No. 23-825

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether attempted murder, in violation of the Violent Crimes in Aid of Racketeering statute, 18 U.S.C. 1959(a)(5), qualifies as a crime of violence under 18 U.S.C. 924(c)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 83 F.4th 113. The withdrawn opinion of the court of appeals is reported at 36 F.4th 423. The summary order of the court of appeals (Pet. App. 16a-33a) is not published in the Federal Reporter but is available at 2022 WL 2068434. The decision and order of the district court (Pet. App. 34a-41a) is not published in the Federal Supplement but is available at 2018 WL 9539130. A subsequent opinion and order of the district court is not published in the Federal Supplement but is available at 2018 WL 1033242.

JURISDICTION

The amended judgment of the court of appeals was entered on October 2, 2023. A petition for rehearing was denied on December 14, 2023 (Pet. App. 42a). The petition for a writ of certiorari was filed on January 29, 2024.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to commit racketeering under the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d); one count of operating an illegal gambling business, in violation of 18 U.S.C. 1955 and 2; one count of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958; one count of conspiring to commit murder, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(5); one count of VICAR attempted murder, in violation of 18 U.S.C. 1959(a)(5); and one count of using and carrying a firearm during and in relation to a crime of violence, predicated on each of the three conspiracies and the VICAR attempted-murder offense, in violation of 18 U.S.C. 924(c)(1)(A)(i) and 2. Judgment 1-2. The court sentenced him to a term of 300 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-15a, 16a-33a.

1. Petitioner was an associate in the Genovese Crime Family, part of "the larger criminal network known as 'La Cosa Nostra' in New York." Pet. App. 5a. Petitioner worked for a "made" member of the Family, Robert DeBello, "participat[ing] in a variety of criminal activities," including helping to run an illegal sports-gambling operation in Queens. *Ibid.*; Presentence Investigation Report (PSR) ¶ 17.

In 2014, a local "bully," Joseph Bonelli, began causing problems for a gas station that petitioner and the Family frequented. Pet. App. 5a-6a. The Family also

suspected Bonelli of "cooperating against 'known bookies in the neighborhood,' which made him a potential threat" to the Family's gambling business. *Id.* at 6a (citation omitted); see PSR ¶ 24. The gas-station owner paid petitioner to "organize[] a plot to murder Bonelli." Pet. App. 6a. Petitioner shared the payment with DeBello, received permission to kill Bonelli, and then paid an accomplice $5000 "to coordinate the murder with several members of the 'Crips' gang." *Ibid.*

After a "murder crew" was assembled, petitioner gave them a brown paper bag containing a .38 revolver, provided them with a car, and sent them to murder Bonelli. Pet. App. 6a; PSR ¶¶ 26, 27. The crew drove to Bonelli's home and waited in a parking lot around the corner. Pet. App. 6a. When Bonelli arrived home with another person, the crew abandoned their plan due to the possibility of potential witnesses. *Ibid.* Upon learning that the crew had not killed Bonelli, petitioner tried to get them "to return at once" and kill both Bonelli and his companion. *Ibid.* The crew refused but agreed to return the next day. *Id.* at 6a-7a.

The next day, the crew reassembled and again drove to Bonelli's home. Pet. App. 7a. They brought with them the gun that petitioner had given them the day before, a change of clothes, and a spray bottle "believed to contain a bleach solution." PSR ¶ 27. While en route, the driver coordinated with petitioner. *Ibid.* But law enforcement officers had learned of the plot and they intercepted and arrested the crew near Bonelli's home. Pet. App. 7a; PSR ¶ 27.

Even after the crew's arrest, petitioner continued to plot a way to murder Bonelli. Pet. App. 7a.

2. A grand jury in the Southern District of New York charged petitioner with one count of conspiring to com-

mit racketeering under the RICO Act, in violation of 18 U.S.C. 1962(d); one count of operating an illegal gambling business, in violation of 18 U.S.C. 1955 and 2; one count of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958; one count of conspiring to commit murder, in violation of the VICAR statute, 18 U.S.C. 1959(a)(5); one count of VICAR attempted murder, in violation of 18 U.S.C. 1959(a)(5); and one count of using and carrying a firearm during and in relation to a crime of violence, predicated on each of the three conspiracies and the VICAR attempted-murder offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). Second Superseding Indictment 2-20.

a. Section 924(c) specifies a mandatory consecutive sentence for using or carrying a firearm during and in relation to a "crime of violence," or possessing a firearm in furtherance of a "crime of violence." 18 U.S.C. 924(c)(1)(A). Section 924(c)(3) defines a crime of violence in two ways. First, the "elements clause" encompasses any federal felony 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. 924(c)(3)(A). Second, the "residual clause" includes any federal felony 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." 18 U.S.C. 924(c)(3)(B). In *United States* v. *Davis*, 588 U.S. 445 (2019), this Court held that the residual clause is unconstitutionally vague.

This Court employs a "categorical approach" to determine whether an offense is a crime of violence under Section 924(c)(3)(A). *United States* v. *Taylor*, 596 U.S. 845, 850 (2022). Under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not

"the particular facts of the case." *Mathis* v. *United States*, 579 U.S. 500, 504 (2016). The categorical approach assesses whether the "least culpable" conduct that could satisfy the offense elements in a hypothetical case would "necessarily involve[]," *Borden* v. *United States*, 593 U.S. 420, 424 (2021) (plurality opinion), 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). The defendant's actual conduct is "irrelevant." *Borden*, 593 U.S. at 424.

b. Although the underlying crime of violence for a Section 924(c) offense need not itself be charged as a separate count, see *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999), the Section 924(c) charge in petitioner's indictment listed several of the other charges as potential predicates. See Second Superseding Indictment 19-20. One of those predicates was the charge of attempted murder under the VICAR statute, 18 U.S.C. 1959(a)(5). See Second Superseding Indictment 20.

Section 1959(a)(5) prohibits, *inter alia*, "attempting * * * to commit murder" of any person, "in violation of the laws of any State or the United States," "for the purpose of * * * maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a)(5). Because the VICAR statute requires an underlying state or federal crime that constitutes attempted "murder," proving a violation requires that a defendant's conduct both qualifies as a violation of a state or federal attempted-murder statute and satisfies the generic definition of attempted "murder." See *United States* v. *Keene*, 955 F.3d 391, 398-399 (4th Cir. 2020). As a practical matter, if the relevant state or federal law is substantially similar to or narrower than the

generic definition, the jury may be instructed only as to the state or federal offense.

The charge of attempted murder underlying petitioner's Section 924(c) count was premised on petitioner's commission of attempted second-degree murder, in violation of New York State Penal Law § 20.00 (McKinney 2009); *id.* § 110.00 (McKinney 2021); *id.* § 125.25(1) (McKinney 2020). Second Superseding Indictment 16-17. The applicable definition of second-degree murder encompasses conduct in which a defendant has "intent to cause the death of another person [and] causes the death of such person or of a third person." N.Y. Penal Law § 125.25(1). Attempt under New York law, in turn, requires specific intent to commit the underlying crime and "conduct which tends to effect the commission of such crime." *Id.* § 110.00; see *id.* § 20.00 (aiding and abetting liability).

c. Before trial, petitioner moved pretrial to dismiss the Section 924(c) count on the ground that Section 924(c)'s residual clause was unconstitutionally vague and that none of the charged predicates qualified as a crime of violence. D. Ct. Doc. 450, at 14-20 (Nov. 22, 2017). The district court denied the motion. Pet. App. 40a-41a. The court noted that petitioner's vagueness challenge was foreclosed by circuit precedent and also concluded that each of the predicate offenses satisfied Section 924(c)'s elements clause. *Ibid.*

At trial, the district court instructed the jury on the elements of aiding and abetting New York attempted second-degree murder and did not include any instruction on liability for acts of "omission." See D. Ct. Doc. 619, at 291-292, 309 (Apr. 23, 2018). The jury found petitioner guilty on all counts and specified via a special verdict form that its verdict on the Section 924(c)

charge rested on all four charged predicates (the three conspiracies and the VICAR attempted murder). D. Ct. Doc. 568 (Mar. 29, 2018). The court sentenced petitioner to 300 months of imprisonment, consisting of concurrent 240-month sentences on the non-Section 924(c) counts and a consecutive 60-month sentence for the Section 924(c) offense, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-15a.[1]

In light of *Davis*, which was decided while petitioner's appeal was pending, the government acknowledged during oral argument that the only viable predicate for the Section 924(c) charge was VICAR attempted murder. Oral Argument at 14:36-15:10 (2d Cir. Nov. 18, 2019); see Pet. App. 10a.

On appeal, petitioner asserted that VICAR attempted murder based on New York second-degree murder did not satisfy Section 924(c)'s elements clause because it can, in theory, be committed by an act of "omission." Pet. C.A. Br. 48-49. Under New York law, criminal liability can be premised either on "a voluntary act or the omission to perform an act which [the defendant] is physically capable of performing," N.Y. Penal Law § 15.10 (McKinney 2009), with the term "omission" defined as the "failure to perform an act as to which a duty of performance is imposed by law," *id.* § 15.00(3) (McKinney 2009).

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[1] On June 8, 2022, the court of appeals issued both a published opinion rejecting petitioner's 924(c) claim, 36 F.4th 423, and a summary order disposing of petitioner's and his co-defendant's other claims, Pet. App. 16a-33a. A few weeks later, when this Court decided *United States* v. *Taylor*, petitioner successfully moved for panel rehearing. *Id.* at 4a. The court of appeals withdrew the earlier opinion and issued an amended opinion that addressed petitioner's arguments "in light of *Taylor*." *Id.* at 5a.

The court of appeals rejected that argument. See Pet. App. 10a-15a. The court found "no question that intentionally causing the death of another person involves the use of force." *Id.* at 11a-12a (citing *United States* v. *Castleman*, 572 U.S. 157, 169 (2014)). The court explained that, as applicable here, New York's attempt law "'categorically requires that a person take a substantial step toward the use of physical force,'" and thus "there can be no doubt that attempt to commit second-degree murder under New York law is itself categorically a crime of violence," *id.* at 12a-13a (citation omitted). And, relying on the recent en banc opinion in *United States* v. *Scott*, 990 F.3d 94 (2d Cir.), cert. denied, 142 S. Ct. 397 (2021), the court reiterated 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." Pet. App. 14a (quoting *Scott*, 990 F.3d at 123).

DISCUSSION

Petitioner contends (Pet. 14-28) that the VICAR attempted-murder offense underlying his conviction under 18 U.S.C. 924(c) is not a crime of violence, because it rests on a state-law attempted-murder crime whose elements can, in theory, be satisfied by an act of omission. The court of appeals correctly rejected that contention. But the Third Circuit has reached a conflicting conclusion, and its recent denial of en banc consideration of the issue indicates that the circuits are, and will remain, intractably divided. Because this case would be a suitable vehicle for resolving the circuit conflict, the government agrees with petitioner that further review is appropriate.

1. The court of appeals correctly recognized that, notwithstanding the theoretical possibility that New York at-

tempted second-degree murder could be committed by the omission to perform a legally required duty, that offense is a crime of violence under 18 U.S.C. 924(c)(3)(A).

a. New York attempted second-degree murder "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).

The term "'physical force' * * * refers to force exerted by and through concrete bodies" as distinguished from "intellectual force or emotional force." *Johnson* v. *United States*, 559 U.S. 133, 138 (2010) (citation omitted). And as the Court explained when it addressed an analogous statute (18 U.S.C. 921(a)(33)(A) (2012)) in *United States* v. *Castleman*, 572 U.S. 157 (2014), "physical force" may be applied either directly (*i.e.*, through immediate physical contact with the victim) or indirectly. See *id.* at 170.

As *Castleman* observed, physical force can be employed through such indirect methods as shooting a gun at the victim, poisoning the victim, infecting the victim with a disease, or "resort[ing] to some intangible substance" such as a laser beam. 572 U.S. at 169-170 (citation omitted). Whether direct or indirect, the "force" in question is measured not by what the defendant did, but by how it affected the victim. See *id.* at 171. For example, when a person "'sprinkles poison in a victim's drink,'" the "'use of force' in [that] example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm." *Ibid.* (citation omitted; brackets in original).

The acts of omission that petitioner suggests (Pet. 3) as forms of homicide under New York law—failing to feed or render medical treatment to another person while under a duty to do so—are materially identical to

the hypothetical poison that this Court addressed in *Castleman*. Just as poison employs "'forceful physical properties' as a matter of organic chemistry," *Castleman*, 572 U.S. at 171 (citation omitted), starvation and untreated injuries employ forceful physical properties as a matter of biology, see *United States* v. *Rumley*, 952 F.3d 538, 551 (4th Cir. 2020), cert. denied, 141 S. Ct. 1284 (2021). See *United States* v. *Peeples*, 879 F.3d 282, 287 (8th Cir.) ("[I]t is the act of withholding food with the intent to cause the dependent to starve to death that constitutes the use of force."), cert. denied, 584 U.S. 1040 (2018); *United States* v. *Waters*, 823 F.3d 1062, 1066 (7th Cir.) ("[W]ithholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force under *Castleman*."), cert. denied, 580 U.S. 1021 (2016). Thus, although *Castleman* did not specifically address Section 924(c)(3)(A)'s elements clause, its logic fully applies in that context.

The "force" at issue in *Castleman* was force sufficient for misdemeanor liability, rather than felony liability, and thus did not need to qualify as "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. That further requirement distinguishes the "offensive touching" that sufficed to prove a common-law battery (which does not qualify as violent force) from, for example, "a slap in the face" (which does). *Id.* at 139, 143. But force sufficient to kill someone is plainly sufficient; it "is impossible to cause bodily injury without using force 'capable of' producing that result." *Castleman*, 572 U.S. at 174 (Scalia, J. concurring in part and concurring in the judgment); cf. *Stokeling* v. *United States*, 586 U.S. 73, 80 (2019) (holding that force required to overcome a robbery victim's resistance is violent force). And be-

cause New York attempted murder requires an attempt to cause death—"the ultimate bodily injury"—the crime necessarily involves the attempted use of a sufficient degree of force to qualify as violent force. *United States* v. *Scott*, 990 F.3d 94, 100 (2d Cir.) (en banc), cert. denied, 142 S. Ct. 397 (2021); see Pet. App. 12a.

The employment of such deadly force under New York law also satisfies Section 924(c)(3)(A)'s requirement that the force be "use[d] * * * against the person or property of another," 18 U.S.C. 924(c)(3)(A). The "'use of physical force * * * means 'volitional' or 'active' employment of force," *Borden* v. *United States*, 593 U.S. 420, 431 (2021) (plurality opinion) (citation omitted), which necessarily includes attempting to "cause the death" of a person "[w]ith intent" to do so, N.Y. Penal Law § 125.25(1) (McKinney 2020). Even when the attempt is accomplished by indirect means, "the knowing or intentional causation of bodily injury necessarily involves the use of physical force," *Castleman*, 572 U.S. at 169, because in all such cases the "'physical force'[] has been made the user's instrument," *id.* at 171. And when the defendant is employing that indirect method "knowingly as a device to cause physical harm" to that victim, *ibid.*, it qualifies as the use of physical force "against the person * * * of another," 18 U.S.C. 924(c)(3)(A), because it is "directed or targeted at another," *Borden*, 593 U.S. at 443 (plurality opinion).

The defendant's use of force against another person is apparent irrespective of whether his conduct is characterized as "commission" or "omission." The statutory text does not distinguish between those two malleable categories of conduct. And the common law has long rejected such a distinction. See, *e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* 5 (1769)

("A crime * * * is an act committed or omitted, in violation of a public law, either forbidding or commanding it.") (capitalization altered); 1 William Hawkins *A Treatise of the Pleas of the Crown* 79 (1716) ("Also he who wilfully neglects to prevent a Mischief, which he may, and ought to provide against, is, as some have said, in Judgment of the Law, the actual Cause of the Damage which ensues."). The Model Penal Code, as well as the laws of New York and at least 28 other jurisdictions, have likewise rejected that distinction. See Model Penal Code § 1.13(7) (1985) (defining "'acted'" to include, "where relevant, 'omitted to act'"); *id.* § 2.01(3) (requiring "a duty to perform the omitted act" or an offense that "expressly" includes omissions); N.Y. Penal Law § 15.00(3) and (5) (McKinney 2009) ("'Omission' means a failure to perform an act as to which a duty of performance is imposed by law" and "'[t]o act'" includes "omit[s] to perform an act.").[2]

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[2] See Ala. Code § 13A-2-1(3) (LexisNexis 2015); Alaska Stat. § 11.81.900(b)(44) (2023); Ariz. Rev. Stat. Ann. § 13-105(28) (Supp. 2023); Ark. Code Ann. § 5-2-201(4) 2013; Cal. Penal Code § 15 (West 2014); Colo. Rev. Stat. § 18-1-501(7) (2023); Del. Code Ann. tit. 11, § 233(b) (2015); Haw. Rev. Stat. Ann. § 702-203 (LexisNexis 2024); Idaho Code Ann. § 18-109 (2016); 720 Ill. Comp. Stat. Ann. 5/4-1 (West 2016); Ind. Code Ann. § 35-41-2-1(a) (Lexis Nexis 2020); Iowa Code Ann. § 702.2 (West 2016); Kan. Stat. Ann. § 21-5201(b) (Supp. 2022); Ky. Rev. Stat. Ann. § 501.030(1) (LexisNexis 2014); Me. Rev. Stat. Ann. tit. 17-A, § 103-B(2)(B) (2006); Mo. Ann. Stat. § 556.061(49)(b) (West 2022); Mont. Code Ann. § 45-2-202 (2023); Neb. Rev. Stat. Ann. § 28-109(14) (LexisNexis 2021); N.J. Stat. Ann. § 2C:2-1(b) (West 2015); N.M. Stat. Ann. § 30-1-4 (2022); N.D. Cent. Code § 12.1-02-01(2) (2021); Ohio Rev. Code Ann. § 2901.21(A)(1) (LexisNexis Supp. 2024); Or. Rev. Stat. § 161.085(3) (2023); 18 Pa. Cons. Stat. Ann. § 301(a) and (b) (West 2015); Tex. Penal Code Ann. § 6.01(c) (West 2021); Utah Code Ann. § 76-1-101.5(10) (LexisNexis Supp.

When Congress enacted Section 924(c), "it was aware of these background principles recognizing that the elements of a crime—including the causation elements of crimes such as murder and manslaughter—can be satisfied by acts of omission as well as acts of commission." *Scott*, 990 F.3d at 115. And there is every reason to believe that Congress intended the elements clause to encompass those crimes. See *Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010) ("Congress 'is understood to legislate against a background of common law . . . principles.'") (citation omitted). Nothing in the text or background of the statute suggests that it excludes that entire range of offenses, including some of the most serious crimes like murder and attempted murder.

Indeed, a definition of "crime of violence" that includes, for example, threatening to injure someone, but excludes the premeditated act of actually killing the person, would produce unjustifiable results that defy common sense to lay and legal observers alike. Although the Court incorporated the categorical approach into Section 924(c) in *United States* v. *Davis*, 588 U.S. 445 (2019), it should not endorse an application of that approach that strips the term "crime of violence" of any sensible meaning. Adopting petitioner's position here would completely untether the categorical approach from reality, leading to bewildering and arbitrary sentencing disparities based on hypertechnical distinctions and hypothetical crimes.

b. Petitioner's contrary arguments (Pet. 20-26) center on the assertion that a criminal omission is not naturally understood as a use of physical force. According to petitioner (Pet. 21), the language of Section 924(c) re-

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2023); P.R. Laws Ann. tit. 33, § 4647 (2010); 9 Guam Code Ann. § 4.20 (2024).

quires "an active endeavor" and "affirmative conduct." But petitioner offers no sound textual basis for concluding that a defendant who deliberately takes advantage of certain forces to seriously injure—and ultimately kill—a victim to whom he owes a duty of care has not "use[d]" that force within the meaning of Section 924(c). 18 U.S.C. 924(c)(1)(A). Just as a person sitting on a raft may make use of the force of the river's natural current to carry him forward, so too may a defendant make use of the natural physical forces of another person's body to cause that person's death by starvation or other similar means. Contrary to petitioner's claim (Pet. 22-23), a defendant need not "'ma[k]e' the injurious force occur" to use it for his own ends.

Petitioner also disputes (Pet. 23-24) the existence of any physical force at all in cases of attempted murder through acts of omission. But that argument is inconsistent with *Castleman*'s explicit recognition that "[i]t is impossible to cause bodily injury without applying force in the common-law sense." 572 U.S. at 170. Petitioner notes (Pet. 24) that *Castleman* did not specifically address omissions, but "*Castleman*'s reasoning was not cabined by the case's context." *Scott*, 990 F.3d at 118. The key reasoning of *Castleman*—that intentionally causing physical harm is necessarily the use of physical force—is equally applicable to omissions and indirect acts. See pp. 9-11, *supra*. The meaning and logic of that decision do not cease to apply simply because a defendant's indirect employment of force can be characterized as an "omission."

Petitioner errs in asserting (Pet. 24-25) that *Castleman* lacks relevance because it dealt with common-law force and "d[id] not reach" the question of "[w]hether or not the causation of bodily injury necessarily entails vio-

lent force." 572 U.S. at 167. The Court reserved that question because the Tennessee statute at issue reached "a slight, nonserious physical injury," such as "a cut, abrasion, [or] bruise," and the existence of common-law force was sufficient for purposes of the "domestic violence" at issue under Section 921(a)(33)(A)(ii). *Id.* at 162, 170 (citations omitted); see *id.* at 167. Leaving open the degree of injury required for "violent force" does not undermine the relevance of *Castleman*'s definition of the "use of physical force," which cannot be squared with petitioner's position. In any event, the Court later resolved the question of degree, at least in part, in holding that force sufficient to overcome a robbery victim's resistance qualifies as violent force "even if it ultimately caused minimal pain or injury." *Stokeling*, 586 U.S. at 83-84. And because "'[v]iolent' force * * * is simply physical force distinguished by the degree of harm sought to be caused," an attempt to cause death plainly involves "violent" force. *United States* v. *Báez-Martínez*, 950 F.3d 119, 132 (1st Cir. 2020), cert. denied, 141 S. Ct. 2805 (2021).

Finally, petitioner's reliance (Pet. 25-26) on the rule of lenity is misplaced. After applying ordinary tools of statutory interpretation, there is no "grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Castleman*, 572 U.S. at 173 (citation omitted). It would, moreover, be especially inappropriate to rely on the rule of lenity to adopt an approach that—as petitioner himself acknowledges (Pet. 26-27)—would exclude the most serious offenses from Section 924(c), such as all homicide offenses, including first-degree murders, that could hypothetically be committed by "omission."

2. Although the Second Circuit's decision in this case is correct, the decision below implicates a circuit conflict that warrants this Court's review.

Like the Second Circuit, the First, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits agree that crimes that can be committed by acts of omission, including murder and aggravated assault, satisfy the elements clause of Section 924(c)—or similarly worded clauses such as the definition of a "violent felony" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(b)(i), or a "crime of violence" under the Sentencing Guidelines, see § 4B1.2(a)—when they require the knowing or intentional causation of bodily injury.[3] The Third Circuit, however, disagrees. See *United States* v. *Mayo*, 901 F.3d 218, 230 (2018) (holding that Pennsylvania first-degree aggravated assault is not an ACCA violent felony because it can be

[3] See *Báez-Martínez*, 950 F.3d at 130-133 (1st Cir.) (recognizing that Puerto Rico second-degree murder and attempted murder are ACCA violent felonies); *Scott*, 990 F.3d at 123 (2d Cir.) (recognizing that New York first-degree manslaughter is an ACCA violent felony and a Sentencing Guidelines crime of violence); *Rumley*, 952 F.3d at 550 (4th Cir.) (recognizing that Virginia unlawful wounding is an ACCA violent felony); *United States* v. *Harrison*, 54 F.4th 884, 889 (6th Cir. 2022) (recognizing that Kentucky complicity to commit murder is a "serious violent felony" under 18 U.S.C. 3559(c)(2)(F)); *Waters*, 823 F.3d at 1066 (7th Cir.) (recognizing that Illinois enhanced domestic battery is a crime of violence under the Sentencing Guidelines); *Peeples*, 879 F.3d at 286-287 (8th Cir.) (recognizing that Iowa attempted murder is a Sentencing Guidelines crime of violence); *United States* v. *Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) (recognizing that Colorado second-degree assault is a Sentencing Guidelines crime of violence), cert. denied, 584 U.S. 989 (2018); *United States* v. *Sanchez*, 940 F.3d 526, 535-536 (11th Cir.) (recognizing that New York second-degree murder is an ACCA violent felony), cert. denied, 140 S. Ct. 559 (2019).

committed by omission). And the Third Circuit recently denied the government's petition for rehearing en banc on that issue. See *United States* v. *Harris*, 88 F.4th 458 (2023) (en banc). A concurrence by Judge Jordan, joined by a majority of that court, bemoaned the "absurd result dictated by the categorical approach" but viewed itself bound by this Court's precedent to deny review. *Id.* at 465 (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, & Matey, JJ.); see *id.* at 459.[4]

The Third Circuit has therefore made clear that it will not act to resolve the conflict, leaving it to this Court to do so. As evidenced by the multiple contexts that it implicates, the conflict is one of exceptional importance that warrants this Court's review. And this case presents a suitable vehicle for addressing it. The case is on direct appeal following petitioner's conviction after trial, where the district court gave precise jury instructions defining the elements of the underlying offense. The facts underlying petitioner's offenses—which the jury necessarily found in convicting him on all counts—highlight the stakes of petitioner's argument

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[4] Petitioner additionally cites (Pet. 17-18 & n.4) cases from the Fifth and Ninth Circuit that he contends support his position. But in *United States* v. *Reyes-Contreras*, 910 F.3d 169 (2018) (en banc), the Fifth Circuit "overrule[d]," in light of *Castleman*, pre-*Castleman* precedents excluding offenses that involve indirect force from the scope of elements-cause language. *Id.* at 184, 187. *Reyes-Contreras* reserved the question of "whether an omission, standing alone, can constitute the use of force," *id.* at 181 n.25, and the court has not since answered that question. The Fifth Circuit cases petitioner cites (Pet. 17-18) predate *Reyes-Contreras*, were overruled by it, and are no longer good law. And the single unpublished Ninth Circuit case petitioner cites (Pet. 18 n.4) was decided pre-*Castleman*. *United States* v. *Trevino-Trevino*, 178 Fed. Appx. 701 (2006).

that attempted murder does not qualify as a crime of violence if it can theoretically be committed by acts of omission. Finally, the court of appeals directly addressed the omission issue, with no alternative holdings, meaning that petitioner will be entitled to a remand if he prevails.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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