No. 03-583

IN THE

Supreme Court of the United States

JOSUE LEOCAL,

Petitioner,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondent.

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

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ET AL., AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici are legal defense and civil rights organizations that encompass practitioners, scholars, and policy advocates in the areas of criminal law, immigration, and civil liberties. These organizations have purposes and expertise that range across both immigration law and federal criminal law, but all share a deep commitment to the just, equitable, and uniform application of this nation's laws in both the criminal justice

[1] Amici curiae state that no party or its counsel has authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel have made any monetary contribution to its preparation. This brief is filed with the consent of all parties, and copies of the consent letters have been lodged with the Clerk of the Court

and immigration arenas. Collectively, these organizations represent considerable experience and expertise in the areas at issue in this appeal. This brief is respectfully submitted to inform the Court of the considered views of this community of criminal and immigration legal experts who work every day with the legal questions at issue in this case.

Amici are concerned that the Court's decision as to whether the petitioner's offense in this case constitutes a "crime of violence" and therefore an aggravated felony under the immigration laws has the potential to undermine the reasonable expectations of immigrant defendants—many of them advised by counsel who are members of amici organizations—who pled guilty based on current law in jurisdictions other than the Eleventh Circuit. Affirmance of the decision below—which, amici respectfully submit, misapplies federal statutory law and is inconsistent with the holdings of most federal courts of appeals that have considered the issues at hand—would undermine the reliability of past legal advice, and lead to a dramatic curtailment of the ability of past, present, and future immigrants to avoid mandatory detention, deportation, and separation from lives and families here in the United States.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 11,400 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the immigration consequences of criminal proceedings.

The American Civil Liberties Union ("ACLU") is a national, nonprofit, nonpartisan organization of more than 400,000 members dedicated to protecting the fundamental rights and principles of individual liberty embodied in the Constitution and laws of the United States. Since its founding in 1920, the ACLU has defended the rights of noncitizens. The Immigrants' Rights Project of the ACLU engages in a nationwide program of litigation and advocacy on behalf of immigrants and has litigated numerous cases addressing the consequences faced by immigrants with criminal convictions. Because of the severe substantive and procedural consequences for immigrants who are convicted of a crime determined to be an "aggravated felony," the proper construction of that term raises important civil liberties issues and is essential to preserving rights guaranteed by our immigration laws and the Constitution.

The American Immigration Lawyers Association ("AILA") is a national non-profit association of immigration and nationality lawyers. Founded in 1946, AILA is an affiliated organization of the American Bar Association. It now has more than 8,500 members organized in 35 chapters across the United States and in Canada. AILA's members' clients may be directly affected by the decision in this case.

The Defending Immigrants Partnership ("DIP") is a national program bringing together immigration law experts and defense counsel to ensure that noncitizen defendants have meaningful access to justice. To that end, DIP educates and trains public defenders and assigned counsel on the law relating to citizenship, immigrant status, and the immigration consequences of convictions, and offers technical assistance on individual cases and efforts to develop immigration expertise in defender programs. DIP provides cutting-edge legal analysis, resources, advocacy, and amicus assistance on the proper interpretation of the immigration laws.

The New York State Defenders Association ("NYSDA") is a non-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others throughout the State of New York. Its

objectives are to improve the quality of public defense services in the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the Immigrant Defense Project, which provides immigrants and their lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

STATEMENT OF THE CASE

The case arises out of the removal of Petitioner Josue Leocal, a lawful permanent resident who was removed from the United States after 20 years of law-abiding residence here and thereby separated from his wife and children—all American citizens.

Leocal, a native and citizen of Haiti, immigrated to the United States in 1980 at the age of 24, and became a lawful permanent resident in December 1987. In January 2000, he was involved in a car accident in Miami-Dade County, Florida. Two people were injured in the accident; one required hospitalization. Leocal was arrested in connection with the accident and subsequently pleaded guilty to two counts of driving under the influence causing serious bodily injury in violation of Fla. Stat. Ann. § 316.193(3)(c)(2) ("DUI with injury" or "Florida DUI").

On October 16, 2001, while he was serving his sentence, an Immigration Judge ("IJ") held that Petitioner was removable, on the ground that his offense of conviction was an aggravated felony pursuant to 8 U.S.C. § 1101(A)(43)(F), because the offense was a "crime of violence" within the definition of 18 U.S.C. § 16(a). In making this determination, the IJ relied upon a decision of the Eleventh Circuit, *Le* v. *Attorney General*, 196 F.3d 1352 (11th Cir. 1999) (per curiam), because the proceeding arose within the Eleventh Circuit. The *Le* court had in turn relied upon the Board of Immigration Appeals ("BIA")'s decision in *In re Puente-Salazar*, 23 I. & N. Dec. (BIA 1999), which had concluded

that a similar Texas DUI statute was a "crime of violence" within the meaning of 18 U.S.C. § 16.

Leocal timely appealed the IJ's decision to the BIA. Before Leocal received a decision from his appeal, the BIA issued *In re Ramos*, 23 I. & N. Dec. 336 (BIA Apr. 4, 2002) (en banc), which reversed *In re Puente-Salazar* and held that DUI offenses that did not have a *mens rea* of at least recklessness were not "crimes of violence" within the definition of § 16. Leocal urged the BIA to reconsider its decision in light of *Ramos*. The BIA reopened Leocal's case, vacated its previous order, and issued a new order. In the new order, the BIA stated that although Leocal's offense would not be considered a "crime of violence" under the analysis set forth in *Ramos*, it was nonetheless bound to follow *Le*. The BIA accordingly affirmed the IJ.

On Leocal's appeal, the Eleventh Circuit affirmed the BIA and dismissed the petition in an unpublished per curiam opinion. The Eleventh Circuit examined *Le*, and concluded that, notwithstanding the *Le* court's discussion of deference, the panel in *Le* had in fact reviewed the statute in question *de novo* and had independently concluded that the Florida DUI statute was a "crime of violence" within the definition of 18 U.S.C. § 16(a). The Eleventh Circuit therefore held that it was bound by *Le*, regardless of the BIA's amended interpretation. This Court granted *certiorari* on February 23, 2004. *See* 124 S. Ct. 1405 (2004).

SUMMARY OF ARGUMENT

The Eleventh Circuit concluded that the Florida DUI statute was a "crime of violence" within the meaning of 18 U.S.C. § 16(a). This was error, for two reasons:

First, § 16(a) by its express terms only applies to those offenses that have the use of force as an "element." The Florida DUI statute does not contain any such element, and that statute's separate element (requiring that the intoxicated defendant have caused injury) is not coterminous with a "use of force" element.

Second, the everyday meaning of "use," including as that term has been construed by this Court in *Bailey* v. *United States*, 516 U.S. 137 (1995), connotes intentional action by the subject. The Florida DUI statute does not contain any such requirement of intentional or volitional action, and indeed, under state decisional law, can be violated without a showing of any *mens rea*. The absence of any intent requirement in the Florida DUI statute means that that statute, under canons of construction requiring that statutory text be given its plain meaning, cannot constitute a "crime of violence" under § 16(a). The available legislative history forcefully supports this interpretation. The Senate Report accompanying the passage of 18 U.S.C. § 16 specifically noted that the meaning of "crime of violence" in § 16 was "essentially the same" as a previous use of that term to describe enumerated offenses, each of which was a specific intent (volitional) crime.

Should the Court hold that the Florida DUI statute is not a "crime of violence" under § 16(a), the proper course would be to exercise its discretion and not reach the issue whether Florida DUI falls within § 16(b). That issue has not been considered by the IJ, the BIA, the Eleventh Circuit, or any district court in that circuit, and this Court's consideration of whether Florida DUI falls under § 16(b) should await mature consideration of that issue by other courts. However, if the Court does reach the § 16(b) issue, amici submit that the approach taken by the majority of circuit courts (holding that offenses under state statutes that appear to be similar to Florida DUI do not constitute "crimes of violence" under that provision either) is clearly correct. By its text, § 16(b) also mandates a categorical approach, providing that an offense is a "crime of violence" only if, "by its nature," it entails a "substantial risk" that force will—intentionally—be used. Florida DUI does not satisfy that standard.

Finally, because of the profoundly grave consequences of being deemed an "aggravated felon" under the INA, this Court's longstanding principle of construing criminal and

immigration statutes according to the rule of lenity should guide the Court's analysis here.

ARGUMENT

The Immigration and Nationality Act ("INA" or "the Act") mandates the deportation of virtually any alien convicted of an "aggravated felony." *See* 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony," in turn, is defined to include "any crime of violence (as defined in section 16 of title 18) . . . for which the term of imprisonment is least one year." Congress has defined "crime of violence" in 18 U.S.C. § 16 as:

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

In this case, Petitioner was convicted in Florida of the offense of driving under the influence causing serious bodily injury to another, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2). The Eleventh Circuit, following its precedent in *Le* v. *Attorney General*, 196 F.3d 1352 (11th Cir. 1999), held that Florida DUI constitutes a "crime of violence" as defined in § 16(a). It accordingly held that Petitioner was required to be removed from the United States.

The decision below is wrong in two key respects. First, although § 16(a) requires the offense to have as an element the "use of physical force," the Florida DUI statute does not contain any such element. And the Florida DUI statute's separate element—requiring that the offense have caused harm—is legally distinct from a "use of force" element, as the courts of appeals that have considered that issue closely have persuasively held. Second, again as the courts of appeals have largely recognized, for an offense to be a "crime of violence" under § 16(a), the defendant must have been required to have acted intentionally. But Florida DUI does

not contain any requirement of intentional action; indeed, to support a conviction, Florida DUI does not even require a finding of recklessness or negligence. For these two independent reasons, Florida DUI thus does not constitute a "crime of violence" under § 16(a).

The Eleventh Circuit did not have occasion to consider whether Florida DUI would constitute a "crime of violence" under § 16(b). As amici note in this brief, should the Court hold that Florida DUI is not a "crime of violence" under § 16(a), the better course jurisprudentially would be for the Court to avoid that issue, rather than address the application of § 16(b) to that particular state statute without the benefit of lower-court review. However, should the Court reach the § 16(b) issue, we note that Florida DUI clearly would also fall outside the scope of § 16(b), again as all but one of the courts of appeals to consider parallel state DUI statutes have held.

I. SECTION 16(a) DOES NOT ENCOMPASS DUI STATUTES THAT DO NOT HAVE THE "USE OF FORCE" AS AN ELEMENT, AND THE ELEMENT OF CAUSATION OF INJURY IS NOT A SUBSTITUTE FOR THAT REQUIRED ELEMENT.

Section 16(a) defines a "crime of violence" as an "offense that *has as an element* the use, attempted use, or threatened use of physical force against the person or property of another" (emphasis added). As the courts of appeals have uniformly held, this formulation—focused on statutory elements rather than the proof in a particular case—requires a court reviewing an alien's conviction to focus on whether the elements of the statute of conviction necessarily contain the elements required by § 16(a). *See, e.g.*, *Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (applying elements test under § 16(a)); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 195-196 (2d Cir. 2003) (same); *Ramsey* v. *INS*, 55 F.3d 580, 583 (11th Cir. 1995).

As these appellate courts have recognized, the proper focus under § 16(a) is therefore on the minimum criminal conduct necessary to sustain a conviction under the statute. *See, e.g.*, *Flores*, 350 F.3d at 671 (§ 16(a) requires courts to

look at the elements of the offense, and not defendant's actual conduct); *Chrzanoski*, 327 F.3d at 191 (same). Under this "categorical" approach, the specific facts underlying the conviction are not examined and are irrelevant. *See, e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 600-601 (1990) (applying categorical analysis in context of analogous statute and declining to look to facts of underlying conviction); *Flores*, 350 F.3d at 670 ("element" language in § 16(a) requires categorical approach); *Bazan-Reyes* v. *INS*, 256 F.3d 600, 606 (7th Cir. 2001); *Ramsey*, 55 F.3d at 583.

In this case, the pertinent element required by § 16(a) relates to the "use of force." Section 16(a) requires that the statute of conviction have "*as an element* the use, attempted use, or threatened use of physical force against the person or property of another" (emphasis added). *See, e.g.*, *United States* v. *Martin*, 215 F.3d 470, 473-474 (4th Cir. 2000) (ruling that bank larceny was not a "crime of violence" because it "lacks as a statutory element not only the use of force, violence, or intimidation, but also the taking from the person or presence of another"); *United States* v. *Wilson*, 951 F.2d 586, 588 (4th Cir. 1991) ("[T]he court simply reads the statutory or common law definitions . . . to see whether they list as an element the 'use . . . of physical force.' ").

The words "use of force," however, do not appear anywhere in Florida DUI. Under Florida law, the Florida DUI offense of which Petitioner was convicted requires proof of only three elements: (i) intoxication; (ii) the operation or control of a vehicle; and (iii) the causation of injury. The Florida DUI statute does not contain either (1) an element requiring the "use of force" or (2) a *mens rea* element. *See* Fla. Stat. Ann. § 316.193(3)(c)(2); *State* v. *Hubbard*, 751 So. 2d 552, 556-557 (Fla. 1999); *Baltrus* v. *State*, 571 So.2d 75-76 (Fla. Dist. Ct. App. 1990); *cf. Standard Jury Instructions in Crim. Cases (97-2)*, 723 So. 2d 123, 146-147 (Fla. 1998).

Florida DUI is typical in this respect of the DUI statutes of many other states. And the federal courts of appeals to consider such statutes have largely held that such DUI statutes do not fall within § 16(a). *See Bazan-Reyes*, 256

F.3d at 609; *see also United States* v. *Vargas-Duran*, 356 F.3d 598, 603 (5th Cir. 2004) (en banc) (holding that Texas Intoxication Assault offense was not a "crime of violence" under identically worded Sentencing Guideline provision); *United States* v. *Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995); *cf. United States* v. *Trinidad-Aquino*, 259 F.3d 1140, 1144-1145 (9th Cir. 2001) (holding that offense of California DUI causing injury to another was not crime of violence under § 16(a)). *But see Le*, 196 F.3d at 1354 (classifying Florida DUI statute as "crime of violence"). Amici respectfully submit that this Court should adopt this majority view and hold—based, quite simply, on the absence of this required element from the Florida DUI statute—that § 16(a) does not apply to such statutes.

In its sole statement on this issue, in its per curiam decision in *Le*, the Eleventh Circuit observed that Florida DUI contains as an element that the defendant have "caused injury." *See Le*, 196 F.3d at 1354. This observation was *Le*'s sole basis for treating Florida DUI as a "crime of violence." But the "use of force" element and "causation of injury" element are not coextensive, and thus—contrary to the Eleventh Circuit's summary, unexamined conclusion—the Florida DUI statute does not come within § 16(a).

The Second Circuit's decision and analysis in *Chrzanoski* v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003), forcefully underscore this point. At issue in *Chrzanoski* was the Connecticut offense of third degree assault, which did not contain a "use of force" element, but which did expressly require the defendant to have caused injury. *Id.* at 192-193. The court rejected the government's contention that "use of force" was implicit in the statutory element of injury causation. Its analysis began with its earlier decision in *Dalton* v. *Ashcroft*, 257 F.3d 200 (2d Cir. 2001). In *Dalton*, the Second Circuit had held that New York State's DUI statute did not come within § 16(b), because whereas the New York statute covered conduct that presented a "risk of injury," that risk was different from the "risk of the use of physical force." The *Chrzanoski* court rejected the notion that there was

only a "negligible difference" between the two concepts. 327 F.3d at 194. The Second Circuit in *Dalton* had explained:

> While it may be true that all driving involves some risk of an accident and drunk driving increases that risk, upon closer examination, this reasoning begs the question of whether an accident is something that can be referred to as involving the "use of physical force." Such an argument equates the use of physical force with harm or injury, thus returning the inquiry to the question of whether there is any material difference between the risk of "the use of physical force" and the "risk of injury." . . . There are many crimes that involve a substantial risk of injury but do not involve the use of force. Crimes of gross negligence or reckless endangerment, such as leaving an infant alone near a pool, involve a risk of injury without the use of force. . . . Other courts have also recognized the logical fallacy inherent in reasoning that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must be true.

Chrzanoski, 327 F.3d at 194-195 (quoting *Dalton*, 257 F.3d at 207 (citations and footnotes omitted)).

The *Chrzanoski* court concluded that the same reasoning applies to § 16(a). Like § 16(b), § 16(a) requires the "use of force," not simply the causation of injury. 327 F.3d at 195-196 (citations omitted); *see also Flores*, 350 F.3d at 671; *United States* v. *Gracia-Cantu*, 302 F.3d 308, 312 (5th Cir. 2002) (noting government's concession that statute criminalizing injury to a child did not require application of force as an element).

For these reasons, as the Seventh Circuit has explained, for an offense to constitute a "crime of violence" under § 16(a), the use of force must truly be an *element* of the offense, rather than being a mere possibility or even a probability inferred from the fact that the defendant caused injury. *See Flores*, 350 F.3d at 671-672. In *Flores*, the Seventh Circuit, per Judge Easterbrook, rejected the govern-

ment's claim that an Indiana battery conviction based on a state statute that defined battery as " 'knowingly or intentionally touch[ing] another person in a rude, insolent, or angry manner, . . . result[ing] in bodily injury to any another person,' " had use of force as an element such that it was a "crime of violence." *Id.* at 669 (quoting Ind. Code § 35-42-2-1). While acknowledging that "both touching and injury have a logical relation to the 'use of force,' " the Court emphasized that the State law "does not make intent to injure an element of the offense; intent to *touch* must be established, but not intent to injure." *Id.* at 671 (emphasis in original) ("It may well be that acts designed to injure deserve the appellation 'violent' because the intent makes an actual injury more likely; it does not follow that accidental hurts should be treated the same way."). The Court refused to equate touching with force because to do so "would make hash of the effort to distinguish ordinary crimes from violent ones." *Id.* at 672. Though Flores's acts "were on the 'force' side of this legal line," they did not constitute a "crime of violence" because "the elements of his *offense* are on the 'contact' side." *Id.* at 673 (emphasis in original).

This reasoning is equally applicable to the offense of Florida DUI. Conviction under that statute for causing injury or death is not contingent on force having been used. Instead, the statute provides, in relevant part:

> (3) Any person:
>
> (a) Who is in violation of subsection (1) [by driving or being "in actual control of a vehicle" while legally intoxicated];
>
> (b) Who operates a vehicle; and
>
> (c) Who, by reason of such operation, causes or contributes to causing:
>
> * * * *
>
> Serious bodily injury to another . . . commits a felony of the third degree

Fla. Stat. Ann. § 316.193(3).

Florida decisional law makes clear that the statute can be violated without any "use of force." Indeed, under Florida law, one can be convicted of DUI without even driving—having "control" of the vehicle suffices.[2]—and there is no *mens rea* requirement, the Florida Supreme Court having held that Florida DUI crimes are essentially strict liability offenses. *Hubbard*, 751 So. 2d at 556-557. As a result, for example, Florida DUI could apply in the following scenarios, none of which entails a use of force:

- An intoxicated person stops his car in harm's way, for example, alongside a highway median or opposite oncoming traffic. The stationary car is then struck by another vehicle, causing injury. *See, e.g.*, *Griffin* v. *State*, 457 So. 2d 1070, 1071 (Fla. Dist. Ct. App. 1984) (per curiam) (sufficient grounds exist to show actual physical control for purpose of DUI liability where car is parked in a lane of traffic facing the wrong direction, key is in the ignition, the lights are on, and defendant is stepping on the brake).
- An intoxicated person leaves his car in a place where a duty to move the car will eventually arise, for example, a lane whose traffic direction changes at rush hour. The driver neglects to move his car, and it is struck by another driver.
- An intoxicated driver swerves negligently onto (or towards) the sidewalk. A pedestrian sees the car swerving towards him, and, to avoid being struck, jumps away from the car. Although there is no contact with the car, the pedestrian falls and is "seriously injured" within the meaning of the Florida statute.

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[2] *See Baltrus*, 571 So. 2d 75 (defendant was in physical control of vehicle when found slumped over steering wheel, asleep in driver's seat, in a parking lot, with car's keys in his hand); *Mitchell* v. *State*, 538 So. 2d 106, 107 (Fla. Dist. Ct. App. 1989) (sleeping in parked car's driver's seat, slumped over steering wheel, with keys in the ignition and a hand on the wheel constitutes actual physical control).

- Same hypothetical as immediately above, except that the injured party is a driver of another car that has swerved to get out of the way of the car driven by the intoxicated driver.

The "causation of injury" element of Florida DUI thus cannot serve as a surrogate for the "use of force" required by § 16(a). This is so for a second, independent reason. As we note in Section II of this brief, the § 16(a) term "use of force" presupposes the "active employment" (i.e., intentional) use of such force. *See infra* pp. 14-17. But the injury-causation element of Florida DUI does not contain any requirement of intentional action, let alone intentional employment of force, and therefore cannot satisfy the requirements of § 16(a). *See Bazan-Reyes*, 256 F.3d at 609 ("Although a conviction for homicide by intoxicated use of a vehicle [under the Wisconsin statute] requires that the offender actually hit someone, it does not require that he intentionally used force to achieve that result."); *cf., e.g.*, *Chrzanoski*, 327 F.3d at 193-194 (distinguishing force and injury (citing *Dalton*, 257 F.3d at 202-203)).

II. AN OFFENSE IS NOT A "CRIME OF VIOLENCE" WITHIN THE MEANING OF § 16(a) UNLESS THE OFFENSE REQUIRES INTENTIONAL DEPLOYMENT OF FORCE, AN ELEMENT MISSING FROM FLORIDA DUI.

A. The Plain Language Of The Statutory Phrase "Use Of Force" Unambiguously Limits The Scope Of The "Crime Of Violence" Definition To Specific Intent Offenses.

In identifying the offenses that would be deemed "crimes of violence" under § 16(a), Congress extended the provision to offenses having as an element "the *use*, attempted *use*, or threatened *use* of physical force against the person or property of another" (emphasis added). This definition is drawn considerably more narrowly than it might have been. Rather than employ the "use" formulation, Congress might have included offenses where "force"—defined as "[p]ower, violence, or pressure directed against a person or thing," Black's Law Dictionary 656 (7th ed. 1999)—was

"present," or where physical force "caused injury." But the statutory language that Congress chose demands something more for an offense to be a "crime of violence": the "use" (or "attempted" or "threatened" use) of physical force. The plain meaning of this familiar phrase makes clear that the statute applies only where the defendant had a specific intent to bring physical force to bear. The inadvertent, unintended, or accidental deployment of force—which is the conduct covered by Florida DUI and comparable statutes in other states—is simply not a crime of violence under § 16(a)

This Court has previously had occasion to consider the construction of the statutory term "use." It has held that "[t]he word 'use' must be given its 'ordinary or natural' meaning, a meaning variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.' " *United States* v. *Bailey*, 516 U.S. 137, 145 (1995) (citations omitted).[3] Consistent with this, the Oxford English Dictionary defines "use" as "[t]he act of employing a thing for any . . . *purpose*; . . . utilization or employment for or with some *aim or purpose*, application or conversion *to some . . . end.*" 19 Oxford English Dictionary 350 (2d ed. 1989) (emphasis added), *quoted in Vargas-Duran*, 356 F.3d at 602. The "use of force" necessarily extends only to offenses where there was a specific intent to apply force. *See, e.g.*, *Rutherford*, 54 F.3d 370 ("In ordinary English, the word 'use' implies intentional availment.");

[3] In *Bailey*, this Court addressed 18 U.S.C. § 924(c)(1), which requires courts to impose certain penalties if a defendant "during and in relation to any crime of violence or drug trafficking crime . . ., uses or carries a firearm." The Court construed "use" to require active employment, and reversed two convictions because in each case, the evidence only proved that the defendant was in proximity to, and had access to, a firearm during the commission of a drug trafficking crime. 516 U.S. at 145 (noting that the "various definitions of 'use' imply action and implementation"). Indeed, Justice O'Connor, writing for a unanimous Court, specifically rejected the proposition that mere "storage," which of course could be accomplished through negligence, would constitute "use." *Id.* at 149.

Vargas-Duran, 356 F.3d at 603 ("[T]he plain meaning of the word 'use' requires intent.").

Efforts to avoid this ordinary and natural meaning, and to describe the unintended exertion of force as a "use" of force, lead inevitably to non sequiturs. As the Seventh Circuit has memorably observed:

> Force is exerted in many instances where it is not employed for any particular purpose. For example, earthquakes and avalanches involve the exertion of a tremendous amount of force. Such disasters, however, are freaks of nature; we can identify no intelligence or purpose behind them. Referring to a randomly occurring avalanche as a "use" would torture the English language.

Rutherford, 54 F.3d at 372-373.

It is equally torturous to apply the term "use" to accidental human conduct. A person who intentionally shoves another person has clearly "used" force—but the same simply cannot be said of a person who inadvertently stumbles into another person. Even if an equivalent level of force is involved in both cases, it is "used" only in the first instance. And nothing changes if the person who non-deliberately applies force is under the influence of alcohol—an inebriated person who shoves another on purpose "uses" force, while an inebriated person who trips and lands on another does not.

To be sure, the "use" of an automobile in a manner that causes injury may well involve "force" in many cases—often with tragic consequences. But it is wrong to equate the use of an automobile in a manner that *unintentionally* results in the application of force to a person or property with the "use of force" as the phrase is used in § 16(a) to define "crimes of violence." It would not be said of a sober person who accidentally drove into a tree that he "used force" against the tree, because although he intentionally availed himself of the automobile, he did not intentionally avail himself of the automobile's force to destroy the tree. A person driving under the influence of alcohol may be more irresponsible, but that fact does not transform the accidental result of his in-

tentional use of a car into an intentional use of force against the same tree.

All of these circumstances, of course, are to be distinguished from those occasions when people behind the wheel of a car *do* intentionally use force. Someone who deliberately runs another car off the road clearly "uses" or "attempts to use" force. But no matter how negligent or reckless an impaired driver is, there is no "use" of force when the same end occurs as part of an accident.

Section 16(a)'s inclusion of offenses involving attempted or threatened uses of force further demonstrates that "use" requires intent. Both attempts and threats require specific intent. *See Vargas-Duran*, 356 F.3d at 603; *Rutherford*, 54 F.3d at 373 (placement of threats and attempts alongside "use" evidenced that provision covered only intentional acts); Black's Law Dictionary 123 (7th ed. 1999) (defining "attempt" as the "act or an instance of making an effort to accomplish something"); *id.* at 1489 (defining "threat" as a "communicated intent to inflict harm or loss on another or on another's property"). The juxtaposition of "use," "attempted use," and "threatened use" indicates that the terms should be read as requiring a similar *mens rea*. *See Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps.").[4]

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[4] Requiring intent for attempted and threatened use of force, but not for use of force, would make § 16 nonsensical:

> [T]he word "use" must have an operative effect when left standing alone, or when modified by either "attempted" or "threatened." Both an attempt and a threat require intent. Were we to interpret "use of force" inconsistently with its plain meaning—that is, as capable of being performed without intent —we would effectively nullify the state of mind required by "attempted use" and "threatened use." For how could one intentionally attempt to unintentionally use force, or intentionally threaten to unintentionally use force?

Vargas-Duran, 356 F.3d at 603 (citation omitted).

B. The Legislative History Of 18 U.S.C. § 16(a) Confirms That Congress Intended The Crime Of Violence Designation To Apply Only To Intentional Offenses.

This Court has repeatedly reaffirmed that when the language of a statute is unambiguous, the Court will not look beyond the statutory language. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). In this case that analysis should suffice. But should the Court look to the legislative history, all the available indicators clearly support reading the statute as requiring a showing of intentional "use of force."

Section 16 was added to the U.S. Code as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-374, 98 Stat. 1976 ("CCCA"). The primary legislative history document associated with the CCCA is the Report of the Senate Judiciary Committee, S. Rep. No. 98-225 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 (the "CCCA Report"). The CCCA Report notes that although "crime of violence" was used "occasionally" in "present law," *id.* at 307, 1984 U.S.C.C.A.N. at 3487, it had not previously been defined formally in the United States Code. Crucially, the phrase "crime of violence" had already been introduced into the federal legal lexicon fourteen years earlier in Section 210 of the District of Columbia Court Reform and Criminal Procedural Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, 650 ("DC-CRCPA"). The DC-CRCPA, a comprehensive revision of the District of Columbia's criminal code, used the phrase "crime of violence" to designate the type of prior conviction that would empower a court to order pre-trial detention. Although the DC-CRCPA employed a categorical approach, it did not define "crime of violence" in general terms, but rather listed specific offenses that would be deemed "crimes of violence" for bail purposes.

The CCCA Report noted that offenses constituting "crimes of violence" in what is now § 16 were "essentially the same" as the offenses covered by the same phrase in the DC-CRCPA. *See* CCCA Report at 20-21, 1984 U.S.C.C.A.N.

at 3203. Accordingly one may look to the offenses categorized as "crimes of violence" in the DC-CRCPA to shed light on Congress's understandings concerning the scope of the term:

> [T]he term "crime of violence" means murder, forcible rape, carnal knowledge of a female under the age sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, or an attempt or conspiracy to commit any of the foregoing offenses . . . if the offense is punishable by imprisonment for more than one year.

DC-CRCPA, Pub. L. No. 91-358, § 210, 84 Stat. at 650. Significantly, each of these offenses requires intent. Perhaps most revealing is that Congress included voluntary manslaughter, which requires intent, but excluded involuntary manslaughter, which does not.

Furthermore, the definition enacted in the CCCA in 1984 employed language identical to that employed by earlier criminal law reform bills that had been pending in Congress throughout the early 1980s. The CCCA Report records that the Judiciary Committee had taken the definition from the previous year's attempt to reform the federal criminal code. *See* CCCA Report at 307, 1984 U.S.C.C.A.N. at 3486 ("The definition is taken from S. 1630."). Senate Resolution 1630, in turn, was considered in tandem with House Resolution 6915. The Committee report for House Resolution 6915 makes clear that Congress envisioned "crimes of violence" as crimes of specific intent: "The term 'physical force' refers to 'physical action' against another. 'Action,' a variant of the term 'act,' requires affirmative, volitional behavior." H.R. Rep. No. 96-6915, at 14 (1980). This commentary further indicates that the original drafters of the definition were thinking only of volitional acts.

* * *

It is clear from both the plain language of 18 U.S.C. § 16, as well as the available legislative history, that Congress intended only specific intent offenses to qualify as "crimes of violence."[5]

III. 18 U.S.C. § 16(b) Does Not Change The Result In This Case.

A. This Case Was Decided Below Based Purely On 18 U.S.C. § 16(a), And The Interpretation And Application Of § 16(b) Is Not Properly Before This Court.

Every decision below in this case—from that of the initial Immigration Judge, the BIA, and the Eleventh Circuit in its per curiam opinion—analyzed Petitioner's status solely with reference to § 16(a). The Eleventh Circuit's holding that Petitioner's offense was a "crime of violence" was explicitly and solely premised on that Court's prior decision in *Le* v. *Attorney General*, 196 F.3d 1352 (11th Cir. 1999). *See Leocal* v. *Attorney Gen.*, 02-14992, slip op. at 3 (11th Cir. June 30, 2003). *Le*, in turn, expressly declined to reach the issue of how Florida's DUI statute would be evaluated under § 16(b). *Le*, 196 F.3d at 1354 ("We need not address that

[5] The INA further demonstrates that Congress plainly recognized that DUI offenses in particular are *not* encompassed within § 16's definition of "crime of violence." In 1990, the same Congress that added § 16 to the aggravated felony definition carefully distinguished between § 16 and DUI involving injury. It did so in a provision that added a ground of inadmissibility limiting diplomatic immunity in cases involving a "serious criminal offense." *See* Pub. L. No. 101-246, 104 Stat. 15 (1990). That amendment defines serious criminal offense as "(1) any felony, (2) any crime of violence as defined in [18 U.S.C. § 16], or (3) any crime of reckless driving or of driving while intoxicated . . . if such crime involves personal injury to another." 8 U.S.C. § 1101(h). By separately designating reckless driving and DUI offense with injury in subparagraph (3) after already designating all § 16 "crime of violence" convictions in subparagraph (2), Congress clearly demonstrated that it did not think of DUI with injury as a crime of violence within § 16. Otherwise the separate delineation of that offense would have been wholly unnecessary.

argument [whether § 16(b) applied] here . . . .”). Nor has the Eleventh Circuit or any district court in that circuit yet considered the issue of whether Florida DUI falls within § 16(b). Because no court or other adjudicator has yet to pass on whether petitioner's offense satisfies the requirements of § 16(b), this Court—in the event it agrees that Florida DUI does not fall within § 16(a)—should not itself evaluate in the first instance whether Florida DUI is a “crime of violence” under § 16(b). Consideration by this Court should properly wait until there has been lower-court consideration of that issue. *E.g.*, *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 784 n.2 (1996) (declining to address issue not adjudicated in decision under review). Deferral is particularly advisable because the § 16(b) issue may turn on how courts of the state in question have construed or applied the particular criminal statute (here, Florida DUI) that could be considered to be a “crime of violence.”[6]

B. Should This Court Review The Application Of § 16(b) To The Florida DUI Statute, It Should Hold, With The Majority Of Circuits, That (i) Courts Must Employ A Categorical Analysis, And (ii) Only Offenses That Require *Mens Rea* Of Intent Are “Crimes Of Violence.”

1. Section 16(b)'s focus on the “nature” of the offense requires a categorical analysis.

In § 16(b), Congress provided that certain offenses might constitute “crimes of violence” by virtue of the “nature” of the offense. 18 U.S.C. § 16(b) (defining “crime of violence” as a felony that “by its nature, involves a substantial risk that physical force may be used in the course of committing the offense”). Because a court must decide

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[6] Notably, the United States has recognized that the case presented only issues under § 16(a). *See* Brief For Respondents In Opposition To Certiorari 7-8 (“This case presents *only* an application of Section 16(a). . . . The application of Section 16(b) to petitioner's Florida conviction is an issue that has not been addressed below and, accordingly, should not be reviewed by this Court.” (Emphasis in original)).

whether an offense by its nature involves a substantial risk that physical force may be used, courts have logically looked to the intrinsic nature of the offense rather than the factual circumstances surrounding a specific violation.[7] Under this approach, often referred to as the "categorical approach," courts focus on " 'the minimum criminal conduct necessary to sustain a conviction under a given statute.' " *Dalton* v. *Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (internal quotations omitted). This focus on the minimum conduct necessary to sustain a conviction is appropriate, because if any conduct that would sustain a conviction nonetheless would not meet the definition of "crime of violence," then it cannot be said that the offense "by its nature" comes within the definition. Either a crime is violent "by its nature," or it is not.

A useful illustration of this categorical analysis is supplied by the Second Circuit's decision in *Dalton*, which considered whether New York's Driving While Intoxicated ("DWI") statute, N.Y. Veh. & Traf. L. § 1192.3, "by its nature" involved the risk of the use of physical force. *See Dalton*, 257 F.3d at 205. Looking to state decisional law, the court noted that under the New York statute "a defendant can be found guilty of driving while intoxicated even if he or she is asleep at the wheel of a car whose engine is not running and . . . the vehicle never moved," *id.* (citing *People* v. *Marriott*, 325 N.Y.S.2d 177, 178 (App. Div. 1971)), or if the defendant did not know how to operate the vehicle, *id.* (citing *People* v. *Prescott*, 745 N.E.2d 1000 (N.Y. 2001)), or if the vehicle itself was completely inoperative, *id.* (citing *People* v. *David "W."*, 442 N.Y.S.2d 278 (App. Div. 1981)); *cf. supra*

[7] Every circuit to confront this issue has adopted the "categorical approach" outlined above. *See Omar* v. *INS*, 298 F.3d 710, 714 (8th Cir. 2002); *United States* v. *Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001); *Tapia-Garcia* v. *INS*, 237 F.3d 1216, 1221-1222 (10th Cir. 2001); *Ramsey* v. *INS*, 55 F.3d 580, 583 (11th Cir. 1995) (per curiam); *United States* v. *Winter*, 22 F.3d 15, 19 (1st Cir. 1994); *United States* v. *Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993); *United States* v. *Dunn*, 946 F.2d 615, 620 (9th Cir. 1991).

pp. 13-14 (discussing analogous Florida cases). The Second Circuit therefore concluded that it would be unreasonable to find that the New York statute by its nature entailed a substantial risk of the use of force, because the statute applied to conduct in circumstances that *precluded* the use of force. 257 F.3d at 205-206.

2. Like § 16(a), § 16(b) only applies to offenses with a *mens rea* of specific intent.

Section 16(b) establishes, *inter alia*, that an offense is not a "crime of violence" under that provision unless the offense, "by its nature, involves a substantial risk that physical force may be used." As we have noted, the word "use," as construed by this Court in line with its ordinary meaning, conveys intentional action. *See supra* pp. 14-17. For this reason, as the clear majority of circuits have held, an offense does not fall within § 16(b) unless, by its nature, there is a substantial likelihood that the violator will have acted intentionally in applying physical force to the person or property of another. *Dalton*, 257 F.3d at 206-207 ("[A] crime of violence must involve the *application* of force." (Emphasis in original)); *Bazan-Reyes* v. *INS*, 256 F.3d 600, 611 (7th Cir. 2001) (Section 16(b) "only applies when the nature of an offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force" (emphasis in original; internal quotations omitted)); *United States* v. *Chapa-Garza*, 243 F.3d 921, 925, 927 (5th Cir. 2001) (concluding that "ordinary meaning of the word 'use' " requires that § 16(b) only describes offenses where there is substantial likelihood of intentional use of force).

Congress's decision to define "crime of violence" must therefore be treated as deliberate. Congress could easily instead have focused not on the defendant's conduct, but on the risk of injury or harm, as it has in making other statutory classifications. Section 16(b)'s focus on the "*risk* that physical force *will be used*" thus compels a reviewing court to determine whether the offense in question presents a substantial risk that the defendant will *use force*, meaning intentionally. *See United States* v. *Lucio-Lucio*, 347 F.3d

1202, 1206 (10th Cir. 2003); *Dalton*, 257 F.3d at 206; *Bazan-Reyes*, 256 F.3d at 611; *Chapa-Garza*, 243 F.3d at 927.

Thus, for example, burglary of a home presents an example of a crime that may fit within § 16(b). Burglary of a home by its nature presents the risk of intentional use of force against a person. As this Court has explained, "[t]he fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate. And the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Taylor* v. *United States*, 495 U.S. 575, 588 (1990).

In sharp contrast, DUI does not carry the same inherent risk of *intentional* use of force. Accordingly, a number of courts to consider the application of § 16(b) to state DUI statutes have held that these statutes are not "crime[s] of violence" under § 16(b). This has been so both in cases where the statute at issue has contained an "injury causation" element, *see Bazan-Reyes*, 256 F.3d at 611, as well as in cases where it has not, *see Dalton*, 257 F.3d at 206-207; *Chapa-Garza*, 243 F.3d at 926-927. As these courts have recognized, while drunken driving entails a risk of injury-causing impact, and while this risk is clearly substantial in those cases where injury-causation is an element of the offense, that risk is distinct from the risk that the intoxicated driver will have *intentionally* initiated that contact. And where, as is most often the case, the DUI statute does not contain an element requiring that state of mind, it cannot be said that there is a substantial risk of intentional application of force. To the contrary, the essence of drunk driving is that, when it results in injuries, it does so not as a result of volitional steps, but as a result of impairment.

The Seventh Circuit's discussion of this point is particularly instructive. In *Bazan-Reyes*, the court vacated the deportation order of a petitioner convicted of Wisconsin Homicide by Intoxicated Use of a Vehicle. The court rejected the government's argument that "§ 16(b) covers all felonies that

involve a substantial risk of one object exerting force on another," and affirmed instead that § 16(b) was directed towards a defendant's conduct. 256 F.3d at 610. As the court explained, "[s]ection 16(b) is focused on the defendant's conduct *itself*, as there is no requirement that there be a substantial risk that another's person . . . will sustain injury, but only that . . . the defendant will *use* physical force . . . ." *Id.* (emphasis in original). To determine whether an offense is a violent crime based on the consequences of the offending conduct would mean that § 16(b) "would include many offenses that are not generally thought of as violent crimes." *Id.* This approach is consistent with that in other DUI cases. *See Dalton*, 257 F.3d at 206-207*; Chapa-Garza*, 243 F.3d at 926-927; *cf. United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, J.) (contrasting DUI with violent felonies, "which call[] to mind a tradition of crimes that involve the possibility of more closely related, active violence").

The few courts that have read § 16(b) to apply to drunk-driving statutes have focused on the wrong risk. For example, in *Tapia-Garcia* v. *INS*, the Tenth Circuit held that the Idaho drunk driving statute was a "crime of violence" because driving while intoxicated presented a "risk of injury." 237 F.3d 1216, 1222-1223 (10th Cir. 2001) (internal citations omitted). The Tenth Circuit subsequently disavowed the holding and logic of *Tapia-Garcia*. *Lucio-Lucio*, 347 F.3d at 1203-1204; *see also Dalton*, 257 F.3d at 208 n.9 (distinguishing *Tapia Garcia* because it confuses risk of injury with risk of the use of force).[8]

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[8] The Ninth Circuit committed a similar error in the non-DUI case of *Park* v. *INS*, 252 F.3d 1018, 1023-1024 (9th Cir. 2001), in which it held that a *mens rea* of recklessness was sufficient to satisfy § 16(b). That result is inconsistent with the natural construction of "use" adopted by this Court. Notably, in *United States* v. *Trinidad-Aquino*, the Ninth Circuit refused to extend its construction of § 16(b) to crimes of negligence (in that instance, California's DUI statute, Cal. Veh. Code § 23153). The court recognized that "use" contained a volitional element that placed negligence crimes outside of § 16(b)'s scope. 259 F.3d 1140, 1145 & n.2 (9th Cir. 2001) (citing several dictionary definitions).

The Eighth Circuit was similarly incorrect to hold that a purely non-volitional exertion of force may qualify as a "use."[9] *See United States* v. *Gonzalez-Lopez*, 335 F.3d 793, 797-798 (8th Cir. 2003) (concluding that "use" required only "action" with no specific *mens rea* element); *see also Omar* v. *INS*, 298 F.3d 710, 720 (8th Cir. 2002). In *Omar*, the Eighth Circuit concluded that Minnesota's Vehicular Homicide statute, Minn. Stat. § 609.21, was a "crime of violence" because "there are no circumstances where the offense of criminal vehicular homicide does not present a substantial risk that physical force *will injure another*." 298 F.3d at 718 (emphasis added). Again, the *Omar* court's conclusion is premised—explicitly in this instance—on the confusion of "use of force" with "causation of injury."

Several courts of appeals called upon to interpret 18 U.S.C. § 16(b) have found the Sentencing Commission's revision of U.S.S.G. § 4B1.1 instructive. U.S.S.G. § 4B1.1 enhances sentences for recidivist violent offenders. It defines a crime of violence as any offense punishable by more than one year of imprisonment that, *inter alia*, "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2). As these courts have noted, contrasting this broad language to the narrower "use of force" language in both provisions of § 16 highlights the importance of differentiating between the use of force and causation of harm. As the Fifth Circuit has put the point:

> Guideline 4B1.2(a)(2)'s otherwise clause concerns only the risk of one particular *effect* (physical injury to another's person or property) of the defendant's conduct. Section 16(b) is focused on the defendant's conduct *itself*, as there is no requirement that there be a substantial risk that another's person or prop-

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[9] *United States* v. *Santana-Garcia*, 211 F.3d 1271, 2000 WL 491510 (6th Cir. Apr. 18, 2000) (stating, without discussion, that DUI offense resulting in death was a "crime of violence"), does not explicitly address what, if any, *mens rea* is needed for an offense to be a "crime of violence."

> erty will sustain injury, but only that there be a substantial risk that the defendant will *use* physical force against another's person or property.

Chapa-Garza, 243 F.3d at 925 (emphasis in original); *see also Lucio-Lucio*, 347 F.3d at 1207 (refusing to "collapse the distinction between" § 16(b) and U.S.S.G. 4B1.2(a)(2)); *Jobson* v. *Ashcroft*, 326 F.3d 367, 373 n.5 (2d Cir. 2003); *In re Sweetser*, 22 I. & N. Dec. 709 (BIA 1999). The contrast between the two provisions makes clear that Congress could have focused the "crime of violence" inquiry on effects rather than conduct, had it wished. Congress's decision not to do so must be given weight.

Furthermore, the "use of force" expression that appears in both § 16(a) and § 16(b) must be given the identical construction. Thus, a determination that Florida DUI falls outside of the scope of § 16(a) on the ground that § 16(a) contains an intent requirement necessitates the conclusion that § 16(b)'s "use of force" formulation be given the same meaning. *See, e.g.*, *Bazan-Reyes*, 256 F.3d at 611 (determination that § 16(a)'s "use" means intentional availment "requires that the words 'may be used' in § 16(b) also contain an intent requirement").

IV. Any Lingering Ambiguity In The Language Of § 16(a) And § 16(b) Should Be Construed In Light Of The Rule Of Lenity.

As amici have explained above, the plain language of both § 16(a) and § 16(b) makes clear that the Florida statute at issue in this case lacks the critical provisions to fall with the definition of a crime of violence aggravated felony. But should the Court find any ambiguity in the language of the statute, any such ambiguity should be resolved to avoid the harsh effects of labeling an offense as a "crime of violence."

This Court is being asked to construe a criminal statute that also has serious consequences for immigration law. In both contexts, this Court has long followed a rule of lenity when it faces any statutory ambiguities. *Compare Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (reaffirming

rule of lenity in construing criminal statutes), *with INS* v. *St. Cyr*, 533 U.S. 289, (2001) (applying " 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.' " (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987))). As the Court has explained, "[w]e resolve the doubts in favor of that [more narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile." *Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) (internal quotation omitted).

In this case, the potential consequences could not be more severe. The INA metes out particularly harsh treatment for those whose convictions are classified as "aggravated felonies." Prior to deportation, these persons are subject to mandatory detention, 8 U.S.C. § 1226(c), without any individualized review of their dangerousness or risk of flight. *Demore* v. *Kim*, 538 U.S. 510, 531 (2003). While detained, they can pursue limited claims, such as claims that they are actually citizens. But they cannot seek cancellation of removal, which would permit an evaluation of the equities of their cases, 8 U.S.C. § 1229b(a), or asylum, *id.* § 1158(b)(2)(A)(ii). Once deported, they face a lifelong bar on returning to the United States. *Id.* § 1182(a)(9)(i). These extreme consequences require that Congress make its intent clear. Far from suggesting the intent to impose such consequences in this case, Congress chose words that make clear that the crime for Mr. Leocal was convicted should not be treated as a "crime of violence."

CONCLUSION

For the reasons set forth above, the judgment of the Eleventh Circuit should be reversed and the Order of Removal should be vacated.

Respectfully submitted,

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