No. 20-7778

In the
Supreme Court of the United States

Gerald Scott,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 15.8, Petitioner Gerald Scott submits this brief to call the Court's attention to "matter not available at the time of [his] last filing."

On October 1, 2021, the Third Circuit granted bail to Marc Harris. *See United States v. Harris*, 3d Cir. 17-1861, Docket Entry 247. As explained in Scott's certiorari petition and reply brief, *Harris* is the case that went en banc and could have undone the circuit's rule that crimes of physical inaction are beyond the scope of 18 U.S.C. § 924(e)(2)(B)(i) because they do "not necessarily require proof that a defendant engaged in any affirmative use of 'physical force' against another person." *United States v. Mayo*, 901 F.3d 218, 226 (3d Cir. 2018).

The government's sole (and 19-page) argument against bail for Harris was that "*Mayo* is no longer (and perhaps never was) good law." *Harris*, Docket Entry 246 at 3. Per the government, when it comes to whether one's physical inaction "involves the 'use' of physical force" against another, the "Supreme Court's decision in *United States v. Castleman* [572 U.S. 157 (2014)] is controlling." *Id.* at 9. "The *Mayo* Court . . . was simply mistaken that '*Castleman* did not answer whether causing serious bodily injury without any affirmative use of force would satisfy'" the clause here. *Id.* at 9 n.5 (quoting *Mayo*, 901 F.3d at 228). The government pointed to the Second Circuit majority's ruling against Scott: that physical inaction can be a "use of physical force against" someone "is 'compelled' by *Castleman*." *Id.* at 13 (quoting *United States v. Scott*, 990 F.3d 94, 111 (2d Cir. 2021) (en banc)).

The Third Circuit was unmoved. By granting Harris bail, it adhered to its view that crimes of physical inaction don't fit the clause here and that "*Castleman*

avowedly did not contemplate th[is] question." *Mayo*, 901 F.3d at 228. The en banc Fifth Circuit also recognizes that "*Castleman* does not address whether an omission, standing alone, can constitute the use of force." *United States v. Reyes-Contreras*, 910 F.3d 169, 181 n.25 (5th Cir. 2018) (en banc). That circuit has thus affirmed, post-*Castleman*, that "causing injury . . . is not categorically a crime of violence . . . because [it] may be committed by both acts and omissions." *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017). So has the Sixth Circuit, sitting en banc: A "'failure to act' to prevent serious physical harm to a victim" is a crime committed "without any 'physical force' whatsoever." *United States v. Burris*, 912 F.3d 386, 398-99 (6th Cir. 2019) (en banc). As such, "failing to protect a child is not in itself a violent felony." *Dunlap v. United States*, 784 F. App'x 379, 389 (6th Cir. 2019) (citing *Mayo*, 901 F.3d at 227). *See also United States v. Laurico-Yeno*, 590 F.3d 818, 821 (9th Cir. 2010) (An offense must "be in the category of 'violent, active crimes' before it can qualify" under the clause here.) (citation omitted).

The circuit split over this recurring and highly consequential question is going nowhere. Only this Court can resolve it. Scott's petition should be granted.

Respectfully submitted,

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October 8, 2021