No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO COLON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined the term "physical force" in the elements clause of the Armed Career Criminal Act ("ACCA") to mean "*violent* force—that is, force capable of causing pain or injury to another person." In *United States v. Castleman*, 134 S. Ct. 1405, 1413-14 (2014), the Court expressly left open the question whether the causation of harm necessarily entails the use of "violent force." In *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc) *cert denied* 138 S. Ct. 2620 (2018), the Eleventh Circuit, by a margin of 6-5, held that causation of harm necessarily entails the use of "violent force," reasoning that "violent force" is measured by the harm resulting from the offense, not by the degree of force used to commit it. In the proceeding below, the Eleventh Circuit applied the analysis from *Vail-Bailon* to reach the conclusion that Mr. Colon's Indiana battery conviction was an ACCA predicate offense.

The question presented here is: under *Curtis Johnson,* does the causation of bodily harm necessarily entail the use of "violent force"?

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ricardo Colon respectfully seeks a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

OPINION BELOW

The Eleventh Circuit Court of Appeals' panel opinion in *Colon v. United States,* 899 F.3d 1236 (11th Cir. 2018), is reproduced here as Appendix A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Eleventh Circuit entered judgment against Petitioner on August, 16, 2018. This Petition is timely filed.

STATUTORY PROVISIONS INVOLVED

This case involves the application of the ACCA, 18 U.S.C. § 924(e). The ACCA's enhanced sentencing provision provides, in pertinent part:

> In the case of a person who violates section 922(g) of this title and has three previous convictions … 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[.]

18 U.S.C. § 924(e)(1).

In relevant part, the ACCA defines a "violent felony" as:

> [A]ny 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…

18 U.S.C. § 924(e)(2)(B).

The relevant 2001 Indiana Code reads, in relevant part:

> Sec. 1. (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is…
>
> (2) a Class D felony if it results in bodily injury to:
>
> (A) a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of his official duty;
>
> (B) a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age …

35-42-2-1 Battery, Ind. Code § 35-42-2-1 (2001).

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

The ACCA transforms a ten-year statutory maximum penalty into a fifteen-year mandatory minimum for certain defendants convicted of federal firearms offenses. 18 U.S.C. §§ 924(a)(2), 924(e). The ACCA enhancement applies when the defendant has three prior convictions for "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e). For purposes of the ACCA, "violent felony" is defined as, among other things, any felony "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The italicized language is known as the "residual clause." In *Johnson*, this Court held that the ACCA's residual clause was unconstitutionally vague. Therefore a prior offense can now only qualify as a predicate offense as an enumerated offense, or in accordance with the elements clause. The elements clause requires that the underlying offense include "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).

Pursuant to Indiana law in 2001, a misdemeanor battery inflicted on a law enforcement officer or a victim under fourteen years of age was a felony. The offense required a rude or insolent touching which resulted in bodily injury. Ind. Code § 35-42-2-1 (2). "Bodily injury" was defined as "any impairment of physical condition, including physical pain." Ind. Code § 35-41-1-2 (2001). This meant that even the pinch of a law enforcement officer or person under 14, which caused minor discomfort, could

be classified as a felony. Any conviction under this statute could later be used to enhance a defendant's federal sentence for being a convicted felon in possession of a firearm from a 10-year maximum to a 15-year mandatory minimum.

B. PROCEDURAL BACKGROUND

Mr. Colon plead guilty to one count of being a felon in possession of a firearm and was sentenced to 188 months' imprisonment. He was sentenced pursuant to the ACCA based on three prior convictions. They were: (1) a Florida conviction for resisting arrest with violence; (2) an Indiana conviction for battery on a law enforcement officer resulting in bodily injury; and (3) an Indiana conviction for battery on a person less than fourteen years of age, resulting in bodily injury. At sentencing the district court determined Mr. Colon's Indiana battery convictions qualified as "violent felonies" pursuant to the ACCA's residual clause because they resulted in bodily injury.

After this Court's decision in *Samuel Johnson v. United States,* 135 S. Ct. 2551 (2015), Mr. Colon moved to vacate his sentence in accordance with 28 U.S.C. § 2255. The district court concluded that although at the original sentencing it had qualified Mr. Colon's Indiana battery convictions pursuant to the ACCA's residual clause, the offenses also qualified according to the elements clause. Therefore Mr. Colon's ACCA sentence was still legal and his motion was denied. The court also denied a certificate of appealability ("COA").

The Eleventh Circuit granted a COA on the issue of whether the Indiana battery offenses were violent felonies according to the elements clause of the ACCA.

The Eleventh Circuit ultimately denied his appeal however, finding that because the Indiana statutes require:

> at a minimum, that the victim must suffer physical pain or injury, a felony battery conviction under the Indiana statute necessarily requires that the defendant use "force capable of causing physical pain or injury."

Colon, 899 F.3d at 1239 (quoting *Curtis Johnson,* 559 U.S. at 140). The offenses, therefore, were violent felonies under the ACCA, and Mr. Colon's sentence was legal.

REASONS FOR GRANTING THE PETITION

The Circuits are Divided on Whether the Causation of Bodily Harm Necessarily Entails Violent Force Under *Curtis Johnson*.

In *Curtis Johnson*, 559 U.S. at 140, the Court defined "physical force" in the ACCA's elements clause as "*violent* force—that is, force capable of causing physical pain or injury to another person." If violent force is measured by its "capability" of causing harm, then all offenses requiring the causation of harm would satisfy the definition, for offenses that actually cause harm are necessarily capable of causing harm. On the other hand, if violent force is measured by the degree of force actually applied, as the entirety of the *Curtis Johnson* opinion indicates, then offenses requiring the causation of harm would not necessarily require violent force. For even bodily harm may be caused by only *de minimis* force.

This Court expressly left this question open in *Castleman*, 134 S. Ct. 1405 (2014). There, the Court declined to import *Curtis Johnson*'s definition of "physical force" as "violent force" into a similar elements clause in 18 U.S.C. § 921(a)(33)(A), defining "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9). Instead, the Court held that, as used in that statute, "physical force" broadly referred to common-law force, which, unlike *Curtis Johnson*'s narrower definition, included even a slight touching. *See id.* at 1410-13 & n.4. Applying that broader definition, *Castleman* held that the offense in that case—the intentional or knowing causation of bodily injury—was a misdemeanor crime of domestic violence, because the causation of bodily injury necessarily required the use of common-law force. *See id.* at 1414-15.

Writing only for himself Justice Scalia argued that causation of bodily injury also required violent force under *Curtis Johnson*, because it was "impossible to cause bodily injury without using force 'capable' of producing that result." *Id.* at 1416-17 (Scalia, J., concurring in part and concurring in the judgment). The majority, however, did not accept that reasoning. Instead, it expressly reserved judgment on that question—twice. *Id.* at 1413 ("Whether or not the causation of bodily injury necessarily entails violent force—a question we do not reach—mere offensive touching does not."); *id.* at 1414 ("Justice Scalia's concurrence suggests that these forms of injury necessitate violent force, under *Johnson*'s definition of that phrase. But whether or not that is so—a question we do not decide—these forms of injury do necessitate force in the common-law sense.") (internal citation omitted). That question has long divided the circuits.

1. On the one hand, the Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that the causation of bodily harm or injury necessarily requires the use of violent force. Employing a "capability" test, they work backwards from the harm, reasoning that, if an offense requires harm or injury, it is necessarily capable of causing such a result. *See, e.g.*, *United States v. Chapman*, 866 F.3d 129, 136 (3d Cir. 2017) (employing "capability" test and rejecting view "that there is a minimum quantum of force necessary to satisfy *Johnson*'s definition of 'physical force'"); *United States v. Gatson*, 776 F.3d 405, 410-11 (6th Cir. 2015) ("Force that causes any [physical harm] is (to some extent, by definition) force 'capable of causing physical injury or pain to another person.'") (citations omitted); *United States v.*

Anderson, 695 F.3d 390, 400 (6th Cir. 2012) ("one can knowingly cause serious physical harm to another, only by knowingly using force capable of causing physical pain or injury, *i.e.*, violent physical force") (quotations and brackets omitted); *United States v. Jennings*, 860 F.3d 450, 458-59 (7th Cir. 2017) ("a criminal act (like battery) that causes bodily harm to a person necessarily entails the use of physical force to produce the harm"); *Douglas v. United States*, 858 F.3d 1069, 1071 (7th Cir. 2017) ("force that *actually* causes injury necessarily was capable of causing that injury and thus satisfied the federal definition"); *United States v. Winston*, 845 F.3d 876, 878 (8th Cir. 2017) (finding no "daylight between physical injury and physical force," and rejecting argument "that a defendant might cause physical injury without using physical force"); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016) (rejecting argument "that a person can cause an injury without using physical force," and concluding that, because battery offense required the causation of physical injury, the offense was necessarily "capable" of producing that result); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290-1291 (9th Cir. 2017) ("bodily injury [necessarily required] the use of violent, physical force," because "bodily injury" and "physical force" are "synonymous or interchangeable" terms); *Vail Bailon,* 868 F.3d 1293, 1302 (11th Cir. 2017) (a Florida statute which requires injury as a result logically requires the use of force capable of causing such injury).

In those Circuits, however, numerous judges have registered disagreement. In *Vail-Bailon*, five Eleventh Circuit judges vigorously dissented on this point. In the Sixth Circuit, Judge White opined that "serious physical injury most often results

from physical force, but it can also occur in the absence of any force being used by the offender." *Anderson*, 695 F.3d at 404 (White, J., concurring). Thus, she agreed with other circuits that "have rejected such a broad interpretation of physical force." *Id.* at 405. In the Eighth Circuit, Judge Kelly made the same observation, opining that there were a number of ways that a person could cause physical injury without using any degree of force. *Rice*, 813 F.3d at 707-08 (Kelly, J., dissenting).

In *Flores v. Ashcroft,* 350 F.3d 666 (7th Cir. 2003), the Seventh Circuit held that an Indiana misdemeanor battery, a subsection of the same statute at issue here, did not require violent force. *Id.* at 672. The offense there included injury as an element, but still did not require violent force. *Id.* Subsequently *Curtis Johnson* cited *Flores* "with approval," *Castleman*, 134 S. Ct. at 1412, noting that a squeeze that causes a bruise could hardly be described as violent. But later, the Seventh Circuit in *Douglas*, in an opinion written by the very same judge who wrote *Flores*, reached the opposite conclusion on the same statute -- without even citing the earlier decision in *Flores*. *Douglas,* 858 F.3d at 1072. Clearly even the circuits that are end-result focused are still confused about how to approach the issue.

2. In contrast, the First, Second, Fourth, Fifth, and Tenth Circuits have all recognized that causation of harm need not require the use of violent force under *Curtis Johnson*. That is so because, in their view, violent force is measured by the degree or quantum of force, not the resulting harm. *See, e.g.*, *Whyte v Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) (distinguishing between causation of harm and violent force, and observing that "[c]ommon sense suggests that" the state "can punish conduct that

results in 'physical injury' but does not require the 'use of physical force'"); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 193-94 (2nd Cir. 2003) (agreeing that "'there is a difference between the causation of an injury and an injury's causation by the 'use of physical force,'" and finding a "logical fallacy" in "equat[ing] the use of physical force with harm or injury") (citations omitted); *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (recognizing that "a crime may *result* in death or serious injury without involving use of physical force"); *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc) ("the fact that the statute requires that serious bodily injury result … does not mean that the statute requires that the defendant have used the force that caused the injury," recognizing the "difference between a defendant's causation of an injury and the defendant's use of force");[1] *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005) (accepting the argument that an offense requiring the causation of bodily injury was not necessarily a crime of violence).

Following *Castleman*, where the Court indicated that the administration of poison and other indirect applications of force might nonetheless constitute a "use" of force in the common law sense, 134 S. Ct. at 1414, the Fifth Circuit reaffirmed the

[1] *Accord United States v. Villegas-Hernandez*, 468 F.3d 874, 880 (5th Cir. 2006) (rejecting the reasoning that an offense "include[s] the use of force as an element by virtue of its requirement of causation of serious bodily injury"); *United States v. Andino-Ortega*, 608 F.3d 305, 310-11 (5th Cir. 2010) (following *Vargas-Duran* to conclude that offense of intentionally injuring a child by act did not satisfy elements clause); *United States v. Garcia-Perez*, 779 F.3d 278, 283-84 (5th Cir. 2015) (concluding that Florida manslaughter, which required causation of death, did "not require proof of force" as an element).

continuing validity of its prior precedent holding in the narrower crime of violence context, a person could indeed "cause physical injury without using [violent] physical force." *United States v. Rico-Mejia*, 859 F.3d 318, 321-23 (5th Cir. 2017). While the remaining circuits above have backtracked on parallel pronouncements in light of the indirect force discussion in *Castleman*, they have done so only in cases involving the intentional or knowing causation of harm, *see, e.g., United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017) (Colorado second-degree assault), and/or only to the extent that they had previously relied on the administration of poison or some indirect application of force to illustrate the broader principle that causation of harm need not require violent force. *See, e.g.*, *United States v. Reid*, 861 F.3d 523, 529 (4th Cir. 2017) (recognizing that prior holding in *Torres-Miguel* "may still stand," but that its "reasoning can no longer support an argument that the phrase 'use of physical force' excludes *indirect* applications"); *United States v. Hill*, 832 F.3d 135, 143-44 (2d Cir. 2016) (same). But, again, *Castleman* expressly reserved on the broader question of whether the causation of harm necessarily requires the use of violent force.

In short, the circuits have long been hopelessly confused about the meaning of the term "physical force" in the elements clause. And *Curtis Johnson*'s definition of "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person" has only cemented and exacerbated the confusion. Many circuits reason backwards from the harm, concluding that the causation of pain or injury cannot occur without the use of violent force. Other courts and judges, by contrast, have focused on the degree or quantum of force, concluding that the

causation of pain or injury need not be caused by violent force. The Court expressly left this question open in in *Castleman,* and should decide it here.

The issue presented by this petition is dispositive — if Mr. Colon's prior Indiana battery convictions do not qualify as "violent felon[ies]" under the ACCA's elements clause, then Mr. Colon is ineligible for enhanced sentencing under the ACCA and his 188-month sentence exceeds the applicable 120-month statutory maximum.

The time is ripe to clarify *Curtis Johnson*'s definition of "violent force." Indeed, other than re-affirming that definition in *Castleman*, 134 S. Ct. at 1411 n.4, the Court has not clarified *Curtis Johnson* since deciding it over seven years ago. Moreover, the meaning of that decision is now of paramount importance in light of *Samuel Johnson*, 135 S. Ct. 2551 (2015), which declared the ACCA's residual clause void for vagueness. The residual clause had previously acted as a broad catchall under which many offenses qualified as violent felonies. Without the residual clause, however, the elements clause has become the primary battleground. Parties, probation officers, and lower courts are now routinely required to assess whether offenses satisfy that clause. Its meaning should be uniform across the nation.

Moreover, the question presented here implicates a wide variety of offenses. Indeed, any offense that requires the causation of harm, injury, or death, but that does not specify a violent means for causing that result, will be implicated. That not only includes battery offenses like the one in here, but also assault, manslaughter, domestic violence, child endangerment, and a host of other statutes requiring the

causation of some harm or injury. Given this broad potential application, the Court was careful to leave that question open in *Castleman*, deciding the case on another ground. Here, however, the question of whether causation of bodily harm necessitates "force capable of causing pain or injury to another" cannot be avoided, and should be decided. The rampant uncertainty described above on this question is intractable because it derives from this Court's opinion in *Curtis Johnson* itself.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Ricardo Colon prays that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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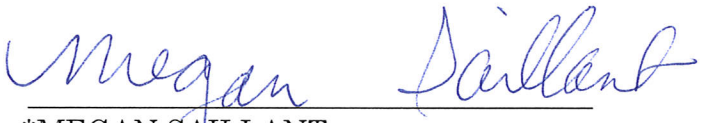

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