No. 23-___

IN THE

Supreme Court of the United States

RANITO ALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an offense that can be committed through omission or inaction can "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another" such that it qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A)?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is Ranito Allen.

Respondent is the United States of America.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

Allen v. United States, No. 21-5782, U.S. Court of Appeals for the Sixth Circuit.

United States v. Allen, No. 2:18-cv-02371, U.S. District Court for the Western District of Tennessee.

United States v. Allen, 2:15-cr-20141, U.S. District Court for the Western District of Tennessee.

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INTRODUCTION

Section 924(c) provides that anyone who "uses or carries a firearm" "during and in relation to any crime of violence," 18 U.S.C. § 924(c)(1)(A), will "face a mandatory minimum sentence of five years in prison, over and above any sentence they receive for the underlying crime," *United States v. Davis*, 139 S. Ct. 2319, 2324 (2019). The statute defines "crime of violence," in relevant part, to "mean[ ] an offense that is a felony and . . . has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(1)(A). This case is about whether that "elements clause" encompasses offenses that can be committed through omission or inaction.

In *United States v. Castleman*, 572 U.S. 157 (2014), this Court held, in construing the elements clause of a different provision, that "force" includes indirect force. *See id.* at 169 (construing "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A)(ii)). But *Castleman* never addressed crimes of omission. Moreover, the Court took pains to distinguish *Johnson v. United States*, 559 U.S. 133 (2010), which used the word "force" in a narrower sense in defining "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"). *Castleman*, 572 U.S. at 163–68. *Castleman* expressly "d[id] not decide" whether indirect force—much less omission—"necessitate[s] violent force, under *Johnson*'s definition of that phrase." *Id.* at 170.

In the wake of *Castleman*, the Courts of Appeals have divided about whether crimes that can be committed through omission "ha[ve] as an element the use, attempted use, or threatened use of physical force

against the person or property of another" for purposes of violent offense provisions. *See, e.g.*, *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022) (acknowledging split); *United States v. Mayo*, 901 F.3d 218, 229 n.15 (3d Cir. 2018) ("[C]ourts have divided on how far to extend *Castleman*."). The Third Circuit has repeatedly held that an "act of omission does not constitute an act of physical force within the meaning of" elements clauses used to define violent offenses. *United States v. Harris*, 68 F.4th 140, 146 (3d Cir. 2023); (citing *Mayo*, 901 F.3d at 227–29). Other courts have squarely rejected the argument that "an omission . . . cannot be considered 'violent force'" under § 924(c)(3) and related provisions. *United States v. Báez-Martínez*, 950 F.3d 119, 131 (1st Cir. 2020). *Castleman*, those courts have generally reasoned, compels the conclusion that "a serious bodily injury must necessarily entail violent force." *Id.* at 132 (emphasis omitted).

The question whether crimes of omission entail violent force is both recurring and important. Thousands of individuals receive mandatory minimum sentences under § 924(c) each year. Thousands more are sentenced under parallel violent offense provisions in ACCA and the U.S. Sentencing Guidelines. Indeed, the Government itself has suggested that the outcome of this very case may "call into question murder as a crime of violence under ACCA and the Sentencing Guidelines in at least 31 jurisdictions nationwide." Appellee Br. at 27 & n.5, *Allen v. United States*, No. 21-5782, 2023 WL 4145321 (6th Cir. June 23, 2023). For each defendant in each of those jurisdictions, years of imprisonment turn on the answer.

The majority rule is also the wrong one. Even under *Castleman*'s common-law "force" standard, crimes committed by omission—unlike crimes committed through indirect force—do not have as an element the "use" of physical force. In any event, *Johnson* made clear that provisions defining violent offenses—like § 924(c)—use "force" in a much narrower sense. 559 U.S. at 140 (rejecting the common-law definition of "force" and holding, in the ACCA context, that "the phrase 'physical force' means *violent* force"). Consistent with *Johnson*, crimes of omission do not entail the use of "violent force" under § 924(c).

The time has come for this Court to resolve the split on this important issue and confirm what statutory text and common sense make plain: Crimes of omission do not entail the use of violent force. This case is an appropriate vehicle for doing just that. Certiorari should be granted.

OPINIONS BELOW

The District Court's opinion is unpublished but is reproduced at Pet.App.16a–36a. The Sixth Circuit's order granting Petitioner's certificate of appealability is unpublished but is reproduced at Pet.App.10a–15a. The Sixth Circuit's opinion affirming the District Court's judgment is unpublished but is available at 2023 WL 4145321 and reproduced at Pet.App.1a–8a. The Sixth Circuit's order denying rehearing en banc is unpublished but is reproduced at Pet.App.9a.

JURISDICTION

The Sixth Circuit entered judgment on June 23, 2023, and denied a timely rehearing petition on September 25, 2023. On December 13, 2023, Justice

Kavanaugh extended the time to file a petition for a writ of certiorari from December 24, 2023 to February 22, 2024. *See* No. 23-A-529. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A) provides, in relevant part:

> 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 . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(3) provides, in relevant part:

> 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.

Tennessee Code § 39-13-210(a) provides, in relevant part:

> Second degree murder is:
>
> (1) A knowing killing of another; or
>
> (2) A killing of another that results from the unlawful distribution of any Schedule I or Schedule II drug, when the drug is the proximate cause of the death of the user.

STATEMENT OF THE CASE

A. Legal Framework

1. 18 U.S.C. § 924(c) "authorizes heightened criminal penalties for using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal crime of violence or drug trafficking crime." *Davis*, 139 S. Ct. at 2324. "The statute proceeds to define the term 'crime of violence' in two subparts—the first known as the elements clause, and the second the residual clause." *Id.* The elements clause covers felonies that "ha[ve] 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 residual clause covers felonies that "by [their] nature, involve[ ] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3)(B). In *Davis*, this Court struck down the residual clause as unconstitutionally vague. 139 S. Ct. at 2325–36. As

a result, § 924(c) now applies *only* to "crimes of violence" that satisfy the elements clause.

2. Courts must apply the categorical approach to determine whether an offense satisfies the elements clause of § 924(c)(3)(A). *See United States v. Taylor*, 596 U.S. 845, 850 (2022). That follows not only from this Court's precedents but also from the text of the provision itself, which asks "whether the federal felony at issue 'has *as an element* the use, attempted use, or threatened use of physical force.'" *Id.* (quoting 18 U.S.C. § 924(c)(3)(A)) (emphasis in original). Under the categorical approach, courts may not consider the individual defendant's alleged conduct. *See id.*; *see also, e.g.*, *Borden v. United States*, 593 U.S. 420, 424 (2021) ("Under that by-now-familiar method, applicable in several statutory contexts, the facts of a given case are irrelevant."). "The only relevant question is whether the federal felony at issue *always* requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." *Taylor*, 596 U.S. at 850 (emphasis added).

3. In *Castleman*, this Court applied the categorical approach in construing 18 U.S.C. § 921(a)(33)(A), which includes a "use of physical force" elements clause in defining "misdemeanor crime of domestic violence." *See* 572 U.S. at 162–71. In so doing, the Court first distinguished *Johnson*, which addressed a similar elements clause in ACCA's definition of "violent felony," 18 U.S.C. § 924(e)(1). *See Castleman*, 572 U.S. at 163. In *Johnson*, this Court held that, in the context of ACCA, "the phrase 'physical force' must mea[n] violent force." *Id.* (quoting *Johnson*, 559 U.S. at 140). But "[t]he very reasons [the *Johnson* Court]

gave for rejecting [the broad common-law] meaning [of 'force'] in defining a 'violent felony" under ACCA, *Castleman* explained, "are reasons to embrace it in defining a 'misdemeanor crime of domestic violence.'" *Id.* *Castleman* thus held that § 921(a)(33)(A) uses the word "force" in the broad "common-law sense." *Id.* at 162–68.

The Court then considered whether the "knowing or intentional" causation of bodily injury under Tennessee law includes an element of "physical force" in that common-law sense. *Id.* at 170–71. That state-law offense, the Court recognized, encompasses not only injuries that can be inflicted directly (like "a kick or punch") but also injuries that can be inflicted indirectly (like "the act of employing poison"). *Id.* at 171. The Court then held that indirect uses of force constitute "physical force" under the common law. *See id.* It is "impossible," the Court opined, "to cause bodily injury without applying force in the common-law sense." *Id.* at 170.

Castleman did not consider, however, whether omission or inaction can constitute "physical force" even in the common-law sense. And it expressly reserved the question whether indirect uses of force can constitute "violent force" under *Johnson*. *Id.* at 170 ("whether or not that is so" is "a question we do not decide").

B. Factual Background

1. In October 2015, Allen was charged in a multi-defendant indictment connected to a gang-related shooting of several rival gang members. *See* Pet.App.2a; Order, No. 2:18-cv-02371-SHM, R.12, PageID#97. He pleaded guilty to five counts of aiding

and abetting attempted murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(5) (the "VICAR statute"), and one count of aiding and abetting the carrying or use of a firearm during and in relation to a "crime of violence" in violation of 18 U.S.C. § 924(c). *See* Pet.App.2a, 10a–11a; Second Superseding Indictment, No. 2:15-cr-20141-SHM-3, R.242, PageID##537–43. The two charges were related, in that the VICAR charges were the "crimes of violence" on which the firearm charge was premised. *See* Pet.App.5a.

The VICAR statute prohibits committing (or conspiring to commit) certain crimes "for the purpose of gaining entrance to or maintaining or increasing [one's] position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). To "properly charge" a VICAR violation, "the government must identify a specific state or federal law that the defendant violated by engaging in the conduct underpinning the VICAR offense." *United States v. Manley*, 52 F.4th 143, 148 (4th Cir. 2022). Allen's VICAR conviction relied on Tennessee's second-degree murder statute, Tenn. Code Ann. § 39-13-210. *See* Pet.App.5a, 11a. The only elements of second-degree murder under Tennessee law are: (1) the unlawful killing of another by (2) a defendant acting knowingly. Tenn. Code Ann. § 39-13-210(a)(1).

The district court sentenced Allen to a term of 172 months' imprisonment on the VICAR charges and to a consecutive term of 120 months' imprisonment on the § 924(c) charge, for a total term of 292 months. *See* Pet.App.3a, 11a; Order, No. 2:18-cv-02371-SHM, R.12, PageID#99.

2. In June 2018, Allen moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* Pet.App.11a. He argued that his conviction and sentence under § 924(c) were invalid because his VICAR conviction, which relied on the Tennessee second-degree murder statute, did not qualify as a "crime of violence." *See id.* He further argued that his counsel had provided ineffective assistance by failing to object to his sentence on that ground. *See id.*

The District Court denied Allen's § 2255 motion, finding that "[t]he predicate offense for Allen's § 924(c) conviction" qualified as "a crime of violence." Pet.App.32a. Because the District Court rejected Allen's claim on the merits, it did not address the question whether his counsel had been ineffective for failing to raise it. *See* Pet.App.28a & n.1, 33a.

3. Allen appealed that ruling to the Sixth Circuit. The Sixth Circuit granted a Certificate of Appealability and appointed counsel "[g]iven the complexity of the legal issues involved," including the "unsettled [question] whether the underlying state offense—Tennessee second-degree murder—constitutes a crime of violence under the use-of-force clause because it encompasses killing by acts of omission." Pet.App.14a.

On June 23, 2023, the Sixth Circuit issued an unpublished opinion affirming the District Court's ruling. Pet.App.1a–8a. Citing a line of recent circuit precedent, the panel held that "murder always involves the use of physical force, *even when committed by omission*." *Id.* at 7a (quoting *Battle v. United States*, No. 21-5457, 2023 WL 2487342, at *2 (6th Cir. Mar. 14, 2023) (emphasis added); *see Battle*,

2023 WL 2487342, at *2 (holding that a VICAR conviction predicated on Tennessee's first-degree murder statute satisfied § 924(c)'s elements clause); *Harrison*, 54 F.4th at 889–90 ("Because murder requires the use of physical force, a Kentucky conviction for complicity to commit murder is a serious violent felony under [18 U.S.C. §] 3559."). As a result, the panel concluded that "the predicate offense for Allen's VICAR conviction"—*i.e.*, second-degree murder under Tennessee law—"constituted a crime of violence" under § 924(c). Pet.App.7a.

4. The Sixth Circuit denied Allen's petition for panel rehearing and rehearing en banc on September 25, 2023. Pet.App.9a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED.

There is an acknowledged and well-developed circuit split about whether crimes that can be committed through omission or inaction "have as an element the use, attempted use, or threatened use of physical force" for purposes of provisions defining "violent" offenses. The Third Circuit holds that crimes of omission do not involve the use of force for purposes of those provisions. The Sixth Circuit and several other Courts of Appeals hold the opposite. That division of authority is entrenched, and only this Court can resolve it.

A. The Third Circuit Holds That Crimes of Omission Do Not Entail Violent Force.

1. In *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018), the Third Circuit applied ACCA's elements clause to Pennsylvania's aggravated assault statute, "which prohibits 'attempt[ing] to cause serious bodily

injury to another, or caus[ing] such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.'" *Id.* at 220 (quoting 18 Pa. Cons. Stat. § 2702(a)(1)) (alterations in original). The court relied on this Court's holding in *Johnson* that ACCA's elements clause uses "force" to capture "a category of violent, active crimes." *Id.* at 226 (quoting *Johnson*, 559 U.S. at 140). Consistent with *Johnson*, *Mayo* recognized that "'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person.'" *Id.* (quoting *Johnson*, 559 U.S. at 140) (emphasis in original).

The court then applied that definition of "physical force" to Pennsylvania's aggravated assault statute. *See id.* Convictions under that statute, the court recognized, "have been upheld not because a defendant used physical force against the victim, but because serious bodily injury occurred, as with the deliberate failure to provide food or medical care." *Id.* at 227 (citing, *e.g.*, *Commonwealth v. Thomas*, 867 A.2d 594 (Pa. Super. Ct. 2005)). As a result, the Third Circuit held that "a conviction under [Pennsylvania's aggravated assault statute] does not necessarily require proof that a defendant engaged in any affirmative use of 'physical force' against another person" for purposes of ACCA. *Id.* at 226.

The Third Circuit rejected the Government's reliance on "the Supreme Court's statement [in *Castleman*] that 'bodily injury' must result from 'physical force.'" *Id.* at 228 (quoting *Castleman*, 134 S.Ct. at 1414). *Castleman*, the court explained, considered the meaning of "force" in the common-law sense. *See id.* It "did not answer whether causing

serious bodily injury without any affirmative use of force would satisfy the violent physical force requirement of the ACCA." *Id.*

2. A different Third Circuit panel reached the same result in *United States v. Harris*, 68 F.4th 140 (3d Cir. 2023). *See id.* at 146 ("[W]e adopt *Mayo's* holding that a conviction under 18 Pa. Cons. Stat. § 2702(a)(1) cannot serve as a predicate offense under ACCA."). Before so holding, however, the "panel petitioned the Pennsylvania Supreme Court for a controlling decision on whether first-degree aggravated assault necessarily requires the perpetrator to use force." *Id.* at 144. The Pennsylvania Supreme Court "definitive[ly]" confirmed what *Mayo* had surmised: that "[t]he attempted or actual infliction of serious bodily injury is a required element" of aggravated assault in Pennsylvania, "but the perpetrator need not use force to inflict such an injury." *Id.*

The panel then "turn[ed] to whether [*Mayo* had] correctly interpreted ACCA to hold a conviction under [the Pennsylvania aggravated assault statute] cannot qualify as a predicate offense." *Id.* The panel recognized that it "was obligated to follow *Mayo*" regardless of whether it would have reached the same result. *Id.* at 146. Nevertheless, the panel conducted its own independent analysis and ultimately "agree[d] with [*Mayo*'s] interpretation of how ACCA's element of force clause applies to Pennsylvania's first-degree aggravated assault." *Id.* Like *Mayo*, *Harris* recognized that "the *Castleman* decision involved the common-law concept of force, and it 'expressly reserved the question of whether causing "bodily injury" necessarily involves the use of "violent force" under the ACCA.'" *Id.* at 148 (quoting *Mayo*, 901 F.3d

at 228). And like *Mayo*, *Harris* ultimately concluded that an "act of omission does not constitute an act of physical force within the meaning of ACCA." *Id.* at 146 (citing *Mayo*, 901 F.3d at 227–29).

3. The Third Circuit denied the Government's petition for en banc review of that ruling. *See United States v. Harris*, 88 F.4th 458 (3d Cir. 2023). Seven judges joined a concurring opinion endorsing the panel's rulings in *Mayo* and *Harris* but criticizing the categorical approach. *See id.* at 459–80 (Jordan, J., concurring in the denial of rehearing en banc).

B. Other Circuits Hold That Crimes of Omission Can Entail Violent Force.

The Sixth Circuit and at least four other Courts of Appeals have squarely held that crimes of omission can satisfy the elements clause of § 924(c) or other provisions defining categories of violent offenses. Still other courts have assumed that offenses involving death or serious bodily injury necessarily entail the use of violent force without addressing crimes of omission expressly.

1. In the decision below, the Sixth Circuit held that "the knowing-killing variant of the Tennessee second-degree murder statute . . . constitute[s] a crime of violence" for purposes of § 924(c)(3)(A). Pet.App.6a. The panel relied on a line of circuit precedent holding "that murder always involves the use of physical force, even when committed by omission." *Id.* at 7a (quoting *Battle*, 2023 WL 2487342, at *2) (citing *Harrison*, 54 F.4th 884).

Most notably, the Sixth Circuit had previously held in *Harrison* that "a Kentucky conviction for complicity to commit murder is a serious violent felony under [18

U.S.C. §] 3559." 54 F.4th at 889–90. "[O]mission that constitutes murder," *Harrison* reasoned, "still uses physical force as section 3559 requires." *Id.* at 889; *see also id.* at 895 (Cole, J., concurring ("indirect means and acts of omission can still be considered uses of force"). *Harrison* acknowledged that its ruling conflicted with the Third Circuit's decision in *Mayo*. *See id.* at 890 ("[O]ne circuit disagrees." (citing *Mayo*, 901 F.3d at 226–30)). Indeed, the Sixth Circuit specifically considered and rejected the very scenario on which the Third Circuit had relied: the parent who "intentionally fails to give his child food," causing the child to "die of starvation." *Id.* at 889. That "malicious parent," *Harrison* reasoned, still "uses the force that lack of food exerts on the body to kill his child." *Id.* So his crime still qualifies as a "serious violent felony" under 18 U.S.C. § 3559(c)(2)(F)(ii). *See id.* at 890.

2. The First Circuit reached the same result in *United States v. Báez-Martínez*, 950 F.3d 119 (1st Cir. 2020), which presented the question whether attempted murder under Puerto Rico law—which can be committed by omission—is a "violent felony" under ACCA. *See id.* at 130–33. But it did so only begrudgingly. The defendant in *Báez-Martínez* argued that "an omission (*i.e.*, doing nothing) cannot be considered 'violent force' 'exerted by and through concrete bodies'" under *Johnson*. *Id.* at 131. If it were writing "[o]n a blank slate," the panel said, it "might well agree." *Id.* "When a child dies from not being fed, the death is not—in nonlegal terms—a result of 'force.'" *Id.* But the court believed itself bound not by "laws of physics" but by this Court's ruling in *Castleman*. *Id.* "[I]f all bodily injuries necessarily entail some force, as *Castleman* declares, then . . . a

serious bodily injury must necessarily entail violent force under *Castleman's* reasoning of 'injury, ergo force.'" *Id.* at 132 (emphasis in original).

3. The Second Circuit relied on the same reasoning in *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc), which considered whether "first-degree manslaughter in violation of New York Penal Law § 125.20(1) is a violent crime under both ACCA and the Career Offender Guideline." *Id.* at 104. The court "assume[d] that New York would apply the [relevant] part of its first-degree manslaughter statute in circumstances where a defendant engaged in no physical action at all." *Id.* at 107. It held, however, that "first-degree manslaughter is a categorically violent crime," "whether committed by omission or commission." *Id.* at 111. That result, the court explained, was "compelled" by this Court's statement in *Castleman* that the "'knowing or intentional causation of bodily injury necessarily involves the use of physical force.'" *Id.* (quoting *Castleman*, 572 U.S. at 169).

Six judges dissented in two separate opinions. As one dissent explained, "law and logic dictate only one possible outcome: a crime committed by omission—definitionally, no action at all—cannot possibly be a crime involving physical, violent force." *Id.* at 138 (Pooler, J., dissenting). As the other emphasized, the rule of lenity compels the same result. *See id.* at 133 (Leval, J., dissenting) ("The legal basis for my opinion is the rule of lenity.").

4. In *United States v. Peeples*, 879 F.3d 282 (8th Cir. 2018), the Eighth Circuit held that Iowa's attempted murder offense "constitutes a crime of violence for the

purposes of [U.S.S.G.] § 2K2.1(a)(4)." *Id.* at 286. The court specifically addressed "crime[s] of omission." *Id.* at 287. Applying *Castleman*, the court held that even attempted murder by omission—such as "a care-giver refusing to feed a dependent"—entails a use of force under the Guidelines' elements clause. *Id.* (citing *Castleman*, 572 U.S. at 170). "Because it is impossible to cause bodily injury without force," the court reasoned, "it would also be impossible to cause death without force." *Id.*

5. Finally, in *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017), the Tenth Circuit held that Colorado's second-degree assault statute is a "violent felony" under ACCA. *Id.* at 538–39. "[I]f it is *impossible* to commit a battery without applying force, and a battery can be committed by an omission to act," the court reasoned, "then second-degree assault must also require physical force." *Id.* at 538 (citing *Castleman*, 572 U.S. at 170) (emphasis omitted). Although the court acknowledged *Johnson*'s holding that "violent force" is different from common-law force, it found that standard satisfied on the ground that "Colorado second-degree assault requires intentional causation of *serious bodily harm*." *Id.* (emphasis in original).[1]

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[1] Other courts have raised the omissions question but have not definitively resolved it on the ground that it was insufficiently clear that the offense in question could actually be committed by omission. *See, e.g.*, *United States v. Jennings*, 860 F.3d 450, 460 (7th Cir. 2017) (deeming it "dispositive" that the defendant was "unable to cite any cases supporting his theory" that crimes of omission are actually "prosecuted as domestic assault in Minnesota"); *United States v. Rumley*, 952 F.3d 538, 551 (4th Cir.

6. Even circuits that have yet to expressly decide whether crimes of omission entail violent force fall prey to the fallacy of "injury, ergo force." *Báez-Martínez*, 950 F.3d at 132. In *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016), for example, the Seventh Circuit held that an Illinois statute prohibiting domestic battery was a "crime of violence" for purposes of U.S.S.G. § 4B1.1(a). *See id.* at 1063. The court relied on circuit precedent finding that "convictions for domestic battery . . . 'clearly qualify' as 'violent felon[ies]' under [ACCA], because proving intentional causation of bodily harm 'unambiguously requires proving physical force.'" *Id.* (quoting *De Leon Castellanos v. Holder*, 652 F.3d 762, 764–65 (7th Cir. 2011)). Similarly, in *Thompson v. United States*, 924 F.3d 1153 (11th Cir. 2019), the Eleventh Circuit held that Florida's second degree murder offense is a "crime of violence" under § 924(c). *Id.* at 1156. "[E]ven indirect force," the court reasoned, satisfies § 924(c)'s elements clause. *Id.* at 1157.

* * *

This split is acknowledged, well-developed, and deeply entrenched. *See, e.g.*, *Harrison*, 54 F.4th at 890 (recognizing split). Only this Court can resolve it. *See Báez-Martínez*, 950 F.3d at 132 (considering "whether [the court] might . . . stay within [its] circuit lane and still accept [the defendant's] argument" but concluding that it was bound by *Castleman*); *Waters*, 823 F.3d at 1065 ("'[I]t would take compelling circumstances, or an intervening on-point Supreme Court decision' to

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2020) ("identif[ying] no Virginia case applying the statute where harm was caused by omission").

disturb our case law holding that domestic battery is a crime of violence").

II. THE QUESTION PRESENTED IS IMPORTANT.

The Question Presented arises frequently in the context of § 924(c), and it has implications for myriad other provisions that use a "physical force" elements clause to define a set of violent offenses. In all of these contexts, the stakes could hardly be higher.

1. Each year, thousands of individuals are convicted of using a firearm in connection with a predicate offense under § 924(c). *See, e.g.*, Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses, U.S. Sentencing Commission, https://www.ussc.gov/research/quick-facts/section-924c-firearms (last accessed Feb. 8, 2024) (counting 2,790 convictions in 2022 alone). As is reflected by the frequency with which the Question Presented has arisen in the Courts of Appeals, *see supra* Part I, many of those convictions are for offenses that can be committed through omission. Indeed, the Government has suggested that this very case may affect whether murder is considered a "crime of violence" in "at least 31 jurisdictions nationwide." Appellee Br. at 27 & n.5, *Allen*, 2023 WL 4145321 (No. 21-5782) (citing cases). It will affect myriad other offenses, too. *See, e.g.*, *Mayo*, 901 F.3d at 221 (addressing Pennsylvania's aggravated assault statute).

2. Although the "physical force" question arose here in the context of § 924(c), it also implicates other provisions that use a substantively identical elements clause in defining categories of violent offenses. For example, 18 U.S.C. § 16, which "defines a 'crime of violence' for purposes of many federal statutes," *Davis*,

139 S. Ct. at 2326, contains an elements clause that covers "offense[s] that ha[ve] 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. ACCA uses almost exactly the same language in defining "violent felony." *See* 18 U.S.C. § 924(e)(2)(B)(i) ("[T]he term 'violent felony' means any crime" that meets certain criteria and that "has as an element the use, attempted use, or threatened use of physical force against the person of another[.]"). The federal three-strikes law uses the same language in defining "serious violent felony." 18 U.S.C. § 3559(c)(2)(F)(ii) (defining "serious violent felony" to include certain offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another"). The Sentencing Guidelines use that language, too. *See* U.S.S.G. § 4B1.2(a) (defining "crime of violence" to refer to certain offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another").

This Court regularly relies on precedents involving these other provisions in construing § 924(c). *See, e.g.*, *Davis*, 139 S. Ct. at 2325–30 (§ 16(b) and ACCA). Although the Question Presented relates specifically to § 924(c), the Court's answer to that question will have implications in these other important contexts. Indeed, no court appears to have distinguished among these violent offense provisions in addressing crimes of omission.

3. For each defendant charged or sentenced under one of these provisions, years of imprisonment hang in the balance. A conviction under § 924(c) means an individual will spend *at least* 5 years in prison. *See* 18

U.S.C. § 924(c)(1)(A)(i). For specified classes of offenders, that mandatory minimum term jumps to 7, 10, 25, or 30 years—and in some cases even to life. *See* 18 U.S.C. § 924(c)(1)(A)(ii)–(iii), (B)(i)–(ii), (C)(i)–(ii); Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses, U.S. Sentencing Commission, https://www.ussc.gov/research/quick-facts/section-924c-firearms (last accessed Feb. 8, 2024) ("The average sentence for all section 924(c) offenders was 142 months.").

"In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty." *Davis*, 139 S. Ct. at 2335. Nor should the happenstance of the jurisdiction in which he happens to reside. *Cf. Mathis v. United States*, 579 U.S. 500, 521 (2016) ("Congress also could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions.") (Kennedy, J., concurring). The division of authority with respect to the applicability of § 924(c) warrants this Court's attention now.

III. THE SIXTH CIRCUIT'S POSITION IS WRONG.

The majority rule, which the Sixth Circuit endorsed below, is simply wrong. As an initial matter, crimes that can be committed by omission do not entail the "use of physical force" even under *Castleman*'s common-law standard. In any event, § 924(c)(3)(A) uses "force" in a much narrower sense than the provision at issue in *Castleman*. And crimes of omission certainly do not entail the use of *violent* force "against the person or property of another" for purposes of § 924(c)(3)(A).

1. Start with the *Castleman* standard. In *Castleman*, the Court "attribute[d] the common-law meaning of 'force' to § 921(a)(33)(A)'s" "misdemeanor crime of domestic violence" provision. 572 U.S. at 168. The Court then considered whether crimes committed through indirect force—such as by "employing poison knowingly as a device to cause physical harm"—entail the use of force in that "common-law sense." *Id.* at 161–63. It held that "the common-law concept of 'force' encompasses even its indirect application." *Id.* at 170.

But this Court "did not expressly consider the problem of omissions—like starving a child—when it decided *Castleman*." *Báez-Martínez*, 950 F.3d at 132. To the contrary, the indirect "actions [*Castleman*] referenced were still affirmative acts, not mere omissions." *United States v. Oliver*, 728 F. App'x 107, 111 n.6 (3d Cir. 2018); *see Castleman*, 572 U.S. at 171 (describing examples of indirect force such as "the *act of employing* poison knowingly as a device to cause physical harm" or "*pulling* the trigger on a gun" (emphases added)). As *Castleman* recognized, "the word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." *Id.* at 170–71 (internal quotation marks omitted). And "physical force" does not encompass "intellectual force or emotional force." *Id.* at 170 (quoting *Johnson*, 559 U.S. at 138). An offense that can be committed without *any* "use" of force thus fails even *Castleman*'s common-law standard. *See, e.g.*, *Báez-Martínez*, 950 F.3d at 131 ("When a child dies from not being fed, the death is not—in nonlegal terms—a result of 'force.'").

2. In any event, § 924(c)(3)(A) is governed by *Johnson*'s "violent force" standard, not *Castleman*'s common-law one. In *Johnson*, this Court "declined to

read the common-law meaning of 'force' into ACCA's definition of a 'violent felony.'" *Castleman*, 572 U.S. at 163; *see Johnson*, 559 U.S. at 139 ("The question is whether the term 'force' in 18 U.S.C. § 924(e)(2)(B)(i) has the specialized meaning that it bore in the common-law definition of battery. The Government asserts that it does. We disagree."). "[I]n the context of a statutory definition of '*violent* felony,'" the Court reasoned, "the phrase 'physical force' means *violent* force." *Id.* at 140; *see id.* (quoting a dictionary "defining 'violent' as '[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement"). Section 924(c)(3)(A)—which, like ACCA (and unlike § 921(a)(33)(A)(ii)), defines a category of violent felonies—uses "force" in the same sense.

Section 924(c)'s text also resembles ACCA's—and differs from § 921(a)(33)(A)(ii)'s—in another important respect: Its elements clause refers to uses of force "against persons or property." As this Court recognized in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that "against" phrase is "critical." *Id.* at 9 (construing 18 U.S.C. § 16, which contains the same language). "While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force *against another person* by accident." *Id.* (second emphasis added). "The phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Borden*, 593 U.S. at 429.

For those reasons, § 924(c)(3)(A)'s elements clause sweeps more narrowly than § 921(a)(33)(A)(ii)'s. Indeed, applying *Castleman*'s common-law definition

of "force" to § 924(c) would "do exactly what *Leocal* decried: 'blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and [all] other crimes.'" *Id.* at 440 (quoting *Leocal*, 543 U.S. at 11).

3. Crimes of omission certainly do not satisfy the "violent force" standard applicable to § 924(c). In *Borden*, this Court held offenses with the *mens rea* of recklessness—like those committed by "a police officer" who hits "another patrol car" while speeding "to a crime scene," "[a] shoplifter [who] jumps off a mall's second floor balcony while fleeing security only to land on a customer," "[a]n experienced skier" who "careens into someone else on the hill," or "a father [who] takes his two-year-old go-karting without safety equipment, and injures her as he takes a sharp turn"—do not entail violent force. 593 U.S. at 439–40. That is just as true for offenses committed through inaction. A "parent [who] intentionally fails to give his child food," *Harrison*, 54 F.4th at 889, or someone who "withhold[s] an EpiPen® in the midst of a severe allergic reaction," *United States v. Jennings*, 860 F.3d 450, 459 (7th Cir. 2017), has committed a terrible crime. But he has not committed a "crime of violence" that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" under § 924(c). Or consider the 70-year-old woman convicted of manslaughter after deciding "to cease putting nutrition in [her dying 95-year-old father's] IV" in "an act of love and mercy," *Scott*, 990 F.3d at 135 (Level, J., dissenting). "May a legislature lawfully command a fifteen-year sentence for such a crime? Undoubtedly, yes." *Id.* But is that really a "crime of violence" that entails "use of physical

force against the person of another" for purposes of § 924(c)? The only reasonable answer, particularly in light of the rule of lenity, is "no." *See id.* (arguing that the rule of lenity compels that conclusion).

The now-defunct residual clause underscores that conclusion. When Congress enacted § 924(c), it included not only the elements clause in § 924(c)(3)(A) but also the residual clause in § 924(c)(3)(B). Congress may well have intended for the *residual clause* to sweep in crimes that do not include an "element" of violent force but that nevertheless result in injury or death. But this Court struck down the residual clause as unconstitutionally vague. *Davis*, 139 S. Ct. 2336.

In the wake of that ruling, courts across the country have been forced to consider whether "crimes that were likely well encompassed by that clause might find refuge in the force clause." *Báez-Martínez*, 950 F.3d at 130. But they cannot simply construe the elements clause so broadly as to "effectively replicat[e] the work formerly performed by the residual clause, collapsing the distinction between them." *Taylor*, 596 U.S. at 857. That reading of the elements clause would "invite" the sort of "constitutional questions" that led to the residual clause's demise. *Id.* It would also defy the "usual rules of statutory interpretation," as this Court "do[es] not lightly assume Congress adopts two separate clauses in the same law to perform the same work." *Id.* (citing *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 839, n. 14 (1988)).

4. To be sure, it may be "wholly unsatisfying" to conclude that a defendant who appears to have in fact used violent force against another person did not

commit a "crime of violence." *Mayo*, 901 F.3d at 230. But that is the conclusion the categorical approach demands. *See id.* ("[T]hat's the categorical approach for you."); *Harris*, 88 F.4th at 459–80 (Jordan, J., concurring in the denial of rehearing en banc) (discussing the implications of the categorical approach in this context and problems with the categorical approach more broadly).

IV. THE CASE IS AN APPROPRIATE VEHICLE.

This case is an appropriate vehicle for answering the Question Presented. Tennessee courts have repeatedly recognized that second-degree murder encompasses killing by inaction. *See, e.g.*, *State v. Bordis*, No. 01C01-9211-CR-00358, 1994 WL 672595, at *1 (Tenn. Crim. App. Dec. 1, 1994); *State v. Bordis*, 905 S.W.2d 214, 216–17 (Tenn. Crim. App. 1995); *State v. Collins*, 986 S.W.2d 13, 18 (Tenn. Crim. App. 1998). The question whether a crime of omission can satisfy the elements clause of § 924(c) was fully briefed and definitively answered by the Sixth Circuit in the decision below. And neither the District Court nor the Sixth Circuit justified its ruling on any other ground.

To be sure, to ultimately prevail Allen will also have to demonstrate that his counsel was ineffective by failing to challenge his § 924(c) conviction. *See* Pet.App.28a & n.1, 33a. But that is issue is entirely distinct from the one on which the lower courts ruled. As it so often does, this Court should grant certiorari, answer the pure legal question on which the Courts of Appeals have divided and on which the decision below turned, and leave any remaining issues for remand. *See, e.g.*, *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76–77 (2022) ("[W]hen we

reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing." (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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