No. 21-_____

In the
Supreme Court of the United States

Dwayne Stone,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether crimes of physical inaction have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). This question has split 11 circuits.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 37 F.4th 825 and appears at Petitioner's Appendix ("Pet. App.") 1a-15a. The opinion of the United States District Court for the Eastern District of New York is unreported and appears at Pet. App. 16a-19a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 2255, entered an order denying § 2255 relief on May 26, 2020, and granted a certificate of appealability on July 27, 2020. The Second Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253 and issued its opinion on June 21, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

18 U.S.C. § 924(c)(1)(A)(i) provides: "[A]ny person who, during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to a term of imprisonment of not less than 5 years."

18 U.S.C. § 924(c)(3)(A) provides: "[T]he term 'crime of violence' means an offense that is a felony and . . . 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. § 1959(a) provides: "Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in

racketeering activity, murders . . . any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment . . .

(5) for . . . conspiring to commit murder . . . , by imprisonment for not more than ten years . . .

N.Y. Penal Law § 105.15 provides: "A person is guilty of conspiracy in the second degree when, with intent that conduct constituting a class A felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct."

N.Y. Penal Law § 125.25(1) provides: "A person is guilty of murder in the second degree when: . . . [w]ith intent to cause the death of another person, he causes the death of such person or of a third person."

INTRODUCTION

"Differences in law of national applicability," the Seventh Circuit recently observed regarding the split here, "need to be resolved." *United States v. Thomas*, 27 F.4th 556, 559 (7th Cir. 2022).

Eleven circuits are divided over whether crimes of physical inaction entail the "use of physical force against the person or property of another." § 924(c)(3)(A).

Six circuits say yes: offenses that deem one person's inaction the legal cause of another's injury have as an element the "use of physical force against" the victim. All six circuits invoke *United States v. Castleman*, 572 U.S. 157 (2014), a case about crimes of commission, not omission. *See United States v. Baez-Martinez*, 950 F.3d

119 (1st Cir. 2020); *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc); *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016); *United States v. Peeples*, 879 F.3d 282 (8th Cir. 2018); *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017); *United States v. Sanchez*, 940 F.3d 526 (11th Cir. 2019).

Four other circuits hold crimes of physical inaction never have as an element the "use of physical force against the person or property of another." § 924(c)(3)(A). And *Castleman*, they note, "avowedly did not contemplate th[is] question," *United States v. Mayo*, 901 F.3d 218, 228 (3d Cir. 2018), as it did "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). *See also United States v. Resendiz-Moreno*, 705 F.3d 203 (5th Cir. 2013); *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc); *United States v. Trevino-Trevino*, 178 F. App'x 701 (9th Cir. 2006); *United States v. Laurico-Yeno*, 590 F.3d 818 (9th Cir. 2010).

One circuit is itself split. *Compare United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020) (certain crimes of physical inaction entail the use of physical force), *with United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012) (no they don't).

The Court should break this logjam. The text at issue runs throughout criminal and immigration law, arising daily in cases across the country; the contradictory readings mean people face consequences like years more in prison and deportation – or not – based solely on where their cases are litigated; and the circuits have made clear that they are not budging from their conflicting positions. The need for a single answer to this weighty and recurring question is plain.

STATEMENT OF THE CASE

1. Following a jury trial in the United States District Court for the Eastern District of New York, Petitioner was convicted of multiple offenses arising from his participation in the activities of a criminal gang in Brooklyn. Pet. App. 3a-4a. As relevant, in connection with a 2000 shooting, Petitioner was found guilty of:

- Count 11: conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5) and N.Y. Penal Law §§ 105.15 and 125.25(1);
- Count 12: murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) and N.Y. Penal Law § 125.25(1);
- Count 13: using and carrying a firearm during and in relation to crimes of violence, namely, the conspiracy to commit murder in aid of racketeering charged in Count 11 and the murder in aid of racketeering charged in Count 12, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i)-(iii).

Pet. App. 3a-4a; C.A. App. 103-04. As to Count 13, the District Court instructed the jury that both Counts 11 and 12 were "crimes of violence" as a matter of law, and the jury returned a general verdict of guilty, without specifying which Count (11, 12, or both) was the predicate for the Count 13 conviction. Pet. App. 4a.

The District Court sentenced Petitioner principally to a mandatory life term on Count 12, and the United States Court of Appeals for the Second Circuit affirmed. Pet. App. 4a; *United States v. Nieves*, 354 F. App'x 547 (2d Cir. 2009).

After *Miller v. Alabama*, 567 U.S. 460 (2012), Petitioner, who was 17 at the time of the shooting, obtained § 2255 relief from his mandatory life sentence. The

District Court resentenced him to an aggregate term of 480 months, including a consecutive 300-month term for the Count 13 under § 924(c)(1). Pet. App. 4a-5a; C.A. App. 243-44; *United States v. Stone*, 621 F. App'x 61, 62 (2d Cir. 2015).

2. In *Johnson v. United States*, 576 U.S. 591 (2015), this Court ruled the "residual clause" of the "violent felony" definition in the Armed Career Criminal Act ("ACCA"), found at § 924(e)(2)(B)(ii), is "unconstitutionally vague." *Johnson*, 576 U.S. at 597. In *Welch v. United States*, 578 U.S. 120 (2016), the Court held *Johnson* applies retroactively to cases on collateral review. Finally, in *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court applied *Johnson* to invalidate as vague the "residual clause" of the "crime of violence" definition at § 924(c)(3)(B).

In light of *Johnson, Welch*, and *Davis*, Petitioner sought § 2255 relief, arguing that his Count 13 conviction and consecutive 300-month sentence violated the Fifth Amendment's Due Process Clause. Pet. App. 5a. He argued that with § 924(c)(3)(B)'s residual clause gone, the Count 11 conspiracy to commit murder in aid of racketeering did not qualify as a predicate crime of violence. Consequently, the District Court had committed constitutional error by instructing the jury that it did, and by permitting the jury to premise the Count 13 conviction on that invalid predicate. *See* Pet. C.A. Br. 10-11. The District Court (Glasser, J.) denied the motion, reasoning that the Count 13 conviction had also been premised on the Count 12 murder in aid of racketeering. Pet. App. 18a-19a. And because "[i]t [wa]s beyond cavil that murder in aid of racketeering is a crime of violence," the court ruled "*Davis* [wa]s not implicated." Pet App. 19a.

3. Petitioner appealed, arguing that "the jury was impermissibly allowed to convict him of the Count 13 § 924(c) charge based on a finding that he used a firearm in connection with a murder conspiracy offense because murder conspiracy is not a 'crime of violence' within the meaning of § 924(c)," and "in the alternative, that his conviction and sentence under § 924(c) should be vacated even if it was premised on a substantive murder because that offense also does not qualify as a crime of violence." Pet. App. 5a-6a. As to this alternative argument, Petitioner contended that "a defendant may be convicted under § 125.25(1), murder in the second degree, based on a culpable omission, and therefore the statute does not categorically involve the 'use' of force as required for a crime of violence." Pet. App. 13a-14a. Specifically, Petitioner explained that § 125.25(1) requires only the intentional causation of death, and that New York law recognizes penal liability for homicide offenses accomplished not by action, but by omission in breach of a duty to act, for example, when a parent neglects to obtain medical care for a child. *E.g.*, *People v. Steinberg*, 79 N.Y.2d 673 (1992). And an omission to act, Petitioner argued, did not meet the plain language of § 924(c)(3)(A)'s elements clause, which demands the "use" of violent physical force. *See* C.A. Br. 35-39.

The Court of Appeals (Walker, J., joined by Nardini and Menashi, JJ.) rejected both arguments and affirmed. Pet. App. 1a-15a. As to Petitioner's argument on crimes of inaction, the court said *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc), "binds us" to conclude that murder by omission involves the "use" of violent force. Pet. App. 15a. In *Scott*, the en banc court held first-degree

New York manslaughter, N.Y. Penal Law § 125.20(1) (applicable to one who "with intent to cause serious physical injury . . . , causes . . . death"), was a violent felony under the elements clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(i), even though it can by committed by culpable omission. And the court here held *Scott*'s interpretation of ACCA's elements clause applied to § 924(c)(3)(A). Pet. App. 14a n.47.

REASONS FOR GRANTING THE WRIT

I. This Recurring Question Has Divided 11 Circuits

The question whether crimes of inaction entail the "use of physical force against" anyone or anything is so common that 11 of the 12 circuits have answered.

Six circuits say crimes deeming physical inaction the legal cause of injury entail the "use of physical force against" the victim even though the defendant never moves a muscle. Petitioner's case is the latest on this side of the split, though the Second Circuit said what "binds us," Pet. App. 15a, is the en banc ruling in *Scott*.

In that 9-5 decision, which produced 120 pages of dueling opinions, the en banc majority reversed the panel's ruling that a crime doesn't fit the text here if it "'can be committed by complete inaction and therefore without the use of force.'" *Scott*, 990 F.3d at 100 (quoting *United States v. Scott*, 954 F.3d 74, 78 (2d Cir. 2020)). The majority found "that path foreclosed by the Supreme Court's decision in *United States v. Castleman*," in which this Court "stated that the 'knowing or intentional causation of bodily injury *necessarily* involves the use of physical force.'" *Id*. (quoting *Castleman*, 572 U.S. at 169) (emphasis in *Scott*).

The five other circuits on the Second's side also cite *Castleman* as compelling

their view, even though "*Castleman* [never] specifically addressed crimes that can be committed by omission," *Scott*, 990 F.3d at 114, and even though "common sense and the laws of physics support [the] position" that "crimes that can be completed by omission fall outside the scope of the force clause." *United States v. Baez-Martinez*, 950 F.3d 119, 131 (1st Cir. 2020). *See id.* ("[W]hile nature follows the laws of physics, circuit courts must follow the law as announced by the Supreme Court. And in *Castleman*, the Supreme Court declared: '[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force.'") (citations omitted); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016) ("[W]ithholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force under *Castleman*."); *United States v. Peeples*, 879 F.3d 282, 287 (8th Cir. 2018) ("In Peeples's example of a care-giver refusing to feed a dependent, it is the act of withholding food with the intent to cause the dependent to starve to death that constitutes the use of force. *See Castleman*."); *United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) (citing *Castleman* in rejecting the view that a crime "requires no 'use . . . of physical force' because one can be convicted for a failure to act"); *United States v. Sanchez*, 940 F.3d 526, 535 (11th Cir. 2019) (citing *Castleman* to hold "a parent's intentional withholding of needed medical treatment or food with the intent to cause his or her child's death and in fact causing the child's death constitutes the use of physical force").

Four circuits disagree with the six above. Besides the fact that "*Castleman* avowedly did not contemplate th[is] question," *United States v. Mayo*, 901 F.3d 218,

228 (3d Cir. 2018), the Third Circuit explains that calling physical inaction a use of physical force "conflate[s] an act of omission with the use of force." *Id*. at 230. The "use of physical force . . . cannot be satisfied by a failure to act," *id*., as "the words 'physical force' have a particular meaning," namely "'[p]ower, violence, or pressure directed against a person or thing, . . . consisting in a physical act.'" *Id*. at 226 (citation omitted). A crime of inaction does not qualify. It makes no difference if the crime involves "'bodily injury,'" as the use of "'[p]hysical force and bodily injury are not the same thing.'" *Id* at 227 (citation omitted). When it comes to a crime of inaction, the person is guilty "not because [he] used physical force against the victim, but because serious bodily injury occurred, as with the deliberate failure to provide food or medical care." *Id*. The "'use of force . . . is not an element.'" *Id*. (citation omitted). *See also United States v. Oliver*, 728 F. App'x 107, 111 (3d Cir. 2018) ("[P]hysical force is not used 'when no act [is done].' So, 'when the act has been one of omission, . . . there has been no force exerted by and through concrete bodies,' and thus, physical force . . . has not been used.") (citations omitted).

The Fifth Circuit agrees that a "'use of physical force' is not necessary to commit" a crime of inaction. *United States v. Resendiz-Moreno*, 705 F.3d 203, 205 (5th Cir. 2013). "Specifically, a person can commit first-degree child cruelty and maliciously inflict excessive pain upon a child by depriving the child of medicine or by some other act of omission that does not involve the use of physical force." *Id*. *See also United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017) ("[C]ausing injury to a child . . . is not categorically a crime of violence . . . because

[it] may be committed by both acts and omissions."); *United States v. Taylor*, 873 F.3d 476, 482 (5th Cir. 2017) ("[U]nder *Martinez-Rodriguez*, Texas's injury-to-a-child offense is broader than the ACCA's elements clause."); *United States v. Reyes-Contreras*, 910 F.3d 169, 181 n.25 (5th Cir. 2018) (en banc) ("*Castleman* does not address whether an omission, standing alone, can constitute the use of force.").

Likewise, as the en banc Sixth Circuit explains, a crime of omission entails no use of force given that it punishes a "'failure to act' . . . when the defendant has a legal duty to do so." *United States v. Burris*, 912 F.3d 386, 398 (6th Cir. 2019) (en banc). Because the offense is committed by someone who "did not have any physical contact" with the victim, and thus "without any 'physical force' whatsoever," it is "too broad to categorically qualify as [a] violent-felony predicate[]." *Id*. at 399. *See also Dunlap v. United States*, 784 F. App'x 379, 389 (6th Cir. 2019) ("[F]ailing to protect a child is not in itself a violent felony.") (citing *Mayo*).

The Ninth Circuit also agrees "one cannot use, attempt to use or threaten to use force against another in failing to do something." *United States v. Trevino-Trevino*, 178 F. App'x 701, 703 (9th Cir. 2006). Thus, a manslaughter offense requires no "'use, attempted use, or threatened use of physical force against the person of another,' because a defendant can be convicted of [it] for an omission." *Id*. *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 text here, so a crime requiring "'application of force on the victim by the defendant'" qualifies.) (citations omitted).

The Fourth Circuit has also said inaction is not a use of physical force— and the opposite. *Compare United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (An offense requiring "physical injury . . . does not require the use of physical force" if it reaches "neglecting to act," which does not "require[] the use of physical force."), *with United States v. Rumley*, 952 F.3d 538, 551 (4th Cir. 2020) ("[T]here is just as much a 'use of force' when a murderous parent uses the body's need for food to intentionally cause his child's death as when that parent uses the forceful physical properties of poison to achieve the same result."). *Rumley* does not mention *Gomez*.

These circuits can't all be right. Physical inaction deemed the cause of harm either is or is not a "use of physical force against" the victim. And *Castleman* either "Compels" the answer, *Scott*, 990 F.3d at 111, or "did not contemplate the question." *Mayo*, 901 F.3d at 228. The Court should settle these disputes.

II. This Consequential Split Will Not Resolve Itself

The government opposed certiorari in *Scott*, noting the Third Circuit had gone en banc in a case that could have undone *Mayo*; the government thus said the "circuit conflict on the question at issue here may not persist." Sup. Ct. 20-7778, Brief for the United States in Opposition at 18. Later, however, the Third Circuit dissolved the en banc proceedings that imperiled *Mayo*. *See United States v. Harris*, 3d Cir. 17-1861, Order of Sept. 17, 2021.

Besides the Third Circuit's declining the opportunity to reverse its view that physical inaction in no "use of physical force against" anyone, the Fifth Circuit has also adhered to that view in post-*Castleman* cases, *see, e.g., Taylor*, 873 F.3d at 482;

Martinez-Rodriguez, 857 F.3d at 286, noting specifically (and en banc) that "*Castleman* does not address whether an omission, standing alone, can constitute the use of force." *Reyes-Contreras*, 910 F.3d at 181 n.25. Likewise, the Sixth Circuit has held – post-*Castleman* and en banc – that the "'failure to act' to prevent serious physical harm to a victim when the defendant has a legal duty to do so" is a crime committed "without any 'physical force'" and is thus "too broad" to fit the text here. *Burris*, 912 F.3d at 398-99. *See also Dunlap*, 784 F. App'x at 389 (citing *Mayo* in concluding that "failing to protect a child is not in itself a violent felony").

"Differences in law of national applicability, once aired thoroughly throughout the Country," the Seventh Circuit observed recently as to the split here, "need to be resolved." *United States v. Thomas*, 27 F.4th 556, 559 (7th Cir. 2022). That court opted not to reconsider its view or "deviat[e] from a path so well-trod," saying "five other circuits have taken the same position." *Id*. But it's clear now that the "split over whether a crime . . . without overt violent force is a violent felony" doesn't just exist. *Id*. at 558-59. It is entrenched.

The polar-opposite answers to the question here will thus persist, and the stakes are exceedingly high. People convicted of crimes like Petitioner's will face consequences like a 15-year mandatory minimum prison term (§ 924(e)(2)(B)(i)), a consecutive sentence of at least 5 years (§ 924(c)(3)(A)), a far higher Sentencing Guidelines range (U.S.S.G. § 4B1.2(a)(1)), and deportation (§ 16(a))— or not. And these provisions arise daily. In 2021, over 6,800 people were charged with violating 18 U.S.C. § 922(g), many of whom were alleged to be subject to § 924(e). *See*

https://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2021/12/31. Over 2,600 people were charged with violating § 924(c). *See id.* In that fiscal year, over 1,200 people were subjected to the Career Offender Guideline, meaning more were alleged to be subject. *See* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY21.pdf. And the "number of cases received annually by immigration courts has fluctuated over the past two decades," rising "to an all-time high of approximately 1.5 million in the first quarter of FY2022." Congressional Research Service, *U.S. Immigration Courts and the Pending Cases Backlog* (Apr. 25, 2022) at 1 (available at https://crsreports.congress.gov/product/pdf/R/R47077).

In this Court's latest case involving the clause here, *United States v. Taylor*, 142 S. Ct. 2015 (2022), at issue was a "5-1" split over whether "attempted Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A)." Sup. Ct. 20-1459, Reply Brief for the Petitioner at 5-6. "The answer matters," as it opens the door (or not) to "years or decades of further imprisonment." 142 S. Ct. at 2018-19. The Court "agreed to take up this case to resolve that question." *Id.* at 2020.

The same thing is warranted here: 11 circuits have split 6-4-1 over the meaning of text that is a daily feature of federal practice – and that has immense consequences for the people subject to it – and the circuits are not budging from their incompatible readings. This significant discord should be resolved given the Court's "responsibility and authority to ensure the uniformity of federal law." *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (Roberts, C.J., dissenting).

III. The Second Circuit is Wrong

The Second Circuit said its prior decision in *Scott* "binds us." Pet. App. 15a. Per *Scott*, "*Castleman* Compels the Conclusion" that a crime treating one person's physical inaction as the legal cause of another's injury "'*necessarily* involves the use of physical force.'" *Scott*, 990 F.3d at 111 (quoting *Castleman*, 572 U.S. at 169) (emphasis in *Scott*). But *Castleman* neither "compels" nor hints at any such thing.

At issue in *Castleman* was a statute that "made it a crime to 'commi[t] an assault . . . against'" a person. 572 U.S. at 168 (quoting Tenn. Code Ann. § 39-13-111(b), which "incorporate[s] by reference § 39-13-101"). There was no suggestion the offense can be committed by inaction, and indeed it cannot. *See State v. Sudberry*, 2012 WL 5544611, at *16 (Tenn. Crim. App. 2012) ("[N]eglect" under § 39-15-402(a)(1) "is founded upon 'neglect,' or an absence of action," but "assault" under § 39-13-101(a)(1) requires "an affirmative action."). Thus, there is no discussion in *Castleman* of crimes of omission. As such, and as multiple courts and the government have noted, "*Castleman* avowedly did not contemplate the question before us." *Mayo*, 901 F.3d at 228. *See also Reyes-Contreras*, 910 F.3d at 181 n.25 ("*Castleman* does not address whether an omission, standing alone, can constitute the use of force."); *Scott*, 990 F.3d at 114 ("[N]either *Castleman* nor *Villanueva* specifically addressed crimes that can be committed by omission."); *Scott v. United States*, Sup. Ct. 20-7778, Brief for the United States in Opposition at 19 ("*Castleman* did not decide the omission issue.").

"Language, of course, cannot be interpreted apart from context." *Smith v. United States*, 508 U.S. 223, 229 (1993). It was in the context of a crime of

commission – not omission – that *Castleman* said the "intentional causation of bodily injury necessarily involves the use of physical force." 572 U.S. at 169. The Court explained: "First, a 'bodily injury' must result from 'physical force.' . . . Second, the knowing or intentional *application of force* is a 'use' of force." *Id*. at 170 (emphasis added). Thus, an "indirect application" of force resulting in injury, such as "administering a poison," is a use of physical force against the victim. *Id*. So is "infecting with a disease," pointing "a laser beam," delivering "a kick or punch," and "pulling the trigger on a gun." *Id*. at 170-71. But *Castleman* never considered an offense that can be committed without any "application of force" at all. *Id*. at 170. As such, nothing in it suggests – let alone "Compels," *Scott*, 990 F.3d at 111 – the logically and linguistically awkward conclusion that complete physical inaction is a "use of physical force against" anyone or anything. Rather, "*nonphysical* conduct" like "acts of omission," Justice Scalia observed in his concurrence, "cannot possibly be relevant to the meaning of a statute requiring 'physical force.'" *Castleman*, 572 U.S. at 181 (Scalia, J., concurring) (emphasis in original).

"The critical aspect . . . is that a crime of violence is one involving the 'use . . . of physical force *against the person or property of another*.'" *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (emphasis in *Leocal*). "As we said in a similar context in *Bailey*, 'use' requires active employment." *Id*. (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). All the "definitions of 'use' imply action." *Bailey*, 516 U.S. at 145. The "ordinary meaning of the word 'use' in th[e] context" of "use of physical force" thus means "an act of force." *Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016).

And because the force must be used "against" someone or something, the force must "actually be applied." *Leocal*, 543 U.S. at 11. The "ordinary meaning" of "force," for that matter, is "'active power'" that is "'exerted upon'" or "'directed against a person'"; namely, "'[f]orce consisting in a physical act.'" *Johnson v. United States*, 559 U.S. 133, 138-39 (2010) (citations omitted). The force may be exerted upon the target "indirectly," *Castleman*, 572 U.S. at 171, as with poisoning, but the "Supreme Court has never held, in *Castleman* or any other case, that *omissions* constitute indirect force." *Rumley*, 952 F.3d at 552 (Motz, J., concurring) (emphasis in original). That's because "the force necessary" to satisfy the clause here must entail more than "nominal contact," *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019), but inaction entails no "contact" at all. As the Court thus held in *Chambers v. United States*, 555 U.S. 122 (2009), a crime "does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another'" if it "amounts to a form of inaction." *Id*. at 127-28.

In short, the "ordinary meaning" of the language here limits the clause to categorically "violent, active crimes." *Leocal*, 543 U.S. at 11.

New York murder is no such crime. Consider first the statutory text: "A person is guilty of murder in the second degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person or of a third person." N.Y. Penal Law § 125.25(1). No "use of physical force against" the victim is needed. Consider next how New York's highest court has interpreted homicide offenses: an entirely "'passive' defendant" can commit one by "failing to seek emergency medical

aid" for someone in his care. *People v. Wong*, 81 N.Y.2d 600, 608 (1993) (citing *People v. Steinberg*, 79 N.Y.2d 673, 680 (1992)). *See also Sanchez*, 940 F.3d at 535 ("[F]or purposes of [N.Y. Penal Law] § 125.25(1), a defendant could intentionally cause the death of a person not only by direct force but also by the act of intentionally not providing medical care or food.").

New York murder and other crimes that can be committed by inaction thus require no "use of physical force against" the victim, as recent rulings also confirm.

The four-Justice plurality in *Borden v. United States*, 141 S. Ct. 1817 (2021), explained that the text here "demands that the perpetrator direct his action at, or target, another individual." *Id*. at 1825. He must have "deployed" or "directed force at another." *Id*. at 1827. The clause reaches only a "narrow 'category of violent, active crimes.'" *Id*. at 1830 (citation omitted). "[I]t captures [] 'violent, active' conduct alone," namely conduct constituting an "active employment of force against another person." *Id*. at 1834 (citation omitted).

Justice Thomas agreed in his concurrence: "As I have explained before, . . . the 'use of physical force' [is a] phrase [that] 'has a well-understood meaning applying only to intentional acts.'" *Id*. at 1835 (Thomas, J., concurring) (quoting *Voisine*, 136 S. Ct. at 2279, 2290 (Thomas, J., dissenting)). "When a person talks about 'using force' against another, one thinks of intentional acts— punching, kicking, shoving, or using a weapon." *Voisine*, 136 S. Ct. at 2284 (Thomas, J., dissenting). "In my view, a 'use of physical force' most naturally refers to cases where a person intentionally creates force and intentionally applies that force

against a [person]." *Id*. at 2285. Thus, "when an individual does not engage in any violence against persons . . . there is no 'use' of physical force." *Id*. at 2287.

The dissent also agreed that the text "'limits the scope' of the use-of-force clause to 'crimes involving force applied to another person.'" *Borden*, 141 S. Ct. at 1839 (Kavanaugh, J., dissenting) (citation omitted). The "word 'against' is often defined to mean 'mak[ing] contact with.' That is the logical meaning of 'against' in the context of [the] use-of-force clause." *Id*. at 1846 (citation omitted).

Accordingly, sitting still while one's charge has a heart attack, slips beneath the water in a bathtub or swallows a handful of allergy-inducing peanuts is no "violent, active crime[]." *Leocal*, 543 U.S. at 11. Such passivity is plainly vile and rightly punished. "In no 'ordinary or natural' sense," however, "can it be said that [the] person . . . 'use[d]' physical force against" the victim. *Id.* (citation omitted). There has been no "active employment of force against [that] person." *Borden*, 141 S. Ct. at 1834 (plurality op.). "The 'use of physical force,' as *Voisine* held, means the 'volitional' or 'active' employment of force." *Id*. at 1825 (citing *Voisine*, 136 S. Ct. at 2279-81). Yet the heart attack, bathwater and peanuts, like "waves crashing against the shore," *id*. at 1826, "have no volition— and indeed, cannot naturally be said to 'use force.'" *Id.* The caregiver, moreover, hasn't "create[d] [the] force," *Voisine*, 136 S. Ct. at 2285 (Thomas, J., dissenting), or "deployed" or "directed" it, *Borden*, 141 S. Ct. at 1827 (plurality op.), or "applied" it. *Id.* at 1839 (Kavanaugh, J., dissenting). He's simply let the force run its course. Though obviously foul, his physical inaction is not a "use of physical force against" his charge.

The Court again reaffirmed this point in *Taylor*: "The statute speaks of the 'use' or 'attempted use' of 'physical force against the person or property of another.' Plainly, this language requires the government to prove that the defendant took specific actions against specific persons or their property." 142 S. Ct. at 2023. Crimes of inaction simply don't fit the bill.

Given the Court's uniform rulings on this text, this is not a close question. And if it were, the "rule of lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). Yet there's no ambiguity here: *Castleman* says nothing about crimes of omission, and all of this Court's decisions on the clause make clear that crimes of physical inaction do not entail the "use of physical force against the person or property of another." § 924(c)(3)(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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