RECORD NO. 17-6577

In The
Supreme Court of the United States

RICHARD ARTHUR ORR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

Despite acknowledging a clear and direct circuit conflict on the question presented, the government urges this Court to deny review. Doing so would leave in place an entrenched (and growing) conflict about the scope of the Armed Career Criminal Act ("ACCA"), one of the harshest and most frequently applied sentencing enhancements in the federal criminal justice system. The result would be to perpetuate an intolerable situation where application of the ACCA's harsh penalties depends upon the circuit in which a defendant is sentenced. The government's arguments for denying certiorari are not persuasive. Review is warranted.

I. The question presented does not turn on a disagreement about Florida law, and the decision below is wrong.

The government first argues that the circuit conflict is "fundamentally premised on the interpretation of a specific state law." BIO at 5, 17. Relatedly, it suggests that while the circuits "disagree about the degree of force required to support a robbery conviction under Florida law," "that state-law issue turns on 'Florida case law.'" BIO at 17.

The government's characterization of the conflict is wrong: there is no disagreement about Florida law. Everyone—petitioner, the government, and all the circuit decisions below—agrees that Florida case law defines robbery as a theft in which the defendant overcomes the victim's resistance, however minimal that resistance may be. *See* Orr's Pet. at 4; BIO at 7; Pet. App. 4a (decision below); *United States v. Geozos*, 870 F.3d 890, 900 (9th Cir. 2017); *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016). The government also expressly agrees that

several Florida decisions illustrate the type of force required by that standard. *See* BIO at 10-13 (citing *Sanders v. State*, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000) (removing money from the victim's clenched fist); *Benitez-Saldana v. State*, 67 So. 3d 320 (Fla. Dist. Ct. App. 2011) (grabbing the victim's arm during a tug of war over the victim's purse); *Hayes v. State*, 780 So. 2d 918 (Fla. Dist. Ct. App. 2001) (bumping the victim)).

The only disagreement is whether these minimal-force offenses satisfy the ACCA's "violent force" threshold under *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson 2010*"). That question is one of federal law that only this Court can resolve. *See id.* at 138 ("The meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law.").

Moreover, the government is wrong on the merits of this federal question. It argues that the force required by the overcomes-resistance standard—which it describes as "[f]orce sufficient to prevail in a physical contest for possession of the stolen item"—is "necessarily" enough to satisfy *Johnson 2010*'s "violent force" threshold. BIO at 8. It does so even though it acknowledges that the standard encompasses minimal levels of force, such as the bump in *Hayes*, the squeezed arm and tugged-on purse in *Benitez-Saldana*, and the grabbing of cash from the victim's hand in *Sanders*. BIO at 12-13.

The government's strikingly broad interpretation of "violent force" conflicts with this Court's precedent. In *Johnson 2010*, this Court articulated the "violent force" standard by reference to Judge Easterbrook's opinion in *Flores v. Ashcroft*,

350 F.3d 666 (7th Cir. 2003). *See Johnson 2010,* 559 U.S. at 140. In *Flores*, Judge Easterbrook explained that minor uses of physical force—such as "the paper airplane [that] inflicts a paper cut, the snowball [that] causes a yelp of pain, or a squeeze of the arm [that] causes a bruise"—are "hard to describe" as involving "violence." 350 F.3d at 670.

When applying *Johnson 2010* in subsequent cases, the Court has relied specifically on this aspect of Judge Easterbrook's reasoning. In *United States v. Castleman*, 134 S. Ct. 1405 (2014), the Court held that *Johnson 2010*'s "violent force" standard does not apply to the element-of-force clause in the definition of a misdemeanor crime of domestic violence. In doing so, the Court explained that most domestic assaults "are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." *Id.* at 1411-12. Such "[m]inor uses of force," the Court explained, do not necessarily satisfy the *Johnson 2010* standard:

> Minor uses of force may not constitute "violence" in the generic sense. For example, in an opinion that we cited with approval in *Johnson [2010]*, the Seventh Circuit noted that it was "hard to describe ... as 'violence'" "a squeeze of the arm [that] causes a bruise." *Flores v. Ashcroft,* 350 F.3d 666, 670 (2003). But an act of this nature is easy to describe as "domestic violence," when the accumulation of such acts over time can subject one intimate partner to the other's control.

Id. at 1412.

The reasoning of *Castleman* belies the government's argument that the minimal force required for the overcomes-resistance standard "necessarily" satisfies the "violent force" threshold. BIO at 8. If the government were correct, *Castleman* would have been "an easy case," for the Court could have applied the "violent force"

standard without addressing whether a lesser definition of force controls in the domestic-violence context. 134 S. Ct. at 1416 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia advocated for that "narrower" reasoning in a concurrence, but no other member of the Court joined his opinion. *Id.*

Moreover, the bruise-causing arm squeeze described by *Flores* is nearly identical to the abrasion-causing arm grab in *Benitez-Saldana*. Thus, if the arm squeeze does not involve violent force, as *Flores* and *Castleman* suggest, then *Benitez-Saldana* dictates that Florida's overcoming-resistance standard does not categorically require "violent force." The Ninth Circuit correctly reached that conclusion in *Geozos*, and the court below erred by relying on the "weight of the case law" to reach the opposite conclusion. Pet. App. 4a.

II. The question presented has broad relevance to similar robbery offenses across the country.

The government also argues that the question presented lacks "broad legal importance" because it "arises only with respect to defendants with prior convictions for Florida robbery." BIO at 5, 17. This argument is unpersuasive for at least two reasons.

First, even if the question presented were relevant only to the ACCA status of Florida robbery, it still arises frequently enough to warrant this Court's review. The Court has at least 15 petitions pending before it in Florida-based prosecutions alone.[1] Further, contrary to the government's suggestion (BIO at 17), this specific

[1] *See Davis v. United States*, No. 17-5543 (petition filed Aug. 8, 2017); *Conde v. United States*, No. 17-5772 (petition filed Aug. 24, 2017); *Phelps v. United States*, No. 17-5745 (petition filed Aug. 24, 2017); *Williams v. United States*, No. 17-6026 (petition filed Sept. 14, 2017); *Everette v. United*

issue arises frequently in cases across the country, not just in Florida. In the past two years, for example, the issue has given rise to at least five written opinions in various federal courts outside Florida, with two decisions holding that Florida robbery does not qualify as an ACCA predicate and three decisions holding that it does. *Compare Geozos*, 870 F.3d at 900, *and Lee v. United States*, 2016 WL 1464118, *6-*7 (W.D.N.Y. 2016) *with* Pet. App. 1a-7a (decision below); *Gardner v. United States*, 2017 WL 1322150, *2 (E.D. Tenn. 2017); and *Wright v. United States*, 2017 WL 1322162, *2 (E.D. Tenn. 2017). The issue is also currently pending before the Eighth Circuit. *See United States v. Garcia-Hernandez*, Eighth Cir. No. 17-3027 (government response brief due Jan. 17, 2018).

Second, and more importantly, the government is wrong to suggest that the question presented affects only the ACCA status of prior Florida robbery convictions. Both the petitioner and the National Association of Criminal Defense Lawyers (NACDL) have urged the Court to review this case because a majority of states define robbery using an overcomes-resistance standard similar to the Florida standard. Orr's Pet. at 15-16; NACDL Amicus Br. at 7-9. Thus, a decision from this Court on the question presented would likely be controlling for those state offenses. At the very least, such a decision would provide much-needed guidance to the lower courts in analyzing those offenses.

States, No. 17-6054 (petition filed Sept. 18, 2017); *Jones v. United States,* No. 17-6140 (petition filed Sept. 25, 2017); *James v. United States*, No. 17-6271 (petition filed Oct. 3, 2017); *Middleton v. United States,* No. 17-6276 (petition filed Oct. 3, 2017); *Rivera v. United States,* No. 17-6374 (petition filed Oct. 12, 2017); *Shotwell v. United States*, No. 17-6540 (petition filed Oct.. 17, 2017); *Mays v. United States,* No. 17-6664 (petition filed Nov. 2, 2017); *Hardy v. United States,* No. 17-6829 (petition filed Nov. 9, 2017); *Pace v. United States*, No. 17-7140 (petition filed Dec. 18, 2017).

The government does not dispute that a majority of states employ an overcomes-resistance standard similar to Florida's. In fact, the government does not even acknowledge the contention (presented by both Orr and NACDL) that the widespread use of that standard warrants this Court's review of the question presented. Rather than address this contention, the government pivots to an argument that many of the recent, apparently conflicting circuit-court decisions on robbery offenses can be reconciled based on "differences in how States define robbery." BIO at 13. But that argument is beside the point: petitioner did not rely on any direct conflict among these cases as the basis for justifying this Court's review.

Put another way, the government does not dispute petitioner's core contention—that the circuit conflict on the question presented will inevitably produce divergent results for the majority of states that use the overcomes-resistance standard. Consider one of those states: Arizona. *See* Orr's Pet. at 15 n.4; NACDL Br. at 7 n.2. The Ninth Circuit recently held, consistent with its approach in *Geozos*, that Arizona robbery does not require "violent force" because the state's case law demonstrates that the overcomes-resistance standard covers robberies that involve only "a minor struggle" or "resistance however slight." *United States v. Molinar*, 876 F.3d 953, 957-58 (9th Cir. Nov. 29, 2017); *see also United States v. Jones*, 877 F.3d 884 (9th Cir. Dec. 15, 2017). Under the Eleventh Circuit's approach, however, the "bare elements" of the statute would be enough to satisfy the force clause without any consideration of the applicable case law. *See United States v.*

Lockley, 632 F.3d 1238, 1245 (11th Cir. 2011); *see also United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) (following *Lockley*). We can only guess what the outcome would be under the "weight of the case law" standard applied by the Fourth Circuit in the decision below. *See* Pet. App. 4a.

This conflict calls out for review. When addressing previous ACCA conflicts, this Court has rejected similar government arguments for denying or delaying review. In *Sykes v. United States*, 564 U.S. 1 (2011), for example, the question presented was whether a vehicular flight conviction from Indiana qualified as an ACCA predicate under the now-void residual clause. The government argued in *Sykes* that there was "no conflict in the courts of appeals" and that any apparent conflict was attributable to "pertinent differences among the state statutes in question." Brief in Opposition, at 5, 14, *Sykes v. United States*, No. 09-11311 (Aug. 9, 2010). This Court granted review over the government's objection, noting that the decision below conflicted with one circuit decision involving a Florida vehicular-flight conviction and created "tension" with four decisions involving similar convictions in other states. 564 U.S. at 7.

The need for this Court's guidance is more pronounced now than it was in *Sykes*. Here, unlike in *Sykes*, the circuits disagree about the ACCA status of the exact same offense, thus eliminating any possibility that the conflict arises from state-law differences. In addition, resolving the broader analytical "tensions" in recent circuit decisions on robbery offenses (*see* Orr's Pet. at 11-14; NACDL Br. at 10-16) is more urgent than in *Sykes* because robbery is one of the most frequently

invoked predicates in the ACCA context (along with burglary), whereas comparatively few ACCA sentences turned on vehicular-flight convictions. As noted in the petition, the circuit courts have issued dozens of opinions on robbery offenses since the Court voided the residual clause in 2015. *See* Orr's Pet. at 7 n.2. This Court's guidance is imperative to ensure that the ACCA's harsh penalties are applied consistently and do not depend upon the circuit of sentencing.

III. This case is an excellent vehicle for review.

The government also makes a cursory argument that Orr's case is not a good vehicle for review. BIO at 18. Throughout his case, Orr has argued in the alternative that his convictions do not qualify as ACCA predicates because, at the time of those convictions, state law permitted a robbery conviction based on a no-resistance snatching. *See* Orr's Pet. at 5-6. Based on this alternative argument, the government contends that "further review in this case would affect only the relatively small category of defendants whose sentences depend on convictions for Florida robbery before *Robinson* was decided in 1997, over two decades ago." BIO at 18.

The government is wrong: the existence of an alternative argument does not make this case an improper vehicle. The Court would reach Orr's alternative argument only if it disagrees with his primary argument that *Robinson*'s overcomes-resistance standard does not satisfy the "violent force" threshold. Thus, even if the Court rejects Orr's primary argument and considers his alternative argument as a result, it still will rule on his primary argument and, by doing so,

provide guidance to the lower courts. Despite the government's implicit suggestion to the contrary, nothing prevents this Court from considering and resolving alternative arguments briefed by the parties. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561-62 (2012) (rejecting the government's primary commerce-power argument while accepting its alternative tax-power argument).

Moreover, Orr's alternative argument itself presents a legal question that has generated significant tension in the circuits, if not a direct conflict, regarding how the categorical approach operates when a state court decision (like *Robinson*) narrows the scope of an offense's elements after a defendant's conviction becomes final. *See* Orr's Pet. at 13-14 (describing this tension). The recent decision in *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017), is illustrative. There, the panel indicated, but did not squarely hold, that *McNeill v. United States*, 563 U.S. 816 (2011), required it to consult "the law . . . at the time of conviction"—as opposed to later-issued decisions—in determining whether a prior conviction satisfied the ACCA's force clause. 853 F.3d at 57-58. In seeking panel rehearing, the government described this analytical issue as "significant" and stated that it could impact "every [ACCA] case." *See* Petition for Panel Rehearing, at 1, *United States v. Faust*, 1st Cir. No. 14-2292 (June 30, 2017). The panel denied rehearing, but Judge Lynch noted in a dissent that "[t]he Supreme Court has yet to squarely address this question" and that further review is needed due to "the potential implications of the [panel] decision." *United States v. Faust*, 869 F.3d 11 (1st Cir. 2017) (Lynch, J. dissenting from the denial of panel rehearing).

Granting review in this case would provide the Court with an opportunity to address this analytical issue. Accordingly, contrary to the government's suggestion, the presence of Orr's alternative argument does not impair this case as a vehicle for review. If anything, that argument makes this case an even better vehicle for the Court to provide guidance to the lower courts.

Alternatively, the Court could grant review in two Florida robbery cases: this one, involving a pre-*Robinson* conviction, and another one that involves a post-*Robinson* conviction, such as *Stokeling v. United States*, No. 17-5554. Doing so would eliminate any theoretical vehicle problems while allowing the Court to maximize its guidance on the analytical framework for addressing these frequently recurring questions.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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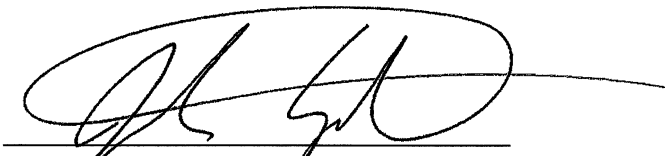
Western District of North Carolina



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