No. 08-6925

IN THE

Supreme Court of the United States

CURTIS DARNELL JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

BATTERY-BY-TOUCHING IS NOT A VIOLENT FELONY UNDER THE ARMED CAREER CRIMINAL ACT.

The issue here is whether Florida's offense of battery-by-touching is a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i) ("the physical force clause" or "clause (i)"), which requires the offense to have "as an element the use, attempted use, or threatened use of physical force against the person of another." Clause (i) defines one type of "violent felony" in the Armed Career Criminal Act ("ACCA"). In that context, the ordinary and natural meaning of "physical force" is force of a sort that is violent, aggressive, and likely to create a serious potential risk of physical injury. A battery that by statutory definition can be committed by an unwanted tap on the shoulder does not meet this definition.

The government nonetheless argues that clause (i) can be satisfied by the minimum amount of force which can exist. The government's argument fails to account for this Court's observation in *Taylor v. United States*, 495 U.S. 575, 588 (1990), that clause (i) applies only to "crimes actually involving violence against persons," fails to account for this Court's teachings in *Begay v. United States*, 128 S. Ct. 1581, 1586 (2008), that crimes committed in a "purposeful, violent, and aggressive manner" are "characteristic of the armed career criminal," and fails to account for the basic purposes of the statute: to distinguish violent felonies from less serious offenses and to punish harshly only those offenders convicted of violent felonies. The government's over-inclusive reading of clause (i) does more than just "blur the

distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). It "collaps[es] the distinction between violent and non-violent offenses[.]" *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003).

I. CLAUSE (i) OF THE "VIOLENT FELONY" DEFINITION REQUIRES VIOLENCE AND AGGRESSION LIKELY TO CREATE A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY.

A. The ordinary and natural meaning of "physical force" in the context of the ACCA requires violence and aggression likely to create a serious potential risk of physical injury.

1. The government acknowledges that physical force is "ordinarily" defined in terms of "actual violence." Respondent's Brief ("Resp. Br.") 13. It argues nonetheless that every intentional touching of another person qualifies as the use of physical force under clause (i) because touching involves "force" under the laws of physics – "even the slightest touch necessarily involves the use of some quantum of physical force."[1] Resp. Br. 16. The fundamental defect in this argument has been addressed by the well-reasoned majority of the circuits: physical force in a legal sense is not the same as force in a scientific, Newtonian sense. *See* Petitioner's Brief ("Pet. Br.") 18-22.

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[1] A "quantum" is defined in physics as the "minimum amount of a physical quantity which can exist." 12 *Oxford English Dictionary* 980 (2d ed. 1989).

Physical force in a statute defining "violent felony" means something more than the minimum amount of force which can exist in the scientific sense. In creating a category of violent felonies, Congress was not concerned with colliding quarks or tapped shoulders; it sought instead to punish aggressive, physical violence. The government's argument for the scientific definition fails to honor that distinction. As Judge Easterbrook explained:

> To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word "force" as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature – the sort that is intended to cause bodily injury, or at a minimum likely to do so.

Flores, 350 F.3d at 672.

The government's argument eliminates the distinction between the concepts of "physical force" and "physical contact," but gives no reason for collapsing the meaning of those distinct terms. *But see id*. Nor does the government mention that the term "physical contact" is found in other statutes, most notably *assault* statutes. *E.g.*, 18 U.S.C. § 111(a) (increasing penalty for assault "where such acts involve physical contact with the victim of that assault"); 18 U.S.C. § 115(b)(1)(B)(ii) (same). There would be no need for Congress to use the different terms if they had the same meaning. Had Congress intended to include as ACCA predicates all felonies that have as an element "physical contact" (or the threat or attempt of physical contact), it could have said just that. Conversely, had Congress intended that "physical force" include all physical contact, no matter how slight, there would have been no need to

use the term "physical contact" when § 111 was amended in 2008.

2. The government asserts that Mr. Johnson's argument "add[s] limiting words" in an "effort to rewrite the statute." Resp. Br. 9, 21; *see also* Resp. Br. 18, 25, 30. On the contrary, Mr. Johnson seeks only to give clause (i) its ordinary and natural meaning *in the context of the ACCA*. *Cf. Begay,* 128 S. Ct. at 1586-88 (interpreting the residual provision of clause (ii) of the "violent felony" definition to require "purposeful," "violent," and "aggressive" conduct). In this case, it is necessary to interpret clause (i) to ensure that the word "violent" is not read out of that clause of the "violent felony" definition. *See* Pet. Br. 22-27.

The government never acknowledges that "physical force" "must [be] read . . . in light of the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.); *see also Leocal*, 543 U.S. at 11. The government would instead have this Court read the term "physical force" in isolation, without reference to the term being defined or the context in which it is used. This Court does not read statutes that way. When interpreting a statute, this Court considers not only the bare meaning of the critical word or phrase, but also its purpose and placement in the statutory scheme. *Holloway v. United States*, 526 U.S. 1, 6 (1999); *see also Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009) ("statutes are not read as a collection of isolated phrases").

The purpose and placement of the physical force clause in the ACCA is crucial to understanding its meaning. The ACCA, which replaces the ten-year

statutory maximum for 18 U.S.C. § 922(g) offenses with a fifteen-year mandatory minimum, "focuses upon the special danger created when a particular type of offender – a violent criminal or drug trafficker – possesses a gun." *Begay*, 128 S. Ct. at 1587. The physical force clause is placed in the definitional portion of the ACCA. Its purpose there is to define "violent felony" and thus to ensure that the increased punishment reaches the intended offenders. Read in the context of the ACCA as a whole, then, the physical force clause is plainly intended to reach only those felonies that have as an element the use of physical force that is violent, aggressive and likely to create a serious potential risk of physical injury – as opposed to any felony that is committed by using force in the Newtonian physics sense, no matter how slight or non-violent that force is.

The purpose and placement of the physical force clause refute the government's claim that had Congress meant to include only violent crimes, it would have used the term "violent force" rather than physical force. Resp. Br. 18-19. Congress made its focus on violent crimes clear by choosing the term "violent felony" as the trigger for the enhanced punishment of the ACCA. That Congress did not define the term "violent felony" by merely repeating the word "violent" in the physical force clause is consistent with the age-old rule against using the term to be defined in the definition. *See* The National Archives, Federal Register, *Drafting Legal Documents*, No. 4[2] ("Do not include part or all of the term being defined in the text of your definition.");

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[2] *See* http://www.archives.gov/federal-register/write/legal-docs/definitions.html.

United States v. Bobadilla-Lopez, 954 F.2d 519, 525 n.3 (9th Cir. 1992) (Reinhardt, J., dissenting).

The government provides no explanation as to how a person convicted of a crime that can be committed by nothing more than spitting or an unwanted tap on the shoulder is "a violent criminal" more likely than other recidivists to deliberately use a gun. *See Begay*, 128 S. Ct. at 1587. The government's attempt to extend the term "physical force" to "the outer limits of its definitional possibilities" by construing it in isolation should be rejected as not in keeping with the plain meaning of that term in the context of the ACCA as a whole. *See Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006).

3. The government concedes that battery, under Florida law, does not *always* involve a risk of physical injury. *See* Resp. Br. 22, 23, 28. The government, however, attempts to fit non-injurious battery into clause (i) by arguing that the categorical approach and the definition of "violent felony" focus on the "ordinary" case and do not demand that every conceivable factual offense covered by the state battery statute present a serious risk of physical injury. Resp. Br. 25-30. Congress's use of the word "element" in clause (i) negates this argument.

Clause (i) requires that the "violent felony" have "as an element" the "use, attempted use, or threatened use of physical force." As the Department of Justice has recognized in the context of another statute containing the "as an element" language (18 U.S.C. § 921(a)(33)(A)), the application of such a statute "depends upon the 'element[s]' of the particular 'offense' of which the person was 'convicted.' That is, the prohibition turns on the *legal definition* of the predicate offense of conviction, not on the *actual conduct* that may have led to the conviction for that

offense." Office of Legal Counsel, U.S. Dept. of Justice, *When a Prior Conviction Qualifies As a "Misdemeanor Crime of Violence"* (May 17, 2007), 2007 WL 3125588, at *2. "This conclusion follows from a proper understanding of the key statutory term 'element.' Elements are the factual predicates of an offense that are specified by law and must be proved to secure a conviction." *Id.* (citing *Patterson v. New York,* 432 U.S. 197, 210 (1970); *Richardson v. United States,* 526 U.S. 813, 817 (1999); *Black's Law Dictionary* 538 (7th ed. 1999)). The categorical approach to clause (i) crimes, therefore, requires the use of physical force *in every conceivable case* before a conviction will qualify under that clause. *See, e.g.*, *United States v. Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) (*en banc*) ("If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element – implicit or explicit – of the crime."); *In re Sealed Case*, 548 F.3d 1085, 1091 (D.C. Cir. 2008) ("But by disputing only the *likelihood* – and not the *possibility* – that appellant pled guilty to a non-qualifying offense, the government essentially concedes the critical point. . . . After all, under *Shepard* [*v. United States*, 544 U.S. 13 (2005)], the question is not what appellant *probably* pled to, but what he *necessarily* pled to.").

The government's failure to acknowledge the element requirement of clause (i) is illustrated by its reliance on *Taylor v. United States*, 495 U.S. 575 (1990) (interpreting "burglary" in clause (ii) as requiring a generic definition of the crime), *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (ascribing a generic definition to "theft offense" under immigration laws), and *James v. United States*, 550 U.S. 192 (2007) (determining whether attempted

burglary fell within the residual provision of clause (ii)). Resp. Br. 26. Crucially, none of those cases interpreted clause (i) or any other statute requiring an offense to have "as an element" a given attribute. The government, in fact, cannot cite even one case that has taken its "ordinary case" approach to the element requirement in clause (i). By acknowledging that "a particular battery offense might not itself involve the use of potentially injurious force," Resp. Br. 28, the government concedes that battery-by-touching fails the "has as an element" test required for a prior conviction to qualify as a "violent felony" under clause (i).

4. The government admits that Congress intended the ACCA to reach crimes that "present a risk of injury" and that "[t]he concept of violence [is] embodied in the ACCA[.]" Resp. Br. 9, 21. Pointing to clause (ii), however, the government argues that the ACCA's concept of violence "is not limited to crimes that in themselves involve the use of potentially injurious physical force[,]" but includes "other crimes that create 'significant risks * * * of confrontation that might result in bodily injury.'" Resp. Br. 21 (quoting *James*, 550 U.S. at 199).

Although violence is, as the government observes, embodied in both clauses of the "violent felony" definition, the two clauses address different aspects and manifestations of violence. The government attempts to extend to a non-injurious touching the risk of injury present in clause (ii) crimes – the risk of confrontation that may lead to an escalation of violence. Resp. Br. 21-25. The plain reading of the statutory language and this Court's precedent establish that the potential risk of confrontation does not apply to clause (i).

The elements test of clause (i) focuses the violence inquiry solely on the conduct necessary to establish the elements of the offense. It asks whether those elements include physical violence. The elements test looks to the matters comprising the defendant's legal offense, and requires, as this Court observed in *Taylor,* that the offense be a crime "*actually involving violence* against persons." 495 U.S. at 588 (emphasis added). The violence must be an element of the offense; it must be present in every instance of the offense; it must be against a person; and it must be the defendant's act. By contrast, the confrontation/ escalation risk test embodied in clause (ii) looks to see if violence is a possibility and allows the violence to be a result of the act of a person other than the defendant. *See, e.g., id*. (noting that Congress singled out burglary because it "often creates the possibility of a violent confrontation"); *James,* 550 U.S. 199-200, 203-07 (recognizing that violence may come as result of the act of a victim or third party). Because of these differences between clause (i) and clause (ii), the confrontation/escalation underlying cases such as *Taylor* and *James* cannot be imported into clause (i).

This Court recognized the difference that Congress intended for the two clauses. It observed that, while the risk of injury in clause (ii) crimes is not necessarily the result of the use of force by the defendant – because that is not an element in clause (ii) crimes as it is in clause (i) crimes[3] – the risk of

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[3] As the Taylor Court stated,

> Congress thought that certain general categories of property crimes – namely burglary, arson, extortion, and the use of explosives – so often presented a risk of injury to persons, or were so often committed by career criminals, that they should be included in the enhancement statute *even though, considered solely in terms of their statutory elements, they do*

injury in clause (ii) crimes can be the result of "the possibility of a violent confrontation." *Taylor*, 495 U.S. at 588. There is no textual or structural justification for extending this theory of the risk of injury (the possibility of confrontation) to clause (i) crimes because clause (i) crimes, unlike clause (ii) crimes, must contain the statutory element of the use or threat of force against the person of another. Clause (i) crimes are thus necessarily crimes that *in themselves* involve the use of potentially injurious physical force.

5. Pointing to the presumption that Congress acts intentionally when including language in one part of a statute while omitting it from another part, the government seeks to rebut Mr. Johnson's position that the physical force in clause (i) must be likely to present a serious potential risk of injury by arguing that "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." Resp. Br. 19 (citing *Russello v. United States*, 464 U.S. 16 (1983)). But where, as here, there is a convincing alternative explanation for the difference in statutory language, the presumption carries little, if any, weight. *See, e.g.*, *Field v. Mans*, 516 U.S. 59, 67 (1995) ("Without more, the [negative] inference might be a helpful one. But [where] there is more . . . the negative pregnant argument should not be elevated to the level of interpretive trump card.").

When Congress created the current definition of "violent felony," it understood that the physical force

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not necessarily involve the use or threat of force against a person.

Id. at 597 (emphasis added).

clause would apply "to offenders who had actually been convicted of crimes of violence against persons." *Taylor*, 495 U.S. at 588. There was no doubt that these offenders' crimes would have involved conduct that presented "a serious potential risk of physical injury to another." *Cf. Begay*, 128 S. Ct. at 1585 ("A crime which has as an element the 'use, attempted use, or threatened use of physical force' against the person (as clause (i) specifies) is likely to create 'a serious potential risk of physical injury' and would seem to fall within the scope of clause (ii)."). There was thus no need to *explicitly* apply any limiting language to clause (i) – it was understood that those convicted under it would have committed crimes necessarily involving violence, which would necessarily involve conduct that presents a serious potential risk of physical injury to another.

When it came to clause (ii), however, there was a need for limiting language. "The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony." *Taylor*, 495 U.S. at 587. Congress did not intend that *all* frequently committed property crimes, crimes such as larceny and auto theft, count as predicate offenses for armed career criminal status. It only intended to include those property crimes with "inherent potential for harm to persons," *id.* at 588, and thus explicitly added the limiting language to clause (ii). *See* H.R. Rep. No. 99-849, at 3 (1986) (purpose of clause (ii) was to "add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person"). There is thus a convincing alternative explanation for the

difference in statutory language between the two clauses of § 924(e)(2)(B). *See Field*, 516 U.S. at 67-69.

Relying on the same presumption, the government argues that by expressly limiting the term "physical force" in 18 U.S.C. § 922(g)(8)(C)(ii) to that which "*would reasonably be expected to cause bodily injury*[,]" Congress's "fail[ure] to include a similar limitation in Subsection (i) of the ACCA suggests that no such limitation was intended." Resp. Br. 19-20. Convincing alternative explanations for the difference in the statutory language again overcome the government's attempt to rely on the negative pregnant inference. *See Field*, 516 U.S. at 67-69.

The amendment to the ACCA was enacted eight years before § 922(g)(8)(C)(ii), as part of a different act. Resp. Br. 20 n.7; *Russello*, 464 U.S. at 23 (applying the presumption to language in different sections "of the same Act"). The two acts also address different concerns. Specifically, clause (i) of the "violent felony" definition in the ACCA uses the term "physical force" to refer to the statutory elements of potential predicate crimes; § 922(g)(8)(C)(ii) uses the term to refer to actual conduct prohibited by a restraining order. A showing of irreparable harm is required for a restraining order. *See United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) (noting that when Congress was enacting § 922(g)(8), it was "legislat[ing] against the background of the almost universal rule of American law that for a temporary injunction to issue: There must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant . . . a strong threat of irreparable injury before trial is an adequate basis.") (internal quotation marks omitted). Congress could thus quite logically have incorporated that standard

into § 922(g)(8)(C)(ii) through use of the "reasonably be expected to cause bodily injury" language. The government has no counterpoint to this rational explanation of the choice of language in § 922(g)(8)(C)(ii), which was discussed in Mr. Johnson's initial brief. Pet. Br. 26.

Additionally, unlike "physical force" in the ACCA, that term in § 922(g)(8) is *not* part of a definition of a "violent felony." Section 922(g)(8) instead defines a class of persons who may not possess firearms – those subject to restraining orders that meet certain criteria – without *any* reference to "violence." Without such a limitation, the question – whether "physical force" in § 922(g)(8)(C)(ii) encompasses even the slightest touchings prohibited by Florida's battery statute – would be a closer one. But the qualification "reasonably be expected to cause bodily injury" accomplishes in § 922(g)(8)(C)(ii) what the word "violent" in the term "violent felony" accomplishes in § 924(e)(2)(B)(i): it limits "physical force" to that which creates a serious risk of injury. By the same token, adding an express injury limitation to § 924(e)(2)(B)(i) would serve little purpose, as the word "violent" already serves to limit "physical force" to that which is likely to create a serious potential risk of physical injury.

Given these alternative explanations, the presence of an express physical-injury limitation in § 922(g)(8)(C)(ii) does not support an inference that Congress intended for there to be no physical-injury limitation in the physical force clause.

6. Another significant flaw in the government's argument is its claim that "[t]he language of Section 924(e)(2)(B)(i) precisely tracks the general definition of the crime of battery." Resp. Br. 14. The government states that the general definition of

battery is "the unlawful application of force to the person of another." Resp. Br. 14 (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.15, at 301 (1st ed. 1986) ("LaFave")). The precise language of physical force clause, however, is that the offense must have as an element "the use, *attempted use, or threatened use* of physical force against the person of another." § 924(e)(2)(B)(i) (emphasis added).

The emphasized language points up a problem with the government's argument that occurs throughout its brief: it conveniently elides "the attempted use, or threatened use" language whenever it refers to the relevant statutory language. The elided language is critical. As little sense as it makes to speak of "touching" as constituting the use of physical force against the person of another in the context of a "violent felony" definition, it makes even less sense to speak of "attempting to touch" or "threatening to touch" in that same context. The government prefers the phrase "use of physical force" because that allows it to fashion an argument – however weak – that touching constitutes the use of physical force. The government makes no attempt to fashion an argument that "attempting to touch" or "threatening to touch" makes any sense in the context of the "violent felony" definition. As this Court has written, "when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9.

7. In any case, the government's discussion of the "general definition of battery," like its discussion of tort-law concepts of objectively offensive contacts, is a red herring. Resp. Br. 14-16, 27-28. The issue in the instant case is *not* whether the conduct for which Mr.

Johnson was convicted meets some "general" or tort-law battery definition. The issue is whether the slightest unwanted touch equates to the use, attempted use, or threatened use of physical force against the person of another as Congress used that phrase to define "violent felony" in the ACCA. The answer is that it does not.

B. Reading the physical force clause to require force that is violent, aggressive, and likely to create a serious potential risk of physical injury will not undermine other statutes.

1. Lacking sound legal bases for its arguments, the government turns to alarmist speculation that if battery-by-touching does not have as an element the actual, attempted, or threatened use of physical force, "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," which "*could* undermine enforcement of federal domestic-violence laws in much of the country" contrary to the *likely* intent of Congress. Resp. Br. 37-41 (emphasis added). This speculation also lacks a legal and factual foundation.

Section 922(g)(9) prohibits a person convicted of a misdemeanor crime of domestic violence from possessing a firearm. A misdemeanor crime of domestic violence "has, as an element, the use or attempted use of physical force" and is committed by a person with a specified domestic relationship with the victim. 18 U.S.C. § 921(a)(33)(A).

Just as a felony battery committed by touching is not a "violent felony," a misdemeanor battery-by-touching is not a "crime of domestic violence" because

neither contains *as an element* the use of physical force. The plain language of both statutes, as supported by Congressional intent, establishes that the statutes were meant to reach crimes that are categorically "violent," not crimes that can be committed by an unwanted (or rude or insolent) touch such as a tap on the shoulder or the pushing away of a pointed finger. *See United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008) (observing that "in the midst of an argument, a wife might angrily point her finger at her husband and he, in response, might swat it away with his hand. This touch . . . does not entail 'use of physical force' in anything other than an exceedingly technical and scientific way. . . ."), quoted in Pet. Br. 20-21.

The Congressional Record reveals that the purpose of § 922(g)(9) was to prevent "people who engage in serious spousal or child abuse" from having guns; the persons targeted by the statute were "those who commit family *violence*," and "*violent* individuals." 142 Cong. Rec. S8831, S8832 (July 25, 1996) (emphasis added); S9419, S9420 (Aug. 1, 1996), S9458, S9459, S9628 (Aug. 2, 1996); S10377, S10378 (Sept. 12, 1996); S11226, S11227 (Sept. 25, 1996); S11363 (Sept. 26, 1996); S11877 (Sept. 30, 1996); *see also id.* at S9458 ("beat your wife, lose your gun; abuse your child, lose your gun"). A review of the entire Congressional Record reflects that the bill's sponsor, Senator Lautenberg, never used the words "touch," "contact," "offensive," "rude," and "insolent" to describe the kind of conduct that would disqualify a person from possessing a firearm. The ephemeral touching at issue when the offense of battery-by-touching is considered as a categorical matter was never the object of the Lautenberg Amendment.

2. In fiscal year 2008, only eighty-two people were convicted under § 922(g)(9), compared to the 6,000-plus persons sentenced for the unlawful receipt, possession, or transportation of firearms or ammunition or prohibited transactions involving firearms or ammunition. *See* Appendix A-1 (United States Sentencing Commission, *2008 Sourcebook of Federal Sentencing Statistics*, datafile, FY2008, Table 17, U.S.S.G. § 2K2.1); Appendix A-2 (USSC monitoring dataset for FY2008, listing defendants with convictions recorded as 18922G9 with the variable NWSTAT1-5). The Sentencing Commission does not provide data on how many, if any, of these convictions were based on battery-by-touching predicates, as opposed to battery-by-striking or battery-by-causing-bodily-injury. But the fact that only eighty-two people were convicted under § 922(g)(9) in 2008 undermines the government's prediction of severe repercussions if battery-by-touching is not found to be a crime of violence.

Likewise, the government claims that 6,000 individuals were convicted under Fla. Stat. § 784.03 in the 2007-08 fiscal year. Resp. Br. 29 n.8. This number does not reveal how many of those convictions were obtained under the "causes bodily harm" or "strikes" provisions of § 784.03, as opposed to the "touches" provision. Its only relevance lies in the fact that in 2008, only ten persons were convicted under § 922(g)(9) in the entire Eleventh Circuit, which holds that touching is physical force for purposes of § 922(g)(9). Appendix A-2; *see United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006). Interestingly, in 2008, the Fourth, Ninth, and Tenth Circuits, which hold that touching is *not* physical force, each had about the same number of convictions under § 922(g)(9) as the Eleventh Circuit,

and each had more § 922(g)(9) convictions than the First Circuit, which, like the Eleventh Circuit, holds that touching is physical force. *See* Appendix A-2; Pet. Br. 20-26.

3. The government admits that it "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*." Resp. Br. 42. But the government asserts that the modified categorical approach is not effective because of the "happenstance" of state prosecutors' charging practices and the vagaries of state court record keeping practices. Resp. Br. 42-44. This same argument was made and rejected in *Shepard*. 495 U.S. at 22-23. As this Court explained:

> The Government's position . . . amounts to a call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State. But that limitation was the heart of the decision, and we cannot have *Taylor* and the Government's position both.
>
> There is not, however, any sufficient justification for upsetting precedent here. We are, after all, dealing with an issue of statutory interpretation, see, *e.g.*, *Taylor*, 495 U.S., at 602, 110 S.Ct. 2143, and the claim to adhere to case law is generally powerful once a decision has settled statutory meaning . . . .

Id. at 23.

4. The actual application of *Shepard* was demonstrated in *United States v. Robledo-Leyva*, 307 F. App'x 859 (5th Cir. 2009), where the court used the modified categorical approach to determine that appellant's prior Florida conviction for battery on a law enforcement officer was a "crime of violence." Noting that "the offense can be committed without the use or threatened use of physical force, *e.g.*, by touching," the court examined the charging document, which alleged that the battery was committed "by actually and intentionally touching or striking [the victim] against his will *by striking* [the victim] with an automobile." *Id*. at 862. Because appellant was "charged with only the act of striking the officer" and striking involves the use of force, the court concluded that "the offense as pared down under the modified categorical approach qualifies as a crime of violence." *Id*.

5. The government would have this Court believe that Mr. Johnson's construction of the physical force clause would exclude most batteries from the reach of federal "crime of violence" definition. *See, e.g.*, Resp. Br. 43-44. But by the government's own admission about half of the states limit battery to instances of physical injury. Resp. Br. 14. The government then selectively points to parts of statutes from the other states, Resp. Br. Appendix B, but neglects to mention that twenty-one of those statutes (including Florida's) have multiple sections, some of which can clearly be used to obtain convictions based on violent acts. *See* Reply Br. Appendix B (listing those statutes). And all jurisdictions have statutes that penalize "wife beaters" and "serious spousal abusers" who commit aggravated battery. LaFave, § 7.15(d), at 307.

Moreover, although the government briefly acknowledges that the Model Penal Code reflects the

modern approach of "limit[ing] battery to instances of physical injury" Resp. Br. 14 (citing LaFave § 7.15(a), at 302), the government ignores the import of the Code, as explained in LaFave. Model Penal Code § 211.1 covers only offenses causing "bodily injury," on the ground that "offensive touching is not sufficiently serious to be made criminal, except in the case of sexual assaults as provided" elsewhere in the Code. LaFave § 7.15(a) n.5, at 302 (quoting Model Penal Code § 211.1, Comment at 185 (1980)). LaFave explains:

> This is the prevailing view in those jurisdictions with new criminal codes, as reflected in the use of such statutory terms as "physical injury," "bodily injury," "bodily harm," "physical harm," "force or violence upon the person," or, occasionally, "serious bodily injury." A minority of these codes follow a much broader view, sometimes extending the crime to any touching or physical contact, but more often requiring that the contact be "offensive," "insulting or provoking," or done "in a rude, insolent, or angry manner."

LaFave § 7.15(a), at 302 (footnotes omitted).

The significance of the current national trend discussed in LaFave should not be lost. If, as the Model Penal Code states, "offensive touching is not sufficiently serious to be made criminal except in the case of sexual assaults as provided" elsewhere in the Code, then certainly *any touching* is not sufficiently serious to be made a predicate for a drastic ACCA enhancement.

C. The legislative history supports a finding that battery-by-touching is not a "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.'" Resp. Br. 31 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989)). Mr. Johnson agrees. As the preceding discussion establishes, the ordinary and natural meaning of the definition of "violent felony" contained in clause (i) of the ACCA requires violent, aggressive, injurious force. It is not necessary, therefore, to resort to the legislative history. In any event, that history supports Mr. Johnson's position that mere touchers are not violent felons within the meaning of the enhancement, and belies the government's position that Congress intended to use the enhancement as a dragnet to apply to all felons, violent or not.

The government points to the legislative history of 18 U.S.C. § 16(a), which referred to misdemeanor assault and battery. Resp. Br. 32-33. The government's reliance on this reference is misleading because battery has various definitions. *See* Appendix B; LaFave § 7.15. Congress did not explicitly define what type of battery it was referring to, but it was clear that it was referring to the category of offenses involving the "use, attempted use, or threatened use of physical force." It *never* mentioned battery-by-touching.

Although Congress employed the same use of physical force language in § 16(a) and clause (i) of the ACCA, the former allows for misdemeanors in its definition of crimes of violence, while the latter does not. This fact was emphasized during the

congressional hearings when Deputy Assistant Attorney General James Knapp testified on behalf of the United States Department of Justice that "[t]he bill would not cover misdemeanors against a person like *simple assault or battery* – that aspect we endorse. . . ." May 21, 1986 House Hearing[4] 15, 21 (emphasis added). This fact is important because the Florida battery statute at issue here is a simple battery statute. *See* Fla. Stat. § 784.03. Mr. Johnson was convicted of felony simple battery because of a prior misdemeanor simple battery conviction. The quantum of contact required for the conviction is the same for misdemeanor and felony simple battery – the slightest touch.

D. If any doubt remains, that doubt must be resolved in Mr. Johnson's favor.

The government asserts that "[a] person who is convicted of felony battery hardly need speculate as to whether that offense qualifies as a 'violent felony' under the ACCA." Resp. Br. 48. This assertion is wrong, as evidenced by the circuit split. *See* Pet. Br. 31-33. The Florida Supreme Court, moreover, has definitively stated that the Florida crime of battery-by-touching does not have as an element "the use or threat of physical force or violence against any individual." *State v. Hearns*, 961 So. 2d 211, 218-19 (Fla. 2007). It is thus impossible to imagine how anyone who is convicted of battery-by-touching in Florida would have fair warning that said offense would necessarily involve the degree of "physical force" needed to be considered a "violent felony." *See*

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[4] Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 99th Congress, 2nd Session, on H.R. 4639 and H.R. 4768 (Armed Career Criminal Legislation), May 21, 1986, Serial No. 96.

United States v. Lanier, 520 U.S. 259, 265 (1997) (noting that the rule of lenity is part of the Due Process "fair warning requirement" under which a person may be prosecuted only after being given "'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'") (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see also* Brief of Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Petitioner 4-6

II. FEDERAL COURTS ARE BOUND BY THE FLORIDA SUPREME COURT'S DETERMINATION THAT BATTERY-BY-TOUCHING DOES NOT CONTAIN AS AN ELEMENT THE USE OR THREAT OF PHYSICAL FORCE AGAINST THE PERSON OF ANOTHER.

The government does not dispute that a decision of a state's highest court construing the elements of a state crime is authoritative and binding on federal courts. *See* Resp. Br. 44-47. The Florida Supreme Court has, in *Hearns*, authoritatively decided that the element of "the use or threat of physical force or violence" against another person is not present in any felony battery conviction that may have been based on an unwanted touching, as proscribed by the misdemeanor battery statute. *Hearns*, 961 So. 2d at 218-19.

The government's discussion of *Hearns*, however, omits the actual holding of the Florida Supreme Court. That court applied a "statutory elements test" just like the one approved by this Court in *Taylor* and *Shepard* to determine if the crime of battery on a law enforcement officer contained as a necessary element the "use of physical force," that is, whether the use of physical force was always present in every way the

crime could be committed. *Id*. at 215 ("to be a forcible felony under section 776.08, the 'use or threat of physical force or violence' must be a *necessary element* of the crime. If an offense may be committed without the use or threat of physical force or violence, then it is not a forcible felony.").

Applying the statutory elements test, the Florida Supreme Court addressed various ways battery could be committed. "For example, tapping a law enforcement officer on the shoulder without consent would constitute a forcible felony. A child shooting a spitball at a school police officer would be guilty of a forcible felony." *Id*. at 219. The court's conclusion, and its actual holding, was that "such minor infractions are incompatible with the level of force the forcible felony statute contemplates." *Id*. The government's contention, Resp. Br. 46, that the decision in *Hearns* did not rest on the ordinary and natural meaning of physical force is simply wrong.

The government tries to assign other reasons for the holding in *Hearns*, but fails to note that those reasons are merely supportive of the actual holding. Resp. Br. 45; *see Hearns*, 961 So. 2d at 219 ("This reasoning is supported by the canon of statutory construction *ejusdem generis*"); *id*. ("We also note that simple battery is a misdemeanor offense"); *id*. ("We also note . . . the canon of statutory construction *expressio unius est exclusio alterius*"). The government thus never addresses the pertinent reasoning in *Hearns*, which is that a crime that can be committed by nominal "force" such as a tap on the shoulder or a spitball is simply not within the category of crimes that constitutes forcible (or violent) felonies.

Again trying to selectively parse a statute, the government claims 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)." Resp. Br. 46. The Florida statute, however, does not merely use the word "force." Instead, in the same manner that the ACCA defines "violent felony," the Florida statute defines "forcible felony" as one that "involves the use or threat of physical force or violence against any individual." Fla. Stat. § 776.08.[5] The government provides no explanation as to why the element of the "use or threat of physical force" found in § 776.08 should be construed any differently than the "use, attempted use, or threatened use of physical force" found in § 924(e)(2)(B)(i).

The government argues that *Hearns* is inapplicable because the Florida Supreme Court was construing its violent career criminal statute, not its battery statute. Resp. Br. 44-45. This, too, is incorrect. Just as the Court here is confronted with the issue of whether Mr. Johnson's prior battery conviction is a predicate for sentencing as an armed career criminal, the Florida Supreme Court was confronted with the issue of whether Mr. Hearns's prior battery conviction was a predicate for sentencing as a violent career criminal. Importantly, the Florida Supreme Court was, as this Court is now, faced with the issue of whether a conviction for battery in Florida always involves (has as an element) the use or threatened use of physical force against another person. The government has provided no reason for this Court to

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[5] The *Hearns* court explained that "involves" means the offense has to have the use or threat of physical force or violence as "a *necessary element* of the crime" to be considered a forcible felony. 961 So. 2d at 215. The government does not dispute that Florida applies the same elements test as the federal courts do when construing the physical force clause.

depart from the holding of the Florida Supreme Court that the offense of battery-by-touching does not contain as an element the use of physical force against another person.

III. REMAND IS NOT NECESSARY TO DETERMINE WHETHER MR. JOHNSON'S BATTERY-BY-TOUCHING CONVICTION QUALIFIES UNDER THE RESIDUAL PROVISION OF CLAUSE (ii).

The government asks in the alternative that the case be remanded for a determination of whether a violation of Florida's battery-by-touching statute qualifies as a violent felony under § 924(e)(2)(B)(ii). Resp. Br. 48-49. Such a remand is inappropriate for at least three reasons.

1. The Eleventh Circuit already addressed and disposed of the clause (ii) issue. As pointed out in Mr. Johnson's initial brief, the Eleventh Circuit agreed with Mr. Johnson that his prior conviction did not qualify as a violent felony under clause (ii). Pet. Br. 7. The court noted Mr. Johnson's argument that "felony battery under Florida law does not come within the definition of 'violent felony' that is contained in the ACCA, 18 U.S.C. § 924(e)(2)(B)." JA 82. After quoting clause (i), the court stated "[i]f battery under Florida law fits within that description, it is a violent crime for ACCA purposes; if not, then not." *Id*.

2. The government waived any right to raise a claim under clause (ii). The government did not seek clarification or rehearing of the Eleventh Circuit's decision. Nor did the government address clause (ii) in its brief in opposition to Mr. Johnson's certiorari petition.

3. A remand would also waste judicial resources. If this Court finds that by physical force Congress meant force of a violent sort, not the sort involved in a battery-by-touching, Mr. Johnson's battery conviction at issue herein would necessarily fail the clause (ii) test, which requires conduct that is purposeful, *violent*, and aggressive. *Begay*, 128 S. Ct. at 1586-87.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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