No. 16-860

In the Supreme Court of the United States

JAVIER ARELLANO HERNANDEZ, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be removed from the United States if (*inter alia*) he has been convicted of an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to include any "crime of violence," 8 U.S.C. 1101(a)(43)(F), which is separately defined to include "an 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).

The question presented is whether the California offense of "willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person," in violation of California Penal Code § 422 (West 1999), qualifies as a "crime of violence" under 18 U.S.C. 16(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-12a) is reported at 831 F.3d 1127. The decisions of the Board of Immigration Appeals (Pet. App. 13a-21a) and the immigration judge (Pet. App. 22a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2016. A petition for rehearing was denied on October 7, 2016 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 5, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be removed from the United States if he has been convicted of a

specified crime, including an "aggravated felony." See 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to encompass a variety of federal and state offenses. See 8 U.S.C. 1101(a)(43). Those offenses include a "crime of violence," as defined in 18 U.S.C. 16, for which the term of imprisonment is at least one year, see 8 U.S.C. 1101(a)(43)(F), and any "attempt or conspiracy to commit" a crime of violence, 8 U.S.C. 1101(a)(43)(U). Section 16, in turn, defines "crime of violence" to include an 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).

2. Petitioner is a native and citizen of Mexico and a lawful permanent resident of the United States. Pet. App. 23a. In 2009, petitioner was convicted in California of several offenses, including unlawful possession of drug paraphernalia and attempted criminal threats. *Id.* at 3a. The latter crime, codified at California Penal Code § 422 (West 1999), requires proof that the defendant (1) "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person"; (2) "with the specific intent that the statement * * * is to be taken as a threat"; (3) by means "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat"; and (4) "thereby cause[d] that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." *Ibid.*;[1] see Cal. Penal Code § 664 (West Supp. 2008)

[1] The current version of Section 422 is substantively identical to the version in force at the time petitioner committed his offense. See Cal. Penal Code § 422(a) (West Supp. 2017).

(providing criminal liability for attempts); *People* v. *Toledo*, 26 P.3d 1051, 1055 (Cal. 2001). Petitioner was sentenced to 365 days in county jail and three years of probation for that offense. Pet. App. 3a.

In 2010, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner. Pet. App. 3a, 23a; see Pet. 6. DHS alleged that petitioner was removable on two grounds: (1) that his conviction for possessing drug paraphernalia qualified as a "controlled substance" offense that rendered him removable under 8 U.S.C. 1227(a)(2)(B)(i); and (2) that his conviction for attempted criminal threats was a "crime of violence" and thus qualified as an "aggravated felony." Pet. App. 23a-24a.

Petitioner conceded that his drug paraphernalia conviction qualified as a "controlled substance" offense under the INA and that he was removable on that ground. Pet. App. 3a, 24a. He argued, however, that his conviction for attempted criminal threats was not an "aggravated felony." *Ibid.* Petitioner also requested discretionary cancellation of removal under 8 U.S.C. 1229b. Pet. App. 4a. That relief is available for certain lawful permanent residents who are removable from the United States but not for those who have been convicted of aggravated felonies. 8 U.S.C. 1229b(a)(3); see Pet. App. 26a.

3. An immigration judge ordered petitioner's removal, see Pet. App. 31a, and the Board of Immigration Appeals (Board) dismissed petitioner's appeal, *id.* at 13a-21a. The Board concluded that a violation of California's criminal threat statute is "categorically a crime of violence under 18 U.S.C. § 16(a) because it is an offense that has as an element the threatened use of physical force against the person or property of

another." *Id.* at 15a (ellipsis omitted) (quoting *Rosales-Rosales* v. *Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003)). The Board further held that an attempted criminal threat, as that offense has been interpreted by the California Supreme Court, likewise qualifies as a crime of violence. *Id.* at 16a-18a (citing *Toledo*, 26 P.3d at 1057); see *id.* at 18a (noting that "[t]he only difference" between a criminal threat and an attempted criminal threat is that, in the latter scenario, a "'fortuitous' act * * * prevents the threat from actually causing the threatened person to be in sustained fear for his safety; the threat of physical force, however, always remains as an element").

Because petitioner's offense resulted in a one-year jail sentence, Pet. App. 19a-21a, the Board concluded that it qualified as an aggravated felony and thus rendered petitioner ineligible for cancellation of removal, *id.* at 21a. The Board further noted that, even if petitioner were eligible for cancellation of removal, he would not warrant that relief "as a matter of discretion" because of his criminal history. *Ibid.*

4. The court of appeals denied a petition for review. Pet. App. 2a-12a. The court noted that it had consistently held, "based on the plain language of the statute," that the elements of California Penal Code § 422 (West 1999) "necessarily include a threatened use of physical force capable of causing physical pain or injury to another person." Pet. App. 6a (quoting *United States* v. *Villavicencio-Burruel*, 608 F.3d 556, 562 (9th Cir. 2010), cert. denied, 562 U.S. 1250 (2011)) (citation and internal quotation marks omitted). The court further concluded that "the 'attempt' portion of [petitioner's] conviction does not alter [that] determination," *id.* at 8a, because the INA specifically pro-

vides that an attempt to commit a qualifying offense is itself an aggravated felony, *id.* at 9a (citing 8 U.S.C. 1101(a)(43)(U)), and because "attempts to commit crimes of violence" are usually "themselves crimes of violence," *id.* at 8a-9a (quoting *United States* v. *Riley*, 183 F.3d 1155, 1160 (9th Cir. 1999), cert. denied, 528 U.S. 1174 (2000)). The court therefore held that petitioner's "conviction for attempted criminal threats is categorically a crime of violence" and thus qualifies as an "aggravated felony," rendering petitioner ineligible for cancellation of removal. *Id.* at 9a.

The court of appeals acknowledged that the Fourth and Fifth Circuits had held that a violation of Section 422 is not a "crime of violence" under provisions similar to 18 U.S.C. 16(a) because the elements of the offense could include threats to cause harm through "poison" rather than "force." Pet. App. 7a (citing *United States* v. *Torres-Miguel*, 701 F.3d 165, 168-169 (4th Cir. 2012); *United States* v. *Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (per curiam)). The court noted, however, that those decisions predated this Court's decision in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), which held that the "use of force" under a related statute includes poisoning and other indirect applications of force. Pet. App. 7a (quoting *Castleman*, 134 S. Ct. at 1415).[2]

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[2] Petitioner further argued that his sentence for attempted criminal threats was less than a year and did not satisfy the minimum sentence requirement for an aggravated felony under 8 U.S.C. 1101(a)(43)(F). See Pet. App. 11a. The court of appeals rejected that claim, see *id.* at 10a-12a, and petitioner does not renew it in his petition for a writ of certiorari.

ARGUMENT

Petitioner contends (Pet. 10-16) that a writ of certiorari is warranted to resolve a circuit conflict over whether California's criminal threats statute and other laws that encompass threats to cause bodily injury by indirect means categorically require the "use, attempted use, or threatened use of physical force" under 18 U.S.C. 16(a) and similar provisions. The decisions on which petitioner relies, however, largely predate this Court's decision in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), which holds that the "use of physical force" includes both the direct and indirect causation of physical harm. *Id.* at 1414-1415. This Court has repeatedly denied review of the same alleged circuit conflict in cases involving provisions similar to Section 16(a). See, *e.g.*, *McBride* v. *United States*, 137 S. Ct. 830 (2017) (No. 16-6475) (Sentencing Guidelines § 4B1.2(a)(1)); *Waters* v. *United States*, 137 S. Ct. 569 (2016) (No. 16-5727) (same); *Gill* v. *United States*, 137 S. Ct. 599 (2016) (No. 16-6601) (18 U.S.C. 924(c)(3)(A)); *Lindsey* v. *United States*, 137 S. Ct. 413 (2016) (No. 16-6266) (18 U.S.C. 924(e)(2)(B)(i)); *Schaffer* v. *United States*, 137 S. Ct. 410 (2016) (No. 16-6201) (same); *Rice* v. *United States*, 137 S. Ct. 59 (2016) (No. 15-9255) (Sentencing Guidelines §§ 2K2.1(a)(3), 4B1.2(a)(1)). The same result is appropriate here.[3]

1. Petitioner argues (Pet. 19-22) that his conviction for attempted criminal threats does not qualify as a "crime of violence" under 18 U.S.C. 16(a) because a threat to cause "death or great bodily injury," Cal. Penal Code § 422 (West 1999), need not involve a

[3] The question presented in this case is similar to that presented in *Jackson* v. *United States*, petition for cert. pending, No. 16-7204 (filed Dec. 8, 2016).

threat of direct physical force.[4] That assertion is foreclosed by this Court's decision in *Castleman*, *supra*, which holds that the use of physical force includes both the direct and indirect infliction of physical harm and thus "the knowing or intentional causation of bodily injury *necessarily* involves the use of physical force." 134 S. Ct. at 1414 (emphasis added). The court of appeals' decision is consistent with *Castleman* and does not warrant review.

a. *Castleman* considered whether the Tennessee offense of "intentionally and knowingly caus[ing] bodily injury" to the mother of one's child qualifies as a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). 134 S. Ct. at 1409 (citations omitted). Federal law defines a "misdemeanor crime of domestic violence" to include an offense that has as an element "the use * * * of physical force." 18 U.S.C. 921(a)(33)(A)(ii). The lower courts in *Castleman* had held that the Tennessee statute did not satisfy that definition for two "different reason[s]." 134 S. Ct. at 1409. The district court concluded that the offense did not require the "use" of physical force because a person could inflict harm indirectly, such as "by deceiving the victim into drinking a poisoned beverage." *Ibid.* (brackets, citation, and internal quotation marks omitted). The court of appeals held that the offense also did not require "force" because it could involve "a slight, nonserious physical injury" inflicted by offensive touching, rather than the "violent force" required under the Armed

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[4] Petitioner does not dispute the court of appeals' conclusion that, if Section 422 qualifies as a "crime of violence" and thus as an "aggravated felony," his conviction for attempting to violate that statute would also qualify. See Pet. App. 5a-6a, 9a; see also 8 U.S.C. 1101(a)(43)(U).

Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and similar statutes. *Castleman*, 134 S. Ct. at 1409-1410 (emphasis and citations omitted).

This Court rejected both of those rationales. First, the Court held that "force" in the domestic violence context need not be the sort of "violent" force required by the ACCA and similar statutes. *Castleman*, 134 S. Ct. at 1410-1413; see *Johnson* v. *United States*, 559 U.S. 133, 140 (2010) (defining "*violent* force" under the ACCA as "force capable of causing physical pain or injury to another person"). The Court explained that domestic violence often involves "[m]inor uses of force [that] may not constitute 'violence' in the generic sense," such as "a squeeze of the arm that causes a bruise," *Castleman*, 134 S. Ct. at 1412 (brackets and citation omitted), and that Congress presumably intended to include such offenses in the definition of a misdemeanor crime of domestic violence, *id.* at 1412-1413. In light of that holding, the Court "d[id] not decide" whether (as Justice Scalia had urged in his concurring opinion, *id.* at 1417) the types of injuries encompassed by the Tennessee statute at issue—such as a "cut, abrasion, bruise, [or] burn"—"necessitate violent force." *Id.* at 1414 (citation omitted).

Second, the Court held that the "use" of "physical" force requires the application of "force exerted by and through concrete bodies," as distinguished from "intellectual force or emotional force." *Castleman*, 134 S. Ct. at 1414 (quoting *Johnson*, 559 U.S. at 138). The Court determined that such force may be applied either directly through immediate physical contact with the victim, or indirectly by (for instance) shooting a gun in the victim's direction, administering poison, infecting the victim with a disease, or "resort[ing] to

some intangible substance" such as a laser beam. *Id.* at 1414-1415 (citation omitted). The Court reasoned that when, for example, a person "sprinkles poison in a victim's drink," he or she has used force because the "'use of force' in [that] example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm." *Id.* at 1415 (citation omitted; second set of brackets in original).

b. Petitioner contends (Pet. 20, 21-22) that *Castleman*'s holding concerning the direct and indirect use of force is limited to misdemeanor crimes of domestic violence. That argument is incorrect. As petitioner concedes (Pet. 5), the only issue the Court reserved in *Castleman* concerned the *amount* of force necessary in the domestic violence context: the Court "d[id] not decide" whether "seemingly minor act[s]" of domestic violence could qualify as "violent force" because it had held that violent force was not statutorily required in that context. 134 S. Ct. at 1412, 1414; see *id.* at 1417 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the statute requires "violent" force but that acts of domestic violence would qualify). That issue is not presented in this case. The government does not dispute that 18 U.S.C. 16(a), like the ACCA, requires "violent force." See *Johnson*, 559 U.S. at 140. And petitioner identifies no plausible way in which a threat to cause "death or great bodily injury," in violation of California Penal Code § 422 (West 1999), could be committed without a threat that violent physical force will be brought to bear against the

victim. See *Castleman*, 134 S. Ct. at 1414-1415; see also Pet. App. 6a.[5]

The Court made no similar distinction, however, about whether the "use" of "physical" force—violent or otherwise—includes both the direct and indirect causation of harm. To the contrary, the Court explained that including the indirect application of force was consistent with *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), which interpreted the "crime of violence" definition in 18 U.S.C. 16, because a person who causes harm indirectly has made physical force "the user's instrument," as *Leocal* required. *Castleman*, 134 S. Ct. at 1415 (citation omitted). And the examples of indirect force identified in *Castleman*—"administering a

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[5] Petitioner suggests (Pet. 21) that a defendant could be convicted under Section 422 for threatening to deprive vulnerable persons of care or to subject them to hazardous conditions. It is unclear whether Section 422 would apply to such threats, given that the statute requires that the threatened harm be "so unequivocal, unconditional, immediate, and specific" as to cause the victim to be in "sustained fear for his or her own safety or for his or her immediate family's safety." Cal. Penal Code § 422 (West 1999). If threats of the sort petitioner describes satisfied those elements, however, it would hardly be incongruous to treat them as threats of violent force. See *Castleman*, 134 S. Ct. at 1414-1415; see also *United States* v. *Pena*, 161 F. Supp. 3d 268, 282 (S.D.N.Y. 2016) ("If the defendant uses guile, deception, or omission to intentionally cause someone to be injured by physical force, then that would be the use of force as well.") (emphasis omitted). In any event, the possibility of a marginal case under Section 422 does not mean that the statute is categorically overbroad. See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1685 (2013) (holding that, in applying the categorical approach, "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute'" to nonqualifying conduct) (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

poison," "infecting with a disease," or "pulling the trigger on a gun," *id.* at 1414-1415 (citation omitted)—are inherently "capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140.

A contrary interpretation would lead to incongruous consequences. Many States define a range of crimes against the person, from simple assault to murder, by specifying a particular result (*e.g.*, causing "bodily injury" or "death"), without explicitly specifying the means by which an offender must have achieved that result. See, *e.g.*, Ala. Code § 13A-6-2(a)(1) (LexisNexis Supp. 2016) ("A person commits the crime of murder if * * * [w]ith intent to cause the death of another person, he or she causes the death of that person or of another person."); Alaska Stat. § 11.41.100(a)(1) (2016) (similar); Ariz. Rev. Stat. Ann. § 13-1105(A)(1) (2010) (similar); Colo. Rev. Stat. § 18-3-102(1)(a) (2016) (similar); Conn. Gen. Stat. Ann. § 53a-54a(a) (West Supp. 2017) (similar). Many such offenses can be committed by means of indirect uses of physical force, as well as by direct physical contact between the offender and the victim. See generally 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.2(c), at 433 (2d ed. 2003) ("While the method of producing an intentional death is usually some weapon in the hands of the murderer, * * * sometimes more subtle means are used."). Yet under petitioner's analysis, even murder would not have as an element the use of physical force because it can be accomplished through poisoning or by other indirect methods. Congress could not have intended such a result.

c. Petitioner notes (Pet. 14-16) that the Fourth and Fifth Circuits have held that Section 422 does not require the threatened use of physical force under pro-

visions similar to 18 U.S.C. 16(a). See *United States* v. *Torres-Miguel*, 701 F.3d 165, 168-169 (4th Cir. 2012); *United States* v. *Cruz-Rodriguez*, 625 F.3d 274, 276 (5th Cir. 2010) (per curiam). As the court of appeals explained, however, both decisions predate *Castleman* and rely on reasoning that *Castleman* rejected. Pet. App. 7a; see *Torres-Miguel*, 701 F.3d at 168-169 (concluding that a defendant could violate Section 422 "by threatening to poison another, which involves no use or threatened use of force"); *Cruz-Rodriguez*, 625 F.3d at 276 (same, adopting reasoning of *United States* v. *De La Rosa-Hernandez*, 264 Fed. Appx. 446 (5th Cir.) (per curiam), cert. denied, 553 U.S. 1012 (2008)). Neither circuit has reexamined California's criminal threats statute in light of *Castleman*. No reason exists to grant review in those circumstances.

2. Petitioner argues (Pet. 11-14) that review is also warranted to consider a circuit conflict over the more general question of whether statutes that make it a crime to cause bodily injury, including by indirect means, necessarily involve the use, attempted use, or threatened use of physical force. That conflict, like the more specific one concerning California Penal Code § 422 (West 1999), does not merit review.

a. All but two of the decisions on which petitioner relies predated *Castleman* and relied on the now-discredited notion that the indirect application of force, such as by poisoning, does not constitute the "use of physical force." See *Torres-Miguel*, 701 F.3d at 168-169; *United States* v. *Perez-Vargas*, 414 F.3d 1282, 1286 (10th Cir. 2005); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 194-195 (2d Cir. 2003). *Castleman* makes clear, however, that exclusion of indirect force reads "use of physical force" too narrowly, 134 S. Ct. at

1415, and it expressly concludes that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force," *id.* at 1414. *Castleman* thus abrogates lower court decisions adopting a different approach. See Pet. App. 7a; see also, *e.g.*, *United States* v. *Hill*, 832 F.3d 135, 144 (2d Cir. 2016) (finding that the reasoning in *Chrzanoski*, *supra*, was rejected by *Castleman* and concluding that a threat to cause harm indirectly constitutes the "threatened use of physical force" under 18 U.S.C. 924(c)(3)(A)); *United States* v. *Waters*, 823 F.3d 1062, 1065-1066 (7th Cir.), cert. denied, 137 S. Ct. 569 (2016); *United States* v. *Rice*, 813 F.3d 704, 705-706 (8th Cir.), cert. denied, 137 S. Ct. 59 (2016).

Petitioner cites two post-*Castleman* decisions that have reached a contrary result, but neither establishes a conflict that merits review. In *Whyte* v. *Lynch*, 807 F.3d 463 (2015), the First Circuit held that the definition of a "crime of violence" under 18 U.S.C. 16(a) excludes the indirect application of force. 807 F.3d at 469 (citing *Chrzanoski*, 327 F.3d at 196). But although *Whyte* cited *Castleman* in the course of explaining that Section 16(a) requires "violent force," *id.* at 470-471, it overlooked *Castleman*'s discussion of direct and indirect use of force. The government filed a petition for rehearing in which it argued that, under *Castleman*, causation of injury "not only involves physical force in some abstract sense, but also involves the *use* of physical force by the defendant himself even if the defendant's misconduct was limited to guile, deception, or deliberate omission." *Whyte* v. *Lynch*, 815 F.3d 92, 92 (1st Cir. 2016) (internal quotation marks omitted). The court of appeals denied rehearing on waiver grounds, noting that it had "never considered" wheth-

er *Castleman* abrogated prior decisions excluding the indirect use of force and stating that the government's waiver of that argument was "[f]or purposes of this case only." *Id.* at 92-93. *Whyte* does not, therefore, foreclose another panel of the First Circuit from deciding the question differently in a future case in which the issue is properly presented.

Petitioner's reliance on *United States* v. *Rodriguez-Rodriguez*, 775 F.3d 706 (5th Cir. 2015), is also misplaced. That case involved the definition of a "crime of violence" in the commentary to Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2014), which is similar to the definition in 18 U.S.C. 16(a). See Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2014).[6] The court construed that provision to exclude the indirect use of force based entirely on pre-*Castleman* precedent. 775 F.3d at 711-712 (citing, *inter alia*, *Cruz-Rodriguez*, 625 F.3d at 275-277). The court did not mention *Castleman*, nor did the parties cite *Castleman* in their briefs.[7] And the court ultimately held that any error in classifying the defendant's prior offense (a Texas stalking conviction) as a "crime of violence" under the Sentencing Guidelines was harmless because the district court had made it clear that the defendant's sen-

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[6] The commentary to the current version of Section 2L1.2 contains, in relevant part, the same "crime of violence" definition as the 2014 version. See Sentencing Guidelines § 2L1.2, comment. (n.2) (2016).

[7] The defendant filed his brief the day after *Castleman* was decided. See Def.'s C.A. Br., *Rodriguez-Rodriguez*, *supra* (No. 13-51021) (filed Mar. 27, 2014). The government's brief did not address whether the defendant's prior offense qualified as a crime of violence and argued only that any error was harmless. See Gov't C.A. Br. at 7-11, *Rodriguez-Rodriguez*, *supra* (No. 13-51021) (filed Apr. 25, 2014).

tence "would be the same with or without the Guidelines." *Id.* at 709 (brackets omitted); see *id.* at 712-713.

b. After petitioner filed his petition for a writ of certiorari, another panel of the Fifth Circuit concluded that the "crime of violence" definition in the commentary to Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2014) excludes indirect uses of force. *United States* v. *Rico-Mejia*, No. 16-50022, 2017 WL 568331, at *3 (Feb. 10, 2017) (per curiam). The panel construed *Castleman* to apply "only to crimes categorized as domestic violence" and stated that *Castleman* "does not disturb this court's precedent regarding the characterization of crimes of violence" outside that context. *Ibid.*

Although the reasoning of *Rico-Mejia* is inconsistent with the holdings of other courts of appeals following *Castleman*, the decision does not create a conflict that merits review. First, the panel's only explanation for limiting *Castleman* to domestic violence offenses was a brief reference to the Court's conclusion that, unlike in the ACCA and similar statutes, the term "force" in 18 U.S.C. 921(a)(33)(A)(ii) does not require "violent" force. *Rico-Mejia*, 2017 WL 568331, at *3. As explained above, that aspect of *Castleman*'s holding is distinct from the Court's conclusion that the use of physical force may be direct or indirect.

Second, the offense at issue in *Rico-Mejia* (terroristic threatening under Arkansas law) may not qualify as a "crime of violence" under the Sentencing Guidelines for another reason: the relevant definition of a "crime of violence" requires the use, attempted use, or threatened use of physical force against a "person,"

Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2014), whereas the Arkansas offense "includes property damage," 2017 WL 568331, at *2. That issue would not arise under Section 16(a), which defines a "crime of violence" to include "the use, attempted use, or threatened use of physical force against the person *or property* of another." 18 U.S.C. 16(a) (emphasis added). The government has filed a petition for rehearing in *Rico-Mejia*, asking the panel to amend its opinion to clarify that its holding is based on the Arkansas statute's inclusion of property damage and to delete its unnecessary language about *Castleman*. See Pet. for Reh'g at 3-10, *Rico-Mejia*, No. 16-50022 (5th Cir. Mar. 23, 2017). That petition is currently pending.

Third, *Rico-Mejia* concerns the interpretation of the Sentencing Guidelines and related commentary. This Court does not typically grant review to address alleged conflicts concerning the interpretation and application of the Guidelines because the Sentencing Commission can revise the Guidelines to eliminate a conflict or correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991).

No reason exists, therefore, to grant review in this case to resolve the disagreement between the recent decision in *Rico-Mejia* and other post-*Castleman* cases. *Rico-Mejia*'s cursory reasoning concerning a Sentencing Guidelines question, the presence of an alternative ground for the panel's judgment, and the pendency of the government's petition for rehearing leaves open the possibility that the Fifth Circuit will clarify, limit, or overrule *Rico-Mejia*'s discussion of *Castleman*.

The better approach is to await further development of that issue in the courts of appeals.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner contends (Pet. 22-23) that his drug paraphernalia conviction no longer qualifies as a ground of removal in light of *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015), which holds that a state conviction for possession of drug paraphernalia does not qualify as a "controlled substance" offense under 8 U.S.C. 1227(a)(2)(B)(i) unless "the elements that make up the state crime of conviction relate to a federally controlled substance." 135 S. Ct. at 1990. That issue is not presented here. Petitioner previously conceded that his drug paraphernalia conviction rendered him removable, Pet. App. 24a, and neither the Board nor the court of appeals addressed that issue. Petitioner asserts (Pet. 9) that the government conceded at oral argument in the court of appeals that removal based on his drug paraphernalia conviction is foreclosed by *Mellouli*, but the brief statement on which he relies did not specifically address that issue (which was not before the court) nor did it reflect a considered government position. If this Court were to hold that California's criminal threats statute is not an aggravated felony, the appropriate result would be a remand to permit further agency consideration of whether, under applicable law, the elements of petitioner's drug paraphernalia conviction related to a federally controlled substance.