

**C.A. No. 17-17508**  
Opinion dated May 10, 2019  
Hawkins, M. Smith, Jr., Hurwitz, CJJ

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D. Ct. No. CV-16-2160-PHX-SRB  
D. Ct. No. CR-11-0856-PHX-SRB

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

SELSO RANDY ORONA,

Defendant-Appellee.

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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**UNITED STATES' PETITION FOR PANEL REHEARING  
AND/OR REHEARING *EN BANC***  
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### **III. INTRODUCTION AND RULE 35 STATEMENT**

In 2007, Selso Orona was convicted of aggravated assault in Arizona state court for attacking his ex-wife, fracturing her wrist and lacerating her face badly enough to require eight stitches. When he was later charged federally for possessing ammunition as a convicted felon, this conviction was used to enhance his sentence under the Armed Career Criminal Act (ACCA). After the Supreme Court invalidated ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the district court held that Orona's state conviction was no longer a qualifying "violent felony" and resentenced him. The government appealed.

An *en banc* majority of this Court previously determined that Arizona's inclusion of a reckless mens rea in its aggravated assault statute precluded certain convictions from having as an element the "use . . . of physical force against the person . . . of another." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-31 (9th Cir. 2006). But three years ago, the Supreme Court fatally damaged *Fernandez-Ruiz*'s foundational reasoning in *Voisine v. United States*, 136 S. Ct. 2272 (2016).

The three-judge panel in this case recognized, "[t]here is no question that *Voisine* casts serious doubt on the continuing validity of *Fernandez-Ruiz*'s analysis." *United States v. Orona*, 923 F.3d 1197, 1202 (9th Cir. 2019). Indeed, were the panel "writing on a blank slate," it "very well might follow the lead of [its] sister circuits and extend *Voisine*'s reasoning" to ACCA. *Id.* at 1203. However, because *Voisine*

arose in a slightly different context and expressly did not address how its reasoning applied elsewhere, *Orona* held the conflict did not meet the “high” “clear irreconcilability” standard to allow a three-judge panel to deem prior precedent implicitly overruled. *Id.* at 1200, 1203. In allowing *Fernandez-Ruiz* to endure, the panel opinion conflicts with the Supreme Court’s decision in *Voisine*. En banc consideration is therefore necessary to secure and maintain the uniformity of the court’s decisions. Fed. R. App. P. 35(b)(1).

*Fernandez-Ruiz*’s continued viability in light of the “serious doubts” *Voisine* cast is also exceptionally important. This Court has wholesale imported *Fernandez-Ruiz*’s now-flawed logic to a variety of different statutes, including ACCA, 18 U.S.C. § 924(c), and—as expressly repudiated in *Voisine*—misdemeanor crimes of domestic violence (MCDVs). *See United States v. Lawrence*, 627 F.3d 1281, 1284 n.3 (9th Cir. 2010), *overruled on other grounds as recognized by United States v. Robinson*, 869 F.3d 933, 937 (9th Cir. 2017) (ACCA); *United States v. Begay*, --- F.3d ----, 2019 WL 3884261, at \*4 (9th Cir. Aug. 19, 2019) (18 U.S.C. § 924(c)); *United States v. Nobriga*, 474 F.3d 561, 564-65 (9th Cir. 2006) (MCDV). Given the evolution of other Supreme Court authority, this Court now erroneously bars quintessentially violent felonies—federal and state aggravated assaults like the one here, and even federal second-degree *murder*—from serving as “crime of violence” conviction predicates and sentencing enhancements.

Moreover, failing to apply *Voisine*'s reasoning to ACCA and other similarly-worded provisions puts this Court at odds with the majority of circuits to have squarely considered the question and leads to absurd results. A defendant who commits second-degree murder by shooting a victim in the head on the Navajo Nation Indian Reservation is guilty of an additional federal crime, and subject to a mandatory additional ten-year prison term, if he discharges the firearm in New Mexico rather than Arizona. This Court should join its sisters in reexamining the logic of *Fernandez-Ruiz*, which—even if not “clearly irreconcilable”—is nevertheless anchored on a premise the Supreme Court has unmoored.

En banc review should be granted, and *Fernandez-Ruiz* overruled.

#### **IV. BACKGROUND**

##### **A. Relevant Facts**

In 2012, a federal jury found Orona guilty of possessing ammunition as a felon. *Orona*, 923 F.3d at 1199. Orona had previously been convicted of at least three qualifying offenses under ACCA, 18 U.S.C. § 924(e). *Id.* (ER 137.) As a result, the district court sentenced Orona to ACCA’s mandatory-minimum fifteen-year imprisonment term. *Id.*

Following the Supreme Court’s 2015 *Johnson* decision, Orona filed a timely second-or-successive motion challenging his ACCA-enhanced sentence under 28 U.S.C. § 2255. *Orona v. United States*, 826 F.3d 1196, 1199-1200 (9th Cir. 2016). In *Johnson*, the Supreme Court held that the “residual clause” of ACCA’s “violent felony” definition was unconstitutionally vague. 135 S. Ct. at 2560. Of Orona’s five felony convictions, the government argued his three Arizona aggravated assaults still met ACCA’s ‘elements clause,’ which *Johnson* left intact: felonies that have “as an element the use, attempted use, or threatened use of physical force against the person of another.”<sup>1</sup> 18 U.S.C. § 924(e)(2)(B)(i). (ER 67, 70-76.)

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<sup>1</sup> Subsequent Supreme Court cases extended *Johnson*’s logic to the residual clauses of two federal statutes used to define many federal crimes and sentencing enhancements. *See United States v. Davis*, 139 S. Ct. 2319 (2019) (18 U.S.C. § 924(c)(3)(B)); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (18 U.S.C. § 16(b)). This leaves elements clauses almost identical to ACCA’s as the only means of satisfying these “crime of violence” definitions. *See* 18 U.S.C. § 16(a); 18 U.S.C. § 924(c)(3)(A).

Orona conceded in the district court that his 1994 Arizona aggravated assault conviction (for trying to ignite a pipe bomb that, if successful, would have included his family within its lethal radius (PSR ¶ 37)) met the elements clause definition. (ER 61.) On appeal, he conceded his 1982 attempted aggravated assault conviction (for having caused lacerations to his mother and sister by striking them with a nine-inch knife (PSR ¶ 34)) also satisfied that clause. (Answ. Br. at 17.) To meet ACCA's required "three previous convictions," then, Orona's 2007 aggravated assault conviction had to have "as an element the use . . . of physical force against the person of another."

Court records show that Orona was convicted in Maricopa County Superior Court of "Aggravated Assault (Disfigurement)," a class 4 felony, in violation of Ariz. Rev. Stat. §§ 13-1203(1) and 13-1204(A)(3). (ER 91-92, 96.) Orona's federal PSR indicates that he assaulted his ex-wife, causing lacerations to her face (one of which required eight stitches) and a fractured wrist. (PSR ¶ 40.)

**B. Arizona's Statutory Framework**

A person commits assault under Ariz. Rev. Stat. § 13-1203(1) by "[i]ntentionally, knowingly or recklessly causing any physical injury to another person." Circumstances that aggravate the assault are listed in Ariz. Rev. Stat. § 13-1204, and include "commit[ting] the assault by any means of force that causes temporary but substantial disfigurement, temporary but substantial loss or

impairment of any body organ or part or a fracture of any body part.” Ariz. Rev. Stat. § 13-1204(A)(3).

Both the assault and aggravators statutes are divisible. *See United States v. Cabrera-Perez*, 751 F.3d 1000, 1004-05 (9th Cir. 2014). Courts may therefore use the modified categorical approach to determine whether a given conviction qualifies under the elements clause, as Arizona aggravated assault convictions requiring intentional conduct under Ariz. Rev. Stat. § 13-1203(2) do. *Id.* at 1007. However, Orona’s 2007 conviction permits a reckless mens rea.

This Court has long grappled with Section 13-1203(1)’s recklessness provision.

At first, it held that despite the inclusion of a reckless mens rea, aggravated assault convictions invoking Section 13-1203(1) categorically met 18 U.S.C. § 16(a)’s “crime of violence” definition. *United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172-73 (9th Cir. 2000). This was because under Arizona’s framework, even reckless conduct must have caused actual physical injury, and therefore had “the use of physical force [as] a required element.” *Id.*

But after the Supreme Court decided *Leocal v. Ashcroft*, 543 U.S. 1 (2014), three-judge panels split on *Ceron-Sanchez*’s continued validity. *Fernandez-Ruiz*, 466 F.3d at 1126-27. In *Leocal*, the Supreme Court examined whether a Florida aggravated DUI offense that required no particular mental state satisfied § 16(a). 543

U.S. at 6-10. *Leocal* held the “use . . . of physical force against” the person or property of another “most naturally suggest[ed] a higher degree of intent than negligent or merely accidental conduct[.]” *Id.* at 9. It expressly reserved whether a conviction involving the reckless use of force against a person would qualify as a crime of violence, *id.* at 13, but favorably cited this Court’s holding that reckless crimes meet the “use . . . of physical force against” definition because recklessness requires a volitional act. *Id.* at 9 (citing *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir. 2001)); *see also Begay*, 2019 WL 3884261, at \*8 (N.R. Smith, J., dissenting) (“*Leocal* effectively affirmed our decision in *Trinidad-Aquino*”).

Despite the favorable citation to *Trinidad-Aquino*’s holding that reckless crimes count, the *Fernandez-Ruiz* majority read the opposite meaning into *Leocal*’s silence. *Fernandez-Ruiz*, 466 F.3d at 1129-32 (“the reasoning of *Leocal*—which merely holds that using force negligently or less is not a crime of violence—extends to crimes involving the reckless use of force”). *Voisine* demonstrates that the *Fernandez-Ruiz* majority misapprehended *Leocal*. Instead, *Trinidad-Aquino* and *Fernandez-Ruiz*’s dissenters got it right: because of the volition inherent in recklessness, reckless crimes may satisfy elements clause definitions requiring the use of physical force against another person.

## V. REHEARING IS WARRANTED

The three-judge panel decision leaves in place en banc precedent that now demonstrably conflicts with Supreme Court authority.

### A. *Fernandez-Ruiz* Conflicts with *Voisine*

“There is no question that *Voisine* casts serious doubt on the continuing validity of *Fernandez-Ruiz*’s analysis.” *Orona*, 923 F.3d at 1202. Three-judge panels have recognized this unmistakable conflict—not outcome-determinative elsewhere—since shortly after *Voisine*. *Id.* at n.5 (collecting cases). But whether *Fernandez-Ruiz*’s logic continues to be viable after *Voisine* does determine the outcome here—and in dozens of other cases pending around the circuit in the wake of the Supreme Court’s recent residual clause jurisprudence.

The conflict between *Voisine* and *Fernandez-Ruiz* is stark. The *Fernandez-Ruiz* majority held that the “bedrock principle of *Leocal* is that to constitute a federal crime of violence an offense must involve the *intentional* use of force against the person or property of another.” 466 F.3d at 1132 (emphasis added). But in actuality, *Voisine* explained, “nothing in the word ‘use’” requires knowing or intentional conduct: the word “use” is “indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness . . . .” 136 S. Ct. at 2278-79. And—most critically for the demise of *Fernandez-Ruiz*’s analysis—“nothing in *Leocal* suggests a different conclusion.” *Id.* at 2279 (internal citation omitted).

*Voisine* shows *Fernandez-Ruiz* was based on a flawed syllogism. The *Fernandez-Ruiz* majority's analysis proceeded in four steps, as the dissent showed: (1) *Leocal* held that accidental conduct cannot constitute a crime of violence; (2) accidental conduct is "by definition 'not purposeful'"; (3) "reckless conduct is also not purposeful"; (4) *ergo*, "*Leocal* compels the conclusion that 'the reckless use of force is accidental' and crimes of recklessness cannot be crimes of violence." 466 F.3d at 1141 (Wardlaw, J., dissenting) (alterations omitted); *see also* 466 F.3d at 1127-32 (majority's analysis). *Voisine* pinpoints the en banc majority's logical error at steps (2)-(4): it's incorrect to equate accident with recklessness when conducting a "use of force" analysis. 136 S. Ct. at 2279 (describing "the harm [reckless] conduct causes" as "no more an accident than if the substantial risk [of causing injury] were practically certain.") (internal alterations omitted).

As *Voisine* explained, the dominant formulation of recklessness is "to consciously disregard a substantial risk that the conduct will cause harm to another." 136 S. Ct. at 2278 (quoting ALI, Model Penal Code § 2.02(2)(c) (1962)) (internal alterations omitted). A reckless act can constitute the use of force against a victim because "use" simply means the "act of employing" something: it "does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so." *Id.* at 2278-79. "On that common understanding, the force involved in a

qualifying assault must be volitional; an involuntary motion, even a powerful one, is not naturally described as an active employment of force.” *Id.* at 2278-79.

*Voisine* establishes volition—not purpose—as the litmus test for crimes having “as an element the . . . use of physical force” against a victim, as would have the *Fernandez-Ruiz* dissenters, and as did *Trinidad-Aquino*. See *Fernandez-Ruiz*, 466 F.3d at 1140 (Wardlaw, J., dissenting) (“recklessness requires conscious disregard of a risk of harm that the defendant is aware of—a volitional requirement absent in negligence. A volitional definition of ‘use . . . against’ encompasses conscious disregard of a potential physical impact on someone . . . —it does not encompass non-volitional negligence as to that impact.”) (quoting *Trinidad-Aquino*, 259 F.3d at 1146). En banc review is necessary to correct the conflict.

1. *Voisine*’s Logic Applies to ACCA

The panel held it couldn’t declare *Fernandez-Ruiz* and *Voisine* “clearly irreconcilable” because *Voisine* arose in a different context and reserved the question as to other statutes. 923 F.3d at 1200, 1203. That standard does not guide whether to grant en banc review. *United States v. Pepe*, 895 F.3d 679, 687-88 (9th Cir. 2018). Even though *Voisine* arose in a different context, its logic compels re-examining, and overruling, the conflicting *Fernandez-Ruiz* majority opinion.

The MCDV provision at issue in *Voisine* and ACCA’s elements clause both require qualifying offenses to have “as an element, the use [or] attempted use of

physical force,” or the threatened use of physical force (broadly, in ACCA, or by threatening use of a deadly weapon, for MCDVs). *Compare* 18 U.S.C. § 921(a)(33)(A)(ii) *with* 18 U.S.C. § 924(e)(2)(B)(i). However, ACCA also requires the physical force be used “against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i). In contrast, the MCDV provision applies when the use of physical force is committed by a person in a specified domestic relationship with the victim. 18 U.S.C. § 921(a)(33)(A). “Against the person of another” makes no difference to *Voisine*’s analysis of “use,” however, for several reasons.

First, the MCDV requires that force be used against a person: the “victim” in 18 U.S.C. § 921(a)(33)(A). Even *Voisine* couldn’t escape this necessary implication. 136 S. Ct. at 2282 (describing statute as covering “misdemeanor conviction[s] for the ‘use . . . of physical force’ *against* a domestic relation”) (emphasis added). The D.C. and Sixth Circuits, too, recognize this inevitability. *See United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (“But the provision at issue in *Voisine* still required the defendant to use force against another person—namely, the ‘victim.’”); *United States v. Verwiebe*, 874 F.3d 258, 263 (6th Cir. 2017). That’s even truer here, because this Court effortlessly imported *Fernandez-Ruiz*’s reasoning to MCDVs by implying an “against the body of another individual” requirement. *Nobriga*, 474 F.3d at 564-65 (quoting *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003)).

Second, the hypotheticals illustrating *Voisine*'s volition principle apply no differently if "against the person of another" is added. *See* 136 S. Ct. at 2279. In each, the perpetrator used force "against the person of another": one by hurling the plate near *his wife*; and the other by slamming the door with *his girlfriend* following close behind. *Id.*; *see also Verwiebe*, 874 F.3d at 263. And here, too, this Court analyzed "against the person of another" pre-*Leocal* in *Trinidad-Aquino* and arrived at the volition/accident distinction that ultimately matches *Voisine*. 259 F.3d at 1146.

Third, although *Fernandez-Ruiz* expressly decried examining legislative history because the text is clear, 466 F.3d at 1131, the MCDV and ACCA share a similar provenance. Both appear within the firearms chapter of the U.S. Code, aim to prevent gun violence, and were enacted long after the Model Penal Code determined "a mens rea of recklessness should generally suffice to establish criminal liability," leading to the passage of assault statutes carrying a reckless mens rea in a great majority of states. *Voisine*, 136 S. Ct. at 2280. Where two statutes with similar purposes use the same language, courts presume Congress intended the words to have the same meaning.<sup>2</sup> *See Northcross v. Bd. Of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam). Orona's argument would have this Court

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<sup>2</sup> ACCA also sufficiently narrows the covered class of offenders to "armed career criminals" by requiring three felony convictions and a higher quantum of force. *Compare United States v. Castleman*, 572 U.S. 157, 162-65 (2014) with *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).

“find that *no* conviction obtained under *any* of these statutes qualifies” under any elements clause, a perverse result Congress can’t have intended. *See Verwiebe*, 874 F.3d at 263.

This Court wasn’t isolated in misinterpreting *Leocal*, and it wouldn’t fly solo overruling prior precedent because *Voisine*’s logic applies beyond the MCDV. As the panel noted, “the majority of our sister circuits, either by overruling prior precedent or deciding the issue in the first instance, have extended *Voisine*’s holding to other ‘crime of violence’ and ‘violent felony’ definitions.” 923 F.3d at 1202. The D.C., Sixth, Eighth, and Tenth Circuits have held that *Voisine* applies to ACCA, and the Fifth Circuit agrees as to the identically-worded career offender guidelines. *See Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018); *Haight*, 892 F.3d at 1281; *United States v. Hammons*, 862 F.3d 1052, 1055-56 (10th Cir. 2017); *United States v. Howell*, 838 F.3d 489, 500-501 (5th Cir. 2016); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016); *see also United States v. Bettcher*, 911 F.3d 1040, 1045-46 (10th Cir. 2018) (U.S.S.G. § 4B1.2(a)(1)). The Eleventh Circuit granted rehearing en banc to consider *Voisine* in an ACCA case where it wasn’t raised before the panel, and the Third Circuit will hear en banc argument in October. *See United States v. Moss*, 928 F.3d 1340 (11th Cir. 2019); *United States v. Santiago*, No. 16-4194, Doc. 003113312424 (3d Cir. Aug. 6, 2019).

*Orona* leaves this Court on the very light side of a circuit split. 923 F.3d at 1202. Of the others to squarely confront the question, only the First Circuit has allowed its pre-*Voisine* recklessness holdings to survive. See *United States v. Rose*, 896 F.3d 104, 109-10 (1st Cir. 2018). It did so because of the rule of lenity, a theory the Supreme Court rejected in *Voisine*, and the *Fernandez-Ruiz* majority and dissent necessarily agreed couldn't apply. Compare *id.* with *Vosine*, 136 S. Ct. at 2282 n.6 (rule of lenity inapplicable because statute was clear), *Fernandez-Ruiz*, 466 F.3d at 1131 (meaning of statute was clear from text), and 1142 (Wardlaw, J., dissenting) (“Because the plain language of § 16(a) is clear, the rule of lenity does not apply.”).

*Voisine*'s analysis of the “use of physical force” language applies outside the MCDV to statutes like ACCA. This Court should rehear this case en banc to resolve its conflict with the Supreme Court and, nearly uniformly, its sister circuits.

## 2. Arizona Recklessness Matches the Generic Definition

Both *Fernandez-Ruiz* and *Orona* hinted that Arizona recklessness may be overbroad due to its voluntary intoxication provision. See *Orona*, 923 F.3d at 1201, 1203 (quoting *Fernandez-Ruiz*, 466 F.3d at 1130). *Orona* waived the issue here, and it appears neither party briefed it in *Fernandez-Ruiz*.<sup>3</sup> (Compare Op. Br. at 22 n.6 (asserting Arizona recklessness matches the generic definition), with Answ. Br.

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<sup>3</sup> The issue was raised in one amicus brief counsel has located. See Brief by Amici Curiae the Immigrant Legal Resource Center et al., *Fernandez-Ruiz v. Gonzales* (No. 03-74533), 2006 WL 2924077.

(failing to challenge the government’s assertion.) *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (party concedes issues by failing to respond to arguments in the opening brief). Even if not waived, Arizona’s recklessness provision is materially identical to the Maine statute considered in *Voisine*, federal law, “the majority of cases in America,” and indeed “[m]any of the modern [state statutory] recodifications.” Wayne R. LaFare, *Substantive Criminal Law* § 9.5(c).

Arizona defines “recklessly” as the mental state where:

a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. . . . A person who creates such a risk but who is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

Ariz. Rev. Stat. § 13-105.10(c). There’s no question the heart of the definition matches generic recklessness. *Compare id. with Voisine*, 136 S. Ct. at 2278 (describing “dominant formulation” of recklessness as “consciously disregard[ing] a substantial risk that the conduct will cause harm to another”) (alterations omitted). It’s the inclusion of voluntary intoxication within Arizona’s recklessness definition that tripped up the *Fernandez-Ruiz* majority and endured in *Orona*. *See Fernandez-Ruiz*, 466 F.3d at 1130 (italicizing voluntary intoxication provision); *Orona*, 923 F.3d at 1201, 1203 (quoting *Fernandez-Ruiz*).

But it’s only the *location* of Arizona’s voluntary intoxication provision—not its existence, substance, or application—that’s somewhat unusual. *But see* Alaska

Stat. § 11.81.900(a)(3) (including voluntary intoxication within recklessness definition); Del. Code Ann. tit. 11, § 231(e); N.H. Rev. Stat. Ann § 626:2; N.Y. Penal § 15.05. That voluntary intoxication modifies recklessness is the same in Arizona as the Model Penal Code and most of the other state statutory recodifications derived from it. *See* Model Penal Code § 2.08 (“When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”); LaFave, *Substantive Criminal Law* § 9.5(c).

Thus, the same voluntary intoxication principle applied to the statute at issue in *Voisine*, as well as those in Sixth and Tenth Circuit cases applying *Voisine* (*Davis* and *Bettcher*, respectively). *See* Me. Rev. Stat. Ann. tit. 17-A § 37; Tenn. Code Ann. § 39-11-503(b); Utah Code Ann. § 76-2-306(1). So, too, federally. *See United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984) (“[A]n exception to the requirement of subjective awareness of risk is made where lack of such awareness is attributable solely to voluntary drunkenness.”); *United States v. Loera*, 923 F.2d 725, 728, 730 (9th Cir. 1991).

This Court has long found Arizona aggravated assault an appropriate statute from which to derive rules of general applicability regarding recklessness. *See Ceron-Sanchez*, 222 F.3d at 1172-73; *Fernandez-Ruiz*, 466 F.3d at 1129-32. Arizona’s widely-shared voluntary intoxication provision changes nothing.

**B. Whether Reckless Crimes Constitute Violent Felonies is also Exceptionally Important**

Earlier this week, a three-judge panel bound by *Orona* applied *Fernandez-Ruiz* to hold that federal second-degree murder is not a crime of violence. *Begay*, 2019 WL 3884261, at \*5-6. This result is incorrect after *Voisine*<sup>4</sup> and defies common sense. *See id.* at \*6 (N.R. Smith, J., dissenting) (“MURDER in the second-degree is NOT a crime of violence??? . . . ‘I feel like I am taking crazy pills.’”). That *Fernandez-Ruiz* incorrectly disqualifies second-degree murder as a crime of violence, a “glaringly absurd” consequence, *id.* at \*11, illustrates the exceptional importance of this case.

Judge Smith’s *Begay* dissent aptly demonstrates the havoc that *Orona*, channeling *Fernandez-Ruiz*, wreaks. The “depraved heart” recklessness in second-degree murder bars it from being a crime of violence, while crimes like making criminal threats are. *Id.* Head-scratchingly, *attempted* murder is a crime of violence because it carries an intentional mens rea, while *completed* murder is not. *Id.* This Court need no longer engage in this exercise of mental gymnastics. *Fernandez-*

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<sup>4</sup> To be sure, that result was also incorrect *before Voisine*, because even if crimes committed recklessly did not meet the elements clause, that rule should not extend to second-degree murder (which requires a heightened degree of recklessness to satisfy the malice-aforethought element). *See Begay*, 2019 WL 3884261, at \*9-10 (N.R. Smith, J., dissenting). But the fact that the Court excluded second-degree murder in *Begay* underscores how far it has strayed from *Voisine*’s recklessness conception.

*Ruiz*'s reasoning conflicts with *Voisine*, with exceptionally important results to a plethora of predicate offenses carrying reckless mens rea.

Moreover, *Orona* perpetuates absurd results on a national scale, in a variety of different scenarios. The Tenth Circuit applies *Voisine* to reckless crimes, including § 924(c) predicates. *See United States v. Mann*, 899 F.3d 898, 905-06 (10th Cir. 2018). So a defendant who commits second-degree murder on the Navajo Nation Indian Reservation by shooting his victim in the head, as Begay did, will be guilty of discharging a firearm during a crime of violence in New Mexico (or Utah), but not if he steps over the Arizona border. The Tenth Circuit defendant will receive an additional 10-year sentence for his crime. An alien who committed Arizona aggravated assault will be removable under 18 U.S.C. § 16(a) in El Paso, but not Phoenix. The same absurd results apply to 15-year ACCA mandatory minimum sentences like the one here, and a host of other legal consequences that rely on “violent felony” and “crime of violence” definitions.

This can't have been what Congress intended.

## **VI. CONCLUSION**

*Orona* leaves this Court's precedent in conflict with a decision of the Supreme Court. It relegates this Court to the light side of a circuit split, for no good reason. And it produces exceptionally important, "glaringly absurd" results. This Court should order panel rehearing or rehearing *en banc*.

MICHAEL BAILEY  
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District of Arizona

*s/ Krissa M. Lanham*  
KRISSA M. LANHAM  
Assistant U.S. Attorney

## **VII. STATEMENT OF RELATED CASES**

To the knowledge of counsel, the following cases raise the same or closely related issues:

*United States v. Begay*, No. 14-10080

*United States v. Daniel Draper*, No. 17-15104

*United States v. Percy*, No. 17-16365

*United States v. Birdinground*, No. 18-35722

*United States v. Morrison*, No. 18-35931

*Lee v. United States*, No. 18-16965

*United States v. Derick Skultka*, No. 19-30087

**VIII. CERTIFICATE OF COMPLIANCE**

I certify that the combined response to petitions for rehearing and rehearing *en banc* is:

Proportionately spaced, has a typeface of 14 points or more and contains 4,186 words (petitions and answers must not exceed 4200 words), or is

Monospaced, has 10.5 or fewer characters per inch and contains \_\_\_\_\_ words or \_\_\_ lines of text (petition and answers must not exceed 4200 words or 390 lines of text), or is

In compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

August 22, 2019  
Date

*s/ Krissa M. Lanham*  
KRISSA M. LANHAM  
Assistant U.S. Attorney

**IX. CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of August, 2019, I electronically filed the United States' Petition for Panel Rehearing and/or Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

*s/ Melody A. Karmgard*

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Melody A. Karmgard  
Paralegal Specialist  
U.S. Attorney's Office

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellant,*

v.

SELSO RANDY ORONA,  
*Defendant-Appellee.*

No. 17-17508

D.C. Nos.  
2:16-cv-02160-SRB  
2:11-cr-00856-SRB-1

OPINION

Appeal from the United States District Court  
for the District of Arizona  
Susan R. Bolton, District Judge, Presiding

Argued and Submitted February 4, 2019  
Phoenix, Arizona

Filed May 10, 2019

Before: Michael Daly Hawkins, Milan D. Smith, Jr.,  
and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hawkins

**SUMMARY\***

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**28 U.S.C. § 2255**

The panel affirmed the district court’s judgment granting Selso Randy Orona’s 28 U.S.C. § 2255 motion in connection with a 2012 conviction for which Orona received an enhanced sentence under the Armed Career Criminal Act (ACCA).

The district court agreed with Orona that, following *Johnson v. United States*, 135 S. Ct. 2551 (2015), his 2007 conviction for aggravated assault under Arizona Revised Statute § 13-1203(A)(1) no longer qualified as a predicate felony under the ACCA. The district court relied on *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), which held that § 13-1203(A)(1) does not have as an element “the use, attempted use or threatened use of physical force against the person . . . of another” because it encompasses reckless conduct.

The government argued that *Voisine v. United States*, 136 S. Ct. 2272 (2016) – which held that a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a firearm under 18 U.S.C. § 922(g)(9), and explained that § 922(g)(9) applies to reckless assaults – implicitly overruled *Fernandez-Ruiz*. The panel rejected this argument because *Voisine* expressly left open the question that *Fernandez-Ruiz* answered.

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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**OPINION**

HAWKINS, Senior Circuit Judge:

This is a government appeal from the grant of habeas relief to Selso Randy Orona in connection with a 2012 conviction for which he received an enhanced sentence under the Armed Career Criminal Act ("ACCA").

Following the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause<sup>1</sup> of ACCA's "violent felony" definition is

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<sup>1</sup> ACCA defines "violent felony" as any crime punishable by more than one year in prison 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 [(iii)] otherwise involves conduct that

unconstitutionally vague, Orona filed a motion under 28 U.S.C. § 2255, arguing that his conviction for aggravated assault under Arizona Revised Statute (“A.R.S.”) § 13-1203(A)(1)<sup>2</sup> no longer qualified as a predicate felony under ACCA. The district court agreed, relying on our opinion in *Fernandez-Ruiz v. Gonzales*, which held that A.R.S. § 13-1203(A)(1) does not have as an element “the use, attempted use or threatened use of physical force against the person . . . of another” because it encompasses reckless conduct. 466 F.3d 1121, 1126, 1132 (9th Cir. 2006) (en banc); *see also United States v. Lawrence*, 627 F.3d 1281, 1284 n.3 (9th Cir. 2010) (extending *Fernandez-Ruiz* to ACCA’s force clause), *overruled on other grounds by Descamps v. United States*, 570 U.S. 254 (2013).

Although the government conceded Orona was entitled to relief under *Fernandez-Ruiz*, it argued that the Supreme Court’s decision in *Voisine v. United States*, 136 S. Ct. 2272 (2016), implicitly overruled that case. Because we conclude that *Fernandez-Ruiz* remains in effect, we affirm.

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presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). These are commonly referred to as (i) the “force clause,” (ii) the “enumerated crimes clause,” and (iii) “the residual clause.” *See United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018).

<sup>2</sup> We **GRANT** the government’s unopposed motion to take judicial notice of certain documents regarding Orona’s prior convictions (Dkt. Entry No. 8).

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## BACKGROUND

In 2012, Orona was convicted of being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). The government sought an enhanced sentence under ACCA, which provides for a mandatory minimum fifteen-year sentence for individuals who violate 18 U.S.C. § 922(g) and have three prior convictions for certain violent felonies or serious drug offenses. 18 U.S.C. § 924(e)(1). The district court found that Orona had at least three qualifying prior convictions—including a 2007 aggravated assault conviction under A.R.S. § 13-1203(A)(1)<sup>3</sup>—and imposed the fifteen-year mandatory minimum sentence.

Following the Supreme Court’s decision in *Johnson*, Orona received permission to file a second § 2255 habeas motion challenging his ACCA sentence. In that motion, Orona argued that his 2007 aggravated assault conviction no longer qualified as a violent felony under ACCA’s residual clause, in light of *Johnson*, and could not qualify as a violent felony under ACCA’s force clause, in light of *Fernandez-Ruiz*. The district court agreed with Orona, rejected the government’s contention that *Fernandez-Ruiz* had been implicitly overruled, and resentenced Orona to time served and thirty months of supervised release. This timely appeal followed.

## STANDARD OF REVIEW

We review de novo the grant of a motion under 28 U.S.C. § 2255. *United States v. Allen*, 157 F.3d 661, 663 (9th Cir.

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<sup>3</sup> The state statute provides, in relevant part, that a person commits assault by “[i]ntentionally, knowingly or recklessly causing any physical injury to another person.” A.R.S. § 13-1203(A)(1).

1998). We also review de novo whether a state conviction qualifies as a violent felony under ACCA. *Walton*, 881 F.3d at 770–71.

### DISCUSSION

Because *Voisine* did not expressly overrule *Fernandez-Ruiz*,<sup>4</sup> we must follow it unless *Voisine* “undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The “clearly irreconcilable” standard is a high one, and as long as we “can apply our prior circuit precedent without running afoul of the intervening authority[,] [we] must do so.” *Close v. Sotheby’s, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018).

#### I. *Evolution of Precedent Regarding A.R.S. § 13-1203(A)(1) and the “Crime of Violence”/“Violent Felony” Definition.*

When first confronted with the issue, we held that A.R.S. § 13-1203(A)(1) has “as an element the use, attempted use or threatened use of physical force against the person or property of another.” *United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172–73 (9th Cir. 2000). *Ceron-Sanchez* considered the definition of “crime of violence” in 18 U.S.C. § 16(a), which includes verbatim ACCA’s force clause. *See id.* at 1171–72. The defendant in *Ceron-Sanchez* argued that A.R.S. § 13-1203(A)(1) is not a “crime of violence” because

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<sup>4</sup> Although *Fernandez-Ruiz* considered whether A.R.S. § 13-1203(A)(1) was a crime of violence within the meaning of 18 U.S.C. § 16(a), its holding also applies to the force clause of ACCA’s “violent felony” definition. *Lawrence*, 627 F.3d at 1284 n.3. The parties agree that *Fernandez-Ruiz* controls the outcome of this appeal, unless *Voisine* implicitly overruled it.

it encompasses reckless conduct. *Id.* at 1172. We rejected the argument because, “in order to support a conviction under § 13-1203(A)(1), the reckless conduct must have caused actual physical injury to another person.” *Id.* at 1172–73.

Several years later, the Supreme Court granted certiorari “to resolve a conflict among the Courts of Appeals on the question whether state DUI offenses . . . which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence [under § 16(a)]” and held that they do not. *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004). In relevant part, the Court explained:

The critical aspect of § 16(a) is that a crime of violence is one involving the “use . . . of physical force *against the person or property of another*.” As we said in a similar context . . . “use” requires active employment. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural say to say that a person actively employs physical force against another person by accident. Thus, a person would “use . . . physical force against” another when pushing him; however, we would not ordinarily say a person “use[s] . . . physical force against” another by stumbling and falling into him. . . . The key phrase in § 16(a)—the “use . . . of physical force against the person or property of another”—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

*Id.* at 9 (alterations in original) (internal citations omitted). Accordingly, the Court held that the DUI conviction at issue did not qualify as a crime of violence under § 16(a). *Id.* at 10. The Court clarified, however, that the case did not address “whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under . . . § 16.” *Id.* at 13.

Following *Leocal*, our court, sitting en banc, reconsidered whether assault under A.R.S. § 13-1203(A)(1) qualifies as a crime of violence under § 16(a). *Fernandez-Ruiz*, 466 F.3d at 1126–32. Acknowledging that *Leocal* “merely holds that using force negligently or less is not a crime of violence,” we extended that case’s reasoning to “crimes involving the reckless use of force.” *Id.* at 1129. We saw no “important differences between negligence and recklessness,” as neither “implies that physical force is instrumental to carrying out the crime, such as the plain meaning of the word ‘use’ denotes.” *Id.* at 1130. The en banc court recognized that “[r]eckless conduct, as generally defined, is not purposeful,” and “[e]ven more clearly, reckless conduct as defined by Arizona law is not purposeful.” *Id.* Looking at the “full range of conduct proscribed by [A.R.S.] § 13-1203(A)(1),” we elaborated:

As the Court suggested in *Leocal* . . . any other conclusion would blur the distinction between the violent crimes Congress sought to distinguish for heightened punishment and other crimes. . . . Indeed, a person could be convicted of assault under [A.R.S.] § 13-1203(A)(1) by running a stop sign solely by reason of voluntary intoxication and causing physical injury to another. Such

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conduct cannot, in the ordinary sense, be called active or violent.

*Id.* (internal quotation marks and citations omitted).

*Fernandez-Ruiz* “expressly overrule[d] our cases holding that crimes of violence under . . . § 16 may include offenses committed through the reckless, or grossly negligent, use of force” and held that A.R.S. § 13-1203(A)(1) is not a crime of violence under § 16(a). *Id.* at 1132. In doing so, we relied on “[t]he bedrock principle of *Leocal* . . . that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another.” *Id.* Because § 16(a) is materially identical to ACCA’s definition of “violent felony,” we later recognized that *Fernandez-Ruiz* controls our interpretation under ACCA. *Lawrence*, 627 F.3d at 1284 n.3.

In 2016, the Supreme Court held in *Voisine v. United States*, 136 S. Ct. 2272 (2016), that a misdemeanor conviction for recklessly assaulting a domestic relation disqualifies an individual from possessing a firearm under 18 U.S.C. § 922(g)(9). The statute at issue there applied to a “misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that ‘has as an element, the use or attempted use of physical force.’” *Id.* at 2276 (quoting 18 U.S.C. § 921(a)(33)(A)). Explaining that “[n]othing in the word ‘use’ . . . indicates that § 922(g)(9) applies exclusively to knowing or intentional domestic assaults,” the Court determined that § 922(g)(9) “applies to reckless assaults, as it does to knowing or intentional ones.” *Id.* at 2278.

The Court confirmed that its interpretation was consistent with the purpose and history of § 922(g)(9). *Id.* at 2280. Indeed, “Congress enacted § 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors—just like those convicted of felonies—from owning guns.” *Id.* Many states defined misdemeanor domestic assault and battery crimes to include the reckless infliction of injury. *Id.* “[I]n linking § 922(g)(9) to those laws, Congress must have known it was sweeping in some persons who had engaged in reckless conduct.” *Id.* Construing the statute to exclude recklessness would risk rendering it “broadly inoperative in the 35 jurisdictions with assault laws extending to recklessness.” *Id.*

The Court rejected the petitioners’ argument that *Leocal* required a different conclusion and explained:

[N]othing in *Leocal* . . . suggests a different conclusion—*i.e.*, that “use” marks a dividing line between reckless and knowing conduct. . . . Conduct like stumbling . . . is a true accident, and so too the injury arising from it; hence the difficulty of describing that conduct as the “active employment” of force. But the same is not true of reckless behavior—acts undertaken with awareness of their substantial risk of causing injury . . . . The harm such conduct causes is the result of a deliberate decision to endanger another—no more an “accident” than if the “substantial risk” were “practically certain.” And indeed, *Leocal* itself recognized the distinction between accidents and recklessness, specifically reserving the issue whether the

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definition in § 16 embraces reckless conduct

. . . .

*Id.* at 2279 (alterations in original) (internal citations omitted). *Voisine* identified several examples to illustrate that reckless conduct could involve a “use of force”: a person who injures his wife by throwing a plate against the wall near where she is standing, and a person who catches his girlfriend’s fingers in the door jamb by slamming the door shut with her following close behind. *Id.*

*Voisine* expressly limited its holding to the specific issue before it and explained that its decision “does not resolve whether § 16 includes reckless behavior.” 136 S. Ct. at 2280 n.4. The Court proceeded to distinguish § 921(a)(33)(A) from § 16, explaining that “[c]ourts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states.” *Id.*

## II. *Voisine*’s Impact on Fernandez-Ruiz.

*Fernandez-Ruiz* brought the law of our circuit in line with that of several of our sister circuits. 466 F.3d at 1129. Now, however, the tide has changed, and the majority of our sister circuits, either by overruling prior precedent or deciding the issue in the first instance, have extended *Voisine*’s holding to other “crime of violence” and “violent felony” definitions. See *United States v. Haight*, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018) (ACCA); *Davis v. United States*, 900 F.3d 733, 736 (6th Cir. 2018) (same); *United States v. Pam*, 867 F.3d 1191, 1207–08 (10th Cir. 2017) (same); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (same); see also *United States v. Mann*, 899 F.3d 898, 905–06 (10th Cir. 2018) (18 U.S.C. § 924(c)(3)); *United*

*States v. Bettcher*, 911 F.3d 1040, 1045–46 (10th Cir. 2018) (U.S.S.G. § 4B1.2(a)(1)); *United States v. Ramey*, 880 F.3d 447, 448–49 (8th Cir. 2018) (same); *United States v. Verwiebe*, 874 F.3d 258, 262–64 (6th Cir. 2017) (same); *United States v. Howell*, 838 F.3d 489, 500–01 (5th Cir. 2016) (same).

There is no question that *Voisine* casts serious doubt on the continuing validity of *Fernandez-Ruiz*'s analysis.<sup>5</sup> *Fernandez-Ruiz* relied on *Leocal* to hold that felony assault under Arizona law is not a “crime of violence” involving the use or threatened use of force because the crime encompasses reckless conduct. *Fernandez-Ruiz*, 466 F.3d at 1129–32. *Voisine* explained that *Leocal* did not impact its determination that a domestic assault statute encompassing reckless conduct constitutes a “misdemeanor crime of domestic violence” involving the use or threatened use of force. 136 S. Ct. at 2279. *Fernandez-Ruiz* reasoned that the “conscious disregard of a substantial and unjustifiable risk

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<sup>5</sup> Our court has noted this tension numerous times. See *United States v. Vasquez-Gonzalez*, 901 F.3d 1060, 1067 n.4 (9th Cir. 2018) (“In a different context, the Supreme Court later held [in *Voisine*] that reckless assault implies intentional conduct. We do not need to revisit the recklessness issue to decide this case because . . . assault in California requires more than recklessness.” (internal citation omitted)); *United States v. Perez-Silvan*, 861 F.3d 935, 942 n.4 (9th Cir. 2017) (noting the same when analyzing Tennessee assault statute); *United States v. Benally*, 843 F.3d 350, 354 (9th Cir. 2016) (“After *Leocal*, we held that neither recklessness nor gross negligence is a sufficient mens rea to establish that a conviction is for a crime of violence under § 16. This June, the Supreme Court [in *Voisine*] suggested the opposite, and held that for purposes of a similar statute—18 U.S.C. § 921(a)(33)(A)—reckless conduct indeed can constitute a crime of violence. But we need not resolve any tension regarding the inclusion of reckless conduct in this case.” (internal quotation marks and citations omitted)).

of injury [does not] impl[y] that physical force is instrumental to carrying out the crime, such as the plain meaning of the word ‘use’ denotes.” 466 F.3d at 1130. *Voisine* explained that “the word ‘use’ does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so.” 136 S. Ct. at 2279.

Nevertheless, *Voisine* expressly did not decide whether reckless conduct falls within the scope of § 16(a) and instead confirmed that it did not foreclose a different interpretation of that statute.<sup>6</sup> 136 S. Ct. at 2280 n.4. Nor did *Voisine* wholly “undercut the theory or reasoning” of *Fernandez-Ruiz* that is central to this case. *See Miller*, 335 F.3d at 900. Indeed, analyzing “the full range of conduct” proscribed under A.R.S. § 13-1203(A)(1), *Fernandez-Ruiz* determined that some of the proscribed conduct—“running a stop sign solely by reason of voluntary intoxication and causing physical injury to another”—similar to the conduct at issue in *Leocal*, could not “in the ordinary sense be called active or violent.” 446 F.3d at 1130 (internal quotation marks and citations omitted).

Although we acknowledge that an intervening case need not involve the exact same issue to implicitly overrule prior authority, the distinctions here make it possible to “apply our prior circuit precedent without running afoul of the intervening authority.” *Close*, 894 F.3d at 1073. Thus, we must do so. *See id.* at 1074 (“Nothing short of ‘clear irreconcilability’ will do.”). At least one of our sister

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<sup>6</sup> *See Gonzalez-Ramirez v. Sessions*, 727 F. App’x 404, 405 n.7 (9th Cir. 2018) (noting *Voisine* “does not affect our § 16(a) case law [and] our § 16(a) cases remain the law of this circuit”).

circuits, the First, has reached a similar conclusion with respect to its pre-*Voisine* law, confirming our view that it is possible to reconcile *Fernandez-Ruiz* and *Voisine*. See *United States v. Rose*, 896 F.3d 104, 109–10 (1st Cir. 2018) (continuing to hold that reckless conduct does not meet force clause of ACCA’s “violent felony” definition despite *Voisine*).

### CONCLUSION

Were we writing on a blank slate, we very well might follow the lead of our sister circuits and extend *Voisine*’s reasoning to the statute before us. But we are not, and *Voisine* expressly left open the question that *Fernandez-Ruiz* answered. We cannot say that *Voisine* is so clearly irreconcilable with *Fernandez-Ruiz*’s reasoning that this three-judge panel is no longer bound by the precedent of our court. We therefore affirm the district court’s judgment.

**AFFIRMED.**

No. 17-17508

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellant,*

*v.*

SELSO RANDY ORONA,  
*Defendant-Appellee.*

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*APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
Nos. CV-16-2160-PHX-SRB, CR-11-0856-PHX-SRB*

**APPELLEE'S RESPONSE TO PETITION FOR  
REHEARING AND REHEARING EN BANC  
(Decided May 10, 2019—Hawkins,  
M. Smith & Hurwitz)**

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No. 17-17508

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellant,*

*v.*

SELSO RANDY ORONA,  
*Defendant-Appellee.*

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*APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
Nos. CV-16-2160-PHX-SRB, CR-11-0856-PHX-SRB*

**APPELLEE’S RESPONSE TO PETITION FOR  
REHEARING AND REHEARING EN BANC**

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**I**

**INTRODUCTION AND STATEMENT**

The government asks the en banc Court to overrule itself and find that a prior conviction for an unarmed reckless assault is a “violent felony” under the Armed Career Criminal Act. This request is based on a recent Supreme Court decision that expressly declined to consider the mens rea required for ACCA predicates, and is made despite the

absence of any split within this Circuit over the issue. En banc review is unwarranted, and the government's petition should be denied.

The ACCA provides for a 15-year mandatory minimum for certain firearm offenses if the defendant has three prior convictions “for a violent felony.” 18 U.S.C. § 924(e)(1). Here, the prior conviction that would constitute the third such offense for the defendant, Selso Orona, was for unarmed aggravated assault under Ariz. Rev. Stat. § 13-1203(A)(1)—which, everyone agrees, encompasses reckless conduct. *See* Pet. 6. If reckless assault constitutes a “violent felony” under the ACCA’s so-called “Elements Clause,” then Orona would be subject to the ACCA’s 15-year sentence enhancement; if it does not, he would not.

As the panel held, it has long been the law in this Circuit that a crime with a mens rea of recklessness (like Orona’s) does not qualify as a “violent felony” under the Elements Clause. And for good reason. The Elements Clause defines “violent felony” to mean a crime that has as an element “the use . . . of physical force *against* the person of another.” 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). According to natural usage, someone cannot recklessly use force “*against* the person of another.” To use force “against” someone is to direct that force intentionally and

purposefully at a particular target. Thus, the statutory text cannot require mere recklessness, but instead requires that the offender have the purpose—the specific intent—to use force “against” a person.

That is what the en banc Court already held in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006).<sup>1</sup> Yet even though this Court consistently has reaffirmed *Fernandez-Ruiz*, the government asks to overturn that en banc ruling because of *Voisine v. United States*, 136 S. Ct. 2272 (2016), and a nascent circuit split caused by confusion in *Voisine*’s wake. Neither reason supports rehearing.

To start, nothing in *Voisine* impacts this Court’s decision in *Fernandez-Ruiz*, much less “fatally damage[s]” it. Pet. 1. The statute in *Voisine* does not include the ACCA’s qualification that, to constitute a violent felony, the force at issue must be directed “*against* the person of another.” As the Supreme Court has explained, the addition of “against”

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<sup>1</sup> *Fernandez-Ruiz* dealt with the definition of a “crime of violence” under 18 U.S.C. § 16(a), which covers use of force against “the person *or* property of another.” It is undisputed, however, that the addition of the word “property” is immaterial and that Section 16(a) and ACCA’s otherwise identical definition of “violent felony,” 18 U.S.C. § 924(e)(2)(B)(i), should be interpreted “in the same manner.” *United States v. Garcia-Lopez*, 903 F.3d 887, 893 (9th Cir. 2018) (citation omitted).

is “critical” to the meaning of the Elements Clause. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). And *Voisine* itself chose not to reach the ACCA issue here because of critical “differences in the[] contexts and purposes” between the ACCA and the statute there. 136 S. Ct. at 2280 n.4. Those distinctions leave *Fernandez-Ruiz*—and Orona’s resentencing—undisturbed. To the extent that *Voisine* creates any uncertainty over the meaning of Section 924(e)(2)(B)(i), moreover, the rule of lenity requires that uncertainty to be resolved in Orona’s favor.

Unable to show a conflict with Supreme Court precedent or within this Circuit, the government highlights an underdeveloped split among the courts of appeals. But none of the five courts that has extended *Voisine* grappled with the textual and legislative distinctions raised here. Conversely, the one court that *has* grappled with those issues has held that *Voisine*’s logic cannot apply to the ACCA. Insofar as it can be called a true “split,” this Court is already on the right side of it.

For any of those reasons, en banc review is unwarranted. The panel decision should be upheld and the petition should be denied.

## II

### ARGUMENT

**A. There Is No Conflict with *Voisine* Because the ACCA’s Distinct Text and Purpose Make Clear that Recklessness Offenses Are Not “Violent Felonies” Within the Meaning of Section 924(e)(2)(B)(i).**

There is no conflict between *Fernandez-Ruiz* and *Voisine* that the en banc Court needs to resolve. The ACCA and the domestic-violence statute at issue in *Voisine* use distinct language and have distinct legislative purposes. To the extent that *Voisine* has sowed uncertainty about the meaning of the ACCA’s Elements Clause, the rule of lenity requires resolving any ambiguity in Orona’s favor. Either way, the panel’s decision remains correct, and further review is unwarranted.

**1. *The Use of Force “Against” Someone Plainly Suggests Intentionality and Purpose, and Forecloses Recklessness.***

“The starting point in discerning congressional intent is the existing statutory text.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Undertaking the task of statutory construction, courts “must give words their ‘ordinary or natural’ meaning.” *Leocal*, 543 U.S. at 9. And they “must enforce plain and unambiguous statutory language according to

its terms.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

Congress has provided that an offense that categorically involves the “use, attempted use, or threatened use of physical force against the person of another” qualifies as a “violent felony.” 18 U.S.C.

§ 924(e)(2)(B)(i). The Supreme Court addressed nearly identical language in *Leocal*.<sup>2</sup> There, it stressed that the word “use” could not be interpreted on its own. 543 U.S. at 9. The word “use,” the Court explained, is “elastic” and must be interpreted “in its context and in light of the terms surrounding it.” *Id.* And there, the terms immediately following “use”—“*against the person or property of another*”—were “critical” to understanding its meaning. *Id.* Because of Congress’s “emphasis on the use of physical force *against* another person,” the Court held that the statute necessarily could apply to only the “category of violent, active crimes” that require a “higher degree of intent,” and could *not* apply to “accidental or negligent conduct.” *Id.* at 9, 11. Indeed, according to “ordinary or natural” usage, *id.* at 9, it makes no sense to

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<sup>2</sup> Like *Fernandez-Ruiz*, *Leocal* dealt with the definition of a “crime of violence” under Section 16(a). *See* note 1, *supra*.

say that someone may *indifferently* (that is, recklessly) use force “against the person . . . of another.” To use force “against” someone plainly suggests intentionality and purpose.

This Court, in *Fernandez-Ruiz*, applied that same reasoning to hold that Section 16(a)’s materially indistinguishable Elements Clause also excludes crimes that may be committed recklessly. As this Court explained, “[t]he requirement that the offense have ‘as an element, the *use . . . of physical force against the person . . . of another’ . . . implies the use of force must be a means to an end,” i.e., it “must be volitional . . . [and] cannot be ‘accidental.’” *Fernandez-Ruiz*, 466 F.3d at 1129-30 (quoting *Leocal*, 543 U.S. at 8-10).*

Applying that understanding to Arizona’s aggravated assault statute, this Court explained that “[r]eckless conduct, as generally defined, is *not* purposeful.” *Fernandez-Ruiz*, 466 F.3d at 1131 (emphasis added). Rather, the definitions of both “accidental” and “recklessness” carve out acts that are “purposeful” or that “*desire harmful consequences.*” *Id.* (construing *Black’s Law Dictionary* 16, 1298 (8th ed. 2004)); *see also United States v. Harper*, 875 F.3d 329, 331-32 (6th Cir. 2017) (“[T]he phrase “‘use . . . of physical force’ . . . *against the person of*

*another*” requires “not merely recklessness as to the consequences of one’s force, but knowledge or intent that the force apply to another person”). Or, as the First Circuit explained it, because “[t]he injury caused [by a] . . . reckless assault is” not “the perpetrator’s object,” a reckless assault cannot be “naturally described as [an action] that is taken ‘against’ another.” *Bennett v. United States*, 868 F.3d 1, 18 (1st Cir. 2017).<sup>3</sup> For these reasons, this Court held in *Fernandez-Ruiz* that reckless assault cannot qualify as a “use . . . of physical force against the person . . . of another.”

*Voisine* does not disturb *Fernandez-Ruiz*’s reasoning in the slightest. The question presented in *Voisine* was “whether a reckless assault” qualified as a “use . . . of physical force” within the meaning of Section 921(a)(33)(A), which set forth offenses that constitute “misdemeanor crimes of domestic violence” under Section 922(g)(9). *Voisine*, 136 S. Ct. at 2277-78. The Supreme Court held that the word “use,” when unaccompanied by additional qualifying language, “does *not*

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<sup>3</sup> *Bennett* was withdrawn upon the death of the defendant but readopted in *United States v. Windley*, 864 F.3d 36, 37 n.2 (1st Cir. 2017).

demand that the person applying force have the purpose or practical certainty that it will cause harm.” *Id.* at 2279 (emphasis added).

While that issue may appear to overlap with the definition of a “violent felony” under the ACCA, *Voisine* was crystal clear that the word “use,” taken entirely alone, was “the *only* statutory language” that drove its decision. 136 S. Ct. at 2277-78 (emphasis added); *accord id.* at 2281 n.5 (“the statutory term ‘use’” is “the only one identified as potentially relevant here”). *Voisine* thus at most “tells us what ‘use’ means” when taken alone. *Harper*, 875 F.3d at 333. It says nothing at all about the phrase “against the person of another,” which is the phrase that *Leocal* identified as “[t]he critical aspect” of the text at issue in this case. 543 U.S. at 9; *see Bennett*, 868 F.3d at 17 (“*Voisine* had no occasion to consider the meaning that the ‘elastic’ word ‘use’ might take on in the context of a clause that includes a modifying ‘against’ phrase.”) (citation omitted).<sup>4</sup>

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<sup>4</sup> “Against the person of another” has to add meaning to the ACCA, as compared to the naked “use” clause in Section 921, because “it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” of statutory language. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). The government’s view, though, effectively excises that phrase from Section

Accordingly, while the government notes that, in the context of Section 921(a)(33)(A)'s definition of misdemeanor crimes of domestic violence, a "reckless act can constitute the *use* of force . . . because 'use' . . . does not demand that the person applying force have the purpose . . . [of] caus[ing] harm," Pet. 9, the same is not true when the act must be directed *against* a person—as the ACCA requires. Directing physical force *against* a person requires a level of intentionality beyond mere recklessness. *See Leocal*, 543 U.S. at 11 (Congress's "emphasis on the use of physical force *against another person*" must be understood to refer to "violent, active crimes." (emphasis added)); *Bennett*, 868 F.3d at 18 (a reckless assault cannot be "naturally described as [an action] that is taken 'against' another").

The government's own hypotheticals (taken from *Voisine*) highlight this point. Recklessly throwing a plate "near" a person or slamming a door in front of a person "following close behind" are, under *Voisine*, simple "use[s] . . . of physical force." Pet. 12. But neither case

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924(e), thus running afoul of the "cardinal principle" of interpretation that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citation omitted).

involves an action directed *against* another person. Rather, while reckless conduct can of course lead to injury to a “victim,” *see* Pet. 11, both scenarios (plate-throwing and door-slamming) envision conduct that was ostensibly directed *away from*—*i.e.*, “near” or “close behind,” but not *against*—the unintended victim. *See Bennett*, 868 F.3d at 18 (“[t]he injury caused [by a] . . . reckless assault is” not “the perpetrator’s object”); *Black’s Law Dictionary* 1524 (11th ed. 2019) (defining “recklessness” as “[c]onduct whereby the *actor does not desire harmful consequence*” (emphasis added)). Neither hypothetical situation reflects the sort of conduct that would fall into the “category of violent, active crimes” targeted by the ACCA. *Leocal*, 543 U.S. at 9, 11.

**2. *The ACCA’s Legislative Purpose—Which Is Fundamentally Distinct from Section 922(g)(9)’s—Was Never Intended to Extend to Reckless Conduct.***

Statutory text must be read “holistic[ally]” and in light of its “history and purpose.” *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality). Here, those considerations further weigh in favor of denying the petition and not disturbing the panel’s affirmance of the district court’s resentencing decision.

The statute at issue in *Voisine*—Section 922(g)(9), added to Section 922 as part of the Lautenberg Amendment—was enacted in a different context to achieve a different goal than the ACCA’s recidivism enhancement. Though the government asserts that these two statutes have a “similar provenance,” Pet. 12, *Voisine* itself disagreed with that view, emphasizing that Congress’s purpose in enacting Section 922(g)(9) was to criminalize the possession of firearms by domestic-violence offenders, knowing full well that most state domestic-violence statutes can be violated with recklessness. “Congress,” the Court explained in *Voisine*, “enacted [Section] 922(g)(9) in 1996 to bar those domestic abusers convicted of garden-variety assault or battery misdemeanors . . . from owning guns.” 136 S. Ct. at 2280. The “point” of the statute was therefore to “apply firearms restrictions to those abusers, along with all others, whom the States’ ordinary misdemeanor assault laws covered.” *Id.* This purpose counseled in favor of an expansive interpretation of Section 922(g)(9): “Because fully two-thirds of such state laws extend to recklessness, construing § 922(g)(9) to exclude crimes committed with that state of mind would substantially undermine the provision’s design.” *Id.* at 2278.

Here, by contrast, the purpose of the ACCA’s recidivism enhancement is both narrower and harsher: to impose a severe mandatory minimum sentence on “career offenders . . . who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons.” *Taylor v. United States*, 495 U.S. 575, 587-88 (1990). In this respect, the “ACCA aims at offenses that ‘show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger,’ rather than [at] offenses that merely ‘reveal a degree of callousness toward risk.’” *Bennett*, 868 F.3d at 21 (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)). “‘Crimes,’ the Court stated in *Begay*, ‘committed in such a purposeful, violent, and aggressive manner are potentially more dangerous when firearms are involved.’” *Id.* (quoting same). The *Fernandez-Ruiz* Court correctly understood this point, and noted that extending Section 16(a)’s materially indistinguishable definition would trigger significant consequences for “a wife and mother . . . convicted of assault and domestic violence under Arizona law by recklessly running a stop sign and causing a traffic accident that injured her passenger-husband and

child. . . . Such conduct cannot, in the ordinary sense, be called ‘active’ or ‘violent.’” *Fernandez-Ruiz*, 466 F.3d at 1130 (quoting *Leocal*, 543 U.S. at 11). Nor can it qualify someone as an “armed career criminal.” *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (courts may look to a statute’s title to resolve ambiguity in the text).

The historical approach to the ACCA has thus been the precise opposite of the approach to Section 922(g)(9) in *Voisine*. It has reflected the “Court’s desire to limit application of the stringent penalties imposed by the ACCA . . . to those predicate felonies involving conduct that is not only dangerous but also indicative of a willingness to inflict harm on an identifiable victim.” *United States v. Velázquez*, 777 F.3d 91, 97 (1st Cir. 2015). These differences are highly salient and point in the same direction as Section 924(e)(2)(B)(i)’s plain text, particularly given the facts here: far from the government’s hypothetical second-degree-murder-by-gunshot, *see* Pet. 18, the predicate crime on which this case turns was an aggravated assault in which Orona was not armed. *See* ER 91-92, 96; PSR ¶ 40. That cannot be the sort of conduct that Congress had in mind when it passed the ACCA.

**3. Any Ambiguity as to Whether a “Violent Felony” Includes Reckless Assaults Must Be Resolved in Orona’s Favor.**

For all of the reasons given above, Section 924(e)(2)(B)(i)’s plain text and purpose support the panel’s opinion and the continued validity of *Fernandez-Ruiz*. But if there were any “reasonable doubt” on this score—there should be none—the Court would have to resolve it in Orona’s favor under the rule of lenity. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (“[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute’s intended scope.”); *see also United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc) (Gorsuch, J.) (“[I]f [Congress’s] directions are unclear, the tie goes to the presumptively free citizen and not the prosecutor.”); *Leocal*, 543 U.S. at 11 n.8 (“Even if [Section] 16 lacked clarity” on the question whether negligent crimes can constitute violent felonies, “we would be constrained to interpret any ambiguity in the statute in petitioner’s favor” under the “rule of lenity.”); Antonin Scalia & Bryan A. Garner, *Reading Law* § 49, at 299 (2012) (“[W]hen the government means to punish, its commands must be reasonably clear.”).

On this point, the government contends that both *Fernandez-Ruiz* and *Voisine* rejected the rule of lenity's application here. Pet. 14. Neither case did so. Starting with *Fernandez-Ruiz*, this Court did *not* hold that the rule of lenity "couldn't apply" here, as the government says it did. Pet. 14. It actually did the opposite: after endorsing *Leocal*'s unequivocal holding that "the rule of lenity applies" and reiterating that, "to whatever extent [the] definitions of a crime of violence lack clarity, courts should construe the ambiguous statutory language against the government," *Fernandez-Ruiz*, 466 F.3d at 1127 (construing *Leocal*, 543 U.S. at 11 n.8), the *Fernandez-Ruiz* Court concluded that, in light of *Leocal*, Section 16(a) was "sufficiently clear" to resolve the case without the need to apply the rule of lenity (or "employ legislative history as an interpretive aid"), *id.* at 1131.

Likewise, as discussed above, *Voisine* addressed only the meaning of the term "use" when unaccompanied by additional language, and expressly did *not* reach the meaning or level of clarity of that phrase as it appears in Section 16 or the ACCA. 136 S. Ct. at 2277-78, 2280-81 & n.4. *Voisine*'s holding about the clarity of the naked term "use," therefore, does not and cannot remove the ambiguity from the longer,

more complex, and contextually distinct phrase “use . . . against [a] person” at issue here. To the contrary, *Voisine*’s explicit refusal to explain whether or how that decision would impact the ACCA can only undermine the government’s contentions that Orona’s weaponless reckless assault satisfies the ACCA’s Elements Clause. If the ACCA’s Elements Clause so clearly should be interpreted in the same way as the Section 921(a)(33)(A), the Supreme Court would have said so, and would not have left open the possibility that the Elements Clause demands a different mental state. *See Voisine*, 136 S. Ct. at 2280 n.4 (noting the “differences in the[] contexts and purposes” between the statutes).

Consequently, neither decision supports the government’s arguments against the rule of lenity here. If anything, the fact that *Voisine* may point to a particular application of a statute that this Court previously found clearly to dictate the opposite only highlights the potential ambiguity in the statute and reinforces the need for the rule of lenity here. *Cf. United States v. Edling*, 895 F.3d 1153, 1158 (9th Cir. 2018) (holding that the decision that the Sentencing Guidelines are not subject to vagueness challenges, in *Beckles v. United States*, 137 S. Ct.

886 (2017), did not disturb this Court’s continued application of the rule of lenity to those same Guidelines).

The confusion caused by *Voisine*, in fact, was the basis for the First Circuit’s invocation of the rule of lenity to the ACCA in *Bennett*. There, the court reasoned that even if *Voisine* “calls into question” circuit law holding that crimes with a mens rea of recklessness do not qualify as violent felonies, 868 F.3d at 13, *Voisine*’s reservation of judgment about the ACCA meant that the court could not “say that *Voisine* does more than that.” *Id.* at 23. The First Circuit thus concluded that it was “left with a ‘grievous ambiguity’ concerning whether Congress intended the phrase ‘use . . . of physical force against the person of another’ in [the] ACCA’s definition of a ‘violent felony’ to include or exclude reckless aggravated assault.” *Id.* (citations omitted). “And so,” the First Circuit concluded, “we must apply the rule of lenity.” *Id.* “We are considering here a sentencing enhancement of great consequence” and must first “have confidence” that Congress intended the enhancement to apply before applying it. *Id.* Absent such confidence—and here there can be none—the rule of lenity requires upholding the panel’s decision in Orona’s favor.

**B. The Petition Fails to Demonstrate a Conflict with this Court’s or Other Courts’ Precedents that Would Warrant En Banc Review.**

Unable to show a conflict with Supreme Court precedent, the petition fails to demonstrate a conflict with this Court’s or other circuit courts’ precedent that would warrant en banc review. *See* Fed. R. App. P. 35(b)(1); *cf. Fernandez-Ruiz*, 466 F.3d at 1124 (“We ordered rehearing en banc to resolve an inter- and intra-circuit conflict”). To the contrary, this Court repeatedly has reaffirmed or relied on *Fernandez-Ruiz* in numerous published decisions since *Voisine*, and the government does not identify any that have departed from it. *See, e.g., Ward v. United States*, No. 17-35563, --- F.3d ----, 2019 WL 4148782, at \*4 n.3 (9th Cir. Sept. 3, 2019) (citing *Fernandez-Ruiz* for the proposition that, “to qualify as . . . a violent felony [under the ACCA], a state statute must require that the physical force be inflicted *intentionally*, as opposed to recklessly or negligently”); *United States v. Begay*, 934 F.3d 1033, 1039-40 (9th Cir. 2019) (rejecting argument that *Voisine* “implicitly overruled *Fernandez-Ruiz*” regarding “crimes of violence” in Section 924(c)); *United States v. Perez*, 932 F.3d 782, 785-86 (9th Cir. 2019) (citing *Fernandez-Ruiz* for the proposition that a “crime of violence” under

Section 4B1.2(a)(1) of the Sentencing Guidelines requires “the intentional ‘use, attempted use, or threatened use’ of violent physical force against another person”); *United States v. Garcia-Lopez*, 903 F.3d 887, 892-93 (9th Cir. 2018) (holding that California robbery is not a “crime of violence” under Section 16(b), and reaffirming *Fernandez-Ruiz*’s holding that “the force used must be intentional, not just reckless or negligent”).

Nor has the petition demonstrated a true split of authority with other courts of appeals that would warrant en banc review. Fed. R. App. P. 35(b)(1)(B). To be sure, several circuits have extended *Voisine* to “violent felony” definitions under the ACCA or Section 16. *See* Pet. 13. But none of those courts has wrestled with the arguments set forth above. Three of them did not even acknowledge the phrase “against the person of another,” much less address the possibility that it could affect the mens rea required by the generic crime described in the statute. *See United States v. Mendez-Henriquez*, 847 F.3d 214, 221-22 (5th Cir. 2017); *United States v. Pam*, 867 F.3d 1191, 1207-08 (10th Cir. 2017); *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016). Two others incorrectly described Section 924(e)(2)(B)(i) and Section 921(a)(33)(A) as

“nearly identical,” while failing to address the substantive textual differences identified in *Voisine* and *Leocal*. See *United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018). And while the Eleventh Circuit did recently grant rehearing ostensibly to consider *Voisine*’s effect in an ACCA case, see Pet. 13 (citing *United States v. Moss*, 928 F.3d 1340 (11th Cir. 2019)), that court is unlikely to reach the issues raised here because Georgia’s aggravated assault statute has *no mens rea* requirement (or, at most, requires merely negligence, see O.C.G.A. §§ 16-2-1(a), 16-5-20-(a)(2)), which would place it outside the scope of *Voisine* even if it were extended to the ACCA.

The only court to have grappled with the issues presented here is the First Circuit. See *Bennett*, 868 F.3d at 8. As discussed above, that court correctly held that *Voisine* could not extend to Section 924(e)(2)(B)(i) because of the significant differences in language and legislative purpose between that statute and Section 921(a)(33)(A), and because the rule of lenity required resolving any ambiguity left in *Voisine*’s wake in the defendant’s favor. See *id.*

The existence of an insufficiently developed “split” therefore does not present a reasoned basis for disagreeing with the analysis above. Nor does it merit revisiting a decision that is already on the right side of the issue.

### III

### CONCLUSION

For the reasons set forth above, this Court should deny the petition.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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