conduct is unconstitutionally vague. Petitioner relies (Supp. Br. 40, 46-47, 50) on *United States* v. *Evans*, 333 U.S. 483 (1948), but that decision held only that a statute that prescribed "no penalty" at all for an offense—and that entailed "very real doubt and ambiguity concerning the scope of the acts forbidden"—was impermissibly vague. *Id.* at 487-495. And the rare capital factors found vague under Eighth Amendment standards are far more amorphous and subjective than the risk-based language of the ACCA. Cf. *Maynard* v. *Cartwright*, 486 U.S. 356, 363, 364 (1988) (whether murder was "especially heinous, atrocious, or cruel").

Applying a higher standard for sentencing provisions follows from the basic underpinnings of the vagueness doctrine. Neither concern at the heart of the doctrine—providing fair notice about what conduct is criminal and preventing arbitrary or discriminatory enforcement—is implicated by a statute that prescribes the sentence for unequivocally criminal conduct, like possessing a firearm as a felon.

Consider fair notice. Because this Court "assume[s] that [a person] is free to steer between lawful and unlawful conduct," it has "insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)). But no such concern arises here. Petitioner does not claim (and could not possibly claim) that he was deprived of fair notice that his possession

of a firearm was illegal. Rather, petitioner contends that due process requires a statute to clearly "advise a *prospective criminal*" of the sentencing consequences of his unlawful designs. Pet. Supp. Br. 5 (emphasis added). To underscore the point, he posits a "realistic hypothetical example" involving an attorney who, over the course of eight years, regularly advises a three-time felon about what sentence he would receive for violating Section 922(g)(1). *Id.* at 42-44.

That conception of the fair-notice doctrine goes far beyond this Court's precedents. The doctrine is designed to prevent laws that "trap the *innocent*," *Grayned*, 408 U.S. at 108 (emphasis added), and to "enable the *ordinary citizen* to conform his or her conduct to the law," *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999) (opinion of Stevens, J.) (emphasis added). The Court has never suggested that it is designed to help felons run a cost-benefit analysis before they commit new crimes. To whatever extent notice concerns might be implicated by penalty provisions, the Court has made clear that due process does not guarantee a felon contemplating illegal conduct the ability to predict the penalty to be imposed on him, so long as "the conduct prohibited and the punishment authorized" is "clearly define[d]." *Batchelder*, 442 U.S. at 123.

The concern with discriminatory or arbitrary enforcement—"the more important aspect of the vagueness doctrine," *Kolender*, 461 U.S. at 358—is no more infringed by a sentencing statute like the residual clause. A vague criminal statute can be problematic because it "delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned*, 408 U.S. at 108-109.

But neither law-enforcement officers nor juries enforce the ACCA. And while a district judge must decide whether the ACCA applies to a given prior offense, the resolution of that issue is a question of law subject to de novo review by a court of appeals and this Court.

Thus, far from vesting "virtually complete discretion" in local decisionmakers, *Kolender*, 461 U.S. at 358, the ACCA comes into play only when a judge finds that its legal predicates are satisfied at sentencing. And rather than permitting sentencing decisions on an "*ad hoc* and subjective basis," de novo appellate review promotes the statute's consistent application across defendants with similar felonies on their records. Indeed, everyday sentencing decisions entail significantly more localized discretion, and hence variation and unpredictability, than enforcement of the ACCA. See *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

Petitioner thus errs in contending that under the ACCA "no clear limitations are placed on prosecutors," that the residual clause produces "arbitrary and subjective decisions by courts," and that the absence of "assistance from juries" renders the clause somehow *more* susceptible to arbitrary enforcement. Pet. Supp. Br. 44-46. The ACCA applies at sentencing of its own force; it does not require a prosecutor to invoke it. Cf. 21 U.S.C. 851(a) (requiring the government to file a sentencing information for a recidivist enhancement in a drug case). Nor is it clear how jury determinations would produce more predictable or uniform decisions than courts addressing legal ques-

tions subject to appellate review. And, although courts of appeals may sometimes reach different conclusions on particular classes of offenses until this Court issues an authoritative resolution of the conflict, this Court has never suggested that circuit conflicts over the meaning of criminal statutes give rise to vagueness concerns. To the contrary, this Court has repeatedly explained that circuit disagreements do not even justify resort to the rule of lenity. See, *e.g.*, *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990).

Given these background principles, petitioner must, at minimum, make an extraordinary showing to invalidate the residual clause as impermissibly vague. He has not done so.

B. The Text Of The Residual Clause States A Sufficiently Clear Sentencing Principle

Congress enacted the ACCA's residual clause to achieve the important goal of keeping guns out of the hands of individuals who have demonstrated that they are willing to engage in illegal conduct that puts other people in harm's way. See *Begay*, 553 U.S. at 144-147. Given the wide state-by-state variation in crime definition, Congress chose to identify ACCA predicate offenses through a "normative principle": whether they pose "a serious potential risk of physical injury to another." *Sykes*, 131 S. Ct. at 2277. As this Court correctly held in *James* and *Sykes*, that text is not "irredeemably, unworkably opaque." Pet. Supp. Br. 6. To the contrary, it mirrors the language in numerous criminal statutes. And the aspects of the residual clause that differentiate it from those other laws serve only to sharpen the provision's focus.

1. Numerous statutes impose criminal consequences for conduct presenting a general level of risk

As petitioner acknowledges (Supp. Br. 9), close variants of the residual clause are ubiquitous in criminal statutes. Numerous laws hinge criminal liability or sentencing consequences on a "risk," "substantial risk," "grave risk," or "unreasonable risk" of physical injury to other people. This Court identified several such provisions in *James* and *Sykes* in the course of holding that the residual clause is not impermissibly vague. *James*, 550 U.S. at 210 n.6; *Sykes*, 131 S. Ct. at 2277; see 18 U.S.C. 1031(b)(2), 2118(e)(3), 2246(4), 2258B(b), 2332b(a)(1)(B), 3286(b); Ariz. Rev. Stat. Ann. § 13-2508(A)(2) (Supp. 2014); Cal. Health & Safety Code § 42400.3(b) (West 2014); N.Y. Penal Law Ann. § 490.47 (McKinney 2008).

There are many more. For example, the federal Criminal Code's general definition of "crime of violence" set forth at 18 U.S.C. 16 includes any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16(b). That defined term is used in numerous provisions of the Code and other federal laws, including the Immigration and Nationality Act, see 8 U.S.C. 1101(a)(43)(F); *Leocal* v. *Ashcroft*, 543 U.S. 1, 6-7 & n.4 (2004); see also, *e.g.*, 18 U.S.C. 25, 119, 842, 931, 1952, 1956; and the same formulation is used in the provision criminalizing the use, carrying, or possession of a firearm during a "crime of violence," 18 U.S.C. 924(c)(3)(B). Although Section 16 refers to the risk that *force* will be used rather than that *injury* will occur, it is equally susceptible to petitioner's central objection to the residual clause: Like

the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters. Cf. *Leocal*, 543 U.S. at 7 (using categorical approach to construe Section 16). Still other provisions of federal law use similar risk-based formulations. See 18 U.S.C. 1365(a), 1864(a)(3), 2258D(b)(2)(B). And the Sentencing Guidelines' career-offender provision incorporates the ACCA's residual clause verbatim. See p. 10, *supra*.

It is not just federal law—far from it. The appendix to this brief collects over two hundred state statutes that impose criminal liability for conduct that presents a "risk," "substantial risk," "grave risk," or "unreasonable risk" of injury to others. Thus, for example, a typical reckless-endangerment or criminal-recklessness offense is defined as "recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20 (McKinney 2009); see, *e.g.*, Ala. Code § 13A-6-24(a) (LexisNexis 2005); Alaska Stat. § 11.41.250(a) (2014); Ariz. Rev. Stat. Ann. § 13-1201(A) (2010); Ark. Code Ann. § 5-13-205(a)(1) (2013). Similarly, child-abuse offenses impose criminal liability for exposing a child to a given level of risk of physical harm. See, *e.g.*, N.C. Gen. Stat. § 14-318.2(a) (2013) ("substantial risk of physical injury"); Ohio Rev. Code Ann. § 2919.22(B) (LexisNexis 2014) (discipline that is "excessive under the circumstances and creates a substantial risk of serious physical harm"). And many other offenses in disparate areas of the criminal law—arson, theft, sexual assault, threats, resisting arrest, vehicular homicide, kidnapping—use

similar risk-based formulations to define the crime or aggravating elements. See, *e.g.*, Conn. Gen. Stat. Ann. § 53a-111(a) (West 2012); Ind. Code Ann. § 35-43-4-2(a) (LexisNexis Supp. 2014); Iowa Code Ann. § 709.3(1) (West Supp. 2014); Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2014); Mass. Ann. Laws ch. 265 § 13L (LexisNexis 2010); Utah Code Ann. § 76-5-301(1)(b) (LexisNexis 2012). A handful of state laws also use such formulations to identify crimes; a Massachusetts statute incorporates the ACCA's text almost verbatim. See La. Rev. Stat. Ann. § 14:2(B) (Supp. 2015); Mass. Ann. Laws ch. 269, § 10G(e), ch. 140, § 121 (LexisNexis 2007 & 2010); Nev. Rev. Stat. Ann. § 200.408 (LexisNexis 2012); Ohio Rev. Code Ann. § 2901.01(A)(9) (LexisNexis 2014); Okla. Stat. Ann. tit. 21, § 1287.1 (West 2002).

It would be remarkable if a formulation that legislatures have so widely used in criminal statutes were unconstitutionally vague. And no convincing reason exists to believe it is. A statute that relies on the finding of a type or degree of risk is not vague, because it does not authorize criminal sanctions based on "wholly subjective judgments," such as "whether the defendant's conduct was 'annoying' or 'indecent,'" *Williams*, 553 U.S. at 306, or inherently indefinite terms such as "unjust or unreasonable rate[s]," *L. Cohen Grocery Co.*, 255 U.S. at 89 (citation omitted). When liability depends on risk, no "indeterminacy" exists about what fact must be established: "risk" in this context connotes a possibility that physical injury will occur in the course of committing the offense. See *Oxford English Dictionary* (3d ed. June 2010), http://www.oed.com (risk: "the possibility of loss, injury, or other adverse or unwelcome circum-

stance"). The adjective "potential" reinforces the "inherently probabilistic" nature of the inquiry. *James*, 550 U.S. at 207. And an adjective like "serious," "substantial," or "grave" indicates a "quantitative measure of risk." *Begay*, 553 U.S. at 152 (Scalia, J., concurring in the judgment). The natural implication is that something more than a minimal possibility is required, even if the eventuality need not be "a certainty." *James*, 550 U.S. at 207-208.

It is true that terms like "risk," "serious risk," and "substantial risk" can connote different quantitative levels of risk to different people. One person might think that a "serious risk" is a ten percent chance, while another person might think that one percent suffices. But the criminal law has always tolerated that sort of range of quantitative understanding of a general term; the same variation exists in the foundational "beyond a reasonable doubt" standard, after all. As this Court has long understood, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Manslaughter, for example, is often defined as homicide committed under "extreme" mental or emotional disturbance, and rape can be defined to include sexual intercourse compelled through a threat of "serious" bodily injury. Model Penal Code §§ 210.3(1)(b), 213.1(1)(a) (1985). Different factfinders may have different conceptions of what "extreme" and "serious" mean. But that sort of ambiguity has never been thought to render a statute vague.

A risk-based formulation thus sets forth "an imprecise but comprehensible normative standard," rather than "no standard" at all. *Coates*, 402 U.S. at 614. Accordingly, the residual clause could be unconstitu-

tionally vague only if the features that distinguish it from the many other risk-based criminal statutes render it indeterminate in every case. They do not. To the contrary, they sharpen the understanding of the degree of risk that the statute contemplates and promote its uniform application.

2. The distinguishing features of the residual clause make its enforcement more predictable and uniform

Three features of the residual clause distinguish it from other statutes that impose criminal consequences for conduct that creates a risk of harm: (i) the statute focuses on the risk posed by the offense generally, not the offender's specific conduct; (ii) the word "otherwise" indicates that the enumerated offenses themselves involve a level of risk that satisfies the residual clause; and (iii) "risk" is modified by the adjectival phrase "serious potential." The first two differences, far from pointing towards vagueness, make the residual clause more concrete in application than other criminal statutes tied to risk. The third difference at worst represents a subtle redundancy for emphasis; it would not support invalidating the entire provision.

a. *Risk posed by the offense generally*. As discussed above (see pp. 13-14, *supra*), in deciding whether an offense falls under the ACCA's residual clause, a court analyzes whether the conduct encompassed by the elements of the offense presents such a risk generally, regardless of the manner in which the felon actually committed the crime. Thus, for example, it is irrelevant that a felon never intended to attack a homeowner during a burglary that he attempted. Because attempted burglary generally poses a risk of dangerous confrontations, it qualifies. See *James*, 550 U.S. at 208-209. That analysis reflects the

"categorical approach" that this Court has employed for statutes that impose liability based on convictions for particular classes of offenses, including the enumerated-crimes clause of the ACCA. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990) (ACCA burglary); see also, *e.g.*, *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013); *Leocal*, 543 U.S. at 7. It "avoids the practical difficulty of trying to ascertain at sentencing, perhaps from a paper record mentioning only a guilty plea, whether the present defendant's prior crime, as committed on a particular occasion, did or did not involve violent behavior." *Chambers* v. *United States*, 555 U.S. 122, 125 (2009).

The categorical approach, far from raising vagueness concerns, makes the statute's application more predictable and uniform than the typical statute that imposes criminal liability or sentencing consequences for risky conduct on a particular occasion. Whether a given offense falls within the residual clause is a pure question of law, subject to appellate review. That process promotes predictability and consistent application across offenders. For example, any felon who has, say, a Florida attempted-burglary conviction on his record knows that it qualifies as an ACCA predicate. The clarification of the law through appellate decisions affords at least as much certainty and predictability, if not more, than would a case-specific determination about whether a felon's particular conduct during the attempted burglary actually posed the requisite risk.

Of course, if an appellate court has not yet determined whether a particular offense qualifies, a "prospective criminal" might still be uncertain about whether he would be subject to the ACCA's penalties.

But that is inherent in a criminal process that depends on specific cases and appellate review to clarify statutory rules. And it is hard to see how that level of uncertainty could render the residual clause *less* clear than the typical reckless-endangerment or child-abuse offense, under which a defendant often will have no firm idea about whether a jury will later conclude that his conduct presented the requisite risk. See *United States* v. *Powell*, 423 U.S. 87, 93 (1975) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (quoting *Nash* v. *United States*, 229 U.S. 373, 377 (1913)).

Petitioner also objects (Supp. Br. 41-42) that in evaluating whether an offense generally poses a sufficient risk, courts may consult empirical data and other factual material not available to the felon when planning whether to illegally acquire a firearm. But the use of such data surely *reduces* fair-notice and discriminatory-enforcement concerns as compared to the typical jury verdict, which will often rest on jurors' ad hoc assessment of risk on a particular occasion. Testing risk assessments against empirical data makes decisions less subjective, not more.

It is true, as Justice Scalia observed in *Sykes*, "that the average citizen"—or, more specifically, the average three-time felon—would not "be familiar with the sundry statistical studies" that courts may consult for particular offenses. 131 S. Ct. at 2286 (dissenting). But it is even less likely that the average felon could make any confident prediction about whether a factfinder would later decide that a particular course of conduct, with its many case-specific variables, posed a sufficient risk of physical injury to another person.

Yet that kind of uncertainty has never been understood to raise constitutional concerns. And in any event, under ordinary risk-based criminal statutes, courts and juries *do* consider empirical data.[3] Petitioner cites no case in which a court has suggested that the use of such studies to confirm or refute judgments about risk renders a criminal provision vague.

b. *The enumerated offenses.* The ACCA's residual clause also differs from other risk-based criminal statutes in that it gives examples of offenses that satisfy its standard: burglary, extortion, arson, and offenses involving the use of explosives. 18 U.S.C. 924(e)(2)(B)(ii). As this Court has explained, the word "otherwise" indicates that those listed crimes each present a level of risk that satisfies the residual clause. See *Sykes*, 131 S. Ct. at 2273.[4]

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[3] See, *e.g.*, *State* v. *Cummings*, 305 P.3d 556, 567 (Kan. 2013) (holding in child-endangerment prosecution that "the State can meet its burden * * * by referring to medical treatises or statistics on the risk of death from certain infant sleeping arrangements"); *State* v. *Chavez*, 211 P.3d 891, 904 (N.M. 2009) (explaining that in prosecution for child abuse by endangerment, the government may "refer[] to medical journals or treatises on the risks and causes of infant suffocation or statistical information on the risk of death from certain infant sleeping arrangements"); *Williams* v. *State*, 235 S.W. 3d 742, 757-758, 760 & n.54 (Tex. Crim. App. 2007) (relying in part on empirical data to verify that taking a child to a house without working utilities does not "raise[] a substantial and unjustifiable risk of injury"); see also *United States* v. *Babul*, 476 F.3d 498, 503 (7th Cir.) (Easterbrook, J.) ("Many parts of the Guidelines, in addition to statutes such as 18 U.S.C. § 16(b), pose the question whether a particular activity creates a risk of bodily injury or death. Numbers rather than words must supply the answers."), cert. denied, 551 U.S. 1126 (2007).

[4] Petitioner suggests in passing (Supp. Br. 7-8) that this Court has misconstrued the word "otherwise" because that word means

Petitioner contends (Pet. 7-8) that the enumeration of specific offenses posing the requisite risk contributes to the asserted vagueness of the residual clause. But that has it exactly backwards: The enumeration of the offenses makes the residual clause clearer, because it puts felons on notice that all offenses that are at least as risky as the enumerated crimes qualify as ACCA predicates. In contrast, most risk-based criminal statutes have no such textual anchors at all.

Justice Scalia has argued that the enumerated offenses render the residual clause more uncertain because the crimes "have little in common with respect to the supposedly defining characteristic" (*i.e.*, risk). *Sykes*, 131 S. Ct. at 2288 (Scalia, J., dissenting) (quoting *James*, 550 U.S. at 230 n.7 (Scalia, J., dissenting)). Embracing that reasoning, petitioner quotes (Supp. Br. 8) Justice Scalia's linguistic example: "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." 131 S. Ct. at 2288.

That reasoning is faulty, and the analogy inapt. Navy blue is simply not red at all; it cannot be placed on a spectrum of redness. But all of the enumerated

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"in a *different* way or manner." He is mistaken: The word indicates that both the enumerated crimes and residual-clause crimes all pose a "serious potential risk of physical injury to another," albeit potentially in different ways. See *Begay*, 553 U.S. at 144; cf., *e.g.*, 18 U.S.C. 798(a) (imposing criminal liability on "[w]hoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person * * * any classified information").

crimes pose some degree of risk of physical injury to other people, even if the risk levels differ. That creates no indeterminacy. It would raise no eyebrows for a statute to refer to "elephants, hippos, lions, orangutans, and all other large zoo animals," even though elephants are significantly larger than orangutans. Such a statute would sensibly be read to exclude cockatiels and bullfrogs, though not tigers or giraffes. So too here: That the enumerated crimes may vary significantly in their levels of risk does not render the statute "incomprehensible" (Pet. Supp. Br. 36), or even particularly awkward. The natural inference is that each enumerated offense presents a level of risk that suffices under the residual clause, even if the offenses are dissimilar in their degree of risk or other characteristics.

c. *"Serious Potential Risk."* The word "risk" in the residual clause is modified by the adjectival phrase "serious potential." Petitioner contends (Supp. Br. 8) that those "three words * * * , read together, have almost no clear meaning" because they "represent a confounding mix of contradiction and redundancy." That argument lacks merit.

As petitioner agrees (Supp. Br. 9), the word "serious" signifies that the risk of physical injury presented by a prior offense must be more than "scant" or "remote." See p. 25, *supra*. Nothing is vague about that—no more so than phrases in many other statutes that refer to a "substantial risk," "grave risk," or "unreasonable risk." Petitioner argues (Supp. Br. 9-10), however, that the word "potential" renders the entire phrase meaningless. That is not so. This Court has already construed that term to indicate only that the residual clause does not require "metaphysical

certainty" that a particular offense, on every occasion, poses the requisite risk. *James*, 550 U.S. at 207. In that sense, the word "potential" confirms that Congress intended the residual clause to be applied by examining the ordinary case of the commission of the offense. Without "potential," courts might have construed the statute to require that the "serious risk" be present in every conceivable way of committing the offense.

But even if the Court were unsure of the work that the word "potential" was intended to do, the answer would not be to hold the residual clause unconstitutional. Rather, like such common statutory phrases as "close proximity" and "false pretenses," "potential risk" should at most be read as a subtle redundancy, perhaps to emphasize that the statute is truly concerned with the possibility for injury, not the certainty of it. It is not unusual for a technical redundancy to serve such a clarifying function. See, *e.g.*, *DePierre* v. *United States*, 131 S. Ct. 2225, 2232 (2011) ("Congress' choice to use the admittedly redundant term 'cocaine base' to refer to chemically basic cocaine is best understood as an effort to make clear that clause (iii) does not apply to offenses involving powder cocaine or other nonbasic cocaine-related substances."). But a redundancy would not justify voiding the provision on the farfetched theory that "prospective criminals" would have clearer notice of the sentencing ramifications of illegally acquiring a gun if the ACCA said "serious risk" or "substantial risk" rather than "serious potential risk."

3. Petitioner does not identify how Congress could have written the ACCA more clearly while achieving the same purpose

For the foregoing reasons, this Court has correctly concluded that the residual clause's text is sufficiently clear for due-process purposes. Congress chose a close variant of a common risk-based formulation, and it used that phrasing in a statutory context that is less likely than ordinary criminal statutes to give rise to inconsistent or unpredictable application. As the provision's drafting history demonstrates, that formulation was the product of Congress's considered judgment about how best to address dangerous recidivists. Both houses of Congress focused on risk-based formulations, evidently adding the enumerated-crimes clause only as a compromise measure. See pp. 3-5, *supra*.

Petitioner suggests throughout his supplemental brief (at 5, 36, 47-48) that invalidating the residual clause is necessary to spur Congress to redraft that provision and clear out federal courts' ACCA dockets. That suggestion hardly comports with the "principle that it is for the legislature, not the court, to define a crime and ordain its punishment." Pet. Supp. Br. 38-39 (quoting *United States* v. *Lacher*, 134 U.S. 624, 629 (1890)). As this Court explained in *Sykes* in rejecting the vagueness argument, Congress was well within its power to rely on a "normative principle," even if that "approach may at times be more difficult for courts to implement." 131 S. Ct. at 2277.

But more fundamentally, petitioner never actually identifies how Congress could realistically redraft the provision to achieve the same purpose: identifying all of the federal and state offenses that "show an in-

creased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146. Congress could, in theory, expand the list of enumerated generic offenses, but that would simply replace courts' residual-clause dockets with a series of cases defining the new generic federal offenses and determining whether the many state-law variations suffice under the categorical and modified-categorical approaches. See, *e.g.*, *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *Taylor*, *supra*.

It is also conceivable that Congress could compile an "encyclopedic" list of every one of the thousands of state offenses that present the requisite risk. *Sykes*, 131 S. Ct. at 2277. But under that scheme, Congress would be forced not only to scour the statutory codes of every State, but also to canvass the decisions of each State's judiciary construing all potentially includable offenses. And Congress would then be compelled to update the statute periodically as state laws are amended, added, recodified, and construed. The Constitution does not require that entirely unrealistic degree of legislative attention to ensure that dangerous recidivists face higher penalties for gun possession.

The only alternative formulation that petitioner cites is a bill introduced in Congress in 2010. See Pet. Supp. Br. 47 n.29. That bill would have required courts to determine, based on "any reliable evidence" and "without regard to the formal elements of the crime," whether an offender's "conduct" underlying a prior offense "presented a serious potential risk of bodily injury to another." Armed Career Criminal Sentencing Act of 2010, S.4045, 111th Cong., 2d Sess.

7-8 (2010). But it is far from clear why a case-by-case, fact-based approach would afford more notice, predictability, or certainty to defendants or courts. Such an approach would eliminate some legal disputes about application of the categorical approach. But it would require a far more fact-intensive inquiry into conduct that was never subject to a prior finding by a jury or admission in a guilty plea. Future defendants may complain that such a regime might give them *less* certainty about exposure to the ACCA; by no stretch of the imagination could it be said that they would have *more* certainty.

C. This Court's Interpretation Of The Residual Clause Enables Its Principled Application

Petitioner devotes a great deal of his supplemental brief (at 5, 12-36) to arguing that this Court's interpretation and application of the ACCA's residual clause has failed to create an "intelligible analytical framework" and has left lower courts "hopelessly adrift." That is wrong. This Court's most recent precedent makes clear that to decide whether an offense falls under the residual clause, a court should make a commonsense judgment about the risk posed by the offense in the ordinary case. See *Sykes*, 131 S. Ct. at 2275-2276. Courts applying that "categorical and manageable standard" can draw on the conventional tools of judicial decisionmaking—case law, legislative findings, empirical evidence, the recommendations of the expert Sentencing Commission—to reach principled determinations. *Ibid.* Although certain classes of offenses will present hard cases, and thus will sometimes produce conflicts among courts of appeals, that does not mean that the residual clause is unconstitutional. And if portions of this Court's opin-

ions have made the statute harder to apply, the proper remedy would be to refine or clarify those statements, not to facially invalidate a federal statutory provision.

1. This Court's decisions require a practical assessment of whether the commission of the offense ordinarily entails a serious risk of injury to other people

Echoing Justice Scalia's dissent in *Sykes*, petitioner contends (Supp. Br. 24) that this Court's decisions have vacillated between inconsistent standards for applying the residual clause. That is not a fair reading of the cases. Three of the Court's four decisions—*James*, *Chambers*, and *Sykes*—rendered a basic judgment about the level of risk posed by attempted burglary, failure to report to prison, and vehicular flight, respectively. Petitioner seizes on the offense-specific analysis in those cases to suggest that the Court was applying entirely different standards. That contention is unfounded.

In *James*, for example, the Court did not purport to set out a universal "closest analog" test (Pet. Supp. Br. 13) requiring courts in each case to identify the most similar offense among the enumerated offenses (an inquiry that would often be fruitless). The Court merely held that it sufficed to resolve that case that attempted burglary was at least as risky as burglary, and it was unnecessary to go beyond that. See 550 U.S. at 203. That was consistent with this Court's ordinary reluctance to "clarify the entire field" in the course of its "first in-depth examination" of an important provision of law. *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008).

In the same way, *Chambers* and *Sykes* each conducted a focused application of the risk standard to

the offenses at issue. *Chambers* held, after consulting a Sentencing Commission report, that a person who fails to report to prison is not "significantly more likely than others to attack, or physically to resist, an apprehender" and therefore that the offense does not pose a special risk of physical injury to others. 555 U.S. at 127-130; see *Sykes*, 131 S. Ct. at 2275 (explaining that *Chambers*'s holding relied on a "levels of risk" analysis). And *Sykes* reached the "commonsense conclusion" that vehicular flight under Indiana law poses the requisite risk after comparing the risk posed to that of the enumerated offenses, in part relying on empirical data. See *id.* at 2273-2277; accord *id.* at 2278-2281 (Thomas, J., concurring in the judgment). Neither decision announced a new test. To the contrary, *Sykes* made clear that "risk levels provide[d] a categorical and manageable standard" to resolve the case. *Id.* at 2275-2276; accord *id.* at 2278 (Thomas, J., concurring in the judgment).

This Court's decision in *Begay* did employ a standard that differed from the risk analysis of *James*, *Chambers*, and *Sykes*. The Court held that drunk driving does not fall within the residual clause because it is not "purposeful, violent, and aggressive." 553 U.S. at 142-148. The Court developed that criterion based on the view that residual-clause offenses must be similar to the enumerated offenses on dimensions other than risk levels, and it concluded that limiting the clause to "purposeful, violent, and aggressive" offenses best comported with the ACCA's purpose because such crimes are "characteristic of the armed career criminal." *Id.* at 142-145 (citation omitted). Four Justices disagreed with *Begay*'s approach at the time, predicting that it could foster confusion in lower

courts. See *id.* at 150-153 (Scalia, J., concurring in the judgment); *id.* at 158-160 (Alito, J., dissenting).

But *Sykes* went a long way toward dispelling the potential confusion by limiting *Begay*'s standard to offenses lacking a degree of *mens rea*. *Sykes* recognized that "the purposeful, violent, and aggressive formulation" lacks any "precise textual link to the residual clause," and explained that it "was used in [*Begay*] to explain the result" in a case that involved "involved a crime akin to strict liability, negligence, and recklessness crimes." 131 S. Ct. at 2275-2276. The Court indicated that for any other offense, the focus of the analysis should be on the risk presented by the offense. *Ibid.*; accord *id.* at 2277 (Thomas, J., concurring in the judgment) (rejecting use of *Begay* standard for any offense).

Accordingly, whatever confusion the *Begay* standard injected into the analysis, it is now limited to, at most, offenses akin to strict-liability, negligence, and recklessness crimes. For that reason alone, *Begay* could not support an argument that the residual clause is "impermissibly vague in all of its applications." *Hoffman Estates*, 455 U.S. at 495. And in any event, were this Court to harbor serious reservations about the indeterminacy of the *Begay* standard, the remedy would be to reconsider the reasoning of *Begay* (though not necessarily the holding, see *Begay*, 553 U.S. at 153-154 (Scalia, J., concurring in the judgment)), either by rejecting its test altogether, or by adopting a more administrable "similar in kind" approach to crimes with less stringent *mens rea* elements. See *United States* v. *Velázquez*, 777 F.3d 91, 97-98 (1st Cir. 2015) (interpreting *Begay* in light of its purpose "to restrict armed career criminal treatment

to those who 'might deliberately point the gun and pull the trigger'") (quoting *Begay*, 553 U.S. at 146).

2. Courts are well positioned to conduct the necessary risk analysis

This Court has correctly concluded that the risk-based analysis it employed in *James*, *Chambers*, and *Sykes* "provide[s] a categorical and manageable standard" to resolve residual-clause questions. *Sykes*, 131 S. Ct. at 2275-2276. The first step of the analysis—identifying the conduct covered by the elements of the prior offense—is the same inquiry that courts must conduct under the enumerated-crimes clause and other statutes. See *Descamps*, 133 S. Ct. at 2283. The second step—determining whether the ordinary case of that conduct presents the requisite risk—calls upon courts to render a commonsense judgment that they are well positioned to make. *Sykes*, 131 S. Ct. at 2274.

That second-step judgment has two components: identifying the "ordinary case" and assessing the risk presented by that case. Neither poses serious practical barriers to the residual clause's principled application.

a. *Ordinary case.* In *James*, this Court explained that the only feasible way to determine whether an offense poses a serious risk of physical injury is to consider the "ordinary case" of the commission of that offense. 550 U.S. at 208. That is because "[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury." *Ibid.* If the test were instead whether "every conceivable factual offense covered by a statute" presents the requisite risk, *ibid.*, not even the enumerated offenses would qualify—an interpre-

tation incompatible with the text of the statute. See note 4, *supra*.

For example, as the Court explained in *James*, "one could imagine an extortion scheme where an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments," in which case "the risk of physical injury to another approaches zero." 550 U.S. at 208. Likewise, a person could burglarize or set fire to an unoccupied house in a remote area. Similar scenarios exist for virtually any offense. If the Court did not ground its analysis in the "ordinary case," therefore, the residual clause would achieve little (particularly given that the elements clause already includes crimes involving the use, attempted use, or threatened use of violent force) and its interpretation would be at odds with the theory of including the enumerated offenses.

At the same time, however, the ordinary-case inquiry is not an exercise in judicial imagination. That is in part because the inquiry has a critical limiting principle: A court examines only the "subset of [violations] where the offender has been apprehended, prosecuted, and convicted." *James*, 550 U.S. at 204. The ACCA's focus is convictions, not unprosecuted violations. *Ibid.* And for that reason, a court is not left to speculate about what the ordinary instance of an unpunished violation might entail. Rather, judges can consult their deep well of experience reviewing criminal convictions and sentencing decisions, fortified by reported decisions, the determinations of the Sentencing Commission, legislative judgments, and empirical data, to make a commonsense judgment about what conduct underlies the ordinary conviction.

Those determinations are well within the judicial ken. In many cases, "the severity of the risk will be obvious." *Begay*, 553 U.S. at 154 (Scalia, J., concurring in the judgment). In other cases, a judge's "common sense and experience," *Sykes*, 131 S. Ct. at 2291 (Kagan, J., dissenting), will be quickly confirmed by judicial precedents or the Sentencing Commission's conclusions. In still other cases, reported decisions or empirical data may demonstrate that the crime is often committed in non-risky ways, despite a judge's initial assumption to the contrary. See, *e.g.*, *Chambers*, 555 U.S. at 128-130. And in rare cases, a court may be left with no firm idea about what the ordinary case looks like. If so, the defendant wins. But the fact that cases will arise in which courts find it too difficult to identify the ordinary case does not justify invalidating the residual clause in every application.

This Court's decision in *Sykes* exemplifies the proper approach to identifying the ordinary case. The defendant had been convicted of Indiana's vehicular-flight offense, which required that the defendant flee in a vehicle after an officer ordered him to stop, rather than the form of the offense involving "operat[ing] a vehicle in a manner that creates a substantial risk of bodily injury to another person." 131 S. Ct. at 2271, 2276 (quoting Indiana statute). Even though the section under which the defendant was convicted did not, by definition, require that the flight be conducted in a way that posed a risk, the Court concluded based on common sense, real-world experience, and available empirical evidence that, as a general matter, "[s]erious and substantial risks are an inherent part of vehicle flight." *Id.* at 2276; accord *id.* at 2278 (Thomas, J., concurring in the judgment). Indeed, even the Justic-

es who dissented on the statutory holding concluded that "the majority's intuition that dangerous flights outstrip mere failures to stop—that [this] form of the activity is also the ordinary form—seems consistent with common sense and experience," and would probably have supported the application of the ACCA if Indiana had not separately defined a flight offense involving "substantial risk of bodily injury" as an element. *Id.* at 2291-2292 (Kagan, J., dissenting). That eight Justices had little trouble identifying the typical case of vehicular flight in *Sykes* demonstrates that the ordinary-case inquiry does not pose insuperable barriers to applying the residual clause in a principled manner.

b. *Risk analysis.* Once a court identifies the ordinary case, it must render a judgment about whether that case involves a serious risk of injury to other people. For the reasons discussed above (pp. 22-26, *supra*), that judgment does not differ from the kind of determinations that factfinders make all the time in deciding whether a defendant's conduct posed a sufficiently great risk under a general criminal standard. To the contrary, it is substantially more objective, since it can be checked against the views of the Sentencing Commission, empirical data, case law, and legislative findings; individual determinations must be consistent with binding precedent addressing similar offenses under the residual clause; and the analysis does not depend on myriad case-specific variables and the availability of case-specific evidence.

In conducting that analysis, courts must keep in mind that different crimes can pose a risk of physical injury in different ways. That is clear from the enumerated offenses. Arson and the illegal use of explo-

sives "entail[] intentional release of a destructive force dangerous to others." *Sykes*, 131 S. Ct. at 2273. But burglary and extortion are different. Each of those offenses become dangerous only if, in the course of perpetrating the offense, the offender commits an act of violence against someone else—the victim, a police officer, a bystander. (The statute's concern is violence to "another," not the risk that the offender himself will be injured.) For example, extortion leads to violence against someone other than the extortionist only if the extortionist elects to follow through on a threat of violence, and burglary poses a risk only if the burglar decides to use force when confronted. In addition, other crimes may entail types of risk not present in the enumerated crimes.

But although the risk of injury can arise in different ways, there are many offenses that no reasonable jurist would consider to pose a risk of physical injury in any manner. It would be the rare case in which a person who mails a fraudulent insurance form, or downloads child pornography, engages in a physical confrontation with someone while committing the offense or otherwise injures another person. Some offenses may present closer questions. In every case, however, a court must consult "common sense and real world experience" to render a sensible judgment about the risk posed by the offense. *Sykes*, 131 S. Ct. at 2280 (Thomas, J., concurring in the judgment). This Court did not find that task prohibitively difficult in *James*, *Chambers*, and *Sykes*. And where a court truly finds itself uncertain as to the risk posed by an offense in the ordinary case, the defendant must prevail, because the government has not met its burden. A defendant is thus protected against the application

of the ACCA in truly uncertain cases without the need to resort to the constitutional heavy artillery of the vagueness doctrine.

3. This Court's unique docket can produce a skewed impression about the difficulty of applying the residual clause in practice

This Court typically grants certiorari on questions of statutory interpretation to resolve disagreements among the circuits. That unique docket, however, can produce a skewed impression about the difficulty of applying the residual clause in the run of cases, because this Court decides only the questions that have given rise to serious disagreements among the courts of appeals.

But many easy cases never reach this Court. As discussed above, lower courts have held that a range of obviously dangerous crimes fall within the residual clause—crimes that do not involve the use, attempted use, or threatened use of violent force and are not among the enumerated crimes, but that nevertheless pose obviously high risks of physical injury. Those crimes include such inherently dangerous conduct as child abuse, solicitation to commit aggravated assault, larceny from a person, and the malicious discharge of a firearm at an occupied building. See pp. 8-9, *supra*. Those cases do not pose hard questions under the residual clause. And numerous other crimes that have not yet been the subject of reported appellate decisions would surely would qualify under any analysis, like providing material support for terrorism, 18 U.S.C. 2339B(a)(1), producing chemical weapons, 18 U.S.C. 229(a), solicitation to commit murder, *United States* v. *Cox*, 74 F.3d 189, 190 (9th Cir. 1996) (Guidelines), and illegally acquiring a torpedo, see 13-7120

Tr. of Oral Arg. 34, at *ll.*17-21 (Nov. 5, 2014); 26 U.S.C. 5845(f), 5861(c).

Moreover, some offenses that one might expect to fall under the ACCA's elements clause, like rape, may not qualify under that prong of the ACCA because they are statutorily defined to include the remote possibility of being accomplished through a means other than violent force (*e.g.*, fraud), and the charging documents will not necessarily indicate the subset of the offense under which the defendant was convicted. See, *e.g.*, Tenn. Code Ann. § 39-13-503 (2014); *Dawson* v. *United States*, 702 F.3d 347, 351-353 (6th Cir. 2012); see also *United States* v. *Terrell*, 593 F.3d 1084, 1088-1091 (9th Cir. 2010), cert. denied, 131 S. Ct. 2094 (2011). But under the residual clause, the "ordinary case" of a rape conviction and the risks of physical injury associated with rape are not hard to determine. *Id.* at 1090 ("[R]ape is a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist.") (internal quotation marks and emphases omitted); see also *Dawson*, 702 F.3d at 352 (explaining that rape, "even when perpetrated by fraud, creates an inherently high degree of risk of physical injury"). The residual clause thus ensures that individuals with three convictions for serious violent crimes that technically do not fall under the elements clause cannot avoid the ACCA's heightened penalty.

At the other end of the spectrum, many classes of offenses obviously do not fall within the residual clause. Those include all manner of financial and tax fraud, embezzlement, identity theft, bribery, child-pornography possession, money laundering, counterfeiting, illegal gambling, and obstruction of justice.

And still other crimes exist that, even if they might otherwise have raised a colorable question, the government agrees do not qualify, such as the basic felon-in-possession offense, 18 U.S.C. 922(g)(1). See 13-7120 Tr. of Oral Arg. 32, at *ll.*13-23 (Nov. 5, 2014).

Between those two poles are closer cases. But petitioner significantly overstates (Supp. Br. 26-36) the degree of circuit disagreement on the hard issues, particularly in the wake of this Court's clarifying opinion in *Sykes* four years ago. For example, the government is not aware of any post-*Sykes* case holding that a fleeing-and-eluding statute falls outside the residual clause; petitioner cites only dissenting opinions, while acknowledging that "*Sykes* largely resolved the dispute." *Id.* at 34. Similarly, since this Court decided *Chambers*, lower courts have been almost uniform in concluding that among custody-escape offenses, only escapes from secure custody—that is, something akin to a jailbreak—satisfy the residual clause. See, *e.g.*, *United States* v. *Tucker*, 740 F.3d 1177, 1183 (8th Cir. 2014) (en banc); *United States* v. *Covington*, 738 F.3d 759, 765-767 (6th Cir. 2014) (Guidelines); *United States* v. *Proch*, 637 F.3d 1262, 1267-1269 (11th Cir. 2011); *United States* v. *Hart*, 578 F.3d 674, 681 (7th Cir. 2009) (Guidelines). But cf. *United States* v. *Hughes*, 602 F.3d 669, 676-677 (5th Cir. 2010) (concluding that *Chambers* did not overrule prior circuit precedent holding that escape from an institution qualifies under the residual clause), cert. denied, 131 S. Ct. 3018 (2011).

In addition, petitioner cites (Supp. Br. 31) conflicting decisions issued before the Court's decision in *James* established the basic framework for deciding residual-clause issues; it is not clear that those con-

flicts will persist if litigation over the offenses at issue arises again. Some of the purported "conflicts" cited by petitioner and his amicus, moreover, may merely reflect differences in the definition of offenses among different States. And in some cases, panels simply misapplied this Court's settled framework to a particular offense; for such decisions, the government may seek en banc review in the relevant circuit if the question recurs. See, *e.g.*, *United States* v. *Prater*, 766 F.3d 501, 513-518 (6th Cir. 2014) (holding that third-degree burglary under New York law does not categorically fall within the residual clause); see also *id.* at 519-523 (Batchelder, J., dissenting).

It is true that some circuit conflicts may ultimately require this Court's resolution. And this Court may be called upon to resolve some broader questions that cut across offenses, such as whether recklessness offenses (*e.g.*, reckless homicide) can qualify in light of *Begay* or any modification of *Begay*'s doctrine. But even some of the issues currently subject to circuit conflicts may resolve themselves in light of *Sykes*. For example, a number of circuit decisions holding that certain sexual crimes against minors do not qualify as ACCA predicates relied on the proposition that an intentional but "consensual" sexual act inflicted on a minor is not "violent" or "aggressive" under *Begay*. See, *e.g.*, *United States* v. *Christensen*, 559 F.3d 1092, 1095 & n.2 (9th Cir. 2009) (noting that before *Begay* the Ninth Circuit had concluded otherwise under the career-offender guideline); *United States* v. *Thornton*, 554 F.3d 443, 449 (4th Cir. 2009) (holding that Virginia "carnal knowledge" offense fails *Begay* standard even though "nonforcible adult-minor sexual activity can present grave physical risks to minors"); *United*

States v. *Harris*, 608 F.3d 1222, 1224, 1227-1233 (11th Cir. 2010) ("Even though [sexual battery of a child under 16] fits in the plain language of the statute, we must apply the holding of *Begay*."); see also *United States* v. *Goodpasture*, 595 F.3d 670, 671-672 (7th Cir. 2010). And the one circuit to hold that possession of a weapon in prison does not qualify (overruling its precedent to the contrary) relied entirely on *Begay*, while acknowledging that the offense "no doubt * * * involves a high degree of risk." *United States* v. *Polk*, 577 F.3d 515, 518-520 (3d Cir. 2009). Those conflicts may dissolve in light of *Sykes*.

In characterizing lower-court decisions as "wildly divergent" and "all over the map" (Pet. Supp. Br. 5, 26), petitioner thus exaggerates the difficulty of applying the residual clause in practice under the standards that this Court has set out, particularly in *Sykes*. And in any event, petitioner's more "basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 305. There is no "indeterminacy of precisely what" the residual clause targets. *Id.* at 306. It asks a court to determine whether the ordinary case of an offense resulting in a conviction poses a serious potential risk of physical injury—a risk that is more than "remote" or "scant" (Pet. Supp. Br. 9). That the question can be hard to answer for certain classes of offenses does not justify voiding the statute in its entirety.

D. *Stare Decisis* Considerations Militate Strongly Against Invalidating The Residual Clause

This Court has held—twice—that the residual clause is not unconstitutionally vague. See *James*, 550 U.S. at 210 n.6; *Sykes*, 131 S. Ct. at 2277. Although

defendants in those cases did not squarely argue that the statute was vague, the Court reaffirmed that constitutional holding in *Sykes* over a substantial dissent by Justice Scalia. See Reply Br. at 17-20, *James*, *supra* (No. 05-9264) (arguing that the government's interpretation raised vagueness concerns).

Those recent decisions are entitled to *stare decisis* effect. Under that bedrock principle, the Court generally does not overrule one of its prior decisions absent a special justification. *United States* v. *International Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996). No such special justification has arisen since *Sykes* four years ago. Petitioner has not demonstrated that conflicts among lower courts have proliferated since 2011, or that *Sykes*'s analysis has fostered confusion. To the contrary, in cabining the scope of *Begay*'s extratextual gloss, *Sykes* has simplified the judicial task by directing courts to focus exclusively on the "categorical and manageable standard" of "risk levels" in most cases. 131 S. Ct. at 2275-2276.

Important considerations, moreover, weigh against overruling *James* and *Sykes*. According to the Sentencing Commission, from 2008 to 2013, over 3500 defendants were sentenced under the ACCA, and over 13,500 were sentenced under the materially identical career-offender guideline. See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, tbl. 22 (2008-2013). Although the available statistics do not break out how many of those offenders had at least one predicate offense that fell within the residual clause of the ACCA or the career-offender guideline, it is unlikely to be a trivial number in light of the many reported appellate decisions on residual-clause issues.

The availability of the ACCA penalty undoubtedly influenced charging decisions in the period since this Court held in *James* that the residual clause is not unconstitutionally vague. For example, a prosecutor who had an open-and-shut case on a Section 922(g)(1) violation for a three-time felon believed to have committed more serious crimes might have been content to accept a guilty plea on the Section 922(g)(1) charge in light of the ACCA's 15-year minimum sentence. If this Court were to declare the statute void now, and hold that its ruling was retroactive, cf. *Bousley* v. *United States*, 523 U.S. 614, 620-621 (1998), it would unravel the consequences of the many charging decisions made in reliance on this Court's holdings. That would be true even for felons given ACCA sentences based on obviously dangerous offenses.

More broadly, declaring the residual clause irredeemably indeterminate would be extraordinary given that this Court itself has construed and applied it on four separate occasions, with only one Justice (in only one case) contending that the statute is incapable of being intelligibly applied. The Court would arguably be required to overrule the *statutory* holdings of all four of this Court's decisions, which presumably rested on the conclusion that the statute is amenable to principled interpretation. See p. 16, *supra*. Indeed, even two of the three dissenting Justices in *Sykes* agreed that the statute was capable being applied intelligibly. See *Sykes*, 131 S. Ct. at 2289-2290 (Kagan, J., dissenting). In no other circumstance, to the government's knowledge, has the Court struck down a statute as irremediably vague after the Court itself had applied the law repeatedly.

In that sense, holding the residual clause vague now would undermine the fundamental purpose of *stare decisis* to "foster[] reliance on judicial decisions" and "contribute[] to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Citizens and the other branches of government are entitled to presume that when this Court authoritatively interprets a statutory provision, that means, at minimum, that the statute is capable of being interpreted. The fact that super-majorities of this Court have repeatedly found the residual clause sufficiently clear should make it all but impossible at this point to establish that it is unconstitutionally vague.

E. The Residual Clause Is Not Vague As Applied To Petitioner's Offense Of Unlawfully Possessing A Short-Barreled Shotgun

Petitioner contends (Supp. Br. 51-53) that even if the residual clause is not void in toto, it is vague as applied to him because, he asserts, possession of a short-barreled shotgun is not clearly covered by the statute's text, this Court's decisions interpreting it, or a consensus in the lower courts. A circuit conflict alone, of course, cannot render a statute vague. And if this Court were to agree with petitioner that the statute's text and this Court's interpretation of it, fairly applied, do not cover possession offenses of the type at issue here, then the rule of lenity, and not the doctrine of vagueness, would resolve this case.

But petitioner is wrong in finding it obscure whether his offense presents a "serious potential risk of physical injury to another" in the ordinary case. Unlawful possession of a short-barreled shotgun—a weapon long associated almost exclusively with horrif-

ic acts of violence—readily qualifies as an ACCA predicate offense under the residual clause. As the government explained in its opening brief (at 49-51), under Minnesota law, that offense has the requisite *mens rea*—intent to possess the weapon with knowledge of its characteristics. Indeed, the Minnesota Supreme Court has since confirmed that to convict a person for unlawful possession of a short-barreled shotgun, the State must "prove that [his] possession of the gun[] was knowing," because "statutory silence is typically insufficient to dispense with the mens rea requirement." *State* v. *Salyers*, 858 N.W.2d 156, 161 (2015) (citing *State* v. *Ndikum*, 815 N.W.2d 816, 822 (Minn. 2012)). And almost unique among firearm-possession offenses, the conclusion that the ordinary case presents a serious risk of physical injury is fortified by decades of legislative findings, the judgment of the Sentencing Commission, and this Court's longstanding view that short-barreled shotguns are "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. As even the reported decisions cited by petitioner in his three merits briefs make clear, the typical felon who was convicted of the illegal possession of a short-barreled shotgun acquired it for use in committing crimes, not for innocuous purposes.

Accordingly, even acknowledging that in cases of "grievous ambiguity," *Abramski* v. *United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (citation omitted), the rule of lenity would favor the more lenient interpretation, no such ambiguity exists here: The ordinary case of illegal possession of a short-barreled shotgun presents a greater risk than burglary. People do not acquire those weapons illegally for target practice or

hunting. They acquire them to threaten, maim, and kill other people and to facilitate other violent crimes. And when the weapons are brought to crimes, the risk of serious injury or death increases dramatically. That has been the uniform understanding of courts and legislatures for decades, and petitioner has failed to demonstrate that those considered judgments no longer hold true.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A: FEDERAL STATUTES

18 U.S.C. 16 provides:

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 924(c)(3) provides:

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 1031(b) provides:

(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and—

(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

18 U.S.C. 1365(a) provides in pertinent part:

(a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall—

(1) in the case of an attempt, be fined under this title or imprisoned not more than ten years, or both;

(2) if death of an individual results, be fined under this title or imprisoned for any term of years or for life, or both;

(3) if serious bodily injury to any individual results, be fined under this title or imprisoned not more than twenty years, or both; and

(4) in any other case, be fined under this title or imprisoned not more than ten years, or both.

* * * * *

(c)(1) Whoever knowingly communicates false information that a consumer product has been tainted, if such product or the results of such communication affect interstate or foreign commerce, and if such taint-

ing, had it occurred, would create a risk of death or bodily injury to another person, shall be fined under this title or imprisoned not more than five years, or both.

* * * * *

18 U.S.C. 1864(a) provides:

(a) Whoever—

(1) with the intent to violate the Controlled Substances Act,

(2) with the intent to obstruct or harass the harvesting of timber, or

(3) with reckless disregard to the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk,

uses a hazardous or injurious device on Federal land, on an Indian reservation, or on an Indian allotment while the title to such allotment is held in trust by the United States or while such allotment remains inalienable by the allottee without the consent of the United States shall be punished under subsection (b).

18 U.S.C. 2118(e) provides:

(e) For purposes of this section—

(1) the term "controlled substance" has the meaning prescribed for that term by section 102 of the Controlled Substances Act;

(2) the term "business premises or property" includes conveyances and storage facilities; and

(3) the term "significant bodily injury" means bodily injury which involves a risk of death, significant physical pain, protracted and obvious disfigurement, or a protracted loss or impairment of the function of a bodily member, organ, or mental or sensory faculty.

18 U.S.C. 2246(4) provides:

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

18 U.S.C. 2258B(b) provides in pertinent part:

(b) INTENTIONAL, RECKLESS, OR OTHER MISCONDUCT.—Subsection (a) shall not apply to a claim if the electronic communication service provider, remote computing service provider, or domain name registrar, or a director, officer, employee, or agent of that electronic communication service provider, remote computing service provider, or domain name registrar—

(1) engaged in intentional misconduct; or

(2) acted, or failed to act—

(A) with actual malice;

(B) with reckless disregard to a substantial risk of causing physical injury without legal justification; or

* * * * *

18 U.S.C. 2258D(b) provides in pertinent part:

(b) INTENTIONAL, RECKLESS, OR OTHER MISCONDUCT.—Subsection (a) shall not apply to a claim or charge if the National Center for Missing and Exploited Children, or a director, officer, employee, or agent of such center—

(1) engaged in intentional misconduct; or

(2) acted, or failed to act—

(A) with actual malice;

(B) with reckless disregard to a substantial risk of causing injury without legal justification; or

* * * * *

18 U.S.C. 2332b(a)(1) provides:

(a) PROHIBITED ACTS.—

(1) OFFENSES.—Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

> (B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

18 U.S.C. 3286(b) provides:

> (b) NO LIMITATION.—Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a forseeable[1] risk of, death or serious bodily injury to another person.

[1] So in original. Probably should be "foreseeable".

APPENDIX B: STATE STATUTES

Alabama

Ala. Code § 13A-6-24(a) (LexisNexis 2005) provides:

(a) A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Ala. Code § 13A-6-41(a) (LexisNexis 2005) provides:

(a) A person commits the crime of unlawful imprisonment in the first degree if he restrains another person under circumstances which expose the latter to a risk of serious physical injury.

Ala. Code § 13A-6-20(a)(3) (LexisNexis Supp. 2014) provides in pertinent part:

(a) A person commits the crime of assault in the first degree if:

* * * * *

(3) Under circumstances manifesting extreme indifference to the value of human life, he or she recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person;

Ala. Code § 13A-11-290(c)(1) (LexisNexis Supp. 2014) provides:

(c)(1) A licensed day care center, a licensed child care facility, a program providing day care service to incapacitated persons, or any other child care service that is exempt from licensing pursuant to Section 38-7-3, Code of Alabama 1975, or an employee thereof, or a person for hire responsible for a child under the age of 7 or an incapacitated person, shall not leave a child or an incapacitated person in a motor vehicle unattended in a manner that creates an unreasonable risk of injury or harm.

Alaska

Alaska Stat. § 11.41.250(a) (West Supp. 2013) provides:

(a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Alaska Stat. § 11.61.190(a)(2) (2014) provides in pertinent part:

(a) A person commits the crime of misconduct involving weapons in the first degree if the person

* * * * *

(2) discharges a firearm from a propelled vehicle while the vehicle is being operated and under circumstances manifesting substantial and unjustifiable risk of physical injury to a person or damage to property.

Alaska Stat. § 11.81.900(a)(57)(A) (2014) provides:

(57) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a substantial risk of death;

Alaska Stat. § 11.41.255(1) (2014) provides:

Notwithstanding the definition of "serious physical injury" in AS 11.81.900(b), for the purpose of an offense against a child under 12 years of age under AS 11.41.200-11.41.250, unless the context requires otherwise, "serious physical injury" means

(1) physical injury caused by an act performed under circumstances that create a substantial risk of death;

Alaska Stat. § 11.56.700(a)(3) (2014) provides in pertinent part:

(a) A person commits the crime of resisting or interfering with arrest if, knowing that a peace officer is making an arrest, with the intent of preventing the officer from making the arrest, the person resists personal arrest or interferes with the arrest of another by

* * * * *

(3) any means that creates a substantial risk of physical injury to any person.

Alaska Stat. § 11.56.767(b)(1)(A) (2014) provides:

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) did not report as soon as reasonably practicable because the defendant reasonably believed that

(A) doing so would have exposed the defendant or others to a substantial risk of physical injury;

Alaska Stat. § 11.51.200(a)(1) (2014) provides:

(a) A person commits the crime of endangering the welfare of a vulnerable adult in the first degree if the person

(1) intentionally abandons a vulnerable adult in any place under circumstances creating a substantial risk of physical injury to the vulnerable adult and the vulnerable adult is in the person's care

(A) by contract or authority of law; or

(B) in a facility or program that is required by law to be licensed by the state;

Alaska Stat. § 11.61.210(a)(3) (2014) provides in pertinent part:

(a) A person commits the crime of misconduct involving weapons in the fourth degree if the person

* * * * *

(3) discharges a firearm with reckless disregard for a risk of damage to property or a risk of physical inju-

ry to a person under circumstances other than those described in AS 11.61.195(a)(3)(A);

Alaska Stat. § 11.61.150(a)(1) (2014) provides:

(a) A person commits the crime of obstruction of highways if the person knowingly

(1) places, drops, or permits to drop on a highway any substance that creates a substantial risk of physical injury to others using the highway;

Alaska Stat. § 11.61.100(a) (2014) provides:

(a) A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing, damage to property or physical injury to a person.

Alaska Stat. § 11.56.765(b)(1) (2014) provides:

(b) In a prosecution under this section, it is an affirmative defense that the defendant

(1) did not report in a timely manner because the defendant reasonably believed that doing so would have exposed the defendant or others to a substantial risk of physical injury;

Alaska Stat. § 11.61.195(a)(3)(A) (2014) provides in pertinent part:

(a) A person commits the crime of misconduct involving weapons in the second degree if the person knowingly

* * * * *

(3) discharges a firearm at or in the direction of

(A) a building with reckless disregard for a risk of physical injury to a person;

Alaska Stat. § 11.51.100(a)(1) (2014) provides:

(a) A person commits the crime of endangering the welfare of a child in the first degree if, being a parent, guardian, or other person legally charged with the care of a child under 16 years of age, the person

(1) intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child;

Alaska Stat. § 11.41.250(a) (2014) provides:

(a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Alaska Stat. § 11.41.300(a)(2)(B) (2014) provides in pertinent part:

(a) A person commits the crime of kidnapping if

* * * * *

(2) the person restrains another

* * * * *

(B) under circumstances which expose the restrained person to a substantial risk of serious physical injury.

Arizona

Ariz. Rev. Stat. Ann. § 13-1201(A) (2010) provides:

A. A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury.

Ariz. Rev. Stat. Ann. § 13-2508(A) (Supp. 2014) provides in pertinent part:

A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:

1. Using or threatening to use physical force against the peace officer or another.

2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

Arkansas

Ark. Code Ann. § 5-54-103(a) (2005) provides in pertinent part:

(a)(1) A person commits the offense of resisting arrest if he or she knowingly resists a person known by him or her to be a law enforcement officer effecting an arrest.

(2) As used in this subsection, "resists" means using or threatening to use physical force or any other means that creates a substantial risk of physical injury to any person.

Ark. Code Ann. § 5-11-103(a) (2013) provides:

(a) A person commits the offense of false imprisonment in the first degree if, without consent and without lawful authority, the person knowingly restrains another person so as to interfere substantially with the other person's liberty in a manner that exposes the other person to a substantial risk of serious physical injury.

Ark. Code Ann. § 5-13-205(a)(1) (2013) provides:

(a) A person commits assault in the first degree if he or she:

(1) Recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another person;

Ark. Code Ann. § 5-27-201(a) (2013) provides:

(a) A person commits the offense of endangering the welfare of an incompetent person in the first degree if, being a parent, guardian, person legally charged with care or custody of an incompetent person, or a person charged with supervision of an incompetent person, he or she purposely:

(1) Engages in conduct creating a substantial risk of death or serious physical injury to an incompetent person; or

(2) Deserts the incompetent person under circumstances creating a substantial risk of death or serious physical injury.

Ark. Code Ann. § 5-27-205(a) (2013) provides:

(a) A person commits the offense of endangering the welfare of a minor in the first degree if, being a parent, guardian, person legally charged with care or custody of a minor, or a person charged with supervision of a minor, he or she purposely:

(1) Engages in conduct creating a substantial risk of death or serious physical injury to a minor; or

(2) Deserts a minor less than ten (10) years old under circumstances creating a substantial risk of death or serious physical injury.

Ark. Code Ann. § 5-38-302(a) (2013) provides in pertinent part:

(a) A person commits the offense of reckless burning if the person purposely starts a fire or causes an explosion, whether on his or her own property or property of another person, and thereby recklessly:

(1) Creates a substantial risk of death or serious physical injury to any person;

Ark. Code Ann. § 5-74-107(b)(1) (2005) provides:

(b)(1) A person commits unlawful discharge of a firearm from a vehicle in the second degree if he or she recklessly discharges a firearm from a vehicle in a manner that creates a substantial risk of physical injury to another person or property damage to a home, residence, or other occupiable structure.

Ark. Code Ann. § 5-26-307(a) (2013) provides:

(a) A person commits first degree assault on a family or household member if the person recklessly engages in conduct that creates a substantial risk of death or serious physical injury to a family or household member.

Ark. Code Ann. § 5-26-308(a) (2013) provides:

(a) A person commits second degree assault on a family or household member if the person recklessly engages in conduct that creates a substantial risk of physical injury to a family or household member.

Ark. Code Ann. § 5-13-206(a) (2013) provides:

(a) A person commits assault in the second degree if he or she recklessly engages in conduct that creates a substantial risk of physical injury to another person.

Ark. Code Ann. § 5-2-614(b) (2013) provides:

(b) When a person is justified under this subchapter in using physical force but he or she recklessly or negligently injures or creates a substantial risk of injury to a third party, the justification afforded by this subchapter is unavailable in a prosecution for the recklessness or negligence toward the third party.

Ark. Code Ann. § 5-54-201(1)(A) (Supp. 2013) provides:

(1) "Act of terrorism" means:

(A) Any act that causes or creates a risk of death or serious physical injury to five (5) or more persons;

Ark. Code Ann. § 5-38-301(a) (2013) provides in pertinent part:

(a) A person commits arson if he or she:

* * * * *

(C) Any property, whether his or her own or property of another person, if the act thereby negligently creates a risk of death or serious physical injury to any person;

California

Cal. Penal Code § 278.6(a)(1) (West 2014) provides:

(a) At the sentencing hearing following a conviction for a violation of Section 278 or 278.5, or both, the court shall consider any relevant factors and circumstances in aggravation, including, but not limited to, all of the following:

(1) The child was exposed to a substantial risk of physical injury or illness.

Cal. Penal Code § 11417(b) (West 2014) provides:

(b) The intentional release of a dangerous chemical or hazardous material generally utilized in an industrial or commercial process shall be considered use of a weapon of mass destruction when a person knowingly utilizes those agents with the intent to cause harm and the use places persons or animals at risk of serious injury, illness, or death, or endangers the environment.

Colorado

Colo. Rev. Stat. § 18-3-208 (2014) provides:

A person who recklessly engages in conduct which creates a substantial risk of serious bodily injury to another person commits reckless endangerment, which is a class 3 misdemeanor.

Colo. Rev. Stat. § 18-9-124(2)(a) (2014):

(2) As used in this section, unless the context otherwise requires:

(a) "Hazing" means any activity by which a person recklessly endangers the health or safety of or causes a risk of bodily injury to an individual for purposes of initiation or admission into or affiliation with any student organization; except that "hazing" does not include customary athletic events or other similar contests or com-petitions, or authorized training activities conducted by members of the armed forces of the state of Colorado or the United States.

Colo. Rev. Stat. § 18-9-115(1)(a) (2014) provides:

(1) A person commits endangering public transportation if such person:

(a) Tampers with a facility of public transportation with intent to cause any damage, malfunction, nonfunction, theft, or unauthorized removal of material which would result in the creation of a substantial risk of death or serious bodily injury to anyone;

Colo. Rev. Stat. § 18-8-103(1)(b) (2014) provides:

(1) A person commits resisting arrest if he knowingly prevents or attempts to prevent a peace officer, acting under color of his official authority, from effecting an arrest of the actor or another, by:

* * * * *

(b) Using any other means which creates a substantial risk of causing bodily injury to the peace officer or another.

Connecticut

Conn. Gen. Stat. Ann. § 53a-95(a) (West 2012) provides:

(a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury.

Conn. Gen. Stat. Ann. § 53a-111(a) (West 2012) provides in pertinent part:

(a) A person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined in section 53a-100, he starts a fire or causes an explosion, and * * * (4) at the scene of such fire or explosion a peace officer or firefighter is subjected to a substantial risk of bodily injury.

Conn. Gen. Stat. Ann. § 53a-112(a) (West 2012) provides in pertinent part:

(a) A person is guilty of arson in the second degree when, with intent to destroy or damage a building, as defined in section 53a-100, (1) he starts a fire or causes an explosion and (A) such act subjects another person to a substantial risk of bodily injury;

Conn. Gen. Stat. Ann. § 53a-63(a) (West 2012) provides:

(a) A person is guilty of reckless endangerment in the first degree when, with extreme indifference to human life, he recklessly engages in conduct which creates a risk of serious physical injury to another person.

Conn. Gen. Stat. Ann. § 53a-64(a) (West 2012) provides:

(a) A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a risk of physical injury to another person.

Conn. Gen. Stat. Ann. § 53a-254(a) (West 2012) provides:

(a) A person is guilty of computer crime in the third degree when he commits computer crime as defined in section 53a-251 and (1) the damage to or the value of the property or computer services exceeds one thousand dollars or (2) he recklessly engages in conduct which creates a risk of serious physical injury to another person.

Conn. Gen. Stat. Ann. § 53a-59(a)(3) (West 2012) provides:

(a) A person is guilty of assault in the first degree when: * * * (3) under circumstances evincing an extreme indifference to human life he recklessly

engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person;

Delaware

Del. Code Ann. tit. 11, § 603(a)(1) (2007) provides:

(a) A person is guilty of reckless endangering in the second degree when:

(1) The person recklessly engages in conduct which creates a substantial risk of physical injury to another person;

Del. Code Ann. tit. 11, § 782 (2007) provides in pertinent part:

* * * * *

A person is guilty of unlawful imprisonment in the first degree when the person knowingly and unlawfully restrains another person under circumstances which expose that person to the risk of serious physical injury.

Del. Code Ann. tit. 11, § 939(c) (Supp. 2014) provides in pertinent part:

(c) A person committing any of the crimes described in §§ 932-938 of this title is guilty in the third degree when:

* * * * *

(2) That person engages in conduct which creates a risk of serious physical injury to another person.

Del. Code Ann. tit. 11, § 835(b)(2)(a) (2007) provides:

(2) Carjacking in the second degree is a class D felony if the elements of subsection (a) of this section are met and if, while in possession or control of the vehicle, the person:

a. Recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person;

Del. Code Ann. tit. 11, § 613(a)(3) (2007) provides:

(a) A person is guilty of assault in the first degree when:

* * * * *

(3) The person recklessly engages in conduct which creates a substantial risk of death to another person, and thereby causes serious physical injury to another person;

District of Columbia

D.C. Code § 22-1101 (LexisNexis Supp. 2014) provides in pertinent part:

(a) A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise

willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby causes bodily injury.

(b) A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly:

> (1) Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child;

D.C. Code § 22-404.01(a)(2) (LexisNexis Supp. 2014) provides:

(a) A person commits the offense of aggravated assault if:

* * * * *

> (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.

D.C. Code § 22-404.03(a)(2) (LexisNexis Supp. 2014) provides:

(a) A person commits the offense of aggravated assault on a public vehicle inspection officer if that person assaults, impedes, intimidates, or interferes with a public vehicle inspection officer while that officer is engaged in or on account of the performance of his or her official duties, and:

* * * * *

> (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.

D.C. Code § 22-405(c) (LexisNexis Supp. 2014) provides:

> (c) A person who violates subsection (b) of this section and causes significant bodily injury to the law enforcement officer, or commits a violent act that creates a grave risk of causing significant bodily injury to the officer, shall be guilty of a felony and, upon conviction, shall be imprisoned not more than 10 years or fined not more than the amount set forth in § 22-3571.01, or both.

Florida

Fla. Stat. Ann. § 827.03(1)(e) (West Supp. 2015) provides in pertinent part:

* * * * *

> Except as otherwise provided in this section, neglect of a child may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or mental injury, or a substantial risk of death, to a child.

Fla. Stat. Ann. § 825.102(3)(a)(2) (West Supp. 2015) provides in pertinent part:

* * * * *

Neglect of an elderly person or disabled adult may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or psychological injury, or a substantial risk of death, to an elderly person or disabled adult.

Hawaii

Haw. Rev. Stat. Ann. § 703-309 (LexisNexis Supp. 2014) provides in pertinent part:

The use of force upon or toward the person of another is justifiable under the following circumstances:

(1) The actor is the parent, guardian, or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:

* * * * *

(b) The force used does not intentionally, knowingly, recklessly, or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

* * * * *

(3) The actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person, and:

* * * * *

(b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

* * * * *

(7) The actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train, or other carrier, or in a place where others are assembled, and:

* * * * *

(b) The force used is not designed to cause or known to create a substantial risk of causing death, bodily injury or extreme mental distress.

Haw. Rev. Stat. Ann. § 703-308(1) (LexisNexis 2007) provides in pertinent part:

(1) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent the other person from committing suicide, inflicting serious bodily harm upon himself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property, or breach of the peace, except that:

* * * * *

(b) The use of deadly force is not in any event justifiable under this section unless:

(i) The actor believes that there is a substantial risk that the person whom the actor seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons;

Haw. Rev. Stat. Ann. § 707-721(1) (LexisNexis Supp. 2014) provides:

(1) A person commits the offense of unlawful imprisonment in the first degree if the person knowingly restrains another person under circumstances which expose the person to the risk of serious bodily injury.

Haw. Rev. Ann. Stat. § 703-307(3) (LexisNexis 2007) provides in pertinent part:

(3) The use of deadly force is not justifiable under this section unless:

* * * * *

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

Haw. Rev. Stat. Ann. § 703-310(2) (LexisNexis 2007) provides:

(2) When the actor is justified under sections 703-303 to 703-309 in using force upon or toward the person of another but the actor recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence toward innocent persons.

Haw. Rev. Stat. Ann. § 710-1026(1)(b) (LexisNexis 2007) provides:

(1) A person commits the offense of resisting arrest if the person intentionally prevents a law enforcement officer acting under color of the law enforcement officer's official authority from effecting an arrest by:

* * * * *

(b) Using any other means creating a substantial risk of causing bodily injury to the law enforcement officer or another.

Haw. Rev. Stat. Ann. § 703-306(4)(a) (LexisNexis 2007) provides:

(4) The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:

(a) The device is not designed to cause or known to create a substantial risk of causing death or serious bodily injury;

Illinois

720 Ill. Comp. Stat. Ann. 5/12-5.3(a) (West Supp. 2014) provides:

(a) A person commits use of a dangerous place for the commission of a controlled substance or cannabis offense when that person knowingly exercises control over any place with the intent to use that place to manufacture, produce, deliver, or possess with intent to deliver a controlled or counterfeit substance or controlled substance analog in violation of Section 401 of the Illinois Controlled Substances Act or to manufacture, produce, deliver, or possess with intent to deliver cannabis in violation of Section 5, 5.1, 5.2, 7, or 8 of the Cannabis Control Act and:

> (1) the place, by virtue of the presence of the substance or substances used or intended to be used to manufacture a controlled or counterfeit substance, controlled substance analog, or cannabis, presents a substantial risk of injury to any person from fire, explosion, or exposure to toxic or noxious chemicals or gas; or
>
> (2) the place used or intended to be used to manufacture, produce, deliver, or possess with intent to deliver a controlled or counterfeit substance, controlled substance analog, or cannabis has located within it or surrounding it devices, weapons, chemicals, or explosives designed, hidden, or arranged in a manner that would cause a person to be exposed to a substantial risk of great bodily harm.

720 Ill. Comp. Stat. Ann. 5/29D-10(*l*)(1) (West Supp. 2014) provides:

(*l*) "Terrorist act" or "act of terrorism" means: (1) any act that is intended to cause or create a risk and does cause or create a risk of death or great bodily harm to one or more persons; * * *

Indiana

Ind. Code Ann. § 35-31.5-2-168(3) (LexisNexis Supp. 2012) provides:

(a) A person who recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person commits criminal recklessness.

Ind. Code Ann. § 35-42-1-4 (LexisNexis Supp. 2014) provides in pertinent part:

(b) A person who kills another human being while committing or attempting to commit:

(1) a Level 5 or Level 6 felony that inherently poses a risk of serious bodily injury;

(2) a Class A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) battery;

commits involuntary manslaughter, a Level 5 felony.

Ind. Code Ann. § 35-42-2-1.5 (LexisNexis Supp. 2014) provides in pertinent part:

A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes:

(1) serious permanent disfigurement;

(2) protracted loss or impairment of the function of a bodily member or organ; or

(3) the loss of a fetus;

commits aggravated battery, a Level 3 felony.

Ind. Code Ann. § 35-42-2-2.5(a) (LexisNexis Supp. 2014) provides:

(a) As used in this section, "hazing" means forcing or requiring another person:

(1) with or without the consent of the other person; and

(2) as a condition of association with a group or organization;

to perform an act that creates a substantial risk of bodily injury.

Ind. Code Ann. § 35-44.1-3-1(b) (LexisNexis Supp. 2014) provides in pertinent part:

(b) The offense under subsection (a) is a:

(1) Level 6 felony if:

* * * * *

(B) while committing any offense described in subsection (a), the person draws or uses a deadly weapon, inflicts bodily injury on or otherwise causes bodily injury to another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person;

Ind. Code Ann. § 35-43-4-2(a)(2) (LexisNexis 2014) provides:

(a) A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class A misdemeanor. However, the offense is:

* * * * *

(2) a Level 5 felony if:

(A) the value of the property is at least fifty thousand dollars ($50,000); or

(B) the property that is the subject of the theft is a valuable metal (as defined in IC 25-37.5-1-1) and:

(i) relates to transportation safety;

(ii) relates to public safety; or

(iii) is taken from a hospital or other health care facility, telecommunications provider, public utility (as defined in IC 32-24-1-5.9(a)), or key facility;

and the absence of the property creates a substantial risk of bodily injury to a person.

Iowa

Iowa Code Ann. § 709.3(1)(a) (West 2003) provides:

1. A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances:

a. During the commission of sexual abuse the person displays in a threatening manner a dangerous weapon, or uses or threatens to use force creating a substantial risk of death or serious injury to any person.

Louisiana

La. Rev. Stat. Ann. § 14:2(B) (Supp. 2015) provides in pertinent part:

B. In this Code, "crime of violence" means an offense that has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, and that, by its very nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense or an offense that involves the possession or use of a dangerous weapon.

Kansas

Kan. Stat. Ann. § 21-5812(c)(2)(A) (Supp. 2013) provides:

(2) Aggravated arson as defined in:

(A) Subsection (b)(1) is a:

(i) Severity level 3, person felony, if such crime results in a substantial risk of bodily harm; and

(ii) severity level 6, person felony, if such crime results in no substantial risk of bodily harm;

Kan. Stat. Ann. § 21-5406(a) (Supp. 2013) provides:

(a) Vehicular homicide is the killing of a human being committed by the operation of an automobile, airplane, motor boat or other motor vehicle in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances.

Kan. Stat. Ann. § 21-5817(b) (Supp. 2013) provides:

(b) Aggravated tampering with a traffic signal is tampering with a traffic signal as defined in subsection (a) which creates an unreasonable risk of an accident causing the death or great bodily injury of any person.

Maine

Me. Rev. Stat. tit. Ann. 17-A, § 554(1)(B-2) (2006) provides:

1. A person is guilty of endangering the welfare of a child if that person:

* * * * *

B-2. Being a parent, foster parent, guardian or other person responsible for the long-term general care and welfare of a child under 16, recklessly fails to take reasonable measures to protect the child from the risk of further bodily injury after knowing:

(1) That the child had, in fact, sustained serious bodily injury or bodily injury under circumstances posing a substantial risk of serious bodily injury; and

(2) That such bodily injury was, in fact, caused by the unlawful use of physical force by another person;

Me. Rev. Stat. Ann. tit. 17-A, § 213(1) (2006) provides:

A person is guilty of aggravated reckless conduct if the person with terroristic intent engages in conduct that in fact creates a substantial risk of serious bodily injury to another person.

Me. Rev. Stat. Ann. tit. 17-A, § 751-B(1)(C) (Supp. 2014) provides:

1. A person is guilty of refusing to submit to arrest or detention if, with the intent to hinder, delay or prevent a law enforcement officer from effecting the arrest or detention of that person, the person:

* * * * *

C. Creates a substantial risk of bodily injury to the law enforcement officer. Violation of this paragraph is a Class D crime.

Me. Rev. Stat. Ann. tit. 17-A, § 211(1) (2006) provides:

1. A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person.

Me. Rev. Stat. Ann. tit. 17-A, § 101(3) (Supp. 2014) provides in pertinent part:

3. Conduct that is justifiable under this chapter constitutes a defense to any crime; except that, if a person is justified in using force against another, but the person recklessly injures or creates a risk of injury to 3rd persons, the justification afforded by this chapter is unavailable in a prosecution for such recklessness.

Me. Rev. Stat. Ann. tit. 17-A, § 301(1)(B) (Supp. 2014) provides:

1. A person is guilty of kidnapping if either:

* * * * *

B. The actor knowingly restrains another person:

(1) Under circumstances which in fact expose the other person to risk of serious bodily injury;

Maryland

Md. Code Ann., Crim. Law § 3-602.1(a)(5)(i) (LexisNexis 2012) provides:

(5)(i) "Neglect" means the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor.

Md. Code Ann., Crim. Law § 3-204(a) (LexisNexis 2012) provides:

(a) *Prohibited.*—A person may not recklessly:

(1) engage in conduct that creates a substantial risk of death or serious physical injury to another; or

(2) discharge a firearm from a motor vehicle in a manner that creates a substantial risk of death or serious physical injury to another.

Md. Code Ann., Crim. Law § 3-1001(c) (LexisNexis Supp. 2014) provides:

(c) *In general.*—A person may not knowingly threaten to commit or threaten to cause to be committed a crime of violence, as defined in § 14-101 of this article, that would place others at substantial risk of death or serious physical injury, as defined in § 3-201 of this title, if as a result of the threat, regardless of whether the threat is carried out, five or more people are:

(1) placed in reasonable fear that the crime will be committed;

(2) evacuated from a dwelling, storehouse, or public place;

(3) required to move to a designated area within a dwelling, storehouse, or public place; or

(4) required to remain in a designated safe area within a dwelling, storehouse, or public place.

Md. Code Ann., Crim. Law § 3-607(a) (LexisNexis 2012) provides:

(a) *Prohibited.*—A person may not recklessly or intentionally do an act or create a situation that subjects a student to the risk of serious bodily injury for the purpose of an initiation into a student organization of a school, college, or university.

Massachusetts

Mass. Ann. Laws ch. 140, § 121 (LexisNexis 2007) provides in pertinent part:

"Violent crime", shall mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.

Mass. Ann. Laws ch. 265, § 13L (LexisNexis 2010) provides in pertinent part:

Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished by imprisonment in the house of correction for not more than 2 ½ years.

For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and

degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Mass. Ann. Laws ch. 268, § 32B(a) (LexisNexis 2010) provides:

(a) A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or an-other, by:

(1) using or threatening to use physical force or violence against the police officer or another; or

(2) using any other means which creates a substantial risk of causing bodily injury to such police officer or another.

Michigan

Mich. Comp. Laws Ann. § 752.581 (West 2004) provides:

Sec. 1. A person is guilty of a misdemeanor, punishable by a fine of not more than $500.00, or by incarceration in the county jail for not more than 30 days, or both:

(a) When the chief administrative officer of a publicly owned and operated institution of higher education, or his designee, notifies the person that he is such officer or designee and that the person is in violation of the properly promulgated rules of the institution; and

(b) When the person is in fact in violation of such rules; and

(c) When, thereafter, such officer or designee directs the person to vacate the premises, building or other structure of the institution; and

(d) When the person thereafter willfully remains in or on such premises, building or other structure; and

(e) When, in so remaining therein or thereon, the person constitutes (1) a clear and substantial risk of physical harm or injury to other persons or of damage to or destruction of the property of the institution, or (2) an unreasonable prevention or disruption of the customary and lawful functions of the institution, by occupying space necessary therefor or by use of force or by threat of force.

Mich. Comp. Laws Ann. § 752.582 (West 2004) provides in pertinent part:

Sec. 2. A person is guilty of a misdemeanor, punishable by a fine of not less than $200.00 and not more than $1,000.00, or by incarceration in the county jail for not more than 90 days, or both, who enters on the premises, building or other structure of a publicly owned and operated institution of higher education, with the intention to, and therein or thereon does in fact, constitute (a) a clear and substantial risk of physical harm or injury to other persons or of damage to or destruction of the property of the institution * * * .

Minnesota

Minn. Stat. Ann. § 609.595(1) (West 2009) provides:

Subdivision 1. Criminal damage to property in the first degree. Whoever intentionally causes damage to physical property of another without the latter's consent may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both, if:

(1) the damage to the property caused a reasonably foreseeable risk of bodily harm;

Minn. Stat. Ann. § 609.52 (West 2009) provides in pertinent part:

Subd. 3a. Enhanced penalty. If a violation of this section creates a reasonably foreseeable risk of bodily harm to another, the penalties described in subdivision 3 are enhanced as follows:

Minn. Stat. Ann. § 609.50 (West 2009) provides in pertinent part:

Subd. 2. Penalty. A person convicted of violating subdivision 1 may be sentenced as follows:

(1) if (i) the person knew or had reason to know that the act created a risk of death, substantial bodily harm, or serious property damage; or (ii) the act caused death, substantial bodily harm, or serious property damage; to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both;

Minn. Stat. Ann. § 609.851 (West 2009) provides in pertinent part:

Subd. 2. Felony. A person who violates subdivision 1 and knows that doing so creates a risk of death or bodily harm or serious property damage is guilty of a felony and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minn. Stat. Ann. § 609.396 (West 2009) provides in pertinent part:

Subd. 2. Felony. A person is guilty of a felony and may be sentenced to not more than five years imprisonment or to payment of a fine of not more than $10,000, or both, if:

(1) the person intentionally enters or is present in an area at the Camp Ripley Military Reservation that is posted by order of the adjutant general as restricted for weapon firing or other hazardous military activity; and

(2) the person knows that doing so creates a risk of death, bodily harm, or serious property damage.

Minn. Stat. Ann. § 609.2325 (West 2009) provides in pertinent part:

Subdivision 1. Crimes. (a) A caregiver who, with intent to produce physical or mental pain or injury to a vulnerable adult, subjects a vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion, is guilty of criminal

abuse and may be sentenced as provided in subdivision 3.

* * * * *

Subd. 3. Penalties. (a) A person who violates subdivision 1, paragraph (a), may be sentenced as follows:

* * * * *

(3) if the act results in substantial bodily harm or the risk of death, imprisonment for not more than five years or payment of a fine of not more than $10,000, or both;

Minn. Stat. Ann. § 609.662 (West 2009) provides in pertinent part:

Subd. 4. Defense. It is an affirmative defense to a charge under this section if the defendant proves by a preponderance of the evidence that the defendant failed to investigate or render assistance as required under this section because the defendant reasonably perceived that these actions could not be taken without a significant risk of bodily harm to the defendant or others.

Mississippi

Miss. Code. Ann. § 97-3-105 (West 2011) provides in pertinent part:

(1) A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a sub-

stantial risk of physical injury to such other person or a third person and thereby causes such injury.

* * * * *

(3) A person is guilty of hazing in the second degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person.

Missouri

Mo. Ann. Stat. § 565.120(1) (West 2012) provides:

1. A person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.

Mo. Ann. Stat. § 578.360(2) (West Supp. 2015) provides in pertinent part:

As used in sections 578.360 to 578.365, unless the context clearly requires otherwise, the following terms mean:

* * * * *

(2) **"Hazing"**, a willful act, occurring on or off the campus of an educational institution, directed against a student or a prospective member of an organization operating under the sanction of an educational institu-

tion, that recklessly endangers the mental or physical health or safety of a student or prospective member for the purpose of initiation or admission into or continued membership in any such organization to the extent that such person is knowingly placed at probable risk of the loss of life or probable bodily or psychological harm.

Mo. Ann. Stat. § 578.365(1) (West Supp. 2015) provides:

(1) A person commits the offense of hazing if he or she knowingly participates in or causes a willful act, occurring on or off the campus of a public or private college or university, directed against a student or a prospective member of an organization operating under the sanction of a public or private college or university, that recklessly endangers the mental or physical health or safety of a student or prospective member for the purpose of initiation or admission into or continued membership in any such organization to the extent that such person is knowingly placed at probable risk of the loss of life or probable bodily or psychological harm.

Mo. Ann. Stat. § 575.150 (West Supp. 2015) provides:

Resisting an arrest, detention or stop by fleeing in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person is a class D felony; otherwise, resisting or interfering with an arrest, detention or stop in violation

of subdivision (1) or (2) of subsection 1 of this section is a class A misdemeanor.

Mo. Ann. Stat. § 565.075 (West 2012) provides in pertinent part:

A person commits the crime of assault while on school property if the person:

* * * * *

(3) Recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; and the act de-scribed under subdivision (1), (2) or (3) of this subsection occurred on school or school district property, or in a vehicle that at the time of the act was in the service of a school or school district, or arose as a result of a school or school district-sponsored activity.

Mo. Ann. Stat. § 577.070 (West Supp. 2015) provides in pertinent part:

The offense of littering is a class C misdemeanor unless:

(1) Such littering creates a substantial risk of physical injury or property damage to another;

Mo. Ann. Stat. § 565.056(1)(4) (West Supp. 2015) provides:

1. A person commits the offense of assault in the fourth degree if:

* * * * *

(4) The person recklessly engages in conduct which creates a substantial risk of death or serious physical injury to another person;

Mo. Ann. Stat. § 565.074(1)(4) (West 2012) provides:

1. A person commits the crime of domestic assault in the third degree if the act involves a family or household member, including any child who is a member of the family or household, as defined in section 455.010 and:

* * * * *

(4) The person recklessly engages in conduct which creates a grave risk of death or serious physical injury to such family or household member;

Mo. Ann. Stat. § 565.082(1)(7) (West 2012) provides:

1. A person commits the crime of assault of a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer in the second degree if such person:

* * * * *

(7) Acts with criminal negligence to create a substantial risk of death or serious physical injury to a law enforcement officer, corrections officer, emergency personnel, highway worker in a construction zone or work zone, utility worker, cable worker, or probation and parole officer.

Montana

Mont. Code Ann. § 45-5-207(1) (2013) provides:

(1) A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment. This conduct includes but is not limited to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other substance for the purpose of damaging a saw or other wood harvesting, processing, or manufacturing equipment.

Mont. Code Ann. § 45-9-132(3)(a) (2013) provides:

(3) A person convicted of operation of an unlawful clandestine laboratory shall be fined an amount not to exceed $50,000, be imprisoned in a state prison for a term not to exceed 50 years, or both, if 46-1-401 is complied with and the operation of an unlawful clandestine laboratory or any phase of the operation:

(a) created a substantial risk of death of or serious bodily injury to another;

Mont. Code Ann. § 45-7-301(1)(b) (2013) provides:

(1) A person commits the offense of resisting arrest if the person knowingly prevents or attempts to prevent a peace officer from effecting an arrest by:

* * * * *

(b) using any other means that creates a risk of causing physical injury to the peace officer or another.

Mont. Code Ann. § 45-5-208(1) (2013) provides:

(1) A person who negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of negligent endangerment.

Mont. Code Ann. § 45-5-628(1) (2013) provides:

(1) A person commits the offense of criminal child endangerment if the person purposely, knowingly, or negligently causes substantial risk of death or serious bodily injury to a child under 14 years of age by:

(a) failing to seek reasonable medical care for a child suffering from an apparent acute life-threatening condition;

(b) placing a child in the physical custody of another who the person knows has previously purposely or knowingly caused bodily injury to a child;

(c) placing a child in the physical custody of another who the person knows has previously committed an offense against the child under 45-5-502 or 45-5-503;

(d) manufacturing or distributing dangerous drugs in a place where a child is present;

(e) operating a motor vehicle under the influence of alcohol or dangerous drugs in violation of 61-8-401, 61-8-406, 61-8-410, or 61-8-465 with a child in the vehicle; or

(f) failing to attempt to provide proper nutrition for a child, resulting in a medical diagnosis of nonorganic failure to thrive.

Nebraska

Neb. Rev. Stat. Ann. § 28-1412(3) (LexisNexis 2009) provides:

(3) The use of deadly force is not justifiable under this section unless:

(a) The arrest is for a felony;

(b) Such person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer;

(c) The actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(d) The actor believes that:

(i) The crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(ii) There is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Neb. Rev. Stat. Ann. § 28-314(1) (LexisNexis 2009) provides:

(1) A person commits false imprisonment in the first degree if he or she knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury; or (b) with intent to hold him or her in a condition of involuntary servitude.

Neb. Rev. Stat. Ann. § 28-1414(3) (LexisNexis 2009) provides:

(3) When the actor is justified under sections 28-1408 to 28-1413 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Neb. Rev. Stat. Ann. § 28-904(1)(b) (LexisNexis 2009) provides:

(1) A person commits the offense of resisting arrest if, while intentionally preventing or attempting to prevent a peace officer, acting under color of his or her official authority, from effecting an arrest of the actor or another, he or she:

* * * * *

(b) Uses any other means which creates a substantial risk of causing physical injury to the peace officer or another;

Nevada

Nev. Rev. Stat. Ann. § 200.408 (LexisNexis 2012) provides:

1. A person who causes to be administered to another person any controlled substance without that person's knowledge and with the intent thereby to enable or assist himself or herself or any other person

to commit a crime of violence against that person or the property of that person, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years.

2. As used in this section:

(a) "Controlled substance" includes flunitrazepam and gamma-hydroxybutyrate and each substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor as defined in NRS 453.086.

(b) "Crime of violence" means:

(1) Any offense involving the use or threatened use of force or violence against the person or property of another; or

(2) Any felony for which there is a substantial risk that force or violence may be used against the person or property of another in the commission of the felony.

(c) "Without a person's knowledge" means the person is unaware that a substance that can alter the person's ability to appraise conduct or to decline participation in or communicate an unwillingness to participate in conduct has been administered to the person.

Nev. Rev. Stat. Ann. § 200.575(3) (LexisNexis 2012) provides:

(3) A person who commits the crime of stalking with the use of an Internet or network site, electronic mail, text messaging or any other similar means of communication to publish, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim shall be punished for a category C felony as provided in NRS 193.130.

New Hampshire

N.H. Rev. Stat. Ann. § 633:2(I) (2007) provides:

(I) A person is guilty of a class B felony if he knowingly confines another unlawfully in circumstances exposing him to risk of serious bodily injury.

N.H. Rev. Stat. Ann. § 638:18(II)(b) (Supp. 2014) provides:

(II) Computer crime constitutes a class B felony if:

* * * * *

(b) The person recklessly engages in conduct which creates a risk of serious physical injury to another person;

New Jersey

N.J. Stat. Ann. § 2C:20-10(c) (West 2005) provides:

(c) A person commits a crime of the third degree if, with purpose to withhold temporarily from the owner, he takes, operates or exercises control over a motor vehicle without the consent of the owner or other person authorized to give consent and operates the motor vehicle in a manner that creates a risk of injury to any person or a risk of damage to property.

N.J. Stat. Ann. § 2C:3-7 (West 2005) provides in pertinent part:

The use of deadly force is not justifiable under this section unless:

(a) The actor effecting the arrest is authorized to act as a peace officer or has been summoned by and is assisting a person whom he reasonably believes to be authorized to act as a peace officer; and

(b) The actor reasonably believes that the force employed creates no substantial risk of injury to innocent persons; and

(c) The actor reasonably believes that the crime for which the arrest is made was homicide, kidnapping, an offense under 2C:14-2 or 2C:14-3, arson, robbery, burglary of a dwelling, or an attempt to commit one of these crimes;

N.J. Stat. Ann. § 2C:29-2(a)(1) (West Supp. 2014) provides in pertinent part:

a. (1) Except as provided in paragraph (3), a person is guilty of a disorderly persons offense if he purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest. (2) Except as provided in paragraph (3), a person is guilty of a crime of the fourth degree if he, by flight, purposely prevents or attempts to prevent a law enforcement officer from effecting an arrest. (3) An offense under paragraph (1) or (2) of subsection a. is a crime of the third degree if the person:

(a) Uses or threatens to use physical force or violence against the law enforcement officer or another; or

(b) Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

N.J. Stat. Ann. § 2C:13-2(a) (West 2005) provides:

A person commits a crime of the third degree if he knowingly:

a. Restrains another unlawfully in circumstances exposing the other to risk of serious bodily injury;

N.J. Stat. Ann. § 2C:40-20 (West 2005) provides:

A person who uses any type of device, including but not limited to wire or cable, that is not a fence but is installed at a height under 10 feet from the ground, to

indicate boundary lines or otherwise to divide, partition or segregate portions of real property, if the device is not readily visible or marked in such a way as to make it readily visible to persons who are pedestrians, equestrians, bicyclists or drivers of off-the-road vehicles and poses a risk of causing significant bodily injury to such persons, shall be guilty of a crime of the fourth degree. However, this section is not intended to apply to markers set by a licensed land surveyor, pursuant to existing statute.

N.J. Stat. Ann. § 2C:3-9(c) (West 2005) provides:

(c) When the actor is justified under sections 2C:3-3 to 2C:3-8 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such reckless-ness or negligence towards innocent persons.

N.J. Stat. Ann. § 2C:17-2(c) (West 2005) provides:

(c) A person who recklessly creates a risk of widespread injury or damage commits a crime of the fourth degree, even if no such injury or damage occurs. A violation of this subsection is a crime of the third degree if the risk of widespread injury or damage results from the reckless handling or storage of hazardous materials. A violation of this subsection is a crime of the second degree if the handling or storage of hazardous materials violated any law, rule or regulation intended to protect the public health and safety.

N.J. Stat. Ann. § 2C:33-14(d) (West Supp. 2014) provides:

(d) Interference with transportation is a crime of the third degree if the person purposely, knowingly or recklessly causes significant bodily injury to another person or causes pecuniary loss of $2,000 or more, or if the person purposely or knowingly creates a risk of significant bodily injury to another person.

New York

N.Y. Penal Law § 135.10 (McKinney 2009) provides:

A person is guilty of unlawful imprisonment in the first degree when he restrains another person under circumstances which expose the latter to a risk of serious physical injury.

N.Y. Penal Law § 125.25(4) (McKinney 2009) provides:

A person is guilty of murder in the second degree when:

* * * * *

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person;

N.Y. Penal Law § 120.20 (McKinney 2009) provides:

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

N.Y. Penal Law § 120.16 (McKinney 2009) provides:

A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury.

N.Y. Penal Law § 120.17 (McKinney 2009) provides:

A person is guilty of hazing in the second degree when, in the course of another person's initiation or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person.

N.Y. Penal Law § 156.26 (McKinney 2010) provides in pertinent part:

A person is guilty of computer tampering in the second degree when he or she commits the crime of computer tampering in the fourth degree and he or she intentionally alters in any manner or destroys:

* * * * *

2. computer material that contains records of the medical history or medical treatment of an identified or readily identifiable individual or individuals and as a result of such alteration or destruction, such individual or individuals suffer serious physical injury, and he or she is aware of and consciously disregards a substantial and unjustifiable risk that such serious physical injury may occur.

N.Y. Penal Law § 490.47 (McKinney 2008) provides:

A person is guilty of criminal use of a chemical weapon or biological weapon in the third degree when, under circumstances evincing a depraved indifference to human life, he or she uses, deploys, releases, or causes to be used, deployed, or released any select chemical agent or select biological agent, and thereby creates a grave risk of death or serious physical injury to another person not a participant in the crime.

N.Y. Penal Law § 125.20 (McKinney 2009) provides in pertinent part:

A person is guilty of manslaughter in the first degree when:

* * * * *

4. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly engages in conduct which creates a grave risk of serious physical injury to such person and thereby causes the death of such person.

North Carolina

N.C. Gen. Stat. § 14-318.2(a) (2013) provides:

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

North Dakota

N.D. Cent. Code § 12.1-17-03 (2012) provides:

A person is guilty of an offense if he creates a substantial risk of serious bodily injury or death to another. The offense is a class C felony if the circumstances manifest his extreme indifference to the value of human life. Otherwise it is a class A misdemeanor. There is risk within the meaning of this section if the potential for harm exists, whether or not a particular person's safety is actually jeopardized.

N.D. Cent. Code § 12.1-17-10 (2012) provides:

A person is guilty of an offense when, in the course of another person's initiation into or affiliation with any organization, the person willfully engages in conduct that creates a substantial risk of physical injury to that other person or a third person. As used in this section, "conduct" means any treatment or forced physical activity that is likely to adversely affect the

physical health or safety of that other person or a third person, or which subjects that other person or third person to extreme mental stress, and may include extended deprivation of sleep or rest or extended isolation, whipping, beating, branding, forced calisthenics, overexposure to the weather, and forced consumption of any food, liquor, beverage, drug, or other substance. The offense is a class A misdemeanor if the actor's conduct causes physical injury, otherwise the offense is a class B misdemeanor.

N.D. Cent. Code § 12.1-05-01(2) (2012) provides:

If a person is justified or excused in using force against another, but he recklessly or negligently injures or creates a risk of injury to other persons, the justifications afforded by this chapter are unavailable in a prosecution for such recklessness or negligence.

N.D. Cent. Code § 12.1-08-02(1) (2012) provides:

A person is guilty of a class A misdemeanor if, with intent to prevent a public servant from effecting an arrest of himself or another for a misdemeanor or infraction, or from discharging any other official duty, he creates a substantial risk of bodily injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting the arrest or the discharge of the duty. A person is guilty of a class C felony if, with intent to prevent a public servant from effecting an arrest of himself or another for a class A, B, or C felony, he creates a substantial risk of bodily

injury to the public servant or to anyone except himself, or employs means justifying or requiring substantial force to overcome resistance to effecting such an arrest.

N.D. Cent. Code § 12.1-18-02 (2012) provides in pertinent part:

A person is guilty of a class C felony, if he:

* * * * *

2. Knowingly restrains another under terrorizing circumstances or under circumstances exposing him to risk of serious bodily injury;

Ohio

Ohio Rev. Code Ann. § 2921.331(C)(5)(a) (LexisNexis 2014) provides in pertinent part:

* * * * *

(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

* * * * *

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

Ohio Rev. Code Ann. § 2919.22(B)(3) provides:

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

* * * * *

(3) Administer corporal punishment or other physical disciplinary measure, or physically restrain the child in a cruel manner or for a prolonged period, which punishment, discipline, or restraint is excessive under the circumstances and creates a substantial risk of serious physical harm to the child;

Ohio Rev. Code Ann. § 2901.01(9) (LexisNexis 2014) provides in pertinent part:

(9) "Offense of violence" means any of the following:

* * * * *

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons.

Ohio Rev. Code Ann. § 2909.02(A) (LexisNexis 2014) provides:

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Create a substantial risk of serious physical harm to any person other than the offender;

(2) Cause physical harm to any occupied structure;

(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

Ohio Rev. Code Ann. § 2905.01(B) (LexisNexis 2014) provides:

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty.

Ohio Rev. Code Ann. § 2905.02(A)(2) (LexisNexis 2014) provides:

(A) No person, without privilege to do so, shall knowingly do any of the following:

* * * * *

(2) By force or threat, restrain the liberty of another person under circumstances that create a risk of

physical harm to the victim or place the other person in fear;

Ohio Rev. Code Ann. § 2909.08 (LexisNexis 2014) provides in pertinent part:

* * * * *

(D) Whoever violates division (B) of this section is guilty of endangering aircraft, a misdemeanor of the first degree. If the violation creates a risk of physical harm to any person, endangering aircraft is a felony of the fifth degree. If the violation creates a substantial risk of physical harm to any person or if the aircraft that is the subject of the violation is occupied, endangering aircraft is a felony of the fourth degree.

(E) Whoever violates division (C) of this section is guilty of endangering airport operations, a misdemeanor of the second degree. If the violation creates a risk of physical harm to any person, endangering airport operations is a felony of the fifth degree. If the violation creates a substantial risk of physical harm to any person, endangering airport operations is a felony of the fourth degree. In addition to any other penalty or sanction imposed for the violation, the hunting license or permit of a person who violates division (C) of this section while hunting shall be suspended or revoked pursuant to section 1533.68 of the Revised Code.

Ohio Rev. Code Ann. § 2909.07(C) (LexisNexis 2014) provides:

(1) Whoever violates this section is guilty of criminal mischief, and shall be punished as provided in division (C)(2) or (3) of this section.

(2) Except as otherwise provided in this division, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a misdemeanor of the third degree. Except as otherwise provided in this division, if the violation of division (A)(1), (2), (3), (4), or (5) of this section creates a risk of physical harm to any person, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a misdemeanor of the first degree. If the property involved in the violation of division (A)(1), (2), (3), (4), or (5) of this section is an aircraft, an aircraft engine, propeller, appliance, spare part, fuel, lubricant, hydraulic fluid, any other equipment, implement, or material used or intended to be used in the operation of an air-craft, or any cargo carried or intended to be carried in an air-craft, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is one of the following:

(a) If the violation creates a risk of physical harm to any person, except as otherwise provided in division (C)(2)(b) of this section, criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a felony of the fifth degree.

(b) If the violation creates a substantial risk of physical harm to any person or if the property involved in a violation of this section is an occupied aircraft,

criminal mischief committed in violation of division (A)(1), (2), (3), (4), or (5) of this section is a felony of the fourth degree.

(3) Except as otherwise provided in this division, criminal mischief committed in violation of division (A)(6) of this section is a misdemeanor of the first degree. Except as otherwise provided in this division, if the value of the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section or the loss to the victim resulting from the violation is one thousand dollars or more and less than ten thousand dollars, or if the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section is used or intended to be used in the operation of an aircraft and the violation creates a risk of physical harm to any person, criminal mischief committed in violation of division (A)(6) of this section is a felony of the fifth degree. If the value of the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section or the loss to the victim resulting from the violation is ten thousand dollars or more, or if the computer, computer system, computer network, computer software, computer program, or data involved in the violation of division (A)(6) of this section is used or intended to be used in the operation of an aircraft and the violation creates a substantial risk of physical harm to any person or the aircraft in question is an occupied aircraft, criminal mischief committed in vio-

lation of division (A)(6) of this section is a felony of the fourth degree.

Ohio Rev. Code Ann. § 2921.23(A) (LexisNexis 2014) provides:

(A) No person shall negligently fail or refuse to aid a law enforcement officer, when called upon for assistance in preventing or halting the commission of an offense, or in apprehending or detaining an offender, when such aid can be given without a substantial risk of physical harm to the person giving it.

Ohio Rev. Code Ann. § 2903.31(A) (LexisNexis 2014) provides:

(A) As used in this section, "hazing" means doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person.

Ohio Rev. Code Ann. § 2909.101(B) (LexisNexis 2014) provides in pertinent part:

(B) Whoever violates this section is guilty of railroad grade crossing device vandalism. Except as otherwise provided in this division, railroad grade crossing device vandalism is a misdemeanor of the first degree. Except as otherwise provided in this division, if the violation of this section causes serious physical harm to property or creates a substantial risk

of physical harm to any person, railroad grade crossing device vandalism is a felony of the fourth degree.

Ohio Rev. Code Ann. § 2917.11(A)(5) (LexisNexis 2014) provides:

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:

* * * * *

(5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.

Ohio Rev. Code Ann. § 2909.06(B) (LexisNexis 2014) provides:

(B) Whoever violates this section is guilty of criminal damaging or endangering, a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any person, criminal damaging or endangering is a misdemeanor of the first degree. If the property involved in a violation of this section is an aircraft, an aircraft engine, propeller, appliance, spare part, or any other equipment or implement used or intended to be used in the operation of an aircraft and if the violation creates a risk of physical harm to any person, criminal damaging or endangering is a felony of the fifth degree. If the property involved in a violation of this section is an aircraft, an aircraft engine, propeller, appliance, spare part, or any other equipment or implement used or intended to be used in

the operation of an aircraft and if the violation creates a substantial risk of physical harm to any person or if the property involved in a violation of this section is an occupied aircraft, criminal damaging or endangering is a felony of the fourth degree.

Ohio Rev. Code Ann. § 2909.03(A) (LexisNexis 2014) provides:

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Cause, or create a substantial risk of, physical harm to any property of another without the other person's consent;

(2) Cause, or create a substantial risk of, physical harm to any property of the offender or another, with purpose to defraud;

(3) Cause, or create a substantial risk of, physical harm to the statehouse or a courthouse, school building, or other building or structure that is owned or controlled by the state, any political subdivision, or any department, agency, or instrumentality of the state or a political subdivision, and that is used for public purposes;

(4) Cause, or create a substantial risk of, physical harm, through the offer or the acceptance of an agreement for hire or other consideration, to any property of another without the other person's consent or to any property of the offender or another with purpose to defraud;

(5) Cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by another person, the state, or a political subdivision without the consent of the other person, the state, or the political subdivision;

(6) With purpose to defraud, cause, or create a substantial risk of, physical harm to any park, preserve, wildlands, brush-covered land, cut-over land, forest, timberland, greenlands, woods, or similar real property that is owned or controlled by the offender, another person, the state, or a political subdivision.

Ohio Rev. Code Ann. § 2909.09(C) (LexisNexis 2014) provides:

(C) Whoever violates this section is guilty of vehicular vandalism. Except as otherwise provided in this division, vehicular vandalism is a misdemeanor of the first degree. Except as otherwise provided in this division, if the violation of this section creates a substantial risk of physical harm to any person or the violation of this section causes serious physical harm to property, vehicular vandalism is a felony of the fourth degree. Except as otherwise provided in this division, if the violation of this section causes physical harm to any person, vehicular vandalism is a felony of the third degree. If the violation of this section causes serious physical harm to any person, vehicular vandalism is a felony of the second degree.

Ohio Rev. Code Ann. § 2923.162(C) (LexisNexis 2014) provides in pertinent part:

(C) Whoever violates this section is guilty of discharge of a firearm on or near prohibited premises. A violation of division (A)(1) or (2) of this section is a misdemeanor of the fourth degree. A violation of division (A)(3) of this section shall be punished as follows:

* * * * *

(2) Except as otherwise provided in division (C)(3) or (4) of this section, if the violation created a substantial risk of physical harm to any person or caused serious physical harm to property, a violation of division (A)(3) of this section is a felony of the third degree.

Ohio Rev. Code Ann. § 2917.13(C) (LexisNexis 2014) provides:

(C) Whoever violates this section is guilty of misconduct at an emergency. Except as otherwise provided in this division, misconduct at an emergency is a misdemeanor of the fourth degree. If a violation of this section creates a risk of physical harm to persons or property, misconduct at an emergency is a misdemeanor of the first degree.

Ohio Rev. Code Ann. § 2909.27(A) (LexisNexis 2014) provides:

(A) No person shall recklessly use, deploy, release, or cause to be used, deployed, or released any chemical

weapon, biological weapon, radiological or nuclear weapon, or explosive device that creates a risk of death or serious physical harm to another person not a participant in the offense.

Ohio Rev. Code Ann. § 2909.10(E) (LexisNexis 2014) provides:

(E) Except as otherwise provided in this division, railroad vandalism; criminal trespass on a locomotive, engine, railroad car, or other railroad vehicle; and interference with the operation of a train each is a misdemeanor of the first degree. Except as otherwise provided in this division, if the violation of division (A), (B), or (C) of this section causes serious physical harm to property or creates a substantial risk of physical harm to any person, the violation is a felony of the fourth degree. Except as otherwise provided in this division, if the violation of division (A), (B), or (C) of this section causes physical harm to any person, the violation is a felony of the third degree. If the violation of division (A), (B), or (C) of this section causes serious physical harm to any person, the violation is a felony of the second degree.

Ohio Rev. Code Ann. § 2921.31(B) (LexisNexis 2014) provides:

(B) Whoever violates this section is guilty of obstructing official business. Except as otherwise provided in this division, obstructing official business is a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any

person, obstructing official business is a felony of the fifth degree.

Oklahoma

Okla. Stat. Ann. tit. 21, § 1287.1 (West 2002) provides:

PENALTY ENHANCEMENT FOR WEAPON POSSESSION

Any person who, while committing or attempting to commit a crime of violence, discharges a firearm, in addition to the penalty provided by statute for the crime of violence committed or attempted, upon conviction, may be charged, in the discretion of the district attorney, with an additional felony for possessing such weapon, which shall be a separate offense punishable, upon conviction, by not less than ten (10) years in the custody of the Department of Corrections which may be served concurrently with the sentence for the crime of violence. For purposes of this section, "crime of violence" means an offense that is a felony and has as an element of the offense, the use, attempted use, or threatened use of physical force against the person of another or that by its nature involves a substantial risk that physical force against the person of another may be used in the course of committing the offense. For purposes of this section, "firearm" means a rifle, pistol or shotgun.

Okla. Stat. Ann. tit. 21, § 1289.11 (Supp. 2015) provides:

It shall be unlawful for any person to engage in reckless conduct while having in his or her possession any shotgun, rifle or pistol, such actions consisting of creating a situation of unreasonable risk and probability of death or great bodily harm to another, and demonstrating a conscious disregard for the safety of another person. Any person convicted of violating the provisions of this section shall be punished as provided in Section 1289.15 of this title.

Oregon

Or. Rev. Stat. § 163.195(1) (2013) provides:

(1) A person commits the crime of recklessly endangering another person if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Or. Rev. Stat. § 162.315 (2013) provides in pertinent part:

(1) A person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer or parole and probation officer in making an arrest.

(2) As used in this section:

* * * * *

(c) "Resists" means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person and includes, but is not limited to, behavior clearly intended to prevent being taken into custody by over-coming the actions of the arresting officer. The behavior does not have to result in actual physical injury to an officer. Passive resistance does not constitute behavior intended to prevent being taken into custody.

Or. Rev. Stat. § 163.197(4)(a) (2013) provides in pertinent part:

(4) As used in this section:

(a) "Haze" means:

* * * * *

(B) To subject an individual to sleep deprivation, exposure to the elements, confinement in a small space or other similar activity that subjects the individual to an unreasonable risk of harm or adversely affects the physical health or safety of the individual;

(C) To compel an individual to consume food, liquid, alcohol, controlled substances or other substances that subject the individual to an unreasonable risk of harm or adversely affect the physical health or safety of the individual;

Or. Rev. Stat. § 163.257(1) (2013) provides in pertinent part:

(1) A person commits the crime of custodial interference in the first degree if the person violates ORS 163.245 and:

* * * * *

(b) Exposes that person to a substantial risk of illness or physical injury.

Pennsylvania

18 Pa. Cons. Stat. Ann. § 5104 (West 1983) provides:

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome the resistance.

18 Pa. Cons. Stat. Ann. § 2902 (West Supp. 2014) provides:

(a) Offense defined.—Except as provided under subsection (b) or (c), a person commits a misdemeanor of the first degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(2) holds another in a condition of involuntary servitude.

(b) Unlawful restraint of a minor where offender is not victim's parent.—If the victim is a person under 18 years of age, a person who is not the victim's parent commits a felony of the second degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(2) holds another in a condition of involuntary servitude.

(c) Unlawful restraint of minor where offender is victim's parent.—If the victim is a person under 18 years of age, a parent of the victim commits a felony of the second degree if he knowingly:

(1) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(2) holds another in a condition of involuntary servitude.

Rhode Island

R.I. Gen. Laws Ann. § 11-4-2 provides in pertinent part:

Any person who knowingly causes, procures, aids, counsels or creates by means of fire or explosion a substantial risk of serious physical harm to any person or damage to any building the property of that person or another, whether or not used for residential purposes, which is occupied or in use for any purpose or

which has been occupied or in use for any purpose during the six (6) months preceding the offense or to any other residential structure, shall, upon conviction, be sentenced to imprisonment for not less than five (5) years and may be imprisoned for life, or shall be fined not less than three thousand dollars ($3,000) nor more than twenty-five thousand dollars ($25,000), or both * * * .

R.I. Gen. Laws Ann. § 11-47-61 provides:

Every person who shall discharge a firearm from a motor vehicle in a manner which creates a substantial risk of death or serious injury shall, upon conviction, be fined not less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000) or imprisoned for not less than ten (10) years nor more than twenty (20) years, or both.

R.I. Gen. Laws Ann. § 11-47-51.1(a)(1) provides:

No person shall unlawfully discharge a firearm or incendiary or explosive substance or device from a motor vehicle in a manner which creates a substantial risk of death or serious personal injury to another person. Every person violating the provisions of this section shall be punished by imprisonment for not less than ten (10) years nor more than twenty (20) years and shall be fined not less than five thousand dollars ($5,000.00) nor more than fifty thousand dollars ($50,000.00), or both.

South Dakota

S.D. Codified Laws § 22-11-4 provides in pertinent part:

> Any person who intentionally prevents or attempts to prevent a law enforcement officer, acting under color of authority, from effecting an arrest of the actor or another, by:
>
> * * * * *
>
> (2) Using any other means which creates a substantial risk of causing physical injury to the law enforcement officer or any other person;

is guilty of resisting arrest. Resisting arrest is a Class 1 misdemeanor.

Tennessee

Tenn. Code Ann. § 39-16-603(a)(3) provides:

> (a)(3) A violation of subsection (b) is a Class E felony unless the flight or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties, in which case a violation of subsection (b) is a Class D felony.

Tenn. Code Ann. § 39-13-303(a) provides:

> (a) Kidnapping is false imprisonment as defined in § 39-13-302, under circumstances exposing the other person to substantial risk of bodily injury.

Texas

Tex. Penal Code Ann. § 22.041(b) provides:

(b) A person commits an offense if, having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm.

Tex. Penal Code Ann. § 20.02(c)(2)(A) provides in pertinent part:

(c) An offense under this section is a Class A misdemeanor, except that the offense is:

* * * * *

(2) a felony of the third degree if:

(A) the actor recklessly exposes the victim to a substantial risk of serious bodily injury;

* * * * *

Tex. Penal Code Ann. § 9.42 provides:

A person is justified in using deadly force against another to protect land or tangible, movable property:

(1) if he would be justified in using force against the other under Section 9.41; and

(2) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft

during the nighttime, or criminal mischief during the nighttime; or

(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

Tex. Penal Code Ann. § 35.02(c)(7)(B) provides:

(c) An offense under Subsection (a) or (b) is:

* * * * *

(7) a felony of the first degree if:

* * * * *

(B) an act committed in connection with the commission of the offense places a person at risk of death or serious bodily injury.

Utah

Utah Code Ann. § 76-5-301(1)(b) provides:

(1) An actor commits kidnapping if the actor intentionally or knowingly, without authority of law, and against the will of the victim:

* * * * *

(b) detains or restrains the victim in circumstances exposing the victim to risk of bodily injury;

Utah Code Ann. § 76-5-112(1) provides:

A person commits reckless endangerment if, under circumstances not amounting to a felony offense, the person recklessly engages in conduct that creates a substantial risk of death or serious bodily injury to another person.

Utah Code Ann. § 76-5-102(1)(c) provides:

(1) Assault is:

* * * * *

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

Vermont

Vt. Stat. Ann. tit. 13, § 3501(a)(1)(B) provides:

(a) As used in this chapter:

(1) "Chemical warfare agents" means:

* * * * *

(B) A dangerous chemical or hazardous material generally utilized in an industrial or commercial process when a person knowingly and intentionally utilizes the material with the intent to cause harm, and the use places persons at risk of serious bodily injury or death, or endangers the environment.

Vt. Stat. Ann. tit. 13, § 2407(a)(1) provides:

(a) A person commits the crime of unlawful restraint in the first degree if that person

(1) knowingly restrains another person under circumstances exposing that person to a risk of serious bodily injury;

Virginia

Va. Code Ann. § 18.2-286.1 provides:

Any person who, while in or on a motor vehicle, intentionally discharges a firearm so as to create the risk of injury or death to another person or thereby cause another person to have a reasonable apprehension of injury or death shall be guilty of a Class 5 felony. Nothing in this section shall apply to a law-enforcement officer in the performance of his duties.

Washington

Wash. Rev. Code Ann. § 9A.42.030(1) provides:

(1) A parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she recklessly, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

Wash. Rev. Code Ann. § 9A.36.050(1) provides:

(1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

Wash. Rev. Code Ann. § 9A.36.045(1) provides:

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Wash. Rev. Code Ann. § 9A.84.020(1) provides:

(1) A person is guilty of failure to disperse if:

(a) He or she congregates with a group of three or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person, or substantial harm to property; and

(b) He or she refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

Wash. Rev. Code Ann. § 9A.42.070(1) provides in pertinent part:

(1) Except as provided in subsection (2) of this section, a person is guilty of the crime of abandonment of a dependent person in the second degree if:

(a) The person is the parent of a child, a person entrusted with the physical custody of a child or other dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or other dependent person any of the basic necessities of life; and

(b) The person recklessly abandons the child or other dependent person; and:

* * * * *

(ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child

or other dependent person will die or suffer great bodily harm.

Wash. Rev. Code Ann. § 9A.42.035(1)(a) provides:

(1) A person is guilty of the crime of criminal mistreatment in the third degree if the person is the parent of a child, is a person entrusted with the physical custody of a child or other dependent person, is a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:

(a) With criminal negligence, creates an imminent and substantial risk of substantial bodily harm to a child or dependent person by withholding any of the basic necessities of life;

Wash. Rev. Code Ann. § 9A.42.080(1) provides in pertinent part:

(1) Except as provided in subsection (2) of this section, a person is guilty of the crime of abandonment of a dependent person in the third degree if:

(a) The person is the parent of a child, a person entrusted with the physical custody of a child or other dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person any of the basic necessities of life; and

(b) The person recklessly abandons the child or other dependent person; and:

* * * * *

(ii) Abandoning the child or other dependent person creates an imminent and substantial risk that the child or other person will suffer substantial bodily harm.

Wash. Rev. Code Ann. § 9A.42.037(1)(a) provides:

(1) A person is guilty of the crime of criminal mistreatment in the fourth degree if the person is the parent of a child, is a person entrusted with the physical custody of a child or other dependent person, is a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or is a person employed to provide to the child or dependent person the basic necessities of life, and either:

(a) With criminal negligence, creates an imminent and substantial risk of bodily injury to a child or dependent person by withholding any of the basic necessities of life;

Wash. Rev. Code Ann. § 9A.40.060 provides in pertinent part:

* * * * *

(1) A relative of a child under the age of eighteen or of an incompetent person is guilty of custodial interference in the first degree if, with the intent to deny access to the child or incompetent person by a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person, the

relative takes, entices, retains, detains, or conceals the child or incompetent person from a parent, guardian, institution, agency, or other person having a lawful right to physical custody of such person and:

* * * * *

(b) Exposes the child or incompetent person to a substantial risk of illness or physical injury; or

* * * * *

(2) A parent of a child is guilty of custodial interference in the first degree if the parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan, and:

* * * * *

(b) Exposes the child to a substantial risk of illness or physical injury;

West Virginia

W. Va. Code Ann. § 61-2-9c provides:

Any person who, during the manufacture or production of an illegal controlled substance uses fire, the use of which creates substantial risk of death or serious bodily injury to another due to the use of fire, is guilty of a felony and, upon conviction, shall be committed to the custody of the Division of Corrections for a definite term of years of not less than one nor more than five years or, in the discretion of the court, confined in the regional jail for not more than one year, or

fined not less than two hundred fifty dollars or more than two thousand five hundred dollars, or both.

W. Va. Code Ann. § 61-3E-10 provides:

Any person who wantonly performs any act with a destructive device, explosive material or incendiary device which creates substantial risk of death or serious bodily injury to another shall be guilty of a felony and, upon conviction thereof, shall be committed to the custody of the division of corrections for not less than two years nor more than ten years or fined not more than ten thousand dollars, or both.

W. Va. Code Ann. § 61-8D-3 provides in pertinent part:

* * * * *

(c) Any parent, guardian or custodian who abuses a child and by the abuse creates a substantial risk of death or serious bodily injury, as serious bodily injury is defined in section one, article eight-b of this chapter, to the child is guilty of a felony and, upon conviction thereof, shall be fined not more than $3,000 or imprisoned in a state correctional facility for not less than one nor more than five years, or both.

(d)(1) If a parent, guardian or custodian who has not previously been convicted under this section, section four of this article or a law of another state or the federal government with the same essential elements abuses a child and by the abuse creates a substantial risk of bodily injury, as bodily injury is defined in section one, article eight-b of this chapter, to the child is guilty of a misdemeanor and, upon conviction there-

of, shall be fined not less than $100 nor more than $1,000 or confined in jail not more than six months, or both.

W. Va. Code Ann. § 61-8D-4 provides in pertinent part:

* * * * *

(c) If a parent, guardian or custodian grossly neglects a child and by that gross neglect creates a substantial risk of death or serious bodily injury, as serious bodily injury is defined in section one, article eight-b of this chapter, of the child then the parent, guardian or custodian is guilty of a felony and, upon conviction thereof, shall be fined not less than $1,000 nor more than $3,000 dollars or imprisoned in a state correctional facility for not less than one nor more than five years, or both.

(d)(1) If a parent, guardian or custodian who has not been previously convicted under this section, section three of this article or a law of another state or the federal government with the same essential elements neglects a child and by that neglect creates a substantial risk of bodily injury, as defined in section one, article eight-b of this chapter, to the child, then the parent, guardian or custodian, is guilty of a misdemeanor and, upon conviction thereof, for a first offense, shall be fined not less than $100 nor more than $1,000 or confined in jail not more than six months, or both fined and confined.

W. Va. Code Ann. § 61-7-12 provides:

Any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a definite term of years of not less than one year nor more than five years, or, in the discretion of the court, confined in the county jail for not more than one year, or fined not less than two hundred fifty dollars nor more than two thousand five hundred dollars, or both.

W. Va. Code Ann. § 61-3-29(b) provides:

(b) Any person who knowingly and willfully: (1) Damages or destroys any real or personal property owned by a railroad company, or public utility company, or any real or personal property used for producing, generating, transmitting, distributing, treating or collecting electricity, natural gas, coal, water, wastewater, stormwater, telecommunications or cable service; and (2) creates a substantial risk of serious bodily injury to another or results in the interruption of service to the public is guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or confined in a state correctional facility not less than one nor more than three years, or both fined and imprisoned.

Wisconsin

Wis. Stat. Ann. § 939.24(1) provides:

(1) In this section, "criminal recklessness" means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk * * * .

Wis. Stat. Ann. § 939.25(1) provides:

In this section, "criminal negligence" means ordinary negligence to a high degree, consisting of conduct that the actor should realize creates a substantial and unreasonable risk of death or great bodily harm to another * * * .

Wis. Stat. Ann. § 940.19(6) provides in pertinent part:

(6) Whoever intentionally causes bodily harm to another by conduct that creates a substantial risk of great bodily harm is guilty of a Class H felony. * * *

Wis. Stat. Ann. § 948.03 provides in pertinent part:

(1) Definitions. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.

* * * * *

(4) Failing to act to prevent bodily harm.

(a) A person responsible for the child's welfare is guilty of a Class F felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused great bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of great bodily harm by the other person or facilitates the great bodily harm to the child that is caused by the other person.

(b) A person responsible for the child's welfare is guilty of a Class H felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

Wis. Stat. Ann. § 941.11 provides:

Whoever does either of the following is guilty of a Class H felony:

(1) Intentionally burns his or her own building under circumstances in which he or she should realize he or she is creating an unreasonable risk of death or great bodily harm to another or serious damage to another's property; or

(2) Intentionally burns a building of one who has consented to the destruction thereof but does so under circumstances in which he or she should realize he or she is creating an unreasonable risk of death or great bodily harm to another or serious damage to a 3rd person's property.

Wis. Stat. Ann. § 940.295(1)(km) provides:

1) Definitions. In this section:

* * * * *

(km) "Negligence" means an act, omission, or course of conduct that the actor should realize creates a substantial and unreasonable risk of death, great bodily harm, or bodily harm to another person.

Wis. Stat. Ann. § 939.45 provides in pertinent part:

The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

* * * * *

(5)(b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

Wis. Stat. Ann. § 940.285(1)(dm) provides:

(1) Definitions. In this section:

* * * * *

(dm) "Recklessly" means conduct that creates a situation of unreasonable risk of harm and demonstrates a conscious disregard for the safety of the vulnerable adult.

Wyoming

Wyo. Stat. Ann. § 6-2-202(a)(1) provides:

(a) A person is guilty of felonious restraint if he knowingly:

(1) Restrains another unlawfully in circumstances exposing him to risk of serious bodily injury;

Wyo. Stat. Ann. § 6-1-104(a) provides in pertinent part:

(a) As used in this act, unless otherwise defined:

* * * * *

(iii) "Criminal negligence" is defined as the following conduct: A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that the failure to perceive it constitutes a gross devia-

tion from the standard of care that a reasonable person would observe in the situation;

* * * * *

(ix) "Recklessly" is defined as the following conduct: A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation;