No.

In the Supreme Court of the United States

SALVATORE DELLIGATTI, PETITIONER,

v.

UNITED STATES OF AMERICA

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

Under 18 U.S.C. § 924(c)(3)(A), a felony qualifies as a "crime of violence" if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Courts have disagreed about how to apply use-of-force language to crimes that require proof of a victim's bodily injury or death but can be committed by *failing* to take action.

In the decision below, the Second Circuit held that any crime requiring proof of death or bodily injury categorically involves the use of physical force, even if it can be committed through inaction—such as by failing to provide medicine to someone who is sick or by failing to feed a child. That ruling reflects the law in eight circuits.

Two courts of appeals, by contrast, have held that the use of force is *not* an element of such crimes if the crime may be committed by inaction. One of those courts recently rejected the government's petition for rehearing en banc, which had argued that any crime requiring proof of bodily injury or death necessarily involves the use, attempted use, or threatened use of physical force.

The question presented is:

Whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. *Pastore*, No. 1:15-cr-491 (Jul. 29, 2015)

United States Court of Appeals (2d Cir.):

United States v. *Pastore*, No. 18-2482(L); 18-2610(Con) (Aug. 22, 2018)

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OPINIONS BELOW

The original opinion of the court of appeals (App. 16a-33a) is reported at 36 F.4th 423 (2d Cir. 2022). The amended opinion of the court of appeals (App. 1a-15a) is reported at 83 F.4th 113 (2d Cir. 2023).

JURISDICTION

The amended judgment of the court of appeals was entered on October 2, 2023. App. 1a. The court of appeals denied a timely petition for rehearing on December 15, 2023. App. 42a. 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—
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> > **(i)** be sentenced to a term of imprisonment of not less than 5 years;
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> > **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > **(iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
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> * * *
>
> **(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.

INTRODUCTION

Under federal law, an offense qualifies as a "crime of violence" if it "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). To determine whether an offense satisfies this definition, which is commonly referred to as the use-of-force clause, a court applies the categorical approach: Looking at the elements necessary to sustain the conviction, the court must determine whether the least-serious conduct they cover still satisfies the use-of-force clause in all instances.

This case presents an acknowledged circuit conflict over how to apply use-of-force language to an important category of offenses: crimes that require proof of bodily injury or death, but can be committed solely through the defendant's *inaction*. Under the law of some States, a person who has a duty to act but fails to do so—such as by failing to provide medicine to someone who is sick or by neglecting to feed a dependent—may face criminal liability. If the defendant's nonfeasance results in death, he or she may even be convicted of homicide. See, *e.g.*, *People* v. *Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992).

The courts of appeals have reached different conclusions about how to apply use-of-force language to such offenses. Eight circuits, including the Second Circuit in the decision below, have held that any crime requiring proof of death or bodily injury categorically involves the use of physical force, even if it can be committed through inaction. But two circuits have taken the position that the use of force is *not* an element of such an offense if the offense may be committed by the defendant's failure to act.

In light of this "conflict," the government petitioned the Third Circuit for rehearing en banc on this issue, which it described as "a question of exceptional importance." Pet. at 1, 12, *Harris* v. *United States*, No. 17-

1861 (3d Cir. July 3, 2023). But the Third Circuit recently denied review, making clear that the conflict will persist "unless the Supreme Court takes this matter up." *United States* v. *Harris*, 88 F.4th 458, 465 (3d Cir. 2023) (Jordan, J., concurring in the denial of rehearing en banc).

The time to take up the question is now. The circuit split is well-developed and entrenched, with ten courts of appeals having weighed in. The issue is important, affecting not just thousands of prosecutions each year under Section 924(c), but also many others under materially identical use-of-force clauses, including the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), and the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(a). And this case, in which the issue was briefed and decided at every stage, is an ideal vehicle for addressing it.

The Court should also grant review because the majority view is wrong: A crime that can be committed through inaction does not have "as an element the use, attempted use, or threatened use of physical force." Failing to provide someone with necessary medical care or nutrition may be morally reprehensible and, in some States, criminally liable conduct. But it does not involve the use of *any* force, much less the type of violent physical force necessary to satisfy the use-of-force clause.

STATEMENT OF THE CASE

Section 924(c) makes it a federal offense to use or possess a firearm during and in relation to any "crime of violence" that can be prosecuted in federal court. 18 U.S.C. § 924(c)(1)(A). The offense carries a mandatory-minimum sentence of at least five years—more if the firearm is brandished or discharged—and a maximum of life in prison. *Id.* § 924(c)(1)(A)(i)-(iii). Section 924(c) sentences must run consecutively to any other sentence. *Id.* § 924(c)(1)(D)(ii).

Under Section 924(c)(3)(A), a "crime of violence" includes a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." That definition is often called the use-of-force clause.

A. In *United States* v. *Scott*, 954 F.3d 74 (2d Cir. 2020), the Second Circuit addressed whether crimes that "can be committed by complete inaction" may satisfy a use-of-force requirement. *Id.* at 78.

1. The defendant in *Scott* had received a mandatory-minimum sentence under the Armed Career Criminal Act based in part on his prior convictions for first-degree manslaughter under New York law. *Ibid.* The government argued that those offenses qualified as "violent felonies" under the ACCA's use-of-force clause because they require proof that the defendant's conduct resulted in death. *Id.* at 80-81. According to the government, any offense that requires proof that the defendant caused death or bodily injury necessarily "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

In an opinion by Judge Pooler, a divided panel of the Second Circuit disagreed. Under New York law, Judge Pooler explained, Scott's predicate offenses "may be committed by a defendant's failure to act," and a crime that "can be committed by omission" does not satisfy the use-

of-force requirement. 954 F.3d at 81. In one case, for instance, the New York Court of Appeals had held that a parent could be prosecuted for manslaughter based on the "failure to secure medical care" for his injured child. *Ibid.* According to the New York Court of Appeals, parents have a "nondelegable affirmative duty to provide their children with adequate medical care," and a parent's "failure to fulfill that duty can form the basis of a homicide charge." *Ibid.* (quoting *People* v. *Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992)) (emphasis omitted).

Judge Pooler next considered "whether a crime that can be committed by omission 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'" *Id.* at 84 (quoting 18 U.S.C. § 924(e)(2)(B)(i)). The government argued "that where a defendant's omission causes a serious injury, force is implicit in the inaction and thus the omission constitutes a use of force." *Ibid.* But Judge Pooler determined that if a crime may be based on a defendant's "failure to act"—such as in situations where the defendant "has a duty to act to protect the victim" but fails to do so—then the crime does not satisfy the use-of-force requirement:

> [A] defendant who commits a crime by omission definitionally takes no action and thus initiates nothing. This might occur, for example, when the mandatory caretaker defendant observes that the victim has, entirely through natural causes, entered into a condition that urgently requires administration of medical help and, with intention to harm the victim, the defendant fails to summon such help.

Id. at 86.

The Second Circuit panel thus concluded that crimes that "can be committed by inaction" do not satisfy "the ordinary meaning" of the ACCA's use-of-force clause. *Id.* at 87.

Judge Leval concurred, arguing that the rule of lenity further supported the panel's decision, given the "lack of clarity whether ACCA's requirement of use of physical force can be satisfied . . . where the defendant has taken no action whatsoever." *Id.* at 92.

Judge Raggi dissented. In her view, even a crime that can be committed by failing to act necessarily involves the use of force so long as it requires proof that death or bodily injury resulted. *Id.* at 96. "Carried to its logical—or illogical—conclusion," she noted, the majority's "reasoning would preclude even intentional murder from being recognized as a categorical violent felony or crime of violence because, presumably, a person can cause death through omission [if] his specific intent is to kill." *Ibid.* (citing N.Y. Penal Law § 125.25).

2. The government petitioned the Second Circuit for rehearing, which it argued was necessary to address "questions of exceptional importance." *Scott* Reh'g Pet. at 10. The panel's decision was inconsistent with rulings from "[s]ix circuits," the government noted, which "have concluded that various assault and homicide offenses that can be committed by omission or inaction still involve the use of physical force." *Id.* at 12 (collecting cases). In joining the other side of this "circuit conflict," the government stated, the panel had aligned itself with "only one other Court of Appeals"—namely, the Third Circuit. *Id.* at 13-14 (citing *United States* v. *Mayo*, 901 F.3d 218 (3d Cir. 2018)). But as the government emphasized, the Third Circuit was actively "reconsidering the issue" en banc. *Id.* at 14 (citing *United States* v. *Harris*, No. 17-1861 (3d Cir.)).

3. The Second Circuit granted rehearing en banc and reinstated the defendant's enhanced sentence. *United States* v. *Scott*, 990 F.3d 94 (2d Cir. 2021).

In an opinion by Judge Raggi, the en banc majority held that the question was controlled by *United States* v. *Castleman*, 572 U.S. 157 (2014). In *Castleman*, this Court

stated that the "knowing or intentional causation of bodily injury *necessarily* involves the use of physical force." *Scott*, 990 F.3d at 100 (quoting *Castleman*, 572 U.S. at 169) (emphasis added by the Second Circuit). Based on that principle, the Second Circuit concluded, if a crime "can only be committed by a defendant who causes death—the ultimate bodily injury—while intending to cause at least serious physical injury, [then] the crime necessarily involves the use of physical force." *Ibid.* (footnote omitted).

The en banc majority rejected the argument, previously accepted by the panel, that a different conclusion was warranted for crimes that can be "committed by omission." *Ibid.* Under *Castleman*, the majority reasoned, "a defendant's use of force does not depend on his own actions in initiating or applying injurious force." *Ibid.* Instead, "[w]hat matters is that he knowingly employed or availed himself of physical force as a device to cause intended harm," and a "defendant can do that as much by omission as by commission." *Id.* at 100-01.

The en banc majority also rejected the defendant's reliance on this Court's decision in *Johnson* v. *United States*, 559 U.S. 133 (2010). *Johnson* held that "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—*i.e.*, force capable of causing physical pain or injury to another person," rather than the "merest touching" that sufficed at common law for misdemeanor battery. *Id.* at 140-41. According to the Second Circuit, *Johnson*'s definition "says nothing about what constitutes a use of physical force," and *Johnson* "does not hold that use requires a physical act." 990 F.3d at 117.

The en banc majority further emphasized that "[s]ix of [its] sister circuits agree that crimes intentionally causing physical injury are categorically violent even if committed by omission." *Id.* at 101. And the "continued

viability" of the Third Circuit's contrary precedent, the majority noted, was "under *en banc* review in *United States v. Harris*." *Id.* at 101 n.5.

Judge Menashi concurred in part and in the judgment to express his view that the en banc majority's "argument depends on [giving] a specialized, legal meaning [to] the statutory text." *Id.* at 127. In his opinion, "the panel was right that the 'ordinary meaning'" of the use-of-force-clause is "not satisfied by inaction' or omission," because "an ordinary speaker of English might assume that a 'use of physical force' entails a physical act." *Id.* at 128 (citation omitted). Nevertheless, Judge Menashi concluded that "the *legal* meaning of the phrase includes omissions because the law treats an omission the same as a physical act," and the court could "properly assume" that Congress wrote the use-of-force clause with the legal (rather than ordinary) meaning in mind. *Ibid.* (emphasis added).[1]

Judge Pooler dissented, joined in relevant part by Judges Leval and Carney, reiterating that "a crime committed by omission—definitionally, no action at all—cannot possibly be a crime involving physical, violent force." *Id.* at 138. In her view, the majority opinion misread *Castleman*'s statement that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Id.* at 140 (quoting 572 U.S. at 169). That statement, she noted, was made in the context of deciding whether a crime resulting in bodily injury "qualified as 'a misdemeanor crime of domestic violence,'" and it reflected a "*misdemeanor-specific* meaning of 'force.'" *Id.* at 141 (quoting *Castleman*, 572 U.S. at 159, 64) (emphasis added by Judge Pooler). But *Castleman* expressly reserved the issue of "whether or not the causation of bodily injury necessarily entails violent force" of the sort necessary to

[1] Judge Park concurred on grounds not relevant here. *Id.* at 125-27.

satisfy the ACCA's use-of-force clause. *Ibid.* (quoting 572 U.S. at 167) (brackets omitted). Judge Pooler further noted that Justice Scalia—the author of *Johnson*—had concurred in *Castleman*, where he "reaffirmed" that "physical force still means violent force" outside of the misdemeanor context. *Ibid.* (quoting 572 U.S. at 176) (brackets omitted).

Judge Leval also dissented, joined in relevant part by four other judges, to express his continued reliance on the rule of lenity, since the use-of-force clause "does not clearly apply to a crime that can be committed by doing nothing at all." *Id.* at 133. The rule of lenity is particularly appropriate in a case involving a mandatory-minimum provision, Judge Leval explained, because even in absence of a statutory minimum, judges will apply appropriately severe sentences to defendants who merit them. *Id.* at 136. As a result, "the instances in which harsh mandatory sentencing statutes substantially influence the sentence are not those involving offenders who deserve the harsh sentences." *Id.* at 137.

4. The defendant (Scott) petitioned for review in this Court, arguing that the circuits were "divided over whether physical inaction is a 'use of physical force against the person of another.'" Cert. Pet. at 10, No. 20-7778 (Mar. 31, 2021). In response, the government acknowledged that the issue had produced a "circuit conflict," but it argued that the "outlying" decision by the Third Circuit was not a basis for review because "the Third Circuit sua sponte granted en banc review" in *Harris* "to reconsider" its position. Br. in Opp. at 18, No. 20-7778 (Sept. 15, 2021). In light of "the Third Circuit's willingness to revisit" the issue en banc, the government maintained, the circuit conflict "may not persist." *Ibid.* This Court denied review. *Scott* v. *United States*, 142 S. Ct. 397 (2021).

B. Salvatore Delligatti was indicted in May 2017 on charges of racketeering conspiracy, conspiracy to commit murder in aid of racketeering, attempted murder in aid of racketeering, conspiracy to commit murder for hire, operating an illegal gambling business, and—as most relevant here—possessing a firearm in furtherance of a crime of violence under Section 924(c). See C.A. App. 38-61.

1. As predicates for Mr. Delligatti's Section 924(c) charge, the government relied on four of the other charged offenses. Mr. Delligatti moved to dismiss prior to trial, arguing that none of the charged predicates qualified as crimes of violence—either under the use-of-force clause or under the so-called residual clause of Section 924(c)(3)(B). *Id.* at 69. The district court denied his motion, determining that the other offenses were valid predicates under both clauses. *Id.* at 70-71.

Mr. Delligatti proceeded to trial and was convicted on all charges in March 2018. *Id.* at 449-52. He was sentenced to 300 months of imprisonment, which included "a consecutive sentence of 60 months" for his conviction under Section 924(c). *Id.* at 516.

2. While Mr. Delligatti's appeal was pending, this Court invalidated the residual clause of Section 924(c)(3)(B) in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), and the Second Circuit ruled that conspiracy offenses do not satisfy the use-of-force clause, see *United States* v. *Laurent*, 33 F.4th 63 (2d Cir. 2022). As a result, most of the charged predicate offenses could no longer support Mr. Delligatti's conviction under Section 924(c). The government was left to rely on his conviction for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5), which itself was based on a charge of attempted second-degree murder under N.Y. Penal Law § 125.25(1). Mr. Delligatti accordingly renewed his argument that the state offense is not a crime of violence because it can be committed "by way of affirmative acts *or omissions*." Def. C.A. Br. at 48.

The court of appeals rejected that argument as foreclosed by circuit precedent:

> This argument fails in light of our recent *en banc* decision in *Scott*. There, we rejected a similar argument regarding first-degree manslaughter by omission, explaining that "whether a defendant acts by commission or omission, in every instance, it is his intentional use of physical force against the person of another that causes death." *Scott*, 990 F.3d at 123. Further, in rejecting Scott's argument, this Court specifically pointed out the absurdity of an argument that, "carried to its logical—or illogical—conclusion, would preclude courts from recognizing even intentional murder under N.Y. Penal Law § 125.25(1) as a categorically violent crime." *Id.* at 100.
>
> Because Delligatti's conviction for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) is premised on the predicate crime of attempted murder under New York law, which constitutes a crime of violence as defined in the elements clause of section 924(c), we conclude that Delligatti's conviction for attempted murder in aid of racketeering under section 1959(a)(5) is necessarily a crime of violence.

App. 14a-15a (brackets omitted). The court of appeals accordingly "uph[e]ld the section 924(c) conviction and affirm[ed] the judgment of the district court." App. 15a.[2]

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[2] The court of appeals originally issued a decision affirming Mr. Delligatti's conviction and sentence in June 2022. See App. 3a-4a. Following this Court's ruling later the same month in *United States* v. *Taylor*, 142 S. Ct. 2015 (2022), Mr. Delligatti filed a petition for rehearing primarily on the basis of *Taylor*. See App. 4a. The court of appeals granted the petition, withdrew its original opinion, and issued an amended opinion that "includes only minor changes to

3. Mr. Delligatti sought rehearing, which the court of appeals denied. App. 42a.

C. While Mr. Delligatti's appeal was pending in the Second Circuit, the Third Circuit was considering the same issue in *United States* v. *Harris*.

As the government noted in its brief in opposition in *Scott*, the Third Circuit had originally issued a sua sponte order that *Harris* be reheard en banc. No. 17-1861 (3d Cir. June 7, 2018). But in light of this Court's decision in *Borden* v. *United States*, 141 S. Ct. 1817 (2021), the Third Circuit vacated its sua sponte order and restored the case to the original merits panel. No. 17-1861 (3d Cir. Sept. 17, 2018). The merits panel then issued a precedential opinion reaffirming the Circuit's position that "an act of omission does not constitute an act of physical force within the meaning of ACCA." *United States* v. *Harris*, 68 F.4th 140, 146 (3d Cir. 2023).

The government sought rehearing en banc, arguing that review was necessary to address "a question of exceptional importance." *Harris* Reh'g Pet. at 1, No. 17-1861 (3d Cir. July 3, 2023). In particular:

> the key question . . . is whether the basis of liability allowed by state law—an omission to act by a person with a duty to act that causes bodily injury—is a "use" of physical force under ACCA. Eight other Circuits say yes, in decisions which the panels did not address and with which its decisions now stand in conflict.

Id. at 12.

On November 27, 2023—while Mr. Delligatti's rehearing petition was still pending before the Second Circuit—the Third Circuit denied the government's rehearing

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address the arguments made by Delligatti in light of *Taylor*." App. 4a-5a. All citations here are to the amended opinion.

petition. *United States* v. *Harris*, 88 F.4th 458, 459 (3d Cir. 2023) (Mem.). The denial was accompanied by a concurring opinion by Judge Jordan, joined by six other judges. The opinion reiterated the Circuit's view that crimes that can be committed by "total inaction" do not satisfy the use-of-force requirement, even where they cause "serious bodily injury," because a defendant's inaction "exert[s] no physical force at all on the victim." *Id.* at 464 (Jordan, J., concurring in the denial of rehearing en banc).

REASONS FOR GRANTING THE PETITION

The courts of appeals are intractably divided on the question of whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force. Describing this as "a question of exceptional importance," *Harris* Reh'g Pet. at 1, the government has filed multiple en banc petitions to address it. This case presents a common scenario in which the use-of-force question arises; was resolved on that basis below; and involves no impediment to addressing the issue. The Court should grant the petition.

I. THE CIRCUITS ARE SPLIT ON HOW THE USE-OF-FORCE REQUIREMENT APPLIES TO CRIMES COMMITTED BY INACTION

As the government has noted, the courts of appeals are divided on whether a crime involving "an omission to act by a person with a duty to act that causes bodily injury" necessarily involves the use, attempted use, or threatened use of physical force. *Harris* Reh'g Pet. at 1. "Eight . . . Circuits say yes." *Ibid.* But two other circuits say no, in decisions that "stand in conflict" with the majority view, *ibid.*, and the Third Circuit has denied the government's rehearing petition in *Harris*. It is accordingly clear that only this Court's intervention can resolve the disagreement.

A. Eight Circuits Agree with the Government

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); *Scott*, 990 F.3d at 112-13 (2d Cir.); *United States* v. *Rumley*, 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 on the long side of the split have read the decision as implicitly resolving the issue:

> [I]n *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.'"
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> * * *
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> [I]f all bodily injuries necessarily entail some force, as *Castleman* declares, then it seems to us that a serious bodily injury must necessarily entail violent force under *Castleman*'s reasoning of "injury, ergo force."

Báez-Martínez, 950 F.3d at 131-32 (quoting *Castleman*, 572 U.S. at 169-70) (cleaned up); see *Ontiveros*, 875 F.3d

at 537 (agreeing with "[a]lmost every circuit that has looked at this issue" that "*Castleman*'s logic is applicable to the 'physical force' requirement"); see also, *e.g.*, *Scott*, 990 F.3d at 121 ("Scott's argument is defeated by *Castleman*'s clear pronouncement").

These courts of appeals also agree that such reasoning applies equally to use-of-force clauses with materially identical language. See, *e.g.*, *Battle* v. *United States*, No. 21-5457, 2023 WL 2487342, at *1 (6th Cir. Mar. 14, 2023); *United States* v. *Manley*, 52 F.4th 143, 148 (4th Cir. 2022); *Alvarado-Linares* v. *United States*, 44 F.4th 1334, 1343-44 (11th Cir. 2022); *United States* v. *Clark*, 1 F.4th 632, 637 (8th Cir. 2021); *Thompson* v. *United States*, 924 F.3d 1153, 1158 (11th Cir. 2019); *United States* v. *Melgar-Cabrera*, 892 F.3d 1053, 1066 (10th Cir. 2018).

B. Two Circuits Have Rejected the Government's 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." *Ibid.*

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)[3]; 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), since "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.[4]

C. The Circuit Split Will Not Resolve Itself

There is no reasonable prospect that the courts of appeals will resolve this disagreement on their own. Both sides have acknowledged the division and have rejected the other side's reasoning. See, *e.g.*, *Mayo*, 901 F.3d at 230 ("we do not consider the reasoning in those cases to be persuasive"); *Harrison*, 54 F.4th at 890; *United States* v. *Thomas*, 27 F.4th 556, 558-59 (7th Cir. 2022); *Báez-Martínez*, 950 F.3d at 131-33. The split is thus "square and

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[3] In *United States* v. *Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), the Fifth Circuit partially overruled *Resendiz-Moreno* regarding a different issue: "the distinction between direct and indirect force." *Id.* at 187. But the court expressly did "not address whether an omission, standing alone, can constitute the use of force," and therefore left that aspect of *Resendiz-Moreno* undisturbed. *Id.* at 181 n.25.

[4] In *United States* v. *Trevino-Trevino*, 178 Fed. App'x 701 (9th Cir. 2006), the Ninth Circuit held that North Carolina's involuntary manslaughter statute, which may be committed by way of "a culpably negligent act or omission," is not a "crime of violence" for purposes of the illegal-reentry sentencing guideline because "one cannot use, attempt to use or threaten to use force against another in failing to do something." *Id.* at 702-03 (quotation marks omitted).

mature." Pet. Reply at 7, *United States* v. *Taylor*, No. 20-1459 (June 7, 2021).

Nor is there any longer a reasonable possibility that the Third Circuit might reverse itself through the en banc process. In opposing certiorari on this question two years ago, the government urged the Court to wait further in hopes that the "outlier" Third Circuit might "reconsider" its position en banc. Br. in Op. at 11, *Scott* v. *United States*, No. 20-7778. At that time, the Third Circuit had "sua sponte granted en banc review [in *Harris*] to reconsider" its position. *Id.* at 18 (citing Order, *United States* v. *Harris*, No. 17-1861 (July 1, 2021)). As the government explained, "the Third Circuit's willingness to revisit the holding of *Mayo*" in *Harris* suggested that the "circuit conflict on the question . . . may not persist." *Ibid.*

But subsequent events have made clear that reversal through the en banc process will not occur. After this Court's decision in *Borden* v. *United States*, 141 S. Ct. 1817 (2021), the Third Circuit vacated its en banc order in *Harris* and returned the case to the panel, which issued a precedential opinion reaffirming the Circuit's position that "an act of omission does not constitute an act of physical force within the meaning of ACCA." *United States* v. *Harris*, 68 F.4th 140, 146 (3d Cir. 2023). And in *United States* v. *Jenkins*, 68 F.4th 148 (3d Cir. 2023), in a separate appeal arising from the same trial, another unanimous panel—composed of three different judges—similarly held that "an omission cannot constitute the use of physical force under ACCA as a matter of federal law." *Id.* at 154. The government then sought en banc review from both decisions, arguing that "[t]he decisions in *Harris* and *Jenkins*" are "at odds with the unanimous view of eight other Circuits." *Harris* Reh'g Pet. at 2; see *Jenkins* Reh'g Pet. at 2 (same).

The Third Circuit has now denied the government's requests, with "a majority of the judges of the circuit in

regular service not having voted for rehearing." *Harris*, 88 F.4th at 459. No judge wrote to disagree with the decision to deny en banc review. And Judge Jordan, joined by six other judges, described the Circuit's view as being "dictated by the categorical approach," even as he criticized the categorical approach for producing unpalatable results. *Id.* at 463 (Jordan, J., concurring in the denial of rehearing en banc). Thus, as Judge Jordan explained, the Third Circuit's view—and hence the split—will persist "unless the Supreme Court takes this matter up." *Id.* at 465. The time to do so is now.

II. THE MAJORITY VIEW IS WRONG

The Third and Fifth Circuits are on the correct side of the split. A use-of-force clause applies only where a crime "has as an element the *use*, attempted *use*, or threatened *use of physical force*." 18 U.S.C. § 924(c)(3)(A) (emphasis added). But where an offense can be committed by "total inaction," the defendant may "exert no physical force at all on the victim." *Harris*, 88 F.4th at 464 (Jordan, J., concurring in the denial of rehearing en banc). Even an offense resulting in serious bodily injury or death, therefore, does not necessarily involve the use of physical force.

Mr. Delligatti's predicate offense of second-degree murder under N.Y. Penal Law § 125.25(1) is a good example because, like other New York homicide offenses, it can be committed by "failure to perform a legally imposed duty." *People* v. *Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992). The State's courts have thus upheld the convictions of a father who was charged with the "omission" of "withholding medical care" from a fatally sick child, *id.* at 848; and of a mother who "fail[ed] to seek medical attention for [her] boy," *People* v. *Best*, 609 N.Y.S. 2d 478, 480 (N.Y. App. Div. 1994). See *People* v. *Wong*, 619 N.E.2d 377, 380 (N.Y. 1993) (accepting the legal validity of prosecuting "passive" parent who "failed to seek medical assistance" after other parent violently shook child, though over-

turning conviction for lack of evidence) (citations omitted). When a crime is committed by failing to take any action, it cannot be said that the defendant *used physical force* against the victim.

Use. "[T]he word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." *Castleman*, 572 U.S. at 170-71. To make something one's instrument is an active endeavor. It is unnatural at best to say that a person "made" physical force his "instrument" by doing nothing. Thus, as Judge Menashi explained in *Scott*, "the ordinary meaning of the phrase 'use of physical force' entails a physical act." 990 F.3d at 130 (Menashi, J., concurring in part and in the judgment).[5]

This Court's cases are consistent with construing "use" as referring only to affirmative conduct. In *Bailey* v. *United States*, 516 U.S. 137 (1995), the Court rejected the government's argument that the defendant had "'use[d] . . . a firearm'" under Section 924(c)(1) based on his "mere possession" of a gun while committing a drug offense. *Id.* at 142-43 (quoting 18 U.S.C. § 924(c)(1)). "The word 'use' in the statute must be given its ordinary or natural meaning," the Court explained, and "various [dictionary] definitions of 'use' imply action and implementation." *Id.* at 145 (citing examples) *(*quotation marks omitted). The Court accordingly adopted "a more limited, active interpretation of 'use.'" *Id.* at 146. The Court's other cases interpreting criminal statutes have similarly embraced

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[5] Though Judge Menashi agreed that failing to act does not amount to the use of physical force under the "ordinary, natural, everyday meaning of the statutory language," he nevertheless stated that he would adopt the government's construction by giving the phrase a "specialized, legal meaning." *Id.* at 127 (quotation marks omitted). No other judge has endorsed that argument, which contradicts this Court's instruction that "[t]he word 'use' in the statute must be given its ordinary or natural meaning." *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (quotation marks omitted).

this "active-employment understanding of 'use.'" *Id.* at 148; see, *e.g.*, *Voisine* v. *United States*, 579 U.S. 686, 692-93 (2016) (adopting "common understanding" that use of force involves "an active employment of force"); *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) ("'use' requires active employment").

To be sure, a defendant may actively employ physical force to injure or kill a victim without *personally* applying the physical force that causes the victim's injuries. As *Castleman* explained, a person may use force "indirectly, rather than directly (as with a kick or punch)." 572 U.S. at 171. For instance, someone who "pull[s] the trigger on a gun" has made physical force his instrument even though "it is the bullet, not the trigger, that actually strikes the victim." *Ibid.* But even where physical force is invoked only indirectly, the defendant must still be the one who invoked it. "The 'use of [physical] force'" thus consists in "*the act* of employing [it] knowingly as a device to cause physical harm." *Ibid.* (emphasis added) Unless the defendant has engaged in such an "act," he has not "made" physical force his instrument. *Ibid.*

The contrary reading of "use" adopted by most courts of appeals is unpersuasive. In *Scott*, the Second Circuit emphasized that a defendant may have a "legal duty to check or redress violent force" unleashed by another; and in failing to do so, he also may "intend[] thereby for that force to cause serious physical injury" or death. *Scott*, 990 F.3d at 101. From that premise, the court concluded that the nonfeasant bystander has "ma[de] that force his own injurious instrument." *Ibid.* That conclusion is a non sequitur.

A defendant's failure to act may well be wrongful and even criminally culpable, and he "may . . . spend several years in prison for it." *Id.* at 143 (Pooler, J., dissenting). But it does not follow, either as a matter of logic or common speech, that the defendant himself has "made" the

injurious force occur—as opposed merely to letting it happen. Indeed, the fact that the same violent force (and resulting injury) would have occurred even if the defendant was *absent*, or was present but *unable* to stop it, shows that the defendant did not "use" the force in any ordinary sense of the word.

Physical Force. The phrase "'physical force' . . . plainly refers to force exerted by and through concrete bodies." *Johnson*, 559 U.S. at 138. Put aside for the moment the *degree* of force necessary to constitute physical force. Cf. pp. 24-25, *infra*. At minimum, the phrase requires the type of tangible force that produces "the acceleration of mass." *Id.* at 139.

Crimes that can be committed by failing to act, however, do not necessarily involve even such a minimal degree of force. For instance, where a caregiver fails to feed her patient, causing the patient to slowly starve, no force is brought to bear on the patient *at all*. Instead, any harm results from the patient's body cells running out of the chemical inputs necessary to sustain their metabolic processes. But the lack of continued cellular activity does not result from the external application of any force. See *Harris*, 88 F.4th at 464 (Jordan, J., concurring in the denial of rehearing en banc) ("A heartless person with the duty to care for a victim could do nothing, exert no physical force at all on the victim, and simply watch the serious bodily harm occur as the victim starved or got gangrenous bedsores and died as a result.").

In resisting this conclusion, courts of appeals on the majority side of the split have relied on *Castleman*'s statement that "[i]t is impossible to cause bodily injury without applying force in the common-law sense." 572 U.S. at 170. The Court made that statement, however, in the context of explaining that "the common-law concept of 'force' encompasses even its indirect application." *Ibid.* As noted above, a defendant may "use . . . physical force" indirectly,

by taking some step, however modest, that unleashes force against the victim. 18 U.S.C. § 924(c)(3)(A). But that principle does not encompass the *non*-application of force, as in the example of the caretaker who withholds nutrition. Nor does *Castleman* otherwise address a scenario in which a defendant commits a crime through nonfeasance.

Violent force. In any event, *Castleman*'s statement that "[i]t is impossible to cause bodily injury without applying force *in the common-law sense*," 572 U.S. at 170 (emphasis added), even if it applied here, would not justify adopting the circuit majority's view. The physical force required under Section 924 is *not* "force in the common-law sense," as *Castleman* itself confirms. *Ibid.*

In *Castleman*, the Court considered a ban on the possession of a firearm by anyone convicted of a "misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), which was defined to include crimes involving "the use or attempted use of physical force," *id.* § 921(a)(33)(A)(ii). In that context, where Congress had tied the provision to "misdemeanor" offenses—and to "domestic violence" misdemeanors in particular—the Court found it appropriate to treat "'physical force'" as "a common-law term of art [that] should be given its established common-law meaning." *Castleman*, 572 U.S. at 163 (quoting *Johnson*, 559 U.S. at 139). And at common law, "the element of force in the crime of battery was satisfied by even the slightest offensive touching." *Ibid.* (quoting *Johnson*, 559 U.S. at 139). The Court accordingly "incorporate[d] that misdemeanor-specific meaning of 'force' in defining a 'misdemeanor crime of domestic violence.'" *Id.* at 164.

At the same time, the Court recognized that this misdemeanor-specific interpretation of physical force was *not* appropriate "[i]n defining a *violent* felony" under Section 924, where "the phrase 'physical force' must mean *violent* force." *Id.* at 163 (quoting *Johnson*, 559 U.S. at 140) (cleaned up). The Court therefore left untouched *Johnson*'s

holding that violent force under Section 924 is "force capable of causing physical pain or injury to another person." 559 U.S. at 140; see *ibid.* ("a substantial degree of force"). And the Court expressly "d[id] not reach" the question of whether "the causation of bodily injury necessarily entails violent force." *Castleman*, 572 U.S. at 167.

Castleman's statement about the connection between bodily injury and common-law force thus does not bear on the question at issue here. See *Mayo*, 901 F.3d at 230 (*Castleman* "does not support" "conflat[ing] an act of omission with the use of force"). Even if allowing a patient to starve were enough to satisfy the "misdemeanor-specific meaning of 'force'" at issue in *Castleman*, 572 U.S. at 164, it would not constitute the use of "*violent* force" under *Johnson*, 559 U.S. at 140. However reprehensible and legally culpable the caretaker's failure to act may be, it certainly would not involve "a *substantial* degree of force," as required under Section 924. *Ibid.* (emphasis added); see *id.* at 142 ("force strong enough to constitute 'power'").

Lenity. For the foregoing reasons, the minority view is correct that "the use of physical force" necessary to satisfy a use-of-force requirement "cannot be satisfied by a failure to act." *Mayo*, 901 F.3d at 230. But even if, after applying traditional tools of statutory interpretation, this Court concluded that it was "left with an ambiguous statute," *Shular* v. *United States*, 140 S. Ct. 779, 787 (2020) (quotation marks omitted), it would still be required to adopt Mr. Delligatti's interpretation under the rule of lenity.

As Judge Leval explained in *Scott*, "statutes imposing harsh mandatory sentences," such as the mandatory-minimum sentencing provisions in Section 924, "present a particularly compelling need for invocation of the rule of lenity." 990 F.3d at 137 (Leval, J., dissenting). Such statutes are unnecessary to punish "offenders who

deserve . . . harsh sentences," because sentencing judges will generally give them "harsh sentences regardless of whether the sentence was mandatory." *Ibid.* And in unusual cases where offenders merit special leniency, mandatory sentences "cause serious injustice . . . by requiring far harsher sentences than the facts of the case can justify." *Ibid.* Even accepting that the rule of lenity is to be "sparingly employed," it appropriately applies here, where "the requirement of 'use of physical force against the person of another' does not clearly apply to a crime that can be committed by doing nothing." *Ibid.*

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING A QUESTION OF CLEAR IMPORTANCE

As the government has explained, the applicability of use-of-force language to crimes that require proof of bodily injury or death, but can be committed by failing to take action, is "a question of exceptional importance." *Harris* Re'hg Pet. at 1; see *Scott* Reh'g Pet. at 10 ("exceptional importance"). Indeed, the government has sought rehearing en banc on this issue multiple times. See pp. 7, 13, 19 *supra*. This is the right case for resolving the deeply entrenched circuit split.

A. As evidenced by the number of courts that have expressed a view on the question presented, see pp. 14-18, *supra*, the question carries immense practical significance in criminal and civil proceedings across the country.

Last year, more than 2,300 criminal defendants in the federal system were charged with violating Section 924(c).[6] For each such prosecution predicated on the defendant's commission of a "crime of violence," the offense must

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[6] U.S. Courts, *Table D-2: U.S. District Courts—Criminal Defendants Commenced (Excluding Transfers), by Offense, During the 12-Month Periods Ending September 30, 2019 Through 2023*, https://www.uscourts.gov/statistics/table/d-2/judicial-business/2023/09/30.

satisfy the use-of-force clause, 18 U.S.C. § 924(c)(3)(A), since this Court invalidated the alternative "residual clause" as unconstitutional in *United States* v. *Davis*, 139 S. Ct. 2319 (2019). At present, two different rules apply to such prosecutions: In the Third and Fifth Circuits, crimes that can be committed by failing to act *may not* serve as predicate offenses for a charge under Section 924(c); in eight other circuits, they *may*.

The division in approach similarly implicates "violent felonies" under the Armed Career Criminal Act's use-of-force clause, 18 U.S.C. § 924(e)(2)(B). As noted, since Sections 924(c) and 924(e) contain "nearly identical elements clause[s]," the courts of appeals invariably apply the same "reasoning" when deciding whether they are satisfied by crimes that can be committed through inaction. *Thompson*, 924 F.3d at 1158; see pp. 15-16, *supra*. Indeed, that is precisely what the Second Circuit did in Mr. Delligatti's case. See App. 14a ("This argument fails in light of our recent en banc decision in *Scott*.").

The split's implications are broader still, because identical language defining a "crime of violence" appears in other federal statutes. When considering pretrial release for a criminal defendant, for example, a judge or magistrate judge must "determine[e] whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community," 18 U.S.C. § 3142(g), including "whether the offense is a *crime of violence*," *id.* § 3142(g)(1) (emphasis added). And "crime of violence" is defined in language functionally identical to Section 924(c)'s use-of-force clause: as "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 3156(a)(4)(A). Last year, federal courts made

pretrial detention decisions—implicating this use-of-force clause—in more than 71,000 cases.[7]

Materially identical use-of-force language also applies under the INA, which defines "aggravated felony" to include a "crime of violence," 8 U.S.C. § 1101(a)(43)(F), which includes "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a). Use-of-force language appears as well in the Career Offender enhancement under the United States Sentencing Guidelines. See U.S.S.G. § 4B1.2(a)(1) (defining "crime of violence"). As with other provisions involving use-of-force language, courts invariably apply their standard approach to crimes of omission when construing these provisions. See, *e.g.*, *United States* v. *Brown*, 2 F.4th 109, 111-12 (2d Cir. 2021); *Thompson* v. *Garland*, 994 F.3d 109, 112 (2d Cir. 2021); *United States* v. *Spratt*, 735 Fed. App'x 291, 220 (8th Cir. 2018); *United States* v. *Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016).

B. This case is an ideal vehicle for addressing whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force. The question was preserved in the district court, C.A. App. 69-71, and on appeal, Def. C.A. Br. at 6, 48-49. And the Second Circuit's answer was outcome-determinative for Mr. Delligatti's conviction under Section 924(c). See App. 14a-15a. Moreover, because a sentence imposed under Section 924(c) must run consecutively to any other sentence, see 18 U.S.C. § 924(c)(1)(D)(ii), reversing Mr. Delligatti's conviction on that count will have a significant

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[7] U.S. Courts, *Table H-3: U.S. District Courts—Pretrial Services Recommendations Made For Initial Pretrial Release For the 12-Month Period Ending September 30, 2023*, https://www.uscourts.gov/statistics/table/h-3/judicial-business/2023/09/30.

effect on his overall term of imprisonment. See C.A. App. 516 (district court imposed "a consecutive sentence of 60 months" for his conviction under Section 924(c)).

C. The one-sidedness of the circuit conflict does not counsel against review. In *United States* v. *Taylor*, the government petitioned for certiorari based on a 5-1 circuit split on the question of whether attempted Hobbs Act robbery satisfies Section 924(c)'s use-of-force clause. Pet. at 19, No. 20-1459 (Apr. 14, 2020). The government asserted that the circuit conflict was "square and mature" because the "outlier" court of appeal, the Fourth Circuit, had already "refused to reconsider its decision en banc." Pet. Reply at 1, 5, 7 No. 20-1459 (June 7, 2021). In light of that refusal, the government explained, "further percolation" was unnecessary. *Id.* at 7 (quotation marks omitted). This Court granted the government's certiorari petition and then, on plenary review, concluded that the Fourth Circuit had "correctly" interpreted the statute. *United States* v. *Taylor*, 142 S. Ct. 2015, 2025 (2022).

The same considerations apply here. The 8-2 split on the question presented is even more "square and mature" than the 5-1 split in *Taylor*. Pet. Reply at 7 (quotation marks omitted). Now that the Third Circuit has declined the government's requests for en banc review, "nothing but this Court's review will eliminate the conflict." *Ibid.* And as in *Taylor*, the "outlier" circuits have the correct position. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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