No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2018

PRESTON PHILLIPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Whether an offense committed by indirect force, or by "any means" like an omission, qualifies as a "violent felony" under the Armed Careener Criminal Act, because they categorically must involve the "use, attempted use, or threatened use of physical force."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Preston Phillips respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A) is unpublished at ___ Fed.Appx. ___, 2019 WL 1749388 (2019).

JURISDICTION

On January 9, 2017, this Court remanded this case to the United State Court of Appeals for the Eighth Circuit for further consideration in light of *Mathis v. United States*, 136 S.Ct. 2243 (2016). *Phillips v. United States*, 137 S. Ct. 634, 196 L. Ed. 2d 507 (2017). The Eighth Circuit, in turn, remanded the case to the district court to determine whether Mr. Phillip's ACCA sentence was proper. *United States v. Phillips*, 853 F.3d 432 (2017). After the district court sentenced Mr. Phillips to the same ACCA sentence, the Eighth Circuit again affirmed Mr. Phillips' sentence. *United States v. Phillips*, ___ Fed.Appx. ___, 2019 WL 1749388 (2019). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PRVISIONS INVOKED

18 U.S.C. § 924(e) of the Armed Career Criminal Act provides, in relevant part: (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title 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, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

2) As used in this subsection— . . . . (B) 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 punishable 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 . . . .

Mo. Rev. Stat § 565.073, Missouri domestic assault in the second degree, provides that "[a] person commits the offense of domestic assault in the second degree if . . . . he or she . . . [k]nowingly causes physical injury to such domestic victim by any means, including but not limited to, use of a deadly weapon or dangerous instrument, or by choking or strangulation."

Minn. Stat. § 609.222, Minnesota assault, provides that assault is "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another."

INTRODUCTION

This case presents a question upon which there is an acknowledged and entrenched conflict amongst the court of appeals: whether an offense committed by indirect force or an omission qualifies as a "violent felony" under the Armed Careener Criminal Act, 18 U.S.C. § 924(e), because they categorically must involve the "use, attempted use, or threatened use of physical force." See *id.* § 924(e)(2)(B)(i).

As used in the ACCA, the words "physical force" have a particular meaning. In *Johnson v. United States*, 559 U.S. 133, (2010), this Court stated that the common understanding of the word "physical" refers to "force exerted by and through concrete bodies," which "distinguish[es] physical force from, for example, intellectual force or emotional force." *Id.* at 138. It stated that the word "force" means "[p]ower, violence, or pressure directed against a person or thing," and "physical force" means "[f]orce consisting in a physical act," such as "a violent act directed against a robbery victim." *Id.* at 139. This Court, mindful that it was interpreting the term "physical force" in the context of the ACCA's "statutory category of 'violent felon[ies],' " *id.* at 140, rejected the specialized common-law meaning of the word "force," which could be satisfied by a mere unwanted touch, *id.* at 139. It explained that "the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes[.]" *Id.* at 140. Thus, it concluded, the ACCA's "phrase 'physical force' means *violent* force—that is, force capable of causing physical pain

or injury to another person." *Id.*

The Court should grant the petition for a writ of certiorari to decide this question for four reasons. *First*, there is an acknowledged and intractable conflict amongst the circuits on the question presented. Despite the government's extensive arguments throughout the nation that this Court's holding in *United States v. Castleman*, 572 U.S. 157 (2014) has resolved this issue in the unique context of the ACCA, recent circuit court decisions highlight that the split continues to divide the circuits on this subject. *See United States v. Mayo*, 901 F.3d 218, 228 (3d Cir. 2018) ("*Castleman* does not support the government's argument that any form of bodily injury requires violent force"); *see also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) (same).

Second, the correct interpretation of this provision of the ACCA is an issue of national importance that arises frequently in the lower courts. ACCA enactments are applied to hundreds of defendants each year, and as this Court's various ACCA related decisions indicate, it is important that the ACCA sentencing enhancements- which can dramatically increase a defendant's term of imprisonments- be applied uniformly throughout the country.

Third, the decision below is wrong. In concluding that an offense committed by indirect force or omission qualifies as a "violent felony" under the ACCA, the Eighth Circuit has concluded that this Court's decision in *Castleman* is fully dispositive of this issue. But *Castleman* employed the common law meaning of 'force' in broadly interpreting 18 U.S.C. § 921(a)(33)(A)(ii), a misdemeanor domestic

assault statute, so as to include any offensive touching, no matter how slight, as sufficient to satisfy the statute. 134 S.Ct. at 1413. Just this term, this Court reaffirmed that common law principles are inapplicable in determining whether battery type of offenses are a "violent felony" because "[t]he nominal contact that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a [robbery] victim." *Stokeling v. United States*, 139 S.Ct. 544, 553 (2019). "The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the 'unwanted' nature of the physical contact itself suffices to render it unlawful." *Id.*

Fourth, this case presents an ideal vehicle for the Court to answer the question presented. The facts are undisputed, and there are no jurisdictional issues for the Court to decide. Moreover, the question presented is dispositive for Preston Phillip's ACCA sentence. If the answer to the question presented is yes then Petitioner is subject to the ACCA's mandatory minimum sentence. If the answer to the question presented is no, then Petitioner is not.

The petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

1. In 2014, Petitioner Preston Phillips pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). That statute typically carries a maximum sentence of ten years' imprisonment. *Id.* at § 924(a)(2). But under the ACCA, a federal defendant's sentencing range is enhanced to fifteen years to life if he has certain qualifying offenses, called a "violent felony."

After he pled guilty, the Probation Office's presentence investigation report ("PSR") identified the Missouri burglary and Missouri domestic assault offenses it deemed to be qualifying "violent felony" offenses, pursuant to § 924(e)(2)(B). The district court concluded that Mr. Phillips was an ACCA offender, and sentenced him to 200 months in prison.

2. On direct appeal, Mr. Philips argued that he was improperly sentenced as an ACCA offender, but the Eighth Circuit affirmed concluding that Mr. Phillips had at least three prior "violent felony" predicate convictions. *United States v. Phillips*, 817 F.3d 567, 570 (8th Cir. 2016). Specifically, the Eighth Circuit held that Mr. Phillips' two convictions for Missouri burglary in the second degree and two convictions for Missouri domestic assault in the second degree constituted violent felonies under the ACCA. *Id*.

3. Mr. Phillips filed a petition of certiorari, challenging his ACCA sentence because his Missouri burglary and Missouri domestic assault convictions were not predicate offenses. On January 9, 2017, this Court remanded this case to the United State Court of Appeals for the Eighth Circuit for further consideration in light of *Mathis v. United States*, 136 S.Ct. 2243 (2016). *See Phillips v. United States*, 137 S. Ct. 634, 196 L. Ed. 2d 507 (2017).

4. On remand, the Eighth Circuit held that Mr. Phillips' Missouri domestic assault convictions still qualified as ACCA offenses because *Mathis* "did not address the ACCA's force clause." *United States v. Phillips*, 853 F.3d 432, 434 (2017). However, the Eighth Circuit remanded the case to the district court to determine

whether Mr. Phillip's Missouri burglary convictions were qualifying ACCA offenses under the enumerated offense clause, pursuant to its decision in *United States v. Sykes*, 844 F.3d 712, 715 (8th Cir. 2016), *cert. granted, judgment vacated*, 138 S. Ct. 1544, 200 L. Ed. 2d 738 (2018), and *overruled by United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc).

5. The district court concluded that Mr. Phillips' Missouri burglary convictions did not constitute a "violent felony." However, it still concluded that Mr. Phillips was an ACCA offender based on his convictions for Missouri domestic assault, Missouri assault, Minnesota assault, and Missouri unlawful use of a weapon. It again sentenced him to 200 months' imprisonment.

6. Subsequently, the Eighth Circuit again affirmed Mr. Phillips's ACCA sentence on direct appeal. *United States v. Phillips*, ___ Fed.Appx. ___, 2019 WL 1749388. (Appendix A). In concluding that Mr. Phillips had at least three "violent felony" convictions, the Eighth Circuit focused on his Minnesota second-degree assault conviction, his Missouri second degree assault conviction, and his Missouri unlawful use of a weapon conviction.

In concluding that Mr. Phillips' Minnesota second-degree assault conviction was a violent felony, the court relied on its prior decision in *United States v. Lindsey*, 827 F.3d 733, 740 (8th Cir. 2016), which rejected the defendant's argument that Minnesota second-degree assault is not a "violent felony" because it only focuses on bodily harm, "which can be inflicted without the use of physical force, such as when a defendant administers poison to a victim, draws a bath for the

victim using scalding hot water, or exposes the victim to excessive ultraviolet radiation by intentionally leaving a tanning bed on for too long." *Id.* at 739. In rejecting these arguments in *Lindsey*, the court relied on *United States v. Castleman,* 134 S.Ct. 1405, 1415 (2014), to conclude "[t]hat the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter" under the ACCA. *Id.*

REASONS FOR GRANTING THE WRIT

I. There is an acknowledged conflict of authority on the question presented.

Since *Castleman* was decided in 2014, the circuit courts have struggled to uniformly decide the question left unanswered by this Court: "[w]hether or not the causation of bodily injury necessarily entails violent force." 134 S.Ct. at 1413. In *Castleman*, the Court was addressing whether the "knowing or intentional causation of bodily injury" satisfies "the common –law concept of force", within the unique context of "a misdemeanor crime of domestic violence" in 18 U.S.C. § 922(g)(9). While this Court concluded that "even the slightest offensive touching" would satisfy the force clause in that distinct statute, *Castleman*, 134 S.Ct. at 1410-13, it expressly reserved the question of whether causing bodily injury necessarily involves the use of "violent force" under the ACCA. 134 S.Ct. at 1414.

The Third and Fourth Circuits agree that the causation of bodily injury does not necessarily entail violent force under the ACCA and, thus, does not render an offense a "violent felony." *See United States v. Mayo*, 901 F.3d 218, 228 (3d Cir.

2018) ("*Castleman* does not support the government's argument that any form of bodily injury requires violent force"); *see also United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) (same). Thus, these courts have held that an offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the definition of a "violent felony". *Id*.

Taking the opposite view, the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits have held that the causation of bodily injury necessarily entails violent force and, thus, by itself, qualifies an offense as a "crime of violence" or "violent felony." *Villanueva v. United States*, 893 F.3d 123, 128 (2nd Cir. 2018); *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018); *United States v. Anderson,* 695 F.3d 390, 400-01 (6th Cir. 2012); *United States v. Waters,* 823 F.3d 1062, 1064-66 (7th Cir. 2016); *United States v. Rice,* 813 F.3d 704, 706 (8th Cir. 2016); *United States v. Villavicencio-Burruel*, 608 F.3d 556, 562 (9th Cir. 2010); *United States v. Haight*, 892 F.3d 1271, 1280 (D.C. Cir. 2018).

This conflict is fully entrenched, and only this Court can resolve it.

II. The question presented is extremely important.

It cannot be disputed that the issue is extremely important, for a number of reasons. To begin with, the issue of ACCA enhanced sentences arises frequently because hundreds of defendants are sentenced to ACCA sentences every year. What is more, this specific issue of "[w]hether or not the causation of bodily injury necessarily entails violent force" *Castleman,* 134 S.Ct. at 1413, has a significant

impact on a broad swath of ACCA predicate offenses, i.e. battery, assault, domestic assault and manslaughter, just to name a few.

This Court recently addressed the amount of force required by the ACCA in robbery predicate offenses, when concluding that the use of force sufficient to overcome a victim's resistance triggers the ACCA enhancement. *See Stokeling v. United States*, 139 S.Ct. 544 (2019). Nonetheless, after *Stokeling*, lower courts need further guidance by this Court as to whether these types of assault offenses are qualifying ACCA predicates. *See Stokeling*, 139 S.Ct. at 560, (Sotomayor J., dissenting) ("Starting today, however, the phrase 'physical force' in § 924(e)(2)(B)(i) will apparently lead a Janus-faced existence. When it comes to battery, that phrase will look toward ordinary meaning; when it comes to robbery, that same piece of statutory text will look toward the common law.).

The stakes are also high because being sentenced to an enhanced ACCA sentence has drastic consequences. An ACCA defendant *must* be sentenced to a mandatory minimum sentence of at least fifteen years, and may be sentenced to imprisonment for the rest of his life. The non-ACCA defendant faces instead a maximum of 10 years' imprisonment, and stands a good chance of being sentenced to much less time in prison. Stakes these high should not be decided by the happenstance of geography, but right now that is exactly the situation.

III. The Eighth Circuit's ruling is incorrect.

1. The fatal flaw in the Eighth Circuit's reasoning in Mr. Phillips' case is its conclusion that *Castleman* disposes of the central issue here within the distinct

context of an ACCA "violent felony." *United States v. Phillips,* 2019 WL 1749388, *2 citing *United States v. Lindsey*, 827 F.3d 733, 740 (8th Cir. 2016), citing *Rice*, 813 F.3d at 706. "We believe that *Castleman* resolves the question before our court, however, because there the Court . . . held 'that [whether] the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter.'" *Rice*, 813 F.3d at 706, quoting *Castleman*, 134 S.Ct. at 1415.

But of course this distinction regarding force matters, as it pertains to the plain language of the ACCA in using the phrase "violent felony", because "[i]t is unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a *misdemeanor*." *Johnson v. United States*, 559 U.S. 133, 141 (2010) (emphasis added). In contrast, this Court in *Castleman* broadly interpreted 18 U.S.C. § 921(a)(33)(A)(ii), a misdemeanor domestic assault statute, so as to include any offensive touching, no matter how slight, as sufficient to satisfy the statute. *Castleman,* 134 S.Ct. at 1413.

Johnson played a critical role in the holding of *Castleman*. "We declined to read the common-law meaning of 'force' into ACCA's definition of a 'violent felony,' because we found it a 'comical misfit with the defined term [in the ACCA in *Johnson*].'" *Castleman,* 134 S.Ct. at 1410. "The very reasons for rejecting the common-law meaning in *Johnson* are reasons to embrace it here." *Castleman*, 134 S.Ct. at 1411. "Whereas it was 'unlikely' that Congress meant to incorporate in the definition of a 'violent felony' a phrase that the common law gave peculiar meaning

only in its definition of a misdemeanor,' *Johnson,* 559 U.S., at 141, 130 S.Ct. 1265, it is likely that Congress meant to incorporate that misdemeanor-specific meaning of 'force' in defining a 'misdemeanor crime of domestic violence.'" *Castleman*, 134 S.Ct. at 1411

Therefore, *Castleman* sensibly concluded in the misdemeanor context that "the common-law concept of 'force' encompasses even its indirect application." 134 S.Ct. at 1414 (emphasis added). This Court reasoned that "'[f]orce' in this sense describes one of the elements of the common-law crime of battery, and the force used in battery need not be applied directly to the body of the victim." *Id.* (citations omitted). This is because a common law "battery may be committed by administering a poison or by infecting with a disease, or even by resort to some intangible substance, such as a laser beam." *Id.* at 1414-15. So, it was only logical to conclude in the misdemeanor context that "[i]t is impossible to cause bodily injury without applying force in the *common-law sense*." *Id*. at 1415 (emphasis added).

Although the *Castleman* Court concluded that "force" in the common-law context encompasses its indirect application, it made no such assumption in regards to "force" in the violent felony context. In fact, *Castleman* explicitly declined to address the issue of whether the mere "causation of bodily injury necessarily entails violent force." See *id.* at 1413.

2. In *Stokeling*, this Court reiterated that common law battery *is* different from felony battery, and thus again rejected the notion that common law principles should be applied to these types of felony battery crimes in the ACCA. "The nominal

contact that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a [robbery] victim." *Stokeling* 139 S.Ct. at 553. "The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the 'unwanted' nature of the physical contact itself suffices to render it unlawful." *Id*.

While it is true that *Stokeling* clarified that force "capable of causing physical pain or injury" in *Johnson* includes "force as small as 'hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling'", *Stokeling*, 139 S.Ct at 53, quoting *Castleman*, 572 U.S. at 182 (Scalia, J., concurring), that conclusion does not address the distinct issue here of whether an offense committed by indirect force, or by omission, qualifies under the ACCA.

This Court's precedents mandate that assault crimes committed by indirect force or by omission do not have "as an element the use, attempted use, or threatened use of physical force against the person of another" 924(e)(2)(B)(i). This is because common law battery concepts cannot be applied to determine whether felony assault or felony battery crimes are ACCA predicates, because such crimes that include the "slightest offensive touching" and "any intentional physical contact" simply do not satisfy the ACCA. *Stokeling*, 139 S.Ct. at 553.

3. The Eighth Circuit even acknowledged in *Rice* that "*Castleman* does not end our analysis, however, because the Court held there that the physical force requirement of § 921(a)(33)(A)(ii) could be 'satisfied by even the slightest offensive touching.'" *Rice*, 813 F.3d at 706, quoting *Castleman*, 134 S.Ct at 1410. But the

problem with *Rice*, and other circuits that employ similar reasoning, is that they go no further than stating in a conclusory fashion that *"Castleman* resolves the question" *Rice*, 813 F.3d at 706, even when *Castleman* indisputably reserved the question of "[w]hether or not the causation of bodily injury necessarily entails violent force." 134 S.Ct. at 1413.

4. *Johnson* highlights why acts by indirect force or omission crimes do not satisfy the ACCA, because the term "physical" in "physical force" must be given meaning, and "[i]t plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." *Johnson*, 599 U.S. at 138. But acts of omission require *no* force, and therefore it is impossible to discern how they have "as an element the use, attempted use, or threatened use of physical force against the person of another." 924(e)(2)(B)(i). Starving a child is a heinous crime, but no "physical force" is required to commit it, at least not how that term has been defined by Congress in the ACCA. *Mayo*, 901 F.3d at 227, citing *Commonwealth v. Thomas*, 867 A.2d 594 (Pa. Super. Ct. 2005).

The same is true of acts committed by indirect force, because they do not require "force exerted by and through concrete bodies", *Johnson*, 599 U.S. at 138, in that any force used may be remote and distant in time. *Middleton*, 883 F.3d 485, 492 (4th Cir. 2018) (involuntary manslaughter conviction for sale of alcohol to minor not a "violent felony", because "[i]t does not follow that any action leading to bodily injury, through however attenuated a chain of causation, necessarily qualifies as a use of violent physical force against the person of another.").

IV. This case is an excellent vehicle to resolve the conflict.

This case presents an ideal vehicle for the Court to answer the question presented. Had Mr. Phillips been sentenced in the Third or Fourth Circuits, he would not be serving an ACCA sentence, but because he was sentenced in the Eighth Circuit he is. Specifically, without his Missouri domestic assault and Minnesota convictions, he would not have three or more requisite "violent felony" convictions.

1. Mr. Phillips' convictions for Missouri domestic assault illustrate why the reasoning of *Castleman* cannot apply to an ACCA predicate conviction in this specific context because it would render Congress' term "violent felony" meaningless. The Missouri domestic assault statute expressly provides that the "physical injury" to the victim may occur "***by any means,*** including but not limited to, use of a deadly weapon or dangerous instrument, or by choking or strangulation." Mo. Rev. Stat § 565.073. (emphasis added). Jury verdicts have been affirmed by Missouri appellate courts when the injury was committed by "means unknown", or "by any means." *See State v. Simino*, 397 S.W.3d 11, 19 (Mo. Ct. App. 2013)(abrogated on other grounds); *State v. Shelton*, 183–84 (Mo. Ct. App. 2012).

Force "by *any* means" under Mo. Rev. Stat § 565.073 does not satisfy the ACCA's requirement of "physical force", as required by this Court in *Johnson*, and most recently in *Stokeling*. Missouri courts have held that "by any means" in the domestic violence statute is *not* "limited only to means similar to deadly weapons, dangerous instruments, choking, or strangulation." *State v. Shelton*, 363 S.W.3d

183, 183–84 (Mo. Ct. App. 2012). Rather, Mo. Rev. Stat § 565.073 "plainly states that physical injury may be attempted 'by any means'", and "'[a]ny' means 'all.'" *State v. Comstock*, 492 S.W.3d 204, 210 (Mo. Ct. App. 2016).

Additionally, "physical injury", under the Missouri domestic assault statute, §565.073.1(1), need not require force at all, because it is defined to simply mean "physical pain, illness, or any impairment of physical condition[.]" Mo. Rev. Stat § 556.061(20). This is a low hurdle under the prophylactic Missouri statute, which can be met with "[j]ust a few aches and pains." *State v. Cole,* 148 S.W.3d 896, 901 (Mo. Ct. App. 2004) (quoting *State v. Barnes*, 980 S.W.2d 314, 319 (Mo. Ct. App. 1998). While the resultant injury is not the touchstone of the analysis (it is instead the force involved that matters), the Missouri domestic assault statute, § 565.073.1(1), stands in stark contrast to statutes that require "serious physical injury" in Missouri. *See* Mo. Rev. Stat § 565.002(6) (defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.").

Missouri domestic violence convictions also have been affirmed when no force whatsoever was used by the defendant. In *State v. Blackburn*, defendant's conviction under Mo. Rev. Stat § 565.073 was affirmed after a defendant poured gasoline over the outside of his girlfriend's trailer in an attempt to burn it. *State v. Blackburn*, 168 S.W.3d 571, 573 (Mo. Ct. App. 2005). However, in *Blackburn* it was unambiguous that no "physical force" was used by defendant to commit the crime.

Id. By expansively holding that physical injury may be attempted "by any means", the Missouri Court of Appeals highlights that convictions under § 565.073.1(1), does not have as an element the use, attempted use, or threatened use of physical force against the person of another.

Missouri courts expansively interpret its domestic violence statute, for similar reasons given by the Court in *Castleman* for broadly interpreting a 18 U.S.C. § 921(a)(33)(A). Specifically, the Missouri Court of Appeals rejected a defendant's narrow interpretation of Mo. Rev. Stat § 565.073 because it concluded that "the defendant's suggested limitations were not well-suited to statutes containing the language 'by any means', . . . given our legislature's concern with domestic violence and . . . [the need] to aid those impacted by domestic assault and to prevent further abuse." *Comstock*, 492 S.W.3d at 210; *see also State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 226 (Mo. banc 1982)(Missouri Supreme Court noting that "[e]xisting remedies such as peace bonds, regular criminal process, and tort law have proved to be less than adequate in aiding the victims of abuse and in preventing further abuse.").

This Court has shared these same concerns, in expansively interpreting a "misdemeanor crime of domestic violence" pursuant to 18 U.S.C. § 921(a)(33)(A). In *Castleman*, the Supreme Court worried about adopting a narrow definition that would render the Misdemeanor Domestic Violence Act entirely inoperable in a large number of states. *See Castleman*, 134 S.Ct. at 1413 ("if offensive touching did not constitute 'force' under § 921(a)(33)(A), then § 922(g)(9) would have been ineffectual

in at least 10 States—home to nearly thirty percent of the Nation's population"). But while Missouri domestic assault convictions satisfy § 921(a)(33)(A) based on the holding of *Castleman*, this Court's reasoning in *Castleman* mandates the opposite outcome in the ACCA's elements clause because Congress did not intend that the ACCA have the same meaning. *See Castleman*, 134 S.Ct. at 1410 ("We declined to read the common-law meaning of 'force' into ACCA's definition of 'violent felony,' because we found it a comical misfit with the defined term [in *Johnson*]'").

2. Mr. Phillips' conviction for Minnesota assault also demonstrates why the reasoning of *Castleman* is inapplicable to the ACCA. One may be convicted of Minnesota assault, Minn. Stat. §609.222, based on "'assault harm" felonies that require only "the intentional infliction of or attempt to inflict bodily harm upon another." *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012).

Specifically, in *State v. Livingston*, 420 N.W.2d 223 (Minn. Ct. App. 1988), the defendant's conviction under §609.222 was sustained by the Minnesota Court of Appeals, when defendant ordered his dog to attack the victim. *Id.* at 229. Not only was the defendant found guilty of assaulting the victim, he was also found guilty of additional crimes under the "transferred intent doctrine" of assaulting the victim's two friends after they attempted to intervene and assist their friend. *Id.* While the conduct involved in *Livingston* was undoubtedly criminal in nature, it did not involve "the use, attempted use, or threatened use of physical force against the person of another" by the *defendant* pursuant to §924(e)(2)(B), but instead involved force by the defendant's *dog*. This is especially true as it pertains to the other

unintended victims of the dog's assault, because "[i]t does not follow that any action leading to bodily injury, through however attenuated a chain of causation, necessarily qualifies as a use of violent physical force against the person of another." *United States v. Middleton*, 883 F.3d 485, 492 (4th Cir. 2018).

Ultimately, if this Court were to resolve the question presented in line with precedent from the Third and Fourth Circuits, Mr. Phillips would be entitled to relief, because he would be without three "violent felony" convictions.

* * *

The ACCA demands that the categorical analysis be faithfully applied in determining which offenses qualify as a "violent felony", based on the ACCA's text, Sixth Amendment concerns, and the need to avoid unfairness to defendants. *Mathis v. United States,* 136 S.Ct. 2243, 2252-53 (2016). With the residual clause of the ACCA now gone, it is vital that the elements clause be faithfully interpreted as written, in order to prevent improper "nostalgia for the residual clause." *Stokeling*, 139 S.Ct. at 564, fn 4 (Sotomayor J., dissenting).

There can be no doubt that physical force and bodily injury are not the same thing textually, and that the term "bodily injury" cannot be found in §924(e)(2)(B). Just like this Court concluded that a mere unwanted touch did not qualify for the ACCA sentencing enhancement by rejecting common law battery principles in *Johnson*, 559 U.S. at 139, a rejection of these same common law principles mandates that injuries that are committed by indirect force or by omission do not satisfy the elements clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A – Judgment of the Eighth Circuit Court of Appeals