NO. _____

IN THE
Supreme Court of the United States

JOSE CABAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should grant certiorari to resolve the conflict among the circuits on the question of whether a crime that can be committed by complete inaction constitutes a crime of violence under 18 U.S.C. § 924(c)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other

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

An entrenched circuit split has caused an extreme violation of the people's right to equal protection under the 14th Amendment to the United States Constitution. Based upon the disparate approach taken among the Circuit Courts of Appeal, a defendant could be sentenced to up to life imprisonment under section 924, subdivision (c)(1)(C) in the Second Circuit, but not in the Third or Fifth Circuits, for the same crime. This grave inconsistency among convictions and sentences for defendants who might be subject to an additional penalty of between an additional five years' (ordinary firearm) imprisonment up to an additional life term of imprisonment (machine gun, or destructive device or equipped with a firearm muffler or silencer and the defendant has already been convicted of a section 924(c) offense), 18 U.S.C. § § 924(c)(1)(A), (B), (C), must be resolved by this Court by the grant of petitioner's writ for certiorari. In Petitioner's case, if he was

prosecuted in the Third or Fifth Circuit, he would not be subject to the two 924(c) counts in the indictment, and he would likely be out of jail by now.

OPINION BELOW

The Summary Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A. 1-12).[1]

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on February 5, 2024. (A. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924 of Title 18 of the United States Code provides:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, 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 of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

[1] Numerical References preceded by "A." refer to the pages of the Appendix filed herewith.

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to

for life.

* * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

STATEMENT OF THE CASE

Petitioner seeks review of the Second Circuit's determination that his 18 U.S.C. section 924, subdivision (c) ("section 924(c)" or "§ 924(c)") convictions were properly supported by the crime of violence of attempted murder in the second-degree under New York Penal Law section 125.25, subdivision (1). In Petitioner's case, the Court of Appeals held that attempted murder in the second-degree categorically qualifies as a crime of violence. There is a split among the Circuits on this issue as the 3rd and 5th Circuits have held that crimes that can be committed by "total inaction," like attempted murder in the second degree under New York law, do not satisfy the use of force requirement necessary to sustain a conviction under section 924(c).

REASONS FOR THE GRANTING OF THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AS TO WHETHER A CRIME THAT CAN BE COMMITTED BY TOTAL INACTION CAN BE A CRIME OF VIOLENCE

A. Introduction

Contrary to the Second Circuit's determination, New York attempted second degree murder can be committed by complete inaction and therefore cannot be categorically considered a crime of violence under 18 U.S.C. § 924(c)(3)(A).

B. Legal Framework

Under 18 U.S.C. section 924, subdivision (c)(3)(D), a felony qualifies as a "crime of violence" only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This Court has repeatedly explained that the "ordinary meaning" of the term "physical force" in the Armed Career Criminal Act refers to "'violent, active crimes.'" *Borden v. United States*, 593 U.S. 420, 437-438 (quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010) and *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)). Eight circuits have held that crimes that can be committed by an omission involving no force can somehow involve the "use of physical force."

In *Taylor*, the Court held that attempted Hobbs Act robbery does not qualify as a "crime of violence" under section 924, subdivision (c)(3)(A) because no element of the offense requires proof that the defendant used, attempted to use, or threatened to use force. *Taylor*, 142 S. Ct. at 2017.

In *Taylor*, the Court rejected the concept that attempts to commit crimes of violence must categorically qualify as crimes of violence themselves. The Court explained that "the elements clause does not ask whether the defendant committed a crime of violence or attempted to commit one. It asks whether the defendant *did* commit a crime of violence—and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force." *Taylor*, 142 S. Ct. at 2022. To determine whether a federal felony may serve as a predicate for a conviction and sentence under the elements clause of section 924,

subdivision (c)(1), the Court must apply a "categorical approach." The Court must apply the categorical approach because the elements clause poses the question whether the federal felony at issue "has *as an element* the use, attempted use, or threatened use of physical force." *Taylor*, 142 S. Ct. at 2020. 18 U.S.C. § 924(c)(3)(A) (emphasis added). "And answering that question does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the federal felony at issue 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. This Court has long understood similarly worded statutes to demand similarly categorical inquiries." *Taylor*, 142 S. Ct. at 2020 (2022) citing *Borden* v. *United States*, 593 U. S. ___, ___, 141 S. Ct. 1817, 210 L. Ed. 2d 63, 87 (2021); *Davis*, 588 U. S., at ___, 139 S. Ct. 2319, 204 L. Ed. 2d 757; *Leocal* v. *Ashcroft*, 543 U. S. 1, 7, (2004).

C. The Circuit Split

1. The Faulty Majority View

Most courts of appeals hold that if a crime results in death or bodily injury, it "*necessarily* involves the use of violent force," even if the crime may be committed "by omission." *United States* v. *Scott*, 990 F.3d 94, 112-13 (2d Cir. 2021) (en banc). That is the rule in eight circuits. See *United States* v. *Báez-Martínez*, 950 F.3d 119, 130-33 (1st Cir. 2020);[2] *Scott*, 990 F.3d at 112-13 (2d Cir.); *United States* v. *Rumley*,

[2] The First Circuit questioned the logic of whether a crime that can be committed by an omission should be categorically defined as a crime of violence. First, the Court cited several cases that have "at least suggested that crimes that can be completed

952 F.3d 538, 549-51 (4th Cir. 2020); *United States* v. *Harrison*, 54 F.4th 884, 890 (6th Cir. 2022); *United States* v. *Jennings*, 860 F.3d 450, 460-61 (7th Cir. 2017); *United States* v. *Peeples*, 879 F.3d 282, 286-87 (8th Cir. 2018); *United States* v. *Ontiveros*, 875 F.3d 533, 536-38 (10th Cir. 2017); *United States* v. *Sanchez*, 940 F.3d 526, 535-36 (11th Cir. 2019).

To arrive at this conclusion, these courts of appeals have adopted identical reasoning, including a broad reading of this Court's decision in *United States* v. *Castleman*, 572 U.S. 157 (2014). Although the Court there expressly "[d]id not reach" the question of whether "causation of bodily injury necessarily entails violent force," *id.* at 167, the circuits in the majority of the split have read the decision as implicitly resolving the issue. In *Castleman*, the court declared: "The knowing or intentional causation of bodily injury necessarily involves the use of physical force.

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by omission fall outside the scope of the force clause. *Baez-Martinez,* 950 F.3d 119, 131 (1st Cir. 2020) citing *United States v. Teague*, 469 F.3d 205, 208 (1st Cir. 2006) (Texas child endangerment); *see also United States v. Mayo*, 901 F.3d 218, 230 (3d Cir. 2018) (Pennsylvania aggravated assault); *United States v. Resendiz-Moreno*, 705 F.3d 203, 205 (5th Cir. 2013) (Georgia first-degree child neglect), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169, 187 (5th Cir. 2018); *cf. Chambers v. United States*, 555 U.S. 122, 127-28, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009) (holding that a "failure to report" crime is not a violent felony because "the crime amounts to a form of inaction"); *United States v. Middleton*, 883 F.3d 485, 489-90 (4th Cir. 2018) (holding that South Carolina involuntary manslaughter is not a violent felony because it can be committed by providing alcohol to minors)." The Court admitted that "common sense and the laws of physics support" the petitioner's argument that force can not be exhibited by inaction or an omission. However, the Court ultimately ruled that it must follow *United States* v. *Castleman*, 572 U.S. 157 (2014), "[a]nd in *Castleman*, the Supreme Court declared: "the knowing or intentional causation of bodily injury necessarily involves the use of physical force. . . . [A] 'bodily injury' must result from 'physical force.'" *Baez-Martinez,* 950 F.3d at 131 citing 572 U.S. at 169-70.

"A 'bodily injury' must result from 'physical force.'" Following this erroneous logic, the Second Circuit determined in petitioner's case that even though New York attempted second degree murder can be committed by complete inaction, it is categorically a crime of violence. See, e.g., *People v. Steinberg*, 595 N.E. 2d 845, 846-847 (N.Y. 1992) (parents' failure to provide child with adequate medical care "can form the basis of a homicide charge").

2. The Correct, Minority View

Two courts of appeals have reached the opposite conclusion in precedential opinions. In *United States* v. *Mayo*, 901 F.3d 218 (3d Cir. 2018), the Third Circuit held that if a crime involving death or bodily injury can be committed through inaction—such as through "the deliberate failure to provide food or medical care" despite a duty to do so—then the crime does not "include an element of 'physical force.'" *Id.* at 227. In so ruling, the court rejected the government's position "that causing or attempting to cause serious bodily injury necessarily involves the use of physical force." *Id.* at 228. *Mayo* also rejected the argument, advocated by the government, and endorsed by other courts of appeals, that *Castleman* resolves the issue by equating the causation of bodily injury with the use of violent force. *Castleman* addressed the different question of "whether the 'knowing or intentional causation of bodily injury' satisfies 'the common-law concept of 'force,'" the Third Circuit explained, and it "expressly reserved the question of whether causing 'bodily injury'" necessarily involves the use of 'violent force.'" *Ibid.* (quoting *Castleman*, 572 U.S. at 169). Even if *Castleman*'s discussion of common-law force "were pertinent,"

moreover, it dealt only with affirmative acts that apply external force to a person (even if indirectly), not with omissions. *Id.* at 230. The Third Circuit thus rejected decisions from courts of appeals on the other side of the split as not "persuasive," because "they conflate an act of omission with the use of force, something that *Castleman* . . . does not support." *Id.*

The Fifth Circuit has similarly held that an offense is "not categorically a crime of violence" if it "may be committed by both acts and omissions." *United States* v. *Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017). The defendant in *Martinez-Rodriguez* was sentenced under a provision of the Immigration and Nationality Act (INA) that authorizes up to 20 years of imprisonment for an alien who unlawfully reenters the country after having been convicted of an "aggravated felony." 8 U.S.C. § 1326(b)(2). The INA defines "aggravated felony" to include a felony "crime of violence," *id.* § 1101(a)(43)(F), which in turn is defined to include "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). Prior to his unlawful reentry, the defendant had been convicted of causing injury to a child under Texas Penal Code § 22.04(a). But since that statute may be satisfied "by act or by omission," the court explained, "the offense of causing injury to a child is broader under the Texas statute than a crime of violence." *Martinez-Rodriguez*, 857 F.3d at 286. The court accordingly vacated the defendant's sentence. *Id.* at 287.

Under the same reasoning, the Fifth Circuit has also held that an "act of omission" cannot satisfy the functionally identical definition of "crime of violence" in

the United States Sentencing Guideline for illegal reentry offenses. *United States* v. *Resendiz-Moreno*, 705 F.3d 203, 205-06 (5th Cir. 2013); see U.S.S.G. §2L1.2(b)(1)(A)(ii) & app. n.1(B)(iii) (2013). The court accordingly vacated a sentence that had been enhanced based on the defendant's conviction for first degree cruelty to a child under Georgia law, Ga. Code Ann. § 16-5-70(b) (2010), because "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." *Resendiz-Moreno*, 705 F.3d at 205.

The reasoning employed by the Third and Fifth Circuits makes much more sense than the justification applied by the majority view. A bodily injury can occur in many ways that do not involve any force, the majority's contorted view is result-based and must be clarified by this Court.

D. The "Use of Force" Clause is Unconstitutionally Vague

This split of views among the courts of appeals on this issue confirms that the phrase "use of physical force" in the ACCA is unconstitutionally vague. This split confirms that it is, at a minimum, unclear whether Congress intended to include crimes of omission within the force clause of the ACCA.

"[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see

also *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) ("[v]ague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them" (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) and *Collins v. Kentucky*, 234 U.S. 634, 638 (1914))). Because the use of force clause of Section 924(c) is unconstitutionally vague, the petition should be granted.

E. The Rule of Lenity

Finally, the rule of lenity requires that the Court, when determining a criminal statute's scope, or its penalties, must resolve ambiguities "in the defendant's favor." *Davis*, 139 S. Ct. at 2333; see also *Bittner v. United States*, 598 U.S. 85, 101 (2023) ("Under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals."); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (rule of lenity applies to the "interpretations of the substantive ambit of criminal prohibitions" and "the penalties they impose"). Before interpreting an ambiguous criminal statute to impose a "'harsher alternative,'" courts must find that Congress has spoken in "'clear and definite'" language. *United States v. Bass*, 404 U.S. 336, 347-348 (1971)).

F. Conclusion

The Court should grant certiorari because the majority view unconstitutionally employs result-based, illogical reasoning. Moreover, most circuit courts, shattering the rule of lenity, have wrongfully interpreted an unconstitutionally vague provision that can subject offenders to up to life

imprisonment. When courts resort to unsound interpretations of the law, especially when resulting in a circuit split, and ignoring the rule of lenity, the grant of certiorari is paramount.

II. THE COURT SHOULD GRANT CERTIORARI TO REMEDY THE SECOND CIRCUIT'S MISAPPREHENDED INTERPRETATION OF THE DEFINITION OF "CRIME OF VIOLENCE" UNDER 18 U.S.C. SECTION 924, SUBDIVISION (e)(2)(B).

The Second Circuit does not analyze whether the violent crime in aid of racketeering ("VICAR") statute is a crime of violence when it is the underlying crime to a § 924(c) charge. *United States v. Pastore,* 36 F.4th 423, 428 (2d Cir. 2022). Instead, the Court decided, just two years ago, that it will review the state offenses alleged as underlying the VICAR charge to determine whether those state statutes are crimes of violence. *Id.* Under that approach, "a substantive VICAR offense is a crime of violence when predicated on at least one violent crime in aid of racketeering acts." *Id.* at 429. However, the VICAR statute provides that a violent crime (such as attempted murder or assault with a dangerous weapon) in aid of racketeering must be "in violation of the laws of any State or the United States." 18 U.S.C. § 1959(a). Thus, where a "substantive VICAR offense hinges on the underlying predicate offense," this Court "look[s] to that predicate offense to determine whether [the defendant] was charged with and convicted of " a Section 924, subdivision (c) ("§ 924(c)") offense predicated on a valid "crime of violence." *Id.* In *Pastore*, where a § 924 (c) conviction was predicated on attempted murder in aid of racketeering, which was in turn based on attempted murder under N.Y. Penal

Law § 125.25(1), *id*, the Second Circuit affirmed the Section 924(c) conviction concluding that attempted murder under New York Penal Law Section 125.25(1) satisfies the elements clause, *id*. at 430.

The approach employed by the Second Circuit in *Pastore* is not correct. § 924(c) requires that the defendant carry or use a firearm . . . "during and in relation to any crime of violence . . ." "*for which the person may be prosecuted in a court of the United States.*" 18 U.S.C. § 924(c). Thus, the proper underlying crime is 18 U.S.C. section 1959, subdivision (a), not attempted murder under N.Y. Penal Law section 125.25, because a defendant may not be prosecuted under state law for a crime like N.Y. Penal Law section125.25 in a court of the United States. And, 18 U.S.C. section 1959, subdivision (a) is not categorically a crime of violence because a person can be guilty of 18 U.S.C. section 1959, subdivision (a)(4) without force, by merely making a "threat[]" to commit a crime of violence, or a person can be guilty of subdivision (a)(5) and (a)(6), by attempting or conspiring to commit violent acts. *Taylor*, 142 S. Ct. at 2020. 18 U.S.C. § 924(c)(3)(A) (emphasis added). Thus, the *Pastore* approach is an ends-based method to find a crime that is not categorically a crime of violence under a commonsense, plain-meaning approach to be a crime of violence and subject defendants to additional penalties.

Alternatively, attempted murder under N.Y. Penal Law section 125.25 is also not categorically a crime of violence. *People v. Naradzay*, 11 N.Y.3d 460, 466-67 (2008). While NY Penal Law § 125.25(1) states guilty of murder in 2nd degree when with intent to cause the death of another, causes the death of such person.

Attempted second degree murder does not require the use, attempted use, or threatened use of force. In fact, petitioner's jury instructions on the attempted murder predicate for VICAR required only that the jury find two elements:

> 1. The defendant intended to commit murder;
> 2. The defendant committed some act that was a substantial step in an effort to bring about or accomplish the murder.

Neither of these elements required that petitioner use, attempt, or threaten to use force, so the crime should not have resulted in a finding that the crime categorically required that the defendant use, attempt or threaten to use force, warranting the reversal of petitioner's two convictions under § 924(c).

In the *Naradzay* case, the defendant was convicted of attempted murder in the second degree when proof established that he wrote down eight steps that involved entering victim's home, and the "final shot." The defendant purchased a shotgun, and went to location of intended victim's home where neighbor saw him carrying gun and called 911. 11 N.Y.3d at 466-67. However, the defendant did not use any force at all. So, a person may be convicted of an attempt to commit murder under New York Penal Law section 125.25 without any use of force. Another example of an attempt to commit murder would be taking steps to hire a hit man. Those steps taken may not involve the use of force at all. Petitioner is serving twenty years in jail based upon an incorrect application of the law by the lower courts. The petition should be granted to remedy the Second Circuit's misapplication of an important question of federal law.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: May 2, 2024
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