No.

IN THE
Supreme Court of the United States

MARTIN JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "elements clause" of the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)(i)) is void for vagueness.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are set forth in the caption.

Petitioner has no disclosures pursuant to this Court's Rule 29.6.

RULE 14.1(b)(iii) STATEMENT

Pursuant to this Court's Rule 14.1(b)(iii), the following cases are related to this petition for a writ of certiorari:

- *United States* v. *Johnson*, No. GLR-1-16-CR-00552-001 (D. Md.) (judgment entered April 18, 2018, amended judgment entered May 11, 2018).
- *United States* v. *Johnson*, Nos. 18-4459, 18-4457 (4th Cir.) (judgment entered December 18, 2019, petition for rehearing denied January 14, 2020).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Martin Johnson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–17a) is reported at 945 F.3d 174. The district court's oral ruling at sentencing (Pet. App. 18a–21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2019. Pet. App. 1a–17a. A timely petition for panel rehearing and rehearing en banc was denied on January 14, 2020. Pet. App. 22a–23a. This Court's order of March 19, 2020 extended the time for filing a petition for a writ of certiorari to 150 days. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution and the Armed Career Criminal Act are reproduced in the appendix. Pet. App. 51a–53a.

STATEMENT

"In our constitutional order, a vague law is no law at all." *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). The so-called "elements clause"—sometimes called the "force clause"—of the Armed Career Criminal Act ("ACCA") violates this fundamental constitutional protection.

The ACCA imposes a fifteen-year mandatory minimum sentence on any defendant convicted of being a felon in possession of a firearm if the defendant has three prior "violent felon[ies]" or "serious drug offense[s]." 18 U.S.C. § 924(e)(1). The statute defines "violent felony" to include, among other things, "any crime 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." *Id.* § 924(e)(2)(B)(i). This "elements clause" was the sole basis for the Fourth Circuit's determination that petitioner must be sentenced to a mandatory minimum of fifteen years due to a Maryland robbery offense he pled guilty to in 1995.

Four Justices of this Court have already recognized that the Court's current interpretation of the elements clause closely resembles the now-defunct "residual clause" of the ACCA, struck down by this Court as unconstitutionally vague. *See Stokeling* v. *United States*, 139 S. Ct. 544, 564 n.4 (2019) (Sotomayor, J., dissenting). Like the residual clause, *see Samuel Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015), the elements clause offers defendants no notice as to which state-law offenses will qualify as violent felonies, and gives lower courts no way of fairly and uniformly interpreting the clause. This shapeless criminal provision has clogged the dockets of the federal

courts and produced numerous circuit splits. Review is warranted to address the important question of whether the ACCA's elements clause is unconstitutionally vague.

1. Section 922(g) of the U.S. criminal code makes it a felony for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to, among other things, possess in interstate commerce any firearm or ammunition, or to receive any firearm or ammunition that has been transported in interstate commerce. 18 U.S.C. § 922(g)(1). The default *maximum* term of imprisonment for a violation of Section 922(g) is ten years. *Id.* § 924(a)(2).

The ACCA, however, enhances that penalty to a *minimum* term of imprisonment of *fifteen* years when the defendant has three previous convictions "for a violent felony or a serious drug offense." 18 U.S.C. § 924(e). "Violent felony" and "serious drug offense" are defined terms under the statute. Relevant here is the definition of "violent felony":

> (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; 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[.]

Id. § 924(e)(2)(B). The definition of "violent felony" therefore consists of three clauses: The first subsection (i) is called the "elements clause," or sometimes

the "force clause"; the first part of the second subsection ("is burglary, arson, or extortion . . .") is the "enumerated clause"; and the second part of the second subsection ("or otherwise involves conduct") is the "residual clause."

Under all three clauses, the Court employs a "categorical approach," *Descamps* v. *United States*, 570 U.S. 254, 257 (2013), meaning that a sentencing court confronted with a question of whether a prior conviction qualifies as a violent felony should look not to the specific facts of the underlying conviction, but to the least culpable conduct criminalized by the statute, *see Moncrieffe* v. *Holder*, 569 U.S. 184, 191–92 (2013) (courts should "presume that the conviction rested upon nothing more than the least of the acts criminalized" (alterations and quotation marks omitted)). Only if there is a categorical match between the underlying offense and one of the ACCA's three clauses will a prior offense be deemed a violent felony. And in order to demonstrate that a prior conviction does not qualify as a violent felony, the defendant must establish a "realistic probability, not a theoretical possibility, that the State would apply its statute" to conduct falling outside the definition of a "violent felony." *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

For years, this Court struggled with how to interpret and apply the ACCA's residual clause. *See, e.g.*, *Sykes* v. *United States*, 564 U.S. 1 (2011); *Chambers* v. *United States*, 555 U.S. 122 (2009); *James* v. *United States*, 550 U.S. 192 (2007). That struggle came to a head in *Samuel Johnson*, when the Court struck down the residual clause as void for vagueness. 135 S. Ct. at 2563. The Court identified "[t]wo features of the residual clause [that] conspire to make it unconstitutionally vague." *Id.* at 2557. First, "the residual

clause leaves grave uncertainty about how to estimate the risk posed by a crime," because "[i]t ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," thus requiring "the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557–58. Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. The Court pointed also to the "failure of persistent efforts to establish a standard," observing that its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Ibid.* (alteration and quotation marks omitted). Because the Court's efforts to give meaning to "so shapeless a provision" had proven to be a "failed enterprise," the Court struck down the residual clause as unconstitutionally vague. *Id.* at 2560.

The elements clause similarly has been challenging to pin down. This Court confronted the meaning of the elements clause in *Curtis Johnson* v. *United States*, 559 U.S. 133 (2010), where it held that a prior conviction under Florida law for common-law battery did not qualify as a violent felony under the elements clause. *See id.* at 139. The Court observed that while "physical force" had a meaning at common law that would include the nominal amount of "offensive" force required for common-law battery, the elements clause is aimed at defining a "statutory category of 'violent felonies.'" *Id.* at 140 (alteration omitted). Thus, "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Ibid.* And for that reason, common-law assault or battery did not have as an element

the "use or attempted use of physical force against the person of another."

The Court revisited the elements clause in *Stokeling*. There, the Court held that a prior conviction for Florida robbery qualified as a violent felony, notwithstanding that Florida robbery requires only "resistance by the victim that is overcome by the physical force of the offender." 139 S. Ct. at 549 (quotation marks omitted). The Court examined the statutory history of the ACCA—which originally included "robbery" as an enumerated violent felony—and considered the elements of robbery at common law. *Id.* at 550. Because Congress had (at one time) considered robbery to qualify as a violent felony, and because common-law robbery, like Florida robbery, required only enough force to overcome the "slight" resistance of the victim, Florida robbery therefore qualified as a violent felony. *See id.* at 551–52. The Court opined that its decision was consistent with *Curtis Johnson* because "the force necessary to overcome a victim's physical resistance is inherently 'violent' in the sense contemplated by [*Curtis*] *Johnson*." *Id.* at 553.

Four Justices of this Court dissented. Emphasizing the explanation in *Curtis Johnson* that "physical force" in the elements clause requires "a degree of force that is '*violent*,' 'substantial,' and 'strong,'" the dissent was critical of the majority's fixation on the phrase "capable of causing physical pain or injury," which, depending on the context, could require nothing more than a light touch. *Stokeling*, 139 S. Ct. at 557 (Sotomayor, J., dissenting). Turning to the majority's examination of the common-law meaning of robbery, the dissent pointed out that in *Curtis Johnson*, the Court had *rejected* the notion that the ACCA incorporated the common-law meaning of "physical

force" in enacting the elements clause. *Id.* at 560. The majority thus created "two different meanings" for "physical force," "depending on the crime to which it is being applied." *Ibid.* ("That is a radical and unsupportable step."). The dissent additionally noted that "[t]he majority's doubling down on [*Curtis*] *Johnson*'s 'capable of causing physical pain or injury' language suggests nostalgia for the residual clause," and that the majority's interpretation "risks sowing confusion in the lower courts for years to come." *Id.* at 564 n.4 (citation omitted).

2. On December 12, 2017, petitioner was convicted in the United States District Court for the District of Maryland for possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g). Following the verdict, the probation office prepared the presentencing report ("PSR"). The PSR concluded that petitioner is an armed career criminal under the ACCA based on three prior state criminal convictions: (1) a 1997 conviction for possession with intent to distribute cocaine, (2) a 1998 conviction for unlawful manufacture of cocaine, and (3) a 2011 conviction for possession with intent to distribute marijuana. Upon objection from petitioner, the government conceded that the 2011 marijuana conviction did not qualify as a "serious drug offense" under the ACCA, but contended that a 1995 conviction for robbery under Maryland law qualified as a "violent felony."

The principal dispute on this issue was whether Maryland robbery has, as an element, "the use, attempted use, or threatened use of physical force against the person of another" under the elements clause. 18 U.S.C. § 924(e)(2)(B). Under Fourth Circuit law at the time, a conviction under a State's robbery statute did not constitute a violent felony if it

could be committed with "*de minimis* contact." *United States* v. *Gardner*, 823 F.3d 793, 803 (4th Cir. 2016); *see also United States* v. *Winston*, 850 F.3d 677, 685 (4th Cir. 2017) (Virginia robbery not a violent felony because it "encompass[es] a range of de minimis contact by a defendant"). Maryland courts have held that "the degree of force necessary to constitute robbery is immaterial, so long as it is sufficient to compel the victim to part with his property." *Facon* v. *State*, 796 A.2d 101, 119 (Md. Ct. Spec. App. 2002) (quotation marks omitted), *rev'd on other grounds*, 825 A.2d 1096 (Md. 2003).

At sentencing, counsel for petitioner cited the above authorities and urged the district court to hold that petitioner's 1995 Maryland robbery did not constitute a violent felony under the ACCA, and that petitioner therefore did not have three predicate violent felonies or serious drug offenses to qualify as an armed career criminal.[1] After an oral presentation by petitioner's counsel, the government advised the court it would be "relying on [its] papers." Pet. App. 20a. When pressed for a more substantive response, the government stated only that "[i]t's the Government's position that Maryland robbery is a crime of violence under the Armed Career Criminal Act." *Ibid.* The district court agreed with petitioner that Maryland robbery is not a violent felony and sentenced petitioner to 51 months' incarceration. Pet. App. 20a–21a, 40a.

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[1] Petitioner argued also that Maryland robbery could not qualify as a violent felony because it could be committed through violence or a threat of violence to property.

3. The government appealed. After the government filed its opening brief, this Court issued its decision in *Stokeling*. Faced with intervening Supreme Court precedent, counsel for petitioner was forced to modify its argument under the ACCA. Petitioner relied on *Snowden* v. *State*, a case in which the Maryland Court of Appeals had indicated that Maryland robbery could be committed by a mere assault or battery, 583 A.2d 1056, 1059 (Md. 1991), neither of which involve the level of force needed to commit a violent felony under *Curtis Johnson*, 559 U.S. at 139.

Petitioner argued also that the elements clause, as construed by the Court in *Stokeling*, is unconstitutionally vague. Citing to *Samuel Johnson*, petitioner explained that the elements clause suffers from the same defects as the residual clause in that *Stokeling*'s standard for violent felonies—which requires whether a crime involves force "capable of causing physical pain or injury"—provides no meaningful notice to criminal defendants as to whether a prior conviction will be treated as sufficiently "forceful" under the elements clause. C.A. Opp'n Br. 33–36.

The Fourth Circuit held that Maryland robbery is a violent felony under the ACCA because it requires either "force that overcomes a victim's resistance" or force sufficient to "cause injury to the person of the owner" of the property. Pet. App. 11a–12a (quotation marks omitted). The panel did not address petitioner's argument that the elements clause is unconstitutionally vague.

Petitioner filed a timely petition for panel rehearing and rehearing en banc, again emphasizing the constitutional infirmity of the elements clause. The Court denied that petition. Pet. App. 23a.

REASONS FOR GRANTING THE PETITION

This petition presents the important question of whether the elements clause of the ACCA is unconstitutionally vague. Both due process and separation of powers demand that laws, especially criminal laws, be defined with enough clarity and specificity such that individuals of "common intelligence" can understand their prohibitions and ramifications, and that law enforcement officers and courts are given meaningful guidance as to their scope. The elements clause flunks both of these tests. Under the current regime, the nature of the inquiry depends on the type of predicate offense being analyzed, and requires courts to navigate a labyrinth of hypotheticals—predicting how state courts would decide imagined cases bearing no relationship to the actual case on review. This approach rarely produces a predictable outcome, and individuals therefore have no reasonable understanding as to which of the hundreds of state offenses—as interpreted by often-conflicting state court precedents—qualify as a violent felony. The all-too-common result, as was the case here, is that reasonable expectations about a prior offense's treatment under the ACCA will be proven wrong after intervening and sometimes conflicting judicial decisions.

The time to resolve this important issue is now. For years, courts have struggled with how to apply the elements clause consistently and fairly, leading to a range of circuit splits and numerous opinions decrying the arbitrary results the clause produces. Even the Department of Justice has expressed its dismay with the variance in justice meted out by the ACCA. Meanwhile, numerous defendants, including petitioner, have been sentenced pursuant to this unconstitutional provision of the ACCA. The elements clause

should not be deployed to deprive defendants like petitioner of their due process rights any longer.

I. THE ELEMENTS CLAUSE IS VOID FOR VAGUENESS

The elements clause is unconstitutionally vague pursuant to this Court's decision in *Samuel Johnson* and a host of other cases nullifying statutes that fail to provide adequate notice or guidance of their meaning.

A. Due Process Precludes Enforcement Of Criminal Statutes That Fail To Provide Fair Notice Or Meaningful Guidance Of The Proscribed Conduct

1. Vague laws have always been understood to be incompatible with the rule of law. *See* John Finnis, *Natural Law and Natural Rights* 270 (1980) ("A legal system exemplifies the Rule of Law to the extent . . . that . . . its rules are . . . clear . . . ."). When despots have sought to obscure the law so as to broaden their own power, *see, e.g.*, *Screws* v. *United States*, 325 U.S. 91, 96 (1945) (describing how Caligula "published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it" (quotation marks omitted)), it was understood that such laws were "no law[s] at all," *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). This understanding was shared at English common law, which held that the law can serve as an effective guide for "civil conduct" only if "the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down." 1 W. Blackstone, *Commentaries on the Laws of England* 53–54 (1765).

The Due Process Clause retains that tradition. *See* Nathan S. Chapman & Michael W. McConnell,

Due Process as Separation of Powers, 121 Yale L.J. 1672, 1681 (2012) ("[The Due Process Clause] originate[s] in Magna Carta and the English customary Constitution."). Thus, it has always been "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). James Madison agreed, explaining that "on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law." James Madison, *The Report of 1800*, *available at* Founders Online, National Archives, https://bit.ly/3cQKCiV.

The prohibition against vague laws also has roots in the constitutional separation of powers, because vague laws threaten to "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges." *Davis*, 139 S. Ct. at 2323. Vague laws therefore essentially delegate the legislative power to the Executive and Judicial Branches. The Framers were acutely attuned to this danger, warning that if vague statutes are enforced, then "the whole power of legislation might be transferred by the legislature from itself." Madison, *The Report of 1800*, *supra*.

2. This Court's vagueness doctrine is firmly grounded in this history. It "rests on the twin constitutional pillars of due process and separation of powers," *Davis*, 139 S. Ct. at 2325, and it consists of two principles: First, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process law." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see also*

Kolender v. *Lawson*, 461 U.S. 352, 357 (1983) ("[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited[.]"). In other words, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Second, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108; *see also Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) (noting that a "principal element" of vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement").

An assessment of vagueness depends in all circumstances on the practical realities of the statute in question. This means the Court should generally take into account, among other things, the nature of the law (criminal vs. civil), *see Winters* v. *New York*, 333 U.S. 507, 515 (1948), and the likely target of the law, *see Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). Persistent challenges in defining standards and consistently applying the law are telltale signs that a law may be unconstitutionally vague. *See Samuel Johnson* v. *United States*, 135 S. Ct. 2551, 2559–60 (2015) (striking down the residual clause where it had "'created numerous splits among the lower federal courts,' where it has proved 'nearly impossible to apply consistently'").

This Court applied these background principles in *Samuel Johnson*, when it struck down as unconstitutionally vague the residual clause of the ACCA. 135 S. Ct. at 2557. Examination of the residual clause revealed two major defects: First, it required a court to

imagine the "ordinary case" of an offense and determine whether such an "ordinary case" presents a serious risk of physical injury; and second, it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557–58.

The Court noted also the confounding line of cases attempting to interpret the residual clause's vague mandate. In each of its four prior decisions examining the clause, the Court had resorted to a different mode of analysis in order to determine whether the "ordinary case" of a crime was sufficiently violent to trigger the ACCA. *Samuel Johnson*, 135 S. Ct. at 2558–59. Those disparate approaches had proven vexing to lower courts, resulting in persistent splits about how to approach various state-law offenses potentially implicated by the residual clause. *Id.* at 2560. The result of that precedent was a "failed enterprise" to give meaning to a "shapeless" criminal provision. *Ibid.* Accordingly, rather than uphold the law simply because some crimes "obviously" implicate the clause, the Court struck down the residual clause as unconstitutionally vague. *Id.* at 2561–62.

B. The Elements Clause Does Not Provide Fair Notice Or Meaningful Guidance

The elements clause of the ACCA fails every part of this Court's test for unconstitutional vagueness. The lack of guidance in the statute invites arbitrary enforcement, forcing judges to simply make their best guess as to whether a hypothetical state court would deem some hypothetical nonviolent conduct sufficient to satisfy the elements of the past crime for which the defendant was convicted. Consequently, the elements clause provides no fair notice to defendants as to what past convictions may count against them under the

ACCA. In fact, whether a conviction counts as a violent felony can sometimes turn on in which jurisdiction the defendant is prosecuted, or when the case was filed.

1. "[T]he failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." *Samuel Johnson*, 135 S. Ct. at 2558 (alteration in original) (quoting *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)). This Court's repeated efforts to give meaning to the elements clause demonstrate the myriad problems with the provision. This Court's decision in *Stokeling* is its latest attempt to provide clarity to a shapeless law, but the decision only exemplifies—and amplifies—the vagueness of the elements clause.

In examining whether Florida robbery qualifies as a violent felony, this Court in *Stokeling* did not start with its prior decision in *Curtis Johnson*. Nor did it start with an assessment of the text of the statute. Rather, it started with the historical, common-law meaning of robbery, unearthing decisions and treatises going back over 200 years. *See Stokeling*, 139 S. Ct. at 550–51. The Court then examined the history of the ACCA, observing that "robbery" had originally been included as an enumerated crime under the ACCA requiring the use of "force or violence," and opining that because Congress intended its amendment removing "robbery" as an enumerated offense to "expand the number of qualifying offenses," common-law robbery should be understood as involving the use or attempted use of physical force. *Id.* at 551. To be sure, the Court urged that its interpretation "comport[ed]" with *Curtis Johnson*, *id.* at 552, but it certainly did not flow naturally from it. Rather, the

core of the Court's decision was the common-law history of robbery, analyzed through the lens of the statutory history of the ACCA.

The effect of this approach, as the dissent recognized, is that "physical force" now "bear[s] two different meanings . . . depending on the crime to which it is being applied." *Stokeling*, 139 S. Ct. at 560 (Sotomayor, J., dissenting). Thus, while a light, offensive touching outside of the context of robbery cannot qualify as a violent felony under *Curtis Johnson*, standing in the path of someone and obstructing their pursuit—without *any* touching—can suffice to "overcom[e] the victim's resistance" and therefore qualify the underlying robbery offense as a violent felony. *United States* v. *Thrower*, 914 F.3d 770, 775 (2d Cir. 2019); *see also United States* v. *Sanchez*, 940 F.3d 526, 532 (11th Cir. 2019) (same). And, as the dissent also recognized, broadening the meaning of "physical force" to include any force "capable of causing physical pain or injury" suggests "nostalgia for the residual clause." *Stokeling*, 139 S. Ct. at 564 n.4 (Sotomayor, J., dissenting).

Stokeling and the Court's prior precedents have left the courts of appeals at a loss "about the nature of the inquiry one is supposed to conduct." *Samuel Johnson*, 135 S. Ct. at 2560. This Court has instructed lower courts to examine the "least of the acts criminalized" by the predicate offense to determine if it meets the definition of a violent felony, *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (alteration and quotation marks omitted), but has also stated that a defendant must show that there is "a realistic probability, not a theoretical possibility, that the State would apply its statute" to the least culpable conduct, *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). How "realistic" must that possibility be? Some courts

have read *Duenas-Alvarez* strictly, and require a defendant to provide an actual case in which a conviction for the predicate offense was upheld under facts not involving an element of force. *See, e.g.*, *Chaney* v. *United States*, 917 F.3d 895, 902 (6th Cir. 2019) ("[The petitioner] has not pointed to any [state] case that applied the statute to nonqualifying force and thus has not shown that realistic probability."); *United States* v. *Hill*, 890 F.3d 51, 59 (2d Cir. 2018) ("[A] defendant is required to 'point to his own case or other cases in which the courts in fact did apply the statute' in such a manner . . . ." (alteration omitted)). Others deem it sufficient if a defendant can point to language from a State's highest court that indicates that conduct not including an element of force could *hypothetically* sustain a conviction for the predicate offense. *See United States* v. *Aparicio-Soria*, 740 F.3d 152, 157–58 (4th Cir. 2014) (en banc); *cf. Partyka* v. *Att'y Gen. of U.S.*, 417 F.3d 408, 411 (3d Cir. 2005) ("Under this categorical approach [for crimes of moral turpitude], we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute."). And although this Court has instructed that the "version of state law that the defendant was actually convicted of violating" is the proper subject of the inquiry, *McNeill* v. *United States*, 563 U.S. 816, 821 (2011), courts "disagree as to whether post-conviction *judicial* interpretations of state statutes should be consulted when determining the content of state law at the time of conviction," *United States* v. *Geozos*, 870 F.3d 890, 899 n.8 (9th Cir. 2017) (citing *United States* v. *Faust*, 869 F.3d 11, 12 (1st Cir. 2017) (mem.); *United States* v. *Seabrooks*, 839 F.3d 1326, 1351 (11th Cir. 2016) (Martin, J., concurring)). This is the same type of widespread disagreement that preceded this Court's decision in *Samuel Johnson*.

The elements clause cannot be applied fairly or consistently. The question is not whether the Court's decision in *Stokeling* is a faithful interpretation of Congress's vision for the elements clause, but rather whether the mode of interpretation called for by the elements clause, as interpreted by this Court in *Stokeling* and other cases, can be said to give defendants fair notice and judges adequate guidance. It plainly cannot. Determining whether a prior offense qualifies as a violent felony now not only requires the layering of multiple abstractions and hypotheticals, but the nature of the inquiry itself is dependent in part on the type of underlying offense at issue. If defendants cannot know, without resort to statutory history and centuries-old common law, whether a prior offense qualifies a violent felony, then surely it is the case that "men of common intelligence must necessarily guess at its meaning." *Connally*, 269 U.S. at 391. And that, due process does not tolerate.

2. The confounding structure of the elements clause has unsurprisingly resulted in disparate and unpredictable application of the statute in the lower courts. The elements clause, as its name indicates, is keyed to the elements of the prior conviction. But determining whether a prior conviction qualifies as a violent felony is not a mechanical exercise of simply reading the face of a statute. State-law offenses—which make up the vast majority of criminal convictions implicated by the elements clause, *cf.* Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 Cornell J.L. & Pub. Pol'y 247, 253–54 (1997)—are seldom defined in unambiguous terms. In fact, many state offenses—including Maryland robbery—are common-law offenses, defined only by the judicial decisions of a State's appellate courts. *See*, *e.g.*, Md. Code Ann., Crim. Law § 3-402 (robbery not defined by

statute); N.C. Gen. Stat. § 14-87.1 (North Carolina robbery defined at common law); N.M. Stat. Ann. § 30-1-3 ("In criminal cases where no provision of this code is applicable, the common law . . . shall govern."). There is thus rarely an objective, unambiguous statement from a state legislature as to whether a state offense includes as an element "the use, attempted use, or threatened use of physical force."

This framework means that a federal court faced with the question of whether some hypothetical, non-violent conduct would satisfy the elements of a state offense is not tasked with engaging in the ordinary process of statutory interpretation, but rather must attempt to guess at how the relevant state court would decide the issue. *See Curtis Johnson*, 559 U.S. at 138 ("We are . . . bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of [the state offense].").

That inquiry is fraught with imprecision and ambiguity. Much like the residual clause, which required courts to imagine the "ordinary case," *Samuel Johnson*, 135 S. Ct. at 2557, the elements clause requires a court to hypothesize an imagined set of facts and decide how a state court in the relevant jurisdiction might apply or interpret those imagined facts under the statute in question. In this sense, the elements clause shares with the residual clause the virtually impossible challenge of applying an indefinite standard to "a judge-imagined abstraction." *Id.* at 2558. The residual clause failed because it required courts "to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch* v. *United States*, 136 S. Ct. 1257, 1262 (2016). The elements clause calls upon courts to perform almost an identical inquiry, resulting in "a Rube Goldberg jurisprudence of

abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end." *United States* v. *Tavares*, 843 F.3d 1, 19 (1st Cir. 2016) (discussing an analogous clause in the Sentencing Guidelines).

The circumstances here prove the point. Maryland's highest court has defined robbery as consisting of "a larceny from the person accomplished by either an assault (putting in fear) or a battery (violence)." *Snowden* v. *State*, 583 A.2d 1056, 1059 (Md. 1991). In light of this Court's ruling in *Curtis Johnson* that common-law assault or battery do not suffice for the elements clause, *see* 559 U.S. at 139, that statement would appear to disqualify Maryland robbery as a violent felony. Yet the lower court probed further, emphasizing the usage of "violence" in the parenthetical following "battery," the lack of decisions evaluating the sufficiency of the evidence in a robbery case using the same formulation, and the definitions of robbery offered at other points in the decision and in other cases. Pet. App. 13a. Those additional factors led the panel to conclude that Maryland robbery is a violent felony, notwithstanding the statement by Maryland's highest court suggesting otherwise. *Ibid.* Whether the panel was correct or incorrect in its proffered guess as to how the Maryland Court of Appeals might resolve this question if given the opportunity, the point is that it was just that—a guess. And it was a guess that required the court to choose—arbitrarily—between two formulations of robbery offered by Maryland courts as applied to a hypothetical, idealized version of Maryland robbery. In other words, petitioner simply lost the "elements lottery." *United States* v. *Burris*, 912 F.3d 386, 407 (6th Cir. 2019) (Thapar, J., concurring).

The ability of a federal court to anticipate how a state court would resolve fringe cases involving non-violent conduct is further inhibited by the practical reality that state prosecutors exercise their discretion and likely are disinclined to bring charges for robbery or other allegedly "violent" crimes in the absence of evidence of actual force, even if they might ultimately prevail in doing so. *See Aparicio-Soria*, 740 F.3d at 158 ("It may be that Maryland prosecutors tend to charge too many offenders with resisting arrest when they could charge far more serious crimes . . . ."). And for similar reasons, the fact that the majority of (or even all) convictions for a particular offense involve violent, physical force is also unhelpful. *See* Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immigr. L.J. 257, 283–84 (2012) ("The realistic probability standard can be particularly difficult to meet because the vast majority of criminal cases end in plea bargains, not published appellate opinions . . . ."). Thus, even assuming courts were otherwise capable of accurately and consistently making the inquiry called for by the elements clause, in the absence of helpful data points from state courts cases, they often lack the tools to do so.

The consequence of all of this is that individuals have no reasonable expectation as to whether a particular prior offense will qualify as a violent felony under the elements clause, and courts have no meaningful guidance as to how to consistently make that determination. Petitioner, for example, was sentenced in 2018, at a time when the law of the Fourth Circuit held, pursuant to *Curtis Johnson*, that a robbery offense requiring only enough force to compel the victim to part with her property was not a violent felony. *See*

United States v. *Gardner*, 823 F.3d 793, 803 (4th Cir. 2016). On that basis, two district courts had ruled that Maryland robbery is not a violent felony. *See United States* v. *Toomer*, No. 01-CV-573, 16-CR-3235, 2018 WL 372333, at *4 (E.D. Pa. Jan. 10, 2018); *United States* v. *Wilson*, 249 F. Supp. 3d 305, 318 (D.D.C. 2017). It was only after *Stokeling*, in which this Court addressed the application of the elements clause to a robbery offense requiring force sufficient to overcome a victim's resistance, that the Fourth Circuit reversed course and held that Maryland robbery is a violent felony. Petitioner plainly had no actual or fair notice as to whether he was going to be treated as an armed career criminal, and in fact, all objective signs pointed to the contrary. Like many others in his shoes, petitioner was blindsided by a statute that, until the middle of briefing on appeal, he had no reason to believe would apply to him.

* * *

Under the elements clause, a court must jump through several theoretical loops. First, it must imagine the hypothetical "least of the acts criminalized" by the statute, an exercise which is hampered by the absence of clear standards from state courts. Second, it must assess whether there is a "realistic probability" that a hypothetical prosecution of that hypothetical conduct would be upheld by a state court (hypothetically). Third, the court must determine whether such hypothetical conduct satisfies the test for "physical force" under the ACCA, which turns on the type of offense in question (robbery or something else), the common-law elements of the offense (unless it is assault and battery, in which case the common law is irrelevant), and statutory and legislative history. And each

of these steps contains numerous ambiguities, imprecisions, and inconsistencies, as detailed above. No defendant—and particularly one in petitioner's shoes—can anticipate how a court will resolve such vexing questions. And no court can have confidence that it has accurately and faithfully applied the statue as Congress intended to one of hundreds of state offenses the ACCA implicates. Under this Court's extensive precedent, the historical understanding of the rule of law, and basic principles of due process, the elements clause is unconstitutionally vague. Review is warranted to address this critical constitutional defect.

II. THE QUESTION PRESENTED WILL RESOLVE NUMEROUS CIRCUIT SPLITS AND BRING CLARITY AND STABILITY TO THE CRIMINAL LAW

The constitutionality of the elements clause is an important question that warrants immediate review by this Court. The elements clause has long produced deep disagreement among the lower courts of appeals regarding the treatment of various state-law offenses, resulting in an arbitrary and fundamentally unfair regime in which defendants essentially draw numbers in an "elements lottery" hoping for a favorable outcome. The limited resources of the judiciary should no longer be wasted attempting to sort out these persistent issues.

A. Courts Of Appeals Are Split In Numerous Ways On The Elements Clause

Because of its vague formulation, the elements clause has proven to be a magnet for circuit splits. Most commonly, courts are split in numerous ways

about how to treat various categories of state-law offenses under the elements clause. For example, assault with a deadly weapon is typically deemed a violent felony. *See, e.g.*, *United States* v. *Barbosa*, 896 F.3d 60 (1st Cir. 2018) (Massachusetts). But not if it is committed in Rhode Island or North Carolina. *See United States* v. *Rose*, 896 F.3d 104 (1st Cir. 2018); *United States* v. *Geddie*, 125 F. Supp. 3d 592 (E.D.N.C. 2015). And rape, predictably, is considered in numerous jurisdiction to be a violent felony. *See, e.g.*, *United States* v. *Mata*, 869 F.3d 640, 644 (8th Cir. 2017) (Minnesota); *United States* v. *Kaplansky*, 42 F.3d 320, 321 (6th Cir. 1994) (Ohio); *United States* v. *Potter*, 895 F.2d 1231, 1232 (9th Cir. 1990) (California). Yet the indeterminacies of the elements clause exclude rape from the definition of "violent felony" if it is committed in Tennessee, Washington, Oklahoma, Texas, Alabama, or Florida. *See, e.g.*, *Lowe* v. *United States*, 920 F.3d 414 (6th Cir. 2019) (Tennessee).

Even more unsettling is that the courts of appeals have split on whether *specific* state offenses qualify. The Ninth Circuit has held that armed robbery in Massachusetts is not a violent felony, *see United States* v. *Parnell*, 818 F.3d 974 (9th Cir. 2016), but the First Circuit disagrees, *see United States* v. *Luna*, 649 F.3d 91 (1st Cir. 2011). The treatment of Georgia robbery also depends on in which circuit a defendant is litigating. *Compare United States* v. *Fluker*, 891 F.3d 541, 549 (4th Cir. 2018) (Georgia robbery not a violent felony), *with United States* v. *Cooper*, 689 F. App'x 901, 906–07 (11th Cir. 2017) (Georgia robbery a violent felony). And the Sixth Circuit reversed itself after seven years, with no intervening precedent from this Court, regarding the treatment of felonious assault in Ohio. *Compare United States* v. *Anderson*,

695 F.3d 390 (6th Cir. 2012) (felonious assault a violent felony), *with United States* v. *Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc) (felonious assault not a violent felony).

The circuit splits involving the elements clause are not only limited to categories of offenses and specific state offenses. Courts also disagree about broader interpretive questions, such as whether the elements clause encompasses offenses that can be committed recklessly, *see Borden* v. *United States*, No. 19-5410 (granting certiorari to resolve a split among nine courts of appeals), or offenses that can be committed by acts of omission, *see United States* v. *Scott*, 954 F.3d 74, 104–05 (2d Cir. 2020) (Raggi, J., dissenting) (listing cases involved in the circuit split).

The lower courts thus remain in disarray as to how to approach the elements clause. Despite *Curtis Johnson* and *Stokeling*—as well as the host of cases addressing the categorical approach—"[t]he result has been chaos in the federal courts." Rachel E. Barkow, Comment, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 202 (2019). In the year-and-a-half following *Stokeling*, dozens of federal courts of appeals have issued decisions attempting to apply that decision to the national patchwork of state and federal criminal offenses, and the result has been anything but consistency. *See, e.g.*, *United States* v. *Shelby*, 939 F.3d 975, 978–79 (9th Cir. 2019) (Oregon robbery not a violent felony); *United States* v. *Dinkins*, 928 F.3d 349, 352 (4th Cir. 2019) (North Carolina robbery a violent felony); *United States* v. *Jones*, 914 F.3d 893, 905–06 (4th Cir. 2019) (South Carolina assaulting, beating, or

wounding a law enforcement officer not a violent felony); *United States* v. *Bong*, 913 F.3d 1252, 1260–67 (10th Cir. 2019) (Kansas robbery and aggravated robbery not violent felonies). Even the Department of Justice recognizes this problem, lamenting in a 2018 letter to the U.S. Sentencing Commission the numerous "circuit splits" that have developed, "such that the same state or federal offense qualifies as a predicate crime of violence or controlled substance offense in some circuits but not others." Letter from David Rybicki, Deputy Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n 9 (Aug. 10, 2018), https://bit.ly/39k9hL7.

This "chaos" should not be tolerated anymore. This Court has an opportunity to close the book on this unfortunate and unconstitutional chapter in criminal law. However laudable Congress's goals may have been in enacting the ACCA, those goals must be accomplished pursuant to a constitutionally permissible framework. As shown above, the elements clause is not such a framework, and the constant frustration in lower courts over their inability to fairly and consistently apply the statute is ample evidence of both the unconstitutionality of the statute and the need for review by this Court.

B. The Question Presented Affects Thousands Of Defendants And Implicates Substantial Judicial Resources

The question presented here also is significant because it marks the difference between the approximately four-year sentence petitioner originally received and the fifteen-year *minimum* sentence made mandatory by the Fourth Circuit's decision. But the

ramifications of the issue in this case resonate far beyond petitioner's individual circumstances, affecting thousands of other defendants and the federal judiciary as a whole.

As of 2016, 5,506 federal inmates had been sentenced pursuant to the ACCA. *See* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 46 (Mar. 2018), https://bit.ly/3bqA9u4. Nearly two-thirds of those individuals (3,521) were Black. *Id.* at 50. In 2018 alone, 289 defendants were sentenced pursuant to the ACCA. *See* U.S. Sentencing Comm'n, *Quick Facts: Felon in Possession of a Firearm* (2018), https://bit.ly/2TO4Q5y. Absent exceptional and narrow circumstances, those defendants received a *minimum* sentence of fifteen years, compared to the average of just 59 months (about five years) for all other offenders under Section 922(g). *Ibid.* Petitioner is just one of thousands of defendants implicated by the central issue in this case. Certiorari would therefore address an important question of criminal law with nationwide implications.

Resolution of this question is appropriate also because of the substantial judicial resources expended attempting to untangle the elements clause and apply it to the hundreds of state laws and statutes it potentially implicates. The elements clause has been applied to no less than 40 different types of state-law offenses. *See* Jondavid S. Delong, *What Constitutes "Violent Felony" for Purposes of Sentence Enhancement Under Armed Career Criminal Act (18 U.S.C.A. § 924(e)(1))*, 119 A.L.R. Fed. 319 (2020 update). Extrapolated across 50 States, that means courts are left with sorting out the meaning and categorization of hundreds of state-law offenses. As the Ninth Circuit

has recognized, categorizing crimes under the ACCA is a taxing job, and "perhaps no other area of the law has demanded more of [the courts'] resources." *United States* v. *Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011) (en banc), *abrogated by Descamps* v. *United States*, 570 U.S. 254 (2013). In fact, there have been over 1,300 cases (and counting) in the federal courts of appeals regarding the meaning of "violent felony" under the ACCA. *See* Delong, *supra*.

There is no reason for the judiciary to expend more resources litigating, on an offense-by-offense basis, a complex and indeterminate legal question that has no ascertainable answer. If the elements clause is unconstitutionally vague—and it is—there is no basis for delaying review of this important issue. No split regarding the constitutionality of the residual clause existed prior to *Samuel Johnson* (although the residual clause did, like the elements clause, *create* numerous circuit splits). And in fact, the petitioner there did not even raise the issue in his petition for a writ of certiorari. *See* Petition for Writ of Certiorari, *Samuel Johnson*, 135 S. Ct. 2551 (2015) (No. 13-7120). But this Court nonetheless recognized that its repeated, failed efforts to give meaning to the "shapeless" residual clause, and the resulting confusion in the lower courts, warranted immediate judicial intervention. The same is true here—the constitutionality of the elements clause should be decided now, before more defendants are subject to unconstitutional punishments, more judicial resources are expended, and more confusion and uncertainty permeate the thousands of criminal proceedings affected by this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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