No. 18-5393

IN THE
Supreme Court of the United States

SHANE MCMAHAN,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Shane McMahan was sentenced as an armed career criminal under 18 U.S.C. § 924(e) based on the lower courts' determination that his prior Kansas aggravated-battery conviction under KSA § 21-3414(a)(1)(C) (since recodified at KSA § 21-5413(b)(1)(B)) qualified as a violent felony. But the Fifth and Tenth Circuits disagree over whether a conviction under this statute has the requisite element of violent force to qualify as a violent felony/crime of violence. Pet. 11-16. This narrow conflict implicates a broader conflict in the Circuits over whether a statute with a causation-of-harm element necessarily has an element of violent force. Pet. 17-26. This Court expressly left open this broader question in *United States v. Castleman*, 134 S.Ct. 1405, 1413 (2014). This broader question is immensely important in light of the number of statutes (state and federal) that have causation elements and not elements of violent force. Pet. 21-26, 28-32. It is time for this Court to answer this unanswered question, and this case is the ideal vehicle to do so. *See also Williams v. United States*, No. 18-6005 (cert. pet. filed Sept. 13, 2018) (raising identical issue, but in the advisory guidelines context).

The government does not dispute the importance of this issue, nor does it dispute that this case is an ideal vehicle to resolve the conflict. And the government concedes that a conflict in the Circuits exists on the precise issue presented in Mr. McMahan's petition. BIO 10-11. But the government asks this Court not to resolve the conflict because, in its view, the lower courts might resolve the conflict on their own. Although it is true that the Fifth Circuit has granted rehearing en banc in *United States v.*

Reyes-Contreras, 882 F.3d 113 (5th Cir. 2018), it is not true that *Reyes-Contreras* involves the issue presented here. Thus, however the Fifth Circuit decides *Reyes-Contreras*, the conflict at issue here will persist.

The government also claims that the broader conflict in the Circuits over whether statutes with causation elements necessarily have elements of violent force is limited to the Fifth and Tenth Circuits. BIO 12-15. But that's not true. Pet. 17-21. In fact, this larger conflict was recently broadened by the Third Circuit's decision in *United States v. Mayo*, 901 F.3d 218, 228-229 (3d Cir. 2018) (rejecting the government's argument that "causing or attempting to cause serious bodily injury necessarily involves the use of physical force").

On the merits, the government assumes that *Castleman* extends to the violent-crimes context. BIO 11-12. But it never gives a reason why *Castleman* would extend to the violent-crimes context, nor does it acknowledge that this Court has not extended *Castleman* to the violent-crimes context. The government also faults our plain-text approach because, in its view, this Court has never supported such an approach. BIO 10. But this Court has only interpreted the element-of-violent-force clause once, and in that case the parties agreed that the underlying provision had an element of force (but disagreed whether this element of force required *violent* force). *Johnson v. United States*, 559 U.S. 133 (2010). In analogous contexts, this Court has adopted our plain-text approach to defining elements of a statute. *See*, *e.g.*, *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). And our plain-text approach has support where it matters most – the text of § 924(e)(2)(B)(i). Review is necessary.

I. The Circuits are split.

The government asks this Court not to resolve an acknowledged conflict between the Fifth and Tenth Circuits over the precise issue presented in this petition. BIO 10-11. It does so for two reasons. First, the government thinks that the Fifth Circuit's decision in *Llarin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006), is wrong. BIO 11-12. But that is not a reason to deny Mr. McMahan's petition. If *Llarin-Ulloa* was incorrectly decided (we don't think it was), it would make sense for this Court to grant this petition to overrule *Llarin-Ulloa*.

Second, the government claims that review is unnecessary here because the Fifth Circuit has granted rehearing en banc in *Reyes-Contreras*. But *Reyes-Contreras* involves Missouri's voluntary manslaughter statute, not Kansas's aggravated battery statute. 882 F.3d at 117. Unlike Kansas's aggravated battery statute, the relevant portion of the Missouri statute does not have a causation element, but rather defines voluntary manslaughter as "knowingly assist[ing] another in the commission of self-murder." *Id.* at 118 (quoting Mo. Stat. Ann. § 565.023.1(1)). As such, the government's petition for rehearing en banc in *Reyes-Contreras* focuses not on whether causation elements necessarily qualify as elements of violent force, but on whether indirect (as opposed to direct) uses of force can constitute elements of violent force. That is a different question than the one presented here and in *Llarin-Ulloa* (the word "indirect" is nowhere to be found in that decision). Regardless of the resolution in *Reyes-Contreras*, the conflict between the Fifth and Tenth Circuits on causation elements as elements of violent force (as well as the specific conflict presented here)

will persist until this Court resolves it. And this Court should do just that in this case.

The government additionally claims that, aside from the Fifth Circuit, the courts of appeals are "uniform" in applying *Castleman* to the violent-crimes context and in holding that causation elements necessarily qualify as elements of violent force. BIO 12-15. But neither claim is true. As we've already explained, the First and Fourth Circuits (and to some extent the Sixth Circuit) also have published decisions declining to extend *Castleman* to the violent-crimes context. Pet. 17-20.

The government suggests that the First Circuit has backtracked on this point, citing *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017), and *United States v. Garcia-Ortiz*, __ F.3d __, 2018 WL 4403947 (1st Cir. Sept. 17, 2018). But in *Edwards*, the First Circuit expressly refused "to take sides" in the debate. 857 F.3d at 426. And in any event, the statute in *Edwards* (Massachusetts armed assault with intent to murder) did not have a causation element. 857 F.3d at 423-424. *Edwards*, like *Reyes-Contreras*, discussed indirect force, not causation of harm. *Id.* at 426-427. The case is inapposite.

So too *Garcia-Ortiz*. The statute at issue there also does not have a causation element. 2018 WL 4403947, at *2-*3 (quoting the federal robbery statute – 18 U.S.C. § 1951(b)(1)). And nowhere does *Garcia-Ortiz* actually cite *Castleman* to support its holding. Instead, *Garcia-Ortiz* cites Justice Scalia's *concurrence* in *Castleman* for the proposition that "'force' encapsulates the concept of causing or threatening to cause bodily injury." *Id.* at *4. Because the statute at issue in *Garcia-Ortiz* did not have a causation element, this portion of the decision is dicta and cannot overrule the First

Circuit's earlier decision in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015).

The government also suggests that the Fourth Circuit applies *Castleman* in the violent-crimes context, citing *United States v. Reid*, 861 F.3d 523, 528-529 (2017). BIO 15. But again, the Virginia statute at issue in *Reid* punished "inflicting" bodily injury, not "causing" it. *Id.* at 524 (quoting Va. Code § 18.2-55). The statute, unlike the Kansas aggravated battery statute at issue here, simply does not have a causation element, thus making *Reid* irrelevant as to whether causation elements necessarily qualify as elements of violent force. And like *Reyes-Contreras* and *Edwards*, *Reid* discussed *Castleman* in terms of indirect v. direct force, not in terms relevant here (causation element v. element of violent force). 861 F.3d at 526-528. With respect to the causation issue, *Reid* merely acknowledged that *Castleman* reserved that issue. *Id.* at 528. And *Reid* further acknowledged that *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012), was still good law. *Reid*, 861 F.3d at 529. *Torres-Miguel* expressly holds that a causation element is not the equivalent of an element of violent force. 701 F.3d at 168-169 ("a crime may *result* in death or serious injury without involving use of physical force").

If all of this is not enough, the Third Circuit, citing with approval cases from the Fourth and Fifth Circuits, recently held that a causation-of-injury element is not equivalent to an element of violent force. *Mayo*, 901 F.3d at 229. Similar to the Kansas statute at issue here, the Pennsylvania statute at issue in *Mayo* punished "caus[ing] serious bodily injury to another." *Id.* at 226 (quoting 18 Pa. Cons. Stat. § 2702(a)(1)). This provision was not a violent crime because it required the causation of injury,

"regardless of whether that injury was caused by the defendant's use or attempted use of physical force against the victim." *Id.* at 228. The Third Circuit expressly rejected the government's *Castleman*-based claim that "causing or attempting to cause serious bodily injury necessarily involves the use of physical force." *Id.* And when it did so, the Third Circuit rejected contrary authority from the Seventh and Eighth Circuits, noting that it did "not consider the reasoning in those cases persuasive." *Id.* at 229-230.

Mayo lies to rest the government's claim that a conflict in the Circuits does not exist on the broader issue presented in this case. The conflict is alive, well, and expanding. This Court should step in now to resolve it.

II. The Tenth Circuit Erred.

The government barely makes an effort to defend the Tenth Circuit's decision in this case. At most, it asks this Court to reject our "textual rule" because it doesn't think this Court's precedent supports it. BIO 10. And the government further claims that the Tenth Circuit's decision is correct because it is consistent with *Castleman*. BIO 11-12.

This latter argument is a nonstarter. *Castleman* left open the question presented here. 134 S.Ct. at 1413. It did not resolve it. And as we've already explained above (and in our petition), the Circuits are divided over *Castleman*'s applicability to the violent-crimes context, particularly in cases, like this one, involving a statute with a causation element and not an element of violent force. Pet. 17-21. The fact that the Tenth Circuit based its decision on *Castleman*, while other Circuits would have

refused to do so, is a reason to grant certiorari, not a reason to deny it.

The former argument fares no better. The government makes no effort to undermine our plain-text argument. It summarily states that our plain-text argument has no support in this Court's precedents. BIO 10. But that's untrue. Our definition of an "element" of violent force flows straight from this Court's definition of an "element" in the violent-crimes context. Pet. 26-27 (discussing *Mathis*, 136 S.Ct. at 2248). The government makes no effort to undermine this point. It merely notes the test this Court adopted in *Johnson*, 133 U.S. at 140. BIO 10. But *Johnson* supplements 18 U.S.C. § 924(e)(2)(B)(i)'s "element" of force with an additional requirement that this "element" require *violent* force. 133 U.S. at 140. Nowhere does *Johnson* hold that "element" in § 924(e)(2)(B)(i) means something other than "the constituent parts of a crime's legal definition – the things the prosecution must prove to sustain a conviction." *Mathis*, 136 S.Ct. at 2248 (cleaned up).

Nor does the government explain why it disagrees with an argument rooted in the statute's text. It is "the clarity of the text" that wins the day. *Trump v. Hawaii*, 138 S.Ct. 2392, 2412 (2018). As in so many other cases, the "statutory text alone is enough to resolve this case." *Pereira v. Sessions*, 138 S.Ct. 2105, 2114 (2018). Kansas's aggravated battery statute has a causation-of-contact element, not an element of violent force. Pet. 26-35. This is so because a Kansas jury need only find that the defendant caused contact, not that the defendant used, attempted to use, or threatened to use physical force to cause the contact. *Id.* The Tenth Circuit erred in holding otherwise. Review is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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