No. 17-5554

In The Supreme Court of the United States

DENARD STOKELING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR PETITIONER

A straightforward application of *Curtis Johnson v. United States*, 559 U.S. 133 (2010) resolves this case. According to *Curtis Johnson*, "physical force" in 18 U.S.C. § 924(e)(2)(B)(i) means "*violent* force." 559 U.S. at 140. And Florida robbery lacks "*violent* force" "as an element" because Florida courts require only slight force to overcome a victim's slight resistance. Unable to dispute that conclusion, the government attempts to re-litigate *Curtis Johnson* in three respects.

First, although the Court in *Curtis Johnson* found the meaning of "physical force" to be "clear" in the context of a statutory definition of "*violent* felony," 559 U.S. at 140, the government asks the Court to reinterpret that clear statutory language in light of the ACCA's legislative history. But where "the statutory language is plain, [the Court] must enforce it according to its terms." *King v. Burwell*, 576 U.S. ___, 135 S. Ct. 2480, 2489 (2015).

Second, although *Curtis Johnson* described "*violent* force" as a "substantial degree of force," 559 U.S. at 140, the government attempts to redefine "*violent* force" to include insubstantial, non-violent force. The government plucks a single word ("capable") out of the clause following "*violent* force" to argue that "physical force" is any force potentially capable of causing pain or injury in a hypothetical case. But because the government fails to dispute that *all* force is potentially capable of causing pain or injury in some circumstances, its expansive reading of "capable" would

vitiate not only *Curtis Johnson*'s "*violent* force" definition, but also its legal reasoning and result.

Finally, *Curtis Johnson* strictly applied the categorical approach in determining whether a state offense has "*violent* force" "as an element." The government disregards *Curtis Johnson*'s dictate that federal courts are "bound" by a state's interpretation of the elements of its own statute and must closely examine state case law to ascertain the least culpable conduct for conviction. *Id*. at 136-38. The government attempts to subvert that longstanding analytical framework by mischaracterizing Florida robbery law and equating other states' robbery-by-force offenses without scrutinizing how each state interprets the "force" element in its statute.

Despite attempting to re-litigate these aspects of *Curtis Johnson*, the government offers no reason to disturb that settled statutory precedent. Indeed, the government ignores that "[t]he principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what [this Court] ha[s] done." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ___, 134 S. Ct. 2398, 2411 (2014) (citations omitted). The Court should reject the government's invitation to usurp that legislative function here.

ARGUMENT

A. *Curtis Johnson* Defined "Physical Force" as "*Violent* Force"

Using well-established tools of statutory construction, the Court in *Curtis Johnson* concluded that, in the "violent felony" context, "the phrase 'physical force' means *violent* force." 559 U.S. at 140 (emphasis in original). Although statutory construction begins and ends with the text when it is clear, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), the government refuses to accept that bedrock principle of statutory interpretation and the substantive construction it dictated in *Curtis Johnson*.

1. Using the legislative history as its starting point, the government highlights isolated statements from a 1981 Senate Report and a 1986 House Report to assert that Congress intended to incorporate into the ACCA's elements clause a definition of "force" derived from common law robbery. Gov't Br. 7-8, 14-18, 27. But where, as here, the text is "clear," *Curtis Johnson*, 559 U.S. at 140, legislative history has no role to play. For that reason, the Court in *Curtis Johnson* refused to rely on legislative history, even to confirm its plain-language interpretation of "physical force" as "*violent* force." *Id*. Indeed, that was so even though both parties had extensively discussed legislative history in their briefing. *See Curtis Johnson*, Pet. Br. 27-33, 2009 WL 1510257 (U.S. No. 08-6925); *Curtis Johnson*, Gov't Br. 31-37, 2009 WL 3663947 (U.S. No. 08-6925); *Curtis Johnson*, Pet. Reply Br. 21-23, 2009

WL 2919036 (U.S. No. 08-6925). The government fails to explain why the Court should now resort to legislative history to re-examine the same text it has already definitively construed and found "clear."

In any event, the government's account of the legislative history is wrong. Common law robbery had nothing to do with the ACCA's elements clause. As the government candidly conceded in *Curtis Johnson*, but acknowledges only in a footnote here (Gov't Br. 18 n.1), Congress based the ACCA's elements clause on the nearly-identical elements clause in 18 U.S.C. § 16(a), which defines "crime of violence." In its brief in *Curtis Johnson*, the government tracked the ACCA's legislative history to correctly explain that, in 1986, "Congress patterned its definition of 'violent felony' on the Section 16 definition" from 1984, using it "as its template for a new definition of ACCA predicates." *Curtis Johnson*, Gov't Br., *supra* at 32-35. That origin has not changed.

Not only does the government seek to rewrite history, but it does so by relying on legislative history of a statute Congress deliberately discarded. In the original 1984 ACCA legislation, Congress enumerated and defined "robbery," and a 1981 Senate Report indicated that the 1984 definition tracked common law robbery. But that Report specifically excluded from the definition offenses that, like Petitioner's post-1987 Florida robbery, could be committed by using force after the taking. S. Rep. No. 307, 97th Cong., 1st Sess. 671 (1981). And in any event, that definition remained in the ACCA for only two years. In 1986, Congress not only

declined to re-enact the 1984 definition; it declined to re-enumerate "robbery" altogether. And given that Congress *did* re-enumerate burglary in 1986, Congress' failure to re-enumerate robbery was deliberate. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotations and alteration omitted).

Congress' deliberate elimination of "robbery" as an enumerated ACCA predicate in 1986 likewise undermines the government's reliance on a 1986 House Report mentioning that the new elements clause "would include . . . felonies involving physical force against a person," such as "murder, rape, assault, robbery, etc. . . ." Gov't Br. 3, 16, 18 (quotation omitted). The discussion leading up to that Report makes clear that Congress' focus in 1986 was on the most violent robberies. *See* NACDL Amicus Br. 8-13. Had Congress intended to capture the majority of state robbery offenses in the 1986 amendment—irrespective of whether violence was an "element" of those offenses—Congress would have simply re-enumerated robbery, just as it did burglary. *See Taylor v. United States*, 495 U.S. 575, 589 (1990). But by eliminating robbery as an enumerated predicate in 1986, Congress confirmed that its intent with the amendment was to capture only those robberies that either had "physical force" "as an element,"

or "involve[d] a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

Indeed, as this Court has explained, and the government ignores, the *two* "violent felony" definitions enacted in 1986 reflected Congress' intent for the amended ACCA to encompass only those "offenses of a certain level of seriousness that involve violence or an inherent risk thereof," *Taylor*, 495 U.S. at 590, because only such offenses predict an "increased likelihood" of gun violence, *Begay v. United States*, 553 U.S. 137, 146-47 (2008). Despite the government's focus on legislative intent, it never once acknowledges Congress' overriding statutory purpose in 1986, as embodied in both clauses of the ACCA and recognized in this Court's precedents. *See* Pet. Br. 41-44.

Although "the best evidence of Congress' intent is the statutory text," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012), the government avoids the text at all costs. It does not even acknowledge that the residual clause was enacted with the elements clause in 1986 and provided a separate path to the enhancement. Moreover, from the selective manner in which the government discusses *Curtis Johnson*, the government also avoids the text of the elements clause and the Court's plain-meaning interpretation of "physical force" to require "*violent* force."

2. Noticeably, the government acknowledges *Curtis Johnson*'s definition of "physical force" as "*violent* force" only once. Gov't Br. 11. It skips over "*violent* force" every other time it discusses the Court's

"physical force" definition. Gov't Br. 7, 8, 10, 20. And that is telling, given that its substituted word of choice ("capable") is part of the clause explaining "*violent* force." Moreover, just as the government avoids mentioning "*violent* force," it fails to acknowledge *why* the Court found the text to "clear[ly]" require "*violent* force." *Curtis Johnson*, 559 U.S. at 140. Specifically, it minimizes (Gov't Br. 10-11) that the Court used dictionary definitions of both "force" ("strength," "energy," "active power," and "vigor") and "violent" ("extreme," "furious," "severe," "vehement," and "strong") in concluding that "physical force" within a statutory "violent felony" definition clearly requires "*violent* force." *Id*. at 139-40 (citations omitted). All of these definitions are consistent with the Court's recognition that the word "violent" in "violent felony" itself "connotes a substantial degree of force." *Id*. at 140.

It is also telling that the government does not mention that, in *United States v. Castleman*, 572 U.S. ___, 134 S. Ct. 1405 (2014), the Court not only confirmed *Curtis Johnson*'s plain-language interpretation of "physical force" as "'*violent* force,'" *id.* at 1409-10, but reiterated that "the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,'" *id*. at 1411 (quoting *Curtis Johnson*, 559 U.S. at 140). And the government discounts *Castleman*'s clarification that "*violent* force" would exclude "[m]inor uses of force," such as "'a squeeze of the arm that causes a bruise.'" *Id*. at 1412 (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (alteration omitted)). Although the government prefers the view of the

lone concurrence (Gov't Br. 26, 28) that certain minor uses of force would constitute "*violent* force," *id*. at 1417, 1421 (Scalia, J., concurring in part and concurring in the judgment), the majority expressly disagreed with that portion of the concurrence, *id*. at 1412 & n.6.

The government also embraces the concurrence's separate view that causation of injury necessarily entails "*violent* force." However, the government acknowledges that the majority did not address that question, and instead left it open for a future case. *Id*. at 1413-14. And that question is not presented here for two reasons. First, causation of injury is not a required element of Florida robbery, as it was in the statute considered in *Castleman*. Second, Petitioner has identified several Florida cases where a person was convicted of robbery by "force" without causing any injury. The only question here is whether, in light of Florida case law, the minimum degree of "force" required to commit a Florida robbery amounts to "*violent* force."

3. Because Petitioner has identified several Florida robbery cases involving no pain or injury, the government attempts to re-interpret *Curtis Johnson* to encompass any force that is potentially capable of causing physical pain or injury. In effect, the government's view is that if there is a "theoretical possibility" the conduct could cause pain or injury, it satisfies the elements clause. But this Court prohibits such "legal imagination" when applying the categorical approach. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

Moreover, beyond being methodologically unsound, the government's "potentially capable" rule conflicts with *Curtis Johnson*'s core reasoning. Because the government fails to dispute that "all force is potentially capable of causing pain or injury in some situations" (Gov't Br. 21), its rule would sweep in all sorts of non-violent conduct. And that would eviscerate the very distinction between violent and non-violent force *Curtis Johnson* sought to draw by defining "physical force" as "*violent* force." 559 U.S. at 140; *see Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (declining to "blur th[at] distinction" in § 16's "crime of violence" context).

The government's "potentially capable" rule is also inconsistent with *Curtis Johnson*'s result. As explained (Pet. Br. 22-23), even the offensive touching *Curtis Johnson* deemed non-violent is potentially capable of causing pain or injury in an outlier case. While the government contends that the touching in *Curtis Johnson* could occur only "in a context in which no pain or injury can result" (Gov't Br. 22), the Court did not incorporate any such limitation. Nor could there be one, given that Florida law expressly recognizes that the same offensive touching *Curtis Johnson* deemed non-violent can in some cases "cause[] great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. §§ 784.041(1), 784.045(1).

Because the government's rule would encompass a tap on the shoulder with only the slightest degree of force, it also cannot be squared with the Court's repeated explanations of "*violent* force" as a "substantial

degree of force." *Curtis Johnson*, 559 U.S. at 140; *Castleman*, 134 S. Ct. at 1411. To circumvent that anomaly, the government asserts that a "substantial degree of force" serves as "an explanation of . . . 'force capable of causing physical pain or injury.'" Gov't Br. 23. To the extent that assertion suggests that "force" is "capable" of causing pain or injury only when it involves a "substantial degree of force," Petitioner agrees. However, the government adds that the "force capable" language "elucidates how 'substantial' the force must be." Gov't Br. 23. And that assertion is not only circular but nonsensical. On that view, a "substantial degree of force" would include force that is *not* substantial, since it is undisputed that all force is "potentially capable" of causing pain or injury under certain conditions. Gov't Br. 21. By unmooring the word "capable" from its context, the government strips the word "substantial" of any meaning, just as it does "*violent* force."

4. This Court has consistently cautioned that its statements must not be read "in isolation," *Endrew F. ex rel. Joseph F. v. Douglas Cnty. School Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 998 (2017), and are not "to be parsed as though we [a]re dealing with language of a statute," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). Rather, they must "be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821) (Marshall, C.J.). The government is well aware of this principle. Indeed, in *United States v. Stitt & Sims*, the

government has relied upon it to advocate against a myopic reading of the phrase "building or structure" in *Taylor*. *See* Gov't Br. 33-34, U.S. Nos. 17-765 & 17-766, 2018 WL 3155832 (June 26, 2018). The government fails to explain why the Court should apply that principle in reading *Taylor*, but ignore it in reading *Curtis Johnson*. By reading the word "capable" in isolation from "*violent* force," "substantial degree of force," and every other word in *Curtis Johnson*, the government violates this Court's express guidance on how to read its decisions.

Unlike the government, Petitioner advances a holistic interpretation of *Curtis Johnson* that accounts for *all* of the opinion, including the word "capable." The Court specifically defined "force" as an "unusual degree of strength or energy," "active power," and "vigor." *Curtis Johnson*, 559 U.S. at 139 (citations omitted). "Force" must bear that meaning when used in the phrase "force capable of causing pain of injury to another." *Id.* at 140. Moreover, that clause as a whole explains, and must be read consistently with, the "*violent* force" definition preceding it and the approving citation to *Flores* following it. *Id*.; *see Castleman*, 134 S. Ct. at 1412 (reiterating that *Curtis Johnson* "cited [*Flores*] with approval").[1] And, in the sentence immediately after the citation to *Flores*, the Court underscored that the word

[1] Although *Curtis Johnson* and *Castleman* both approvingly cited *Flores*, the government makes no attempt to account for that approval. Instead, it criticizes the "intent" aspect of *Flores*' formulation (Gov't Br. 24-25), even though Petitioner never relied on it.

"violent" in "violent felony" alone "connotes a substantial degree of force." *Curtis Johnson*, 559 U.S. at 140. Thus, when considered in the context of that statutory language and the entire opinion, "capable" must refer to a degree of force that is "reasonably expected" to cause pain or injury.

The government suggests that, by not using the "reasonably expected" terminology in 18 U.S.C. § 922(g)(8)(C)(ii), the Court in *Curtis Johnson* intended for the ACCA's elements clause to have a different substantive meaning. But, in the same breath, the government concedes that the Court recognized "Congress *itself* [did not] necessarily intend[] all differences in language between the elements clause and Section 922(g)(8)(C)(ii) as differences in meaning." Gov't Br. 23. The government thus assumes this Court foreclosed a "reasonably expected" understanding despite recognizing Congress itself did not. And that assumption is untenable given that *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018) has bolstered the "reasonably expected" understanding. Specifically, referring to the "capable" language in *Curtis Johnson*, the Court explained in *Dimaya* that physical force must be gauged by its "likely" consequences—namely, by whether it is "likely . . . to lead to an injury." *Id*. at 1220-21.

Reading *Curtis Johnson* as a whole, and in light of both *Castleman* and *Dimaya*, it is clear that "*violent* force" means a "substantial degree of force," and that force "capable" of causing pain or injury is a degree of force "reasonably expected" or "likely" to do so. It is not

force "potentially capable" of doing so in a freakish scenario existing only in the government's "legal imagination." Petitioner's contextual reading of "capable" is faithful to *Curtis Johnson*'s "*violent* force" definition, reasoning, and result. The government's reading is not.

B. Florida Robbery Lacks "*Violent* Force" "as an Element"

1. The government attempts to re-litigate not only *Curtis Johnson*'s statutory interpretation but also its application of the categorical approach. In applying its "*violent* force" definition to Florida's simple battery offense, the Court in *Curtis Johnson* emphasized that it was "bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the offense. 559 U.S. at 138. The Court therefore scrutinized state law to determine the "least of the[] acts" criminalized. *Id*. at 137. Since Florida's battery statute prohibited offensive "touching," the Court examined Florida case law to ascertain the minimum degree of force required to commit a "touching." And that examination revealed that a prosecutable touching could be committed by "any intentional physical contact, 'no matter how slight,' such as a 'tap on the shoulder without consent.'" *Id*. at 138 (quoting *State v. Hearns*, 961 So. 2d 211, 218-19 (Fla. 2007) (alterations omitted)).

That examination is standard practice. In applying the categorical approach, the Court always examines state case law to discern the meaning of a state-law element. *See, e.g.*, *Mathis v. United States*, 579 U.S.

___, 136 S. Ct. 2243, 2250, 2256 (2016) (Iowa case law established statutory alternatives were means, not elements); *Descamps v. United States*, 570 U.S. 254, 259, 264-65 (2013) (California case law established burglary did not require breaking and entering); *Moncrieffe v. Holder*, 569 U.S. 184, 194 (2013) (Georgia case law established possession with intent to distribute marijuana did not require remuneration); *James v. United States*, 550 U.S. 192, 202-03 & n.2 (2007) (Florida case law established scope of attempted burglary), *overruled on other grounds by Samuel Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551, 2563 (2015); *Duenas-Alvarez*, 549 U.S. at 190-93 (California case law established scope of aiding and abetting); *Leocal*, 543 U.S. at 7-8 (Florida case law established lack of *mens rea* for DUI offense).

As in these precedents, the Court here must examine Florida case law to ascertain the minimum degree of "force," Fla. Stat. § 812.13, necessary to "overcome a victim's resistance," *Robinson v. State*, 692 So. 2d 883, 886-87 (Fla. 1997). Only by identifying the least culpable manner of overcoming resistance can the Court determine whether the Florida robbery statute has "*violent* force" "as an element." Although the categorical approach is enshrined in this Court's precedents, the government never acknowledges that the categorical approach governs the analysis here. And there is a reason for that omission: Florida robbery law clearly establishes that only slight, non-violent force is needed to overcome slight resistance.

2. The government ignores the two overarching principles of Florida law that compel that conclusion. First, as the Florida Supreme Court stated nearly a century ago, "[t]he degree of force" required to commit robbery is "immaterial" provided it overcomes victim resistance. *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922). Therefore, and as that court later reiterated, "[a]ny degree of force suffices." *McCloud v. State*, 335 So. 2d 257, 258 (Fla. 1976). The government fails to recognize either of these controlling statements from the Florida Supreme Court.

Second, Florida juries have been instructed for decades on the related principle that Florida "law does not require that the victim of robbery resist to *any particular extent*." Fla. Std. Jury Instr. (Crim.) 15.1 (emphasis added). Florida appellate courts have long recognized that a robbery victim may "resist[] in any degree." *S.W. v. State*, 513 So. 2d 1088, 1091 (Fla. Dist. Ct. App. 1987) (quoting *Adams v. State*, 295 So. 2d 114, 116 (Fla. Dist. Ct. App. 1974) and *Mims v. State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977)). Although the Florida Supreme Court in *Robinson* approvingly cited Florida's standard robbery instruction, as well as *S.W.*, *Adams*, and *Mims*, *see* 692 So. 2d at 886-87, the government overlooks the established principle in Florida that "any degree of resistance" suffices, just as it overlooks the principle that "any degree of force" may overcome it. When considered together, these dual principles make clear that, when a victim's resistance is slight, the slight degree of force necessary to overcome it will suffice for a Florida robbery conviction.

These complementary legal principles are not mere abstractions in Florida. The cases cited by Petitioner confirm that individuals may be, and in fact have been, convicted of Florida robbery by using only a slight degree of force to overcome slight resistance. The government does not dispute that the Florida Supreme Court has expressly recognized that a person commits robbery (not larceny) where a pickpocket is caught in a non-forceful taking and uses force merely "to escape from the victim's grasp." *Robinson*, 692 So. 2d at 887 n.10 (citing *Colby v. State*, 35 So. 189, 190 (Fla. 1903)). Nor does the government dispute that a Florida robbery occurs where a person simply grabs cash from a victim's hand and tears a bill because the victim tightens her grip on the cash and pulls back her hand. *State v. Dawkins*, Pet. Br. App. 7a-8a. And the government likewise does not dispute that a Florida robbery (not a snatching) occurs where the defendant, in one fluid motion with one hand, momentarily peels back a victim's fingers to grab cash from the victim's closed fist. *Sanders v. State*, 769 So. 2d 506, 506-07 (Fla. Dist. Ct. App. 2000).

3. In *Colby*, *Dawkins*, and *Sanders*, the defendants used only a slight degree of force that caused no reported pain or injury. But even though the degree of force used to overcome the minimal resistance in those cases cannot plausibly be described as "substantial," "extreme," "vehement," "furious," or "severe," *Curtis Johnson*, 559 U.S. at 139-40 (citations omitted), the government maintains that it still satisfies *Curtis*

Johnson. Beyond invoking its incorrect and all-inclusive "potentially capable" standard, the government's only explanation is that the conduct in Petitioner's cases "involves no less force than a slap to the face." Gov't Br. 29, 32 n.4. That bald assertion, however, is contrary to human experience: a slap to the face involves substantial force and is thus reasonably expected to cause pain or injury; pulling away from another's grasp or grabbing a bill grasped by another does not. Indeed, such conduct did not *actually* cause any reported pain or injury in *Colby*, *Dawkins*, or *Sanders*.

That is not to say that the presence or absence of pain or injury in a real case will always be dispositive. For example, in *Winston Johnson v. State*, 612 So. 2d 689, 690-91 (Fla. Dist. Ct. App. 1993), "rak[ing]" the victim's hand incidentally caused a "slight injury" only because the victim's hand happened to have a scab on it, not because the degree of force used was substantial. Conversely, some victims may be uncommonly immune to pain or injury. To take the government's example, throwing a punch would still amount to "*violent* force" even where a victim has superb reflexes and avoids any pain or injury by deftly deflecting the punch. The degree of force used is substantial and therefore reasonably expected to cause pain or injury, even though it unexpectedly does not because of the victim's exceptional skill. A degree-of-force test respects the dividing line the Court drew between violent and non-violent force. The government's "potentially capable" test eliminates that line by sweeping everything into the

elements clause, including slight-force robberies that do not actually cause, and are not reasonably expected to cause, any pain or injury.

4. Because the minimum degree of force required by Florida robbery law is not "*violent* force" under a faithful reading of *Curtis Johnson*, the government resorts to mischaracterizing Florida law. It asserts, without support, that slight force can suffice *only* for a snatching offense (*i.e.*, where there is no victim resistance), not a robbery offense. Gov't Br. 30-31. But the legal principles articulated by the Florida courts make clear that a robbery victim may resist to *any* extent, and the degree of force required is immaterial. The line between snatching and robbery in Florida is razor thin. Indeed, the reflexive and momentary tightening of a victim's grip can spell the difference between robbery and theft. That subtle distinction also refutes the government's contention that "inherent" in every Florida robbery is a "physical contest" or "struggle," where the defendant must "overpower[] a defiant victim." Gov't Br. 7, 9, 12, 22, 32. While a physical contest or struggle may ensue where, as the government puts it, the victim is "unrelenting" (Gov't Br. 30), that heightened level of resistance is not required for every Florida robbery conviction.

Petitioner's Florida robbery cases confirm that resistance may take the form of merely tightening one's grip on a dollar bill and releasing it after only a split second. In that scenario, only a slight degree of force—not overwhelming physical domination—is necessary to overcome the victim's slight resistance. To obscure

that reality, the government exaggerates the reported conduct in *Dawkins* by describing the defendant's grabbing a bill from the victim's hand as "wrench[ing] paper money from a victim's clutches." Gov't Br. 30. And, when discussing *Sanders* (Gov't Br. 29), the government omits any mention of the fact that the seamless, momentary, one-handed finger-peeling by the defendant succeeded only because, as the court observed, the victim did not "put up greater resistance." 769 So. 2d at 507.

In a last-ditch effort to avoid the conclusion that a slight degree of force is sufficient for a Florida robbery conviction, the government asks the Court to "defer" to the Eleventh Circuit's interpretation of Florida law. Gov't Br. 8-9, 28. But no such deference is analytically possible here. In *United States v. Fritts*, 841 F.3d 937, 942-44 (11th Cir. 2016), the case relied upon below, the Eleventh Circuit did no more than recognize the unremarkable and undisputed general principle that overcoming resistance is required to commit Florida robbery. The Eleventh Circuit's state-law analysis ended there. As the Ninth Circuit correctly recognized, the Eleventh Circuit "overlooked" that, under Florida law, "the resistance itself [may be] minimal." *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017). Indeed, the Eleventh Circuit did not examine Florida case law to ascertain the minimum degree of force required to overcome resistance. Thus, this is not a case where a court of appeals has interpreted state law in a manner at odds with a party. Rather, the Eleventh Circuit failed to analyze Florida law in the manner

required by the categorical approach and this Court's precedents. The government's request for deference in such circumstances confirms not only its discomfort with controlling Florida law but its aversion to the categorical approach.

C. The Government's Analysis of Other State Robbery Offenses Contravenes the Categorical Approach

The government's disregard of the categorical approach is more pronounced when it attempts to tie the issue here to other state robbery offenses. It advocates a *per se* rule that force necessary to overcome resistance always amounts to "*violent* force," claiming that any other rule would have excluded the simple robbery-by-force offense of 43 states at the time of the ACCA's enactment. Gov't Br. 8, 10, 18-20, 16a-27a. But that claim significantly misrepresents the actual legal landscape in 1986.

1. First, the government overstates the number of state non-aggravated robbery statutes for which overcoming resistance was the least culpable conduct. Although determining a statute's divisibility is the "first task" under the categorical approach, *Mathis*, 136 S. Ct. at 2256, the government ignores that task. It therefore overlooks that 3 states had *indivisible* robbery statutes for which fear of injury to *property* was the least culpable conduct, rendering those statutes categorically overbroad for a reason unrelated to overcoming resistance. App. A(1), *infra*. In addition, while the government claims that the robbery statutes of

only 3 states did not meet the elements clause due to the absence of an overcoming-resistance requirement (Gov't Br. 27a), there were actually 10 such states: in 6, robbery could be committed by any bodily impact or contact akin to the *Curtis Johnson* touching; and, in 4, robbery could be committed by snatching. App. A(2)-(3), *infra*. Thus, at the time of enactment, the robbery-by-force offenses in 13 states would have been overbroad for reasons having nothing to do with overcoming resistance. Moreover, at least 2 additional states (Kansas and Utah) included among the government's 43 did not recognize an overcoming-resistance element in their statutes or case law. And that brings the government's 43-state count down to 31 that could have possibly been impacted by the question presented here.

2. Even in that more limited universe of robbery offenses with an overcoming-resistance element, the government wrongly assumes that the minimum degree of force necessary to overcome resistance is identical in each state. But robbery laws are not monolithic. Indeed, the government at one point acknowledges that the minimum degree of force necessary to commit robbery is a product of the peculiarities of each state's law. Gov't Br. 32-33. Yet, in categorizing states in its Appendix B, the government does no more than engage in a simple word-matching game. It highlights the words "force" and "resistance" in each state's law, without scrutinizing how each state interprets those words. It therefore never ascertains the least culpable conduct in each state, as required by the categorical approach.

By prematurely terminating its inquiry after detecting the words "force" and "resistance," the government obscures whether other states are analogous to Florida in: 1) recognizing that any degree of resistance suffices; 2) recognizing that any degree of force can overcome resistance; and/or 3) applying those principles by prosecuting slight-force robbery cases. Some states may have neither similar principles nor applications, and in such states defendants will be hard pressed to show a "reasonable probability" the state would apply its robbery statute in an overbroad manner, as required by *Duenas-Alvarez*, 549 U.S. at 193. The government's superficial analysis ultimately provides the Court with no reliable information as to how many states other than Florida require only slight force to overcome slight resistance.

3. The government also understates the number of robbery offenses that would have satisfied the ACCA in 1986 for reasons unrelated to overcoming resistance. As an initial matter, the government refuses to even acknowledge the existence of the residual clause. It therefore ignores that virtually all robbery offenses—and even theft offenses requiring no resistance or touching—satisfied the expansive residual clause until this Court invalidated that clause in 2015. *See, e.g.*, Pet. Br. 3-4 (pickpocketing); *United States v. Welch*, 683 F.3d 1304, 1312-14 (11th Cir. 2012) (Florida robbery by snatching).

But even looking only at the elements clause, the government ignores that numerous *aggravated* robbery offenses would have easily met that clause in

1986 for reasons unrelated to overcoming resistance. Indeed, 29 states in 1986 had one or more aggravated robbery offenses that required the use, display, or representation of a weapon, conduct that indisputably involves the "use" or "threatened use" of "*violent* force." App. B, *infra*. Those easily-qualifying armed robbery offenses are precisely the type of offenses that predict future gun violence, and were repeatedly referenced in the lead-up to the 1986 amendment. *See* NACDL Amicus Br. 8-13.

Moreover, *if* the government is correct that a causation-of-injury element itself satisfies the elements clause (Gov't Br. 20), far more than the 5 non-aggravated robbery offenses it identifies (Gov't Br. 28a) would have qualified for that reason. As of 1986, 26 states had at least one aggravated robbery offense incorporating a causation-of-injury element. App. C, *infra*. And since 1986, even more states have added weapons-based and injury-based aggravated robbery offenses to their arsenal. App. D, *infra*.

4. Ignoring that many states have robbery offenses that, under its view, easily satisfy *Curtis Johnson*, the government asks the Court to craft a special rule for a subset of robbery statutes that require overcoming resistance. *See, e.g.*, Gov't Br. 8. But a *per se* rule automatically equating overcoming resistance with "*violent* force" is irreconcilable with the categorical approach. Federal courts must defer to each state's interpretation of the elements of its statute.

The government fails to offer any justification for the dramatic departure from practice and precedent its novel rule would require. It claims that applying *Curtis Johnson*'s "substantial degree of force" standard "is unlikely to achieve consistency in judicial decisionmaking." Gov't Br. 28. But it offers no support for that assertion. "Substantial" is an "adjective" this "Court has interpreted and applied innumerable times across a wide variety of contexts." *Dimaya*, 138 S. Ct. at 1240 & n.3 (Roberts, C.J., dissenting) (citing "a round dozen" of cases). And a "substantial" standard poses little difficulty where, as here, it is used to evaluate "real-world conduct." *Id*. at 1214-15 (quoting *Samuel Johnson*, 135 S. Ct. at 2561). The government has not identified any, let alone systemic, difficulties in applying *Curtis Johnson*. Nor has it offered any other reason why the Court should subordinate *Curtis Johnson*'s settled interpretation of the statutory text to unsupported concerns of administrability.

* * *

A straightforward application of *Curtis Johnson* compels the conclusion that Florida robbery is not a "violent felony." If Congress wants slight-force robberies to trigger the ACCA's severe 15-year mandatory-minimum penalty, it may amend the statute at any time. But absent such reform, the Court should not expand the elements clause beyond its text to compensate for the loss of the residual clause or to accommodate the government's policy preferences.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed and the case remanded.

Respectfully submitted,

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SEPTEMBER 4, 2018