No. _____

IN THE

Supreme Court of the United States

SETH GRANT HUNTINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether treating a state assault statute as a "violent felony" under the Armed Career Criminal Act when that statute requires no more than the intent to commit a common-law battery violates this Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Seth Grant Huntington, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Seth Grant Huntington respectfully petitions for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eight Circuit, affirming a conviction and sentence of the United States District Court for the District of Minnesota.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 44 F.4th 812 (8th Cir. 2022) and is attached as Appendix A. The Eighth Circuit's denial of petitioner's motion for panel rehearing or rehearing en banc is attached as Appendix B.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit affirmed Mr. Huntington's sentence in a published opinion filed August 12, 2022. Mr. Huntington's petition for rehearing was denied on October 3, 2022.

On January 3, 2023, Justice Kavanaugh extended the time for filing this petition until March 2, 2023. Application 22A579. This Court has jurisdiction to review a judgment of the court of appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) and (e)(2)(B)(i):

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)...

(e)(2)(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that —

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

Minnesota Statute § 609.02, subd. 10:

Subd. 10. Assault. "Assault" is:

(1) an act done with intent to cause fear in another of immediate bodily harm; or

(2) the intentional infliction of or attempt to inflict bodily harm upon another.

Minnesota Statute § 609.223, subd. 1:

> Assault in the Third Degree
>
> Subd. 1. Substantial bodily harm. Whoever assaults another and inflicts substantial bodily harm may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minnesota Statute § 609.02, subd. 7a:

> Subd. 7a. Substantial bodily harm. "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.

STATEMENT OF THE CASE

The issue presented in this case requires the Court to consider whether the Eighth Circuit opinion below has misapplied this Court's decision in *Johnson v. United States*, 558 U.S. 1128 (2010). *Johnson* held that a "violent felony" under the Armed Career Criminal Act's "force" clause requires the use of "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id*. at 140 (citations omitted). *Johnson* rejected the government's argument that the force could be satisfied by a common-law battery. *See id*. at 139–40. Here, though, Minnesota's assault statute has been interpreted by its state courts to require only the intent to commit a common-law battery.

Petitioner Seth Grant Huntington was charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and the indictment alleged he was subject to sentencing under the Armed Career Criminal Act, 18 U.S.C. § 924(e), because of two prior convictions for third-degree assault under Minnesota Statute § 609.223 and one conviction for first-degree burglary with assault under Minnesota Statute § 609.582, subd. 1(c). He pleaded guilty to the offense while preserving the right to challenge application of the ACCA.

Mr. Huntington argued that Minnesota third-degree assault crimes are not violent felonies under the ACCA because, based on the way "assault" has been defined by Minnesota courts, they can be committed without the force required by *Johnson*. He argued that Eighth Circuit

precedents to the contrary were erroneous because of their reliance on *United States v. Castleman*, 134 S.Ct. 1405 (2014), and *Voisine v. United States*, 136 S.Ct. 2272 (2016). Because both *Castleman* and *Voisine* addressed the definition of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), they are inapt precedents for interpreting the ACCA, as this Court has emphasized. *See Borden v. United States*, 141 S.Ct. 1817, 1832–34 & n.9 (2021) (explaining at length the important textual and policy-based distinctions between the two statutes).

The district court found itself bound by decisions ruling that Minnesota assaults are proper ACCA predicates under the ACCA's force clause. *See United States v. Lindsey*, 827 F.3d 733, 739–40 (8th Cir. 2016) (holding that Minnesota second-degree assault qualifies as a "violent felony" because it has "assault" as an element); *United States v. Wadena*, 895 F.3d 1075, 1076 (8th Cir. 2018) (per curiam) (holding that third-degree assault uses "the definition of 'assault' . . . derived from Minn. Stat. § 609.02, subdiv. 10," so it is a "violent felony"). Mr. Huntington was sentenced to serve 180 months under the ACCA.

On appeal, the Eighth Circuit affirmed the district court in a per curiam opinion, relying on circuit precedent. *See* 44 F.4th 812 (8th Cir. Aug. 12, 2022) (Appendix A). Mr. Huntington filed a petition asking for rehearing en banc to reconsider prior circuit decisions, but this petition was denied. (Appendix B).

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT DECISION BELOW INCORRECTLY APPLIES THIS COURT'S PRECEDENT IN *JOHNSON*.

This Court recently stepped in to review decisions where the courts of appeals had relied on decisions discussing a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) when deciding the mens rea applicable to "violent felonies" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). *See Borden v. United States*, 141 S. Ct. 1817 (2021). This Court held in *Borden* that, given the differing purposes underlying the separate statutory definitions, precedent supporting reckless misdemeanor crimes of domestic violence did not support recklessness in violent felonies. *See id*. at 1832–34 & n.9.

The Eighth Circuit has made a similar error in relying on precedents of this Court such as *United States v. Castleman*, 572 U.S. 157 (2014) (discussing the definition of force required to establish a misdemeanor crime of domestic violence) when determining the degree of force required to establish an ACCA violent felony. In doing so, the Eighth Circuit has failed to apply the standard this Court established in *Johnson*.

In *Johnson*, this Court analyzed the meaning of "physical force" in the force clause. The Court noted that force was an element of common-law battery, which required "the intentional application of unlawful force against the person of another," and where the force necessary was "the slightest offensive touching." *See Johnson*, 559 U.S. at 139 (citing in support Blackstone, among others). But because "force" was being interpreted in the context of defining a "violent felony" under this ACCA, the Court ruled that common-law battery would be insufficient and that a greater degree of force was necessary. *See id*. at 139–40. As stated in *Johnson*, the force required under the ACCA was "force capable of causing physical pain or injury to another person." *Id*. at 140.

Eighth Circuit precedent holds that all Minnesota assaults are predicate violent felonies under the ACCA's force clause. *See United States v. Wadena*, 895 F.3d 1075, 1076 (discussing the core definition of "assault" in Minn. Stat. § 609.02, subd. 10). But that precedent approving assault as a valid force-clause predicate rests on two erroneous applications of this Court's precedent.

First, the precedents do not engage with Minnesota caselaw elucidating and limiting the mens rea requirement for assault, firmly establishing that assault in Minnesota requires the intent to commit a common-law battery. Under *Johnson* and other decisions of this Court, the state is the ultimate arbiter of the meaning of its own laws.

Second, the Eighth Circuit relied heavily on precedents of this Court analyzing the definition of "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9), rather than the ACCA, in a manner called into serious question by this Court's decision in *Borden*. Because Minnesota has interpreted its assault statute to require only common-law battery, and because the Eighth Circuit's precedents finding that Minnesota assault constitutes an ACCA felony rest on an interpretation of non-ACCA decisions of the Supreme Court, Minnesota's third-degree assault statute is not a valid ACCA predicate.

I. Minnesota law requires only the intent to commit a common-law battery.

Mr. Huntington has two convictions for third-degree assault under Minn. Stat. § 609.223, subd. 1, which says that "[w]hoever assaults another and inflicts substantial bodily harm" may be punished with a felony sentence. Minnesota defines "assault" as "(1) an act done with

intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10.

On its face, the definition of "assault" under Minnesota law establishes a clear force-clause predicate, but the Minnesota courts have interpreted the definition in unexpected ways that take assault-harm out of the ACCA's reach. And it is the state courts who have the last word on the meaning of state statutes. *See Johnson*, 559 U.S. at 138 ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements[.]").

There are two means of committing an assault, which Minnesota courts have termed "assault-fear" and "assault-harm." *See State v. Fleck*, 810 N.W.2d 203, 305 (Minn. 2012). Juries need not be unanimous about whether a defendant has committed assault-fear or assault-harm, so the definition is indivisible. *See State v. Dalbec*, 789 N.W.2d 508, 513 (Minn. Ct. App. 2010) ("The jury could agree, therefore, that appellant intended to assault S.M., but need not agree on whether the assault

was accomplished by causing fear or inflicting or attempting to inflict bodily harm.").

Because jury unanimity is not required under *Dalbec*, "assault" is the element, and "assault-fear" and "assault-harm" are just means of committing an assault. Under the categorical approach, there is therefore "no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) (finding the "elements or means" inquiry to be "easy" where "a state court decision definitively answers the question").

Minnesota distinguishes between the intent necessary to commit assault-fear and assault-harm. *See Fleck*, 810 N.W.2d at 309–10. The Minnesota Supreme Court has determined that assault-harm requires only the general intent to "intentionally engage[] in the prohibited conduct," and "nothing in the definition requires proof that the defendant meant to violate the law or cause a particular result." *Id*. The only intent required for assault-harm is the "intent to do the prohibited physical act of committing a battery." *Id*. at 310.

In the decision most relevant to this matter, the Minnesota Supreme Court later clarified that the intent necessary for assault requires only

that a defendant "intentionally apply force to another person without his consent." *State v. Dorn*, 887 N.W.2d 826, 831 (Minn. 2016). With that definition, *Dorn* approved a conviction for first-degree assault (the most serious form of assault under Minnesota law) where the evidence showed that the defendant merely pushed the victim, which led him to trip and fall into a fire. *See id.* at 833. *Dorn* emphasized that, after *Fleck*, the common-law definition of battery, requiring only "the slightest offensive touching," defined Minnesota assault. *See id.* at 832 (citing *Gallagher v. State*, 3 Minn. 270, 271–73, 3 Gil. 185, 187–88 (1859), for the proposition that a strike hard enough to make a person lose his balance was properly considered a battery).

Simply stated, Minnesota's definition of assault does not require the necessary quantum of force under *Johnson* because it can be committed through simple battery, and so the Eighth Circuit erred in holding that Mr. Huntington's two convictions for third-degree assault could be proper predicates under the ACCA force clause.[1]

[1] This Court has explicitly left open the question of whether causing bodily injury is itself proof of violent force. *See Castleman*, 572 U.S. 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.") (distinguishing *Johnson*).

II. Eighth Circuit precedent incorrectly applies this Court's precedent in *Johnson*.

Eighth Circuit precedents holding that Minnesota assault constitutes an ACCA violent felony rely almost exclusively on the lesser degree of force required in *Castleman* and *Voisine*. *Borden* shows how *Lindsey* and *Wadena* rest on a faulty premise, namely that the *Castleman* and *Voisine* decisions addressing the force necessary to establish a misdemeanor crime of domestic violence should guide ACCA analysis, despite the different language and different purposes of the two statutes.

Among various circuit decisions abrogated by *Borden* was *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016), where the Eighth Circuit had approved reckless crimes as ACCA predicates largely in reliance on the definition of force in *Voisine*. *See Fogg*, 836 F.3d at 956 (interpreting the ACCA in light of *Voisine* because the force clause was "similarly worded" in both statutes); *see also* 836 F.3d at 957 n.2 (Bright, J., concurring in part and dissenting in part) (objecting to the majority opinion's reliance on *Voisine* in part because that decision "expressly

distinguishes itself from the statutory provision at issue") (citing *Voisine*, 136 S.Ct. at 2280 n.4).

This dispute between the definitions of force in *Johnson*, on the one hand, and *Voisine* and *Castleman* on the other, first came out in *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016), where the Eighth Circuit analyzed whether an Arkansas statute criminalizing intentionally or knowingly causing bodily injury to another should be deemed a crime of violence under §§ 2K2.1 and 4B1.2 of the sentencing guidelines. The majority compared the Arkansas statute to the Tennessee statute at issue in *Castleman* and found them to be a match, so it affirmed the use of his conviction as a crime of violence. *See id*. at 705–06.

The dissent pointed out that this was a misrepresentation of *Castleman*'s more limited holding. For its analysis of the "misdemeanor crime of domestic violence" statute, *Castleman* explicitly adopted the common-law definition of force, the same definition that had been explicitly ***rejected*** for ACCA analysis in *Johnson*. *See id*. at 706 (Kelly, J., dissenting). The majority quoted Justice Scalia's *Castleman* concurrence for the proposition bodily injury implied not just common-law force but the "strong violent force" required by *Johnson*. *See id*. at

706 (quoting *Castleman*, 134 S.Ct. at 1416–17 (Scalia, J., concurring)). But, as the dissent pointed out, the *Castleman* majority specifically said that the application to the ACCA was not at issue and not being decided. *See id*. at 707 (quoting *Castleman*, 134 S.Ct. at 1414).

The Eighth Circuit later took its erroneous decision in *Rice* to hold that Minnesota's second-degree assault statute was a force-clause predicate in reliance on *Castleman*. *See Lindsey*, 827 at 739–40. And because the core definition of assault under Minnesota law is the same for all degrees, the Eighth Circuit later applied the same analysis to third-degree assault, the predicate offense at issue in this case. *See Wadena*, 895 F.3d at 1076 ("Although *Lindsey* concerned second-degree assault and this case concerns third-degree assault, the definition of 'assault'—derived from Minn. Stat. § 609.02, subdiv. 10—is the exact same for each. As such, *Lindsey* controls.").

Additionally, as with the Arkansas assault statute discussed in *Rice*, a Minnesota assault can also be committed without any direct use of force against the person of another. *See* 813 F.3d at 707–08 (Kelly, J., dissenting); *but see United States v. Schaffer*, 818 F.3d 796, 798 (8th Cir. 2016) (rejecting this argument made against Minnesota's domestic-

assault statute in reliance on the *Rice* majority opinion). "A person could, for example, direct a firefighter acting in the line of duty to drive towards a bridge at night, knowing that it was out. Or he might cancel an incompetent individual's insulin prescription, knowing her to be severely diabetic. Or he could, on finding out that a 60–year–old was going skydiving, suggest that she use a parachute that he knew was defective." *Rice*, 813 F.3d at 708 (Kelly, J., dissenting). All of these would involve "the intentional infliction of or attempt to inflict bodily harm upon another," Minn. Stat. § 609.02, subd. 10(2), but none would involve the necessary degree of force required under *Johnson*. *See Rice*, 813 F.3d at 707–08 (Kelly, J., dissenting) (collecting decisions from five circuit courts and concurrences from two others that "have concluded that a person may cause physical or bodily injury without using violent force").

The Eighth Circuit relied on *Rice* and its progeny in upholding Mr. Huntington's ACCA sentence. Minnesota cases, however, make plain that even the most serious of assaults may be committed through a common-law battery, if that common-law battery starts a chain of events leading to unintended and unanticipated injury. *See Dorn*, 832

N.W.2d at 832–33 (upholding a first-degree assault conviction for a push that led the victim to trip and fall into a fire). The decisions of the Eighth Circuit ruling that Minnesota assault crimes are ACCA violent felonies are erroneous under this Court's decision in *Johnson*.

CONCLUSION

For the foregoing reasons, Mr. Huntington respectfully asks this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, vacate the judgment below, and remand for resentencing.

Dated: March 2, 2022

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