SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES BORDEN, JR.,)

Petitioner,)

v.) No. 19-5410

UNITED STATES,)

Respondent.)

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Washington, D.C.

Tuesday, November 3, 2020

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

APPEARANCES:

KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

ERIC J. FEIGIN, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:30 a.m.)

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

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

The text of the force clause does not

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

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

I welcome the Court's questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Shanmugam.

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

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

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

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

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

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

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

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

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

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

We're not disputing that --

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

MR. SHANMUGAM: -- substantial --

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

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

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

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

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

Now, if you don't accept --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

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

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

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

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

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

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

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

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

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

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

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

MR. SHANMUGAM: Well, perhaps, but

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

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

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Thank you.

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

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

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

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

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

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

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

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

But I would make one additional point

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

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

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

As the government recognizes in

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

CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

potentially to treat extreme recklessness differently from ordinary recklessness.

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

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

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

JUSTICE ALITO: All right.

MR. SHANMUGAM: Now --

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

person, and this person's got a lot of -- has got a hairdo that sticks up quite a bit, and on top of the hairdo there is a hat. And the person says: Oh, you know, I don't know how great a shot I am, but I'm going to try to pick off that hat without touching a hair on the person's face -- person's head.

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

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

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

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

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

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

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

MR. SHANMUGAM: I think, in that hypothetical, the explicit use of recklessness might override what would otherwise be the plain meaning of the phrase "use of force against the person of another."

But I would respectfully submit that that's just not how a person would ordinarily speak. And if Congress was trying to convey that meaning, it would have said something like the use of physical force that recklessly causes injury to another person.

JUSTICE ALITO: All right. Thank you.

MR. SHANMUGAM: Congress didn't --

JUSTICE ALITO: Thank you. My time is up.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

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

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

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

MR. SHANMUGAM: Yes, that's correct,

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

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

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

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

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

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

MR. SHANMUGAM: I would make two

points in response to that, Justice Kagan.

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

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

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

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

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

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

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

JUSTICE KAGAN: Absolutely.

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

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

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

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

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

MR. SHANMUGAM: Yes.

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

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

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

JUSTICE KAGAN: Thank you, Mr. Shanmugam.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Good morning,

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

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

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

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

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

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

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

MR. SHANMUGAM: Well, Justice --

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

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

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

MR. SHANMUGAM: Yeah.

JUSTICE GORSUCH: -- just answer the question.

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

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

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

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

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

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

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

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

JUSTICE GORSUCH: All right.

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

JUSTICE GORSUCH: Thank you. Thank you. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

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

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

JUSTICE KAVANAUGH: So -- so, again --

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

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

reckless offenses.

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

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

So can you respond to that?

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

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

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

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

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

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

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

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

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

MR. SHANMUGAM: Yes, Justice Kavanaugh, very briefly.

I think that that is simply reflective of the fact that the force falls on the victim when you're dealing with a reckless offense like a negligent offense. And, again, the Court went on for pages about the distinct context of Section 922(g)(9), which was to serve the public safety purpose of taking guns out of the hands of anyone who has engaged in domestic abuse, even misdemeanors.

JUSTICE KAVANAUGH: Thank you very much.

CHIEF JUSTICE ROBERTS: Justice Barrett.

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

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

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

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

With regard to felony assault itself, the government correctly notes that in a number of states -- it's around half of them -- there

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

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

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

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

JUSTICE BARRETT: Mr. Shanmugam, let me just interrupt so I don't run out of time. I have another question. So the word "against" -- let me just read you this definition -- can mean in -- into contact or collision with, toward, upon.

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

MR. SHANMUGAM: We don't dispute, Justice Barrett, that in isolation, "against" could define the object of force.

But, here, the word "against" is being used with "use of force." And that makes all the difference. The government in its brief talks about the application of force. It certainly would be true that if you hit a baseball against a windshield, that the ball has hit the windshield. But you wouldn't say that

you've used force against the windshield if your intent is not for the ball to land on the windshield.

JUSTICE BARRETT: Thank you.

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

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

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

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

I think the second problem is that the government's interpretation would sweep in a host of unintentional and nonviolent offenses,

particularly reckless driving offenses, which the United States Code itself breaks out from crimes of violence. And a mom who fails to buckle in her child and then gets into an accident is not the sort of offender who is likely to point a gun at someone in the future.

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Feigin.

ORAL ARGUMENT OF ERIC J. FEIGIN

ON BEHALF OF THE RESPONDENT

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

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

It necessarily follows that recklessly causing injury to the person of another is the use of physical force against the person of another. It makes no difference that in Voisine the phrase "against a domestic relation" was the Court's own descriptive language, while, here, the phrase "against the person of another" is Congress's descriptive language.

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

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

In this Court's decision in Voisine, background principles of criminal law as the default state of liability and common sense all group "knowingly causing injury" with

"recklessly causing injury," which, by definition, involve the knowing disregard of a substantial and unjustifiable risk that an injury will occur.

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

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

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

And I think this Court's use of the

phrase in its own language in the opinion in Voisine on page 2282 illustrates that that plain meaning argument that he's making can't possibly be right. It shows the language can be used in this way, and Congress did use the language that way.

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, don't --

MR. FEIGIN: -- another --

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

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

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

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

MR. FEIGIN: The activity I just described, yes, Your Honor. And -- and as to the label, I think while the courts looked at

that as to the degree, of course, it doesn't make much sense to look at it as to the mens rea.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

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

MR. FEIGIN: Sure, Your Honor.

I think that Voisine itself resolves any tension between Voisine and Leocal because Voisine explains that the reasoning of Leocal is

simply a distinction between accidental offenses, which would include negligent crimes, and non-accidental offenses, which Voisine makes clear include reckless crimes.

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

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

And the reason that the additional language doesn't matter is because it has independent weight. My friend on the other side suggests that it has no meaning if it doesn't

impose the targeting restriction that he would impose, but it actually does two things.

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

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

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

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

And to the extent that my friend on the other side is suggesting that the residual

clause might have excluded this or might not have, I think the elements clause here focuses on crimes that actually involve the use of force, where someone is, in this case, actually injured.

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

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

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

So this Court, I think, has struggled to try to make sure the really bad things are in those three priors and not things that are not

quite so bad. So that's why I find Leocal and Begay pretty much on point.

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

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

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

The second thing that I would say is the Court never resolved whether the residual clause covers reckless offenses, and it -- it -- and so it -- it really mattered whether it did. I don't think that necessarily cuts in Petitioner's favor.

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

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

JUSTICE BREYER: One last thing --

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

JUSTICE BREYER: Is -- I mean, what -- is there a difference between the words you just used, which were reckless murder with a car, and

the words I'm going to call drunk driving? I mean --

MR. FEIGIN: I guess --

JUSTICE BREYER: -- is that a big difference?

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

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

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

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

JUSTICE BREYER: "Purposeful" was across the board. "Purposeful" was across the board.

MR. FEIGIN: Well, Your Honor, first, the other -- another thing the Court was trying

to do in that case, and it ultimately abandoned this project, was to grope for a standard that applies to the residual clause in particular.

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

We don't have that issue --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Alito.

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

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

MR. FEIGIN: Your Honor, I think it may have some kind of contextual influence on mens rea but no more so than it had in Voisine because, in Voisine, as I was saying earlier in -- in response to Justice Thomas, you had a

similar context where you needed somebody who was injured.

And I want to be quite clear that we really are only talking today about crimes that require the actual causation of injury, somebody actually was hurt, and then we're -- and then the defendant was reckless as to whether someone would get hurt, because those are the set of crimes that the Court has in front of it today. And only in crimes that involve the actual causation of injury would we even be able to prove that -- that force capable of causing pain or injury, in -- in fact, took place.

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

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

So which of these two parades of horribles is more horrible?

MR. FEIGIN: I -- I -- if horribleness

is a good thing, then I think our parade of horribles is more horrible. And let me give you two concrete reasons why.

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

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

And the Court looked at what Congress was trying to do as a categorical matter, and just because that can happen once doesn't mean

it's going to happen three times to someone such that they're classified under the ACCA.

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

JUSTICE ALITO: All right. Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

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

I -- I also point to something that the government said in its response brief in

Voisine, and that responsive brief made an opposite point than the one you advanced today.

I'm quoting from your Voisine brief: "While both provisions contain the phrase use of physical force, the domestic violence provision, and ACCA, the misdemeanor crime of violence definition omits the remainder of the Leocal's provision Section 16 definition, which qualifies that the force is against the person or property of another."

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

Were you wrong then and right now?

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

But even if you see some tension between our position in Voisine and our position

here today, there's been a significant intervening event, which is the decision in Voisine, which I think clears up the misimpression that the courts of appeals have been laboring under, as Justice Alito referred to in my friend's part of the argument, that Leocal actually controlled the question of reckless conduct.

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

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

JUSTICE SOTOMAYOR: So, counsel --

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

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

MR. FEIGIN: Sorry.

JUSTICE SOTOMAYOR: -- in Leocal, we said that a DWI cannot be a crime of violence because it does not require the use of force against the person of another. And it didn't -- it happened to be negligence, but its entire focus was, was the force directed at another person.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Kagan.

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

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

And, further, I mean, Voisine spends as -- as much time talking about the effects of coming out the other way than it does about the text. In other words, it basically says, if we don't hold the way we are holding today, this

entire federal scheme will be rendered inoperative.

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

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

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

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

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

And as I was suggesting earlier, we're talking about cases where people have been charged with felony assault or -- or murder or robbery or a serious offense like that, and

we're not simply talking about cases where one crime makes all the difference.

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

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

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

And I think it would be quite surprising to Congress to find that a fairly subtle change of wording, one statute requiring that the crime be committed by a domestic relation and the other statute requiring that it be against the person of another, make that big a difference as to whether the scheme works as

it was intended to.

JUSTICE KAGAN: Thank you, Mr. Feigin.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Good morning, Mr. Feigin. I -- I guess one other possible distinction textually between this and Voisine, of course, is that we don't have the phrase "against the person or property of another." And I know -- in that case and we do here.

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

And I guess I'm still struggling with how, if we're to take our precedent seriously, we ignore that construction, which isn't present

in Voisine, irrelevant in Voisine.

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

JUSTICE GORSUCH: All right. But that answer that it just relates to the object of the force runs directly counter to Leocal's express instruction that it has something to say about mens rea. And it also renders, as your friend pointed out, that phrase, "person of another or property of another," superfluous in Leocal itself. What do we do about that?

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

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

MR. FEIGIN: Right.

JUSTICE GORSUCH: -- that that doesn't work as a matter of precedent if we're to take our precedent seriously.

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

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

JUSTICE GORSUCH: That phrase isn't in Voisine, is your problem.

Let me ask you another question if we're not going to get more progress there. What do we do about the rule of lenity? And this statute is supposed to provide notice not to nine judges on the Supreme Court who are struggling with it but to ordinary Americans. And if -- if we can't make heads or tails of it and every circuit to have addressed it up until recently came out against you, why shouldn't we -- if Congress wishes to legislate here

further, and, of course, it may, why shouldn't we here say the tie goes to the defendant, the presumptively free defendant?

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

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

JUSTICE GORSUCH: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Good afternoon, Mr. Feigin. I want to pick up on Justice Gorsuch's point about precedent because we have two precedents we have to make sense of, Leocal and Voisine. And in your brief, I -- I thought the answer that you were giving about the distinction of Leocal -- and this is page 13 of

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

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

MR. FEIGIN: That -- that's right, Your Honor. And I would -- as I was saying earlier, I think the reason why that is true -- and it comports with traditional criminal law principles where, under the model penal code on which my friend has been relying, recklessness is the default mens rea. And the reason why that is is because of --

JUSTICE KAVANAUGH: Exactly. Well, so -- so I'm sorry to interrupt, but the -- the point being that Leocal recognizes the distinction that's traditional: Negligence, out; recklessness and above, per model penal code, is usually considered more important. But you don't have to guess because you have Voisine, I guess, that draws that distinction.

And so that's what I thought the

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

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

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

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

MR. FEIGIN: Your Honor, I think

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

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

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

force acts against the victim.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Barrett.

JUSTICE BARRETT: Good morning, Mr. Feigin. I -- I have a question about the language "attempted or threatened." So, you know, the statute -- "to qualify as a crime of violence must have as an element the use, attempted use, or threatened use of physical force," suggesting that the kind of use of physical force is the kind that can be attempted or threatened.

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

MR. FEIGIN: Your Honor, I think, traditionally, under the criminal law, you can have an attempt to commit a crime with

recklessness. It's going to -- the elements of the attempt crime and the mens rea for the attempt crime are going to look somewhat different than the crime that actually achieves its completed result.

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

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

JUSTICE BARRETT: The --

MR. FEIGIN: A defendant who has -- sorry, Justice Barrett.

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

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

MR. FEIGIN: Well, Your Honor, I -- I really don't think so, because we're just talking about the standard definition of recklessness. It's the exact same inquiry that courts are already doing under Voisine and the courts adopting our interpretation appear -- of the ACCA appear to have no difficulty doing.

And I'd also emphasize something this Court said at the end of Quarles, which is that at the end of the Quarles opinion, it makes clear that what's really required under the Taylor categorical approach is some kind of

rough correspondence and that we don't look at these very minute curlicues of -- of particular state laws.

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

JUSTICE BARRETT: Thank you, counsel.

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

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

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

And this Court should reject his gerrymandered constriction of the ACCA to exclude crimes involving recklessness. Harming someone by knowingly disregarding their physical safety is a serious crime. It forms the core of numerous aggravated assaults, common law robbery, and murder offenses, and cutting those

crimes out of the ACCA would defy both common sense and Congress's clear intent as expressed in the statutory text.

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

Petitioner doesn't challenge that holding, and the Court should adhere to it.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Three minutes for rebuttal, Mr. Shanmugam.

REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONER

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

This case really boils down to one proposition. Our interpretation faithfully reconciles Leocal and Voisine, and the government's doesn't.

As to the text, both in Leocal and Voisine, this Court made clear that the word "use" is synonymous with active employment. And

it would be very odd to say that someone recklessly actively employs force against another person.

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

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

And as to the legislative history, if Congress had wanted to cover every variant of robbery and assault, and there's no evidence to that effect, it surely would have enumerated those offenses. And it bears repeating that under our interpretation, intentional or knowing variance of those offenses would still be fully covered.

The government's argument today really boils down to an argument that the Court

resolved in Voisine, a question that it expressly left open, and that the Court should effectively overrule Leocal at least as to negligent offenses.

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

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

It's only been since the government -- the Court's decision in Voisine that the government has been pushing the envelope and trying to do under the force clause what it can no longer do under the residual clause now that it has been invalidated.

As this Court has said time and again

in its many ACCA cases, this is a recidivist statute that should be construed narrowly. If a defendant is not subject to the ACCA, he or she can still be subject to a sentence of up to 10 years in prison.

And, finally, this is the paradigmatic case for the rule of lenity which Justice Kavanaugh applies in the sentencing context no less than it does in the substantive criminal context.

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

The court of appeals' interpretation rests entirely on an overreading of this Court's decision in Voisine and an underreading of this Court's decision in Leocal, and its judgment should be reversed.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

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