No. 14-2357

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANTHONY MCKAY WHYTE,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT DEFENSE PROJECT, BOSTON COLLEGE POST-DEPORTATION HUMAN RIGHTS PROJECT, MASSACHUSETTS LAW REFORM INSTITUTE, AND POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT IN SUPPORT OF THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* National Immigration Project of the National Lawyers Guild, Immigrant Defense Project, Boston College Post-Deportation Human Rights Project, Massachusetts Law Reform Institute, and Political Asylum/Immigration Representation Project state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations.

Pursuant to Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND STATEMENT OF *AMICI CURIAE*

Under Federal Rule of Appellate Procedure 29(b), the National Immigration Project of the National Lawyers Guild, Immigrant Defense Project, Boston College Post-Deportation Human Rights Project, Massachusetts Law Reform Institute, and Political Asylum/Immigration Representation Project respectfully submit this brief to assist the Court in determining whether the misdemeanor offense of assault in the third degree, under Conn. Gen. Stat. Ann. § 53a-61(a)(1), qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F).[1] The question is both one of first impression and one of great significance for noncitizens facing removal.

In 2002, the Board of Immigration Appeals (BIA or Board), in a divided published opinion, held that Connecticut assault in the third degree is a crime of violence under 18 U.S.C. § 16(a), and therefore an aggravated felony. *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). Rather than determining whether the state offense contained the statutorily-required element of force, the Board in *Martin* divined that force was an "inherent" element of the offense—implicit in the statute's requirement of the intentional causation of injury. *Id*. at 498. A year later, the Second Circuit Court of Appeals rejected *Matter of Martin* and held that a conviction under section 53a-61(a)(1) is not a crime of violence because the statute

[1] *Amici's* briefing is limited to this one issue.

lacked the necessary "element" of "use of force." *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003).

In Petitioner's case, the Board, rather than follow Supreme Court and Second Circuit precedent, chose to adhere to its original flawed and rejected caselaw. Administrative Record (R.) 5. Specifically, the Board below applied *Matter of Martin* to find that Petitioner's Connecticut conviction for assault in the third degree was a crime of violence under 18 U.S.C. § 16(a). *Id*. Not only does *Matter of Martin* clash with *Chrzanoski*, but a decade of subsequent Supreme Court precedent analyzing crimes of violence undermines it. *See United States v. Castleman*, 134 S. Ct. 1405, 1410-12 (2014); *Johnson v. United States*, 559 U.S. 133, 140 (2010); *Leocal v. Ashcroft* 543 U.S. 1, 10 (2004). In particular, the Supreme Court in *Leocal v. Ashcroft* distinguished the "risk of injury" from the "use of physical force" under 18 U.S.C. § 16, which the Board conflated in *Matter of Martin*. 543 U.S. at 10.

Moreover, in 2010, the Supreme Court defined "physical force" as "violent force" – force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. at 140. The Board has applied this requirement of "violent force" to 18 U.S.C. § 16(a). *Matter of Velasquez*, 25 I&N Dec. 278, 282-83 (BIA 2010). Contrary to the Supreme Court's requirement of force "capable of causing physical pain or injury," the Connecticut statute is satisfied

merely by causing *any* bodily "impairment," however minor. Because the government has not established that a minor impairment sufficient to fulfill the Connecticut statute satisfies the Supreme Court's definition of force, it has failed to meet its burden of proving that the offense is a categorical match under the approach recently reaffirmed in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), and *Descamps v. United States*, 133 S. Ct. 2276 (2013).

In its misguided application of the categorical approach in Petitioner's case, the Board both wrongly construed 18 U.S.C. § 16(a) and ignored the breadth of the Connecticut statute. *Amici* submit this brief to urge the Court to reverse this incorrect designation of Connecticut assault in the third degree as an aggravated felony. This Court should correct the Board's mistake, and thereby prevent similarly situated petitioners from facing mandatory banishment.

Amici are non-profit organizations with a direct interest in assuring that the rules governing classification of criminal convictions for immigration purposes are fair and predictable and give noncitizen defendants the benefit of their plea bargains. The National Immigration Project of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The Immigrant Defense Project is a non-profit legal resource and training center

dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. The Post-Deportation Human Rights Project is a legal advocacy project that aims to conceptualize the new field of post-deportation law, not only by providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members, but also through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Massachusetts Law Reform Institute is a statewide legal services support center that provides advocacy, training, information, and other legal assistance on issues of broad systemic impact that affect low-income immigrants, including issues that relate to the intersection between criminal and immigration law and to the procedural rights of immigrants. The Political Asylum/Immigration Representation Project (PAIR) is a non-profit organization in Boston and the leading provider of *pro bono* legal services to indigent asylum-seekers in Massachusetts and immigrants detained in Massachusetts, including detainees charged as removable for crimes of violence.

ARGUMENT

I. CONNECTICUT ASSAULT IN THE THIRD DEGREE IS NOT A CRIME OF VIOLENCE UNDER 18 U.S.C. § 16(a).

This case boils down to a single question: Does Connecticut assault in the third degree contain an element of use of violent "physical force," as required by 18 U.S.C. § 16(a), the generic definition of the federal ground of deportability?

Because the elements of the Connecticut statute do not match the generic definition of a crime of violence under 18 U.S.C. § 16(a), this Court should find that Petitioner's conviction is not an aggravated felony.

A. Connecticut Assault In The Third Degree Is Not A Crime Of Violence Under 18 U.S.C. § 16(a) Because It Does Not Contain the Element of "Use of Force."

1. Connecticut assault in the third degree lacks the requisite element of "use of force."

When determining whether a particular offense qualifies as a crime of violence under 18 U.S.C. § 16(a), this Court applies the categorical approach. *See United States v. Fish*, 758 F.3d 1, 5 (1st Cir. 2014); *Kaufmann v. Holder*, 759 F.3d 6 (1st Cir. 2014). Under the categorical approach, the factfinder "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).

This approach requires two basic steps. First, the adjudicator must look at the statute defining the criminal offense to determine the *minimum* conduct it covers. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (requiring "presum[ption] that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense") (internal citations omitted). Next, the adjudicator compares that minimum conduct to the generic definition in the federal statute. *Id*.

Only when the state statute, at its minimum, necessarily and in every case satisfies the generic definition in the federal statute is that conviction a "categorical match."[2] *Id*.

A crime of violence under 18 U.S.C. § 16(a) "requires that a predicate offense have 'as an *element* the use, attempted use, or threatened use of physical force against the person or property of another.'" *Fish*, 758 F.3d at 9 (quoting 18 U.S.C. § 16(a)) (emphasis added). Based on the "plain language" of this definition, the Second Circuit in *Chrzanoski* held that the "use of force must be an *element* of the offense for that offense to be a crime of violence under section 16(a)." 327 F.3d at 191 (emphasis added). *See also Singh v. Ashcroft*, 386 F.3d 1228, 1231 (9th Cir. 2004) (stating that, for purposes of § 16(a), an "element" is a constituent part of the predicate offense that must be proven in every case to sustain a conviction); *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003) (emphasizing that when classifying an offense under § 16(a) "the inquiry begins and ends with the elements of the crime"); *Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) ("[Section] 16(a) is narrowly drawn to include only crimes whose elements require the 'use, attempted use, or threatened use of physical force.'").

[2] Where the statute of conviction defines more than one crime and at least one of those crimes comes within the removal ground, courts may employ a "modified categorical approach," and consult a limited class of documents to identify the offense of conviction for comparison. *Moncrieffe*, 133 S. Ct. at 1684. Neither the parties nor the Board, however, have suggested that the statute at question is "divisible." The modified categorical approach therefore plays no role here.

The Supreme Court has repeatedly given the term "element" a specific meaning. As the Court recently reaffirmed in *Descamps*, "elements" are facts a jury must find "unanimously and beyond a reasonable doubt." 133 S. Ct. 2276, 2288 (2013) (citing to *Richardson v. United States*, 526 U.S. 813, 817 (1999)). *See also United States v. O'Brien*, 560 U.S. 218, 224 (2010) ("Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt."); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). The Board, of course, has followed these precedents, recently holding that "an offense's 'elements' are those facts about the crime which '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find ... unanimously and beyond a reasonable doubt.'" *Matter of Chairez-Castrejon*, 26 I&N Dec. 478, 480 (BIA 2015) (quoting *Descamps*,133 S. Ct. at 2288).

The high Court has also specifically defined the terms in 18 U.S.C. § 16 here at issue. The Court has defined "use" as "active employment." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). And "physical force," the Court has explained, means "violent force." *Johnson v. United States*, 559 U.S. 133, 140 (2010). To meet Congress's clear criteria in 18 U.S.C. § 16, the elements of a state statute must include violent force being intentionally and actively used, i.e., actively employed by the offender. Conversely, if it is possible to commit the state-law offense

without "using physical force," that offense necessarily cannot have, "as an element, the use or attempted use of physical force."

The statute at issue here, Conn. Gen. Stat. Ann. § 53a-61(a)(1), lacks the requisite element of use of physical force. Specifically, the statute provides that a person is guilty of the offense when "with intent to cause physical injury to another person, he causes such injury to such person or to a third person." Conn. Gen. Stat. Ann. § 53a-61(a)(1). In interpreting the statute, the Connecticut Supreme Court has held that section 53a–61(a)(1) merely "require[s] the state to prove that the defendant had intentionally *caused* physical injury." *Connecticut v. Tanzella,* 628 A.2d 973, 980 (Conn. 1993) (emphasis added). Similarly, the jury instructions confirm that the state must prove only two elements: "(1) that the defendant specifically intended to cause physical injury to another;" and (2) "that the defendant caused physical injury to another person." Criminal Jury Instructions for the State of Connecticut Judicial Branch, § 6.1-13, Assault in the Third Degree (Physical Injury) -- § 53a-61(a)(1), *available at* http://www.jud.ct.gov/ji/criminal/part6/6.1-13.htm. Connecticut law further defines physical injury as "impairment of physical condition or pain." Conn. Gen. Stat. Ann. § 53a–3(3).

On its face, then, the statute lacks the "use, attempted use, or threatened use of physical force," as required by 18 U.S.C. § 16(a). Nor has the statute been

construed by the Connecticut courts to contain such an element. *See Connecticut v. Tanzella*, 628 A.2d at 980. In *Chrzanoski*, the Second Circuit, after considering the identical statute at issue here, therefore recognized that "nothing in that definition nor in the statutory language of section 53a–61(a)(1) requires the government to prove that *force was used* in causing the injury." 327 F.3d at 193. Accordingly, the Court correctly concluded that this Connecticut statute lacks the critical element that would be necessary for the offense to qualify as a crime of violence under 18 U.S.C. § 16(a). *Id.*

The Fifth Circuit has likewise found that where the state offense requires injury, but not an element of "use of force," it is not a crime of violence. *United States v. Villegas-Hernandez*, 468 F.3d 874, 882 (5th Cir. 2006) (concluding that because Texas causing bodily injury may be accomplished "by means *other than* the actual, attempted, or threatened 'use of physical force against the person of another,'" it does not "have such use of force as an element and does not fall within section 16(a)") (emphasis in original). The rationale of this decision and *Chrzanoski* compel the same conclusion in Petitioner's case.

In *Moncrieffe*, the Supreme Court pointed out that its "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense." 133 S. Ct. at 1684–85 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). In other words, there must be a

"realistic probability" that a state would apply its statute to non-removable conduct.[3] *Duenas-Alvarez*, 549 U.S. at 193. Even before this guidance had come, the Second Circuit in 2002 had appropriately tied its analysis to Connecticut case law:

> Connecticut recognizes that even second degree assault, which qualifies as a Class D felony, can be committed without any physical force. *See State v. Nunes*, 260 Conn. 649, 800 A.2d 1160, 1164 & n.2 (2002) (affirming conviction for assault in the second degree, which requires, *inter alia*, that the defendant "intentionally cause[ ] stupor, unconsciousness or other physical impairment or injury to another person," based on the defendant's placement of a tranquilizer in the victim's drink). In the exercise of prosecutorial discretion, the same non-forceful conduct at issue in *Nunes* could presumably be charged as the lesser included offense of third degree assault.

Chrzanoski, 327 F.3d at 195-96. Connecticut also prosecutes the offense of spitting as assault in the third degree,[4] which plainly does not require a "use of force." Where the least of the acts, as illustrated above, do not satisfy the generic federal definition, this Court should find that the offense itself cannot qualify as an aggravated felony, and Petitioner is thus not removable for a crime of violence.

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[3] If a statute is overbroad by its own terms, either on its face or as authoritatively construed, it satisfies any "realistic probability" concerns. *See infra* discussion on pages 19-20.

[4] *See, e.g.*, Frank MacEachern, *Stamford Man Charged With Spitting At Cabbie During Traffic Dispute*, Stamford Daily Voice, Oct. 29, 2014, *available at* http://stamford.dailyvoice.com/police-fire/stamford-man-charged-spitting-cabbie-during-traffic-dispute.

2. *Matter of Martin* erroneously construes 18 U.S.C. § 16 (a) and conflicts with subsequent Supreme Court precedent.

Matter of Martin, which the Board applied to find Petitioner removable, wrongly construes Section 16(a) and collides with subsequent Supreme Court precedent. In *Matter of Martin,* the Board ignored the common, ordinarily understood meaning of the term "element." Instead, the Board looked to the legislative history of 18 U.S.C. § 16 to create ambiguity when 18 U.S.C. § 16(a) is plainly unambiguous. *Matter of Martin*, 23 I&N Dec. at 494-95. Unsurprisingly, the Second Circuit characterized the Board's reliance on the legislative history as "inappropriate." *Chrzanoski,* 327 F.3d at 196 ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous.") (quoting *Dep't of Housing & Urban Dev. v. Rucker,* 535 U.S. 125, 132 (2002)). Indeed, the Board's action is at odds with Justice Frankfurter's warning: "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947). Rather than determining whether the state offense at issue in that case contained the requisite element of force, the Board divined that force was an "inherent" element of the

offense—implicit in the statute's requirement of the intentional causation of injury. *Matter of Martin*, 23 I&N Dec. at 498.

In doing so, the Board failed to appreciate that it does not suffice under § 16(a) for an offender merely to cause an injury – he must do so by the "use of physical force." The following example aptly illustrates the distinction: putting poison in a person's food or drink may result in an injury, but that injury is not *caused by a use of physical force*.[5] Indeed, *Chrzanoski* employed that logic to conclude that "just as risk of injury does not necessarily involve the risk of the use of force, the intentional causation of injury does not necessarily involve the use of force." 327 F.3d at 195 (internal citations omitted).

Significantly, the Supreme Court, subsequent to *Matter of Martin*, distinguished the "risk of injury" from the "use of physical force" under 18 U.S.C. § 16. *Leocal v. Ashcroft*, 543 U.S. at 10 ("§16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime"). This Circuit too has recognized the difference between "injury" and "use of force." *Fish*, 758 F.3d at 10-11 (citing to *Leocal*). *See also United States v.*

[5] In *United States v. Andino-Ortega*, the Fifth Circuit held that that such injury through poisoning, which is covered by the offense of injury to a child, does not meet the definition of section 16(a) because it can be committed by an intentional act *without* the use of physical force. 608 F.3d 305 (5th Cir. 2010) (emphasis added).

Torres-Miguel, 701 F.3d 165, 169-70 (4th Cir. 2012) ("Not to recognize the distinction between a *use* of force and a *result* of injury is not to recognize the logical fallacy . . . that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true.") (internal citations omitted) (emphasis in original).

Moreover, the Supreme Court's subsequent decision in *United States v. Castleman* has also called into question the reasoning undergirding *Matter of Martin.* 134 S. Ct. 1405 (2014). *Cf. Kawashima v. Holder*, 132 S. Ct. 1166 (2012) (where the use of the term "involving" tolerated a more expansive reading of a statute than a statute like section 16(a) that specifically requires "elements").[6]

Specifically, *Castleman* makes clear that the Board relied on precedent with no bearing here. The Board both below and in *Matter of Martin* relied significantly on this Circuit's decision in *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001) to conclude section 53a–61(a)(1) is a crime of violence. A.R.4; *Matter of Martin*, 23

[6] In *Kawashima*, the Court held that the petitioner was deportable under 8 U.S.C. § 1101(a)(43)(M) for a tax conviction "involving fraud or deceit." 132 S. Ct. at 1172. The Court concluded that the offense "necessarily entail[s] fraudulent or deceitful conduct," even though the statute contained no express element of fraud or deceit. *Id*. In so holding, the Court found that when Congress uses the word "involves" in the aggravated felony definition it is not limited to the formal elements, but refers more broadly to conduct that necessarily entails fraud or deceit. In contrast, Congress did not choose the broader term *"involves"* for crimes of violence, but chose instead to require the narrower "element"-based test under § 16(a). It was therefore error for the Board in *Matter of Martin* to use the "necessarily entails" test where the statutory definition Congress specifically provided requires "elements."

I&N Dec. at 497-98. At issue in *Nason* was whether the Maine assault statute[7] was a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). Reliance on *Nason*, however, is unavailing for two reasons.

First, *Nason* decided a different issue. *Nason* interpreted the more expansive definition of "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). In *Castleman*, the Supreme Court defined "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) to incorporate the broad common law meaning of force. 134 S. Ct. at 1410. And it drew a clear line of demarcation between "misdemeanor crime of domestic violence" under section § 922(g)(9) and crimes of violence under 18 U.S.C. § 16(a) and the Armed Career Criminal Act (ACCA). It held that the latter denotes "active and violent force." *Id*. at 1412 n.4 ("Nothing in today's opinion casts doubt on [*Johnson*'s requirement of violent force to 18 U.S.C. § 16 and ACCA's crimes of violence], because—as we explain—'domestic violence' encompasses a range of force broader than that which constitutes 'violence' *simpliciter*."). The Court specifically recognized that Congress intended for the terms to have a different scope. Thus, the Board's reliance on *Nason* is inapposite.

[7] The Maine statute provides that "[a] person is guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another." Me. Rev. Stat. Ann. tit. 17–A, § 207(1).

Second, in contrast to the Connecticut statute at issue here, the Maine courts interpreting the Maine statute have held that it requires the "use of force." *See Nason*, 269 F.3d at 20 ("In pertinent part, the statute criminalizes the '*use of unlawful force* against another causing bodily injury.'") (emphasis added) (citing to *State v. Griffin*,459 A.2d 1086, 1091 (Me.1983)). Significantly, Connecticut courts have not read such an element of use of force into the Connecticut third degree assault statute. *See, e.g., Connecticut v. Tanzella,* 628 A.2d 973, 980 (Conn. 1993).

In sum, the Board both below and in *Matter of Martin* erred in its construction of 18 U.S.C. § 16(a). This Court should not hesitate to reverse findings of the Board based on its idiosyncratic interpretation of the federal criminal statute. While this Circuit defers to the BIA's reasonable interpretations of ambiguous terms in the immigration statute, it reviews *de novo* its interpretation of federal or state *criminal* statutes. This is because the Board does not have special expertise in interpreting a criminal statute outside of the immigration statute. *See Johnson v. United States,* 559 U.S. 133, 138 (2010) (finding that it was "bound by" state courts' interpretation of state law elements for purposes of the categorical approach); *Lecky v. Holder*, 723 F.3d 1, 4 (1st Cir. 2013) ("We afford no deference, however, to the BIA's interpretation of Connecticut state law, as the BIA is not charged with the administration of these laws.") (internal citations omitted).

Accordingly, because the INA defines an 'aggravated felony' in 8 U.S.C. § 1101(a)(43)(F) by reference to a 'crime of violence' in 18 U.S.C. § 16, courts do not defer to the Board in determining whether an offense qualifies as a crime of violence. *See, e.g., Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1052 (9th Cir. 2011) ("The BIA is not charged with administering 18 U.S.C. § 16 and its interpretation of that statute gains no deference") (internal citations omitted); *Brooks v. Holder*, 621 F.3d 88, 91-92 (2d Cir. 2010) (same); *Dale v. Holder*, 610 F.3d 294, 301-302 (5th Cir. 2010) (same); *Garcia v. Gonzales*, 455 F.3d 465, 467 (4th Cir. 2006) (same); *Oyebanji v. Gonzales*, 418 F.3d 260, 262 (3d Cir. 2005) (same); *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003) (same). This Court should reverse the Board's misguided conclusion that Connecticut assault in the third degree is a crime of violence under 18 U.S.C. §16 (a) because the Board's decision is plainly wrong.

B. Connecticut Assault In The Third Degree Is Not A Crime Of Violence Under 18 U.S.C. § 16(a) Because It Does Not Require "Violent" Physical Force.

Should this Court find that "use of force" is an "inherent" element of Connecticut assault, a conviction under the statute nevertheless is not a crime of violence because it does not require "violent" physical force.

In *Johnson v. United States*, the Supreme Court held that to qualify as a "violent felony" under the ACCA, the level of "physical force" required for a

conviction must be "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S. 133, 140 (2010). Because the ACCA's definition of a "violent felony" is almost identical to 18 U.S.C. § 16(a),[8] the BIA treats the rule in *Johnson* as controlling authority in interpreting whether an offense is a "crime of violence" under section 16(a). *Matter of Velasquez*, 25 I&N Dec. 278, 282-83 (BIA 2010). Moreover, in contrasting the definition of "violence" associated with ACCA and 18 U.S.C. § 16 from "domestic violence" under 18 U.S.C. § 922(g)(9), the Supreme Court in *Castleman* observed:

> Minor uses of force may not constitute "violence" in the generic sense. For example, in an opinion that we cited with approval in *Johnson,* the Seventh Circuit noted that it was "hard to describe . . . as 'violence' " "a squeeze of the arm [that] causes a bruise." *Flores v. Ashcroft,* 350 F.3d 666, 670 (7th Cir. 2003).

134 S. Ct. at 1412. In short, to come within § 16(a), the state offense must require "force capable of causing physical pain or injury to another person"; a minor use of force is insufficient.

Significant to its decision below, the Board noted that Connecticut's statutory definition of "physical injury" ("impairment of physical condition or pain," Conn. Gen. Stat. Ann. § 53a–3(3)) closely tracks the definition of "violent physical force" in *Johnson* ("force capable of causing physical pain or injury to

[8] *See* 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" in relevant part as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

another person"). R.5. Though the two are similar in some respects, there is also an important difference sidestepped by the Board—a Connecticut conviction can be satisfied by an "impairment of physical condition."

What is an "impairment of condition"? One Connecticut appellate court has defined it as "a reduced ability to act as one would otherwise have acted," and that it may be "minor." *State v. Wright*, 958 A.2d 1249, 1251 (Conn. App. 2008). *See also* Criminal Jury Instructions for the State of Connecticut Judicial Branch, § 6.1-13, Assault in the Third Degree (Physical Injury) -- § 53a-61(a)(1), *available at* http://www.jud.ct.gov/ji/criminal/part6/6.1-13.htm. Moreover, "the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). Under that canon of statutory construction, then, the term "impairment" must have a different meaning from "pain." *See id*.

Because the Connecticut legislature made it clear that it intended prosecution for acts causing mere impairments, such are the "least of acts" criminalized under section § 53a-61(a)(1). The government has not demonstrated that a mere impairment, as defined under Connecticut law, must necessarily have been caused by "violent force" as defined by the Supreme Court and BIA in *Johnson* and *Matter of Velasquez*. Accordingly, the BIA erred in concluding that the government met its burden of establishing by clear and convincing evidence

that Petitioner's conviction under the Connecticut statute satisfies the federal definition under 18 U.S.C. § 16(a) and thereby renders Petitioner deportable. 8 U.S.C. § 1229a(c)(3)(A).

Where a statute *on its face* reaches conduct that may fall outside the generic offense, it requires no "legal imagination" to determine that it is categorically overbroad. In such cases, the petitioner need not point to actual cases involving prosecutions for the covered conduct. *See United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, 127 S. Ct. at 822, is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text."); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) ("Here, by contrast, no application of 'legal imagination' to the Pennsylvania simple assault statute is necessary. The elements of 2701 are clear, and the ability of the government to prosecute a defendant under subpart 2701(b)(2)—even where the defendant is unaware of the victim's age—is not disputed."); *Ramos v. Attorney General*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (rejecting contention respondent must show that state would prosecute overbroadly, stating "But *Duenas–Alvarez* does not require this showing when the statutory language itself, rather than 'the application

of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition. Here, the statute expressly requires alternate intents."). Here, because the language of the Connecticut statute expressly proscribes a mere impairment, the statute itself satisfies a realistic probability of prosecution.

Accordingly, because Connecticut statute requires neither an element of "use of force" or "violent force," this Court should find that a conviction under Conn. Gen. Stat. Ann. § 53a-61(a)(1) does not qualify as a crime of violence under18 U.S.C. § 16 (a).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for review, and vacate the Board's decision.

Dated: April 16, 2015

Respectfully submitted,

/s/ Sejal Zota

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), I hereby certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 4876 words.

DATED: April 16, 2015

/s/ Sejal Zota
Sejal Zota
National Immigration Project of the
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CERTIFICATE OF SERVICE

When All Case Participants are Registered
for the Appellate CM/ECF System

U.S. Court of Appeals Docket No. 14-2357

I, Sejal Zota, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on April 16, 2015.

I certify that all participants in the case (who are listed below) are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: April 16, 2015

/s/ Sejal Zota
Sejal Zota
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