No. 23-____

In the
Supreme Court of the United States

Jaime Rivera,

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 a crime of physical inaction ever "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. § 924(c)(3)(A).

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OPINION BELOW

The ruling of the United States Court of Appeals for the Second Circuit is unreported and appears at Petitioner's Appendix ("Pet. App.") 1a-4a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231; the Circuit did under 28 U.S.C. § 1291; and this Court does under § 1254(1).

RELEVANT PROVISION

A "'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. § 924(c)(3)(A).

INTRODUCTION

"When a person talks about 'using force' against another," Justice Thomas has explained, "one thinks of intentional acts— punching, kicking, shoving, or using a weapon." *Voisine v. United States*, 579 U.S. 686, 701 (2016) (Thomas, J., dissenting). Other Justices (and the Solicitor General) agree. "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021) (Kagan, J., joined by Breyer, Sotomayor and Gorsuch, JJ.). The "phrase 'against the person of another' . . . 'limits the scope' of the use-of-force clause to 'crimes involving force applied to another person.'" *Id*. at 1839 (Kavanaugh, J., joined by Roberts, C.J., Alito and Barrett, JJ., dissenting) (quoting gov't brief).

Six circuits have ruled, however, that sitting still in a chair can be a "use of physical force against" someone. § 924(c)(3)(A). They reason that, if one person sits

and watches while another suffers a heart attack, hoping for injury or worse (think Bette Davis in *The Little Foxes*, http://tinyurl.com/44vdnxma), the chair-sitter's physical inaction is a "use of physical force against" the heart-attack victim. Thus, these circuits say, a crime in which one person's intentional inaction is deemed the legal cause of another's injury "has as an element the . . . use of physical force against the person or property of another." § 924(c)(3)(A).

All six circuits cite one sentence in *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).

Three other circuits say physical inaction is never a use of physical force. And *Castleman* "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. Martinez-Rodriguez*, 857 F.3d 282 (5th Cir. 2017); *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).

Two circuits are themselves divided. *Compare United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020), and *United States v. Harrison*, 54 F.4th 884 (6th Cir. 2022) (physical inaction sometimes constitutes a use of physical force), *with United States*

v. Middleton, 883 F.3d 485 (4th Cir. 2018), and *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc) (physical inaction is never a use of physical force).

The "circuit split" here "need[s] to be resolved." *United States v. Thomas*, 27 F.4th 556, 558-59 (7th Cir. 2022). The question is whether an entire class of crimes fits within text at issue daily in the federal courts. The contradictory answers mean people face consequences like years more in prison and deportation – or not – based simply on where they are. The circuits aren't budging from their conflicting views. And those in the majority have badly misread *Castleman*, taking a position rejected by literally every Member of this Court who's had the opportunity to weigh in on what "the use of physical force against" someone means. "Plainly," the Court said in last considering § 924(c)(3)(A), its "language requires the government to prove that the defendant took specific actions against specific persons or their property." *United States v. Taylor*, 142 S. Ct. 2015, 2023 (2022). But as a crime of inaction requires no such thing, it's not a "crime of violence."

STATEMENT OF THE CASE

1. Petitioner Jaime Rivera was charged in 2017 in the United States District Court for the Eastern District of New York with: (1) violating 18 U.S.C. § 1959(a) by murdering Tafare Berryman in 2005 in violation of New York Penal Law § 125.25(1); and (2) violating 18 U.S.C. § 924(j) during a "crime of violence"— the New York murder in Count One.

In 2017, a "crime of violence" was defined as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or

property of another" or "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3). The elements of New York murder (in 2005 and today) are "intent to cause the death of another person" and "caus[ing] the death." N.Y. Penal Law § 125.25(1). A "'passive' defendant" can commit homicide 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)).

Rivera pleaded guilty in March 2019 to the "crime of violence" charge in Count Two and was sentenced to 220 months in prison. Pet. App. 6a.

In June 2019, this Court invalidated "§ 924(c)(3)(B) [a]s unconstitutionally vague." *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

2. Rivera appealed, arguing his conviction is unlawful because New York murder, which "can be committed by a culpable omission," Pet. App. 2a, does not "always requires the government to prove – beyond a reasonable doubt, as an element of its case – the use, attempted use, or threatened use of force." *Taylor*, 142 S. Ct. at 2020. He acknowledged, however, that his "arguments on appeal [we]re foreclosed" in the Second Circuit. Pet. App. at 4a. *See United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc) (New York manslaughter is a "crime of violence."); *Stone v. United States*, 37 F.4th 825 (2d Cir. 2022) (New York murder is a "crime of violence.").

The circuit accordingly affirmed Rivera's conviction, noting his intent to "seek Supreme Court review." Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. This Recurring Question Has Divided 11 Circuits

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

Six circuits say crimes in which intentional inaction is deemed the legal cause of injury have as an element the "use of physical force against" the victim even though the defendant never moves a muscle. Petitioner's case is the latest on that side of the split, as the Second Circuit said it was "bound by *Scott* and *Stone* to affirm Rivera's conviction." Pet. App. 4a. The en banc ruling in *Scott* is indeed the controlling case, which the *Stone* panel said "binds us." 37 F.4th at 833.

In the 9-5 decision in *Scott*, which produced 120 pages of dueling opinions, the 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.'" 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.* (emphasis in *Scott*) (quoting *Castleman*, 572 U.S. at 169).

Five other circuits also cite *Castleman* as compelling this view, even though "*Castleman* [never] specifically addressed crimes that can be committed by omission," *id.* 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* in ruling "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").

Three 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 "'[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. Harris*, 68 F.4th 140, 146 & 148 (3d Cir. 2023) ("As we held in *Mayo*, an act of omission does not constitute an act of physical force," and *Castleman* does not "require[] this Court to conflate the infliction of bodily injury with physical force.").

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.").

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, an offense requires no "'use, attempted use, or threatened use of physical force against the person of another,' [if] 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," so a crime requiring "'application of force on the victim by the defendant'" qualifies.) (citations omitted).

Two circuits are themselves divided over this question. The Fourth Circuit has held 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." *United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012). An "'offense that results in physical injury, but does not involve the use or threatened use of force, simply does not meet the [] definition of a crime of violence.'" *United States v. Middleton*, 883 F.3d 485, 491 (4th Cir. 2018) (citation omitted). And "'*Castleman* did not [] abrogate'" an earlier holding "that 'a crime may result in death or serious injury without involving the use of physical force.'" *Id.* (citation omitted). The Fourth Circuit has also said, however, that "there 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." *United States v. Rumley*, 952 F.3d 538, 551 (4th

Cir. 2020). *Rumley* doesn't acknowledge either *Gomez* or *Middleton*.

Likewise, the en banc Sixth Circuit has held 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*). Yet a panel of that court has also said an "omission that constitutes murder – omission that intentionally or wantonly causes the death of another – still uses physical force." *United States v. Harrison*, 54 F.4th 884, 889 (6th Cir. 2022). As with the Fourth Circuit cases, *Harrison* makes no mention of *Burris* or *Dunlap*.

Finally, though the D.C. Circuit has yet to address this question, its district court has held "'omissions resulting in death'" do "not involve the use, attempted use, or threatened use of violent force against the person or property of another." *United States v. Williams*, 353 F. Supp. 3d 14, 20 (D.D.C. 2019) (Friedman, J.) (quoting *United States v. Key*, 599 F.3d 469, 479 (5th Cir. 2010)).

These courts can't all be right. Physical inaction deemed the cause of harm either is or isn't 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. Only this Court can settle these disputes.

II. The Split is Entrenched and Needs to be Resolved

The government opposed certiorari in *Scott*, noting the Third Circuit had gone en banc in a case that could've undone *Mayo* and thus that 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. And when the panel then adhered to its circuit's rule that an "omission does not constitute an act of physical force," *Harris*, 68 F.4th at 146, the government sought – and was denied – en banc review. *See United States v. Harris*, ___ F.4th ___, 2023 WL 8655275 (3d Cir. Nov. 27, 2023).

Besides the Third Circuit's declining another chance to reverse its view that physical inaction is 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 Fourth and Sixth Circuits have held, post-*Castleman*, that an "'offense that results in physical injury, but does not involve the use or threatened use of force, simply does not meet the [] definition of a crime of violence.'" *Middleton*, 883 F.3d at 491 (citation omitted). 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.

The fact that panels of the Fourth and Sixth Circuits have ruled contrary to the decisions above (without even acknowledging them), *see Rumley*, 952 F.3d at 551; *Harrison*, 54 F.4th at 889, only underscores how conflicted jurists are.

The "circuit split over whether a crime involving the intentional infliction of bodily harm without overt violent force is a . . . crime of violence" clearly "need[s] to be resolved." *Thomas*, 27 F.4th at 558-59.

And the stakes are high. Applying the text at issue has consequences like a 15-year mandatory minimum prison sentence (§ 924(e)(2)(B)(i)), a consecutive term 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 (18 U.S.C. § 16(a)).

These provisions arise daily in federal courts across the country. In 2022, over 6,200 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/2022/12/31. Over 2,500 people were charged with violating § 924(c). *Id.* In that fiscal year, over 1,300 people were subjected to the Career Offender Guideline, meaning more were alleged subject. *See* https://www.ussc.gov/research/quick-facts/career-offenders. And there were "nearly 2 million" pending immigration cases "at the end of the second quarter of FY 2023, an all-time high." Congressional Research Service, *Immigration Judge Hiring and Projected Impact on the Immigration Courts Backlog* (July 28, 2023) at Summary (available at https://crsreports.congress.gov/product/pdf/R/R47637).

This Court's latest case on the clause here, *Taylor*, involved a "5-1" split over

whether a single offense, "attempted Hobbs Act robbery[,] is a crime of violence." Sup. Ct. 20-1459, Reply Brief for the Petitioner at 5-6. "The answer matters," the Court said, 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.

It should do so here too. Eleven circuits are split over whether not one crime but an entire class of crimes fits the text here, which is a daily feature of federal practice carrying immense consequences for the people subject to it. This 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

"Plainly," this Court said when it last considered § 924(c)(3)(A), its "language requires the government to prove that the defendant took specific actions against specific persons or their property." *Taylor*, 142 S. Ct. at 2023. The Second Circuit noted New York murder doesn't categorically require such proof, as it "can be committed by a culpable omission," Pet. App. 2a, yet the circuit said it was "bound by *Scott*" to rule against Petitioner. *Id*. at 4a. Per *Scott*, "*Castleman* Compels the Conclusion" that a crime treating physical inaction as the legal cause of injury "'*necessarily* involves the use of physical force.'" 990 F.3d at 111 (emphasis in *Scott*) (quoting *Castleman*, 572 U.S. at 169). But *Castleman* compels nothing of the kind.

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. *See also Mayo*, 901 F.3d at 228 ("*Castleman* avowedly did not contemplate the question before us."); *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.").

Further, *Castleman* concerned whether a crime required only the "'use of physical force,'" 572 U.S. at 161 (citation omitted), not the "use of physical force *against the person or property of another*." § 924(c)(3)(A) (emphasis added). This difference matters: the "phrase 'against the person of another' . . . '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) (quoting Brief for the United States at 23). "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Id.* at 1825 (plurality op.). Thus, even if a crime of omission – a crime where there is no "force applied" and the perpetrator takes no "action" – could be said to involve some

conceivable "use of physical force," it cannot reasonably be described as entailing the use of force "against the person or property of another."

"Language," moreover, "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 the counterintuitive view that sitting still is a "use of physical force against" someone. The "'English language tells us not to expect'" that description, so "'we must be very wary'" of it. *Dubin v. United States*, 599 U.S. 110, 124 (2023) (citation omitted). Indeed, "*nonphysical* conduct" like "acts of omission," Justice Scalia cautioned, "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*) (citation omitted). "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" is "an act of force." *Voisine*, 579 U.S. at 693.

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 applied to the target "indirectly," *Castleman*, 572 U.S. at 171, as with poisoning, but this "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 doesn't fit that bill. Consider first the statutory text: it

requires "intent to cause the death of another person" and "caus[ing] the death." 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: a "'passive' defendant" can commit one by "failing to seek emergency medical aid" for someone in his care. *Wong*, 81 N.Y.2d at 608 (citing *Steinberg*, 79 N.Y.2d at 680). *See also* Pet. App. 2a (Murder under § 125.25(a) "can be committed by a culpable omission."); *Sanchez*, 940 F.3d at 535 (Murder under § 125.25(1) can be committed by "intentionally not providing medical care or food."). As the crime can thus be committed by inaction, it requires no "use of physical force against" the victim. This Court's latest rulings in this area, like those above, also make that plain.

The four-Justice plurality in *Borden* explained that the text here "demands that the perpetrator direct his action at, or target, another individual." 141 S. Ct. 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*, 579 U.S. at 713 (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*, 579 U.S. at 701 (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 704. Thus, "when an individual does not engage in any violence against persons . . . there is no 'use' of physical force." *Id*. at 708.

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) (quoting government brief). 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).

Yet a crime of inaction entails no "active employment of force against another person," *id*. at 1834 (plurality op.), no "force applied to" or "contact with" him, *id*. at 1839 & 1846 (Kavanaugh, J., dissenting), and no "violence against" anyone. *Voisine*, 579 U.S. at 708 (Thomas, J., dissenting).

Again, § 924(c)(3)(A) "requires the government to prove that the defendant *took specific actions against* specific persons or their property." *Taylor*, 142 S. Ct. at 2023 (emphasis added). But proving *no action* is what crimes of omission require.

Doing nothing when one's charge has a heart attack, slips beneath the water in a bathtub or swallows a handful of allergy-inducing peanuts is clearly vile and rightly punished, but that passivity is no "violent, active crime[]." *Leocal*, 543 U.S. at 11. "In no 'ordinary or natural' sense' can it be said that [the] person . . . 'use[d]' physical force against" his charge. *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*, 579 U.S. at 693-96). Yet the heart attack, bathwater and peanuts, like "waves crashing against the shore," *id.* at 1826, "have no volition." *Id.* And the caregiver, passively watching their effects, "cannot naturally be said to 'use force.'" *Id.* He hasn't "create[d] [the] force," *Voisine*, 579 U.S. at 703 (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 criminal, his physical inaction is not a "use of physical force against" his charge. § 924(c)(3)(A).

Thus New York murder, which can be committed by such inaction, is not categorically a "crime of violence." If that sounds odd to "a man on the street," *Scott*, 990 F.3d at 99, that's only because of recent legal developments. Before 2019, when the Court invalidated "§ 924(c)(3)(B) [a]s unconstitutionally vague," *Davis*, 139 S. Ct. at 2336, New York murder obviously counted as a "crime of violence." Any homicide offense, "by its nature, involves a substantial risk that physical force against the person or property of another may be used." § 924(c)(3)(B). But a "crime of violence" is now limited to the definition in § 924(c)(3)(A). And as shown, no element of New York murder invariably "requires the government to prove that the defendant took specific actions against" the victim. *Taylor*, 142 S. Ct. at 2023. The Second Circuit thus erred by "shoehorning" the offense "into [a] statutory section[] where it does not fit." *Leocal*, 543 U.S. at 13. "At this point, the only

tenable, long-term solution" to the problem of § 924(c)(3)(A)'s not reaching certain crimes (if that is indeed a problem) "is for Congress to formulate a specific list" of qualifying offenses. *Chambers*, 555 U.S. at 134 (Alito, J., joined by Thomas, J., concurring).

Given the Court's rulings on this text, the question here isn't close. And if it were, "lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333. But there's no ambiguity here: *Castleman* says nothing of crimes of omission, and the Court's decisions make plain that crimes of physical inaction do not have as an element 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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December 27, 2023