VIOLENTLY POSSESSED: *JOHNSON* AS THE VEHICLE FOR LIMITING SENTENCING ENHANCEMENT UNDER THE ARMED CAREER CRIMINALS ACT

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INTRODUCTION

As a curative measure for indeterminacy in sentencing, legislatures, and particularly the United States Congress, have often imposed mandatory minimum sentencing, including sentence enhancement, for certain crimes.[1] At the federal level these sentencing regimes date back to the early days of the republic but have only gained significant attention over the past several decades.[2] There are currently nearly two-hundred federal offenses that come with mandatory minimum prison sentences (many of them added in the past couple of decades),[3] though not all are enforced to the same degree.[4] And many academics and practitioners have challenged the efficacy of such regimes.[5] Criticism of mandatory minimum sentencing regimes has become increasingly widespread.[6] For example, Justice Breyer, who served previously as United States Sentencing

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1. *See, e.g.*, SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1167 (9th ed. 2012).

2. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200 (1993).

3. *See* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 72 (2011).

4. *See* Schulhofer, *supra* note 2, at 201.

5. *See, e.g.*, *id.* at 220–21 (concluding that mandatory minimums often lead to excessive punishment without eliminating uncertainty, create the potential for abuse, and lower accountability in sentencing).

6. *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010) (noting that the belief that mandatory minimums "depriv[e] judges of the flexibility to tailor punishment . . . and can result in an unduly harsh sentence" has spread beyond the judiciary to the political branches).

Commissioner, has argued that statutory mandatory minimum sentencing hampers the determination of appropriate sentences and allows prosecutors to subvert the judicial role in the sentencing proces.[7] This view has also gained currency with the general public.[8]

The Armed Career Criminal Act (ACCA) of 1984 is an example of statutorily defined mandatory minimum sentences, imposing sentencing enhancements for firearm offenses committed by persons with a prior history of violent crime.[9] The ACCA allows for sentencing enhancement if a defendant has prior convictions meeting the statute's definition of a "violent felony."[10] Importantly, the ACCA contains a so-called "residual clause" providing that a prior conviction counts as a violent felony for purposes of sentencing enhancement if it "otherwise involves conduct that presents a serious potential risk of physical injury to another."[11]

As the Supreme Court found in 1990, the principal aim of the ACCA is to "supplement the States' law enforcement efforts against 'career' criminals."[12] The legislative rationale was that particular care needed to be taken with regard to repeat offenders, given evidence that such offenders were responsible for a "large percentage" of violent crimes.[13] The legislature's motivation was to "incapacitate" such criminals.[14]

Because of the complexity (or perhaps the opacity)[15] of the ACCA's residual clause, it has been the subject of a remarkable amount of litigation in the federal courts.[16] There is currently a circuit split over the question presented in *Johnson v. United States*,[17] namely

7. Hon. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180 (1999).

8. *See, e.g.,* Leon Neyfakh, *Can juries tame prosecutors gone wild?*, BOSTON GLOBE, Feb. 3, 2013, http://www.bostonglobe.com/ideas/2013/02/03/can-juries-tame-prosecutors-gone-wild-can-juries-tame-prosecutors-gone-wild/yAvVOZPmpm408lskfiMe3M/story.html.

9. *See* 18 U.S.C.A. § 924(e) (West 2014).

10. The three definitions of violent felony are discussed *infra* Part III.

11. 18 U.S.C.A. § 924(e)(2)(B)(ii).

12. Taylor v. United States, 495 U.S. 575, 581 (1990).

13. *See* H.R. REP. NO. 98-1073, at 1 (1984), *reprinted* in 1984 U.S.C.C.A.N. 3661.

14. *Id.* at 2.

15. *See* Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J. dissenting) (Justice Scalia has termed it the "Delphic residual clause").

16. *See* United States v. Miller, 721 F.3d 435, 437 (7th Cir. 2013) (remarking that "[p]erhaps no single statutory clause has ever received more frequent Supreme Court attention in such a short period of time or such a proliferation of lower court reaction").

17. No. 13-7120 (U.S. argued Nov. 5, 2014).

whether mere possession of a short-barreled shotgun is a violent felony under the ACCA.[18] Four circuits answer in the negative and two in the affirmative.[19] Thus, *Johnson* presents the Court not only an opportunity to resolve a circuit split but also to provide much needed clarity to its jurisprudence regarding the ACCA residual clause.

This commentary details the relevant facts and procedural history, including the Eighth Circuit's holding below, and overviews current ACCA residual clause jurisprudence. It then lays out the arguments advanced by both parties and analyzes these arguments in light of the governing law, concluding that the Court should reverse the Eighth Circuit and resolve the existing circuit split by interpreting the residual clause of the ACCA so as not to encompass mere possession offenses. This commentary offers a way for the Court to structure its holding narrowly to cover constructive possession cases only. Doing so will still allow application of ACCA sentence enhancements when appropriate.

I. FACTUAL AND PROCEDURAL BACKGROUND

The issue in *Johnson v. United States* centers squarely upon the ACCA residual clause: whether mere possession of short-barreled shotgun constitutes "conduct that presents a serious potential risk of physical injury to another."[20] From 2010 to 2012, the FBI investigated the Petitioner, Samuel Johnson, in connection with his involvement in several illicit activities.[21] During the investigation, Johnson divulged to undercover federal agents that he had manufactured explosives and displayed both an AK-47 assault rifle and a cache of ammunition in excess of one thousand rounds.[22] Later, Johnson was found in possession of several semi-automatic firearms; when arrested in April 2012, he admitted to possessing an AK-47 rifle and a .22 caliber semi-automatic rifle.[23]

18. *See* Brief for Petitioner at 42–47, Johnson v. United States, No. 13-7120 (U.S. Jun. 26, 2014) [hereinafter Brief for Petitioner].

19. The circuit split is discussed *infra* Part III.

20. 18 U.S.C.A. § 924(e)(2)(B)(ii) (West 2014).

21. *See* United States v. Johnson, 526 Fed. Appx. 708, 709 (8th Cir. 2013), *cert. granted* 134 S. Ct. 1871 (2014).

22. *Id.*

23. *Id.*

Subsequently, Johnson was charged with four counts of possession of a firearm by a convicted felon and two counts of possession of ammunition by a convicted felon, all violations of 18 U.S.C. § 922(g)(1).[24] While the penalty for such offenses is ordinarily a prison term not exceeding ten years,[25] Johnson faced a potential mandatory minimum sentence of fifteen years because he was also charged with being an armed career criminal in violation of 18 U.S.C. § 924(e), because of his three prior violent-felony convictions.[26]

A presentence investigation report (PSR) classified three of Johnson's prior convictions as "violent felonies" for purposes of establishing the requisite number of predicate offenses under the ACCA: a 1999 attempted simple robbery conviction; a 2007 simple robbery conviction; and a 2007 conviction for possession of a short-barreled shotgun during a drug sale.[27] Over Johnson's objection, the district court followed the recommendation of the PSR and found that Johnson was subject to sentence enhancement under the ACCA.[28] The basis for the third predicate offense for Johnson's classification as an "armed career criminal" was his conviction under a

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24. *See generally* Indictment, United States v. Johnson, No. 12-0104 (D. Minn. April 16, 2012) [hereinafter Indictment]. The statute prohibits, in relevant part, a person "who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year . . . to possess in or affecting commerce, any firearm or ammunition." 18 U.S.C.A. § 922(g)(1).

25. *See* 18 U.S.C.A. § 924(a)(2) ("[W]hoever knowingly violates [§ 922(g)] . . . shall be fined as provided in this title, imprisoned not more than ten years or both.").

26. *See generally* Indictment, *supra* note 24. The Indictment listed Johnson's five prior convictions, including convictions for felony theft, attempted simple robbery, simple robbery, possession of a short-barreled shotgun, and sale of a simulated controlled substance. *Id.* Under the ACCA, a person who violates § 922(g) and who also has three prior convictions for "violent felon[ies]" is subject to a punishment of a fine and a mandatory minimum prison sentence of fifteen years. 18 U.S.C.A. § 924(e) (defining a "violent felony" to be a "crime punishable by imprisonment for a term exceeding one year . . . [which] (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another").

27. *See* Johnson, 526 Fed. Appx. at 709.

28. *Id*. at 710. The district court made clear that its decision to classify Johnson as an armed career criminal, and therefore subject to an enhanced sentence, was mandated by Eighth Circuit precedent. During the sentencing hearing, the court observed:

> For whatever it's worth, and it's probably worth nothing, I think 180 months is too heavy of a sentence in this case. But I take an oath to follow the law as I see it and I've made my decision in that regard. But, as I say, I impose the sentence reluctantly because I think a sentence of half that or two-thirds of that would be more than sufficient.

Transcript of Sentence Hearing at 22, United States v. Johnson, No. 12-0104 (D. Minn. Sept. 5, 2012).

Minnesota statute prohibiting a person from "possess[ing] . . . [a] short-barreled shotgun."[29]

Johnson subsequently pleaded guilty to one count of being an armed career criminal in possession of a firearm in violation of § 922(g)(1).[30] Following his guilty plea, the remaining five counts were dismissed, and Johnson was given a prison sentence of fifteen years.[31] As part of the plea agreement, Johnson agreed to his designation as an armed career criminal, but he reserved the right to challenge the application of the ACCA.[32]

Significantly, the Eighth Circuit noted that the factual situation at issue in *Johnson* is indistinguishable from that in *United States v. Lillard*,[33] which dealt with the constructive possession of a short shotgun under a Nebraska statute comparable to the Minnesota statute.[34] Thus, the court held that mere possession of a short-barreled shotgun constitutes a violent felony for purposes of sentence enhancement under the ACCA.[35] Johnson petitioned for a writ of certiorari to the Supreme Court,[36] granted on April 21, 2014.[37] Johnson's case was argued on November 5, 2014 but the Court later reopened the case in January 2015, requesting further briefing and oral argument on the question of whether the ACCA is unconstitutionally vague.[38]

29. MINN. STAT. ANN. § 609.67(2) (West 2014). The statute provides that a violation is punishable by a prison term of five years or a fine of not more than $10,000 or both. *Id.* Johnson is only contesting the designation of this third offense as a violent felony; he is not challenging the classification of either attempted robbery or simple robbery as violent felonies. *See* Brief for Petitioner, *supra* note 18, at 4.

30. *See Johnson*, 526 Fed. Appx. at 709.

31. *Id.* at 710.

32. *Id.*

33. United States v. Lillard, 685 F.3d 773 (8th Cir. 2012), discussed *infra* Part II.

34. *Id.* at 776 n.3. The Nebraska statute in *Lillard* provided that "[a]ny person or persons who shall transport or possess any machine gun, short rifle, or short shotgun commits a Class IV felony." NEB. REV. STAT. ANN. § 28-1203(1) (West 2014).

35. *Johnson*, 526 Fed. Appx. at 711.

36. Brief of Petitioner in Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 8, Johnson v. United States, No. 13-7120 (U.S. Oct. 28, 2013).

37. Johnson v. United States, 134 S. Ct. 1871 (2014) (granting certiorari).

38. *See* Johnson v. United States, 135 S. Ct. 939 (2015) (directing parties to file briefs and rescheduling argument on the question of unconstitutional vagueness).

II. LEGAL BACKGROUND

A. The Statutory Language of § 924(e)

Under 18 U.S.C. § 924(e), there are three distinct ways in which a predicate offense, punishable by a prison term in excess of one year, can constitute a violent felony for purposes of sentencing enhancement.[39] First, a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another" is considered a violent felony.[40] Second, the statute explicitly lists burglary, arson, extortion, or the use of explosives as crimes meeting the definition of violent felony.[41] Finally, under the residual clause at issue here, any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" also qualifies as a violent felony.[42] Those persons convicted under § 922(g) and subject to § 924(e) recieve a minimum sentence of fifteen years.[43]

B. The Supreme Court's § 924(e) Residual Clause Jurisprudence

The Court has adopted a "categorical approach" to the residual clause, holding that a sentencing court must "look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[44] In applying this approach, the Court has further held that judicial inquiry should be restricted to the "least of [the] acts" required to constitute a violation of a statutory prohibition.[45]

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39. *See generally* 18 U.S.C.A. § 924(e) (West 2014).
40. *Id.* § 924(e)(2)(B)(i).
41. *See id.* § 924(e)(2)(B)(ii).
42. 18 U.S.C.A. § 924(e)(2)(B)(ii).
43. *Id.* § 924(e)(1).
44. Taylor v. United States, 495 U.S. 575, 600 (1990) (holding that a conviction for an offense requiring proof of all elements of burglary constituted burglary under the residual clause regardless of how the offense was labeled).
45. Johnson v. United States, 559 U.S. 133, 137 (2010). A more recent case, dealing with the Immigration and Naturalization Act rather than the ACCA, further explicated the categorical approach given in *Taylor* by requiring a "focus on the minimum conduct criminalized" under a state statute without resorting to "legal imagination." Moncrieffe v. Holder, 133 S. Ct. 1678, 1684–85 (2013).

In four prior cases, the Supreme Court has described this categorical approach as a test that "consider[s] whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision" by "ask[ing] whether the risk posed . . . is comparable to that posed by its closest analog among the enumerated offenses."[46] Risk is assessed in terms of "the possibility that an innocent person might appear while the crime is in progress."[47] Those offenses falling within the scope of the residual clause are those "similar" to the enumerated offenses in § 924(e)(2)(B)(ii).[48] An offense must be "roughly similar," in both kind and degree of risk.[49]

The Court has also adopted a "purposeful, violent, and aggressive" conduct test for determining whether an offense qualifies as a violent felony.[50] However, this test is not always necessary in a residual clause analysis.[51] In some cases, the analysis under this test folds into the "risk" inquiry because offenses that would fall within the class of "purposeful, violent, and aggressive" conduct would also be "those that present serious potential risks of physical injury to others."[52] In these cases, only a risk assessment is required because "risk levels provide a categorical and manageable standard."[53] In assessing risk, the question is that formulated in *James v. United States*, namely a comparison of risk to the closest analog in the enumerated offenses.[54] Nonetheless, the "purposeful, violent, and aggressive" conduct test remains appropriate for offenses with a required mental state of less than intentionality.[55]

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46. James v. United States, 550 U.S. 192, 202–03 (2007).

47. *Id*. at 203.

48. The enumerated offenses are burglary, arson, extortion, and the use of explosives. *See* 18 U.S.C.A. § 924(e)(2)(B)(ii). *See also* Begay v. United States, 553 U.S. 137, 143–44 (2008) (rejecting the claim that the word "otherwise" in the residual clause meant that the enumerated offenses in no way limited the scope of the residual clause).

49. *Begay*, 553 U.S. at 143–44.

50. *See id*. at 144–45 (recognizing that the enumerated crimes "all typically involve purposeful, 'violent,' and 'aggressive' conduct"). The Court has ruled that an offense which "amounts to a form of inaction [is] a far cry" from that conduct which would satisfy this test as a violent felony. Chambers v. United States, 555 U.S. 122, 128 (2009).

51. *See* Sykes v. United States, 131 S. Ct. 2267, 2275 (2011) (observing that the phrase from *Begay* "'purposeful, violent, and aggressive' has no precise textual link to the residual clause" and is "an addition to the statutory text").

52. *Id.*

53. *Id.* at 2275–76.

54. *Id*. at 2273 (quoting James v. United States, 550 U.S. 192, 203 (2007)).

55. *Id.* at 2276. Thus, *Sykes* did not overrule *Begay* or *Chambers*, but merely noted that the rules from those cases are not necessarily applicable in all cases dealing with the residual clause.

C. The Circuit Split on "Mere Possession" of Short-barreled Shotguns

Although the Supreme Court has not addressed whether possession of a short-barreled (or sawed-off) shotgun is a violent felony under § 924(e), several circuit courts of appeals, employing current residual clause jurisprudence, have. The Sixth,[56] Eleventh,[57] and Seventh[58] Circuits have all ruled that possession of a short-barreled shotgun is not a violent felony under § 924(e). The Fourth Circuit, in two unpublished opinions, has also answered that question negatively.[59]

The Sixth Circuit has held that mere possession of a sawed-off shotgun is not a violent felony for purposes of the ACCA because possession does not "fit well with the more active crimes" listed in § 924(e)(ii).[60] The Eleventh Circuit agreed, noting that while both short-barreled shotguns and explosives are treated equivalently under the National Firearms Act (NFA),[61] the ACCA includes only "use of explosives" in the enumerated offenses and does not include *possession* offenses.[62] The Eleventh Circuit therefore held that it would be incongruous to "classify *possessing* one type of NFA-outlawed weapon as a violent felony when the ACCA speaks only to the *use* of another."[63] The Seventh Circuit also held that mere possession of a short-barreled shotgun is not a violent felony because such possession, in terms of the risk, "is not in the same league as the risks presented by the offenses of burglary, arson, extortion, or crimes involving the use of explosives."[64] In so holding, the Seventh Circuit expressly rejected the approach adopted by the Eighth Circuit, discussed *infra*, by positing that the "latent risks inherent in . . .

56. United States v. Amos, 501 F.3d 525, 529 (6th Cir. 2007). The Sixth Circuit reached its decision in *Amos* prior to the Supreme Court's decision in *Begay*.

57. United States v. McGill, 618 F.3d 1273, 1277 (11th Cir. 2010).

58. United States v. Miller, 721 F.3d 435, 437 (7th Cir. 2013).

59. United States v. Ross, 416 Fed. Appx. 289, 290 (4th Cir. 2011); United States v. Haste, 292 Fed. Appx. 249, 250 (4th Cir. 2008).

60. *Amos*, 501 F.3d at 528.

61. National Firearms Act of 1934, June 26, 1934, ch. 757, 48 Stat. 1236, amended by the National Firearms Act Amendments of 1968, Pub. L. 90-618, Title II, Oct. 22, 1968, 82 Stat. 1227 (codified in scattered sections of 26 U.S.C.A. (West 2014)). Under the NFA, it is a criminal offense to possess a firearm made or transferred in violation of the NFA, *see* 26 U.S.C.A. § 5861(b)–(d) (West 2014), punishable by a fine of up to $10,000, a prison term of not more than ten years, or both, *see* 28 U.S.C.A. § 5871 (West 2014).

62. *McGill*, 618 F.3d at 1279.

63. *Id*.

64. United States v. Miller, 721 F.3d 435, 439–40 (7th Cir. 2013).

possessing a short-barreled shotgun" do not reach the level of risk inherent in those enumerated offenses because mere possession of a firearm requires an "extra step . . . to manifest" the risk of physical injury to another.[65]

In contrast, the First[66] and Eighth[67] Circuits have held that possession of a short-barreled shotgun is a violent felony under § 924(e). Underlying the Eighth Circuit's conclusion was the "inheren[t] dange[r] and lack [of] usefulness except for violent and criminal purposes" of short-barreled shotguns.[68] The court reasoned that because short-barreled shotguns have no lawful purpose, possession of such a firearm "creates a serious potential risk of physical injury to others" and is thus similar in kind to the enumerated offenses in § 924(e).[69] With *Johnson*, the Eighth Circuit reaffirmed its prior holdings, noting that the situation at issue here is not materially different from that in *United States v. Lillard*, where the court held that mere possession of a short-barreled shotgun constitutes a violent felony.[70]

D. Void-for-Vagueness Doctrine

It is well-established as a matter of criminal constitutional law that a penal statute violates due process if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[71]

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65. *Id.* at 443. *Miller* is therefore consistent with the holding of *United States v. Archer*, 531 F.3d 1347, 1349 (11th Cir. 2008) (concealed carry of a weapon is not a violent felony).

66. United States v. Bishop, 453 F.3d 30, 31 (1st Cir. 2006); United States v. Fortes, 141 F.3d 1, 8 (1st Cir. 1998). Both of the First Circuit cases predate the Supreme Court's decision in *Begay*. Interestingly enough, however, the First Circuit initially held, prior to *Fortes*, that possession of a *firearm* by a felon was not a violent felony under the ACCA in an opinion authored by then-Chief Judge Breyer. *See* United States v. Doe, 960 F.2d 221, 222 (1st Cir. 1992).

67. United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012), *cert. denied* 133 S. Ct. 1242 (2013); United States v. Vincent, 575 F.3d 820, 826–27 (8th Cir. 2009), *cert. denied* 560 U.S. 927 (2010).

68. *Vincent*, 575 F.3d at 825 (quoting United States v. Childs, 403 F.3d 970, 971 (8th Cir. 2005)). Similarly, *Lillard* embraced the conclusion that "[s]hort shotguns are inherently dangerous because they are not useful" for lawful purposes. *Lillard*, 658 F.3d at 776.

69. *Vincent*, 575 F.3d at 825–26. The dissent in *Vincent* took issue with this conclusion, stating that "simple possession of a sawed-off shotgun itself does not involve violent and aggressive conduct in the manner of burglary, arson, extortion, or criminal use of explosives" and to hold otherwise "risks expanding the ACCA's residual clause to include any crime that has a hypothetical connection to violence." *Id*. 575 F.3d at 831 (Gruender, J., dissenting).

70. United States v. Johnson, 526 Fed. Appx. 708, 711 (8th Cir. 2013).

71. Connelly v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). This principle, commonly

The rationale for this rule is two-fold: it ensures that the public is provided with actual notice as to what conduct is criminally proscribed and it prevents arbitrary enforcement of the criminal laws.[72] Under this doctrine, the analysis goes "not [to] the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved . . . but rather [to] the indeterminacy of precisely what that fact is."[73] A criminal statute fails the notice purpose when it fails to delineate unlawful criminal conduct from lawful acts or does not provide objective criteria for making such a determination.[74] A criminal statute fails the non-arbitrary enforcement purpose if it "vests virtually complete discretion" in law enforcement for deciding if a criminal suspect has engaged in criminal behavior.[75]

A facial challenge that a law is unconstitutionally vague must allege that *all* applications of that law are invalid; and a court will uphold such a challenge if the law "reaches a substantial amount of constitutionally protected conduct."[76] However, a court ruling on a vagueness challenge must first determine whether there is a reasonable saving construction of the statutory language.[77] In as applied challenges, however, because the standard of certainty for criminal statutes is relatively high, such a law may fail on vagueness grounds even if it is possible there may be some valid application of the law.[78]

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referred to as "void-for-vagueness" doctrine, is not without its critics. A popular criminal law casebook, with all the irony it can muster, notes that "[t]he case law that determines when statutes are too vague is itself exceedingly vague." KADISH ET AL., *supra* note 1 at 185. *Cf.* Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J. dissenting) ("[I]ndefiniteness' is not a quantitative concept. . . . It is itself an indefinite concept."); John Calvin Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) ("The difficulty is that there is no yardstick of impermissible indeterminacy.").

72. Kolender v. Lawson, 461 U.S. 352, 358 (1983). Of these two purposes, the prevention of arbitrary enforcement predominates. *See id.*

73. United States v. Williams, 553 U.S. 285, 306 (2008).

74. *See* Gonzales v. Carhart, 550 U.S. 124, 149 (2007).

75. *Kolendar*, 461 U.S. at 358.

76. Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 494 (1982).

77. Skilling v. United States, 561 U.S. 358, 405 (2010) (citations omitted).

78. *Kolender*, 461 U.S. at 358 n.8.

III. ARGUMENTS

A. Johnson's Arguments

Johnson first argues that mere possession of a short-barreled shotgun cannot constitute a violent felony for purposes of the ACCA because mere possession differs in kind from the enumerated offenses listed in § 924(e)(ii).[79] He contends that possession of a short-barreled shotgun is a strict-liability offense under Minnesota law involving no purposeful, violent or aggressive conduct.[80] Additionally, possession is not even illegal in a majority of states whereas the enumerated offenses listed in the ACCA are universally regarded as unlawful.[81]

Johnson notes that under the Court's existing jurisprudence, it is imperative to read the residual clause in conjunction with the enumerated offenses. Ignoring those offenses would lead to an inclusion of *additional* predicate offenses too dissimilar to the enumerated offenses to justify their classification as violent felonies.[82]

Johnson argues that the purpose of the ACCA was designed to create national uniformity with respect to sentence enhancement for violent criminals.[83] As the Court has previously noted, the legislative intent behind the ACCA was to "supplement the States' law enforcement efforts against 'career' criminals."[84] Within this overarching goal, Congress sought to focus only upon the most serious offenses and to ignore other, lesser offenses.[85]

Next, Johnson argues that, under the various tests put forth in the residual clause jurisprudence, mere possession of a short-barreled shotgun cannot be a violent felony.[86] Under the "similar in kind" test,[87] Johnson argues that such a possession offense is markedly different

79. Brief for Petitioner, *supra* note 18, at 16.
80. *Id.* at 7.
81. *Id.*
82. *Id.* at 15 (quoting Begay v. United States, 553 U.S. 137, 141–42 (2008)).
83. *Id.* at 11; *cf.* Taylor v. United States, 495 U.S. 575, 590 (1990) (stating that there is no "indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness . . . regardless of technical definitions and labels under state law").
84. *Taylor*, 495 U.S. at 581.
85. Brief for Petitioner, *supra* note 18, at 12. According to Johnson, it makes sense that the legislative history does not suggest legislative intent to include mere possession of either explosives or firearms in the predicate offenses for purposes of sentence enhancement. *See id*. at 13.
86. *Id.* at 15.
87. *See Begay*, 553 U.S. at 143.

from the enumerated offenses in that it is an offense merely of possession and requires no proof of additional elements.[88] Possession is "passive," unlike the enumerated offenses which "all involve active felonies."[89] A focus on the minimum conduct required for an offense necessitates that the appropriate comparative analysis is between the enumerated offenses and only the "basic passive elements of mere possession . . . and not some imagined use."[90] This is of particular salience in cases dealing with possession of a weapon, Johnson argues, because in many cases, the weapon is never exposed to another person.[91]

Simply put, "mere possession of a weapon doesn't have to involve any risk," whereas those activities involving a weapon that "go beyond . . . mere possession" have a high level of risk.[92] Furthermore, Johnson argues, possession of a short-barreled shotgun is widely legal under state law and is, subject to registration, allowed under federal law as well; in contrast, enumerated offenses are universally proscribed.[93] In only a small minority of states, Johnson asserts, is possession of short-barreled shotguns prohibited outright.[94]

As to whether a mere possession offense meets *Begay*'s "purposeful, violent, and aggressive" test, Johnson argues that "additional steps are required to convert simple possession into an act that uses violence."[95] Thus, in a case dealing with mere possession, the "purposeful, violent, and aggressive" test is not subsumed into the risk analysis.[96]

Johnson further argues that the closest analog, among the enumerated offenses, to mere possession of a short-barreled shotgun is the use of explosives; although the former only entails passive possession, the latter "necessarily entails an active employment of a

88. Brief for Petitioner, *supra* note 18, at 19. As the Court held in *Taylor*, the focus of an ACCA analysis is on the "elements of the statute of conviction, not to the facts of each defendant's conduct." *Taylor*, 495 U.S. at 601.

89. Brief for Petitioner, *supra* note 18, at 20, 22.

90. *Id.* at 20.

91. *Id.* at 21 (quoting United States v. Miller, 721 F.3d 435, 439 (7th Cir. 2013)).

92. *Miller*, 721 F.3d at 440.

93. Brief for Petitioner, *supra* note 18, at 25–26 (noting that the National Firearms Act does not outright proscribe possession of short-barreled shotguns, though it does provide for strict regulation of such firearms).

94. *Id.* at 28.

95. *Id.* at 29.

96. *Id.* at 30.

dangerous item."[97] The risk entailed with mere possession, Johnson argues, is relatively low because there is no requirement for use of the firearm, particularly given that, under the right circumstances, possession is lawful and available statistics do not show mere possession to be more risky.[98]

B. The Government's Arguments

The Government begins by arguing that this case is properly framed as dealing with *illegal possession* of a short-barreled shotgun, not mere possession more generally.[99] Viewing the question in this manner, the Government argues, makes it clear that such possession constitutes a violent felony under the ACCA because it presents a heightened risk of serious physical injury to another person.[100] A person who unlawfully possesses a short-barreled shotgun is one who is "likely to engage in serious, dangerous crimes with the weapon,"[101] and possession of such a weapon during the commission of a serious crime increases the risk of serious physical harm.[102]

To buttress this argument, the Government argues that the ordinary case of possession of a short-barreled shotgun is in connection with the commission of serious crime,[103] in part relying upon dicta in *District of Columbia v. Heller*,[104] which implied that possession of a short-barreled shotgun is typically dissociated from law-abiding behavior. The Government notes that while all shotguns, regardless of the length of the barrel, can cause "catastrophic injury," the particular danger inherent with a short-barrel shotgun is especially acute because such a weapon is easily concealed and "maneuver[able] in tight confines."[105] Shotguns with short or shortened barrels, the Government claims, are not designed for lawful uses such as self-defense or hunting or skeet shooting.[106] Instead,

97. *Id.* at 39.
98. *Id*. at 37, 39.
99. Brief for Respondent at 15, Johnson v. United States, No. 13-7120 (U.S. Feb. 28, 2014) [hereinafter Brief for Respondent].
100. *Id.* at 17.
101. *Id.* at 18.
102. *Id.* at 31.
103. *Id*. at 18.
104. 554 U.S. 570, 625 (2008) (explicitly excluding short-barreled shotguns from those firearms "typically possessed by law-abiding citizens for lawful purposes").
105. Brief for Respondent, *supra* note 99, at 18–19.
106. *Id.* at 20 (citing *Heller*, 554 U.S. at 624–25; United States v. Upton, 512 F.3d 394, 404

short-barreled shotguns are in the same "quasi-suspect" class as grenades or machineguns,[107] because they are designed for "indiscriminate murder, maiming, and intimidation."[108] As such, the Government embraces the Eighth Circuit's prior holdings that such weapons present an "inherent[] danger[] and lack usefulness except for violent and criminal purposes."[109]

To rebut Johnson's claim that possession of a short-barreled shotgun is lawful in some circumstances and thus cannot be a violent felony,[110] the Government contends that the ordinary state-law case of *unlawful possession* is highly unlikely to involve a possessor who abides with federal firearms regulations; therefore, for analysis of the ordinary case, lawful possession of short-barreled shotguns must be ignored.[111]

The Government cites empirical evidence supporting the view that "short-barreled shotguns are primarily weapons of crime."[112] Although admitting Johnson may be correct that, statistically, handguns are used in more crimes than short-barreled shotguns, the Government contends that the comparison is inapt principally because it has long been recognized that handguns have a lawful use, whereas short-barreled shotguns do not.[113] In this respect, the Government emphasizes that cases of unlawful possession of short-barreled shotguns indicate that the "typical offender . . . [is] a violent

(7th Cir. 2008)).

107. Staples v. United States, 511 U.S. 600, 611–12 (1994).

108. Brief for Respondent, *supra* note 99, at 21 (also noting that a "substantial number" of the cases of lawful possession of short-barreled shotguns are due to use in law enforcement or military contexts).

109. *Id*. at 20 (quoting United States v. Vincent, 575 F.3d 820, 825 (8th Cir. 2009) (internal quotation marks omitted)). The Government also argues that other legislation, such as the National Firearms Act, demonstrates a longstanding view of Congres that short-barreled shotguns have no inherent lawful use for private citizens. *Id.* at 22. In particular, the Government notes that it was precisely this concern that underpinned the Minnesota statute prohibiting possession of a short-barreled shotgun under which Johnson was convicted. *Id.* at 24 (quoting State v. Ellenberger, 543 N.W.2d 673, 676 (Minn. Ct. App. 1996)).

110. *See supra* Part IV.A.

111. Brief for Respondent, *supra* note 99, at 25. Relying upon the dicta of *Heller*, the Government concludes that it is incontrovertible that "short-barreled shotguns possessed *unlawfully* are typically possessed in connection with other unlawful activity." *Id.* Further, as the Government sees it, the regulatory regime set up by Congress for allowing possession of registered short-barreled shotguns merely provides a way to minimize the risk of criminal use of a short-barreled shotgun rather than demonstrating that possession of short-barreled shotguns is not inherently dangerous. *Id.* at 28.

112. *Id.* at 22.

113. *Id*. at 29.

felon" who intends to use the weapon in a violent crime.[114] Compounding this with the fact that such firearms are extremely powerful, easily concealed, and easy to control, possession of short-barreled shotguns dramatically increases the risk of physical injury to others.[115] Short-barreled shotguns thus pose a "unique danger," evidenced by their use in many of high-profile crimes of mass violence.[116]

The Government argues that possession of a short-barreled shotgun presents risks similar in kind as those presented by the enumerated offenses of § 924(e) because such possession evinces "a lack of concern for the safety of others,"[117] increases the danger of violence, and "conveys an implicit threat of violence."[118] These risks are apparent in the ordinary case of illegal possession, which, given *James v. United States*,[119] confines the range of analysis for determining whether such conviction is a violent felony.[120]

The Government also takes issue with the contention that a categorical approach to § 924(e) necessarily excludes possessory offenses from the ambit of violent felonies; the Government instead argues that the "principal thrust" of the residual clause analysis asks what additional conduct may occur simultaneous to the offense.[121] Thus, the Government rejects the contention that the "least of the acts" analysis applies to the residual clause.[122] Further, the Government argues that possession of a short-barreled shotgun is similar in risk to the use of explosives because the former is inherently dangerous and because possession of explosives can be legal even though the use of them may not.[123]

Finally, the Government notes that, under applicable Minnesota precedent, illegal possession of a short-barreled shotgun is not a strict liability offense.[124] Rather, the Minnesota statute requires a defendant

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114. *Id.* at 31.
115. *Id*. at 32–34.
116. *Id.* at 34.
117. Sykes v. United States, 131 S. Ct. 2267, 2269 (2011).
118. Brief for Respondent, *supra* note 99, at 39.
119. 550 U.S. 192 (2007).
120. *See id.* at 39–40 (quoting *James*, 550 U.S. at 204).
121. *Id.* at 43.
122. *See id.* at 44 (citing *James*, 550 U.S. at 207–09, for the proposition that an inquiry into risk turns on the ordinary case of the commission of the offense).
123. *Id.* at 47–48.
124. *See id.* at 49–50 (explaining that the "purposeful, violent, and aggressive" test only

to "knowingly possess[]" a weapon to be convicted;[125] thus, there is no need, under *Sykes v. United States*, to determine whether or not mere possession includes purposeful, violent, and aggressive conduct.[126] The Government concludes that one who engages in the act of arming oneself with a short-barreled shotgun is engaged in the same sort of dangerous behavior as one who commits one of the enumerated offenses.[127]

IV. ANALYSIS: DETERMINING THE PROPER SCOPE OF "VIOLENT FELONY"

Central to the question of the scope of violent felony is the meaning of the term "conduct."[128] Statutory construction begins with application of the "ordinary meaning" canon: where statutory language is unambiguous, that language should be interpreted according to the words themselves unless such application leads to absurd results.[129] The term "conduct" means the "action or manner of conducting, directing, managing, or carrying on (any business, performance, process, course, etc.); direction, management."[130] In contrast, "possession," or the "exercise of dominion or control,"[131] has been defined by the Supreme Court to include both actual possession and constructive possession.[132] While a showing of actual possession

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applies to offenses which do not require a mens rea element).

125. *Id.* at 50–51 (quoting State v. Salyers, 842 N.W.2d 28, 34–35 (Minn. Ct. App. 2014)).

126. *See Sykes*, 131 S. Ct. at 2275–76.

127. Brief for Respondent, *supra* note 99, at 53–54.

128. *See* 18 U.S.C.A. § 924(e)(2)(B)(ii) (West 2014) ("'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . [which] involves *conduct* that presents a serious potential risk of physical injury to another person" (emphasis added)).

129. *E.g.*, United States v. Missouri Pac. R.R. Co., 278 U.S. 269, 278 (1929). Two commentators refer to the ordinary-meaning rule as the "most fundamental semantic rule of interpretation." ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012).

130. 3 OXFORD ENGLISH DICTIONARY 690 (2d ed. 1989); *cf.* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 274 (1988) (defining conduct as "the act, manner, or process of carrying on" or the "mode or standard of personal behavior"); BLACK'S LAW DICTIONARY 336 (9th ed. 2009) (stating that conduct is "[p]ersonal behavior, whether by action or inaction; the manner in which a person behaves"). This meaning has persisted for a considerable time. *See* 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 44 (1828) (defining the term as "personal behavior; course of actions" and noting that, at the time, conduct, by itself, denoted the "idea of behavior or course of life or manners").

131. BLACK'S LAW DICTIONARY, *supra* note 130, at 1281.

132. *See* Nat'l Safe Deposit Co. v. Stead, 232 U.S. 58, 67 (1914) (noting that "both in common speech and in legal terminology, there is no word more ambiguous in its meaning than possession" because the term "is interchangeably used to describe actual possession and

may necessitate proof of some sort of "directing, managing, or carrying on," constructive possession, as a legal construct, requires no demonstration of conduct.[133] This is particularly true for the Minnesota statute Johnson was convicted under: there was no requirement that actual, physical custody of the shotgun be demonstrated to convict.[134] In fact, as the Eighth Circuit below noted, the factual record here is not distinguishable from that in *United States v. Lillard*, which dealt with a conviction under a Nebraska statute prohibiting constructive possession of a "short shotgun."[135]

Thus, under the ordinary meaning of the term, constructive possession would not fall within the scope of "conduct" because it does not entail any "action or manner of . . . directing, managing or carrying on."[136] The Court's prior rulings on the residual clause in no way distract from the plain meaning of the clause because those cases dealt only with offenses involving conduct.[137]

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constructive possession which often so shade into one another that it is difficult to say where one ends and the other begins").

133. *See* BLACK'S LAW DICTIONARY, *supra* note 130, at 1282 (defining constructive possession as "[c]ontrol or dominion over a property without actual possession or custody"); *see also* 22 C.J.S. *Criminal Law* § 45 (2006) (stating that constructive possession is knowledge of the object possessed along with an "ability to maintain control over it or reduce it to . . . physical possession") (citation omitted); WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 224 (2d ed. 2010) (stating that constructive possession is "often described in terms of dominion and control" or even more generally used to describe "circumstances in which the defendant had the ability to reduce an object to his control"); WILLIAM L. CLARK JR., HANDBOOK OF CRIMINAL LAW 323–24 (William E. Mickell, ed., 3d ed. West Publishing Co. 1915) (differentiating actual from constructive possession). This is the definition courts have adopted for constructive possession in the context of criminal law. *See, e.g.*, Aqua Log, Inc. v. Georgia, 594 F.3d 1330, 1336–37 (11th Cir. 2010).

134. *See generally* MINN. STAT. ANN. § 609.67(2) (West 2014).

135. United States v. Lillard, 685 F.3d 773, 776 n.3 (8th Cir. 2012).

136. Interestingly enough, Johnson does not flesh out this plain meaning argument, though he does reference the "plain meaning of the term 'violent felony.'" Brief for Petitioner, *supra* note 18, at 42. The plain meaning of the term "conduct" plays a central role in one of the *amici* arguments, however. *See* Brief *Amicus Curiae* of Gun Owners of America, Inc. et al. at 7–9, Johnson v. United States, No. 13-7120 (U.S. Jul. 3, 2014) (arguing that Johnson's conviction was based upon constructive possession, not requiring showing of actual custody, and thus not based upon any proof of conduct on part of Johnson) [hereinafter Brief *Amicus Curiae* of Gun Owners of America]. The Government addressed this argument, arguing that the meaning of conduct must encompass both actual and constructive possession because "[p]ossession requires action to exercise dominion over an object, either actually or constructively, such as by exercising exclusive control over the area where the object is located." Brief for Respondent, *supra* note 99, at 46 n.21 (citing State v. Denison, 607 N.W.2d 796, 799–800 (Minn. Ct. App. 2000)).

137. *See* Sykes v. United States, 131 S. Ct. 2267 (2011) (vehicular flight); Chambers v. United States, 555 U.S. 122 (2009) (fleeing officer); Begay v. United States, 553 U.S. 137 (2008) (DUI); James v. United States, 550 U.S. 192, 192 (2007) (attempted burglary). Because all of

Of course, statutory interpretation does not end with the plain meaning divorced from context; rather, in determining the meaning of statutory language, the Court must examine not only the particular language at issue but also the "language and design of the statute as a whole."[138] Tellingly, one of the enumerated offenses, the use of explosives, expressly limits its scope to use, not to possession.[139] The fact that only *use* of explosives is included in the definition of violent felony forecloses the possibility that mere *possession* of explosives would also meet that definition.[140] By extension, therefore, it would be illogical to view the statutory language of the residual clause as including as a violent felony constructive possession of a short-barreled shotgun when, arguably, explosives are inherently more dangerous than a firearm. This is so because the latter normally requires some additional action to create a risk of physical harm while the former does not.

Further, as one appellate court has reasoned, all of the enumerated offenses "manifest affirmative, overt and active conduct" with respect to the serious risk of potential physical harm they present to another "beyond the mere possession of a weapon."[141] The Court's residual clause jurisprudence bears this point out. As the Court ruled in *Begay v. United States*, all four of the enumerated offenses "typically involve purposeful, 'violent,' and 'aggressive' conduct."[142] Therefore, the Court's precedent supports the conclusion that, read contextually, the residual clause does not encompass offenses of mere possession because these offenses lack an element requiring an "act, manner, or process of carrying on."[143]

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these cases dealt with conduct, the Court's approach in *Sykes*, focusing on the risk analysis, does not do away with the statutory requirement that, for a predicate offense to constitute a violent felony under the ACCA, it must involve conduct.

138. K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (citations omitted); *cf.* United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs, Ltd, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."). This rule is sometimes referred to as the "whole-text" canon.

139. *See* 18 U.S.C.A § 924(e)(2)(B)(ii) (West 2014).

140. This is precisely the reasoning adopted by the Sixth Circuit in *United States v. Flores*, 477 F.3d 431, 436 (6th Cir. 2007).

141. United States v. Oliver, 20 F.3d 415, 418 (11th Cir. 1994).

142. *Begay*, 553 U.S. at 144–45; *see also Chambers*, 555 U.S. at 128 (stating that a "crime amount[ing] to a form of inaction [is] a far cry from the "purposeful, 'violent,' and 'aggressive' conduct potentially at issue" with respect to the enumerated offenses) (citation omitted).

143. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 274 (1988).

This construction of the statute is reinforced by application of the rule against superfluous construction, a canon holding that "a statute should be construed so that effect is given to all its provisions" rendering "no part [to] be inoperative or superfluous."[144] Application of this canon suggests that mere possession could not be within the confines of § 924(e). A contrary reading would render the term "use" superfluous in the phrase "use of explosives," one of the enumerated offenses.[145] The fact that the residual clause hinges on the phrase "involves conduct," by negative implication, would foreclose offenses *not based on conduct* from falling within the purview of the residual clause. Furthermore, the Government all but concedes that the residual clause cannot encompass mere possession offenses when it acknowledges that "the elements required to complete the offense of possession of a short-barreled shotgun do not *necessitate* a risk of physical injury."[146]

In terms of the risk analysis performed under the residual clause, comparison should be made between the offense at issue and its closest analog among the enumerated offenses.[147] While the *use* of explosives is undeniably risky, the mere possession of a short-barreled shotgun is "not in the same league."[148] Though statistics can be useful in informing the Court's analysis of the residual clause, they are by no

144. Clark v. Rameker, 134 S. Ct. 2242, 2248 (2014) (quoting Corley v. United States, 556 U.S. 303, 314 (2009)) (internal quotation marks omitted). Some refer to this rule of statutory construction as the "surplusage canon." *See* SCALIA & GARNER, *supra* note 129, at 174 (stating "[i]f possible, every word and every provision is to be given effect").

145. Such reasoning follows the Court's analysis of neighboring provisions of the ACCA, in which the Court construed "use" of a firearm as "requir[ing] evidence sufficient to show an *active employment* of the firearm" and that, therefore, the term "must connote more than mere possession." Bailey v. United States, 516 U.S. 137, 143 (1995), *superseded by statute*, An Act to throttle criminal use of guns, Pub. L. 105–386, 112 Stat. 3469, *as recognized in* Abbott v. United States, 562 U.S. 8 (2010). The fact that Congress responded to *Bailey* by amending 18 U.S.C.A. § 924(c) to include mere possession is proof Congress understands that if it intends to regulate the possession of firearms under the ACCA, it must incorporate explicit language to that effect. Because Congress included possession of a firearm in § 924(c) but continues not to do so in § 924(e) is further evidence that § 924(e) does not cover possession offenses.

146. Brief for Respondent, *supra* note 99, at 43.

147. *E.g.*, Sykes v. United States, 131 S. Ct. 2267, 2273 (2011) (comparing vehicular flight to the enumerated offense of burglary because both crimes may lead to violent confrontation).

148. United States v. Miller, 721 F.3d 435, 440 (7th Cir. 2013). As *amici* Gun Owners et al. perceptively, yet drolly, point out, "[a] short-barreled shotgun sitting in the corner is not inherently more dangerous than a short-barreled shotgun sitting in the corner with an ATF tax stamp lying next to it." Brief *Amicus Curiae* of Gun Owners of America, *supra* note 136, at 15 n.8.

means "dispositive."[149] Given the fundamental difference between "use" and "mere possession," it follows that "*possess*[*ion of*] one type of [National Firearms Act] outlawed weapon" cannot constitute a violent felony.[150]

If the Court is concerned about construing the residual clause too narrowly, it should restrict its holding to constructive possession and leave for another day a decision on whether certain cases of actual possession fall within the scope of conduct offenses which satisfy the requirements of the residual clause. This holding would be consistent with the prior Supreme Court decisions requiring the scope of the residual clause to be informed by the enumerated offenses, all of which the Court has characterized as "conduct," an element lacking from the concept of constructive possession.[151] Because this interpretation derives from the correct construction of the statutory text, the Court ought to hold that an offense requiring nothing more than constructive possession does not constitute a violent felony under the residual clause of the ACCA.

Finally, a holding focused upon the plain meaning of the statutory language would allow the Court to resolve the case in such a way as to avoid the constitutional question of whether the ACCA is impermissibly vague.[152] Interpreting the ACCA in light of the plain meaning of the term "conduct" would not result in an indefinite criminal prohibition because courts would only engage in complex, comparative risk analysis under the ACCA only if the predicate offense first involved conduct. Any non-conduct based offenses would necessarily be excluded as predicate offenses under the § 924(e) residual clause.

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149. *Sykes*, 131 S. Ct. at 2274.

150. United States v. McGill, 618 F.3d 1273, 1279 (11th Cir. 2010).

151. *See* Chambers v. United States, 555 U.S. 122, 127–28 (2009) (declaring that inaction does not amount to "conduct," because it lacks "as an element the use, attempted use, or threatened use of physical force against the person of another" (quoting 18 U.S.C.A. § 924(e)(2)(B)(ii) (West 2014) (internal quotation marks omitted))).

152. Under the rule of constitutional avoidance, in its modern form, a court must not resolve a case on constitutional grounds if it can decide the case as a matter of statutory construction. *E.g.,* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343 (1999) (quoting Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944)). The Court has described the operation of this rule as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." Clark v. Martinez, 543 U.S. 371, 381 (2005) (citations omitted).

Engaging in this saving construction would serve both ends of the void-for-vagueness doctrine. It would provide the public with actual notice that only those offenses involving conduct fall within the purview of the statute and prevent arbitrary enforcement as police, prosecutors, and juries would otherwise continue to struggle with determining which non-conduct offenses count under the ACCA, potentially making such determinations based merely upon "their [own] personal predilections."[153] Further, an avoidance of the constitutional question would allow the Court to keep its existing § 924(e) residual clause jurisprudence intact precisely because all of the Court's prior decisions are consistent with the plain meaning of the term conduct.[154] On the other hand, a holding that the ACCA is unconstitutionally vague would necessitate the Court over-ruling all of its prior § 924(e) residual clause jurisprudence.

CONCLUSION

Parsing an ambiguous statutory provision can be difficult and requires the Court to tread delicately. However, a careful textual analysis indicates that the correct answer to the question of whether mere possession of a short-barreled shotgun is a violent felony under the ACCA is not an insurmountable challenge under the Court's residual clause jurisprudence. Indeed, both the ordinary meaning of the term "conduct" and the context surrounding the residual clause indicate that possession offenses and, in particular, constructive possession offenses, fall outside of the scope of that clause. Because existing residual clause jurisprudence has focused upon deciding which conduct offenses fall within the reach of § 924(e)—by implication mere possession offenses are outside the scope of the residual clause. Put differently, a holding that mere possession offenses are not covered by the residual clause is not only consistent with prior cases but is actually favored by precedent. Such a holding

153. Smith v. Goguen, 415 U.S. 566, 575 (1974).

154. *See supra* note 137 and accompanying text. This appears to be the approach Justice Scalia has long advocated, though without success in securing a majority on the Court. For instance, he has declared his preference for an approach to the residual clause which "figure[s] out a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion" as including a relatively small subset of crimes rather than strike down the law on vagueness grounds. James v. United States, 550 US. 197, 230 (2007) (Scalia, J. dissenting). Justice Scalia reaffirmed his position four years later. *See* Sykes v. United States, 131 S. Ct. 2267, 2287 (2011) (Scalia, J. dissenting).

would allow the Court to follow the rule of constitutional avoidance and resolve the case based solely upon matters of statutory interpretation without reaching any constitutional question.