No. ____

IN THE

Supreme Court of the United States

FERNANDO SANCHEZ, JR.,

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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QUESTION PRESENTED

As relevant here, the Armed Career Criminal Act ("ACCA") defines "violent felony" as an offense 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).

In *(Curtis) Johnson v. United States*, 559 U.S. 133 (2010), the Court defined "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original). In *United States v. Castleman*, 572 U.S. 157 (2014), the Court left open whether "the causation of bodily injury necessarily entails violent force" under *Johnson*. *Id.* at 167, 170.

In the decision below, the Eleventh Circuit affirmatively resolved that question. Deepening a circuit split, it held that the causation of injury or death necessarily requires violent force. And that is true, it held, even where the injury or death is caused by an act of omission, such as withholding food or medical care.

The question presented is the one left open in *Castleman*:

Whether the causation of physical injury or death necessarily requires the use of violent force.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Sanchez, No. 17-cr-20524 (Feb. 14, 2018)

United States Court of Appeals (11th Cir.):

United States v. Sanchez, No. 18-10711 (Oct. 2, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at __ F.3d __, 2019 WL 4854922 and is reproduced as Appendix ("App.") A. App. 1a–22a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on October 2, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under the Armed Career Criminal Act, an offense qualifies as a "violent felony" if it, *inter alia*, "has 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).

In New York, a person commits second-degree murder when, "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person." N.Y. Penal Law § 125.25(1). Criminal liability may be based on either a "voluntary act or the omission to perform an act which he is physically capable of performing." *Id.* § 15.10. An "omission" "means a failure to perform an act as to which a duty of performance is imposed by law." *Id.* § 15.00(3).

INTRODUCTION

In *(Curtis) Johnson v. United States*, 559 U.S. 133 (2010), the Court interpreted the phrase "physical force" in the elements clause of the ACCA. Defining the term "violent felony," the Court gave that phrase its "ordinary meaning," as opposed its broader common-law meaning. *Id*. at 138–42. The Court ultimately interpreted "physical force" to mean "*violent* force—that is, force capable of causing physical pain or injury." *Id*. at 140 (emphasis in original); *see Stokeling v. United States*, 139 S. Ct. 544, 552–54 (2019) (re-affirming that definition). And the Court held that a slight offensive touching did not constitute "violent force."

In *United States v. Castleman*, 572 U.S. 157 (2014), the Court interpreted the phrase "physical force" in a different elements clause. Because that clause defined the term "misdemeanor crime of violence," the Court gave "physical force" its common-law definition, as opposed to the stricter violent-force definition from *Johnson*. *Id*. at 162–68 & n.4. Addressing an assault offense requiring the intentional causation of bodily injury, the Court then held that "[i]t is impossible to cause bodily injury without applying force in the common-law sense." *Id*. at 169–70.

However, *Castleman* expressly declined to address whether the same would be true for violent force. *See id*. at 167 ("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 170 ("Justice Scalia's concurrence suggests that [certain] 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). Following *Castleman*, the courts of appeals have deeply divided on that question.

The Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have held that the causation of injury or death necessarily requires violent force, even where the injury or death is caused by an act of omission, such as withholding food or medical care. The First, Third, Fourth, and Sixth Circuits have reached the opposite conclusion, refusing to equate injury with force. Meanwhile, the law in the Second and Fifth Circuits is internally inconsistent, compounding the confusion.

This mature circuit split must be resolved. Scores of criminal defendants are subject to the ACCA enhancement each year. And there are numerous and various criminal offenses that require the intentional causation of injury or death, but that may be committed by an act of omission. Whether defendants are subject to the ACCA's fifteen-year mandatory-minimum, as opposed to the unenhanced ten-year statutory maximum, may now turn solely on the circuit where they are sentenced. The arbitrariness of geography should not dictate the length of incarceration.

This case is an ideal vehicle to resolve the conflict. The question presented was pressed and passed on in the lower courts, culminating in a fully-reasoned published opinion after oral argument. This case is on direct appeal (not collateral review), it involves the ACCA itself (not the Sentencing Guidelines), and a favorable resolution of the question presented would substantially reduce Petitioner's sentencing exposure. And there is no dispute that his predicate offense could have been committed by an act of omission, squarely teeing up the question presented.

Finally, the decision below (and numerous others like it) is wrong. Physical injury and death may be caused by a mere failure to act, such as withholding food or medicine from a dependent. Such inaction does not require any force at all. The decision below effectively re-writes the elements clause to encompass all offenses requiring causation of injury or death. But that is not the statute Congress wrote. Instead, Congress encompassed all offenses with "physical force" as an element. And this Court has interpreted that phrase to mean "violent force," excluding an offensive touching. If an offensive touching is not violent force, neither is the failure to act. While the decision below (and others like it) found *Castleman* dispositive, that case expressly declined to address the question presented. And it analyzed the common-law definition of force, not *Johnson*'s narrower violent-force definition.

STATEMENT

A. LEGAL BACKGROUND

For federal defendants convicted of unlawfully possessing a firearm, the Armed Career Criminal Act ("ACCA") transforms a ten-year statutory maximum penalty into a fifteen-year mandatory minimum. *See* 18 U.S.C. §§ 922(g), 924(a)(2), 924(e). It can also substantially increase the sentencing guidelines range. U.S.S.G. § 4B1.4. The enhancement applies where the defendant has a total of three prior convictions deemed "violent felonies" or "serious drug offenses." 18 U.S.C. § 924(e).

The ACCA defines "violent felony" as a felony 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). Subsection (ii) is not relevant here. The first half of that definition enumerates particular offenses, none of which apply here. And this Court has invalidated the second half of that definition, known as the "residual clause." *(Samuel) Johnson v. United States*, 135 S. Ct. 2551 (2015). The only definition at issue is subsection (i), which is known as the "elements clause."

In *(Curtis) Johnson v. United States*, 559 U.S. 133 (2010), the Court interpreted the phrase "physical force" in the ACCA's elements clause. Giving that phrase its "ordinary meaning," the Court defined "physical force" as "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 138–40 (emphasis in original). The Court held that an offensive touching did not satisfy that definition. *Id.* at 137–38; *see Stokeling v. United States*, 139 S. Ct. 544, 552–54 (2019) (re-affirming *Johnson*'s definition, and holding that the force necessary to overcome a robbery victim's resistance was violent force).

In *United States v. Castleman*, 572 U.S. 157 (2014), the Court interpreted the elements clause in 18 U.S.C. § 921(a)(33)(A), defining the term "misdemeanor crime of violence" in 18 U.S.C. § 922(g)(9). While the Court re-affirmed *Johnson*'s violent-force definition for the ACCA, the Court found that definition inapplicable in the "misdemeanor domestic violence" context. The Court instead gave "physical force" its broader common-law meaning. *See id.* at 162–68 & n.4. The Court then held that "[i]t is impossible to cause bodily injury without applying force in the common-law sense," including when caused indirectly through the use of poison. *Id.* at 169–

70. The Court, however, expressly reserved (twice) on whether the causation of bodily injury necessarily requires violent force under *Johnson*. *Id.* at 167, 170

B. PROCEEDINGS BELOW

Petitioner pled guilty in the Southern District of Florida to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Before sentencing, the probation officer recommended applying the ACCA enhancement based on three prior convictions, one of which was for New York attempted second-degree murder. App. 3a. Without the enhancement, Petitioner's advisory guideline range would have been 37–46 months, well below the ten-year statutory maximum. *See id.*

As relevant here, Petitioner objected to the enhancement, arguing that his murder offense was not a "violent felony" because it did not have as an element the use of "physical force" under *Johnson*. App. 4a. He observed that, under New York law, that offense could be committed by an act of omission. Dist. Ct. Dkt. Entry 31 at 7–8; Dist. Ct. Dkt. Entry 45 at 3–4. At sentencing, the district court overruled his objection and sentenced him to the ACCA's fifteen-year mandatory minimum. App. 5a, 24a; Dist. Ct. Dkt. Entry 45 at 5–7.

On appeal, Petitioner reiterated his argument—namely, that New York attempted second-degree murder did not satisfy the ACCA's elements clause because it could be committed by an act of omission, such as withholding food or medical care. To support his argument that the causation of injury or death did not necessarily require violent force, he cited the Third Circuit's decision in *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) and the Fourth Circuit's decision in

United States v. Middleton, 883 F.3d 485 (4th Cir. 2018). *See* Pet. C.A. Br. 14–15; Pet. C.A. Reply Br. 10–11; Pet. C.A. Supp. Ltr. Br. 8.

After oral argument, the Eleventh Circuit affirmed in a published opinion, holding that Petitioner's New York second-degree attempted murder conviction satisfied the ACCA's elements clause. App. 14a–20a. First, the court of appeals invoked *Castleman*'s holding that it is impossible to cause injury without using common-law force. App. 16a. The court explained that its prior precedent had already extended that logic to the ACCA, holding that it is impossible to cause injury without violent force. App. 16a (citing *United States v. Vail-Bailon*, 868 F.3d 1293, 1303–04 (11th Cir. 2017) (en banc)). Applying that logic here, the court stated that the causation of death necessarily requires violent force as well. App. 16a.

Second, the court reiterated its prior precedent that the ACCA's elements clause "encompasses both direct and indirect applications of physical force, including the use of poison, to cause pain or physical injury." App. 16a–17a (citing *United States v. Deshazior*, 882 F.3d 1352, 1357–58 (11th Cir. 2018)). The court explained that, in *Castleman*, this Court had reasoned that an individual uses physical force by "knowingly employ[ing] a device to indirectly cause physical harm—from a bullet, a dog bite, or a chemical reaction." App. 17a. And the court of appeals had previously rejected poison arguments in concluding that other murder offenses satisfied ACCA's elements clause. App. 17a (citations omitted).

Third, the court "reject[ed] Sanchez's contention that New York second-degree murder does not require the use or threat of physical force because it can be

committed by omission, such as when a parent intentionally withholds food or refuses to seek medical care for a child and thereby causes the death of the child." App. 17a. After reviewing New York law, the court acknowledged that "a defendant could intentionally cause the death of a person . . . by the act of intentionally not providing medical care or food given the parent's duty to act." App. 18a. Nonetheless, the court concluded that, under *Castleman*, such an act of omission constituted violent force because, "as with poisoning, the intentional causation of bodily injury or death, even by indirect means such as withholding medical treatment or food, necessarily involves the use of physical force." App. 18a.

Ignoring Petitioner's out-of-circuit authority, the court "joined three other circuits that have concluded, based on *Castleman*, that intentionally withholding food or medicine with the intent to cause bodily injury or death constitutes a use of force under the elements clause." App. 18a–19a (citing *United States v. Peeples*, 879 F.3d 282, 287 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017); and *United States v. Waters*, 823 F.3d 1062, 1064, 1066 (7th Cir. 2016)). The court expressly "endorse[d] the Eighth Circuit's reasoning" that "'it is the act of withholding food . . . that constitutes the use of force. It does not matter that the harm occurs indirectly as a result of malnutrition. Because it is impossible to cause bodily injury without force, it would also be impossible to cause death without force.'" App. 19a–20a (quoting *Peeples*, 879 F.3d at 287). And the court refused "to draw a distinction between administering a poisonous substance with the intent to cause death and withholding a life-saving substance" with that intent. App. 20a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED

In *Castleman*, the Court expressly left open "whether or not the causation of bodily injury necessarily entails violent force" within the meaning of *Johnson*. 572 U.S. at 167; *see id.* at 170 ("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).

The courts of appeals are now deeply and openly divided on that question. The Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have held that an offense requiring the causation of injury or death necessarily requires violent force, even where it results from an act of omission. The First, Third, Fourth, and Sixth Circuits have reached the opposite conclusion, refusing to equate injury with force. Exacerbating the split, the law in the Second and Fifth Circuits is confounding.

A. The Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits Equate Causation of Injury or Death with Violent Force

1. In the decision below, the Eleventh Circuit expressly held that an offense requiring the causation of bodily injury or death necessarily requires violent force. App. 16a–20a. In a 6–5 en banc ruling, that court had previously held that the causation of great bodily harm necessarily requires violent force. *See Vail-Bailon*, 868 F.3d at 1299–1303; *id.* at 1311–12 (Wilson, J., dissenting) (disagreeing on that point); *id.* at 1319–20 (Rosenbaum, J. dissenting) (same). The court extended that controversial holding here, reasoning that the same is true even

where the physical injury may be caused by an act of omission, such as withholding food or medical care to a dependent. App. 17a–20a. Although Petitioner argued that this conduct did not involve any force at all, the court reasoned that the "act of withholding" food or medicine "constitutes the use of force." App. 19a–20a. The court relied heavily on *Castleman* and expressly joined the Seventh, Eighth, and Tenth Circuits, which had all reached the same conclusion. App. 19a–20a.

2. In *Peeples*, the Eighth Circuit rejected the argument that Iowa attempted murder did not satisfy the elements clause because it could be "a crime of omission, which does not require force," such as when a caregiver "fail[s] to provide sustenance to a dependent." 879 F.3d at 286–87. The court acknowledged that the offense did "include omissions." *Id.* at 287. But circuit precedent had previously extended *Castleman*'s reasoning about indirect force and poison to the ACCA. *Id.* (citing *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016)). And the court then extended that reasoning to acts of omission, stating that "it is the act of withholding food . . . that constitutes the use of force." *Id.*[1]

3. In *Waters*, the Seventh Circuit held that Illinois domestic battery satisfied the elements clause. The court addressed the argument "that there are many ways in which a person can cause injury to another person in violation of the

[1] Judge Kelly had dissented in *Rice*, opining that *Castleman* reserved (rather than resolved) whether the causation of bodily injury necessary requires violent force. 813 F.3d at 707. And she agreed with the "number of courts and judges . . . [that] have concluded that a person may cause physical or bodily injury without using violent force." *Id.* at 707–08 (citing cases and providing examples). Judge Colloton also concurred in an earlier case, opining that "attempting to cause bodily injury to another person does not appear to have, *as an element*, the use or attempted use of physical force." *United States v. Fischer*, 641 F.3d 1006, 1010 (8th Cir. 2011).

domestic battery statute without using or threatening physical force, including by poisoning or withholding medicine." *Waters*, 823 F.3d 1066. The court found that argument foreclosed by *Castleman*, which "confirmed that the act of employing poison knowingly as a device to cause physical harm is a use of force. Likewise, withholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force under *Castleman*." *Id.* (citation omitted). The Seventh Circuit subsequently reiterated its view that the "caus[ation] of bodily harm to a person necessarily entails the use of physical force." *United States v. Jennings*, 860 F.3d 450, 458–59 (7th Cir. 2017). Notably, however, the court acknowledged that, unlike poison, "the hypothetical as to the denial of food is, as a matter of logic, a more challenging one to place within the category of violent offenses," since "it is more difficult to identify the particular 'force' involved." *Id.* at 459.

4. In *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005), the Tenth Circuit held that Colorado assault did not satisfy the elements clause because one could cause the requisite bodily injury without violent force. *See United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) (following *Perez-Vargas*). However, in *Ontiveros*, the Tenth Circuit concluded that *Castleman* abrogated *Perez-Vargas*. 875 F.3d at 536–38. And, in light of *Castleman*, the court rejected the argument that Colorado assault did not qualify because it could be committed by "a failure to act," such as when a child "neglect[s] to care for his father" by withholding medical care. *Id.* at 538. In curious reasoning, the court stated that,

under *Castleman,* it was impossible to cause bodily injury without using common-law force, and common-law battery could "be committed by an omission to act." *Id.*

5. Finally, although not cited by the decision below, the Ninth Circuit has reached the same result, albeit without addressing omissions. In *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1289–91 (9th Cir. 2017), the court held that Texas aggravated assault satisfied the elements clause, rejecting the defendant's argument "that the terms 'bodily injury' and 'physical force' are not synonymous or interchangeable." *Id.* at 1290. The court acknowledged that, while this "argument might be persuasive in other circuits," the Ninth Circuit had "already reject[ed] it, repeatedly holding that threat and assault statutes [requiring the causation of injury] necessarily involve the use of violent, physical force." *Id.* & n.5. After reviewing its precedent, as well as *Castleman*'s treatment of poison, the court concluded: "Although the Supreme Court [in *Castleman*] reserved the question of whether bodily injury requires violent, physical force of the type required" by *Johnson*, "our court has already addressed the issue" and held that "bodily injury entails the use of violent, physical force." *Id.* at 1291. *Accord United States v. Werle*, 877 F.3d 879, 884 (9th Cir. 2017) (same, and acknowledging the circuit split).

B. The First, Third, Fourth, and Sixth Circuits Do Not Equate Causation of Injury or Death with Violent Force

1. In *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018), the Third Circuit rejected the reasoning of the courts above in holding that Pennsylvania aggravated assault did not satisfy the elements clause. *Id.* at 226–30. The Third Circuit observed that the offense may be committed "not because a defendant used

physical force against the victim, but because serious bodily injury occurred, as with the deliberate failure to provide food or medical care." *Id.* at 227–28. The court rejected the government's argument that, under *Castleman*, "causing or attempted to cause serious bodily injury necessarily involves the use of physical force." *Id.* at 228. Rather, it explained that "*Castleman* avowedly did not contemplate the question before us," but addressed only common-law force. *Id.* And *Castleman* had "expressly reserved" on "whether causing serious bodily injury without any affirmative use of force would satisfy the violent physical force requirement of the ACCA." *Id.*

On that point, the Third Circuit ultimately rejected the government's argument that "bodily injury is always and only the result of physical force" in the ACCA context. *Id.* at 229. And because Pennsylvania aggravated assault "criminalizes certain acts of omission," the court concluded that it "sweeps more broadly then the ACCA's definition of 'physical force.'" *Id.* at 230. In so holding, the Court found that "two of our sister circuits have reached a similar conclusion." *Id.* at 229 (citing *United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) and *United States v. Resendiz-Moreno*, 705 F.3d 203, 205 (5th Cir. 2013)). *Id.* at 229. Although the court acknowledged that other circuits had accepted the government's contrary position, the Third Circuit did "not consider the reasoning in those cases to be persuasive, because they conflate an act of omission with the use of force, something that *Castleman*, even if it were pertinent, does not support." *Id.* at 229–30 (citing *Peeples* and *Waters*).

2. In *Middleton*, the Fourth Circuit held that South Carolina involuntary manslaughter did not satisfy the elements clause because it could be committed merely by selling alcohol to a minor, and without using any force against (or even interacting with) the victim who died as a result of the sale. 883 F.3d 489–90, 492. The court rejected the government's reliance on *Castleman*—both because it "ignore[d] the distinction between de minimus [common-law] force, as discussed in *Castleman*, and violent force, as discussed in *Johnson*," and because it "erroneously conflate[d] the *use* of violent force with the *causation* of injury." *Id*. at 490.

On the latter point, the court explained that "a crime may result in death or serious injury without involving the use of physical force." *Id*. at 491 (quoting *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (emphasis omitted)). While the Fourth Circuit had previously extended *Castleman*'s reasoning about indirect force and poison to the ACCA, it rejected the idea that "any action leading to bodily injury, through however attenuated a chain of causation, necessarily qualifies as a use of physical force against the person of another." *Id*. at 492; *see United States v. McNeal*, 818 F.3d 141, 156 & n.10 (4th Cir. 2016) (rejecting the suggestion that *Castleman* "has abrogated the distinction that we recognized in *Torres-Miguel* between the use of force and the causation of injury"); *United States v. Covington*, 880 F.3d 129, 134 n.4 (4th Cir. 2018) (same).

3. In *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc), the full Sixth Circuit recently held that Ohio assault offenses requiring serious physical harm did not satisfy the elements clause. *Id*. at 395–402. The court explained that

those offenses could be committed by a "'failure to act' to prevent serious physical harm to a victim when the defendant has a legal duty to do so." *Id.* at 398–99. The court referred to one case where a parent failed to prevent a child from discovering a dead body, leading to PTSD, and one case where a parent failed to protect a child from physical and sexual abuse over an extended period of time. *Id.* Those acts of "omission," the court held, did not involve violent force under *Johnson*. *Id.* at 399; *see Harper v. United States*, __ F. App'x __, 2019 WL 2616627, at *7 (6th Cir. 2019) (unpublished) (Moore, J., concurring in the judgment) (opining that the offense of failing or declining to protect a child does not require violent force under *Burris* because it "cover[s] an omission rather than an act").[2]

Even more recently, a unanimous Sixth Circuit panel followed the Third Circuit's decision in *Mayo*. *Dunlap v. United States*, __ Fed. App'x __, 2019 WL 3798534, at *7–8 (6th Cir. 2019) (unpublished). It held that a Tennessee offense for failing to protect a child or adult from assault did not satisfy the elements clause. *Id.* at *8. To reach that conclusion, the court relied on *Mayo*'s holding that Pennsylvania assault did not satisfy the ACCA's elements clause because it could be committed "not because a defendant used physical force against the victim, but because serious bodily injury occurred, as with the deliberate failure to provide food or medical care." *Id.* (quoting *Mayo*, 901 F.3d at 227).

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[2] *Burris* overruled an earlier case, where Judge White wrote separately to express her view "that proof of serious physical harm [does not] necessarily require[ ] proof that violent physical force was used." *United States v. Anderson*, 695 F.3d 390, 403–06 (6th Cir. 2012) (White, J., concurring); *see Williams v. United States*, 875 F.3d 803, 808 (6th Cir. 2017) (Moore, J., concurring in the judgment) (agreeing with Judge White that one can cause physical injury without violent force).

4. In *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015), the First Circuit held that Connecticut third-degree assault did not satisfy the elements clause in 18 U.S.C. § 16(a). The court reasoned that the intentional causation of physical injury did not necessarily require violent force. *Id.* at 468–69. Not only did the assault statute itself not require force, but "[c]ommon sense" made clear that it covered "conduct that results in 'physical injury' but does not require the 'use of physical force.'" *Id.* at 469, 471. "For example, a person could intentionally cause physical injury by telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Id.* at 469 (quotation omitted). The court distinguished *Castleman* on the ground that it analyzed common-law force, not violent force. *Id.* at 470–71.

The court subsequently denied the government's rehearing petition. In doing so, the court clarified that it had adopted the argument that the offense did not satisfy the elements clause because "a person may cause physical injury under the Connecticut statute by 'guile, deception or deliberate omission.'" *Whyte v. Lynch*, 815 F.3d 92, 92 (1st Cir. 2016) (quoting *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003)). In its rehearing petition, the government argued that, under *Castleman*, the causation of physical injury necessarily requires violent force, "even if the defendant's misconduct was limited to guile, deception, or deliberate omission." *Id.* However, because the government had not initially made that argument on appeal, the court considered it waived. *Id.* at 92–93.

In *United States v. Ellison*, 866 F.3d 32 (1st Cir. 2017), the court embraced *Castleman*'s reasoning about indirect force as it related to poison. *Id.* at 37–38 (citing *United States v. Edwards*, 857 F.3d 420, 427 (1st Cir. 2017)). But it stopped there. While the defendant in that case also offered an example about withholding medical care, the court found that this conduct was not encompassed by the offense. *Id.* at 38. And the court did not otherwise suggest that the causation of injury necessarily requires violent force. Thus, *Whyte*'s reasoning in that regard remains the law in the First Circuit. *See Lassend v. United States*, 898 F.3d 115, 126–27 & n.11 (1st Cir. 2018) (finding it unnecessary to address "deliberately withholding vital medicine," and noting that the circuits are divided on whether there is a "distinction between the causation of bodily injury and the use of violent force").

C. The Law in the Second and Fifth Circuits Is Confounding

Exacerbating the circuit split, the state of the law in two circuits is internally inconsistent and contradictory, adding further the confusion to the legal landscape.

1. In *Mayo*, the Third Circuit approvingly cited the Fifth Circuit's decision in *Resendiz-Moreno*, which held that the Georgia offense of first-degree child cruelty did not satisfy the elements clause. 705 F.3d at 205. That court emphasized that this offense could be committed "by depriving the child of medicine or some other act of omission that does not involve the use of physical force." *Id.*

In *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), the full Fifth Circuit recently reconsidered its body of precedent in light of *Castleman*. In doing so, it overruled a number of prior decisions that had

distinguished between direct and indirect force. *See id.* at 181–82, 186. It also overruled prior decisions that had "reasoned that just because the offense *resulted* in serious bodily injury, that did not mean that the statue required the defendant to *use* the force that caused the injury." *Id.* at 183–84, 186.

The en banc court listed *Resendiz-Moreno* among the various decisions that were being overruled "in whole or in part." *Id.* at 187. However, the en banc court noted that "*Castleman* does not address whether an omission, standing alone, can constitute the use of force, and we are not called on to address such a circumstance today." *Id.* at 181 n.25. Thus, *Resendiz-Moreno*'s omission rationale may remain good law: the en banc court may have overruled that decision only in part because it cited a poison case. *Resendiz-Moreno*, 705 F.3d at 205 n.1. On the other hand, the en banc court purported to hold that the causation of bodily injury necessarily requires violent force, in which case injury caused even by omissions would qualify. Thus, despite convening en banc in order to clarify the law of the circuit, the law in the Fifth Circuit remains internally inconsistent and subject to confusion.

2. The Second Circuit's law fares no better. In *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), the court held that Connecticut assault did not satisfy the elements clause in § 16(a) because "the intentional causation of injury does not necessarily involve the use of force." *Id.* at 195. It reasoned that "an individual could be convicted . . . for injury caused not by physical force, but by guile, deception, or even deliberate omission." *Id.* After citing a case involving poison, the court observed that "human experience suggests numerous examples of

intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine from a sick patient." *Id*. at 195–96.

Following *Castleman*, the Second Circuit limited *Chrzanoski* as follows: "To the degree that any aspect of *Chrzanoski*'s reasoning suggests that the conduct Hill describes does not involve the threatened use of physical force, moreover, the *Chrzanoski* panel did not have the benefit of the Supreme Court's reasoning in *Castleman* to the effect that a use of physical force can encompass acts undertaken to cause physical harm, even when the harm occurs indirectly (as with poisoning) rather than directly (as with a kick or punch)." *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018) (citation omitted); *see id*. (citing another poison case); *Villanueva v. United States*, 893 F.3d 123, 130 (2d Cir. 2018) (repeating *Hill*) .

But because the Second Circuit in *Hill* focused only on the poison scenario, and because *Castleman* did not address acts of omission (and expressly reserved on whether the causation of injury necessarily requires violent force), it is unclear whether *Chrzanoski*'s non-poison reasoning remains good law. In that regard, the Second Circuit has observed that "[t]he holding of *Chrzanoski* has not been disturbed." *Villanueva*, 893 F.3d at 130 n.6. The Second Circuit relied on *Chrzanoski* as recently as 2016. *United States v. Welch*, 641 F. App'x 37, 42 (2d Cir. 2016). And one member of that court has even more recently opined that *Castleman* should not be "graft[ed]" onto the ACCA at all, since it was "carefully cabined" to the misdemeanor domestic-violence context. *See Villanueva*, 893 F.3d at 134–36 (Pooler, J., dissenting). Because *Castleman* did not control, she believed

that the court should adhere to *Chrzanosk*'s rule that "force cannot be inferred from causation of bodily injury." *Id*. at 136, 139. And, she explained, while *Castleman* discussed poison, it "did not discuss the types of minimum conduct we identified in *Chrzanoski*," even though, as "nearly every first year law student knows," "a person may cause injury without resorting even to offensive touching." *Id*. at 138–39.

* * *

In sum, the lower courts have long grappled with, and disagreed about, the question presented. There is little dispute that one can cause injury or even death by an act of omission. Yet the courts of appeals continue to differ about whether such conduct constitutes violent force where it causes injury. That conflict has only intensified after *Castleman*, with numerous lower courts acknowledging the conflict. Every regional circuit except the D.C. Circuit has now issued multiple opinions addressing it, often in contradictory ways and often generating separate opinions. Only this Court can resolve the conflict, as it turns on the meaning of violent force, as defined in *Johnson*, and whether *Castleman* applies in the ACCA context. It is time for the Court to clarify the relationship between these important precedents.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The circuit split has a dramatic and disparate effect on scores of federal criminal defendants in this country. Absent resolution, defendants with the exact same criminal history will continue to receive substantially different sentences based solely on the circuit in which they are sentenced. That disparity is untenable.

Over 6,700 people were convicted last year alone of § 922(g)(1), with hundreds subject to the ACCA enhancement. U.S. Sentencing Commission, Quick Facts, Felon in Possession of a Firearm, Fiscal Year 2018.[3] That enhancement transforms the ten-year statutory maximum penalty into a mandatory fifteen-year sentence. And the practical effect is even more severe, as the average ACCA sentence is 186 months, while the average non-ACCA § 922(g)(1) sentence is merely 59 months. *Id*. That's a ten-year disparity. The sentencing implications do not end there, as the ACCA's elements clause informs the interpretation of several other elements clauses in federal law. *See* 18 U.S.C. § 16(a); 18 U.S.C. § 924(c)(3)(A); U.S.S.G. § 4B1.2(a)(1); U.S.S.G. § 2K2.1 cmt. n.1; U.S.S.G. § 2L1.2 cmt. n.2.

The question presented is not only important but recurring. As reflected in the legal landscape described above, there are numerous criminal offenses that require the causation of injury or death but that may nonetheless be committed by omission. Those offenses span the nation and include battery, assault, child abuse, manslaughter, and even murder. And because those offenses may be committed by an act of omission, federal criminal defendants will continue to argue that those offenses do not satisfy the elements clause. That explains why a circuit split has quickly emerged in the five short years since *Castleman* was decided. And it explains why every regional circuit but one has addressed the question presented, with all of those courts doing so on multiple occasions. Given that question's practical importance and recurring nature, the Court's review is warranted.

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[3] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY18.pdf.

III. THIS CASE IS AN IDEAL VEHICLE

This case is an ideal one to resolve the split. Procedurally, the question presented is well preserved for review. In both the district court and the court of appeals, Petitioner argued that his New York second-degree attempted murder conviction did not satisfy the elements clause because it could be committed by an act of omission, citing the Third Circuit's decision in *Mayo* and the Fourth Circuit's decision in *Middleton*. *See* App. 4a, 14a; Pet. C.A. Br. 14–15; Pet. C.A. Reply Br. 10–11; Pet. C.A. Supp. Ltr. Br. 8; Dist. Ct. Dkt. Entry 31 at 7–8; Dist. Ct. Dkt. Entry 45 at 3–4. And, in a published opinion following oral argument, the Eleventh Circuit expressly rejected that argument, holding that the intentional causation of physical injury or death necessarily requires violent force, even when caused by an act of omission. App. 16a–20a. Because the question presented has been pressed and passed on in the courts below, it is squarely before the Court for decision here.

The procedural posture of this case is also ideal. This case arises on direct appeal. Thus, unlike appeals from post-conviction proceedings under 28 U.S.C. § 2255, there are no lurking procedural obstacles like retroactivity or procedural default that could obstruct a review of the merits. In addition to arising on direct appeal, this case also arises under the ACCA itself, not the Sentencing Guidelines, which this Court typically entrusts to the Sentencing Commission. *See Braxton v. United States*, 500 U.S. 344, 347–49 (1991). And, finally, Petitioner's ACCA enhancement depends on his New York attempted second-degree murder conviction. App. 3a. Thus, a favorable resolution of the question presented would be case

dispositive, reducing his statutory maximum to ten years and his guideline range all the way down to 37–46 months. The stakes could not be higher for Petitioner.

Lastly, there is no dispute that an individual may commit second-degree murder by intentionally withholding food or medicine where there is a duty to provide it. The court of appeals "recognize[d] that New York law imposes criminal liability for conduct that includes both voluntary acts and omissions where there is a duty to act." App. 18a. While such an omission legally constitutes an "act" or "conduct," the court acknowledged that, as a factual matter, one can commit the offense by "intentionally not providing medical care or food" where there is a duty to do so. *Id.* *See People v. Wong*, 81 N.Y.2d 600, 607 (N.Y. 1993) ("this Court [has] held that parents have an affirmative duty to provide their children with adequate medical care and that, under certain circumstances, the failure to perform that duty can form the basis of a homicide charge") (citing *People v. Steinberg*, 79 N.Y.2d 673, 680 (N.Y. 1992)); N.Y. Penal Law § 15.10 (providing that criminal liability may be based on an "omission to perform an act"); *id.* § 15.00(3) (defining "omission" as "a failure to perform an act as to which a duty of performance is imposed by law").

IV. THE DECISION BELOW IS WRONG

1. The Eleventh Circuit erred by conflating the causation of injury or death with violent force. That categorical proposition is contrary to common sense, the plain text of the ACCA, and this Court's precedents. Under certain circumstances, an individual can intentionally cause injury or death by doing

absolutely nothing. Where a child or elder depends on another for food or medicine, the caregiver's absence alone can cause injury or death.

Rather than dispute that dynamic, the Eleventh Circuit (and the other circuits it joined) concluded that such inaction constitutes violent force. But where exactly is the force? The Eleventh Circuit posited that "it is the act of withholding foods with the intent to cause the dependent to starve to death that constitutes the use of force." App. 19a (quoting *Peeples*, 879 F.3d at 287). That argument strains credulity. Withholding food or medicine does not require any action at all; one can do so merely by sitting still without moving. Characterizing such inaction as "force," much less "violent force," is difficult to square with the English language.

For that reason, it is also difficult to square with the plain language of the elements clause. That statutory provision requires "physical force," not the causation of injury. Congress could have written the statute in a way that encompassed any criminal offense requiring the causation of injury or death. Although it has drafted other criminal statutes with an injury component, *see, e.g.*, 18 U.S.C. § 113(a)(6)-(7) (federal assault), it did not do so here. The Eleventh Circuit (and the other circuits it joined) has effectively re-written the statute by excising the term "physical force" and replacing it with "causation of injury or death." But only Congress, not the courts, may revise the statutory language.

2. The Eleventh Circuit's a-textual position also cannot be squared with the interpretation adopted in *Curtis Johnson*. After all, the Court defined "physical force" in the ACCA according to its "ordinary meaning," which is "force consisting in

a physical act," not a failure to act. *Johnson*, 559 U.S. at 139 (quoting Black's Law Dictionary 717 (9th ed. 2009) (brackets omitted)). And, when used in the context of a "violent felony," the Court found that "physical force" "connotes a substantial degree of force" that is "capable of causing physical pain or injury." *Id.* at 140. An act of omission does not satisfy that heightened standard.

The Eleventh Circuit's contrary conclusion is also irreconcilable with examples of non-violent force recognized by the Court. *Johnson* held that an offensive touching did not constitute violent force. *Castleman* indicated that a bruising squeeze to the arm would not constitute violent force. 572 U.S. at 165–66. And, just last Term in *Stokeling*, the Court indicated that the force necessary to snatch a purse without any victim resistance would not qualify as violent force either. *See* 139 S. Ct. at 552–55. If an offensive touching, a bruising squeeze, and a purse snatching do not constitute violent force, then surely a mere failure to act does not constitute violent force either. *See Chambers v. United States*, 555 U.S. 122, 127–28 (2009) (holding, even before *Johnson*, that the "failure to report" to prison was a crime of "inaction" that did not satisfy either the elements or residual clauses), *abrogated on other grounds by Samuel Johnson*, 135 S. Ct. at 2563.

3. Disregarding common sense, the plain statutory text, and this Court's precedents interpreting it, the Eleventh Circuit and the other circuits have instead relied exclusively on *Castleman*. That reliance is misplaced for several reasons.

As an initial matter, most of those courts have failed to recognize that *Castleman* twice expressly reserved the question presented here—namely, whether

causing physical injury or death necessarily requires violent force. 572 U.S. at 167, 170. This Court in *Stokeling* recently confirmed that *Castleman* "had no need to decide" that question. 139 S. Ct. at 554. Needless to say, *Castleman* could not have decided the very question that it left open.

Overlooking that reservation, the Eleventh Circuit and other circuits have relied on *Castleman*'s holding that "[i]t is impossible to cause bodily injury without applying force in the *common-law sense*." 572 U.S. at 170 (emphasis added). But even on its face, that holding has no application to the ACCA context because the Court was referring only to common-law force. And *Johnson* explicitly declined to import that broader definition into the "violent felony" context of the ACCA. 559 U.S. at 139–41. Thus, while the causation of injury or death necessarily requires common-law force, it does not necessarily require *Johnson*-level violent force.

Failing for a similar reason is the Eleventh Circuit's reliance on *Castleman*'s discussion of poison. The Court first explained that that "the common-law concept of 'force' encompasses even its indirect application," which includes "administering a poison." *Castleman*, 572 U.S. at 170. That explanation was limited to common-law force; it did not apply to violent force. The Court then addressed the defendant's separate argument that administering poison did not constitute a "use" of force. *Id.* at 170–71. Rejecting that argument, the Court explained that "[t]he 'use of force' in [the poison] example is not the act of sprinkling the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch) does not matter." *Id.*

at 171. This passage means only that intentionally employing poison is a "use" of common-law force. The courts of appeals have erred by expansively reading this passage to instead mean that administering poison constitutes violent force. *See Villanueva*, 893 F.3d at 135 (Pooler, J., dissenting) (explaining this error).

Finally, even if *Castleman* could be read that way, it would still not resolve the question here. The Eleventh Circuit saw "no reason to draw a distinction between administering a poisonous substance . . . and withholding a life-saving substance." App. 20a. But it overlooked that an act of omission is qualitatively different from administering poison. The latter conduct requires some affirmative act by someone; poison does not administer itself. But withholding food or medical care does not require any affirmative act at all; the perpetrator can literally do nothing and allow time and biology to do all the work. Thus, even if administering poison involves violent force, the same is not true for a failure to act.

* * *

To be sure, the categorical approach can produce results that may seem "unsatisfying and counterintuitive." *Mayo*, 901 F.3d at 230. That is particularly true after *Samuel Johnson* invalidated the ACCA's residual clause. But courts may not re-write the elements clause to suit their own intuitions or to compensate for the loss of the residual clause. That task is for Congress alone. Indeed, "Congress remains free at any time to add more crimes to its list," "to write a new residual clause," or to incorporate offenses "carrying a prison sentence of a specified length." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233 (2018) (Gorsuch, J., concurring in part

and concurring in the judgment). But absent congressional action, the Court must continue to interpret the text of the elements clause in accordance with its plain meaning. Doing so is "vital to the integrity of our justice system," and it is necessary to avoid "render[ing] elements clauses just as capacious and chameleon-like as the residual clauses that are now broadly invalid." *Villanueva*, 893 F.3d at 133–34 (Pooler, J., dissenting). Here, a common-sense reading of the elements clause, and a straightforward application of *Curtis Johnson*, compels the conclusion that an act of omission is not violent force. Therefore, offenses requiring the causation of injury or death do not necessarily require the use of violent force.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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