No. 19-1264

IN THE
Supreme Court of the United States

DONCEY FRANK BOYKIN,
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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Contrary to the Government's arguments, the issue presented in this case has broad practical significance and warrants this Court's review. The Eleventh Circuit's holding entrenches a circuit split on whether Alabama second-degree robbery qualifies as a violent felony under the elements clause of the Armed Career Criminal Act (the "Act") even though that crime encompasses snatching offenses and other minimal uses of force. The implications of that disagreement extend well beyond Alabama's borders because seven other states have robbery statutes that criminalize taking property with the mere *intent* to overcome the victim's resistance. As a result, the issue presented controls whether a wide range of prior convictions constitute violent felonies that trigger the Act's 15-year mandatory minimum sentence.

The Government attempts to downplay the importance of that issue, but its arguments fail for three principal reasons.

First, this case presents a live circuit split on the scope of the Act's definition of violent felonies as it pertains to robbery offenses. The Government errs in asserting that the Ninth Circuit's decision in *United States v. Walton*, 881 F.3d 768 (9th Cir. 2018)—which conflicts with the decision below—is no longer good law. *Walton* still stands because it is not clearly irreconcilable with this Court's ruling in *Stokeling v. United States*, 139 S. Ct. 544 (2019). Indeed, the Ninth Circuit and district courts within that Circuit continue to apply *Walton* as precedential authority.

Second, this case involves issues that go well beyond interpretation of a single state statute.

Alabama's robbery statute, similar to those of seven other states, requires that the defendant use force only *with intent* to overcome the victim's physical resistance—not *actual* force *sufficient* to overcome physical resistance—and it encompasses mere snatching offenses. *Stokeling* did not resolve whether such offenses qualify as violent felonies. Indeed, *Stokeling* left open several subsidiary questions that have divided lower courts regarding the elements clause's reach, and those issues are squarely presented here.

Third, in contending that the decision below was correctly decided, the Government (like the court below) misreads the Alabama statute and Alabama case law. The statute's text and Alabama cases interpreting the statute make clear that Alabama second-degree robbery does not require violent force. The Eleventh Circuit compounded its error by failing to address *any* state court decisions defining the elements of the crime, disregarding the analysis required by *Curtis Johnson v. United States*, 559 U.S. 133 (2010).

For all these reasons, the Court should grant review.

I. The Question Presented Is an Important One Warranting This Court's Review.

A. There Is a Continuing Conflict Between the Decision Below and the Ninth Circuit's Decision in *Walton*.

The Government incorrectly asserts that the Petition should be denied because there is no continuing circuit conflict. Br. in Opp. 10-12. The Government does not dispute that the Ninth Circuit's decision in

Walton conflicts with the Eleventh Circuit's judgment. Nor could it. Contrary to the decision below, *Walton* held that Alabama robbery offenses do not qualify as violent felonies under the Act's elements clause. 881 F.3d at 775.

Instead, the Government contends that this Court's ruling in *Stokeling* overruled *Walton*. Br. in Opp. 10-12. Not so. To be sure, the Ninth Circuit has stated that "to the extent our precedent regarding robberies is irreconcilable with *Stokeling*, those cases are effectively overruled." *Ward v. United States*, 936 F.3d 914, 919 (9th Cir. 2019). But the Ninth Circuit has likewise explained that "[t]he clearly irreconcilable requirement is a high standard" and "[s]o long as the court can apply [its] prior circuit precedent without running afoul of the intervening authority it must do so." *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018) (citation omitted).

That high standard is not satisfied here. *Stokeling* recognized that mere snatchings, which involve minimal physical contact, often do not entail force sufficient to overcome a victim's resistance. *See* 139 S. Ct. at 552 ("purse snatching" does not require physical force). The Ninth Circuit has recognized this limitation, explaining that "*Stokeling* made clear that force involved in snatchings, where there is no resistance, is not sufficient to fall under the [Act]'s force clause." *Ward*, 936 F.3d at 919 n.4. For this reason, the Ninth Circuit has concluded that *Stokeling* did not overrule prior decisions holding that robbery offenses that do not require actual resistance do not qualify as violent felonies. *See United States v. Shelby*, 939 F.3d 975, 979 (9th Cir. 2019) (*Stokeling* is not clearly irreconcilable with prior decision holding that Oregon

robbery is not a violent felony). Because Alabama robbery encompasses snatching offenses, the Ninth Circuit's ruling in *Walton* is consistent with *Stokeling*.

Perhaps recognizing that *Walton* has not been overruled, the Government also contends that "[a]t a minimum, *Stokeling* casts *Walton*'s continuing validity into serious doubt." Br. in Opp. 12. But the Ninth Circuit will not overrule *Walton* merely because "intervening higher authority" "cast[s] doubt" on its reasoning. *Close*, 894 F.3d at 1073 (citation omitted).

Not only has the Ninth Circuit refrained from expressly overruling *Walton*, its recent decisions confirm that *Walton* remains good law. Even after *Stokeling*, the Ninth Circuit has continued to apply *Walton* without any indication that the decision has been overruled. *See United States v. Walker*, 953 F.3d 577, 578 n.1 (9th Cir. 2020); *United States v. Ankeny*, 798 F. App'x 990, 991-92 (9th Cir. 2020). District courts within the Ninth Circuit likewise continue to apply *Walton*. *See, e.g.*, *Kenney v. United States*, 2020 WL 3802812, at *3 (E.D. Cal. July 7, 2020); *Jaramillo v. United States*, 2020 WL 3001783, at *16 n.15 (D. Ariz. May 11, 2020), *report and recommendation adopted*, 2020 WL 2991584 (D. Ariz. June 4, 2020); *United States v. Dillard*, 2020 WL 2199614, at *3 n.39 (D. Nev. May 6, 2020).

B. The Question Presented Has Broad Significance Beyond Alabama Robbery.

The Government next suggests that the Petition should be denied because this case requires only "[t]he interpretation of [a] particular state law," namely, Alabama's robbery statute. Br. in Opp. 12. That

argument assumes that *Stokeling* resolved the issues presented here, and that this case therefore involves nothing more than a straightforward application of *Stokeling*'s holding to Alabama robbery. That is incorrect. This case presents several important issues related to the types of robbery offenses encompassed by the Act's elements clause, which *Stokeling* left unresolved and which apply with equal force to other states' robbery statutes.

First, *Stokeling* held that "a robbery offense that has as an element the use of force *sufficient* to overcome a victim's resistance" qualifies as a violent felony. 139 S. Ct. at 548 (emphasis added). But here Alabama second-degree robbery requires only that the defendant "[u]s[e] force … *with intent* to overcome [the victim's] physical resistance." Ala. Code § 13A-8-43(a) (emphasis added). *Stokeling* is silent on the question whether a robbery offense that has as an element the use of force *with intent* to overcome resistance—as opposed to the use of force *sufficient* to overcome resistance—qualifies as a violent felony. The Government's assertion that this issue arises only for Alabama robbery is mistaken. Br. in Opp. 12. As the Petition explained, seven other states also have robbery statutes that criminalize taking property with the intent to overcome the victim's resistance (or similar language). Pet. 18 n.6. The question presented thus has significance well beyond Alabama's borders.

Second, although the Act encompasses offenses that have "as an element the ... threatened use of physical force," 18 U.S.C. § 924(e)(2)(B), Alabama courts have sustained robbery convictions where the victim merely *perceived* a threat of force. *See Saffold v. State*, 951 So. 2d 777, 778-79, 781 (Ala. Crim. App.

2006).[1] *Stokeling* is silent on the question whether a robbery offense that has as an element the *perceived* threat of force qualifies as a violent felony. Notably, courts of appeals have similarly struggled with other robbery statutes that encompass perceived threats of force. *See, e.g.*, *United States v. Hall*, 877 F.3d 800, 808 (8th Cir. 2017) (Texas robbery qualifies as violent felony despite argument that the statute "encompasses not only explicit threats, but also 'perceived threats' of bodily harm"); *United States v. Burris*, 896 F.3d 320, 332 (5th Cir.), *as revised* (Aug. 3, 2018) (Texas robbery does not qualify as violent felony), *opinion withdrawn*, 908 F.3d 152 (5th Cir. 2018), *and on reh'g*, 920 F.3d 942 (5th Cir. 2019) (Texas robbery qualifies as violent felony).

Third, *Stokeling* did not definitively state whether or not robbery offenses that encompass snatchings—like Alabama robbery—qualify as violent felonies. The Court premised its decision that Florida robbery is a violent felony on the fact that Florida distinguishes between snatching and robbery. As the Court acknowledged, the Florida Supreme Court had held in 1997 that "the 'use of force' necessary to commit robbery requires 'resistance by the victim that is overcome by the physical force of the offender,'" and that "[m]ere 'snatching of property from another' will

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[1] The Government suggests that Petitioner "errs in asserting" that "no threat was made" in *Saffold*. Br. in Opp. 10. The Government ignores the fact that one of the victims there testified that the defendant did not threaten him, but that he merely felt "scared." *Saffold*, 951 So. 2d at 779 ("Q. So the answer to the question about whether [the defendant] threatened you is no? A. Well, no, not really. But I was scared….").

not suffice." *Stokeling*, 139 S. Ct. at 549, 555 (quoting *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997)).

The Court did not explain, however, how it would analyze a robbery statute—like Alabama's—where state courts have found that snatching falls *within* the robbery offense. It is notable that at least one Eleventh Circuit judge has recently expressed doubts about whether *Stokeling* extends to pre-1997 robbery convictions, before the Florida Supreme Court explicitly stated that snatching does not constitute robbery. In *Welch v. United States*, 958 F.3d 1093, 1097 (11th Cir. 2020), the Eleventh Circuit assessed whether "pre-1997 Florida robbery convictions" qualify as violent felonies even though, before 1997, at least one intermediate appellate court "had not resolved whether mere snatching of an item was sufficient to support a robbery conviction." The panel reasoned that because *Robinson* "'made clear that [Florida's] robbery statute has *never* included a theft or taking by mere snatching,' and has always required force sufficient to overcome a victim's resistance," "Florida robbery has always required force sufficient to satisfy the [Act]'s elements clause." *Id.* at 1098 (quoting *United States v. Fritts*, 841 F.3d 937, 942-43 (11th Cir. 2016)).

In a concurring opinion, Judge Rosenbaum noted that, although the panel was bound by Eleventh Circuit precedent, its holding "may eventually force us into an absurd result." *Id.* at 1100 (Rosenbaum, J., concurring). In Judge Rosenbaum's view, because some defendants were convicted of Florida robbery before *Robinson* clearly distinguished snatching from robbery, their convictions may not have entailed a use

of force sufficient to overcome the victim's resistance. As Judge Rosenbaum further explained:

> [Our] blind allegiance to an interpretation of the Florida robbery statute that was not, as a matter of fact, uniformly applied before the Florida Supreme Court issued *Robinson* creates the very real possibility that it will keep defendants in prison for extended sentences based entirely on a legal fiction.... [W]hatever the Florida Supreme Court decided in 1997 that the Florida robbery statute "always" meant cannot change the fact that, before *Robinson*, at least some of Florida's intermediate courts of appeals applied the Florida robbery statute to cover mere snatchings.

Id. at 1101-02.

As Judge Rosenbaum's concurring opinion suggests, *Stokeling* does not resolve the "snatching" question for states in which courts have convicted defendants of robbery based on snatching even when on other occasions the state's courts have purported to draw a distinction between snatching and robbery. The issue is not limited to Alabama or pre-1997 Florida convictions. In *Stokeling*'s wake, lower courts have grappled with this same question with respect to other state robbery offenses. *Compare United States v. Thrower*, 914 F.3d 770, 775 (2d Cir. 2019) (New York robbery requires use of force sufficient to overcome victim's resistance), *with United States v. Rabb*, 942 F.3d 1, 5, 6-7 (1st Cir. 2019) (New York robbery does not qualify as a "crime of violence" under federal Sentencing Guidelines because "there is a realistic

probability that ... the least of the acts" it criminalizes "include[s] purse snatching, per se") (quotation marks omitted).

Finally, although the Government asserts that these issues are "unlikely to recur with great frequency," Br. in Opp. 12, that contention is not persuasive. As the Petition explained, Alabama reported nearly 50,000 robbery offenses and arrests from 2008 to 2017, and not all convicted defendants will remain in Alabama. Pet. 15. It is therefore likely that this issue will recur in courts across the country. The issue is significant, too, because it determines whether defendants are subject to a severe, 15-year mandatory minimum sentence, as opposed to the default sentencing range of zero to ten years' imprisonment. *See* Br. in Opp. 3.

II. The Government Relies on a Faulty Understanding of Alabama Robbery.

The Government contends that Alabama second-degree robbery requires force sufficient to overcome a victim's resistance, Br. in Opp. 7-8, but it fails to reconcile that argument with Alabama state court decisions and the text of the Alabama statute.

The Government first argues that Alabama robbery is similar to the Florida robbery offense at issue in *Stokeling*, citing two Alabama state court decisions. Br. in Opp. 8 (quoting *Proctor v. State*, 391 So. 2d 1092 (Ala. Crim. App. 1980); *Casher v. State*, 469 So. 2d 679 (Ala. Crim. App. 1985)).[2] The general statements in

[2] The Government makes much of *Casher*'s passing statement that the "degree of force requisite to robbery is such force as is actually sufficient to overcome the victim's resistance." 469 So.

these decisions, however, cannot erase other instances where Alabama courts sustained robbery convictions that involved less than violent force.

As the Petition explained, Alabama courts have found mere offensive touching satisfies the Alabama robbery statute. *Jackson v. State*, 969 So. 2d 930, 931 (Ala. Crim. App. 2007) (defendant "rushed toward [victim], tugged her purse a couple of times, yanked her purse off of her arm, and ran away"); *Wright v. State*, 487 So. 2d 962, 964 (Ala. Crim. App. 1985) (defendant pushed victim away, thereby knocking the victim off balance); *Wright v. State*, 432 So. 2d 510, 512 (Ala. Crim. App. 1983) (defendant "pushed or shoved" the victim). Two of these decisions post-date *Proctor* and *Casher*, and thus represent the current state of the law in Alabama.

The Government also argues that Alabama robbery qualifies as a violent felony because it can be accomplished through a threatened use of force. Br. in Opp. 10. This argument misses the mark. As explained above, Alabama courts have affirmed robbery convictions where the victim merely perceives a threat. *See Saffold*, 951 So. 2d at 781. Such conduct does not rise to the level of threatened physical force.

The Government also asks the Court to ignore the Alabama statute's "with intent" language in assessing the degree of force required. Br. in Opp. 9. Under the plain language of the statute, however, Alabama

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2d at 680. At best, Alabama courts have been inconsistent on this issue, elsewhere holding that robbery "does not require that actual force be used." *Cook v. State*, 582 So. 2d 592, 593 (Ala. Crim. App. 1991).

clearly criminalizes conduct that involves only the "intent to overcome [victim's] physical resistance." Ala. Code § 13A-8-43(a). Intent is "the mental resolution or determination to do" an act. *Intent*, *Black's Law Dictionary* (11th ed. 2019). This is not the same as requiring the *actual* use of physical force *sufficient* to overcome a victim's physical resistance.

The Government's argument impermissibly reads "with intent" out of the statute. As the Alabama Supreme Court recognizes, "[t]he cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested *in the language of the statute*" and "the court is bound to interpret that language to mean exactly what it says." *Slagle v. Ross*, 125 So. 3d 117, 123 (Ala. 2012) (emphasis added) (citation omitted). The relevant inquiry here requires the Court to consider the least of the acts criminalized under the statute. *Cf. Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). To do so, the Court must consider the whole statute.

The Government likewise does not even attempt to address the Eleventh Circuit's failure to analyze state court decisions. As the Petition explained, the decision below failed to examine any state court decisions defining the substantive elements of Alabama second-degree robbery in deciding whether it qualifies as a violent felony. Pet. 13. The decision below thus contravenes this Court's directive in *Curtis Johnson* that, "in determining whether [a state-law offense] meets the definition of 'violent felony,'" federal courts are

"bound" by state courts' interpretation of state law. 559 U.S. at 138.[3]

Because the plain language of the statute and Alabama cases interpreting the statute show that Alabama second-degree robbery does not require the use of violent force, the offense is not a violent felony under the Act.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition should be granted.

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[3] The Government argues that this Court ordinarily defers to a regional court of appeals on the proper interpretation of state law. Br. in Opp. 12. This principle is not "ironclad," and the Court sometimes "refuse[s] to follow the views of a lower federal court on an issue of state law." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 & n.9 (1985). Moreover, unlike this case, the cases cited by the Government do not involve the interplay between a federal statute and a state criminal offense. Deferring to the court of appeals' interpretation of state law is especially unwarranted here when the lower court did not even cite state court decisions in articulating its interpretation.

Respectfully submitted,

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