NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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RONALD DETRO WINDER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

This case concerns the United States Sentencing Guidelines' "crime of violence" definition, specifically its "elements clause" (also called the "force clause"). U.S.S.G. § 4B1.2(a)(1). The Guidelines' "elements clause" is, in all important ways, identical to the "elements clause" that appears in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), and which this Court interpreted in *Curtis Johnson v. United States*, 559 U.S. 133 (2010), as requiring a prior offense to include the use of "physical force," that is, "force capable of causing *physical pain or injury* to another person." (emphasis added). Because the Guidelines' and ACCA's "elements clauses" are functionally identical, and because the courts of appeals treat precedents governing the two provisions interchangeably, this Court should grant certiorari to address the following question:

Whether a state offense that includes as an element causing injury, but which also defines "injury" broadly to include more than the "physical pain or injury" described in *Curtis Johnson*, is categorically a "crime of violence," that is, an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another?"

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Ronald Detro Winder, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on June 14, 2019.

## OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Winder*, 926 F.3d 1251 (10th Cir. 2019), is found in the Appendix at A1.

## JURISDICTION

The United States District Court for the District of Wyoming had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and entered judgment on June 14, 2019. Justice Sotomayor extended the time in which to petition for certiorari by 30 days, to and including October 15, 2019. (Appendix at 5.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## FEDERAL PROVISION INVOLVED

**U.S.S.G. § 2K2.1 (2018) Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

**(a)** Base Offense Level (Apply the Greatest):

. . .

**(4)** 20, if–

**(A)** the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

*Application Notes:*

1. Definitions. For purposes of this guideline:

. . .

"Crime of violence" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

**U.S.S.G. § 4B1.2 (2018) Definitions of Terms Used in Section 4B1.1**

**(a)** The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

**(1)** has as an element the use, attempted use, or threatened use of physical force against the person of another . . . .

## STATEMENT OF THE CASE

In 2013, Mr. Winder sustained a felony conviction in Wyoming for violating Wyo. Stat. § 6-5-204(b), interference with a peace officer resulting in bodily injury. (Vol. 2 at 62, 68-70; Vol. 3 at 42-43.)[1] He received a suspended sentence, conditioned on completing eight years' probation, and for the next three and a half years had no trouble. (Vol. 2 at 64.) But in 2016, Mr. Winder was found in possession of three firearms, which he'd accepted as payment from someone who owed him money. (Vol. 3 at 39-44; Vol. 2 at 59-62.) And, of course, due to his earlier conviction, he was prohibited under federal law from possessing those firearms. (Vol. 2 at 62; Vol. 3 at 42-43.)

The federal government eventually charged him with a single count of being a felon in possession of firearms, in violation of 18 U.S.C. § 922(g)(1). A few months later, he pleaded guilty to that lone count. (Vol. 2 at 9; Vol. 3 at 41-44.)

As pertinent here, Mr. Winder's Presentence Investigation Report ("PSR") calculated a base offense level of 20, because, in the probation officer's view,

[1] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

Mr. Winder's 2013 Wyoming conviction for interference with a peace officer was a "crime of violence" under the United States Sentencing Guidelines. *See* U.S.S.G. § 2K2.1(a)(4)(A) (raising base offense level from 14 to 20 for firearms offenses where defendant has one prior crime of violence).

The probation officer believed the conviction qualified as a "crime of violence" under U.S.S.G. § 4B1.2(a)(1), a subsection of the Guidelines' "crime of violence" definition commonly referred to as the "elements clause" (or the "force clause"). (Vol. 2 at 27, 55, 62.) That provision is identical to the "elements clause" that appears in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(i), and which this Court interpreted in *Curtis Johnson v. United States*, 559 U.S. 133 (2010), and *Stokeling v. United States*, 139 S. Ct. 544 (2019).

Under both "elements clauses," a prior offense qualifies as a "crime of violence" (Guidelines) or "violent felony" (ACCA), if it "has as an element the use, attempted use, or threatened use of *physical force* against the person of another." § 4B1.2(a)(1) (emphasis added); *accord* § 924(e)(2)(B)(i). In *Curtis Johnson*, this Court held that "physical force" means "violent force," that is, "force capable of causing *physical pain or injury*." 559 U.S. at 138-40 (emphasis added). The Court reaffirmed that definition in *Stokeling*. 139 S. Ct. at 553.

Mr. Winder objected to the PSR's proposed base offense level, arguing, as pertinent here, that Wyoming's felony interference statute was too broad to be a "crime of violence" because it could be committed by causing "injuries" beyond the "physical pain or injury" described in *Curtis Johnson*. (Vol. 2 at 43, 46-47; Vol. 3 at 59.) The district court did not rule on this challenge (vol. 3 at 59-62), and ultimately adopted the PSR's guidelines calculation. (Vol. 3 at 62.)

On appeal, Mr. Winder again argued that Wyo. Stat. § 6-5-204(b) encompassed causing an "injury" beyond mere "physical pain or injury," and, therefore, did not categorically require the use of "physical force" as defined in *Curtis Johnson*. He explained, specifically, that Wyoming defined its statutory term "bodily injury" broadly, to include not only "physical pain," but also "*any impairment of physical condition*." Wyo. Stat. § 6-1-104(a)(i) (emphasis added).[2] He further explained that the Wyoming Supreme Court had interpreted the statutes broadly as well, requiring exceedingly little harm to sustain a conviction. *See, e.g.*, *Flores v. State*, 403 P.3d 993, 996 (Wyo. 2017) (holding that no particular degree of pain, illness, or impairment need "exist to hold a defendant criminally liable for inflicting bodily

[2] At the time of Mr. Winder's 2013 conviction, the term "bodily injury" was defined, in full, to mean any "physical pain, illness or any impairment of physical condition." Wyo. Stat. § 6-1-104(a)(i). The statute was later amended in 2014. *See* 2014 Wyoming Laws Ch. 12 (H.B. 9).

injury"). Accordingly, he argued, because any *de minimis* impairment of physical condition sufficed to satisfy the statute, it covered conduct broader than the "physical pain or injury" required by *Curtis Johnson*. It was not, therefore, categorically a crime of violence.

The Tenth Circuit disagreed. It held, in relevant part, that Wyoming's inclusion of "any impairment of physical condition" in its "bodily injury" definition, did not make that statute sweep more broadly than the "physical pain or injury" contemplated by *Curtis Johnson*. (Appendix at 2-3.) The circuit's decision is discussed, and challenged, in greater detail below.

This petition follows.

## REASONS FOR GRANTING THE WRIT

**This Court's intervention is necessary to impose a consistent rule and resolve differing approaches in the circuits regarding whether state statutes which criminalize causing injury, but define "injury" more broadly than the "physical pain or injury" described by *Curtis Johnson*, are categorically crimes of violence.**

This case involves the United States Sentencing Guidelines' "crime of violence" definition, specifically its "elements clause" (also called the "force clause"). U.S.S.G. § 4B1.2(a)(1).

Under that clause, a "crime of violence" is "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . has as an

element the use, attempted use, or threatened use of *physical force* against the person of another." U.S.S.G. § 4B1.2(a)(1) (emphasis added). This definition mirrors the statutory language of the "elements clause" in the Armed Career Criminal Act's ("ACCA") "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)(i), which this Court interpreted in *Curtis Johnson v. United States*, 559 U.S. 133 (2010). There, this Court held that the term "physical force" means "violent force," that is, "force capable of causing *physical pain or injury* to another person." 559 U.S. at 140 (emphasis added). This Court reaffirmed that holding last term, in *Stokeling v. United States*, 139 S. Ct. 544, 552-53 (2019).

Because the functional language of the "elements clauses" in both the Guidelines and ACCA is identical, the courts of appeals consider precedents interpreting § 4B1.2(a)(1) and § 924(e)(2)(B)(i) interchangeably. *See, e.g.*, Appendix at 1.

To determine whether a conviction qualifies as a "crime of violence" or "violent felony," courts apply the categorical approach. *See, e.g.*, Appendix at 1; *Taylor v. United States,* 495 U.S. 575, 600–602 (1990). Under the "elements clause," that entails asking whether the least culpable conduct covered by the statute at issue nevertheless "has as an element the use, attempted use, or threatened use of physical

force against the person of another." *See, e.g.*, Appendix at 1; *Johnson,* 559 U.S. at 137. If it does not, then the statute is too broad to qualify as a "crime of violence" or "violent felony." *Id.* In determining what a state crime covers for purposes of this federal sentencing enhancement, federal courts look to, and are constrained by, state courts' interpretations of state law. *Id.,* at 138.

What makes the Wyoming statute here slightly different than the statutes at issue in *Curtis Johnson* and *Stokeling* is that it criminalizes not *using force* per se, but, rather, *causing injury*. And the problem statutes like this present is that what counts as an "injury" varies across the states, and many definitions encompasses harms that are broader than the "physical pain or injury" described in *Curtis Johnson*. This case perfectly exemplifies this problem, which is one that only this Court's intervention can resolve.

At the time of Mr. Winder's 2013 conviction, Wyo. Stat. § 6-5-204(b), provided, in full:

> A person who intentionally and knowingly causes or attempts to cause *bodily injury* to a peace officer engaged in the lawful performance of his official duties is guilty of a felony punishable by imprisonment for not more than ten (10) years.

(Emphasis added.)

The term "bodily injury," in turn, was defined at the time to mean any "physical pain, illness or *any impairment of physical condition*." Wyo. Stat. § 6-1-104(a)(i) (emphasis added). This "*any impairment of physical condition*" provision, coupled with the exceedingly low threshold set by the Wyoming Supreme Court for violating the statute, makes plain that Wyo. Stat. § 6-5-204(b) can be violated by causing more than the "physical pain or injury" described by *Curtis Johnson*. The Tenth Circuit erred in concluding otherwise, and two principal reasons weigh in favor of this Court's review.

### A. The Tenth Circuit's decision is wrong—causing "any impairment of physical condition" under Wyoming law is not categorically coterminous with causing "physical pain or injury."

This Court's cases make plain that the "physical pain or injury" described in *Curtis Johnson* presents an important limit on which statutes categorically are—and which statues categorically are not—crimes of violence and violent felonies.

*Curtis Johnson*'s own description ("physical pain or injury") plainly contemplates the physical and corporeal by its own terms; and this Court's discussion of "violent force" and "physical force" as distinguished from "intellectual force or emotional force," reinforces the point. 559 U.S. at 138. Put another way, this Court was not using the term "injury" in its broadest possible sense of any harm or violation that a person might suffer.

While *Stokeling* emphasized the low threshold of *force* required (i.e., force with a mere "potentiality" to cause physical pain or injury, *id.* at 554, or force that causes only "minimal pain or injury," *id.* at 553), it did not further define what constitutes "pain" or "injury." But *Stokeling*'s discussion of a previous case, *United States v. Castleman*, 572 U.S. 157 (2014), provides further confirmation that *Curtis Johnson*'s definition is indeed limited to physical pain or physical injuries.

In 2014, in *Castleman*, this Court held that mere offensive touching (which did not amount to *violent force* in *Curtis Johnson*) nonetheless was *physical force* as that term was used in the definition of "a misdemeanor crime of domestic violence" in 18 U.S.C. §§ 922(g)(9), 921(a)(33)(A). 572 U.S. at 162. What's relevant here is that in so holding, the Court repeatedly distinguished between the type of *physical force* associated with a misdemeanor crime of domestic violence, and the *violent force* it described in *Curtis Johnson*. *Id.* at 162-67. In so doing, the Court noted that the Tennessee definition of bodily injury at issue in the case included "a cut, abrasion, bruise, burn or disfigurement; physical pain *or temporary illness or impairment of the function of a bodily member, organ, or mental faculty*." *Id.* at 170 (emphasis added). Ultimately, however, the Court expressly declined to decide whether "these forms of injury necessitate violent force, under [*Curtis*] *Johnson*'s definition of that phrase." *Id.*

Four years later, in *Stokeling*, the Court noted that it had not previously decided in *Castleman* whether, under *Curtis Johnson*, "conduct that leads to relatively minor forms of injury—such as 'a cut, abrasion, [or] bruise'—'necessitates' the use of 'violent force.'" 139 S. Ct. at 153 (quoting *Castleman*, 572 U.S. at 170) (emphasis added). Those three examples, of course, come from the Tennessee definition of bodily injury that was at issue in *Castleman*. But that definition also was far broader than just those examples, encompassing as well "temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Castleman*, 572 U.S. at 170. *Stokeling*'s omission of *these types* of "injuries" is notable, and reinforces the understanding of *Curtis Johnson*'s definition as one rooted in, and limited to, physical pain and physical injury. Moreover, the examples that *Stokeling* did identify as "injuries" stand in stark contrast to what Wyoming permits punishment for as an "injury" under § 6-5-204(b).

That is, as noted above, Wyoming's felony interference statute, § 6-5-204(b), can be violated by causing any de minimis impairment of physical condition.

The term "impairment" is not statutorily defined, and the Wyoming Supreme Court has not expounded on its precise meaning. But the court does apply the well-established "rules concerning statutory interpretation" under which "[w]ords of a

statute are to be given their plain and ordinary meaning." *Meyers v. State*, 124 P.3d 710, 716 (Wyo. 2005); *see also Curtis Johnson*, 559 U.S. at 138 (noting deference to state court's interpretations of state law).

An "impairment" includes states of being merely "diminished" or "weakened," as well as "damaged." *See, e.g.*, *Impair; impairment*, The American Heritage Dictionary of the English Language ("To cause to weaken, be damaged, or diminish, as in quality");[3] *Impairment*, Dictionary.com ("the state of being diminished, weakened, or damaged, especially mentally or physically");[4] *Impairment*, Black's Law Dictionary (10th ed. 2014) (West) ("The quality, state, or condition of being damaged, weakened, or diminished."). Examples of such possible impairments, which are not coterminous with physical pain or physical injury abound: shining a flashlight in an officer's eyes during a nighttime foot chase, or setting off a stink bomb to cover up the smell of marijuana emanating from a vehicle during a traffic stop, or slipping him a sleeping pill to impair his consciousness. All would impair a physical condition (an officer's sense of sight and smell, or state of

[3] *Available at* https://ahdictionary.com/word/search.html?q=impairment. (Last visited October 15, 2019.)

[4] *Available at* https://www.dictionary.com/browse/impairment. (Last visited October 15, 2019.)

consciousness), but not in a way that causes or is even capable of causing "physical pain or injury."

Moreover, it is clear that "impairment" must mean something different than "physical pain," as evidenced by the terms' deployment alongside one another in Wyoming's "bodily injury" definition. Because were "physical pain" part and parcel of "any impairment of physical condition," there would be no need for the statutory definition to list them both. *See, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (describing the "cardinal principle" of interpretation that courts "must give effect, if possible, to every clause and word of a statute."); *see also Keene v. State*, 812 P.2d 147, 150 (Wyo. 1991) ("Every word in a statute must be given meaning.").

And although the Wyoming Supreme Court has not expressly defined "impairment," it has given effect to the language, explaining that the statute covers conduct amounting to any de minimis "pain," "illness," or "impairment." *See, e.g.*, *Flores v. State*, 403 P.3d 993, 996 (Wyo. 2017) (explaining that no "particular degree" of pain, illness, or impairment is required "to hold a defendant criminally liable for inflicting bodily injury"); *Grimes v. State*, 304 P.3d 972, 976-77 (Wyo. 2013) (explaining that the statute defining bodily injury "does not specify particular gradations of physical pain, illness or impairment"); *see also Palomo v. State*, 415 P.3d 700, 705 (Wyo. 2018) (agreeing with, and describing as "reasonable," a district

court's conclusion that the victim's medical records "were not likely 'critical or relevant because the standard is so low for the definition of the term 'injury'' to sustain a conviction for interference with a peace officer causing bodily injury"). Thus, simply put, one can cause a "bodily injury" in Wyoming without using "physical force," i.e., force capable of causing "physical pain or injury."

Looking at other dictionary definitions, commentary to the Model Penal Code, and the fact patterns of Wyoming's cases involving prosecutions under § 6-5-204(b), the court of appeals concluded that "impair" was not meant to convey anything more than "injure." (Appendix at 2-3.) But its opinion does not adequately account for Mr. Winder's argument that Wyoming's "bodily injury" definition can, on its terms, be read to include something more, a reading that is buttressed by the exceedingly low threshold of proof of "injury" expressly countenanced by the Wyoming Supreme Court. *See, e.g.*, *Grimes*, 304 P.3d at 976-77; *Palomo*, 415 P.3d at 705.

It is, of course, axiomatic that "state courts are the ultimate expositors of state law," *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and this fundamental principle of federalism is deeply embedded in the categorical approach. *Curtis Johnson*, 559 U.S. at 138. And here, Wyoming's statute, and its interpretation by the Wyoming Supreme Court, could not be clearer. Causing a peace officer to suffer "any

impairment of physical condition"—a phrase unbridled by requirements of magnitude—constitutes a "bodily injury" sufficient for criminal culpability. For that simple reason, Wyo. Stat. § 6-5-204(b) is not categorically a crime of violence under the "elements clause." The Tenth Circuit erred in concluding otherwise.

### B. There is a split among the circuits about whether identical state "injury" statutes are categorically crimes of violence, and this question is important and recurring.

Also weighing in favor of review here is the fact that the circuits now have split on whether identically-worded "injury" statutes satisfy the Guidelines' and ACCA's (also identically-worded) elements clauses.

The Tenth Circuit correctly noted below that the Seventh and Eighth Circuits have concluded that state crimes that included an element of "bodily harm," defined as "physical pain or injury, illness, or any impairment of a physical condition," satisfied *Curtis Johnson*'s standard. (Appendix at 3.) Those decisions have limited analytical value here, however, as neither circuit appears to have considered the arguments raised by Mr. Winder. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) (explaining that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

But just two months after the Tenth Circuit rejected Mr. Winder's claim, the Sixth Circuit concluded in an unpublished decision that an identically-worded state injury statute *did not* qualify as a "violent felony' under ACCA's (also identically-worded) elements clause. *Derrick Johnson v. United States*, No. 17-5753, 2019 WL 3779366, at *4 (6th Cir. Aug. 12, 2019).

In *Derrick Johnson*, the Sixth Circuit considered a Missouri third-degree assault statute which involved, as pertinent here, "the intentional attempt to cause *physical injury* to another." *Id.* at *3 (emphasis added). And "physical injury" in Missouri was, at the relevant time, defined exactly as "bodily injury" was in Wyoming; that is, as "physical pain, illness, or any impairment of physical condition." *Id.*[5] Similar too, "Missouri courts ha[d] consistently held that this requirement can be met by a relatively minimal showing." *Id.*

Looking to that broad definition and minimal showing, the Sixth Circuit determined that under the "illness" prong "[s]neezing (or spitting) on someone with the intent to transmit a minor illness does not involve the use of violent force"; and,

[5] The only difference between the definitions appears to be the serial comma following the word "illness" in the Missouri version, which is absent from the Wyoming version. *Compare* Mo. Rev. Stat. § 556.061(20) (2000) *with* Wyo. Stat. § 6-1-104(a)(i) (2013). This appears to be a simple stylistic difference, and, in any event, one that does not change the meaning of either statute in any way.

in further support, the court emphasized that Missouri third-degree assault "requires only the attempt to cause 'physical pain, illness, or *any* impairment of physical condition.'" (Emphasis by the court in *Derrick Johnson*). *Id.* at 4.

The decision below and *Derrick Johnson* cannot be reconciled, and this Court's intervention is necessary to resolve this emerging split, and to ensure uniformity on this issue.

Further weighing in favor of review is the important and recurring nature of this question. Significant numbers of criminal defendants are sentenced each year under either the Guidelines' "crime of violence" or ACCA's "violent felony" provisions. And whether a prior offense satisfies these provisions often has dramatic sentencing consequences—a "crime of violence" can increase a base offense level (as it did to Mr. Winder here), or qualify a defendant as a career offender, with a significant increase in sentencing exposure, *see* U.S.S.G. § 4B1.1; and ACCA imposes a 15–year mandatory-minimum sentence on any § 922(g) offender who has been convicted of at least three qualifying predicate convictions. *See* 18 U.S.C. § 924(e)(1). This number of cases involving ACCA's "violent felony" definition that this Court has considered in recent terms underscores the importance of this issue.

Also weighing in favor of review is the fact that, due to the overlapping language between the two "elements clauses," the courts of appeals look to

Guidelines cases and ACCA cases interchangeably when employing the categorical approach to determine whether a defendant's prior conviction is a "violent felony" or a "crime of violence." Thus, any decision by this Court here would have significant impact for interpreting both provisions. And this importance is even more pronounced given that state statutes defining "injury" vary,[6] meaning that this Court's guidance about the line *Curtis Johnson* draws is very important as district courts and the courts of appeals evaluate multitudes of different predicate offenses.

Finally, that the Sentencing Commission theoretically could address this issue at some point does not counsel against review here. *See generally Braxton v. United States*, 500 U.S. 344, 348 (1991) (discussing restraint in using certiorari power to primary means to resolve conflicting judicial decisions regarding the meaning of the Guidelines). The important sentencing impacts at play (not only under the Guidelines, but also with respect to the 15-year mandatory minimum attendant with prior convictions under ACCA) strongly mitigate against invoking that restraint

[6] *Compare, e.g.*, Wyo. Stat. § 6-1-104(a)(i) (2013) (defining "bodily injury" to mean any "physical pain, illness or any impairment of physical condition") *with* Colo. Rev. Stat. Ann. § 18-1-901(3)(c) ("'Bodily injury' means physical pain, illness, or any impairment of physical or mental condition.") *with* Tenn. Code Ann. § 39-11-106(a)(2) ("'Bodily injury' includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

here. Moreover, while Congress charged the Sentencing Commission with periodically reviewing and revising the Guidelines, *Braxton*, 500 U.S. at 348, it also imposed a duty on the courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). But as the difference between Mr. Winder's case and the Sixth Circuit's recent decision in *Derrick Johnson* shows, criminal defendants in different circuits may face vastly different sentencing exposure despite both being convicted of a past offense involving causation of "physical pain, illness, or any impairment of physical condition." Accordingly, this Court's intervention also is necessary to ensure that sentencing courts can consistently fulfill their statutory mandate to avoid unwarranted sentencing disparities.

## CONCLUSION

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

Respectfully submitted,

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