No. _____

In the Supreme Court of the United States

RICHARD FUENTES, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*.

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

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QUESTION PRESENTED FOR REVIEW

Can a prison sentence imposed upon revocation of supervised release ever be substantively reasonable when: 1) it was authorized by virtue of the fact that the defendant was originally sentenced under the Armed Career Criminal Act (ACCA), 2) it exceeds the maximum revocation sentence for a defendant who did not qualify for the ACCA enhancement, 3) the defendant no longer qualifies as an armed career criminal in the wake of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and 4) the defendant has already served more time in prison than the non-ACCA aggregate maximum for his original offense and any revocation?

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Petitioner Richard Fuentes asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 11, 2018.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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OPINION BELOW

The published opinion of the Fifth Circuit, *United States v. Fuentes*, 906 F.3d 322 (2018), is reproduced at Pet. App. 1a–6a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Fifth Circuit entered its judgment on October 11, 2018. Justice Alito granted Fuentes's motion to extend the time for filing a petition for writ of certiorari to February 8, 2019. *See Fuentes v. United States*, No. 18A689. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3559(a):

> (a) Classification.—An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—
>
> (1) life imprisonment, or if the maximum penalty is death, as a Class A felony;
>
> ***
>
> (3) less than twenty-five years but ten or more years, as a Class C felony[.]

18 U.S.C. § 3583(e)(3):

> The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)[,] … revoke a term of supervised release, and require the defendant to serve in prison all or part of

> the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case[.]

STATEMENT

1. The Armed Career Criminal Act (ACCA) increases the penalties for certain felons who unlawfully possess firearms. The maximum penalty is generally 10 years' imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2). But if the defendant has at least three prior convictions for a "violent felony," a "serious drug offense," or both, the ACCA increases the penalty to a minimum of 15 years in prison and a maximum of life. 18 U.S.C. § 924(e)(1). Also, the maximum term of supervised release increases from three years to five years. *See* 18 U.S.C. §§ 3559(a)(1), (3); 3583(b)(1), (2). And the maximum imprisonment term that a court can impose if it revokes a defendant's supervised release increases from two years to five years. *See*

18 U.S.C. §§ 3559(a)(1), (3); 3583(e)(3). A violent felony is "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the force-element clause), "is burglary, arson, or extortion, [or] involves use of explosives" (the enumerated-offenses clause), "or otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B).

In *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2563 (2015), this Court held that the residual clause is unconstitutionally vague, and that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process."

2. In 2003, Fuentes was charged in a one-count indictment with possessing a firearm after having been convicted of three "violent felonies," in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). Those felonies were a 1989 Texas conviction for indecency with a child by contact, a 1989 Texas conviction for burglary of a building, and a 1991 Texas conviction for burglary of a habitation. The indictment alleged that the felon-in-possession offense occurred on or about July 28, 2002. The Government also filed a "Notice of Enhanced

Penalty" stating that it would seek an enhanced punishment under 18 U.S.C. § 924(e)(1) (the Armed Career Criminal Act, or ACCA), which mandates a minimum fifteen-year prison sentence, based on the same three prior felonies identified in the indictment.

Fuentes pleaded guilty to the indictment. At sentencing, he objected to the ACCA enhancement, arguing that the three felony convictions alleged in the indictment and notice of enhanced penalty did not qualify as violent felonies. The Government responded that Fuentes's burglary convictions qualified as ACCA violent felonies because burglary is specifically enumerated as such, and because that offense "presents a serious potential risk of physical injury to another"—a reference to the so-called "residual clause" in the violent felony definition. *See* 18 U.S.C. § 924(e)(2)(B)(ii). The Government argued that Fuentes's indecency conviction also qualified as a violent felony under the residual clause.

The district court overruled Fuentes's objection to the ACCA enhancement and sentenced him to the mandatory minimum term

of 180 months' imprisonment.[1] The court also imposed a five-year term of supervised release to follow Fuentes's imprisonment, along with a number of mandatory, standard, and special release conditions. The Fifth Circuit affirmed Fuentes's sentence on direct appeal. *United States v. Fuentes*, 109 F. App'x 657 (2004). This Court denied his petition for a writ of certiorari. *Fuentes v. United States*, 543 U.S. 1075 (2005).

In March 2016, Fuentes was released from prison and began his five-year term of supervised release. Two months later, his probation officer filed a petition with the district court alleging that, by refusing to sign a release of documents necessary for him to undergo a sex offender evaluation, Fuentes had violated a special condition of supervised release that required him to participate in mental health and/or sex offender treatment. At a hearing on the petition, Fuentes agreed to sign the release form and to cooperate with the sex offender evaluation.

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[1] The judgment identified the offense of conviction as "Possession of a Firearm by a Convicted Felon With Enhanced Minimum Penalty," under "18 USC 922(g)(1) and 924(e)(1)." The district court's written statement of reasons explained that Fuentes "was sentenced to the statutory minimum of 15 years[.]"

A few months later, in September 2016, the probation officer filed a second petition with the district court alleging that Fuentes was still in violation of the treatment condition. The petition alleged that Fuentes reported for a sex offender evaluation twice in August 2016, but refused to submit to the evaluation. The petition recommended that the district court revoke Fuentes's supervised release, for which Fuentes would face a maximum penalty of five years' imprisonment and five years' supervised release.

Eight months later, in May 2017, the court held a final revocation hearing. The Government presented testimony from Fuentes's probation officer and the counselor to whom he had been referred for the sex offender evaluation. The probation officer testified that the release form Fuentes eventually signed stated that he did not have to answer any questions he did not want to, but she explained to him that he still had to participate in the evaluation process as a condition of his supervised release. The counselor testified that although Fuentes at first refused to sign the release form, he did so when he went back for an evaluation in August 2016. Yet Fuentes refused to answer many questions on the assessment and evaluation forms, which prevented the counselor from doing the evaluation and determining whether he needed counseling. The

counselor explained to Fuentes that, if he chose not to answer certain questions, she could not perform the evaluation and would have to inform his probation officer of that.

After hearing the testimony, the district court found that Fuentes had violated the condition requiring him to undergo treatment and that his supervised release should be revoked. Fuentes's counsel responded that the condition would not be permissible under current Fifth Circuit case law and that the testimony and evidence at the hearing did not establish that Fuentes intentionally violated the treatment condition because the release form gave him the option of not answering questions. Fuentes himself explained that he did not want to answer all the questions on the assessment forms because the release form stated that the information could be shared with law enforcement agencies and used against him for the rest of his life. He also disputed the information that the probation officer provided to the counselor about his prior indecency conviction. The court asked Fuentes if he would cooperate with the counselor and participate in the evaluation if the information was sealed and not turned over to law enforcement. Fuentes said, in that case, he would answer every question.

At the Government's suggestion, the court heard again from the probation officer. She said she explained to Fuentes "over and

over again" that the evaluation and resulting report would not be disclosed to any agency that did not have anything to do with his treatment, and the only information that would be disclosed to the Texas Department of Public Safety, with whom Fuentes has to register as a sex offender, was his risk level. According to the probation officer, Fuentes refused to "do anything that he did not want to do based on this evaluation."

The district court revoked Fuentes's supervised release and sentenced him to 60 months' imprisonment, with no supervised release to follow. Fuentes did not object to the sentence.

3. Fuentes appealed. He pointed out that he no longer qualifies as an Armed Career Criminal after this Court's decision in *Johnson* because one of the three prior convictions on which his enhancement was based—indecency with a child by contact—could only qualify as an ACCA predicate under the residual clause that *Johnson* invalidated. Fuentes acknowledged that, under Fifth Circuit precedent, he could not challenge the unconstitutionality of his underlying ACCA sentence in revocation proceedings. But he argued that his 60-month revocation sentence is plainly substantively unreasonable because it exceeds the 24-month statutory maximum that applies to a non-ACCA felon-in-possession conviction.

For support, Fuentes relied on the Fifth Circuit's decision in *United States v. Willis*, 563 F.3d 168 (2009), which, like Fuentes's case, involved a revocation sentence that rested on a constitutional flaw in the original sentence. Willis had been convicted of two counts of being a felon in possession of a firearm based on his simultaneous possession of two firearms. *Id.* at 169. The counts were "multiplicitous in violation of the Fifth Amendment's prohibition against double jeopardy." *Id.* Willis did not object to the multiplicity, and was sentenced to concurrent terms of imprisonment and supervised release on both counts. *Id.* Willis also did not challenge the multiplicity of the second conviction on direct appeal or in his two unsuccessful § 2255 motions. *Id.* After completing his term of imprisonment, Willis violated the conditions of his supervised release. *Id.* The district court revoked Willis's supervised release and sentenced him to 24 months' imprisonment on both counts, to run consecutively to each other. *Id.*

Willis "appeal[ed] the second of the two revocation sentences as unreasonable, on the ground that it is multiplicitous." *Id.* at 170. Although Fifth Circuit law precluded a challenge to the validity of the underlying conviction, the court held that "the fact of its multiplicity … is, under all circumstances present, plainly unreasonable." *Id.* The Court also purported to limit the precedential effect

of its decision: "We hold only that Willis's revocation sentence, which would require that he actually serve, *i.e.*, consecutively serve, two or more sentences as a penalty for a single offense, is plainly unreasonable. We limit the precedential value of our holding to cases presenting indistinguishable facts in all material respects." *Id*.

Fuentes argued that his *is* materially indistinguishable from *Willis*. Like Willis, Fuentes was not challenging the validity of his original sentence. Instead, he was challenging the reasonableness of his revocation sentence. Also as in *Willis*, Fuentes's underlying sentence is unconstitutional and resulted in a greater term of imprisonment than he should have received when his supervised release was revoked. For that reason, Fuentes argued, his revocation sentence, like Willis's, is unreasonable.

Reviewing for plain error, because Fuentes did not object to his revocation sentence in the district court, the Fifth Circuit affirmed his sentence. Pet. App. 6a. The court held that *Willis* was materially distinguishable from Fuentes's case for three reasons. Pet. App. 5a–6a. First, the court said, the constitutional error in the two cases was different: Willis's multiplicitous conviction was unconstitutional on its face, whereas Fuentes's claimed error "only became apparent years late due to an intervening Supreme Court

decision." Pet. App. 5a–6a. Second, "unlike *Willis*," the Government did not concede the constitutional error in Fuentes's original sentence, and Fuentes cited only pre-*Johnson* Fifth Circuit precedent holding that indecency with a child by contact lacks a force element and thus could qualify as an ACCA predicate only under the residual clause. Pet. App. 6a. Third, the relationship between the constitutional error and the revocation sentence was different from *Willis*. Pet. App. 6a. "In *Willis*, the uncorrected defect in the original conviction was both carried forward and exacerbated by the imposition of two consecutive revocation sentences." Pet. App. 6a. But in the Fifth Circuit's view, "[t]he imposition of a statutory maximum revocation sentence in this case"—although carried forward from the original sentence—"did not exacerbate that original flaw in a sufficiently similar manner to *Willis* such that *Willis* trumps the default view that a statutory maximum revocation sentence is neither plainly unreasonable nor plain error." Pet. App. 6a. Those three distinctions were enough to convince the Fifth Circuit "that the district court did not commit a plain error, particularly in light of *Willis*'s careful limitation of its own precedential value." Pet. App. 6a.

REASONS FOR GRANTING THE WRIT

In 2003, Fuentes was convicted of being a felon in possession of a firearm and received an enhanced sentence under the Armed Career Criminal Act. If he were to commit that same offense today, he could not receive the same sentence. That is because, after this Court's 2015 decision in *Johnson v. United States*, 135 S. Ct. 2551, Fuentes no longer qualifies as an Armed Career Criminal. Nevertheless, when the district court revoked Fuentes's supervised release in 2017, it sentenced to him 60 months' imprisonment—the maximum that applies to a defendant originally sentenced under the ACCA, but three years longer than is authorized for a non-ACCA felon-in-possession revocation. What's more, before his revocation Fuentes had already served more time in prison that the aggregate maximum sentence he should have faced without the ACCA enhancement. Although the circuit courts broadly agree that a defendant cannot challenge the validity of his underlying conviction and sentence in revocation proceedings, the Court should grant certiorari to say whether a revocation sentence of more than two years can ever be reasonable in these circumstances.

A. Given this Court's decision in *Johnson v. United States*, Fuentes did not qualify for an enhanced sentence under the ACCA.

The statutory maximum sentence for a felon-in-possession offense is generally 10 years' imprisonment. 18 U.S.C. §§ 922(g)(1), 924(a)(2). But if the defendant has at least three prior convictions for a "violent felony," a "serious drug offense," or both, the ACCA increases the penalty to at least fifteen years' imprisonment, with a maximum of life. 18 U.S.C. § 924(e)(1). The ACCA also increases the maximum term of supervised release from three years to five years. See 18 U.S.C. §§ 3559(a)(1), (3); 3583(b)(1), (2). For purposes of this enhancement,

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punish-able by imprisonment for such term if committed by an adult, 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 italicized portion of the definition is known as the "residual clause." *Johnson*, 135 S. Ct. at 2555–56.

At Fuentes's original sentencing, he argued that none of the three prior convictions listed in the indictment and notice of enhanced penalty qualified as ACCA violent felonies. The Government responded that the indecency conviction qualified under the residual clause: "[I]ndecency with a child would fit under that definitional purpose as a serious potential risk of injury to a person." The district court overruled Fuentes's objection and sentenced him to the mandatory minimum of fifteen years' imprisonment required by the ACCA.

But in 2015, this Court held in *Johnson v. United States* that the residual clause is unconstitutionally vague and that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." 135 S. Ct. at 2557, 2563. In light of *Johnson*, Fuentes was not in fact subject to the enhanced penalties under the ACCA. Without the residual clause, at least one of his prior convictions no longer qualifies as an ACCA violent felony: indecency with a child by contact. That offense is not enumerated as a violent felony. *See* § 924(e)(2)(B)(ii). Nor does it have an element of force. *See* § 924(e)(2)(B)(i).

To determine whether an offense has an element of physical force, a Court must employ a categorical approach that looks only

to the elements of the crime, not to the actual facts of the case. *See Mathis v. United States*, 136 S. Ct. 2243, 2248, 2257 (2016). The term "physical force," in the violent felony definition, "means violent force[.]" *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). If any set of facts would support a conviction without proof of such force, then it is not an element of the crime. *See Mathis*, 136 S. Ct. at 2248, 2257.

In 1989, Fuentes was convicted in Texas of "Indecency with a Child–Contact." His presentence report did not identify the statute of conviction, but that description of the offense identifies it as Texas Penal Code § 21.11. That statute reads: "A person commits an offense if, with a child younger than 17 years and not his spouse, whether the child is of the same or opposite sex, he … engages in sexual contact with the child[.]" Tex. Penal Code Ann. § 21.11(a)(1) (West 1989). In *United States v. Velazquez-Overa*, the Fifth Circuit addressed whether this offense was a "crime of violence" as defined in 18 U.S.C. § 16. 100 F.3d 418, 419–20 (1996). Subsection 16(a) defines the term to mean "an offense that has as an element the use, attempted use, or threatened use of physical force against the per-son or property of another[.]" *Id.* at 420 (quoting statute). *Velasquez-Overa* held that "[s]ubsection (a) is plainly

inapplicable; physical force is not an element of the crime of indecency with a child as defined by the state of Texas." *Id*. Except for the reference to property, § 16(a)'s force clause is identical to the force clause in the ACCA's violent felony definition. And for that reason, the offense does not qualify as a violent felony under the ACCA.

Without the indecency conviction, Fuentes does not have at least three prior violent felony convictions and does not qualify for the ACCA enhancement in the wake of Johnson.

B. Without the ACCA enhancement, the maximum aggregate term of imprisonment Fuentes could have faced was twelve years: ten years for the original offense, plus two years for violating a condition of his supervised release.

As discussed above, the maximum term of imprisonment for a non-ACCA felon-in-possession offense is ten years. That, in turn, controls the maximum prison term that a district court may impose upon revocation of supervised release, which depends on the class of offense that resulted in the term of supervised release. *See* 18 U.S.C. § 3583(e)(3). An offense punishable by a maximum of ten years' imprisonment is a Class C felony. 18 U.S.C. § 3559(a)(3). The maximum revocation imprisonment term for a Class C felony is two years. 18 U.S.C. § 3583(e)(3).

Also, a penalty imposed upon revocation is treated as "part of the penalty for the initial offense[.]" *Cornell Johnson v. United States*, 529 U.S. 694, 700 (2000). The upshot is that the aggregate statutory maximum term of imprisonment for a given offense is the maximum term that may be imposed for the offense itself, plus the maximum term that may be imposed for a violation of the resulting term of supervised release. *See United States v. Hinson*, 429 F.3d 114, 115–16 (5th Cir. 2005). When Fuentes committed his felon-in-possession offense, on July 28, 2002, that was ten years plus two years, for an aggregate maximum of twelve years.[2]

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[2] At that time, the maximum revocation imprisonment terms in § 3583(e)(3) "applie[d] on a cumulative basis and not separately to each time supervised release is revoked." *United States v. Jackson*, 329 F.3d 406, 407–08 (5th Cir. 2003) (per curiam). In 2003, after Fuentes committed his offense, Congress amended § 3583(e)(3) so that the stated maximum terms "limit[ ] only the amount of revocation imprisonment the revoking court may impose *each time* it revokes a defendant's supervised release." *United States v. Shabazz*, 633 F.3d 342, 345–46 (5th Cir. 2011) (emphasis added).

C. Because Fuentes has already served more than twelve years in prison for his offense, the 60-month revocation sentence—which itself exceeds the two-year statutory maximum imprisonment term that applies without the ACCA enhancement—is substantively unreasonable.

The circuit courts broadly agree that a defendant may not challenge his underlying sentence in revocation proceedings. *See, e.g., United States v. Jones*, 833 F.3d 341, 343–44 (3d Cir. 2016). Consistent with the Fifth Circuit's approach here, the Third and Sixth Circuits have held that this rule bars defendants from challenging pre-*Johnson* ACCA sentences in post-*Johnson* revocation proceedings. *Id.* at 344–45; *United States v. Hall*, 735 F. App'x 188, 191–92 (6th Cir. 2018). This is so, even if the defendant frames his appeal as a challenge not to the underlying sentence, but only to the district court's determination that he faced a five-year revocation maximum. *See Jones*, 833 F.3d at 344. Under this rule, Fuentes's original sentence, which he has already completed, was legal when it was imposed, so "the revocation sentence, which depends on it, is also legal." *Willis*, 563 F.3d at 170; *see* Pet. App. 3a (noting that Fuentes "cannot challenge his underlying conviction and sentence").

But just because a revocation sentence is legal does not make it reasonable. To the contrary, in the circumstances here, Fuentes's legal revocation sentence is substantively unreasonable.

Not only does the five-year revocation sentence alone exceed what should have been a two-year maximum, but even before his revocation Fuentes had already served more time in prison—almost thirteen years—than the twelve-year aggregate maximum that should apply in the wake of *Johnson*. This Court should grant certiorari to say whether a revocation sentence of more than two years can ever be substantively reasonable in these circumstances.

CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted.

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