No. 18-78

In the Supreme Court of the United States

J. CRUZ RAMIREZ-BARAJAS AND
DANIEL OGINGA ONDUSO, PETITIONERS

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a conviction for domestic assault, in violation of Minn. Stat. § 609.2242, subdiv. 1 (Supp. 1995), is a conviction for a "crime of violence" under 18 U.S.C. 16(a).

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-6a (Ramirez-Barajas); Pet. App. 29a-35a (Onduso)) are reported at 877 F.3d 808 (Ramirez-Barajas) and 877 F.3d 1073 (Onduso). The decisions of the Board of Immigration Appeals (Pet. App. 7a-16a (Ramirez-Barajas); Pet. App. 36a-48a (Onduso)) and the immigration judge (Pet. App. 17a-26a (Ramirez-Barajas); Pet. App. 49a-57a (Onduso)) are unreported.

JURISDICTION

The judgment of the court of appeals in petitioner Ramirez-Barajas's case was entered on December 15, 2017. A petition for rehearing was denied on February 15, 2018 (Pet. App. 27a-28a). On May 2, 2018, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including June 15,

2018. On May 29, 2018, Justice Gorsuch further extended the time to and including July 16, 2018.

The judgment of the court of appeals in petitioner Onduso's case was entered on December 20, 2017. A petition for rehearing was denied on February 9, 2018 (Pet. App. 58a-59a). On May 1, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including June 11, 2018. On May 29, 2018, Justice Gorsuch further extended the time to and including July 9, 2018.

A joint petition for a writ of certiorari was filed on July 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is present in the United States without having been admitted or paroled, or who is admitted to the United States temporarily as a nonimmigrant but who remains longer than permitted, is removable. See 8 U.S.C. 1182(a)(6)(A)(i), 1227(a)(1)(B).

The Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b. The discretion to grant cancellation of removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted). To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. 1240.8(d); see, *e.g.*, *Guled* v. *Mukasey*, 515 F.3d 872, 879-880 (8th Cir. 2008).

To demonstrate statutory eligibility for cancellation of removal, an alien who is not a lawful permanent resident must show: (A) that he has been physically present in the United States for a continuous period of at least ten years; (B) that he has been a person of good moral character during that period; (C) that he has not been convicted of certain designated offenses; and (D) that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is either a citizen of the United States or a lawful permanent resident. 8 U.S.C. 1229b(b)(1)(A)-(D).

A conviction for a "crime of domestic violence" is among those convictions that render an alien statutorily ineligible for cancellation of removal. 8 U.S.C. 1227(a)(2)(E)(i); see 8 U.S.C. 1229b(b)(1)(C). Under Section 1227(a)(2)(E)(i), a "crime of domestic violence" means "any crime of violence (as defined in section 16 of Title 18) against a person committed by" an individual with a qualifying domestic relationship to the person. 8 U.S.C. 1227(a)(2)(E)(i) (identifying, as among those with whom an individual has a qualifying relationship, "a person who is protected from that individual's acts under the domestic or family violence laws of * * * any State"). Under Section 16, a "crime of violence" includes "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).

b. Since 1995, Minnesota's domestic assault statute has provided in relevant part:

> Whoever does any of the following against a family or household member * * * commits an assault and is guilty of a misdemeanor:
>
> (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or

> (2) intentionally inflicts or attempts to inflict bodily harm upon another.

Minn. Stat. § 609.2242, subdiv. 1 (Supp. 1995). Under Minnesota law, "[b]odily harm" means "physical pain or injury, illness, or any impairment of physical condition." *Id.* § 609.02, subdiv. 7.

2. a. Petitioner Ramirez-Barajas, a native and citizen of Mexico, entered the United States in 1991 without having been admitted or paroled. Pet. App. 2a, 18a; Ramirez-Barajas A.R. 1032.[1] In 2001, he was convicted of domestic assault, in violation of Subsection 1 of Minn. Stat. § 609.2242, subdiv. 1 (Supp. 1995), after he admitted that he had "pushed [and] punched [his] live-in girlfriend w[ith] no consent [and] w[ith] intent to cause either harm or fear of harm." Ramirez-Barajas A.R. 353; see Pet. App. 2a; Ramirez-Barajas A.R. 327-331, 349-355.

b. In 2012, the Department of Homeland Security (DHS) instituted removal proceedings against Ramirez-Barajas, charging him with being present in the United States without having been admitted or paroled. Pet. App. 17a-18a; Ramirez-Barajas A.R. 1032. Ramirez-Barajas conceded the charge and applied for cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. 17a-18a.

The immigration judge (IJ) denied Ramirez-Barajas's application. Pet. App. 17a-26a. The IJ found Ramirez-Barajas statutorily ineligible for cancellation of removal because of his prior Minnesota conviction for domestic assault. *Id.* at 23a. The IJ observed that the Minnesota

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[1] References to "Ramirez-Barajas A.R." are to the administrative record filed in C.A. No. 17-1618. References to "Onduso A.R." are to the administrative record filed in C.A. No. 17-1526.

"statute of conviction requires intentionally causing fear of bodily harm in another." *Ibid.* Relying on circuit precedent, the IJ explained that "knowingly or purposely . . . making another person fear imminent bodily harm necessarily requires using, attempting to use, or threatening to use physical force." *Id.* at 22a (quoting *United States* v. *Salido-Rosas*, 662 F.3d 1254, 1256 (8th Cir. 2011), cert. denied, 566 U.S. 1040 (2012)). The IJ therefore determined that Ramirez-Barajas's prior offense qualified as a "crime of violence" under 18 U.S.C. 16. Pet. App. 22a-23a. And because the crime had been "committed against a family or household member," the IJ further determined that Ramirez-Barajas had been convicted of a "crime of domestic violence" under 8 U.S.C. 1227(a)(2)(E)(i). Pet. App. 23a.

The Board of Immigration Appeals (Board) dismissed Ramirez-Barajas's appeal. Pet. App. 12a-16a. The Board observed that, while his appeal was pending, the court of appeals had issued a decision squarely holding that Minnesota domestic assault, in violation of Subsection 1 of Section 609.2242, subdiv. 1, "has, as an element, the threatened use of physical force against the person of another." *Id.* at 14a (citing *United States* v. *Schaffer*, 818 F.3d 796, 798 (8th Cir.), cert. denied, 137 S. Ct. 410 (2016)). The Board therefore agreed with the IJ that Ramirez-Barajas's prior conviction qualified as a conviction for a "crime of domestic violence," rendering him statutorily ineligible for cancellation of removal. *Ibid.*

The Board denied Ramirez-Barajas's motion for reconsideration. Pet. App. 7a-11a. In seeking reconsideration, Ramirez-Barajas argued that the Board should have followed its prior decision in *Matter of Guzman-Polanco*, 26 I. & N. Dec. 713 (2016) (*Guzman-Polanco*

I), in which it had reasoned that a person could cause bodily injury through poisoning or other indirect means without using physical force, *id.* at 717-718 (citing *Whyte* v. *Lynch*, 807 F.3d 463, 471-472 (1st Cir. 2015)). In denying reconsideration, the Board observed that it had since issued a decision clarifying *Guzman-Polanco I*. Pet. App. 9a. That decision explained that *Guzman-Polanco I* had rested on *Whyte* (which was "binding circuit precedent" in that case) and "should not be read as attempting to establish a nationwide rule addressing the scope of the use of force through indirect means, including poisoning." *Matter of Guzman-Polanco*, 26 I. & N. Dec. 806, 807-808 (B.I.A. 2016) (*Guzman-Polanco II*). In light of *Guzman-Polanco II*, the Board found "no reason to revisit" its determination that, under Eighth Circuit precedent, Ramirez-Barajas's prior Minnesota conviction for domestic assault qualified as a conviction for a crime of domestic violence. Pet. App. 10a.

c. The court of appeals denied Ramirez-Barajas's consolidated petitions for review of the Board's dismissal of his appeal and denial of reconsideration. Pet. App. 1a-6a. The court explained that in *Schaffer*, it had determined that a conviction under the same Minnesota domestic assault statute qualified as a conviction for a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), "because [Minnesota domestic assault] has 'as an element "the threatened use of physical force against the person of another."'" Pet. App. 4a (quoting *Schaffer*, 818 F.3d at 798). The court reasoned that "[a]lthough *Schaffer* addresses the ACCA, its language—threatened use of physical force against the person of another—mirrors that in § 16(a)." *Ibid.* The court therefore determined

that "[m]isdemeanor domestic assault under the Minnesota statute is a crime of violence under § 16(a)" and that the Board "did not err in finding Ramirez-Barajas ineligible for cancellation of removal." *Ibid.* The court denied rehearing en banc. *Id.* at 27a-28a.

3. a. Petitioner Onduso, a native and citizen of Kenya, was admitted to the United States in 1999 as a nonimmigrant visitor with permission to remain for six months. Pet. App. 30a, 50a. Onduso remained in the United States beyond that period without authorization. *Id.* at 50a.

In 2003, Onduso "punched" his girlfriend "in the eye with a closed fist." Onduso A.R. 321; see *id.* at 208-209, 323. Onduso subsequently pleaded guilty to domestic assault in violation of Minn. Stat. § 609.2242, subdiv. 1 (Supp. 1995). Pet. App. 53a; Onduso A.R. 363. The available state-court records do not specify whether he was convicted under Subsection (1) or Subsection (2) of that provision. Pet. 11; Pet. App. 34a, 39a; Onduso A.R. 321, 323, 363-366.

b. In 2009, DHS instituted removal proceedings against Onduso, charging him with overstaying his six-month period of nonimmigrant admission. Pet. App. 49a-50a. Onduso conceded the charge and applied for cancellation of removal under 8 U.S.C. 1229b(b). Pet. App. 49a-50a.

The IJ denied Onduso's application. Pet. App. 49a-57a. Relying on circuit precedent, the IJ determined that Onduso's prior Minnesota conviction for domestic assault qualified as a conviction for a "crime of violence" under 18 U.S.C. 16(a). Pet. App. 55a (citing *Salido-Rosas*, 662 F.3d at 1256). The IJ further determined that, because Onduso had assaulted "a family or house-

hold member," his conviction was for a "crime of domestic violence" under the INA, rendering him statutorily ineligible for cancellation of removal. *Ibid.*

The Board dismissed Onduso's appeal, Pet. App. 45a-48a, agreeing with the IJ that Minnesota domestic assault qualifies as a "crime of domestic violence," *id.* at 48a. The Board also denied Onduso's motion for reconsideration, *id.* at 36a-44a, explaining that "a conviction under either subsection of Minnesota Statute § 609.2242, subdivision 1 categorically qualifies as a conviction for a crime of violence under 18 U.S.C. § 16(a)," *id.* at 43a-44a.

c. The court of appeals denied Onduso's consolidated petitions for review of the Board's dismissal of his appeal and denial of reconsideration. Pet. App. 29a-35a. The court found the record "unclear" on whether Subsection (1) or Subsection (2) of Minn. Stat. § 609.2242, subdiv. 1 (Supp. 1995), "served as the basis for [Onduso's] conviction." Pet. App. 34a. The court determined, however, that "both subsections satisfy § 16(a)." *Ibid.* The court observed that its prior decision in Ramirez-Barajas's case had held that "subsection 1 categorically qualifies as a crime of domestic violence." *Ibid.* And the court explained that its "conclusion that subsection 2 categorically qualifies as a crime of violence follows naturally from the analysis of subsection 1 in [Ramirez-Barajas's case]," "[g]iven that convictions for both offenses include the same element of 'bodily harm.'" *Id.* at 35a. The court denied rehearing en banc. *Id.* at 58a-59a.

ARGUMENT

Petitioners contend (Pet. 24-27) that the court of appeals erred in determining that their prior convictions for Minnesota domestic assault are convictions for crimes of violence under 18 U.S.C. 16(a). The court of appeals' decisions are correct and do not conflict with

any decision of this Court. Although petitioners assert (Pet. 12-16) the existence of a circuit conflict on whether the causation of bodily injury through indirect means involves the use of physical force, that asserted conflict largely predates this Court's decision in *United States* v. *Castleman*, 572 U.S. 157 (2014). Following *Castleman*, the courts of appeals are now nearly uniform (and may soon be fully uniform) in the application of *Castleman*'s logic to Section 16(a) and other analogous provisions. This Court has recently and repeatedly denied review of the same alleged circuit conflict, and the same result is warranted here.[2] In any event, this case would not be a suitable vehicle for this Court's review, because petitioners may be statutorily ineligible for cancellation of removal, regardless of the resolution of the question presented.

1. The court of appeals correctly determined that petitioners' prior convictions for domestic assault, in violation of Minn. Stat. § 609.2242, subdiv. 1 (Supp. 1995), are convictions for crimes of violence under 18 U.S.C. 16(a), which encompasses any "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

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[2] See, *e.g.*, *Rodriguez* v. *United States*, cert. denied, No. 17-8881 (Oct. 1, 2018); *Solis-Alonzo* v. *United States*, cert. denied, No. 17-8703 (Oct. 1, 2018); *Griffin* v. *United States*, cert. denied, No. 17-8260 (Oct. 1, 2018); *Hughes* v. *United States*, cert. denied, 138 S. Ct. 2649 (2018) (No. 17-7420); *Gathers* v. *United States*, cert. denied, 138 S. Ct. 2622 (2018) (No. 17-7694); *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); *Hernandez* v. *Sessions*, cert. denied, 137 S. Ct. 2180 (2017) (No. 16-860).

Section 609.2242, subdiv. 1, prohibits two forms of domestic assault against a family or household member: "(1) commit[ting] an act with intent to cause fear * * * of immediate bodily harm or death," and "(2) intentionally inflict[ing] or attempt[ing] to inflict bodily harm." Minn. Stat. § 609.2242, subdiv. 1 (Supp. 1995). Petitioners do not dispute that the form of domestic assault described in Subsection (2) qualifies as a crime of violence under Section 16(a). Contrary to petitioners' contention (Pet. 24-27), the form of domestic assault described in Subsection (1) does as well.

In *Johnson* v. *United States*, 559 U.S. 133 (2010), this Court held that the phrase "physical force" in a provision of the ACCA requiring "the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), means "force capable of causing physical pain or injury to another person," 559 U.S. at 140. That standard does not necessarily extend to a statute like Section 16(a), which encompasses any "offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another." 18 U.S.C. 16(a) (emphasis added). But even assuming that *Johnson*'s force standard applies to Section 16(a), petitioners' offenses would still qualify as crimes of violence because "commit[ting] an act with intent to cause fear in another of immediate bodily harm or death," Minn. Stat. § 609.2242, subdiv. 1(1) (Supp. 1995), requires at least the threatened use of "force capable of causing physical pain or injury" to the other person, *Johnson*, 559 U.S. at 140.

Petitioners contend (Pet. 25) that "a person could commit an act with the intent to put another in fear of bodily injury or death without specifically threatening

to use force against the person." The premise of petitioners' argument (Pet. 21) is that bodily harm or death can be caused through indirect means—such as poisoning—that do not involve the use of physical force. That premise, however, is inconsistent with this Court's decision in *Castleman*, which recognized that the phrase "use of * * * physical force" in a provision analogous to Section 16(a) includes both the direct and indirect causation of physical harm. 572 U.S. at 171 (construing 18 U.S.C. 921(a)(33)(A)). *Castleman* explained that "'physical force' is simply 'force exerted by and through concrete bodies,' as opposed to 'intellectual force or emotional force.'" *Id.* at 170 (quoting *Johnson*, 559 U.S. at 138). *Castleman* accordingly determined that force may be applied directly—through immediate physical contact with the victim—or indirectly, such as by 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." *Ibid.* (citation and internal quotation marks omitted). The Court reasoned that when, for example, a person "sprinkles poison in a victim's drink," *id.* at 171 (citation and internal quotation marks omitted), 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," *ibid.* (second set of brackets in original).

Petitioners' examples (Pet. 21) involve the "use * * * of physical force," 18 U.S.C. 16(a), under the logic of *Castleman*. If, for instance, a defendant "trick[ed] a person into consuming a drug that the defendant claims is a vitamin," Pet. 21, the defendant has "employ[ed] [that drug] knowingly as a device to cause physical

harm," *Castleman*, 572 U.S. at 171. Likewise, if a defendant used "a 'shock collar'" to "shock[]" his wife, Pet. 21, the defendant has "employ[ed] [that collar] knowingly as a device to cause physical harm," *Castleman*, 572 U.S. at 171.

Petitioners argue (Pet. 6-7, 25-26) that *Castleman* is inapplicable to Section 16(a) because that case addressed the application of 18 U.S.C. 921(a)(33)(A)'s definition of "'misdemeanor crime of domestic violence,'" *Castleman*, 572 U.S. at 162-163, which "encompasses a range of force broader than that which constitutes 'violence' *simpliciter*," *id.* at 164 n.4. But *Castleman*'s reasoning on the point at issue here did not depend on any considerations unique to Section 921(a)(33)(A). Thus, although the Court in *Castleman* reserved whether a state crime involving bodily injury would satisfy *Johnson*'s definition of "physical force," *Castleman*, 572 U.S. at 167, the courts of appeals that have addressed the question are nearly uniform (and may soon be fully uniform) in the application of *Castleman*'s logic to Section 16(a) and other analogous provisions.[3]

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[3] See, *e.g.*, *United States* v. *Ellison*, 866 F.3d 32, 37-38 (1st Cir. 2017); *Villanueva* v. *United States*, 893 F.3d 123, 128-130 (2d Cir. 2018); *United States* v. *Chapman*, 866 F.3d 129, 133 (3d Cir. 2017), cert. denied, 138 S. Ct. 1582 (2018); *United States* v. *Reid*, 861 F.3d 523, 528-529 (4th Cir.), cert. denied, 138 S. Ct. 462 (2017); *United States* v. *Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017), cert. denied, No. 17-8413 (Oct. 1, 2018); *United States* v. *Jennings*, 860 F.3d 450, 458-460 (7th Cir. 2017), cert. denied, 138 S. Ct. 701 (2018); *United States* v. *Winston*, 845 F.3d 876, 878 (8th Cir.), cert. denied, 137 S. Ct. 2201 (2017); *Arellano Hernandez* v. *Lynch*, 831 F.3d 1127, 1131 (9th Cir. 2016), cert. denied, 137 S. Ct. 2180 (2017); *United States* v. *Ontiveros*, 875 F.3d 533, 537 (10th Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018); *United States* v. *DeShazior*, 882 F.3d 1352, 1357-1358 (11th Cir. 2018), petition for cert. pending, No. 17-8766 (filed May 1,

Castleman also undermines petitioners' reliance (Pet. 25) on *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). The Court in *Castleman* acknowledged that, under *Leocal*, "the word 'use' 'conveys the idea that the thing used (here, "physical force") has been made the user's instrument.'" *Castleman*, 572 U.S. at 170-171 (citation omitted). *Castleman* made clear, however, that the fact that force has been applied "indirectly, rather than directly," does not make such application any less a "'use of force.'" *Id.* at 171. *Castleman* also emphasized that, although *Leocal* had "held that the 'use' of force must entail 'a higher degree of intent than negligent or merely accidental conduct,'" "it did not hold that the word 'use' somehow alters the meaning of 'force.'" *Ibid.* (citation omitted). Petitioners therefore err in contending (Pet. 25-26) that the decisions below are contrary to any decision of this Court.

2. Petitioners do not point to any conflict among the courts of appeals on whether Minnesota domestic assault qualifies as a crime of violence under Section 16(a). See *United States* v. *Jennings*, 860 F.3d 450, 457-461 (7th Cir. 2017) (concluding that Minnesota domestic assault qualifies as a violent felony under the ACCA's elements clause), cert. denied, 138 S. Ct. 701 (2018); see also *United States* v. *Ker Yang*, 799 F.3d 750, 756 (7th Cir. 2015) (concluding likewise that Minnesota assault,

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2018); *United States* v. *Haight*, 892 F.3d 1271, 1280 (D.C. Cir. 2018), petition for cert. pending, No. 18-370 (filed Sept. 20, 2018). Two circuits —the Third and the Fifth—have recently granted rehearing en banc to consider whether the indirect causation of injury qualifies as the "use * * * of physical force" under the ACCA or the Sentencing Guidelines. See *United States* v. *Harris*, No. 17-1861 (3d Cir. June 7, 2018) (ACCA); *United States* v. *Reyes-Contreras*, 892 F.3d 800 (5th Cir. 2018) (Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2015)); pp. 14-15, *infra*.

in violation of Minn. Stat. § 609.224, subdiv. 1 (2010), qualifies as a violent felony under the ACCA's elements clause).

Instead, petitioners assert (Pet. 12-16) the existence of a circuit conflict on whether the causation of bodily injury through indirect means involves the "use * * * of physical force" under Section 16(a). Petitioners rely (Pet. 12) on decisions from the First, Second, and Fifth Circuits, which petitioners contend (*ibid.*) have "reason[ed] that bodily injury can be inflicted without physical force—such as by trickery or poisoning." Following *Castleman*, however, the First and Second Circuits have taken a contrary position, explaining that *Castleman* rejected the reasoning of the decisions petitioners cite (Pet. 13-14). See *United States* v. *Ellison*, 866 F.3d 32, 37-38 (1st Cir. 2017) (rejecting, in light of *Castleman*, the argument that "a threat to poison" is not a "'threatened use of physical force'" under Sentencing Guidelines § 4B1.2(a) (2015), and noting that the First Circuit had previously "rejected the same argument" in the ACCA context); *United States* v. *Edwards*, 857 F.3d 420, 426 n.11 (1st Cir.) (explaining that *Whyte* v. *Lynch*, 807 F.3d 463 (1st Cir. 2015), did not foreclose the argument that *Castleman* applies beyond "the misdemeanor-crime-of-domestic-violence context"), cert. denied, 138 S. Ct. 283 (2017); *Villanueva* v. *United States*, 893 F.3d 123, 128-130 (2d Cir. 2018) (recognizing that *Chrzanoski* v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003), "explained an understanding of the use of force that has been abrogated by the Supreme Court's decision in *Castleman*"); *United States* v. *Hill*, 890 F.3d 51, 59-60 (2d Cir. 2018) (similar).

The Fifth Circuit decision on which petitioners rely (Pet. 13-14), *United States* v. *Villegas-Hernandez*,

468 F.3d 874, 779-882 (2006), cert. denied, 549 U.S. 1245 (2007), likewise rests on reasoning that *Castleman* rejected. Although the Fifth Circuit recently reaffirmed that reasoning in *United States* v. *Reyes-Contreras*, 882 F.3d 113, 123 (2018), the government petitioned for rehearing en banc on the relevant issue, and the Fifth Circuit has granted the government's petition. See *United States* v. *Reyes-Contreras*, 892 F.3d 800 (2018). The Fifth Circuit now has the opportunity to adopt the uniform view of the other courts of appeals and to resolve any division that may have existed.[4]

3. In any event, this case would not be a suitable vehicle for this Court's review, because petitioners may be statutorily ineligible for cancellation of removal, regardless of whether their Minnesota convictions for domestic assault qualify as crimes of violence.

Ramirez-Barajas may be statutorily ineligible on the independent ground that he had not been physically present in the United States for a continuous period of at least ten years before he applied for cancellation of removal. See 8 U.S.C. 1229b(b)(1)(A). Under the INA, a departure from the United States for more than 90 days, or the acceptance of voluntary return to another country under threat of removal, may break an alien's continuous physical presence in the United States. See 8 U.S.C. 1229b(d)(2); *Rodriguez-Labato* v. *Sessions*, 868 F.3d 690, 694-695 (8th Cir. 2017). At some point between December 2005 and February 2006, Ramirez-Barajas traveled to Mexico for a period of time. Ramirez-Barajas A.R. 278-279, 286, 473. While attempting to reenter the United States without any lawful basis for admission, he encountered Border Patrol

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[4] As noted above, see p. 12, n.3, *supra*, a similar issue is also currently pending before the en banc Third Circuit.

officials at or near Calexico, California, and may have been granted a "[v]oluntary [r]eturn" to Mexico. *Id.* at 1027. Although further proceedings would be necessary to develop the record on Ramirez-Barajas's departure from, and attempted reentry to, the United States, the facts may well show that he lacks the ten years of continuous physical presence in the United States required under the INA.

Onduso may likewise be statutorily ineligible for cancellation of removal on the independent ground that he cannot show that his removal would result in exceptional and extremely unusual hardship to a qualifying relative. See 8 U.S.C. 1229b(b)(1)(D). The IJ observed in Onduso's case that U.S. Citizenship and Immigration Services had denied two visa applications by "two different U.S. citizen spouses because of fraud." Pet. App. 55a. Although the IJ did not resolve the issue, she questioned whether "a fraudulent marriage relationship is a qualifying relationship" under Section 1229b(b)(1). *Id.* at 56a. Even assuming, however, that Onduso's current spouse and step children could be qualifying relatives, the merits hearing held on Onduso's cancellation application failed to show that they would experience "exceptional and extremely unusual hardship" if he were removed. 8 U.S.C. 1229b(b)(1)(D); see *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 58-65 (B.I.A. 2001) (discussing the high standard for showing the requisite hardship and finding that it had not been met in part because the citizen children in that case were in good health); Onduso A.R. 205-206, 210-211, 213, 230-235, 241. Because both petitioners may be statutorily ineligible for cancellation of removal regardless of whether their prior offenses qualify as crimes of violence, this

case would not be a suitable vehicle for addressing the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2018