

No. _____

IN THE
Supreme Court of the United States

RANDALL JENNINGS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Armed Career Criminal Act, a defendant convicted of unlawful possession of a weapon in violation of 18 U.S.C. § 922(g) is subject to an increased sentence if he “has three previous convictions for a violent felony or a serious drug offense, or both.” 18 U.S.C. § 924(e)(1). The Act further defines “violent felony” as, in part, “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.” 18 U.S.C. § 924(e)(2)(B). This Court has made it clear that “the phrase ‘physical force’ means *violent* force – that is, force capable of causing physical pain or injury to another person.” *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original).

The questions presented are:

1. Whether a force element that can be satisfied with the force required to inflict only minor injuries or minimal pain is overly broad to be considered “violent physical force” necessary to apply the Armed Career Criminal Act.
2. Whether a statute that requires causation of injury, including any impairment of physical condition, necessarily requires use of violent physical force so as to have, as an element, the use of force required by the Armed Career Criminal Act to be considered a violent felony.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

RANDALL JENNINGS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

Petitioner Randall Jennings, respectfully prays that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Seventh Circuit, issued on June 16, 2017, affirming the petitioner's conviction and sentence.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 860 F.3d 450, and appears in Appendix A to this Petition. The written

opinion and order by the United States District Court for the Western District of Wisconsin was entered on June 23, 2016, and appears in Appendix B.

JURISDICTION

Petitioner seeks review of the final decision of the Court of Appeals entered on June 16, 2017. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in relevant part:

- (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
- (2) As used in this subsection –
[...]
(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
 - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; 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.

Minnesota's simple robbery statute, section 609.24 of the Minnesota Statutes, provides:

Whoever, having knowledge of not being entitled thereto, takes personal property from the person or in the presence of another and uses or threatens the imminent use of force against any person to overcome the person's resistance or powers of resistance to, or to compel acquiescence in, the taking or carrying away of the property is guilty of robbery and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.

Minnesota's domestic assault law, section 609.2242 of the Minnesota

Statutes, provides, in relevant part:

Subdivision 1. Misdemeanor. Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:

- (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or
- (2) intentionally inflicts or attempts to inflict bodily harm upon another.

...

Subd. 4. Felony. Whoever violates the provisions of this section or section 609.224, subdivision 1, within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency is guilty of a felony and may be sentenced to imprisonment for not more than five years or payment of a fine of not more than \$10,000, or both.

STATEMENT OF THE CASE

This case presents an opportunity for the Court to continue to clarify the scope of the Armed Career Criminal Act (ACCA or Act), 18 U.S.C. § 924(e), and to resolve two circuit splits concerning the Act's applicability to statutes which only require the use or threatened use of minimal force and to those which have, as an element, the causation of injury.

A. Legal Background

Federal law prohibits felons from possessing firearms and ammunition. 18 U.S.C. § 922(g)(1). The sentence for a violation of that prohibition is not more than 10 years' imprisonment. 18 U.S.C. § 924(a)(2). Should a person commit the offense after sustaining three convictions for “violent felonies” or “serious drug offenses,” however, he faces a term of imprisonment of at least 15 years up to life under the ACCA. 18 U.S.C. § 924(e)(1). A “violent felony” is defined to include any crime punishable by imprisonment exceeding one year 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*, this Court held that “physical force” in this context is not equivalent to the common law definition of force. 559 U.S. 133, 140 (2010). Indeed, the Court noted that “the word ‘violent’ in § 924(e)(2)(B) connotes a substantial degree of force” and, when “attached to the noun ‘felony,’ its connotation of strong physical force is even clearer.” *Id.* Thus, “the phrase ‘physical force’ means *violent* force – that is, force capable of causing physical pain or injury to another person.” *Id.* (emphasis in original).

This standard can be contrasted with the “use of ... physical force” clause in the definition of “misdemeanor crime of domestic violence” found in Section 922(g)(9), to prohibit those convicted of such crimes from possessing firearms. 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9); *see also United States v. Castleman*, 134 S.Ct. 1405, 1409 (2014). In *Castleman*, the Court clearly distinguished between the

violent force required by Section 924(e) and the less significant force required to constitute a misdemeanor crime of domestic violence, holding that, in the latter case, “the common-law meaning of ‘force’ fits perfectly.” 134 S.Ct. at 1410. In distinguishing between the two standards, the Court suggested that minor uses of force such as “a squeeze of the arm that causes a bruise” could be considered domestic violence even while not rising to the level of violent force under the ACCA. *Id.* at 1412 (citing *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)). The Court also reaffirmed the conclusion it reached in *Johnson* and in *Begay v. United States* that the ACCA should not apply to “crimes which, though dangerous, are not typically committed by those whom one normally labels ‘armed career criminals.’” *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)) (also citing *Curtis Johnson*, 559 U.S. 133).

In 2015, the Court held that the so-called “residual clause” of the ACCA’s definition of violent felony (including those offenses which “otherwise involve[] conduct that presents a serious potential risk of physical injury to another”) was unconstitutional. *Samuel Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015); 18 U.S.C. § 924(e)(2)(B)(ii). This decision has caused courts to re-examine many statutes which have, as an element, the causation of injury, and has resulted in a circuit split as to whether the causation of injury necessarily requires the use of force described in *Curtis Johnson*.

This case presents the Court with an opportunity to evaluate address these two issues that reach well beyond the particular state statutes at hand. Both issues

were fully raised and argued in the court of appeals, and this case provides the Court with a clean vehicle for clarifying the application of the ACCA. The petition should be granted.

B. Factual Background

1. The United States charged petitioner with one count under Section 922(g)(1) after he possessed a firearm as a felon in August 2015. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Petitioner pleaded guilty. The district court sentenced him to 15 years' imprisonment under the ACCA. That determination relied on the district court's view that the following convictions under Minnesota law were "violent felonies" under the Act: one conviction for simple robbery, two for domestic assault, and two for making terroristic threats. App. 21a-24a. Petitioner recognized that there was adverse Seventh Circuit precedent, but preserved his objections to classifying Minnesota's simple robbery statute and felony domestic assault statute as "violent felonies" under the Act. App. 21a-22a. Petitioner also argued that his convictions for making terroristic threats did not qualify. App. 23a.

2. In the court of appeals, petitioner again challenged the characterization of his prior offenses as violent felonies under the ACCA. Minnesota case law has established that the amount of force necessary to sustain a conviction for robbery is slight. *See, e.g., State v. Slaughter*, 691 N.W. 2d 70, 76 (Minn. 2005) (holding that "pushing or grabbing a person" during a theft is enough force to elevate the crime to robbery); *State v. Gaiovnik*, No. A09-190, 2010 WL 149156, at

*4 (Minn. Ct. App. April 13, 2010), *aff'd*, 794 N.W.2d (Minn. 2011) (holding that merely “grabbing or yanking [the victim’s] arm” satisfies the statute’s force element); *see also State v. Burrell*, 506 N.W.2d 34, 37 (Minn. Ct. App. 1993) (contrasting aggravated robbery, requiring infliction of bodily harm, with simple robbery, satisfied by “[m]ere force”); *State v. Nelson*, 297 N.W.2d 285, 286 (Minn. 1980) (holding that evidence that a defendant pulled on the victim’s coat was a sufficient use of force to sustain a conviction for robbery). Petitioner argued that a force element that can be satisfied by such minimal physical contact does not require proof that a defendant used or threatened *violent* force “capable of causing physical pain or injury to another person” and is, accordingly, overly-broad to qualify as an ACCA predicate offense. *See Curtis Johnson*, 559 U.S. at 140.

Petitioner further argued that the causation of injury element in the Minnesota domestic assault statute does not have, as an element, the use of force required to constitute a violent felony under the ACCA because, first, it requires no showing of the use of violent physical force (as injury can result from action, or inaction, other than violent force) and, second, even if some force is inherent in the causation of injury, the statute encompasses “any impairment of physical condition,” including minor pain or bruising, and is too broad to be an ACCA predicate offense. Other federal courts of appeals agree with petitioner that a statute which has, as an element, the causation of injury does not necessarily involve the use of violent physical force. *See Whyte v. Lynch*, 807 F.3d 463, 471 (1st Cir. 2015) (holding that the plain language of the statute at issue, which required

intentional causation of physical injury to another person, “does not require as an element the use, attempted use, or threatened use of violent force”); *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001) (recognizing “the logical fallacy inherent in reasoning that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true”); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2010) (holding that a statute which criminalizes a threat “to commit a crime which will result in death or great bodily injury to another person” did not contain, as an element, the threat of use of force); *United States v. Cracia-Cantu*, 302 F.3d 308, 312-13 (5th Cir. 2002) (employing a parallel analysis of the risk of use of force clause in 18 U.S.C. § 16(b)); *United States v. Perez-Vargas*, 414 F.3d 1282, 1285-87 (10th Cir. 2005) (focusing on the difference between an element requiring a certain means by which an injury occurs and one requiring a certain result of a defendant’s conduct when holding that Colorado’s third degree assault statute did not necessarily require the use of physical force).

Finally, petitioner argued that the Minnesota statute criminalizing the making of terroristic threats was not properly considered a violent felony because it criminalized reckless conduct and because it is indivisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and encompasses conduct that does not require the use or threatened use of physical force. The government agreed with petitioner.

3. The court of appeals affirmed, holding that his convictions for simple robbery and felony domestic violence were ACCA predicate offenses. App. 2a. The

district court declined to address the Minnesota terroristic threats statute. App.4a. With respect to the simple robbery conviction, the court of appeals concluded that even “relatively minor manifestations of force” resulting in minor pain or injury qualifies as “violent force” under the Act. App. 12a. As to the domestic assault statute, the court of appeals concluded that, because *something* must have exerted physical force on the victim in order for an injury to occur, the Act’s requirement that the statute have, as an element, the use of physical force was met. App. 16a. The court pointed to petitioner’s inability to cite to a case where failure to act caused the harm as the “dispositive point” against his argument that the statute does not require the use of force. App. 18a.

As this decision was consistent with the rest of the circuit’s case law, petitioner did not file a petition for rehearing or rehearing en banc.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are divided over two related questions regarding the implementation of the Armed Career Criminal Act: 1) the amount of force required to constitute “violent physical force,” and 2) whether a statutory element which requires the causation of injury necessarily also requires the use of such force. After the Court struck the Act’s residual clause in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), these questions have taken on greater importance, as requiring the use of force has become the determining factor for any non-enumerated offense when determining whether it qualifies as an ACCA predicate offense.

I. Federal courts are divided over the questions presented.

The Seventh Circuit’s decision in this case highlights two ways in which the Armed Career Criminal Act is applied inconsistently among the federal courts of appeals. These conflicts erode the core purpose of the categorical approach of *Taylor v. United States* – to ensure that the same local criminal activity is subject to the same federal penalties. 495 U.S. 575, 591 (1990). A robbery which requires minimal force such as jostling or pushing, or any felony which has, as an element, the *causation of injury*, is considered a “violent felony” when committed by a defendant in the Seventh Circuit, but not when committed by a defendant in the First or Fourth Circuit, for example. These conflicts warrant the Court’s attention.

1. The Supreme Court of Minnesota, in discussing the offenses of theft from the person and simple robbery, noted that the distinguishing element is the use of force: while a purse snatching or pickpocket offense would usually be theft from the person, in the case where “a woman hangs on to her purse and the defendant uses force to overcome her resistance or [where] a defendant pushes a victim against a wall and takes his wallet,” the theft is properly considered a robbery. *State v. Nash*, 339 N.W.2d 554, 557 (Minn. 1983). Minnesota courts have upheld simple robbery convictions where a defendant “grabbed and pushed” a victim in taking his wallet, *State v. Oksanen*, 249 N.W.2d 464, 466 (Minn. 1977), jostled a boy and grabbed his coat, *State v. Nelson*, 297 N.W.2d 285, 286 (Minn. 1980) (noting that there was ample evidence that such use of force caused the victim to acquiesce to the theft), and grabbed a victim’s arm and extended it to take her

purse, *State v. Gaiouvik*, 2010 WL 1439156, at *4 (Minn. Ct. App. April 13, 2010) (non-precedential decision), *j. aff'd*, 794 N.W.2d 643 (Minn. 2011). The Seventh Circuit concluded that such minor displays of force were sufficient to constitute violent physical force under the Act, even though they “might result in minor injuries ... or none at all.” App. 11a-13a. In rejecting petitioner’s arguments related to the Minnesota domestic assault statute, the court effectively held that force sufficient to inflict “any impairment of physical condition” was sufficient to meet *Curtis Johnson*’s violent physical force requirement. App. 20a; *see also State v. Davis*, 2017 WL 474416 at *6 (Minn. App. 2017) (non-precedential decision) (upholding a conviction under Minn. Stat. § 609.2242 when there was evidence that the defendant bit the victim); *State v. Ngacah*, 2009 WL 2431994 at *4 (non-precedential decision) (Minn. App. 2009) (upholding a domestic assault conviction on evidence that the victim was slapped by the defendant); *State v. Beckman*, 2001 WL 69932 at *1-2 (Minn. App. 2001) (non-precedential decision) (recognizing that evidence of grabbing, pushing, and biting without leaving a mark was sufficient to constitute “bodily harm”).

When confronted with similar statutes, other federal courts of appeals have reached the opposite conclusion. The First Circuit concluded that a Maine robbery conviction is not an ACCA predicate because “*any* physical force,” including “snatching a purse from the hand of a victim” is sufficient to meet the statute’s elements. *United States v. Mulkern*, 854 F.3d 84, 93-94 (1st Cir. 2017). The Fourth Circuit held that Virginia robbery is not a violent felony, as only a “slight” degree of

force, such as “approach[ing] the victim from behind, ‘tapp[ing] her on the shoulder, and “jerk[ing]” her around by pulling her shoulder,” before taking her purse is “a sufficient degree of force to support [a Virginia] robbery charge.” *United States v. Winston*, 850 F.3d 677, 685 (4th Cir. 2017) (quoting *Jones v. Commonwealth*, 496 S.E.2d 668, 669-70 (Va. Ct. App. 1998)). It also found that a conviction under the North Carolina robbery statute is not a violent felony because North Carolina courts had upheld convictions for robbery where a defendant “push[ed] the victim’s hand off of a carton of cigarettes” and where another defendant “pushed the shoulder of an electronics store clerk, causing her to fall onto shelves while the defendant took possession of a television.” *United States v. Gardner*, 823 F.3d 793, 803-04 (4th Cir. 2016). The Sixth Circuit similarly concluded that Ohio robbery contemplates less than violent force, noting that, in purse snatching cases, Ohio courts will sustain a conviction for robbery when the evidence “shows that the accused physically exerted enough force upon the victim’s arm so as to remove the purse from her involuntarily,” as “the act of forcibly removing a purse from an individual’s shoulder is sufficient.” *United States v. Yates*, 866 F.3d 723, 729-30 (6th Cir. 2017) (first quoting *In re Boggess*, 2005 WL 3344502, at *3 (Ohio Ct. App. 2005); then quoting *State v. Juhasz*, 2015 WL 5515826, at *2 (Ohio Ct. App. 2015)).

The Eighth, Ninth, and Tenth Circuits have all found that other robbery statutes did not meet the violent force requirement because the statute may be violated with minimal actual force. *United States v. Bell*, 840 F.3d 963, 966-67 (8th Cir. 2016) (Missouri second-degree robbery did not qualify under the force clause of

the Sentencing Guidelines where a defendant can be convicted of the offense “when he has physical contact with a victim but does not necessarily cause physical pain or injury”); *United States v. Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (holding that Massachusetts robbery is overly broad to be considered a violent felony, as it encompassed snatching a purse from a victim’s hand); *United States v. Nichols*, 686 Fed. Appx. 570, 575-76 (10th Cir. 2016) (nonprecedential decision) (concluding that the Kansas robbery statute does not require violent force, as a conviction can arise from “mere purse-snatching”).

The Seventh Circuit’s opinion, by contrast, appears to conclude that anything “beyond simple touching” may be enough to inflict bodily harm upon a victim and, therefore, can be considered “violent force” under the Act. App. 12a. This conclusion led the appellate court to find that a statute whose force element can be met by jostling, or grabbing and extending an arm, was a violent felony under the force clause of the Act and that any impairment of physical condition necessarily implicates the use of violent force. App. 13a, 20a. This decision stands in stark contrast to the decisions cited above and creates tension and inconsistency in the application of the ACCA to statutes which only require a showing of minimal force to satisfy its elements.

2. The Act’s “force” clause requires that a statute proscribe the active employment (by the defendant) of violent physical force against another person. For that reason, several federal courts of appeals have recognized the important distinction between an offense that has as an element an injury and one that has as

an element the use of force to cause that injury, concluding that the former is broader than the latter. Indeed, the Second Circuit called it a “logical fallacy” to conclude “that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must be true,” *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001), and found that even a statute requiring the *intentional* causation of injury “does not necessarily involve the use of force,” particularly when a conviction under the relevant statute could arise out of injury caused “by guile, deception, or even deliberate omission,” *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003) (interpreting the identical “crime of violence” language found in 18 U.S.C. § 16(a)). The court elaborated 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” or someone who causes physical impairment by placing a tranquilizer in the victim's drink. *Id.* at 195–96.

The Tenth Circuit has similarly noted the difference between an element that requires a certain *means* by which an injury occurs (*i.e.*, the use of physical force), and one which requires a certain *result* of a defendant’s conduct (*i.e.*, bodily injury). *United States v. Perez-Vargas*, 414 F.3d 1282, 1285 (10th Cir. 2005). *Perez-Vargas* concluded that Colorado’s third degree assault statute, criminalizing “knowingly or recklessly caus[ing] bodily injury to another person or with criminal negligence ... caus[ing] bodily injury to another person by means of a deadly weapon,” did “not necessarily include the use or threatened use of ‘physical force’ as required by the

Guidelines.” *Id.* at 1285, 1287. The First, Fourth, and Fifth Circuits have also recognized this distinction. See *Whyte v. Lynch*, 807 F.3d 463, 471 (1st Cir. 2015) (holding that the plain language of the statute at issue, which required intentional causation of physical injury to another person, “does not require as an element the use, attempted use, or threatened use of violent force”); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2010) (holding that a statute which criminalizes a threat “to commit a crime which will result in death or great bodily injury to another person” did not contain, as an element, the threat of use of force); *United States v. Cracia-Cantu*, 302 F.3d 308, 312-13 (5th Cir. 2002) (employing a parallel analysis of the risk of use of force clause in 18 U.S.C. § 16(b)).

The Seventh Circuit has repeatedly rejected the line of reasoning of its sister circuits. See App. 16a. The court focused on the force inherent in the harmful agent, rather than the force actually required to be employed by a defendant, concluding that poisoning another or tricking a victim into consuming a harmful agent employs an agent which inflicts a harmful force on the victim and, therefore, constitutes *violent* physical force. App. 16a-17a. The court extended this reasoning to inaction by a defendant – such as withholding food from a child – broadening the definition of “force” to “the exertion of ... control with the aim of physically harming the victim” and concluding that “[i]f the natural and intended result of that force is physical pain, injury, or illness, then arguably the force employed is ‘violent’ force in the sense that *Curtis Johnson* requires.” App. 18a. As such, the Seventh Circuit has repeatedly held that a statute which has as an element the intentional or knowing

causation of some injury *necessarily* has as an element the use of violent force. The Eighth Circuit has reached the same conclusion. *See United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016).

II. The questions presented are important.

As the Seventh Circuit’s decision below illustrates, courts of appeals lack clear guidance on what degree of force is necessary to constitute *violent* physical force, and whether causation of any injury or physical impairment necessarily involves use of such force. In light of *Samuel Johnson*, 135 S. Ct. at 2563, courts may no longer avoid these questions through resort to ACCA’s residual clause. The Court should provide this guidance by more clearly delineating the force required under the Act and reject courts’ attempts to re-impose a modified “ordinary case” standard.

1. In *Curtis Johnson*, the Court distinguished the force necessary to qualify as an ACCA predicate (“*violent* force,” “a substantial degree of force”) from the common law battery definition of force (including offensive touching). 559 U.S. at 140. In *United States v. Castleman*, the Court compared this standard to the force required for classification as a misdemeanor crime of domestic violence, which tracks the common law battery usage. 134 S. Ct. 1405, 1410 (2014). Reasoning that, “whereas the word ‘violent’ or ‘violence’ standing alone ‘connotes a substantial degree of force,’” “‘domestic violence’ is a term of art encompassing acts that one might not characterize as ‘violent’ in a nondomestic context.” *Id.* at 1411 (quoting *Curtis Johnson*, 559 U.S. at 140). *Castleman* went on to provide examples of

“[m]inor uses of force [which] may not constitute ‘violence’ in the generic sense,” such as “pushing, grabbing, shoving, slapping, ... hitting,” and “a squeeze of the arm [that] causes a bruise.” *Id.* at 1412 (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)). By way of comparison, *Castleman* suggests that such minor uses of force suffice for domestic violence but are insufficient in the ACCA framework. The Court further left unanswered the question of “[w]hether or not the causation of bodily injury necessarily entails violent force.” *Id.* at 1413. Without further clarification, the Act’s significant penalties risk being applied to defendants whom one normally would not label “armed career criminals,” something this Court has tried to avoid. *Id.* at 1412.

2. Clarification of the amount of force necessary to constitute violent force is critical because of the nature of the categorical approach. The primary impetus for applying the categorical approach to the ACCA was to ensure that similar conduct is treated similarly regardless of the particular state offense charged. As outlined above, the circuit splits on these issues mean that someone who is imprudent enough to snatch a well-guarded purse in Minnesota is subject to a mandatory minimum sentence of 15 years’ imprisonment, but one who does so in Ohio may be punished by a term of up to only 10 years. *See* 18 U.S.C. § 924(a)(2), (e)(1). Similarly, one who intentionally causes injury to another in Minnesota would be subjected to the heightened imprisonment, whereas the same conduct, if it happened in Connecticut, would not subject a defendant to the increased penalty.

See, e.g., Chrzanoski, 327 F.3d at 195. This inconsistency undermines the purpose of the categorical approach.

3. The Court should also grant the petition because of the dramatic sentencing consequences it entails. Under federal law, a felon in possession of a firearm faces up to 10 years in prison. 18 U.S.C. § 924(a)(2). But if the felon has three prior convictions for a violent felony, he may be sentenced to no less than 15 years in prison up to a life term. The Court's decision in this case will mean the difference of at least five years in prison for every federal defendant facing an ACCA enhancement for a crime which requires minimal force or simply causation of some level of "injury."

4. Finally, the second question presented has taken on particular importance following *Samuel Johnson*, where the Court invalidated the ACCA's residual clause. 135 S. Ct. at 2563. That decision made courts look more closely at the meaning of the force clause. In the past, a court might have simply relied on the residual clause to declare any statute that had, as an element, the causation of some injury a "violent felony." Now, a sentencing court must conduct a thorough analysis of the elements of the predicate offense to determine whether the statute truly requires the use of violent force.

The Seventh Circuit's approach to this question in this case is problematic in that it relies on a defendant's inability to cite to case law wherein withholding of food or other passive, non-violent, causation of injury was prosecuted under Minnesota's domestic assault statute. App. 20a. This ultimately parallels the

“ordinary case” analysis rejected as unconstitutionally vague in *Samuel Johnson*. 135 S. Ct. at 2557–58. The residual clause left grave uncertainty about how to estimate the risk posed by a crime because it tied “the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real-world facts or *statutory elements*.” *Id.* at 2557 (emphasis added). *Samuel Johnson* repeatedly emphasized that the categorical approach should not involve a judge’s imagination about how a crime is typically committed. *Id.* at 2557–59.

The categorical approach looks to the statute to see if the most innocent conduct that would fall under that statute involves the use of force. *United States v. Montes-Flores*, 736 F.3d 357, 369 (4th Cir. 2013); see *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The key is elements, not facts. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). In *Gonzales v. Duenas-Alvarez*, this Court considered an argument that the state statute was broader than the generic crime of theft. 549 U.S. 183, 190–93 (2007). Though the statutory language itself tracked the generic elements of theft, Duenas-Alvarez argued that judicial decisions effectively broadened the generic statutory language to create a nongeneric crime of theft. *Id.* at 187, 191–93. The Court rejected the argument on the merits, since the cases did not actually support that argument. *Id.* at 193. It added that a statute defining a generic crime could not be rendered nongeneric by “the application of legal imagination” divorced from actual decisions of the state court. *Id.* at 193.

Here, however, the shoe is on the other foot. Under the plain language of the Minnesota domestic assault statute, causation of injury is all that is required, not

use of force. So it is the government's burden to show that Minnesota categorically interprets the statutory language to require the use or threatened use of violent physical force, as a matter of law in all cases. Placing the onus on a defendant to show that the statutory language does not, in all cases, require a use of force despite no requirement of the use of force apparent on the face of the statute is strongly reminiscent of the uncertainty of the "ordinary case" analysis rejected in *Samuel Johnson*.

III. This case presents an ideal vehicle for resolving the conflict.

This case is in an ideal posture for the Court to resolve the questions presented. Petitioner preserved objections to the classification of his robbery and domestic assault convictions as violent felonies in the district court because they did not categorically require the use or threatened use of violent physical force. He argued the precise issues raised here in the court of appeals, which squarely addressed them. Further, this case arises on direct appeal, avoiding many of the concerns that attend review of habeas claims about the ACCA following *Samuel Johnson*.

Finally, the answers to the questions presented determine the outcome of petitioner's case. Should the Court agree that either simple robbery or domestic assault in Minnesota are *not* violent felonies, petitioner is entitled to be resentenced without the ACCA enhancement, because petitioner would no longer have three convictions for a violent felony. In other words, petitioner's 15-year sentence would

be vacated because it exceeds the statutory maximum term by 5 years. *See* 18 U.S.C. § 924(a)(2), (e)(1).

CONCLUSION

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

Respectfully submitted,

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