

No. 08-6925

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**In the Supreme Court of the United States**

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CURTIS DARNELL JOHNSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES**

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### **QUESTION PRESENTED**

Whether petitioner's prior conviction for felony battery under Florida law qualifies as a "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), because it "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).

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**BRIEF FOR THE UNITED STATES**

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**OPINION BELOW**

The opinion of the court of appeals (J.A. 81-87) is reported at 528 F.3d 1318.

**JURISDICTION**

The judgment of the court of appeals was entered on May 30, 2008. A petition for rehearing was denied on July 22, 2008 (J.A. 88). The petition for a writ of certiorari was filed on October 20, 2008, and was granted on February 23, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

The relevant statutory provisions are reprinted in an appendix to this brief. App. A, *infra*, 1a-5a.

**STATEMENT**

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to one count of possessing ammunition after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Petitioner had prior felony convictions, entered in the State of Florida, for aggravated battery, burglary of a dwelling, and battery. The district court determined that those prior convictions, including the conviction for felony battery, qualified as “violent felon[ies]” under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and thus required a mandatory minimum 15-year sentence. The court sentenced petitioner to 185 months of imprisonment. The court of appeals affirmed. J.A. 81-87.

1. Section 922(g) of Title 18, United States Code, makes it unlawful for certain persons, including any person who has previously been convicted of a felony, 18 U.S.C. 922(g)(1), to possess firearms or ammunition. Although a violation of Section 922(g) is ordinarily punishable by a maximum term of imprisonment of ten years, 18 U.S.C. 924(a)(2), the ACCA provides for a mandatory minimum of 15 years for an offender who “has three previous convictions \* \* \* for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. 924(e)(1). The ACCA defines a “violent felony” as “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.

18 U.S.C. 924(e)(2)(B).

2. In 2006, a deputy with the Jacksonville, Florida, Sheriff's Office was dispatched to petitioner's home to investigate a domestic disturbance complaint. On arrival, the deputy saw petitioner inside the home holding a rifle and yelling at his girlfriend, with whom he lived at the address. Petitioner's girlfriend later explained that she and petitioner had become involved in an argument that escalated into a physical altercation. During that altercation, petitioner retrieved a rifle and loaded it with ammunition. J.A. 93-94, 121.

Petitioner was arrested. Deputies recovered a rifle, a semi-automatic pistol, and ammunition from inside the residence. J.A. 93-94. A federal grand jury in the Middle District of Florida later returned a single-count indictment charging petitioner with possessing ammunition after a felony conviction, in violation of 18 U.S.C. 922(g)(1). J.A. 8-10. Petitioner pleaded guilty to the charge. J.A. 68.

3. In its Presentence Report (PSR), the Probation Office recommended that petitioner be sentenced as an armed career criminal under the ACCA because he had three prior convictions for "violent felon[ies]," all entered in the State of Florida: a 1986 conviction for aggravated battery, a 1986 conviction for burglary of

a dwelling, and a 2002 conviction for felony battery.<sup>1</sup> J.A. 97-98. Petitioner did not dispute that his aggravated battery and burglary convictions qualified as “violent felon[ies].” He contended, however, that his 2002 felony battery conviction did not so qualify. J.A. 134-135.

a. In *Taylor v. United States*, 495 U.S. 575 (1990), this Court described what it called a “formal categorical approach” for determining whether a prior conviction qualifies as a predicate for ACCA sentencing. Under that approach, a sentencing court generally may “look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” *Id.* at 600. But when the statutory definition of the offense sweeps more broadly than the ACCA’s generic definition of a predicate offense, the sentencing court may apply what is commonly referred to as a “modified categorical approach.” *Nijhawan v. Holder*, 129 S. Ct. 2294, 2302 (2009). Under that approach, a court may consult additional materials, such as an indictment or information and jury instructions, to determine whether the “jury was actually required to find all the elements” required by federal law. *Taylor*, 495 U.S. at 602. When a conviction was entered by guilty plea, a court may also consider “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record.” *Shepard v. United States*, 544 U.S. 13, 26 (2005).

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<sup>1</sup> Although the PSR recited that the felony battery conviction occurred in 2003 (J.A. 98), the section of the PSR outlining petitioner’s criminal history showed that petitioner pleaded guilty to that crime on August 16, 2002 (J.A. 109).

b. Petitioner's felony battery conviction was entered under Fla. Stat. § 784.03(2) (2001). Under that statute, a person commits battery when he:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

*Id.* § 784.03(1)(a). Battery is ordinarily a first-degree misdemeanor punishable by no more than one year of imprisonment. *Id.* §§ 775.082(4)(a), 784.03(1)(b). If, however, the defendant has a prior conviction for battery, aggravated battery, or felony battery, then the offense is a third-degree felony, punishable by a maximum of five years of imprisonment. *Id.* §§ 775.082(3)(d), 784.03(2).

When petitioner committed his felony battery offense in 2002, he had a number of prior misdemeanor battery convictions. According to the PSR in this case, those convictions included: a 1989 conviction for striking his girlfriend in the face and arm (J.A. 103); a 1992 conviction for a domestic-violence battery in which he punched his sister in the stomach (J.A. 103-104); and a 1993 conviction for a domestic-violence battery in which he struck his girlfriend in the head, choked her, and said that he should kill her (J.A. 104).<sup>2</sup>

The charging document in petitioner's 2002 battery case alleged that petitioner, "having previously been convicted of battery on July 25, 1989, did actually and intentionally touch or strike [the victim] against the will of said person, contrary to the provisions of Section

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<sup>2</sup> The PSR also noted that petitioner had been arrested on similar charges on other occasions. J.A. 115-116.

784.03(2), Florida Statutes,” J.A. 37.<sup>3</sup> Petitioner pleaded guilty to the offense. J.A. 62-67. He was sentenced to time served and ordered to have no contact with the victim as a condition of community control. J.A. 65-66. Community control was later revoked, and petitioner was sentenced to three years of imprisonment. J.A. 109-110.

c. At sentencing in this case, petitioner argued that, under the *Taylor* categorical approach, felony battery in violation of Section 784.03(2) neither “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), nor “involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. 924(e)(2)(B)(ii). PSR Addendum (May 11, 2007); J.A. 19-20. Specifically, petitioner emphasized that Florida’s battery statute punishes a person who “*touches* or strikes another person against the will of the other.” Fla. Stat. § 784.03(1)(a) (2001) (emphasis added). Petitioner argued that “the ordinary definition of ‘touch’ does not connote the ‘use of physical force’ and does not involve ‘conduct that presents a serious potential risk of physical injury to another.’” J.A. 135. Here,

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<sup>3</sup> The circumstances of petitioner’s felony battery offense were reported in the original version of the PSR. PSR ¶ 48 (Apr. 18, 2007). Defense counsel objected to their inclusion on the ground that the information was based on an arrest report, rather than a judicial record of the sort approved in *Shepard*, 544 U.S. at 26. PSR Addendum (May 11, 2007). The probation officer disagreed, noting that, under 18 U.S.C. 3661 and Sentencing Guidelines § 1B1.4, a sentencing court may consider any information concerning the defendant in selecting an appropriate sentence, unless otherwise prohibited by law. See PSR Addendum (May 11, 2007). With the government’s acquiescence, however, the court deleted the factual recitation from the PSR. J.A. 109-110; see J.A. 14-15.

petitioner contended, because the charging document alleged only that he “did actually and intentionally touch or strike [the victim]” against her will, J.A. 37, and thus could not rule out the possibility that he had been convicted for an unlawful “touching,” his felony battery offense did not qualify as an ACCA predicate, J.A. 19-21.

The district court rejected the argument. The court agreed with the Probation Office that felony battery in violation of Fla. Stat. § 784.03(2) both necessarily involves the use of physical force, for purposes of 18 U.S.C. 924(e)(2)(B)(i), and presents a serious potential risk of physical injury, for purposes of 18 U.S.C. 924(e)(2)(B)(ii). J.A. 47, 49. The court sentenced petitioner to 185 months of imprisonment, to be followed by five years of supervised release. J.A. 57, 70-71. The court explained that the sentence was based on petitioner’s “very, very strong criminal history,” and that petitioner was “classified as an armed career criminal because of [his] prior convictions for violent felonies.” J.A. 59.

4. On appeal, petitioner renewed his contention that Florida’s battery statute neither “has as an element the use, attempted use, or threatened use of physical force,” nor “involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. 924(e)(2)(B); see Pet. C.A. Br. 8-9, 12-19; Pet. C.A. Reply Br. 1-10.

The court of appeals affirmed petitioner’s sentence, concluding that felony battery qualifies as a “violent felony” under Subsection (i) of the ACCA definition. J.A. 82-87. Relying on circuit precedent, the court explained that, because “[t]he crime of battery under Florida law \* \* \* requires at a minimum the actual and intentional touching or striking of another person against that other

person’s will,” it has as an element “the use, attempted use, or threatened use of physical force against the person of another.” J.A. 82-83 (quoting 18 U.S.C. 924(e)(2)(B)(i)); see *United States v. Llanos-Agostadero*, 486 F.3d 1194, 1197 (11th Cir. 2007) (per curiam) (holding that the Florida offense of aggravated battery on a pregnant woman qualifies as a “crime of violence” under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii), cert. denied, 129 S. Ct. 902 (2009); *United States v. Glover*, 431 F.3d 744, 749 (11th Cir. 2005) (per curiam) (holding that the Florida offense of battery on a law enforcement officer qualifies as a “crime of violence” under Sentencing Guidelines § 4B1.2(a)).

The court of appeals rejected petitioner’s argument that its prior decisions had been undermined by *State v. Hearn*, 961 So. 2d 211 (2007), in which the Florida Supreme Court held that battery was not a “forcible felony” for purposes of the Florida violent career criminal statute. J.A. 83-86. The court explained that its prior cases “applied the federal law definition of ‘violence’ with the understanding that any actual touching or striking of another against that other person’s will is simple battery under Florida law.” J.A. 84-85. *Hearn*, the court noted, did not alter that understanding. J.A. 85. And because “[t]he issue of whether [the ACCA] applies to the state law defined crime of battery is a federal question, not a state one,” the court concluded that “nothing that the Florida Supreme Court said in *Hearn* about that state’s violent career criminal statute binds us.” *Ibid.*

#### SUMMARY OF ARGUMENT

The court of appeals correctly concluded that petitioner’s conviction for felony battery in violation of

Florida law qualifies as a “violent felony” under the ACCA because battery “has as an element the use \* \* \* of physical force against the person of another,” 18 U.S.C. 924(e)(2)(B)(i).

A. Florida’s definition of battery tracks the traditional, common-law rule. Under that rule, a person commits battery if he applies force to another in a manner that results either in physical injury or in an offensive touching. Because the statutory definition of Florida’s battery offense proscribes the application of physical force to another person, it qualifies as an offense that “has as an element the use \* \* \* of physical force.” 18 U.S.C. 924(e)(2)(B)(i).

B. Petitioner contends that the statutory context of the ACCA’s definition of “violent felony” limits the meaning of “physical force” to “physical force” that is “violent” and “aggressive,” which petitioner understands to mean force that is “likely to create a serious potential risk of physical injury.” Br. 8, 9, 18 (emphasis omitted). Petitioner would thus read the language of Subsection (ii)—and of this Court’s opinion interpreting that language in *Begay v. United States*, 128 S. Ct. 1581 (2008)—into Subsection (i) as an implicit qualification on “physical force.” But Congress did not include that qualification in Subsection (i), and the effort to rewrite the statute should be rejected.

Petitioner’s proposal rests on the erroneous assumption that, in the context of the ACCA, a “violent” crime must necessarily involve the use of “violent,” potentially injurious force. Congress intended the ACCA to reach not only crimes that in themselves present a risk of injury, but also crimes likely to lead to confrontations that present a risk of injury. Battery, of course, typically involves conduct that in itself presents a risk of injury to

others. But even in the atypical battery case that does not involve the use of potentially injurious force, the offender's conduct could well lead to a volatile and dangerous confrontation. Congress thus could reasonably have concluded that a crime that necessarily involves the use of physical force against persons should categorically qualify as a "violent felony," regardless of the particular quantum of force involved.

Petitioner further asserts that, absent his narrowing construction, "an unwanted tap on the shoulder" could constitute a "violent felony" under the ACCA. But he offers no evidence that the Florida battery statute has been applied to shoulder-tapping or similar conduct. And in any event, the statutory context of the ACCA does not demand that every conceivable factual offense covered by the language of a state criminal statute present a serious risk of physical injury or otherwise conform to a preconceived notion of what constitutes a crime of violence. The ACCA focuses on ordinary cases, not extraordinary ones. In the ordinary case, battery is, by any definition, a violent crime.

C. Because the text of Section 924(e)(2)(B)(i) is clear and unambiguous, there is no need to consult its legislative history. That history, in any event, confirms the plain meaning of the text, and nothing in the statute's history suggests any intention to exclude battery from its compass.

D. As the reported cases demonstrate, the interpretive question presented in this case has arisen most often in cases concerning federal domestic-violence provisions, particularly the federal ban on firearm possession by persons convicted of misdemeanor crimes of domestic violence, 18 U.S.C. 922(g)(9). Section 922(g)(9), much like Section 924(e)(2)(B)(i), employs a definition of "mis-

demeanor crime of domestic violence” that is limited to any crime that “has, as an element, the use \* \* \* of physical force.” 18 U.S.C. 921(a)(33)(A).

As this Court has recently explained, Congress enacted Section 922(g)(9) to provide a nationwide solution to what it regarded as a nationwide problem: the possession of firearms by those convicted of violent crimes against their families. *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009). Congress did so with the understanding that “domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws.” *Ibid.* But the generic assault and battery laws of about half of the States, like Florida’s, do not draw distinctions between different degrees of force. If the Court were to conclude that such offenses lack a use-of-force element for purposes of the firearms disability provision, then relatively few domestic-violence convictions would qualify as “misdemeanor crime[s] of domestic violence” under Section 922(g)(9).

E. The Florida Supreme Court’s decision in *State v. Hearns*, 961 So. 2d 211 (2007), does not support the conclusion that Florida’s battery statute lacks a use-of-force element under Section 924(e)(2)(B)(i). The outcome in that case rested not on an interpretation of Florida’s battery statute, but rather on an interpretation of a different state statute that is not at issue here, and that differs in material ways from Section 924(e)(2)(B)(i). As such, *Hearns* is neither binding nor persuasive authority for the proposition that battery is not categorically a “violent felony” under Section 924(e)(2)(B)(i).

F. The rule of lenity is inapplicable here because there is no grievous ambiguity that would justify resort to the rule. Section 924(e)(2)(B)(i) unambiguously includes felony battery as defined by Florida law.

G. Finally, even if the Court were to accept petitioner’s restrictive reading of Section 924(e)(2)(B)(i), the proper course would not be to reverse the judgment of the court of appeals, but rather to vacate the judgment and allow the court of appeals to consider whether, as the district court held, felony battery qualifies as a “violent felony” under the so-called residual provision of Section 924(e)(2)(B)(ii).

#### ARGUMENT

#### PETITIONER’S FELONY BATTERY OFFENSE HAS AS AN ELEMENT THE USE OF PHYSICAL FORCE AGAINST ANOTHER, AND THEREFORE QUALIFIES AS A “VIOLENT FELONY” UNDER 18 U.S.C. 924(e)(2)(B)(i)

Florida, like many States, punishes as a criminal offense the unjustified and offensive application of physical force of any degree to another person. That offense—traditionally known as “battery,” but also known in some jurisdictions as “assault” or “assault and battery”—“has as an element the use \* \* \* of physical force against the person of another.” 18 U.S.C. 924(e)(2)(B)(i). Petitioner’s felony battery offense under Florida law therefore qualifies as a “violent felony” under the ACCA.

##### A. The Plain Language Of Section 924(e)(2)(B)(i) Encompasses Felony Battery

The ACCA defines the term “violent felony” as “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.” 18 U.S.C. 924(e)(2)(B).

1. As relevant here, the use-of-force element required by the definition of “violent felony” in subsection (i) of the ACCA has two principal components: (1) “physical force,” that is (2) “use[d] \* \* \* against the person of another.” 18 U.S.C. 924(e)(2)(B)(i).<sup>4</sup>

The term “physical force,” which is undefined in the statute, ordinarily means “[f]orce applied to the body; actual violence.” *Black’s Law Dictionary* 1032 (5th ed. 1979) (*Black’s*). “Force” is variously defined as “[p]ower dynamically considered,” *id.* at 580; “[s]trength or power, of any degree, exercised without law, or contrary to law, upon persons or things”; or “violence.” *Webster’s New International Dictionary of the English Language* 986 (2d ed. 1958) (*Webster’s Second*).

This Court considered the meaning of the phrase “use \* \* \* against” in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), which concerned whether driving under the influence (DUI) and causing bodily injury qualifies as a “crime of violence” under 18 U.S.C. 16. The Court concluded that it does not, because “‘use . . . of physical force against the person or property of another’ \* \* \* most naturally suggests a higher degree of intent than negligent or

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<sup>4</sup> It is undisputed that petitioner’s recidivist felony battery qualifies as “a crime punishable by a term of imprisonment exceeding one year,” 18 U.S.C. 924(e)(2)(B), even though, absent the recidivism enhancement, petitioner’s battery offense would have been punishable as a misdemeanor. See J.A. 86 (citing *United States v. Rodriguez*, 128 S. Ct. 1783 (2008)); *Rodriguez*, 128 S. Ct. at 1793 (holding that, for purposes of the ACCA’s neighboring definition of “serious drug offense,” the “maximum term of imprisonment \* \* \* prescribed by law,” 18 U.S.C. 924(e)(2)(A)(ii), is properly determined by reference to recidivist sentence enhancements); Fla. Stat. §§ 775.082(3)(d) and (4)(a), 784.03(1)(b) and (2) (2001).

merely accidental conduct.” *Leocal*, 543 U.S. at 9 (quoting 18 U.S.C. 16(a)). The Court explained that the word “use” denotes “active employment.” *Ibid.* (citing *Bailey v. United States*, 516 U.S. 137, 144 (1995)). And “[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident.” *Ibid.*; cf. *Black’s* 57 (defining “[a]gainst” as “adverse to, contrary,” and noting that it generally “[s]ignifies discord or conflict; opposed to; without the consent of; in conflict with”). For example, the Court explained, while “we would not ordinarily say a person ‘use[s] . . . physical force against’ another by stumbling and falling into him,” “a person would ‘use . . . physical force against’ another when pushing him.” *Leocal*, 543 U.S. at 9.

2. The language of Section 924(e)(2)(B)(i) precisely tracks the general definition of the crime of battery: “the unlawful application of force to the person of another.” 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.15, at 301 (1st ed. 1986) (*LaFave*); accord *Black’s* 139.

Battery is generally considered to consist of a specified *actus reus*, *mens rea*, and “harmful result to the victim.” *LaFave* § 7.15, at 301. Although the “modern approach, as reflected in the Model Penal Code” in some state criminal codes, is “to limit battery to instances of physical injury,” *id.* § 7.15(a), at 302, about half of the States, by explicit statutory text or judicial interpretation, follow the traditional, common-law approach, under which the required “harmful result” may be *either*

“a bodily injury or an offensive touching.” *Id.* § 7.15, at 301; see App. B, *infra*, 6a-11a.<sup>5</sup>

The common-law approach reflects a judgment that “the least touching of another in anger” constitutes a form of “violence against the other.” *Cole v. Turner*, 90 Eng. Rep. 958 (1704). As Blackstone explained:

The least touching of another’s person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.

3 William Blackstone, *Commentaries* \*120 (*Blackstone*) (discussing battery as a private wrong); see 4 *id.* at \*216-\*218 (noting that battery is also a public wrong, and referring to prior discussion of battery as a private wrong).

Not all subjectively unwanted physical contact qualifies as battery under the common-law approach. The law recognizes that, “in a crowded world, a certain amount of personal contact is inevitable, and must be accepted.” W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 9, at 42 (5th ed. 1984) (*Prosser*). An individual is thus generally assumed to consent “to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life”: neither “a tap on the shoulder to attract attention,” nor “a friendly grasp of the arm,” nor “a casual jostling to make passage” is considered a battery. *Ibid.* To qualify as a battery, the contact must be objectively offensive, and “unwarranted by the social usages prevalent at the time and place at which

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<sup>5</sup> A number of States, as well as the federal government, punish the traditional elements of battery as “assault” or “assault and battery.” See *LaFave* § 7.14, at 300 & nn.2, 3; App. B, *infra*, 6a-11a.

it is inflicted.” Restatement (Second) of Torts § 19 cmt. a, at 35 (1965).

Florida, which defines battery as “[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other” or “[i]ntentionally caus[ing] bodily harm to another person,” follows the common-law approach of including the causation of both bodily injury and of offensive touching in a single crime. Fla. Stat. § 784.03(1)(a) (2001); cf. *United States v. Hays*, 526 F.3d 674, 678-679 (10th Cir. 2008) (recognizing that a similarly worded Wyoming battery statute follows the same approach); *Flores v. Ashcroft*, 350 F.3d 666, 669-670 (7th Cir. 2003) (recognizing that a similarly worded Indiana battery statute follows the same approach).

3. Petitioner does not dispute that the “intentionally caus[ing] bodily injury” prong of the Florida battery statute necessarily involves the use of physical force. He contends, however, that the “intentionally touch[ing] or strik[ing]” prong does not, because “touch[ing]” does not require the use of physical force. *E.g.*, Br. 18.

As a textual matter, petitioner is incorrect. An intentional offensive “touch[ing]” necessarily involves “the unlawful application of force to the person of another.” *LaFave* § 7.15, at 301. As the courts of appeals have acknowledged, even the slightest touch necessarily involves the use of some quantum of physical force. See *United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006) (“A person cannot make physical contact \* \* \* with another without exerting some level of physical force.”), cert. denied, 549 U.S. 1343 (2007); *United States v. Nason*, 269 F.3d 10, 20 (1st Cir. 2001) (“[O]ffensive physical contacts with another person’s body \* \* \* invariably emanate from the application of some quantum of physical force.”); *United States v. Smith*, 171 F.3d 617,

621 n.2 (8th Cir. 1999) (“[P]hysical contact, by necessity, requires physical force to complete.”); cf. *Flores*, 350 F.3d at 672 (acknowledging that “it is impossible to touch someone without applying *some* force, if only a smidgeon”).

Accordingly, battery under Florida law falls within the plain meaning of “any crime \* \* \* that \* \* \* has as an element the use \* \* \* of physical force against the person of another.” 18 U.S.C. 924(e)(2)(B)(i). See *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 20-21; *Smith*, 171 F.3d at 621 n.2; see also *Blake v. Gonzales*, 481 F.3d 152, 159-160 (2d Cir. 2007) (Sotomayor, J.) (concluding that the variant of the Massachusetts offense of assault and battery on a police officer that requires proof of “the intentional and unjustified use of force upon the person of another, however slight,” “[c]learly constitutes ‘the use . . . of physical force’ within the meaning of § 16(a)” (citation omitted).

**B. The Context Of Section 924(e)(2)(B)(i) Supports Its Plain Meaning**

Petitioner’s primary submission is that, to distinguish “violent” crimes from other crimes, Section 924(e)(2)(B)(i)’s reference to “physical force” must be read to mean force that is “aggressive, violent, and likely to create a serious potential risk of physical injury.” Br. 18. A “violent felony,” in petitioner’s view, thus must “have as an element the use of violent, destructive, aggressive, and/or injurious force.” Br. 26. So read, petitioner concludes, Subsection (i) of the ACCA definition would not reach as a categorical matter any felony battery conviction entered in a jurisdiction, like Florida, that draws no distinction between degrees of force. Peti-

tioner provides no valid reason for this Court to interpret Section 924(e)(2)(B)(i) in that manner.

***1. Congress’s use of the unqualified term “physical force” suggests that Congress did not intend to limit the ACCA to only certain criminal uses of physical force***

As petitioner acknowledges (Br. 14-16), his proposed narrowing construction of Subsection (i) is drawn largely from Subsection (ii), which reaches any crime that “is burglary, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. 924(e)(2)(B)(ii); see *Begay v. United States*, 128 S. Ct. 1581, 1586 (2008) (interpreting the so-called residual clause of Subsection (ii) to reach crimes that are both risky and that, like the offenses enumerated in Subsection (ii), “typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct”) (quoting *United States v. Begay*, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part), rev’d, 128 S. Ct. 1581 (2008)). Petitioner reasons that Subsection (i), like Subsection (ii), must be intended to reach “violent, aggressive conduct likely to create a serious potential risk of physical injury.” Br. 16. And in petitioner’s view, the way to ensure that Subsection (i) is limited to such conduct is to read its reference to “physical force” to mean “physical force” that is “aggressive, violent, and likely to create a serious potential risk of physical injury.” *Id.* at 18.

Congress, however, has defined what constitutes a “violent felony” under Subsection (i), and Congress’s definition includes any felony offense that “has as an element the use \* \* \* of physical force against the person of another.” 18 U.S.C. 924(e)(2)(B)(i). Had Congress

intended to limit its definition of “violent felony” to some unlawful uses of physical force but not others, it would have said so. This Court should decline to superimpose the language of Subsection (ii) on the use-of-force language of Subsection (i), when Congress did not see fit to do so itself. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (brackets in original; internal quotation marks and citation omitted).<sup>6</sup>

Moreover, Congress has elsewhere employed limiting language of the sort that petitioner here proposes: federal firearms laws prohibit firearm possession by any person who is subject to a court order that “by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child *that would reasonably be expected to cause bodily injury.*” 18 U.S.C. 922(g)(8)(C)(ii) (emphasis added); see *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 16. That Congress failed to include a similar limitation in Subsec-

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<sup>6</sup> Petitioner emphasizes (Br. 15-16) this Court’s observation that “[a] crime which has as an element the ‘use, attempted use, or threatened use of physical force’ against the person \* \* \* is likely to create ‘a serious potential risk of physical injury.’” *Begay*, 128 S. Ct. at 1585. But that observation provides no support for superimposing the “serious potential risk” language of Subsection (ii) on the “physical force” language of Subsection (i). As explained below, pp. 21-30, *infra*, a crime involving the use of force against another person by its nature creates a risk of injury, regardless of the quantum of force involved.

tion (i) of the ACCA suggests that no such limitation was intended.<sup>7</sup>

This Court “ordinarily resist[s] reading words or elements into a statute that do not appear on its face,” *Bates v. United States*, 522 U.S. 23, 29 (1997). See, e.g., *United States v. Rodriguez*, 128 S. Ct. 1783, 1788-1789 (2008) (declining to read the ACCA’s reference to “the maximum term of imprisonment prescribed by law,” 18 U.S.C. 924(e)(2)(A)(ii), to mean “‘the maximum term of imprisonment prescribed by law’ for a defendant *with no prior convictions that trigger a recidivist enhancement*”); see also, e.g., *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008) (noting that the Court has generally “refused to adopt narrowing constructions” of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, “in order to make it conform to a preconceived notion of what Congress intended to prescribe”); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (read-

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<sup>7</sup> Petitioner contends (Pet. Br. 25-27) that no inferences can be drawn from the language of Section 922(g)(8)(C)(ii) because that provision was added to Section 922(g) in 1994, two years before Congress would enact the definition of “misdemeanor crime of domestic violence” for purposes of Section 922(g)(9). Although petitioner does not mention it, Section 922(g)(8)(C)(ii) was also enacted at a different time from the ACCA, which took its present form in 1986. See pp. 33-34, *infra*.

At a minimum, the language of Section 922(g)(8)(C)(ii) demonstrates that Congress knows how to limit the meaning of “physical force” when it wants to do so. Moreover, Section 922(g)(8)(C)(ii) was enacted at the same time as other provisions that used the generic use-of-force language without further qualification, suggesting that Congress did in fact act “intentionally and purposely” in attaching the bodily-injury qualifier to Section 922(g)(8)(C)(ii). *Russello*, 464 U.S. at 23 (internal quotation marks and citation omitted); see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c)(3), 108 Stat. 2014; see also, e.g., *id.* § 70001(2), 108 Stat. 1982 (18 U.S.C. 3559(c)(2)(F)(ii)); *id.* § 150001, 108 Stat. 2033 (18 U.S.C. 521(c)(2)).

ing the reference to “laws” in 42 U.S.C. 1983 to “mean[] what it says,” rather than being “limited to some subset of laws”). There is no reason for the Court to depart from its usual practice here.

**2. *The ACCA reaches crimes that pose an inherent risk of harm to persons, including those that do not themselves involve the deployment of injurious force***

In any event, petitioner’s proposal to add limiting words to the statutory reference to “physical force” rests on a fundamental misconception about the statutory context: It assumes that, in the ACCA, a “violent felony” must necessarily involve the use of “violent” and “injurious” force. See, *e.g.*, Pet. Br. 18, 26. The plain text of the ACCA shows that assumption to be false.

a. The concept of violence embodied in the ACCA, as the text of Subsection (ii) itself makes clear, is not limited to crimes that in themselves involve the use of potentially injurious physical force. Rather, in drafting the definition, Congress included both crimes that in themselves “create significant risks of bodily injury,” and other crimes that create “significant risks \* \* \* of *confrontation* that might result in bodily injury.” *James v. United States*, 550 U.S. 192, 199 (2007) (emphasis added). Burglary, for example, is a “violent felony” not because it necessarily involves the deployment of injurious force against another person—it does not, see *Taylor v. United States*, 495 U.S. 575, 596-597 (1990)—but because it creates a risk of confrontation that might result in injury, see *id.* at 588 (noting that Congress “singled out burglary” because it “often creates the possibility of a violent confrontation”); *James*, 550 U.S. at 203 (“The main risk of burglary arises not from the simple physical act of wrongfully entering onto another’s property, but rather

from the possibility of a face-to-face confrontation between the burglar and a third party.”).

Similarly, as this Court noted in *Chambers v. United States*, 129 S. Ct. 687 (2009), the question whether prison escape and related offenses qualify as “violent felon[ies]” turns not on whether those offenses themselves involve the deployment of potentially injurious force—again, they need not—but on the likelihood that the offender will “attack, or physically \* \* \* resist, an apprehender, thereby producing ‘a serious potential risk of physical injury.’” *Id.* at 692 (quoting 18 U.S.C. 924(e)(2)(B)(ii)).

b. Unlike burglary, for example, a completed battery offense typically does involve the deployment of potentially injurious force. See, e.g., *State v. Bagley*, 697 So. 2d 1246, 1246 (Fla. Dist. Ct. App. 1997) (conviction for battery, where defendant “hit [his girlfriend] about the body and face approximately nine times,” causing “severe swelling on the side of her face”); *Boroughs v. State*, 684 So. 2d 274, 275 (Fla. Dist. Ct. App. 1996) (convictions for battery and sexual battery, where defendant forced his girlfriend to perform a sexual act and during the act “punched her on the side of her head with his fist”; and later “struck and kicked [her] when he became angry at her for not doing the laundry,” causing “bruises about her body, including a black eye, bruises on her left arm, left leg and under her left breast”).

Although the “touching or striking” prong of Florida’s definition of battery does not, by its terms, require proof that the defendant’s conduct resulted in “bodily harm,” Fla. Stat. § 784.03(1)(a)(2) (2001), cases specifically prosecuted on a “touching or striking” theory demonstrate that the conduct proscribed by that provision is also likely to, and indeed often does, result in physical injury. See *Jomolla v. State*, 990 So. 2d 1234, 1237 (Fla. Dist. Ct.

App. 2008) (defendant convicted of “actually and intentionally touching or striking” the victim in violation of Section 784.03(1)(a)(1), where defendant punched the defendant in the face and hit him with a cane, “causing the cane to break and [the victim] to suffer a lesion requiring four stitches over his right eye”); *Byrd v. State*, 789 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 2001) (per curiam) (jury found defendant guilty of battery on a “touching or striking” theory, where, after an argument, defendant drove his car at his sister in an apparent attempt to run her over); see also *State v. Clyatt*, 976 So. 2d 1182, 1182-1183 (Fla. Dist. Ct. App. 2008) (defendant prosecuted for felony battery for “touching or striking” the victim, based on an incident in which the defendant was observed “beating [the victim’s] head against the car window; slapping and punching her in the face; grabbing her; and then choking her”).

c. As petitioner notes (Br. 40-41), there are a handful of reported cases in which defendants have been found guilty of the elements of Fla. Stat. § 784.03 for conduct that does not itself involve the deployment of injurious force. But contrary to petitioner’s suggestion (Br. 18), the mere existence of those cases does not mean that battery is overbroad such that it is not a categorically violent offense for ACCA purposes.

The unjustified application of physical force to another person, regardless of degree, has long been understood as a confrontational act associated with escalating violence. See, e.g., *Respublica v. Longchamps*, 1 U.S. (1 Dall.) 111, 114 (Pa. Oyer & Terminer 1784) (“[T]hough no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal difinition [sic] of Assault and Battery, and among gentlemen, too often induce duelling, and termi-

nate in murder.”); 1 Thomas Atkins Street, *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law* 6 (1906) (“The hostile hitting or touching, though it falls short of an actual hurt, is treated as a battery because it tends to provoke a quarrel and is in fact itself a breach of the peace.”). What has historically been true remains true today. Intentionally touching another person in an objectively offensive manner is a confrontational act that “may readily lead to an escalation of violence.” *Hays*, 526 F.3d at 683 (Ebel, J., dissenting).

The atypical applications of Florida’s generic definition of battery cited in petitioner’s brief (at 40-41) are consistent with that view. The defendant in *Spivey v. State*, 789 So. 2d 1087 (Fla. Dist. Ct. App. 2001), for example, did not merely “spit[] on another person,” but spat in the face of a law enforcement officer after fighting with him and knocking the night stick from his hand. *Id.* at 1088-1089; see also *C.B. v. State*, 979 So. 2d 391, 393, 395 (Fla. Dist. Ct. App. 2008) (juvenile spat in an officer’s face while “actively resist[ing]” the officer’s efforts to restrain and transport her); *Mohansingh v. State*, 824 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 2002) (defendant spat on officer preventing him from reentering nightclub to locate person who had earlier struck him, after growing “increasingly agitated, angry, and loud”). The juvenile in *S.D.W. v. State*, 746 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 1999) did not merely “ma[k]e contact” with a school official’s arm, see Pet. Br. 40; she pushed the restraining arms of the school official aside in an effort to enter a fight. 746 So. 2d at 1234. And the defendant in *Nash v. State*, 766 So. 2d 310 (Fla. Dist. Ct. App. 2000) did not merely brush past the victim’s “closely-held purse,” see Pet. Br. 41-42, but, after de-

manding the purse from the victim, reached into the victim's disabled vehicle and struggled with her for the purse until the purse was broken from its handles. 766 So. 2d at 310. In each case, the battery, though involving the use of noninjurious force, was committed in the midst of a volatile confrontation that could well have led to escalating violence and ultimately to injury.

d. In short, petitioner provides little reason to think that, even though Congress attached no modifiers to the term "physical force," it nevertheless intended to capture only some subset of crimes involving the use of "physical force" against another person. Cf. *Thiboutot*, 448 U.S. at 4. The Congress that enacted the ACCA could reasonably have concluded that any felony offense involving the use of physical force against other persons inherently poses sufficient potential for harm that it should categorically qualify as a "violent felony," regardless of the quantum of force involved.

***3. The ACCA's categorical approach classifies crimes based on the risks present in ordinary cases, not extraordinary cases***

Petitioner's argument (Br. 15-22) also fails because it rests on the premise that some narrowing construction of Section 924(e)(2)(B)(i) is needed to ensure that each and every factual offense, both actual and hypothetical, that could fall under that provision necessarily "presents a serious potential risk of physical injury." If, as petitioner posits, "battery \* \* \* can be committed merely by an unwanted tap on the shoulder," Br. 8, then, in petitioner's view, battery cannot categorically qualify as a "violent felony," and the definition of "violent felony" must be modified to exclude generic battery, as a formal categorical matter, from its scope.

That argument, too, rests on a fundamental misconception about the relevant statutory context. In the ACCA, Congress used “uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof.” *Taylor*, 495 U.S. at 590. The ACCA’s categorical approach necessarily focuses on “the ordinary case,” not hypothetical or extraordinary cases. *James*, 550 U.S. at 208. Petitioner errs in attempting to isolate potential means of committing an offense that do not pose a risk of violence, without any regard to the frequency of such cases in actual practice.

a. As an initial matter, petitioner’s argument falters because it rests largely on the “application of legal imagination to a state statute’s language,” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), rather than on evidence of how the Florida battery statute has been applied in practice.

Petitioner argues that Fla. Stat. § 784.03 could be applied to essentially harmless conduct, but makes no effort to “show that the statute was so applied in his own case.” *Duenas-Alvarez*, 549 U.S. at 193. Like others who have made similar arguments, petitioner does not dispute that his own battery conviction was based on anything other than an act of “[v]iolence and aggression,” nor does he dispute that his criminal conduct presented “a serious potential risk of physical injury” to his victim. Br. 15; see, e.g., *Flores*, 350 F.3d at 670 (“Now Flores did not tickle his wife with a feather during a domestic quarrel, causing her to stumble and bruise her arm. That would not have led to a prosecution, let alone to a year’s imprisonment. The police report shows that Flores attacked and beat his wife even though prior violence had led to an order barring him from having any contact with her.”);

*United States v. Belless*, 338 F.3d 1063, 1068-1069 (9th Cir. 2003) (“The record indicates that Belless was charged with conduct that was a violent act and not merely a rude or insolent touching.”); see also *Griffith*, 455 F.3d at 1341 (defendant argued that his Georgia simple battery conviction did not qualify as a “misdemeanor crime of domestic violence,” where the factual offense underlying the conviction involved “making ‘contact of an insulting and provoking nature’” by “‘hitting’” his wife “‘dragging her across the floor’”).

Moreover, petitioner does not point to “other cases in which the state courts in fact did apply” Florida’s battery statute to, for example, a person who tapped another on the shoulder. *Duenas-Alvarez*, 549 U.S. at 193. Petitioner instead relies on the Florida Supreme Court’s speculation that shoulder-tapping could constitute a battery. Br. 36 (citing *State v. Hearn*, 961 So. 2d 211, 219 (Fla. 2007)). Petitioner similarly relies on judicial speculation that a person could, for example, be convicted of battery for “throwing ‘a snowball, spitball, or paper airplane,’ or water at one’s spouse or domestic partner.” *Id.* at 21 (quoting *Hays*, 526 F.3d at 679).

Such imaginings should, however, be treated as such. For one thing, the law generally assumes consent to ordinary physical contact. See pp. 15-16, *supra*. Thus, although the court in *Hearn* speculated that a tap on the shoulder might give rise to a battery conviction, 961 So. 2d at 219, the law is generally to the contrary. See *Prosser* § 9, at 42 (noting that “a tap on the shoulder to attract attention” is not a battery); cf. *McDonald v. Ford*, 223 So. 2d 553, 554-555 (Fla. Dist. Ct. App. 1969) (concluding, in a civil tort case, that the defendant’s initial “laughing[] embrace[]” of the plaintiff, as distinguished

from her later struggle to free herself, resulting in injury, did not constitute an assault and battery).

In any event, as the courts themselves have recognized, criminal prosecution is not costless, and minor slights of the sort they have imagined are unlikely to give rise to criminal convictions. See *Flores*, 350 F.3d at 670; see also *id.* at 672 (Evans, J., concurring) (“[P]eople don’t get charged criminally for expending a newton of force against victims.”); *Hays*, 526 F.3d at 683 n.3 (Ebel, J., dissenting) (noting that “only incidents that were sufficiently severe to require police intervention and ultimately support a criminal prosecution and conviction” will lead to a prosecution under 18 U.S.C. 922(g)(9) for possessing a firearm after a “misdemeanor crime of domestic violence”).

Petitioner does, of course, point to decided cases in which Florida’s battery statute has been applied to conduct that does not involve the use of force capable of causing injury. Br. 40-42. But for the reasons explained above, see pp. 21-25, *supra*, a particular battery offense might not itself involve the use of potentially injurious force and yet carry a serious risk that the offender’s conduct will lead to a volatile and dangerous confrontation resulting in injury.

b. Even assuming, however, that there may be concrete instances in which a battery case may not involve a genuine risk of either injury or confrontation that might lead to injury, that does not mean that battery is a categorically nonviolent crime. As this Court explained in *James*, even the second clause of the ACCA definition, which explicitly requires that an offense “involve[] conduct that presents a serious potential risk of physical injury,” does not insist that “every conceivable factual offense covered by a statute must necessarily present a

serious potential risk of physical injury before the offense can be deemed a violent felony.” 550 U.S. at 208. As the Court noted:

One can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury—for example, an attempted murder where the gun, unbeknownst to the shooter, had no bullets. Or, to take an example from the offenses specifically enumerated in § 924(e)(2)(B)(ii), one could imagine an extortion scheme where an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments. In both cases, the risk of physical injury to another approaches zero. But that does not mean that the offenses of attempted murder or extortion are categorically nonviolent.

*Ibid.* (citation omitted); see also *id.* at 207 (imagining “a break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors”); *Taylor*, 495 U.S. at 597 (“Congress presumably realized that the word ‘burglary’ is commonly understood to include not only aggravated burglaries, but also run-of-the-mill burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force.”).

Each year Florida courts enter thousands of battery convictions under Fla. Stat. § 784.03.<sup>8</sup> Petitioner asks this Court to conclude, based on a handful of cases, real and imagined, that battery under Florida law is not a categorically “violent” crime, that it does not categori-

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<sup>8</sup> According to Florida’s Office of the State Courts Administrator, the Florida Offender Based Transaction System shows that approximately 6000 individuals were convicted under Fla. Stat. § 784.03 in Fiscal Year 2007-2008.

cally present a “serious potential risk of physical injury,” and that it therefore should not be considered to involve the use of “physical force” for purposes of Section 924(e)(2)(B)(i). Br. 16. That conclusion is not only “divorced from common sense,” *Flores*, 350 F.3d at 672 (Evans, J., concurring), but inconsistent with the statutory context of Section 924(e)(2)(B)(i).

***4. Petitioner’s proposed narrowing construction would unnecessarily cloud a clear statutory text***

Finally, petitioner’s proposed narrowing construction would convert the relatively straightforward, objective test for determining whether a crime qualifies as a “violent felony” under Subsection (i) of the ACCA definition into a decidedly more complex, qualitative inquiry consciously modeled on the inquiry prescribed by Subsection (ii) of that definition. See Br. 14-16 (citing *Begay*, 128 S. Ct. at 1585, 1586 (2008)). The inquiry whether a crime “involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. 924(e)(2)(B)(ii), as this Court has noted, “requires judges to make sometimes difficult evaluations,” *James*, 550 U.S. at 210 n.6. That difficulty is perhaps reflected in the number of Subsection (ii) cases that have recently come to this Court for resolution. See *Chambers, supra* (considering whether failure to report to prison qualifies as a “violent felony” under Subsection (ii)); *Begay, supra* (felony DUI); *James, supra* (attempted burglary). There is little reason to think that Congress would have intended that result.

Moreover, however formulated, petitioner’s proposal to limit the meaning of “physical force” to force exceeding a certain threshold would require courts to answer precisely the question that the law of battery has tradi-

tionally sought to avoid: How much physical force is enough? Cf. 3 *Blackstone* \*120 (“[T]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it.”).

Petitioner, evidently, would draw the line between a “touch” and a “strike.” See, e.g., Br. 10; cf. *Flores*, 350 F.3d at 672 (suggesting a “qualitative” distinction between “[a]n offensive touching” and “a punch”). But the line between intentionally and offensively “touch[ing]” another person and “strik[ing]” another person is hardly self-defining. Fla. Stat. § 784.03(1)(a)(1) (2001); see *Webster’s Second* 2676 (defining the verb “touch” as, *inter alia*, “[t]o hit or strike lightly”) (emphasis added); *id.* at 2496 (defining the verb “strike” as, *inter alia*, “[t]o touch or hit with some force”) (emphasis added). As Judge Ebel noted in *Hays*, “[o]nce we start down the slippery slope \* \* \* of qualifying what constitutes ‘physical force,’ our work will never be done.” 526 F.3d at 684 (Ebel, J., dissenting).

**C. Legislative History Provides No Support For Petitioner’s Reading Of Section 924(e)(2)(B)(i)**

Petitioner contends (Pet. 27-30) that the ACCA’s legislative history confirms that Congress did not intend to include felony battery within the compass of its definition of “violent felony.” Because the language of Section 924(e)(2)(B)(i) is clear and consistent with its statutory context, there “is no need for [the Court] to inquire beyond the plain language of the statute.” *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989). But to the extent that legislative history is relevant, it supports reading Section 924(e)(2)(B)(i) to mean what it says, rather than reading it, as petitioner urges, to exclude felony battery from its scope.

1. The ACCA was first enacted as Chapter 18 of the Comprehensive Crime Control Act of 1984 (CCCA), Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, which “broadly reformed the federal criminal code in such areas as sentencing, bail, and drug enforcement, and which added a variety of new violent and nonviolent offenses.” *Leocal*, 543 U.S. at 5. As originally written, the ACCA provided for enhanced sentencing for firearms violators with three prior convictions for burglary or robbery. 18 U.S.C. App. 1202 (1982 & Supp. III 1985) (repealed by Firearm Owners’ Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 459); see *Taylor*, 495 U.S. at 581-582.

In a separate provision of the CCCA, Congress provided a general definition of the term “crime of violence,” a term used in various provisions of the Act, and which has since been incorporated into several additional statutory provisions. CCCA § 1001(a), 98 Stat. 2136 (18 U.S.C. 16); see *Leocal*, 543 U.S. at 6-7 & n.4. That definition includes any offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” 18 U.S.C. 16(a), as well as any felony offense “that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense,” 18 U.S.C. 16(b).

In a report describing language that would ultimately be incorporated into the final legislation, the Senate Judiciary Committee explained that, while the second prong of that definition would include “felon[ies] \* \* \* such as burglary,” the first prong would include a “felony or a misdemeanor” offense such as “threatened or attempted simple assault or battery on another person.” S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (*1983 Sen-*

ate Report) (citing 18 U.S.C. 113(d) and (e) (1982), now codified as amended at 18 U.S.C. 113(a)(4) and (5)).<sup>9</sup>

2. Two years after the ACCA was first enacted, Congress amended the statute to broaden the range of predicate offenses for enhanced sentencing. Career Criminal Amendments Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39. The drafters of the legislation used the Section 16 definition of “crime of violence” as its template for a new definition of ACCA predicates. The first legislative proposal, introduced in the Senate by Senator Specter and in the House of Representatives by Representative Wyden, in fact used the term “crime of violence,” and defined the term in a manner identical to Section 16. S. 2312, 99th Cong., 2d Sess. (1986); H.R. 4639, 99th Cong., 2d Sess. (1986); see *Taylor*, 495 U.S. at 583. An alternative proposal, introduced in the House by Representatives Hughes and McCollum, employed a modified version of just the first prong of the Section 16 definition: “any State or Federal felony that

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<sup>9</sup> The two federal statutory provisions specifically cited in the 1983 Senate Report as falling within the first prong of the definition prohibited “[a]ssault by striking, beating, or wounding,” 18 U.S.C. 113(d) (1982), and “[s]imple assault,” 18 U.S.C. 113(e) (1982). Although Section 113 did not define “assault,” courts had previously held that other federal assault provisions reached noninjurious offensive touchings. See *United States v. Masel*, 563 F.2d 322, 323 (7th Cir. 1977) (interpreting 18 U.S.C. 351(e) (1970), which punishes any person who “assaults” certain high-ranking government officials, to reach spitting in the face of a United States Senator), cert. denied, 435 U.S. 927 (1978); *United States v. Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974) (concluding that spitting in the face of a USPS mail carrier, which led to a confrontation in which the defendant “knock[ed] him down, cutting his chin,” is a “forcible assault, or, more exactly, a battery falling within the statutory description ‘forcibly assaults, resists, opposes, impedes, intimidates, or interferes,’” 18 U.S.C. 111 (1970), because, “[a]lthough minor, it is an application of force to the body of the victim”).

has as an element the use, attempted use, or threatened use of physical force against the person of another.” H.R. 4768, 99th Cong., 2d Sess. (1986); see *Taylor*, 495 U.S. at 583.

At congressional hearings, both bills were criticized: the first as potentially too broad, the second as too narrow. *Taylor*, 495 U.S. at 584-586. A new bill emerged that defined the term violent felony to include a crime that:

(i) has as an element the use, attempted use, or threatened use of force against the person of another; or

(ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. 4885, 99th Cong., 2d Sess. § 2(b) (1986).

H.R. 4885 was favorably reported by the House Committee on the Judiciary. In its report on the legislation, the Committee explained that the definition in Subsection (i) “would include such felonies involving physical force against a person such as murder, rape, assault, robbery, etc.” H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986). In its section-by-section analysis, the Committee again explained that the definition of the term “violent felony” in subsection (i) “adds all State and Federal felonies (imprisonment for a term exceeding one year) involving physical force against a person (e.g., murder, rape, assault, robbery, etc.)” as predicate offenses under the bill. *Id.* at 4. The provision that ultimately became law, H.R. 5484, 99th Cong., 2d Sess. § 1402(b) (1986), amended H.R. 4885 by adding to Subsection (ii) specific references to burglary, arson, extortion, and explosives offenses. *Taylor*, 495 U.S. at 587; see 18 U.S.C. 924(e)(2)(B)(ii).

Thus, in the ACCA amendments, Congress patterned its definition of “violent felony” on the Section 16 definition, with two relevant modifications: (1) Congress limited the ACCA’s coverage to felonies only, rather than reaching both felonies and misdemeanors; and (2) Congress focused primarily on crimes involving the use of force against persons, rather than property. Congress did not, however, alter the use-of-force language borrowed from Section 16(a) that had been understood to cover “threatened or attempted simple assault or battery on another person.” *1983 Senate Report* 307 (footnotes omitted).

3. Petitioner argues (Br. 27-31) that remarks at the congressional hearings demonstrate that the Congress that enacted the ACCA did not intend to include battery, as traditionally defined, as a predicate offense. Petitioner is incorrect. While the congressional hearings point to certain concerns about the Section 16 definition of “crime of violence,” those concerns appear to have been largely limited to the questions whether to include misdemeanors and property crimes.

Petitioner cites a number of comments emphasizing the importance of expanding the class of ACCA predicates beyond robbery and burglary, to offenses such as rape or murder. Br. 28-30. But he cites nothing to suggest that Congress intended to *limit* the ACCA’s reach to rape and murder. Moreover, petitioner ignores evidence that legislators understood that even the narrower of the two legislative proposals would, at a minimum, cover the crime of “assault.” See *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 2* (1986) (*House Hearing*) (statement of Rep. Hughes) (“Our bill would

add \* \* \* felonies \* \* \* against a person—that is, murder, rape, assault, robbery, et cetera—as predicate offenses under the enhanced penalty provisions.”).

Petitioner also relies on comments concerning the importance of “prioritiz[ing] offenses” and avoiding including “garden variety local crimes” among the range of ACCA predicates. Br. 29 (brackets in original). But the comments to which he refers consist of a colloquy about what, if any, *property* crimes should be included among the predicate offenses. See *House Hearing* 11 (statement of Rep. Hughes) (“[G]iven the fact that we have got to be careful of our concept of federalism and prioritize, I wonder if you can just tell us, in your own words and generally, just why you would include as predicate offenses property crimes.”); *id.* at 12 (statement of Rep. Wyden) (“I certainly share your view, Mr. Chairman, that it certainly shouldn’t just be garden variety crimes against property. \* \* \* I realize that in drafting we have got to be very careful to make sure that we don’t open up a situation where just garden variety local crimes and property matters end up in the Federal courts.”). Those comments do not, however, indicate that the two legislators regarded any crime involving the use of force against a *person*, such as battery, as either a low-priority or a “garden variety” crime.

Finally, petitioner relies on the testimony of Deputy Assistant Attorney General James Knapp for the proposition that the language of the Hughes bill, which would ultimately be enacted as Section 924(e)(2)(B)(i), “would not cover misdemeanors against a person like simple assault or battery.” Br. 30 (quoting *House Hearing* 15). But the most natural reading of Knapp’s statement is that he understood the bill to exclude “misdemeanors \* \* \* like simple assault or battery” not because they

lack use-of-force elements, but rather because they are misdemeanors. And indeed, Knapp’s testimony indicates that he understood that the Wyden bill, which contained largely the same use-of-force language, *would* cover assault and battery. The difference between the two, as Knapp explained, was that, while H.R. 4639 “would expand the coverage of the act to provide for Federal jurisdiction over career drug, and violent offenders, and perhaps prior misdemeanors and property crimes,” *House Hearing* 15-16, H.R. 4768 would cover only “*felonies* involving the use of physical force against another person,” and not “misdemeanors against a person” or “felonies directed only against a person’s property,” *id.* at 15 (emphasis added).

**D. Petitioner’s Reading Of Section 924(e)(2)(B)(i) Could Unnaturally Constrict The Scope Of Statutory Provisions Designed To Reach Misdemeanor, As Well As Felony, Crimes Of Violence**

Petitioner’s proposed interpretation of Section 924(e)(2)(B)(i) not only conflicts with the terms of that provision, but could undermine enforcement of other federal laws—particularly laws targeting domestic violence—in a way that Congress could not have intended.

1. As the reported cases demonstrate, the interpretive question presented in this case has arisen primarily in cases involving other federal “crime of violence” definitions. Federal firearms laws make it a crime to possess a firearm or ammunition following a conviction for a “misdemeanor crime of domestic violence.” 18 U.S.C. 922(g)(9). Immigration law similarly makes a conviction for a “crime of domestic violence” a ground for deporta-

tion. 8 U.S.C. 1227(a)(2)(E).<sup>10</sup> The conflict of authority that petitioner asked this Court to resolve in his petition for a writ of certiorari largely concerns the meaning and application of those two provisions. See Pet. 18-21; *Hays*, 526 F.3d at 675 (interpreting the definition of “misdemeanor crime of domestic violence”); *Griffith*, 455 F.3d at 1340-1345 (same); *Belless*, 338 F.3d at 1065-1069 (same); *Nason*, 269 F.3d at 11-18 (same); *Smith*, 171 F.3d at 621 n.2 (8th Cir. 1999) (same); see also *Flores*, 350 F.3d at 668 (interpreting the definition of “crime of domestic violence”).

Like Subsection (i) of the ACCA definition of “violent felony,” both “misdemeanor crime[s] of domestic violence” and “crime[s] of domestic violence” are defined by reference to a use-of-force element. See 18 U.S.C. 921(a)(33)(A) (defining “misdemeanor crime of domestic violence,” for purposes of Section 922(g)(9), as a misdemeanor offense that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by” a person who has a specified domestic relationship with the victim); 8 U.S.C. 1227(a)(2)(E) (defining “crime of domestic violence” as a “crime of violence,” as defined in 18 U.S.C. 16, “against a person [and] committed by” a person who has a domestic relationship with the victim).

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<sup>10</sup> Section 922(g)(9) and Section 1227(a)(2)(E) were enacted simultaneously, as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. See Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, § 104(f) [§ 658(b)], 110 Stat. 3009-372; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 350(a), 110 Stat. 3009-639.

The primary differences between those domestic-violence definitions and the definition of “violent felony” in the ACCA are: (1) the domestic-violence definitions explicitly reach misdemeanors, 18 U.S.C. 921(a)(33)(A); see also 18 U.S.C. 16(a), and (2) insofar as they reach misdemeanors, both provisions define predicate offenses *solely* by reference to whether they have, “as an element,” “the use \* \* \* of physical force,” *ibid.*, and contain no residual provision similar to the ACCA’s provision for crimes that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. 16(a), 924(e)(2)(B)(ii). The crime of battery is ordinarily punished as a misdemeanor. See, *e.g.*, *LaFave* § 7.14, at 299-300; see also, *e.g.*, Fla. Stat. §§ 775.082(4)(a), 784.03(1)(b) (2001).

2. This Court previously addressed the meaning of the definition of “misdemeanor crime of domestic violence” in *United States v. Hayes*, 129 S. Ct. 1079 (2009). In that case, the Court rejected the respondent’s contention that a “misdemeanor crime of domestic violence” must have, as an element, a domestic relationship between the offender and the victim, citing both the plain language of the statute and the consequences of accepting the respondent’s proposed interpretation. *Id.* at 1087.

The Court explained that Congress had enacted Section 922(g)(9) as a supplement to the federal felon-in-possession law, 18 U.S.C. 922(g)(1), recognizing that “many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies,” but “are, at most, convicted of a misdemeanor.” 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg). To construe Section 922(g)(9) to apply only to crimes that designate a domestic relationship as an ele-

ment of the offense, the Court reasoned, “would frustrate Congress’ manifest purpose,” since, when Section 922(g)(9) was enacted, “only about one-third of the States had criminal statutes that specifically proscribed *domestic* violence,” and “[e]ven in those States, domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws.” *Hayes*, 129 S. Ct. at 1087. The Court considered it “highly improbable” that Congress intended for Section 922(g)(9) to become “‘a dead letter’ in some two-thirds of the States from the very moment of its enactment.” *Id.* at 1087-1088 (citation omitted).

3. Similar considerations weigh heavily against petitioner’s interpretation here. Much as in *Hayes*, petitioner’s interpretation, if accepted and extended to Section 922(g)(9) and other similar provisions, could undermine enforcement of federal domestic-violence laws in much of the country.

As the Court noted in *Hayes*, most “domestic abusers were (and are) routinely prosecuted” for assault or battery. 129 S. Ct. at 1087. About half of the States today (as when Section 922(g)(9) was enacted) define the crimes of assault or battery according to the common-law rule: as including both the causation of bodily harm and intentional causation of offensive physical contact. See App. B, *infra*, 6a-11a; cf. *LaFave* § 7.15, at 301. Even among the minority of States that had enacted criminal statutes specifically targeting domestic violence when Section 922(g)(9) was enacted, many had incorporated a definition of assault or battery that followed the common-law rule.<sup>11</sup>

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<sup>11</sup> See Cal. Penal Code § 243(e)(1) (West 1997); Idaho Code § 18-918 (Supp. 1996); 720 Ill. Comp. Stat. Ann. 5/12-3.2 (West Supp. 1996); Mich.

If, as petitioner posits, battery, as traditionally defined, does not have, as an element, “the use \* \* \* of physical force against the person of another”—a phrase common to both the ACCA and the firearms disability provision—then it is possible that relatively few misdemeanor domestic violence convictions will qualify as “misdemeanor crime[s] of domestic violence” for purposes of the Section 922(g)(9) firearm possession ban. See *Hays*, 526 F.3d at 675, 681 (concluding for this reason that the defendant’s misdemeanor conviction for assault and battery, based on domestic violence charges, did not qualify as a “misdemeanor crime of domestic violence”); *Belless*, 338 F.3d at 1065, 1067-1069 (similarly concluding that the defendant’s misdemeanor conviction for assault and battery on his wife, based on charges that he “grabb[ed] her chest/neck area and push[ed] her against her car in an angry manner,” did not qualify as a “misdemeanor crime of domestic violence”). Much the same is likely to be true of the domestic-violence provisions of immigration law. See *Flores*, 350 F.3d at 670, 672 (concluding that the alien’s conviction for misdemeanor battery, based on his “attack[ing] and beat[ing] his wife” in violation of a no-contact order, did not qualify as a deportable “crime of domestic violence” under 8 U.S.C. 1227(a)(2)(E) and 18 U.S.C. 16(a)). It is highly unlikely that Congress intended that incongruous result. See *Hayes*, 129 S. Ct. at 1088-1089; see also *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301-2302 (2009) (rejecting an interpretation of 8 U.S.C. 1101(a)(43)(M)(i) that would leave the provision with little application, doubting that

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Comp. Laws Ann. § 750.81(2)-(3) (West Supp. 1996); N.M. Stat. Ann. § 30-3-15 (1994); Okla. Stat. Ann. tit. 21 § 644(C) (West Supp. 1997); Va. Code Ann. § 18.2-57.2 (Michie Supp. 1996); W. Va. Code Ann. § 61-2-28 (Michie Supp. 1996); cf. App. B, *infra*, 6a-11a.

“Congress would have intended (M)(i) to apply in so limited and so haphazard a manner”); *Taylor*, 495 U.S. at 594 (declining to construe the ACCA’s reference to “burglary” as meaning “common-law burglary,” explaining that such a construction “would come close to nullifying that term’s effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition”).

4. Petitioner’s interpretation of the statute would leave open the possibility that the government could prove that a criminal defendant was convicted of a crime that involves the use of “physical force” that is “violent,” “aggressive,” and “likely to cause a serious potential risk of physical injury,” by relying on the modified categorical approach of *Shepard* and *Taylor*. Under that approach, the government could narrow a conviction under an assertedly overbroad battery statute by introducing charging documents, plea colloquies, or other comparable judicial records to establish that the defendant was, for example, convicted of “striking” and not “touching.” See Pet. Br. 10; *Shepard v. United States*, 544 U.S. 13, 16 (2005); *Taylor*, 495 U.S. at 602.

But to rely on the modified categorical approach to determine whether battery is a “violent felony,” a “misdemeanor crime of domestic violence,” or a “crime of domestic violence,” would effectively leave the proper classification of battery convictions to happenstance. In Florida, as elsewhere, charging documents generally track the language of the statute. See, e.g., *Jomolla*, 990 So. 2d at 1237 (information charged the defendant, who had struck the victim with a cane and thereby caused injury, with “actually and intentionally touching or striking” the victim); *Jenkins v. State*, 884 So. 2d 1014, 1019-1020 (Fla. Dist. Ct. App. 2004) (Ervin, J., concurring and

dissenting) (information charged the defendant with “intentionally touching or striking” the defendant, where the defendant rammed his car into a police officer), abrogated on other grounds by *Hearns, supra; Cox v. State*, 530 So. 2d 464, 465 (Fla. Dist. Ct. App. 1988) (information alleged that the defendant “did actually and intentionally touch or strike [a police officer],” based on incident in which the defendant struggled with officers as they tried to arrest him, both striking and injuring them); see also *Clyatt*, 976 So. 2d at 1182-1183 (defendant “was charged by information with felony battery pursuant to section 784.03(2), Florida Statutes (2007), for touching or striking [the victim] against her will,” based on an incident in which the defendant was observed “beating,” “slapping,” “punching,” “grabbing,” and “choking” the victim) (footnote omitted); cf. *Hamling v. United States*, 418 U.S. 87, 117 (1974) (“It is generally sufficient that an indictment set forth the offense in the words of the statute itself.”).

Jury instructions, too, generally do not require jurors to draw distinctions between different quanta of physical force. See, e.g., *Florida Standard Jury Instructions in Criminal Cases* 145 (visited Aug. 6, 2009) <[http://www.floridasupremecourt.org/jury\\_instructions/chapters/entireversion/onlinejuryinstructions.pdf](http://www.floridasupremecourt.org/jury_instructions/chapters/entireversion/onlinejuryinstructions.pdf)> (“To prove the crime of Battery, the State must prove the following element beyond a reasonable doubt: \* \* \* ‘[(Defendant) intentionally touched or struck (victim) against [his] [her] will.’”) (brackets in original; emphasis omitted). And plea colloquies, which are not always transcribed or otherwise available, may reflect—as did the colloquy in this case, J.A. 64—only that the defendant pleaded guilty to the offense as charged in the information or indictment. There is, in short, little reason to think that the modified categorical approach would provide an effective response

to the formal categorical exclusion of battery, as traditionally defined, from the reach of federal “crime of violence” definitions.

**E. The Florida Supreme Court’s Decision In *Hearns* Does Not Control The Federal Definition**

Finally, petitioner contends (Br. 34-43) that, in applying the ACCA’s use-of-force language to a Florida battery, this Court is “bound” by the Florida Supreme Court’s decision in *Hearns*, *supra*. That decision, however, did not define the elements of the state offense at issue in any way that conflicts with treating the Florida offense of felony battery as a “violent felony” under Section 924(e)(2)(B)(i).

1. In *Hearns*, the Florida Supreme Court considered whether battery on a law enforcement officer qualifies as a predicate for sentencing under Florida’s violent career criminal statute, Fla. Stat. § 775.084(1)(d) (2000), which applies to defendants with at least three convictions for certain specified offenses, as well as for any “forcible felony.” See *Hearns*, 961 So. 2d at 212-213. The term “forcible felony” is defined under state law as:

treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

Fla. Stat. § 776.08 (2000).

Because battery on a law enforcement officer is not one of the enumerated offenses, the Florida Supreme Court considered whether it falls under the catch-all pro-

vision for felonies that “involve[] the use or threat of physical force or violence against any individual.” Fla. Stat. § 776.08 (2000); *Hearns*, 961 So. 2d at 215. The court held that it does not. The court explained that battery on a law enforcement officer incorporates the general definition of battery in Fla. Stat. § 784.03, as a crime that “may be committed with only nominal contact.” *Hearns*, 961 So. 2d at 218-219. That crime, the court concluded, is not a “forcible felony” under Fla. Stat. § 776.08, for several reasons: (1) because, applying the canon of *ejusdem generis*, the “force” to which Section 776.08 refers should be interpreted as force “comparable to that of the enumerated felonies”; (2) because treating battery on a law enforcement officer as a “forcible felony” would create a disproportionate disparity in sentencing, since battery is ordinarily punishable only as a misdemeanor; and (3) because, applying the canon of *expressio unius est exclusio alterius*, the statute’s explicit inclusion of “aggravated battery” and “sexual battery” suggested an intent to exclude other forms of battery. *Id.* at 219-220.

2. Petitioner contends (Br. 34-43) that, because this Court is “bound by a state court’s construction of a state statute,” *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993), *Hearns* compels the conclusion that battery in violation of Fla. Stat. § 784.03 does not have a use-of-force element for purposes of the ACCA. 18 U.S.C. 924(e)(2)(B)(i). But insofar as the *Hearns* court interpreted the state statute at issue in this case—Fla. Stat. § 784.03, rather than Fla. Stat. § 776.08—the court merely confirmed that “any intentional touching against another person’s will is battery even if insufficient to injure.” J.A. 85 (citing *Hearns*, 961 So. 2d at 218-219). For all the reasons ex-

plained above, the offense, so understood, has a use-of-force element for purposes of federal law.

The aspect of *Hearns* on which petitioner relies is the Florida Supreme Court's construction of a *different* state statute, and one not at issue in this case: namely, the definition of "forcible felony" in Fla. Stat. § 776.08 (2000). That statute does, as petitioner notes (Br. 42), use language similar to Section 924(e)(2)(B)(i) in its catch-all provision for "any other felony which involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08 (2006). But there is no reason to think that the two statutory phrases must have the same meaning.

In this case, the reasoning of *Hearns* makes particularly clear that the meaning of the word "force" in Fla. Stat. § 776.08 does not correspond to the meaning of the term "physical force" in Section 924(e)(2)(B)(i). The court in *Hearns* did not, as petitioner contends (Br. 40), base its conclusion on the "ordinary and natural meaning of physical force." The court instead based its construction on inferences from the specific wording of Florida's "forcible felony" definition, which enumerated a number of crimes, including "sexual battery" and "aggravated battery," but did not include simple battery among them. See *Hearns*, 961 So. 2d at 219 (invoking the *eiusdem generis* canon); *ibid.* (invoking the *expressio unius* canon). The court in *Hearns* also reasoned that, as a practical matter, the state-law definition of "forcible felony" should not cover an offense ordinarily punished as a misdemeanor. *Ibid.*

By contrast to the state law at issue in *Hearns*, the first prong of the ACCA contains no list of enumerated offenses. And, in marked contrast to the Florida law, the language in the ACCA's definition of "violent felony" in

Section 924(e)(2)(B)(i) is used, in another statute, *specifically* for the purpose of covering crimes that are punished as misdemeanors. See 18 U.S.C. 921(a)(33)(A) (defining “misdemeanor crime of domestic violence”); see also 18 U.S.C. 16(a) (defining felony and misdemeanor “crime[s] of violence”). *Hearns*, in short, provides neither binding nor persuasive authority for petitioner’s restrictive reading of the phrase “has as an element the use \* \* \* of physical force against the person of another.” 18 U.S.C. 924(e)(2)(B)(i).

#### F. The Rule Of Lenity Does Not Apply

Petitioner (Br. 31-33) and his amicus (NACDL Br. 10-15) contend that the rule of lenity requires any remaining doubts about the meaning of Section 924(e)(2)(B)(i) to be resolved in favor of petitioner’s restrictive reading of the term “physical force.” “The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable.” *Smith v. United States*, 508 U.S. 223, 239 (1993). Rather, the rule of lenity applies only if there is a “grievous ambiguity” in the statutory text such that, “after seizing everything from which aid can be derived,” the Court “can make no more than a guess as to what Congress intended.” *Muscarello v. United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted); accord *Dean v. United States*, 129 S. Ct. 1849, 1856 (2009) (“The simple existence of some statutory ambiguity \* \* \* is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree.”) (quoting *Muscarello*, 524 U.S. at 138).

There is no such “grievous ambiguity” here. The statutory language, context, history, and purpose all confirm that battery, as defined by Florida law, qualifies as a

“violent felony” under Subsection (i) of the ACCA. Petitioner’s invocation (Br. 33) of policies of “fair notice” are particularly out of place here. A person who is convicted of felony battery hardly need speculate as to whether that offense qualifies as a “violent felony” under the ACCA. That conclusion is not only consistent with “common sense,” see *Flores*, 350 F.3d at 672 (Evans, J., concurring), but with the plain meaning of the statute as Congress wrote it.

**G. Even If Felony Battery Did Not Qualify As A “Violent Felony” Under The First Clause Of The ACCA Definition, It Would Qualify Under The Residual Provision Of The Second Clause**

For the reasons explained above, the court of appeals correctly concluded that petitioner’s conviction for felony battery in violation of Florida law qualifies as a “violent felony” because it “has as an element the use \* \* \* of physical force against the person of another.” 18 U.S.C. 924(e)(2)(B)(i). That judgment should be affirmed.

The district court, however, concluded that the statute qualified as a “violent felony” under *both* Subsection (i) of the ACCA definition and the residual provision of Subsection (ii). J.A. 47, 49. And, although the court of appeals rested its decision solely on Subsection (i), J.A. 82, both parties also briefed the Subsection (ii) question in that court. See Pet. C.A. Br. 12-19; Gov’t C.A. Br. 17-22.

Thus, if this Court were to accept petitioner’s interpretation of Section 924(e)(2)(B)(i) and determine that felony battery lacks a use-of-force element under that provision, the proper course would be to vacate the judgment and remand to allow the court below to consider whether felony battery qualifies as a “violent felony”

under the ACCA’s provision for a felony offense that “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. 924(e)(2)(B)(ii).

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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**APPENDIX A**

1. Section 784.03, Florida Statutes (2001) provides:

**Battery; felony battery—**

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

(b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(2) A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. For purposes of this subsection, “conviction” means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of nolo contendere is entered.

2. Section 924 of Title 18, United States Code, provides in pertinent part:

**Penalties**

\* \* \* \* \*

(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, com-

(1a)

mitted 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—

(A) the term “serious drug offense” means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

\* \* \* \* \*

3. Section 921 of Title 18, United States Code, provides in pertinent part:

**Definitions**

(a) As used in this chapter—

\* \* \* \* \*

(33)(A) Except as provided in subparagraph (C),<sup>2</sup> the term “misdemeanor crime of domestic violence” means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal<sup>3</sup> law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as

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<sup>2</sup> So in original. No subparagraph (C) has been enacted.

<sup>3</sup> So in original. Probably should not be capitalized.

a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent or guardian of the victim.

\* \* \* \* \*

4. Section 16 of Title 18, United States Code, provides:

**Crime of violence defined**

The term “crime of violence” means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

5. Section 1227 of Title 8, United States Code, provides in pertinent part:

**Deportable aliens**

(a) **Classes of deportable aliens**

\* \* \* \* \*

(2) **Criminal offenses**

\* \* \* \* \*

(E) **Crimes of domestic violence, stalking, or violation of protection order, crimes against children and**

**(i) Domestic violence, stalking, and child abuse**

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

\* \* \* \* \*

## APPENDIX B

## RELEVANT ASSAULT AND BATTERY LAWS

**United States:** 18 U.S.C. 113(a)(5) (setting out penalty for simple assault); *United States v. Delis*, 558 F.3d 177, 181-182 (2d Cir. 2009) (simple assault includes common-law battery); *id.* at 183 (citing cases).

**Arizona:** Ariz. Rev. Stat. Ann. § 13-1203(A) (West 2001) (“A person commits assault by,” *inter alia*, “[k]nowingly touching another person with the intent to injure, insult or provoke such person.”).

**California:** Cal. Penal Code § 242 (West 2008) (“A battery is any willful and unlawful use of force or violence upon the person of another.”); *People v. Pinholster*, 824 P.2d 571, 622 (Cal. 1992) (“[A]ny harmful or offensive touching constitutes an unlawful use of force or violence.”) (citation omitted).

**District of Columbia:** D.C. Code § 22-404(a) (2001) (setting out penalties for assault); *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990) (“[A]n assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.”).

**Florida:** Fla. Stat. § 784.03(1)(a) (2001) (“The offense of battery occurs when a person,” *inter alia*, “[i]ntentionally touches or strikes another person against the will of the other.”).

**Georgia:** Ga. Code Ann. § 16-5-23(a) (2007) (“A person commits the offense of simple battery when he or she,” *inter alia*, “[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another.”).

**Idaho:** Idaho Code Ann. § 18-903 (2004) (“A battery is,” *inter alia*, “[a]ctual, intentional and unlawful touching or striking of another person against the will of the other.”).

**Illinois:** 720 Ill. Comp. Stat. Ann. § 5/12-3(a) (West 2002) (“A person commits battery if he intentionally or knowingly without legal justification and by any means,” *inter alia*, “makes physical contact of an insulting or provoking nature with an individual.”).

**Indiana:** Ind. Code Ann. § 35-42-2-1(a) (LexisNexis Supp. 2007) (“A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery.”).

**Iowa:** Iowa Code Ann. § 708.1 (West 2003) (“A person commits an assault when, without justification, the person does,” *inter alia*, “[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.”).

**Kansas:** Kan. Stat. Ann. § 21-3412(a) (2007) (“Battery is,” *inter alia*, “intentionally causing physical contact with another person when done in a rude, insulting or angry manner.”).

**Louisiana:** La. Rev. Stat. Ann. § 14:33 (West 2007) (“Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.”); *State v. Schenck*, 513 So. 2d 1159, 1165 (La. 1987) (“An essential element of battery is ‘physical contact whether injurious or merely offensive.’”).

**Maine:** Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (West 2006) (“A person is guilty of assault if \* \* \* \* [t]he person intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another person.”).

**Maryland:** Md. Code Ann., Crim. Law § 3-203(a) (LexisNexis Supp. 2008) (“A person may not commit an assault.”); *id.* § 3-201(b) (“‘Assault’ means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.”); *Snowden v. State*, 583 A.2d 1056, 1059 (Md. 1991) (“Battery \* \* \* is the unlawful application of force to the person of another.”); *Kellum v. State*, 162 A.2d 473, 476 (Md. 1960) (“It is well settled that any unlawful force used against the person of another, no matter how slight, will constitute a battery.”).

**Massachusetts:** Mass. Gen. Laws Ann. ch. 265, § 13A(a) (West 2008) (setting out penalties for assault or assault and battery); *Commonwealth v. Campbell*, 226 N.E.2d 211, 218 (Mass. 1967) (“An assault and battery is the intentional and unjustified use of force upon the person of another, however slight.”).

**Michigan:** Mich. Comp. Laws Ann. § 750.81(1) (West 2004) (setting out penalties for assault or assault and battery) *People v. Nickens*, 685 N.W.2d 657, 661 (Mich. 2004) (“[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.”) (internal quotation marks and citation omitted).

**Missouri:** Mo. Ann. Stat. § 565.070(1) (West 1999) (“A person commits the crime of assault in the third degree if,” *inter alia*, “[t]he person knowingly causes physical

contact with another person knowing the other person will regard the contact as offensive or provocative.”).

**Montana:** Mont. Code Ann. § 45-5-201(1)(c) (2007) (“A person commits the offense of assault if the person,” *inter alia*, “purposely or knowingly makes physical contact of an insulting or provoking nature with any individual”).

**New Hampshire:** N.H. Rev. Stat. Ann. § 631:2-a(I) (West 2007) (“A person is guilty of simple assault if he,” *inter alia*, “[p]urposely or knowingly causes bodily injury or unprivileged physical contact to another.”).

**New Mexico:** N.M. Stat. § 30-3-4 (2004) (“Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.”).

**North Carolina:** N.C. Gen. Stat. § 14-33(a) (2007) (setting out penalty for simple assault or simple assault and battery); *State v. West*, 554 S.E.2d 837, 840 (N.C. Ct. App. 2001) (battery is “the unlawful application of force to the person of another by the aggressor himself, or by some substance which he puts in motion,” and “may be proved by evidence of any unlawful touching of [a] person”) (quoting *State v. Hefner*, 155 S.E. 879, 881 (N.C. 1930), and *State v. Sudderth*, 114 S.E. 828, 829 (N.C. 1922)).

**Oklahoma:** Okla. Stat. Ann. tit. 21, § 642 (West 2002) (“A battery is any willful and unlawful use of force or violence upon the person of another.”); *Steele v. State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989) (“[O]nly the slightest touching is necessary to constitute the ‘force or violence’ element of battery.”).

**Rhode Island:** R.I. Gen. Laws § 11-5-3(a) (2002) (setting out penalty for assault or battery); *State v. Coningford*, 901 A.2d 623, 630 (R.I. 2006) (battery “refers to an act that was intended to cause, and does cause, an offensive contact with or unconsented touching of or trauma upon the body of another”) (internal quotation marks and citation omitted.).

**South Carolina:** S.C. Code Ann. § 22-3-560(A) (West Supp. 2008) (setting out penalties for assault and battery); *State v. Mims*, 335 S.E.2d 237, 237 (S.C. 1985) (per curiam) (“Assault and battery is defined as ‘any touching of the person of an individual in a rude or angry manner, without justification.’”) (citation omitted).

**Tennessee:** Tenn. Code Ann. § 39-13-101(a)(3) (2003) (“A person commits assault who,” *inter alia*, “[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative”).

**Texas:** Tex. Penal Code Ann. § 22.01(a) (West Supp. 2008) (“A person commits [assault] if the person,” *inter alia*, “intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.”).

**Virginia:** Va. Code Ann. § 18.2-57(A) (LexisNexis 2009) (setting out penalty for simple assault or assault and battery); *Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927) (“A battery consists of the wilful or unlawful touching of the person of another by the assailant, or by some object set in motion by him.”).

**Washington:** Wash. Rev. Code Ann. § 9A.36.011 *et seq.* (West 2009) (setting out penalties for assault);

*State v. Stevens*, 143 P.3d 817, 821 (Wash. 2006) (courts apply common-law definition of assault; that definition includes, *inter alia*, “an unlawful touching with criminal intent”).

**West Virginia:** W. Va. Code Ann. § 61-2-9(c) (LexisNexis 2005) (defining battery as “unlawfully and intentionally mak[ing] physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally caus[ing] physical harm to another person”).

**Wyoming:** Wyo. Stat. Ann. § 6-2-501(b) (LexisNexis 2007) (“A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another.”), amended by 2009 Wyo. Sess. Laws ch. 124; 2009 Wyo. Sess. Laws ch. 124 § 1 (“A person is guilty of unlawful contact if he: (i) Touches another person in a rude, insolent or angry manner without intentionally using sufficient force to cause bodily injury to another; or (ii) Recklessly causes bodily injury to another person.”) (to be codified at Wyo. Stat. Ann. § 6-2-501(g)).