NO:

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES FREDERICK,

***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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court defined the term "physical force" in the ACCA's elements clause 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 whether the causation of harm necessarily entails the use of "*violent* force," and the circuits have disagreed. The Eleventh Circuit, in the decision followed below, *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017)(en banc), held 6-5 that "*violent* force" under *Curtis Johnson* is measured by its "capability" of causing harm, not the degree of force used, and since great bodily harm is caused in every Florida felony battery, the offense easily meets *Curtis Johnson*'s "capability" test.

The Eleventh Circuit also split 6-5 in *Vail-Bailon*, and the circuit courts have split as well, on proper application of the Court's holding in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 1183, 193 (2007) that in applying the categorical approach, there must be a "realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside" the relevant federal definition. The *Vail-Bailon* court disagreed on whether the plain "touch" language of Florida's battery statute itself established that "realistic probability," or whether a reported case was necessary to confirm overbreadth. The questions presented are:

1. Under *Curtis Johnson*, does causation of harm necessarily entail the use of "violent force"?

2. Under *Duenas-Alvarez*, is it necessary to identify a reported case to establish a statute's overbreadth, if the plain statutory language is itself overbroad?

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's decision in *United States v. James Frederick*, 737 Fed. Appx. 522 (11th Cir. Sept. 11, 2018) (No. 16-15296-A) is reproduced as Appendix A-1.

JURISDICTION

The court of appeals issued its opinion on September 11, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND LEGAL PROVISIONS INVOLVED

The Armed Career Criminal Act defines a "violent felony" as a crime that "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). An identical definition for the term "crime of violence" is incorporated into the federal Sentencing Guidelines. U.S.S.G. § 4B1.2(a)(1); § 2K2.1(a)(4)(A); § 2K2.1, comment. n. 1.

The Florida simple battery statute, Fla. Stat. 784.03(1)(a)1, provides that a defendant commits a misdemeanor simple battery in Florida where, *inter alia*, he "[a]ctually and intentionally touches or strikes another person against the will of the other." If a person has a prior conviction for battery, and he commits a second or subsequent battery, his simple battery is punished as a third-degree felony. Fla. Stat. § 784.03(2).

The Florida felony battery statute, Fla. Stat. § 784.041(1), provides that "a person commits felony battery if he or she . . . [a]ctually and intentionally touches or Strikes another person against the will of the other," and "[c]auses great bodily harm, permanent disability, or permanent disfigurement." Felony battery under § 784.041(1) is likewise a third-degree felony.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

1. In *Curtis Johnson v. United States*, the Court interpreted the term "physical force," as used in the ACCA's elements clause, to mean "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. 133, 140, (2010). Throughout the opinion, both leading up to and following that 15-word definition, the Court repeatedly referred to "*violent* force" as a "substantial degree of force" involving "strength," "vigor," "energy," "pressure," and "power." *Id.* at 139; *see id.* at 140 (even by itself, the word "violent" "connotes a substantial degree of force," but "[w]hen the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer"); *id.* at 142 (violent force "connotes forces strong enough to constitutes 'power'").

The offense at issue in *Curtis Johnson* was a Florida simple battery. A defendant commits a simple battery in Florida where, *inter alia*, he "[a]ctually and intentionally touches or strikes another person against the will of the other." Fla. Stat. § 784.03(1)(a)1. Where such an offense is a first offense, it is punished as a misdemeanor; if, as in *Curtis Johnson*, it is a second offense, it is punished as a

felony. In *Curtis Johnson*, the Court assumed that the offense involved a touching rather than a striking because the record did not indicate otherwise, and touching was the least culpable conduct. 559 U.S. at 137.

In interpreting the touching component, the Court recognized that it was bound by the Florida Supreme Court's holding that "'actually and intentionally touching' under Florida's battery law is satisfied 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)). According to *Curtis Johnson*, such nominal contact did not constitute "violent force," and the Court therefore held that a Florida battery by touching did not satisfy the elements clause. In so holding, the Court focused on the degree of force necessary to commit the offense; the resulting harm was irrelevant.

2. The offense at issue here, Florida felony battery, is derivative of Florida simple battery. The first element of Florida felony battery is perfectly identical to the simple battery offense addressed in *Curtis Johnson*. Fla. Stat. § 784.041(1)(a) ("A person commits felony battery if he or she . . . [a]ctually and intentionally touches or strikes another person against the will of the other"). That very same conduct, however, is punished as a felony when it "[c]auses great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1)(b). While the touching or striking must be intentional in a felony battery (just like simple battery), the defendant need not intend for that conduct to cause great bodily harm. For felony battery, no *mens rea* is required as to the harm

caused. The Florida courts have expressly recognized that a felony battery under § 784.041(1) is nothing more than simple-battery conduct that unintentionally cause great bodily harm. *See Jefferies v. State*, 849 So.2d 401, 404 (Fla. 2d DCA 2003) (describing felony battery as a "species" of simple battery, "but with resulting and *unintended* great bodily harm"), *receded from on other grounds by Hall v. State*, 951 So.2d 91 (Fla. 2d DCA 2007); *Harris v. State*, 111 So.3d 922, 925 (Fla. 1st DCA 2013) ("felony battery wholly subsumes battery").

The Florida Legislature created the separate, third-degree felony offense of felony battery in 1997 to "fill the gap" between a misdemeanor simple battery (an offensive touching or striking regardless of harm) and aggravated battery (a simple battery that *intentionally* causes great bodily harm, punished as a second-degree felony), Fla. Stat. § 784.045. *T.S. v. State*, 965 So.2d 1288, 1290 & n.3 (Fla. 2d DCA 2007). While great bodily harm is intentionally caused in an aggravated battery, it is unintended and completely accidental in a felony battery.

B. PROCEDURAL BACKGROUND

In 2016, Petitioner pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Over his objection, the district court imposed a 6-level sentencing enhancement under U.S.S.G. § 2K2.1(a)(4)(A) (2016) on the ground that his prior conviction for Florida felony battery in violation of § 784.041(1) qualified as a "crime of violence," since it "had as an element the use, attempted use, or threatened use of physical force against the person of another." As a result,

his guideline range became 51-63 months. He was sentenced to the low-end of that range, followed by 2 years supervised release.

On appeal, the Eleventh Circuit held that *United States v. Vail-Bailon*, 865 F.3d 1293 (11th Cir. 2017) (en banc) "squarely foreclose[d]" Mr. Frederick's argument that his Florida felony battery conviction did not meet the elements clause, and that the court was "bound to follow this decision unless and until it is overruled or undermined to the point of abrogation by this Court sitting en banc or by the Supreme Court." *United States v. Frederick*, 737 Fed. Appx. 522 (11th Cir. Sept. 11, 2018) (No. 16-15269).

In *Vail-Bailon*, a narrow 6-5 en banc majority held that Florida felony battery categorically qualifies as a crime of violence under the elements clause. *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. Aug. 25, 2017) (en banc). The en banc majority framed the issue before it as "whether felony battery" "necessarily requires the use of physical force" under *Curtis Johnson*. *Id.* at 1299. The majority concluded that *Curtis Johnson*'s "violent felony" definition set forth a "capability" test by asking whether the offense requires "force capable of causing pain or injury." Reasoning that force actually causing pain or injury is necessarily "capable" of causing such a result, the majority concluded that Florida felony battery met that standard, since it required the causation of great bodily harm. *Id.* at 1299-1302.

The en banc majority rejected Vail-Bailon's contrary assertion that *Curtis Johnson*'s definition of "*violent* force" measured the "degree of force" used. *Id.* at 1300-1302. Moreover, citing *Duenas-Alvarez*—but ignoring the trilogy of circuit

precedents interpreting it—the majority likewise rejected Vail-Bailon's position that the plain language of the statute made clear that, like Florida simple battery, Florida felony battery could be committed by a "mere" or slight touching, regardless of the resulting harm. The en banc majority refused to credit the statute's plain "touching" language, as definitively interpreted in *Curtis Johnson*, because there was "no case" in Florida "in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery." Without such a case, the majority found that Vail-Bailon could not show that prosecution for such non-violent conduct was a "realistic probability," as opposed to "legal imagination." *Id.* at 1305-1307.

In complementary dissents, Judges Wilson and Rosenbaum both opined that the en banc majority had incorrectly "create[d] a new test for 'physical force' that disregards [the] degree of force," and instead adopts a "novel capacity test." *Id.* at 1308-1314 (Wilson, J., dissenting); *see id.* at 1315 (Rosenbaum, J., dissenting). That newfound "capability" test, they argued, "swallow[ed] *Curtis Johnson*'s finding that Florida simple battery does not require 'physical force,'" because even simple battery had the capability of causing pain or injury. *Id.* at 1314 (Wilson, J., dissenting); *see id.* at 1315 & n.2 (Rosenbaum, J., dissenting). In that regard, they emphasized that Florida felony battery was nothing more than Florida simple battery that unintentionally caused great bodily harm: "the *actus reus* elements of felony and simple battery are identical;" the only difference is the result. *Id.* at 1311-1312 (Wilson, J., dissenting); *see id.* at 1315, 1320-1323 (Rosenbaum, J.,

dissenting). Thus, they opined, the en banc majority had also incorrectly applied *Duenas-Alvarez* by requiring the defendant to identify a specific case reflecting a felony battery prosecution for a mere touching. Since the statutory language made plain that the offense could be committed by such conduct, the statutory language itself created the "realistic probability" that Florida would apply the statute in this way; no "legal imagination" was required. *Id.* at 1312, n.4 (Wilson, J., dissenting) (citing *Ramos*); *id.* at 1320-1321 & n.10 (Rosenbaum, J., dissenting) (citing *Ramos*; noting that it was clear from *State v. Hearns*, 961 So.2d 211 (Fla. 2007) and *Curtis Johnson* that the first element of felony battery applies to a mere touching; and opining that "[w]hether Florida has actually prosecuted such a case is entirely irrelevant to the analysis"). Based upon the plain language of the Florida felony battery statute, all five dissenting judges agreed that Florida felony battery could be committed without "*violent* force."

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED ON BOTH QUESTIONS PRESENTED

A. THE CIRCUITS ARE DIVIDED ON PROPER INTERPRETATION OF *CURTIS JOHNSON*, AND IN PARTICULAR, ON WHETHER THE CAUSATION OF BODILY HARM NECESSARILY ENTAILS VIOLENT FORCE UNDER *CURTIS JOHNSON*

In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), 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, as the Eleventh Circuit majority held in *Vail-Bailon*, then not only Florida felony battery but the many other

offenses which likewise require the causation of harm "as an element" would satisfy the definition, since offenses that do cause harm are necessarily "capable" of causing harm. On the other hand, if "*violent* force" is measured by the degree of force applied, as the *Vail-Bailon* dissenters opined and the entirety of the *Curtis Johnson* opinion indicates, then offenses requiring causation of harm would *not* necessarily require violent force. For indeed, even great bodily harm may be caused by only *de minimis* force.

As indicated below, in *United States v. Castleman*, 572 U.S. __, 134 S. Ct. 1405 (2014) the Court expressly left open the question of whether causation of harm necessarily entails the use of "*violent* force," and the circuit courts are now intractably divided on the issue. Notably, though, that circuit conflict may be resolved – or at least significantly impacted – by the Court's decision this term in *Stokeling v. United States*, No. 17-5554. The Eleventh Circuit's reading of *Curtis Johnson* in *Vail-Bailon* is directly at issue in *Stokeling* since, consistent with the majority opinion in *Vail-Bailon*, the government has argued in *Stokeling* that *Curtis Johnson*'s definition of "*violent* force" is measured by its "capability" of causing harm. *See* Resp. Br., *Stokeling*, 2018 WL 3727777 at **7, 11-12, 20-22, 28-29 (Aug. 3, 2018) (No. 17-5554). At the same time, consistent with the *Vail-Bailon* dissenters, the petitioner in *Stokeling* has urged the Court to reject an overly-literal reading of the word "capable" in isolation from the rest of the opinion. Instead, the petitioner in *Stokeling* argues, just like the *Vail-Bailon* dissenters, that the entirety of the *Curtis Johnson* opinion indicates that "*violent* force" is measured by the

"degree of force" used by the perpetrator rather than the actual result upon the victim, and "*violent* force" requires a "substantial degree of force." Pet. Br., *Stokeling*, 2018 WL 2960923 at ** 13, 19-26 (June 11, 2018) (No. 17-5554).

Admittedly, if this Court agrees with the government in *Stokeling* that *Curtis Johnson* set forth a mere "capability" test, that would validate *Vail-Bailon*'s holding that Florida felony battery meets that test, since the fact that harm is actually caused means that the conduct at issue was "capable" of causing harm. But if, on the other hand, the Court agrees with the petitioner in *Stokeling* that *Curtis Johnso*n's "*violent* force" test is one of degree and a "violent felony" requires that a "substantial degree of force" be used in every case, then offenses like Florida felony battery that simply require "causation of harm" will *not* necessarily require "*violent* force." The Eleventh Circuit's – and other circuits' – automatic equation of "causation of harm" and "*violent* force" will be called into question.

1. Whether a causation of harm element in a statute means that an offense necessarily entails the use of "*violent* force" as defined in *Curtis Johnson*, is a question that has been percolating since the 2010 decision in that case. The issue, notably, was directly presented for decision in *Castleman* given that the Tennessee misdemeanor assault statute there at issue contained a "bodily injury" element; the respondent specifically argued that *Curtis Johnson*'s "*violent* force" standard governed whether that offense met the same "use . . . of physical force" language in 18 U.S.C. § 921(a)(33)(A), which defines "misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9); and the respondent asked the Court to hold for purposes of

that definition that bodily injury could indeed be caused without the use of "*violent* force." *See* Resp. Br. at 2, 13-42, *United States v. Castleman*, 2013 WL 6665058 (Dec. 16, 2013)(No. 12-1371). The Court, however, avoided the question of whether bodily injury necessitates "*violent* force" as defined in *Curtis Johnson* by resolving *Castleman* on a different ground. Specifically, instead of importing *Curtis Johnson*'s definition of "physical force" as "*violent* force" into the similar (but slightly different) elements clause in § 921(a)(33)(A), the Court instead held that, for purposes of the "misdemeanor crime of domestic violence" statute, "physical force" broadly refers to common-law force, which, unlike *Curtis Johnson*'s narrower definition, includes even a slight touching. *See Castleman,* 134 S.Ct. at 1410-13 & n.4. Applying the broader definition of common-law "force," *Castleman* held that the assault offense in that case—which necessitated the intentional or knowing causation of bodily injury—was indeed a qualifying misdemeanor crime of domestic violence, since 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). And indeed, that question left open by *Castleman* has continued to divide the circuits.

2. On one side of the divide, 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" under *Curtis Johnson*. Employing a "capability" test, each of these circuits works 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).

In these circuits, however, numerous judges have registered disagreement. As detailed *supra*, the five dissenters in *Vail-Bailon* strenuously debated not only the majority's conclusion that causation of harm necessarily requires "*violent* force," but also the threshold question of interpretation of *Curtis Johnson* – that is, the proper measure of "*violent* force" – underlying it. In the Seventh Circuit, the same court that decided *Douglas* had earlier held in *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003), that an Indiana battery statute materially indistinguishable from the Florida felony battery statute did not require "violent force." *Douglas*, notably, did not reference *Flores*, even though *Castleman* confirmed that *Flores* had been cited with approval in *Curtis Johnson*. 134 S.Ct. at 1412. In the Eighth Circuit, Judge

Kelly opined in *Rice* that there were a number of ways that a person could cause physical injury without using any degree of force. 813 F.3d at 707-08 (Kelly, J., dissenting). And in the Sixth Circuit, Judge White likewise opined in *Anderson* that although "serious physical injury most often results from physical force," "it can also occur in the absence of any force being used by the offender." 695 F.3d at 404 (White, J., concurring).

3. Judge White agreed with the views expressed by several other circuits that (prior to *Castleman*) had "rejected such a broad interpretation of physical force." *Id.* at 405. And indeed, prior to *Castleman*, the First, Second, Fourth, Fifth, and Tenth Circuits had each squarely recognized that causation of harm need *not* require the use of "*violent* force" under *Curtis Johnson*, because in their view "*violent* force" was to be 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 (2d 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 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 continuing validity of its prior precedent holding in the narrower crime of violence context, that 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 upon the administration of poison

[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 force" as an element).

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. And this case neatly presents that question while conveniently avoiding the harder questions about poison and indirect applications of force, since Florida felony battery may be committed only by a touching or a striking. It does not require intentional or knowing causation of bodily harm. And it may not be committed by poisoning or any other indirect application of force.

* * *

In short, to this day the circuits remain hopelessly confused about the meaning of the term "physical force" in the elements clause, and in particular, about whether causation of harm necessarily satisfies *Curtis Johnson*'s definition of "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person." 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 used, concluding that the causation of pain or injury need not be caused by violent force. While the Court expressly left this question open in

Castleman, it could be decided – or at least, impacted by – *Stokeling*. Notably, if the Court confirms in *Stokelin*g that *Curtis Johnson*'s "*violent* force" test is indeed a "degree of force" test, not a mere "capability" test, that would abrogate this Court's contrary interpretation of *Curtis Johnson* in *Vail-Bailon*. It would show that the threshold assumption of *Vail-Bailon*, on which the entire opinion was built, was patently in error. And it would require the Eleventh Circuit to reconsider – irrespective of the harm actually caused – whether Florida felony battery-by-touching categorically requires a "substantial degree of force."

In a petition for certiorari now pending before this Court, where the petitioner has challenged an ACCA sentence predicated upon a conviction under a Texas robbery statute that requires either causation of bodily injury or a threat thereof, *Anthony Hall, Jr. v. United States*, No. 17-8663, the Solicitor General has conceded that the case involves an issue that "relates to the issue currently before this Court in *Stokeling*." Gov't Mem., *Hall* (July 30, 2018), at 1. In fact, even though the robbery statute in *Stokeling* does *not* contain a "causation of harm" element, and factually, all Florida robbery cases do *not* involve causation of injury, *see* Pet. Rep. Br., *Stokeling*, 2018 WL 4275547 at *8, the Solicitor has rightly conceded that *Hall* still "may be affected by the Court's resolution of *Stokeling*," and that the petition in *Hall* should be held "pending that decision." *Id.* at 2.

The Court should hold the petition here for similar reasons. And, if the Court ultimately agrees with the petitioner in *Stokeling* that *Curtis Johnson*'s "*violent* force" test is indeed a "degree of force" test, not a "capability" test, it should either

GVR this case to the Eleventh Circuit with directions to reconsider *Vail-Bailon* in light of *Stokeling*, or – if the circuit conflict on whether "causation of harm" necessarily entails the use of a "*violent* force" is not definitively resolved by *Stokeling* – grant certiorari in this case to resolve that question.

B. The Circuits are Divided on Proper Application of *Duenas-Alvarez* Where the Plain Statutory Language is Overbroad

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Court addressed how to identify the scope of an offense for purposes of applying the categorical approach. It cautioned that doing so "requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the [federal] definition." *Id.* at 193. And "[t]o show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special . . . manner for which he argues." *Id.*

Importantly, however, that passage must be read in context. In *Duenas-Alvarez*, the offender argued that California's aiding-and-abetting doctrine rendered his theft offense non-generic, because it made a defendant criminally liable for unintended conduct. *Id.* at 190-91. That argument found no support in either the statutory language or precedent establishing the scope of aiding-and-abetting liability. As a result, the Court required the offender to identify a specific case to support his novel, proposed application. *See id.* at 187, 190-91. This Court has not addressed whether that case-specific requirement of *Duenas-Alvarez* applies even

where language of the statute plainly establishes that an offense is overbroad. The courts of appeals are now divided on that question.

1. The First, Third, Sixth, Ninth, and Tenth Circuits have all held that a statute's plain language can establish that an offense is overbroad, notwithstanding the absence of any reported case. *See Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017) (the "sensible caution [in *Duenas-Alvarez*] against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case [where the plain statutory language is overbroad]. The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas-Alvarez*, therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is."); *Whyte*, 807 F.3d at 468-69 (where the plain language of the statute does not require the use, attempted use, or threatened use of violent force, there is a "realistic probability" the state could punish conduct that results in physical injury without the "use of physical force;" a reported case is not required); *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to "impose[ ] this additional step" of identifying a reported case because, unlike *Duenas-Alvarez* where the parties "vigorously disputed" the scope of the offense, "no application of 'legal imagination' to the Pennsylvania simple assault statute is necessary. The elements . . . are clear, and the ability of the government to prosecute a defendant" for certain conduct is "not disputed"); *United States v. Lara*, 590 Fed. App'x 574, 584 (6th Cir. 2014) ("The government is correct that there appear to be no cases in Tennessee that have applied § 39–14–403 to unattached,

uninhabited structures. The meaning of the statute, however, is plain: the statute applies to structures that belong to the principal structure. We should not ignore the plain meaning of the statute;" citing as support *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) (where the law is clear, courts do "not need to hypothesize about whether there is a 'reasonable probability' that Maryland prosecutors will charge defendants engaged in non-violent physical contact with resisting arrest; we know that they can") (emphasis added);[2] *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition . . . . The state statute's greater breadth is evident from its text.");[3] *United States v. Tittles*, 852 F.3d 1257, 1274-75 & n.23 (10th Cir. 2017) ("Where, as here, the statute lists means to commit a crime that would render the crime non-violent under the ACCA's force clause, any conviction under the statute does not count as an ACCA violent felony," and there is no "need to imagine hypothetical non-violent facts to take a statute outside the ACCA's ambit" or "require instances of actual prosecutions for the

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[2] *Accord United States v. McGrattan*, 504 F.3d 608, 614 (6th Cir. 2008); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572 (6th Cir. 2007).

[3] *Accord United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc), *abrogated on other grounds, as recognized in Cardozo-Arias v. Holder*, 495 Fed. App'x 790, 792 n.1 (9th Cir. 2012); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-10 (9th Cir. 2015) (re-affirming and applying *Grisel* and *Vidal*); *United States v. Jennings*, 515 F.3d 980, 989 n.9 (9th Cir. 2008) (same); *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017) (following *Grisel*).

means that did not satisfy the ACCA. The disparity between the statute and the ACCA [is] enough.").

2. By contrast, a majority of the judges on the Fifth and Eleventh Circuits have taken the contrary view. Dividing 8-7, the en banc Fifth Circuit held that, under *Duenas-Alvarez*, the defendant was required to identify a reported case in which "courts have *actually applied*" the statute in the way the defendant advocated. *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc). It specifically rejected the contrary assertion that, "because the Texas statute's definition . . . is plainly broader" than the federal definition, "Castillo-Rivera is not required to point to an actual case." *Id.* at 223. That view, according to the majority, "does not comply with the Supreme Court's directive in *Duenas-Alvarez*." *Id.*

Contrary to the views expressed by the First, Third, Sixth, Ninth, and Tenth Circuits, the Fifth Circuit majority reasoned: "There is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face. Indeed, the Court in *Duenas-Alvarez* emphasized that a defendant must 'at least' point to an actual state case—the implication being that even pointing to such a case may not be satisfactory. In short, without supporting state case law, interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193). The majority asserted that this requirement was consistent with prior Fifth Circuit precedents. *Id.* at 223-24. And because the defendant did not identify

a reported case supporting his construction of the statute, the majority rejected his argument. *Id.* at 224-25.

The seven-member dissent in *Castillo-Rivera* disagreed that *Duenas-Alvarez* inflexibly requires a defendant to "point to a state decision . . . in all cases in order to establish a realistic probability that the state would apply its law in a way that falls outside of the scope of the relevant federal" definition. *Id.* at 238 (Dennis, J., dissenting) (citation omitted). Rather, the dissent pointed out, "*Duenas-Alvarez* is concerned with the defendant who tries to demonstrate that a statute is overbroad by hypothesizing that it might be applied in some fanciful or unlikely way—through 'the application of legal imagination.' Castillo-Rivera is not relying on 'the application of legal imagination' to establish that [the statute] is overbroad; he is relying on the statute's plain language." *Id.* at 239.

The majority's contrary conclusion, the dissent argued, also ran afoul of the categorical approach adopted in *Taylor v. United States*, 495 U.S. 575 (1990), because "state prosecutors' discretionary decisions whether or not to prosecute an offense under certain circumstances cannot add *statutory elements* to statutes that plainly do not contain those elements." *Id.* (Emphasis in original). "Viewed in this context, it is clear that *Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case." *Id.* The dissent also argued that the majority's approach was contrary to the facts of *Taylor*, as well as numerous prior

Fifth Circuit cases, which did not require the defendant to identify a case. *See id.* at 239-41.

Finally, the dissent noted that "the majority opinion [does not] address or even acknowledge that its holding directly conflicts with holdings from the First, Third, Sixth, Ninth, and Eleventh Circuits,[4] all of which have recognized the limits of *Duenas-Alvarez*'s requirement." *Id.* at 241 (citing cases). The dissent concluded that "the majority opinion's unqualified rule that a defendant must in all cases point to a state court decision to illustrate the state statute's breadth misconstrues *Duenas-Alvarez*, directly conflicts with *Taylor*, and ignores both our established circuit precedent and the holdings of several of our sister circuits." *Id.*

The Eleventh Circuit is now squarely aligned with the Fifth Circuit. In *Vail-Bailon,* the en banc majority refused to credit scenarios offered by Vail-Bailon, which concretely showed how Florida felony battery could be committed by a mere touching. Although the plain language of the statute made clear that the offense could be committed by a touching, the majority found those scenarios "farfetched" absent a case "in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery under Florida Statute § 784.041." *Vail-Bailon*, 868 F.3d at 1306. Without such a case, the en banc majority found that Vail-Bailon was offering "little more than the verboten legal imagination proscribed" by *Duenas-Alvarez*. *Id.* at 1307. The majority,

[4] Here, the Fifth Circuit was referring to the Eleventh Circuit's pre-*Vail-Bailon* panel precedents in *Ramos*, 709 F.3d at 1071-72, *Vassell*, 839 F.3d at 1362, and *Accardo*, 634 F.3d at 1336-37.

inexplicably, made no mention of the Eleventh Circuit's earlier precedents finding this aspect of *Duenas-Alvarez* inapplicable where the plain language of the statute establishes its scope.

By contrast, and relying upon those earlier precedents, Judge Wilson's dissent correctly explained that:

> the felony battery statute specifically refers to "touching" that "causes great bodily harm," Fla. Stat. § 784.041, and Florida courts have defined "touching" in the battery context to refer to a mere touching, *see Curtis Johnson*, 559 U.S. at 138. Felony battery's "statutory language itself" therefore creates a 'realistic probability that Florida would apply the statute to' a mere touching that happens to cause great bodily harm. *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The Florida legislature would not have included a mere touching as an operative act in felony battery if the legislature did not intend to punish some mere touchings.

Id. at 1312 n. 4 (brackets and parallel citation omitted).

Judge Rosenbaum's dissent made the same point. She reiterated that "a petitioner does not engage in legal imagination when the *statutory language itself* creates the realistic possibility that a state would apply the statute to the identified least culpable conduct, regardless of whether it actually has done so." *Id.* at 1320 (emphasis in original; citations and ellipsis omitted). Applying that principle to felony battery, she explained:

> We know that, by its language, the first element applies to mere touching. *State v. Hearns*, 961 So. 2d 211 (Fla. 2007); *Curtis Johnson*, 559 U.S. 133. . . . So the terms of the felony-battery statute itself make it plain beyond all doubt that mere touching that accidentally results in serious bodily injury squarely satisfies the statute's requirements. Indeed, the government conceded as much at oral argument. For this reason, despite the Majority Opinion's reassurance that, "to its knowledge, there is . . . no case in which mere touching that

> accidentally resulted in serious bodily injury has been held to constitute a felony battery under Florida Statute § 784.041," whether Florida has actually prosecuted such a case is entirely irrelevant to the analysis. *See Ramos*, 709 F.3d at 1071-72.

Id. at 1320-1321 (brackets omitted). While there were only two reported felony battery decisions involving a touching, neither of which involved nominal contact, Judge Rosenbaum opined that they were "not a sufficient sample size to conclude that no one has ever convicted of felony battery for mere-touching conduct." *Id.* at 1320 n.10. And "even if it were, as noted above, mere touching that accidentally results in grievous bodily injury falls squarely within the [statutory] language." *Id.*

Notably, the correctness or incorrectness of the *Vail-Bailon* majority's application of *Duenas-Alvarez* may well be determined this term in *United States v. Sims*, No. 17-766. In *Sims*, the Respondent has asked the Court to weigh in on the longstanding circuit conflict as to whether *Duenas-Alvarez* requires identification of a real case in which a court has applied the statute in an overbroad fashion, if the plain language of the statute of conviction is *itself* facially overbroad. *See* Resp. Br., *United States v. Sims*, No. 17-766, 2018 WL 3913908 at **34-39 (Aug. 14, 2018). The Respondent in *Sims* has argued – similarly to the argument Petitioner raises here – that no "legal imagination" is required to find there is a "realistic probability" that Arkansas will apply its burglary statute to conduct that falls outside the generic definition of burglary, because the "'statute's greater breadth is evident from its text.'" *Id.* at Resp. Br. at *34 (citation omitted). And indeed, if the Court agrees with the Respondent in *Sims* on that point, such a reading of *Duenas-Alvarez* will necessarily abrogate the Eleventh Circuit's contrary reading and application of

Duenas-Alvarez in *Vail-Bailon*. Accordingly, the Court should hold this petition pending issuance of the decision in *Sims*. If the Court holds in *Sims* that the plain language of a statute may itself establish a "reasonable probability" of an overbroad application sufficient to meet *Duenas-Alvarez*, the Court should GVR this case to the Eleventh Circuit with directions to reconsider *Vail-Bailon* in light of *Sims*. However, if the Court resolves *Sims* without reaching the *Duenas-Alvarez* question, it should grant certiorari to resolve that question here.

II. BOTH QUESTIONS ARE RECURRING AND IMPORTANT

1. The time is ripe to definitively clarify the few remaining questions stemming from *Curtis Johnson*'s "*violent* force" definition. The meaning of *Curtis Johnson* is of paramount importance after *Samuel Johnson v. United States*, 576 U.S. __, 135 S. Ct. 2551 (2015), which declared the ACCA's residual clause void for vagueness. While the residual clause had previously acted as a broad catchall under which many offenses qualified as violent felonies, with the elimination of the residual clause, the elements clause has become the primary ACCA battleground. Parties, probation officers, and lower courts are now routinely required to assess whether offenses satisfy that clause. And its meaning should be uniform across the nation.

The "causation of harm" 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 felony battery offenses like the ones here and in

Flores/Douglas, but also assault, manslaughter, threat, domestic violence, child endangerment, and a host of other statutes including robbery and aggravated robbery statutes requiring the causation of some harm or injury. Given this broad potential application, the Court in *Castleman* was careful to leave open the question of whether causation of harm always requires "*violent* force," deciding that case on another ground. Here, however, the question of whether causation of great bodily harm necessitates "force capable of causing pain or injury to another" cannot be avoided, and must be decided. The rampant uncertainty described above on this question is intractable because it derives from this Court's opinion in *Curtis Johnson* itself. That question may or may not be definitively resolved by *Stokeling*.

2. The *Duenas-Alvarez* question here also has widespread application, and likewise necessitates resolution, since Federal courts across the nation apply the categorical approach on a daily basis. In the criminal context, they do so to determine not only whether a federal criminal defendant is subject to a mandatory minimum penalty or enhanced guideline range, but also whether a defendant may have committed predicate "crimes of violence" under 18 U.S.C. § 924(c). And, in the immigration context, courts apply the categorical approach to determine whether an alien is subject to removal. Thus, while the categorical approach represents a technical area of the law, its application has widespread and extremely grave consequences in both the federal criminal and immigration arenas. Given the stakes, its application must be uniform.

This Court has attempted to vigilantly ensure such uniformity by repeatedly granting review to clarify the categorical approach. *See, e.g.*, *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243 (2016) (clarifying when statutes are divisible for modified categorical approach); *Descamps v. United States*, 570 U.S. __, 133 S. Ct. 2276 (2013) (holding that modified categorical approach is inapplicable to indivisible statutes); *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (re-affirming and clarifying application of categorical approach in immigration context); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (declining to apply categorical approach to particular immigration statute); *Shepard v. United States*, 544 U.S. 13 (2005) (limiting class of documents that may be considered under modified categorical approach). It is likely that the Court will provide further clarification to proper application of the categorical approach in both *Stokeling* and *Sims*. But given the uncertainty created by *Duenas-Alvarez*, and the prevalence of the categorical approach, the Court's intervention in this area would be warranted yet again if the Court resolves *Sims* without reaching the circuit conflict on *Duenas-Alvarez*.

The minority view adopted by the en banc Fifth and Eleventh Circuits will have troubling repercussions if not corrected. Under that view, the scope of a predicate offense can be ascertained only by examining the particular facts contained in the universe of reported cases. That limited universe, however, will seldom reflect the true scope of the offense. The reported case law can be skewed or sparse due to the relative novelty of an offense, prosecutorial discretion, and—most importantly—the ubiquity of guilty pleas. *See Aparicio-Soria*, 740 F.3d at 157-158

("It may be that Maryland prosecutors tend to charge too many offenders with resisting arrest when they could charge far more serious crimes, or it may be that we have a skewed universe of cases from the hundreds of resisting arrest convictions sustained each year."); *see also United States v. Davis*, 875 F.3d 592, 606 (11th Cir. Nov. 7, 2017) (Rosenbaum, J., concurring in part) (noting that "only a handful of the numerous cases prosecuted under § 784.041 have published opinions in them. As a result, we have no way of knowing the scope of what Florida has actually prosecuted under that statute").

The charging, plea, and appeal practices under a statute cannot change the scope of the offense, which, at bottom, derives from the statute enacted by the legislature. *See Castillo-Rivera*, 853 F.3d at 239 (Dennis, J., dissenting). And, by precluding courts from relying on the plain statutory language, that application of the categorical approach will ensure an artificial analysis—one where the least culpable conduct used by the courts does not represent the least culpable conduct actually prohibited by the statute. At the very least, such a troubling application and extension of *Duenas-Alvarez* warrants this Court's close scrutiny.

In fact, the effects of *Vail-Bailon* in this regard have already been felt outside the Eleventh Circuit, and in diverse contexts far removed from that here. For example, in *In re Aspilaire*, 2017 WL 5377562 (BIA Sept. 18, 2017), the Board of Immigration Appeals followed *Vail-Bailon* to reject the contention of a lawful permanent U.S. resident subject to a removal order that the absence of Florida prosecutions for possession of antique firearms was irrelevant under *Ramos*. To the

contrary, the Board found citing *Vail-Bailon*, the absence of any reported prosecutions was dispositive. *Id.* at *5. As the Board of Immigration Appeals correctly recognized, the en banc majority in *Vail-Bailon* had "implicitly reject[ed] the understanding of the realistic probability doctrine reflected in *Ramos*." *Id.*

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE BOTH QUESTIONS, IF THEY ARE NOT RESOLVED BY *STOKELING* AND *SIMS*

Both the *Curtis Johnson* question and the *Duenas-Alvarez* questions are ideally presented for decision here. Indeed, the Florida felony battery statute perfectly tees up both current disputes, since the statute requires *both* a touching *and* the causation of great bodily harm. If *Stokeling* holds that "*violent* force" is measured not by the resulting harm but by the degree of force used, then Florida felony battery—which, by its plain terms, can be committed by a touching—arguably would *not* satisfy the elements clause. Proper application of *Duenas-Alvarez* would then be dispositive.

Here, it is undisputed that there are no reported decisions demonstrating that Florida felony battery may be committed by a mere touching. However, as both dissenting opinions in *Vail-Bailon* recognized, the plain language of Fla. Stat. § 784.041(1) makes clear that Florida felony battery may be committed by a touching. Were it otherwise, the Legislature would have limited felony battery to striking. It did not because, as explained above, felony battery is a derivative of simple battery—one that happens to result in great bodily harm. Given that the first element of felony battery *is* simple battery, *see* Fla. Stat. §§ 784.03(1)(a)1, 784.041(1)(a), and the Florida Supreme Court has definitively held that battery by

touching can occur by only the most nominal contact, *Curtis Johnson*, 559 U.S. at 138, the statute plainly proscribes such conduct.

Notwithstanding that, if *Duenas-Alvarez* requires defendants to always identify a case establishing the least culpable conduct, as the Fifth and Eleventh Circuits now hold, then Petitioner could not prevail. There is no reported decision confirming what the plain statutory language says—*i.e.*, that felony battery can occur where a mere touching happens to cause great bodily harm. However, if no case is required where the plain statutory language makes clear that the offense is overbroad, as First, Third, Ninth, Tenth, and earlier Eleventh Circuit opinions have held, then *Duenas-Alvarez* would pose no obstacle here. Thus, the disputed application of *Duenas-Alvarez* is ideally presented here.

IV. THE DECISION BELOW IS WRONG

The Eleventh Circuit incorrectly concluded that Florida felony battery categorically meets the elements clause.

1. The en banc dissents in *Vail-Bailon*, persuasively explain why Florida felony battery, when committed by a touching, does not satisfy the elements clause. Those opinions, as well as the many circuit opinions cited above, have correctly explained that the causation of bodily harm or injury need not require "*violent* force." To reflexively equate physical harm or injury with "*violent* force" reflects a logical fallacy and an incorrect reading of *Curtis Johnson*. As the petitioner in *Stokeling* has argued, a proper reading of that decision—taking into account the entirety of its explanation—compels the conclusion that "*violent* force" is measured

by the degree or quantum of force used, not by whether it has the "capability" of causing pain or injury. Notably, numerous passages of *Curtis Johnson* employed a "degree of force" metric, and this Court has repeatedly cautioned against reading a single statement from an opinion "'in isolation' rather than 'alongside the rest of the opinion,'" *Endrew F. v. Douglas Cty. Sch. Dist.*, 580 U.S. ___, 137 S. Ct. 988, 998 (2017), as the en banc majority did in *Vail-Bailon*. *See* 868 F.3d at 1308-1309 (Wilson, J., dissenting).

Indeed, one need look no further than the result reached in *Curtis Johnson* to confirm that "force capable of causing pain or injury" refers to the "degree of force" rather than the possible consequences of the offense. Had the Court truly adopted a "capability" test in *Curtis Johnson*, it would have reached the opposite outcome in that case. Notably, the very existence of the Florida felony battery statute here confirms that the same mere touching in a simple battery is capable of causing great bodily harm. Yet *Curtis Johnson* nonetheless held that simple battery did not require the use of "*violent* force." The only way to make sense of that holding is to conclude that "*violent* force" depends on the degree or quantum of force used, not its capability of causing pain or injury. The latter test adopted by the en banc majority in *Vail-Bailon* is thus incompatible with the outcome reached in *Curtis Johnson* itself. It will sweep in numerous offenses requiring minimal contact (or none at all), thus eviscerating any distinction between violent and non-violent offenses, which was the very distinction that *Curtis Johnson* sought to create.

In addition to *Curtis Johnson*'s outcome and repeated references to "degree of force," it also approvingly cited the Seventh Circuit's decision in *Flores* immediately following its definition of "*violent* force" as "force capable of causing pain or injury." 559 U.S. at 140. The Court later confirmed in *Castleman* that it had indeed cited *Flores* "with approval." 134 S. Ct. at 1412. It could not have done so had it intended the word "capable" in its definition to refer to the result of the defendant's conduct rather than the degree of force used. That is so because causation of serious bodily harm was also an element of the offense in *Flores*, and the Seventh Circuit held there that the touching in that case did not involve "violent force." If this Court had disagreed with that holding, it would not have so prominently relied upon that decision, citing the very page of the *Flores* opinion where that holding appeared. Indeed, there were many other circuit decisions discussed in the *Curtis Johnson* briefing, but the Court cited only *Flores*. Thus, because the Court approved of *Flores*, it must have agreed with Vail-Bailon's argument about his "materially indistinguishable" battery offense. By reaching the contrary conclusion in *Vail-Bailon*, the Eleventh Circuit has rendered meaningless the Court's citation to *Flores* in both *Curtis Johnson* and *Castleman*.

2. The dissenting opinions in *Vail-Bailon*, as well as the many circuit opinions cited above, persuasively explain why the en banc majority also improperly applied *Duenas-Alvarez*. No reported case is necessary to confirm what the statutory language plainly says: that Florida felony battery may be committed by a touching. And this Court has already correctly explained that "[t]he Florida

Supreme Court has held that the element of 'actually and intentionally touching' under Florida's battery law is satisfied by *any* intentional physical contact, 'no matter how slight.'" *Curtis Johnson*, 559 U.S. at 138 (quoting *Hearns*, 961 So.2d at 218). The law is clear that Florida felony battery may be committed by only a mere touching.

In *Duenas-Alvarez*, this Court was concerned with a defendant who sought to establish a statute's overbreadth in an unlikely way that was unsupported by the statutory language. The Court therefore required a reported case in order to avoid the exercise of legal imagination. But no such imagination is required where, as here, the plain statutory language, as well as precedent from the state's highest court, establishes that the statute is overbroad. Applying *Duenas-Alvarez* under such circumstances contravenes the categorical approach. The elements of the offense ultimately derive from the statute, not from the limited universe of appellate decisions. If a statute is newly enacted, infrequently charged, or has not generated many reported decisions—a distinct possibility given that most cases are resolved by guilty pleas—then the approach of the en banc majorities in the Eleventh and Fifth Circuits would still require courts to disregard the statutory language when ascertaining the least culpable conduct.

Nothing in law or logic justifies that anomalous approach.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. At the very least, this case should be held pending the decisions in *Stokeling* and *Sims*.

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