No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY JOSEPH PENDLETON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Is the Force Clause of the Armed Career Criminal Act (ACCA) invalid under the Fifth Amendment void-for-vagueness doctrine?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeffrey Pendleton requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *United States v. Pendleton*, 894 F.3d 978 (8th Cir. 2017), and the original slip opinion is reprinted in the Appendix to this Petition. (App. A).

JURISDICTION

Petitioner was charged by indictment filed in the United States District Court for the District of Minnesota, alleging federal crimes involving unlawful possession of firearms and ammunition. After a jury trial, Petitioner was found guilty of the unlawful-firearm-possession count. At sentencing, the district court determined that Petitioner's criminal history included the requisite three qualifying convictions to trigger the 15-year statutory minimum prison term required by the Armed Career Criminal Act (ACCA). After briefing and argument on this latter topic—the details of which are at issue in this Petition—the district court imposed the ACCA-minimum 180-month prison term. The Eighth Circuit Court of Appeals affirmed by published opinion filed on July 6, 2018. (App. A). Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves provisions of the United States Constitution and the United States Code, particularly—

* * *

United States Constitution, Amendment 5

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

* * *

18 U.S.C. § 924

Penalties

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years * * *.

(2) As used in this subsection—

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * that—

(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 * * *.

* * *

INTRODUCTION

Petitioner asks this Court to review an important question of federal criminal law: Whether the Force Clause of the Armed Career Criminal Act (ACCA) is invalid under the Fifth Amendment void-for-vagueness doctrine. This Court has previously invalidated the ACCA Residual Clause on this very ground. Because the Force Clause suffers from many of the same defects—and because the question greatly affects the federal criminal justice apparatus and the penalties imposed upon defendants like Petitioner—this Court should grant review.

STATEMENT OF THE CASE

1. Petitioner was charged by indictment alleging federal crimes involving unlawful possession of firearms and ammunition, 18 U.S.C. § 922(g). The matter proceeded to trial, and a jury found Petitioner not guilty on one charged count, but guilty on the other. The district court then initiated sentencing proceedings.

2. The government sought application of a 15-year statutory minimum prison term, under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). This penalty enhancement markedly increases the range of penalties for the aforementioned § 922(g) violation. That is to say, a standalone § 922(g) violation is subject to a 10-year statutory *maximum* prison term. But when an ACCA enhancement is applied, an identical violation is subject to a 15-year *minimum* prison term. Accordingly, application of ACCA is a high-stakes and much-litigated affair in federal criminal law.

3. As relevant here, an ACCA enhancement is triggered when the accused is found guilty of the aforementioned § 922(g) violation, and also has a criminal

history that includes "three previous convictions * * * for a violent felony." The term "violent felony" is defined by three statutory categories, commonly known as: (1) the Force Clause, 18 U.S.C. § 924(e)(2)(B)(i); (2) the Enumerated Offenses Clause, 18 U.S.C. § 924(e)(2)(B)(ii); and (3) the Residual Clause, 18 U.S.C. § 924(e)(2)(B)(ii). *See also supra* Petition at 3 (reprinting statute).

4. For the purposes of this Petition, only the Force Clause and the Residual Clause are germane. These will be described in turn.

5. The Force Clause defines "violent felony" to include any qualifying prior conviction which "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

6. The Residual Clause defines "violent felony" to include any qualifying prior conviction which "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This provision was purposely phrased in broad terms to account for sundry prior convictions that might fall outside the terms of the ACCA Force Clause or Enumerated Offenses Clause.

7. Unfortunately, the wording of the Residual Clause proved so amorphous that lower courts had great difficulty in formulating a coherent legal test to determine whether a prior conviction met its terms. This Court was compelled to issue numerous decisions attempting to clarify matters, but with no success. Finally, this Court concluded that the Residual Clause was constitutionally invalid under the Fifth Amendment void-for-vagueness doctrine. *Samuel Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

8. Turning back to Petitioner's case, the district court identified three prior convictions in his record that could potentially meet ACCA's definition of "violent felony." All were convictions that involved variants of the State of Minnesota's offense known as "assault." Minn. Stat. § 609.222.

9. Recognizing that ACCA Enumerated Offenses Clause did not apply by its term and the Residual Clause was unavailable after this Court's *Samuel Johnson* decision, the district court analyzed the Minnesota Assault convictions under the ACCA Force Clause, quoted earlier.

10. Petitioner argued that the Minnesota Assault convictions did not qualify under the terms of the Force Clause. Alternatively, he said the Force Clause was constitutionally invalid under the Fifth Amendment void-for-vagueness doctrine, using reasoning that largely paralleled this Court's *Samuel Johnson* decision.

11. The district court rejected Petitioner's Fifth Amendment vagueness challenge, and found the Minnesota Assault convictions qualified under the ACCA Force Clause. Accordingly, the district court determined that the ACCA enhancement applied, and imposed the resulting 15-year statutory-minimum prison term.

12. The Eighth Circuit Court of Appeals affirmed the district court's determination to uphold the Force Clause against the vagueness challenge. As noted earlier, this Petition seeks review of that question.

REASONS FOR GRANTING THE PETITION

I. The issue at hand presents an important question of federal law, generating splits of authority and greatly impacting the federal criminal justice system.

Petitioner requests that the Court grant review of the Question Presented, an important question of federal criminal law that has and will continue to vex lower courts and produce splits of legal authority.

A. The ACCA Force Clause generates discordant rulings.

As noted earlier, three years ago this Court struck the ACCA Residual Clause as invalid under the Fifth Amendment void-for-vagueness doctrine. *Samuel Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). This Court supplied a number of compelling rationales for its decision, a prominent one being that the Residual Clause language sets up an amorphous test that continually generates inter-circuit and intra-circuit splits of authority. *See id.* at 2556. Illustrative of this phenomenon, in less than a decade-long span this Court was compelled to resolve five (5) questions involving application of the Residual Clause. *Id.* Did it cover forms of state attempted burglary? Driving under the influence of intoxicants? Failure to report to jail? Vehicular flight? Weapons possession? *See id.*

On each of these occasions, this Court noted its own difficulties in fashioning a satisfactory legal test. *Id.* at 2558-59. And the struggles of lower courts to reach consistent and coherent determinations. *Id.* at 2560. "[T]he life of the law is experience," said this Court. *Id.* And experience taught that attempt to derive coherent meaning from the Residual Clause was a "failed enterprise." *Id.* One that

would condemn many citizens to 15 years imprisonment. *Id.* That would invite arbitrary enforcement. *Id.* at 2557. That would deny fair notice to the accused. *Id.*

Now, three years later, it is increasingly clear that the ACCA Force Clause suffers from the very same defects. True, just as with the Residual Clause, this Court has tried to fashion a test for the lower courts to apply. This Court has said the Force Clause refers to "violent force." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). That is to say, "force capable of causing pain or injury to another person." *Id.*

Simple enough in the abstract, this test has proven difficult for lower courts to apply. As difficult as the now-stricken Residual Clause, in fact. And the result is current and future splits of legal authority, both within and amongst the federal judicial circuits.

Consider the case of the varied and sundry offenses that states typically call "robbery." The Eighth Circuit Court of Appeals has issued rulings that suggest one such statute does not qualify under the Force Clause, due to the low quantum of force required to sustain a conviction. *United States v. Eason*, 829 F.3d 633, 641-42 (8th Cir. 2016). Then it examined another state robbery statute, and reached a similar conclusion. *United States v. Bell,* 840 F.3d 963, 964-67 (8th Cir. 2016). Then it partially reversed itself, saying one might continue to qualify under the Force Clause, but possibly not the other. *United States v. Swopes*, 886 F.3d 668, 671-72 (8th Cir. 2018).

The problem is not confined to the Eighth Circuit. In *Stokeling v. United States,* No. 17-5554—scheduled for argument on 9 October 2018—this Court granted review to resolve an inter-circuit split of authority as to whether certain forms of state

robbery offenses categorically fit under the Force Clause. Specifically, those robbery statutes that permit a conviction via a showing that the accused overcomes light victim resistance.

As with the Residual Clause saga, this Court will doubtless make a heroic effort to state governing legal principles in its ultimate *Stokeling* decision. But just like the Residual Clause cases, vexing variants will continue to crop up. What about robbery statutes that permit a conviction due to "offensive" contact? What about reckless contact? What about negligent contact? The permutations are endless. And despite this Court's best efforts—by way of the *Curtis Johnson* standard and possibly a future *Stokeling* corollary—this is what generates all manner of dissonant results.

The problem is by no means limited to robbery statutes. Rather, in applying the Force Clause, courts reach conflicting results with respect to a great many criminal offenses.

For example, lower courts have reached disparate results with respect to:

► Offenses that require mere recklessness, rather than intentional use of force. *Compare, e.g., United States v. Middleton,* 883 F.3d 485, 489-93 (4th Cir. 2018) (state manslaughter statute fails to qualify as ACCA predicate under Force Clause, since conviction may result from reckless provision of alcohol), *with, e.g., United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016) (state drive-by shooting statute qualifies under Force Clause despite requiring mere recklessness as to *mens rea* element).

► Sexual abuse statutes. *Compare, e.g., United States v. Degeare*, 884 F.3d 1241, 1258 (10th Cir. 2018) (state forcible sodomy offense does not qualify as ACCA

predicate under Force Clause), *with, e.g., United States v. Deshazior*, 882 F.3d 1352, 1355-58 (11th Cir. 2018) (state sexual battery statute qualifies under Force Clause).

► And particularly relevant to the case at hand, garden-variety assault statutes. *Compare, e.g., United States v. Kennedy,* 881 F.3d 14, 19-24 (1st Cir. 2018) (state assault offense does not qualify as ACCA predicate under Force Clause), *with, e.g., United States v. Haight,* 892 F.3d 1271, 1280 (D.C. Cir. 2018) (state assault offense qualifies under Force Clause).

The situation parallels the ACCA Residual Clause saga, in an almost uncanny way. This Court announces a legal standard for lower courts to follow. Lower courts struggle to apply the standard in a consistent and coherent way. This Court issues decisions aimed at clarifying the original test. And yet every such attempt only raises more fissures, producing more and more splits of authority amongst the lower courts.

There is no need to repeat what this Court has aptly described as a "failed enterprise" of nearly 10 years. *Samuel Johnson,* 135 S. Ct. at 2560. This Court should accept review in this case—either to declare the Force Clause void for vagueness, or announce a standard that avoids that fate.

B. The issue at hand involves an important question of federal criminal law, and this case presents an excellent vehicle to resolve it.

The constitutional validity of the ACCA Force Clause presents a highly important question of federal criminal law. For the provision is frequently invoked by lower courts to drastically increase a defendant's permissible sentencing range (as noted earlier, shifting the permissible range from a 10-year *maximum* prison term, to a 15-year *minimum* term). This alone demonstrates the matter's importance.

But in addition, the Force Clause has come to take on far more weight in the wake of this Court's *Samuel Johnson* decision, invaliding the ACCA Residual Clause. Lower courts used to rely heavily upon the Residual Clause to impose severe ACCA-enhanced prison terms. That ended with the issuance of *Samuel Johnson*, and generated a wave of judicial construction of the Force Clause. But as just demonstrated, that effect has created its own suite of difficulties for lower courts.

In *Samuel Johnson,* this Court correctly observed that is deeply problematic "to condemn someone to prison for 15 years to life" by way of "so shapeless a provision" in the statutory criminal law. 135 S. Ct. at 2560. So too with respect to the amorphous Force Clause, as shown above.

And, it is worth adding, this case presents a good vehicle to decide the important question. Petitioner is now serving the above-referenced and severe 15-year prison term mandated by ACCA. And the basis for this greatly enhanced penalty is multiple prior state assault convictions. Recall that it is this very type of assault statute that has generated splits of authority amongst lower courts. It might be said, then, that Petitioner's 15-year prison term is dependent upon the federal judicial

circuit in which he happens to reside. In the Eighth Circuit, his assault convictions have been adjudicated to qualify under the ACCA Force Clause. In any number of other circuits, however, he might well be required to serve just 10 years, or less.

The Court can and should use Petitioner's case to resolve current splits amongst the lower courts with respect to Force Clause. And future splits as well. As already mentioned, this can be accomplished by declaring the ACCA Force Clause constitutionally invalid under the Fifth Amendment void-for-vagueness doctrine. Or alternatively, by using this case to announce a test that might save the Force Clause from the fate of the Residual Clause.

CONCLUSION

For all these reasons, Petitioner asks the Court to grant this Petition for a Writ of Certiorari.

Dated: October 3, 2018

Respectfully submitted,

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