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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

The government agrees that certiorari should be granted to decide 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 courts of appeals "are, and will remain, intractably divided" on this question, U.S. Br. 8; the question is "exceptional[ly] importan[t]," *id.* at 17; and this case "presents a suitable vehicle for addressing it," *ibid.* The Court should grant review.

A. Petitioner and the government agree that this question is part of a deeply entrenched "circuit conflict." U.S. Br. 16; see Pet. 14-19. Eight courts of appeals "agree that crimes that can be committed by acts of omission . . . satisfy the elements clause of Section 924(c) [and] similarly worded clauses" in other provisions. U.S. Br. 16. But two other courts have disagreed, including the Third Circuit, which denied the government's rehearing petition in *United States* v. *Harris*, 88 F.4th 458 (3d Cir. 2023). The Third Circuit has thus "made clear that it will not act to resolve the conflict, leaving it to this Court to do so." U.S. Br. 17.

The parties also agree that the question presented is "one of exceptional importance that warrants this Court's review." U.S. Br. 17; *see* Pet. 26-28. The dispute is "implicate[d]" in "multiple contexts" because numerous statutes and rules contain materially identical use-of-force language. U.S. Br. 17. Thus, as Mr. Delligatti noted, the resolution of the question presented will affect thousands of litigants "in criminal and civil proceedings across the country." Pet. 26; see Pet. 27-28 (discussing use-of-force language in the Armed Career Criminal Act, 18 U.S.C. § 924(e); pre-trial detention statute, 18 U.S.C. § 3142(g); Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F); and Career Offender enhancement under United States Sentencing Guidelines, U.S.S.G. § 4B1.2(a)(1)).

Finally, the parties agree that this case is "a suitable vehicle for resolving the circuit conflict." U.S. Br. 8. The issue was squarely presented to and resolved by the district court, which adopted "precise jury instructions defining the elements of the underlying offense"; and the court of appeals "directly addressed the omission issue, with no alternative holdings." *Id.* at 17-18. As a result, the issue is outcome-determinative, and Mr. Delligatti "will be entitled to a remand if he prevails." *Id.* at 18.

B. The only non-merits disagreement between the parties concerns the *extent* of the circuit split. As Mr. Delligatti noted, the Fifth Circuit has joined the Third Circuit in holding 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 disagreement among the courts of appeals on the question presented is thus 8-2.

The government argues that the Fifth Circuit does not "support [Mr. Delligatti's] position" because the en banc court "'overruled,' in light of [*United States* v.] *Castleman*, [572 U.S. 157 (2014),] pre-*Castleman*

precedents excluding offenses that involve indirect force from the scope of elements-cause language." U.S. Br. 17 n.4 (quoting *United States* v. *Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc)) (brackets omitted). But *Martinez-Rodriguez* post-dates *Castleman* by more than three years. In any event, *Reyes-Contreras* expressly stated—correctly—that "*Castleman* does not address whether an omission, standing alone, can constitute the use of force," and the court emphasized that it was "not called on to address such a circumstance." 910 F.3d at 181 n.25. It therefore left untouched the relevant holding in *Martinez-Rodriguez*. And indeed, when the opinion in *Reyes-Contreras* listed the cases the court was overruling, see *id.* at 187 ("We therefore overrule, in whole or in part, as explained herein, the following decisions and their progeny"), *Martinez-Rodriguez* was not on the list.

Any disagreement over the breadth of the circuit split, however, does not undermine the need for plenary review. Even assuming the government were correct that the Third Circuit is the only court of appeals to adopt Mr. Delligatti's position, the parties agree that the resulting conflict is still "one of exceptional importance that warrants this Court's review." U.S. Br. 17.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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