No. 18-78

IN THE

Supreme Court of the United States

J. CRUZ RAMIREZ-BARAJAS,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

DANIEL OGINGA ONDUSO,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF OF PETITIONERS

David L. Wilson
Grace E. Fiddler
WILSON LAW GROUP
3019 Minnehaha Ave.
Minneapolis, MN 55406

Kelsi Brown Corkran
Counsel of Record
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
kcorkran@orrick.com

Counsel for Petitioners J. Cruz Ramirez-Barajas and Daniel Oginga Onduso
(Additional Counsel Listed on Inside Cover)

Benjamin Casper Sanchez
JAMES H. BINGER CENTER FOR NEW AMERICANS, UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455

Thomas M. Bondy
Hannah Garden-Monheit
Randall C. Smith
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

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INTRODUCTION

The government does not dispute that six courts of appeals have squarely addressed the question presented and evenly divided in answering it: The Seventh, Eighth, and Ninth Circuits hold that 18 U.S.C. § 16(a) applies to "bodily harm" offenses that do not require any use of physical force, and the First, Second, and Fifth Circuits hold that it does not.

The government nonetheless opposes review on the theory that *United States v. Castleman*, 572 U.S. 157 (2014), resolved the question presented in the government's favor when it held that the Domestic Violence Offender Gun Ban, 18 U.S.C. § 921(a)(33)(A), "includes both the direct and indirect causation of physical harm." BIO 11.

This theory fails first because the question presented does not turn on whether § 16(a) encompasses "indirect" uses of physical force. As Circuits on both sides of the split recognize, the question is whether § 16(a) applies where the underlying offense refers to bodily harm but does not require *any* use of force. These "bodily harm" offenses can be satisfied where the defendant does nothing more than speak—for example, telling the victim the street is clear to enter when in fact a car is coming. To the extent *Castleman* says anything relevant, it affirms that "physical force" means "force exerted by and through concrete bodies," and *does not* include this sort of "intellectual force." 572 U.S. at 170.

Second, *Castleman* applied a common-law interpretation of the phrase "use of physical force" that the

Court emphasized *does not extend* to § 16. *Id.* at 164 n.4. The Court's inclusion of "indirect force" crimes in the Domestic Violence Offender Gun Ban relied entirely on common law. The government offers no explanation for how that discussion could possibly resolve the question presented here when the Court specifically said that the common-law definition does not apply to § 16(a).

The government stretches even further when it suggests that the First and Second Circuit decisions answering the question presented have been overruled based on *Castleman*, and the Fifth Circuit decision "may soon" be too. As the Board of Immigration Appeals (BIA) explained in 2016—two years after *Castleman*—the split continues to foreclose a "nationwide rule" on the question presented; instead, divided "circuit law governs this issue unless the Supreme Court resolves the question." *In re Guzman-Polanco*, 26 I. & N. Dec. 806, 807-08 (BIA 2016). Indeed, in the four years since *Castleman*, the circuit split has deepened from 2-1 to 3-3. The government argues otherwise only by grasping at cases that are doubly inapplicable: they do not involve § 16(a) and they do not involve offenses that may be committed without any use of physical force.

The government makes no serious argument that the decisions below suffer from any vehicle problems. The government does not dispute the Minnesota statute at issue squarely raises the question presented—most significantly, there is a realistic probability that the Minnesota statute applies to conduct causing bodily injury without *any* use of physical force. The government does not dispute that in both cases the issue

was preserved and passed upon below. And it does not dispute that the question presented is significant and recurring.

The Court should grant review.

ARGUMENT

I. *Castleman* Did Not Resolve The Question Presented.

The government's main argument is that *Castleman* resolves the question presented because it holds that the term "physical force" in the Domestic Violence Offender Gun Ban "includes both the direct and indirect causation of physical harm." BIO 11. This argument lacks merit for two reasons.

First, the question presented does not turn on whether § 16(a) encompasses "indirect" uses of physical force. The question is whether § 16(a)'s force element is satisfied where the underlying offense refers to bodily harm but does not require *any* use of physical force. Indeed, the courts of appeals on both sides of the split recognize that the government's interpretation of § 16(a) sweeps in scenarios where an injury results from mental or emotional manipulation, without any use of physical force at all. *See, e.g.*, *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) (bodily injury could result from "telling the victim he can safely back his car out while knowing an approaching car … will hit the victim"); *De Leon Castellanos v. Holder*, 652 F.3d 762, 766 (7th Cir. 2011) (injury resulting from deception, trickery, or manipulation is as a "crime of violence" under § 16

because it involves a "fraud on the will of the victim equivalent to force").

Castleman's discussion of "direct" versus "indirect" uses of force never addressed such scenarios, and it certainly never embraced the metaphysical notion that injuries resulting from trickery or manipulation require "physical force" because "fraud on the will of the victim [is] equivalent to force." *De Leon Castellanos*, 652 F.3d at 766. On the contrary, *Castleman* reaffirmed *Johnson*'s holding that "physical force" means "'force exerted by and through concrete bodies,' *as opposed to* 'intellectual force or emotional force.'" 572 U.S. at 170 (quoting *Johnson v. United States*, 559 U.S. 133, 138 (2010) (emphasis added)). The government cannot be right that *Castleman* nonetheless resolves the circuit split over the question presented here.

Second, *Castleman* applied a common-law interpretation of the phrase "use of physical force" that the Court *explicitly declined to extend to § 16*. The question in *Castleman* was whether the phrase "use of physical force" in the Domestic Violence Offender Gun Ban encompasses all offensive touching, as it does under common law. 572 U.S. at 162-63. In deciding to apply common law, the Court acknowledged its interpretation departed from *Johnson*'s holding that "use of physical force" requires a "substantial degree of force." *Id.*

Fatal to the government's argument here, the Court explained this departure was driven by the distinctive statutory context of the Domestic Violence Offender Gun Ban, and did not extend any further. *Id.*

at 162-68. In particular, the Court noted that lower courts and the BIA have long relied on *Johnson* to interpret § 16, and emphasized that "[n]othing in [*Castleman*] casts doubt on these holdings." *Id.* at 164 n.4. The Court then further noted that, unlike the Domestic Violence Offender Gun Ban, which contains a specific definition for "misdemeanor crime of domestic violence," the Immigration and Nationality Act (INA) defines a "crime of domestic violence" by reference to § 16. *Id.* The Court emphasized that its adoption of the common-law definition for the "use of physical force" in *Castleman* "does not extend to a provision like" the INA "crime of domestic violence" provision, "which specifically defines 'domestic violence' by reference to a generic 'crime of violence'" and therefore "defines 'domestic violence' in more limited terms." *Id.*

The Court's inclusion of "indirect force" crimes in the Domestic Violence Offender Gun Ban relied entirely on common law: "That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter" because "the *common-law concept* of 'force' encompasses even its indirect application." *Id.* at 170-71 (emphasis added). Remarkably, the government offers no explanation for how this discussion of the common law definition of "use of physical force" could possibly resolve the question presented here when the Court specifically said that definition does not apply to § 16(a). There is no explanation—the government is simply wrong.

II. The Circuit Split Over The Question Presented Has Deepened From 2-1 To 3-3 Since *Castleman*.

The government does not dispute that the six court of appeals decisions identified by the petition squarely address the question presented and divide evenly, with the Seventh, Eighth and Ninth Circuits holding that § 16(a) applies to "bodily harm" offenses that do not require any use of force, and the First, Second, and Fifth Circuits holding that it does not. Instead, the government argues that the First and Second Circuit decisions have been overruled post-*Castleman*, and that the Fifth Circuit decision "may soon" be too.

Tellingly, the BIA itself has rejected the government's argument that *Castleman* resolves the split. In 2016—two years after *Castleman*—the BIA explained that the split continues to foreclose a "nationwide rule" on the question presented; instead, divided "circuit law governs this issue unless the Supreme Court resolves the question." *Guzman-Polanco*, 26 I. & N. Dec. at 807-08. Indeed, in the four years since *Castleman*, the split has deepened from 2-1 to 3-3. *See* Pet. 12-16. The government argues otherwise only by grasping at cases that are doubly inapplicable: they do not involve § 16(a) and they do not involve offenses requiring no use of force.

First Circuit. As the petition explains, a year after *Castleman*, the First Circuit answered the question presented in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015). Like the Minnesota statute here, the Connecticut statute in *Whyte* applied to conduct resulting

in physical injury, without requiring any use of force. *Id.* at 469. And, just like here, there was a "realistic probability" the statute would be applied in the absence of any force—e.g., "'telling the victim he can safely back his car out" even though another car is approaching. *Id.* (quoting *Villegas-Hernandez*, 468 F.3d at 879). Accordingly, the First Circuit concluded—contrary to the Eighth Circuit's decisions here—that the "use of force" element was unsatisfied. In so holding, the court of appeals discussed *Castleman* at length, explaining that the Domestic Violence Offender Gun Ban and § 16(a) "serve different purposes and are doing different work." *Id.* at 471. In particular, the First Circuit noted *Castleman*'s observation that the former incorporates common law while §16(a) does not.[1] *Id.*

[1] The government petitioned for rehearing in *Whyte*, arguing that "even if the defendant's misconduct was limited to guile, deception, or deliberate omission," it still involved physical force "in some abstract sense." *Whyte v. Lynch*, 815 F.3d 92 (1st Cir. 2016). The court denied the petition, explaining the government waived this argument by not raising it earlier. *Id.* The government correctly declines to argue here that this rehearing order renders the *Whyte* decision non-precedential in any way. Although the First Circuit has subsequently cited the *Whyte* rehearing order as a basis for allowing the government to make the argument it waived in *Whyte*, it has never suggested any disagreement with the *Whyte* decision. *See United States v. Edwards*, 857 F.3d 420, 426 n.11 (1st Cir. 2017); *Lassend v. United States*, 898 F.3d 115, 126 (1st Cir. 2018). The BIA likewise recognizes that *Whyte* is "binding [First Circuit] precedent" on the question presented. *Guzman-Polanco*, 26 I. & N. Dec. at 807-08.

The government argues the First Circuit overruled *Whyte* in *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017), and *United States v. Ellison*, 866 F.3d 32 (1st Cir. 2017). Neither opinion says anything of the sort. *Edwards* is an ACCA case and it explicitly declines to reach whether "*Castleman*'s physical-force analysis applies equally to ACCA's physical-force requirement." 857 F.3d at 426 (explaining there was no realistic probability that the state felony at issue—armed assault with intent to murder—could be committed without any use of force). *Ellison* is a Sentencing Guidelines case that does not even mention *Whyte*, and again involved an underlying felony—federal bank robbery—where there was no realistic probability of conviction without any use of physical force. *See* 866 F.3d at 38.

The notion that the First Circuit silently overruled *Whyte* in either of these opinions is baseless. Indeed, just three months ago the First Circuit reaffirmed its holding in *Whyte* that *Castleman*'s reasoning does not extend beyond the Domestic Violence Offender Gun Ban. *Lassend*, 898 F.3d at 126.

Second Circuit. In *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003), the Second Circuit held that § 16(a) does not apply to a Connecticut assault statute (the same one at issue in *Whyte* and essentially identical to the one here) criminalizing conduct causing bodily injury, with no use of force required. The government argues that two subsequent Second Circuit decisions overrule this holding, but again the government relies on cases involving different statutory schemes and different issues.

In *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018), the Second Circuit addressed the same federal robbery offense as the First Circuit in *Ellison*, concluding that it qualified as a crime of violence under ACCA. In so holding, the court explained that *Chrzanoski* was inapposite because the offense required taking property from the victim, and accordingly there was no possibility that it could be committed without using physical force. *Id*. at 59-60. Similarly, in *Villanueva v. United States*, 893 F.3d 123 (2d Cir. 2018), the Second Circuit rejected the defendant's reliance on *Chrzanoski* because the underlying offense required seriously injuring someone "by means of a deadly weapon," which necessarily involves physical force. *Id*. at 127-30.

Both opinions also observe that to the extent *Chrzanoski* suggested the kind of force required by these statutes—taking property and causing serious injury by means of a deadly weapon—is insufficient to establish a "crime of violence" under ACCA, that language was abrogated by *Castleman*. As Judge Pooler explained in dissent in *Villanueva*, that reasoning is almost certainly wrong "[g]iven that *Castleman* explicitly confined its application to [the] specific setting" of the Domestic Violence Gun Offender Ban. 893 F.3d at 133. More importantly, however, neither *Hill* nor *Villanueva* cast any doubt on *Chrzanoski*'s vitality regarding the question presented here: whether § 16(a) applies to a "bodily harm" statutes that require no use of physical force. Indeed, when recently confronted with such a statute, the Southern District of New York flatly rejected the government's argument that *Chrzanoski* no longer controlled. *United States v. Brown*, 322 F. Supp. 3d 459, 462-63

(S.D.N.Y. 2018). And the Second Circuit itself has applied *Chrzanoski* to such statutes post-*Castleman*. *Welch*, 641 F. App'x 37, 42 (2d Cir. 2016) (applying *Chrzanoski* to state offense that "could be accomplished by 'causing physical injury' without using physical force").

Fifth Circuit. Finally, the government argues the Fifth Circuit "may soon" switch sides in the circuit split because it granted rehearing en banc in *United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. 2018). But *Reyes-Contreras* does not raise the question presented here—first because it's a Sentencing Guidelines case, and second because the issue is whether "assisting in self-murder" entails force "against another person" where, for example, the defendant simply "help[ed] her gather the things [the victim] needed to commit suicide." Appellant's Supplemental Brief Upon Rehearing En Banc 5, 11-12 (emphasis in original). *Castleman*'s application to that dispute in the context of the Sentencing Guidelines is irrelevant to whether Congress intended § 16(a) to apply to the "bodily harm" statutes underlying the circuit split here, where the government does not dispute there is a realistic probability these statutes cover conduct involving no physical force at all.

III. These Cases Are The Ideal Vehicle For Resolving The Question Presented.

The government's cursory argument that these cases are not a "suitable vehicle for this Court's review" is most revealing in what it does not say. The government does not dispute the Minnesota statute

at issue squarely raises the question presented—most significantly, the government does not disagree that there is a realistic probability the statute applies to conduct causing bodily injury without *any* use of physical force. *See* Pet. 20-24. Nor does the government dispute that in both cases the issue was preserved and passed upon below.

Instead, the government suggests that "petitioners may be statutorily ineligible for cancellation" based on "independent ground[s]" unrelated to their misdemeanor convictions. BIO 15. In neither case, however, did these alleged independent grounds form any part of the BIA's or the Immigration Judge's decisions, which rested exclusively on the prior conviction. Nor did the Eighth Circuit ever address these supposed independent grounds. The government's bare speculation that the BIA might have reached the same decision for some other reason does not represent a "vehicle problem."[2]

Finally, while the government contends that this Court "has recently and repeatedly denied review of the same alleged circuit conflict," the cases it cites do not support that argument. Virtually none of these

[2] The government correctly makes no suggestion that the Court decline review because of its pending decision in *Stokeling v. United States*, No. 17-5554. *Stokeling* involves an entirely separate circuit split, with no overlap across the cases. In the event, however, that the Court anticipates its decision in *Stokeling* will cast doubt on the Eighth Circuit's holdings below, petitioners respectfully request that the Court vacate and remand to the Eighth Circuit for reconsideration.

cases involved § 16(a). Several sought review of conflicts over the Sentencing Guidelines,[3] which this Court does not resolve. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). Several others involved statutes that—unlike the Minnesota statute here—specifically require that injury be caused by "the unlawful touching or application of force," or contain similar language.[4] Indeed, four of the government's cases involve the same Florida statute, which specifically applies where a person "(a) [a]ctually and intentionally touches or strikes another person against the will of the other; and (b) [c]auses great bodily harm, permanent disability, or permanent disfigurement." Fla. Stat. § 784.041(1).[5] Those cases obviously provided unsuitable vehicles for resolving the question presented here, which arises when a state statute refers to "bodily harm" but says nothing about how the harm is caused.

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[3] *Solis-Alonzo v. United States,* cert. denied, No. 17-8703 (Oct. 1, 2018); *Hughes v. United States*, cert. denied, 138 S. Ct. 2649 (2018) (No. 17-7420); *Vail-Bailon v. United States*, cert. denied, 138 S. Ct. 2620 (2018) (No. 17-7151).

[4] *Rodriguez v. United States*, cert. denied, No. 17-8881 (Oct. 1, 2018); *see also Griffin v. United States*, cert. denied, No. 17-8260 (Oct. 1, 2018).

[5] *Gathers v. United States*, cert. denied, 138 S. Ct. 2622 (2018) (No. 17-7299); *Green v. United States*, cert. denied, 138 S. Ct. 2620 (2018) (No. 17-7299); *Robinson v. United States*, cert. denied, 138 S. Ct. 2620 (2018) (No. 17-7188); *Vail-Bailon v. United States*, cert. denied, 138 S. Ct. 2620 (2018 (No. 17-7151).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

David L. Wilson
Grace E. Fiddler
WILSON LAW GROUP
3019 Minnehaha Ave.
Minneapolis, MN 55406

Kelsi Brown Corkran
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400
kcorkran@orrick.com

Benjamin Casper Sanchez
JAMES H. BINGER CENTER FOR NEW AMERICANS, UNIVERSITY OF MINNESOTA LAW SCHOOL
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455

Thomas M. Bondy
Hannah Garden-Monheit
Randall C. Smith
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

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