No. 23-825

IN THE

Supreme Court of the United States

SALVATORE DELLIGATTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTEREST OF *AMICUS CURIAE*[1]

The **National Association for Public Defense** (NAPD) is an association of more than 28,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities, and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents federal, state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models. In addition, NAPD hosts annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous pretrial and trial advocacy and strives to obtain optimal results for clients both at the trial level and on appeal.

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[1] Pursuant to Supreme Court Rule 37, counsel for *amicus* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amicus*'s intent to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

NAPD's members represent a broad cross-section of the criminal defense bar. All have a strong interest in this case because the Second Circuit incorrectly held that a crime that can be committed with no action at all "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See* Pet. App. 8a, 11a-12a (quoting 18 U.S.C. § 924(c)(3)(A)). The Second Circuit's holding does violence to the text of Section 924 of the Armed Career Criminal Act (ACCA) and misapplies this Court's precedents—prejudicing NAPD's members and those they represent.

As the Third Circuit recently explained, a prior criminal conviction cannot be a predicate offense under Section 924's force clauses when the statute of conviction can be committed with no physical act at all. Thus, because first-degree aggravated assault in Pennsylvania, for example, can be accomplished by "'omission,'" it "does not include the use of force as an element. Period. That should be the end of it." *United States v. Harris*, 88 F.4th 458, 464 (3d Cir. 2023) (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, and Matey, JJ.) (rejecting government's contrary argument). This result may sometimes "be a source of great frustration for the government." *See id.* at 459. But it is the "outcome" that "is compelled by precedent" from this Court going back more than thirty years. *Id.* at 459, 466-70; *see Taylor v. United States*, 495 U.S. 575 (1990). At this point, the government must turn to Congress if it wants a different statutory regime.

ARGUMENT

I. New York Second Degree Murder Is Not A Predicate Offense Under Section 924 Of The ACCA.

A. Second degree murder can be committed in New York with no action at all.

1. New York's highest court has held that second degree murder can be committed under state statute regardless of whether the defendant caused the death by his own physical action. In other words, second degree murder can be committed in New York with a complete lack of action by a defendant. That cannot be a predicate offense under Section 924 of the ACCA because it necessarily does not require "as an element the use, attempted use, or threatened use of physical force against the person ... of another." 18 U.S.C. § 924(c)(3)(A) (use-of-force element in "'crime of violence'" definition); *see* 18 U.S.C. § 924(e)(2)(B)(i) (same in "'violent felony'" definition).[2]

In assessing whether an offense qualifies as a crime of violence, "the Supreme Court and other Courts of Appeals have recognized that federal courts are bound by the highest state court's interpretations of state law." *Matthews v. Barr*, 927 F.3d 606, 622 n.11 (2d Cir. 2019) (citing cases). Thus, to determine the minimum conduct necessary for a conviction, this Court looks to the state "statute, as interpreted by the New York Court of Appeals." *Id.* at 621; *see also United States v. Drummond*, 925 F.3d 681, 689-90 (4th Cir.

[2] The use-of-force clauses in Section 924 are functionally identical, so they are treated collectively as "Section 924" in this brief.

2019) ("When evaluating a state court conviction for ACCA predicate offense purposes, a federal court is bound by the state court's interpretation of state law, including its determination of the elements of the potential predicate offense. ... For statutory offenses, we look to the physical actions specified in the statute, and any state court decisions interpreting its terms." (cleaned up)).

In New York, "[a] person is guilty of murder in the second degree when," "[w]ith intent to cause the death of another person," for example, "he causes the death of such person or of a third person." N.Y. Penal Law § 125.25(1). Although N.Y. Penal Law § 125.25 lists four other, alternative sets of scenarios with different *mens rea* requirements that all count as second degree murder, the indictment failed to charge a specific subsection of this "divisible" statute. *Cf. Descamps v. United States*, 570 U.S. 254, 257 (2013). But this failure matters not for present purposes, because the *actus reus* is the same in each subsection, and New York's highest court has repeatedly held that the statute—and others with the same language—does not require the application of physical force.

Under state law, "[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act *or the omission to perform an act* which he is physically capable of performing." N.Y. Penal Law § 15.10 (emphasis added). This understanding is confirmed by Court of Appeals of New York cases interpreting the crime of first degree manslaughter under N.Y. Penal Law § 125.20, which differs from some subsections of the State's second degree murder statute only as far as the applicable *mens rea* is concerned. *See In re Dashawn*

W., 21 N.Y.3d 36, 48 (2013). The *actus reus*, though, is the same across the board.[3]

In explaining the same *actus reus* required for first degree manslaughter, the Court of Appeals of New York has held that harm caused by omission is sufficient for a conviction. Put differently, a defendant can be found guilty of first degree manslaughter in New York without taking any action at all, so long as there is a duty of care. *See People v. Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992).

Thus, for example, a parent who declines to seek medical care for a child who has been severely injured may be found guilty of first degree manslaughter in New York. *Steinberg*, 595 N.E.2d at 847. As put by the State's highest court, "the failure to obtain medical care" by a legal caretaker "can ... support a first degree manslaughter charge, so long as there is sufficient proof of the requisite *mens rea*—intent to cause serious physical injury." *Ibid.* "If the objective is to cause serious physical injury, the mental culpability element

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[3] *Compare* N.Y. Penal Law § 125.20(1) ("A person is guilty of manslaughter in the first degree when," with "intent to cause serious physical injury to another person, he causes the death of such person or of a third person ... ."), *with* N.Y. Penal Law § 125.25(1) ("A person is guilty of murder in the second degree when," with "intent to cause the death of another person, he causes the death of such person or of a third person ... ."), *id.* § 125.25(2) (same *actus reus*), *id.* at § 125.25(3) (*actus reus* is that defendant "or another participant, if there be any, causes the death of a person other than one of the participants" during an enumerated felony), *id.* § 125.25(4) (*actus reus* is "causes the death" of "another person less than eleven years old" "[u]nder circumstances evincing a depraved indifference to human life"), *and id.* § 125.25(5) (same *actus reus* as to "a person less than fourteen years old").

of first degree manslaughter is satisfied—whether or not defendant had knowledge that the omission would in fact cause serious injury or death." *Id.* at 848.

The Court of Appeals of New York reiterated *Steinberg*'s holding just a year later. According to the court, even a "'passive' defendant" can be criminally liable "predicated on an 'omission.'" *People v. Wong*, 619 N.E.2d 377, 381 (N.Y. 1993). Thus, "where the requisite proof [of intent] is present," the court explained, "a person in the position of the 'passive' defendant ... may be held criminally liable for failing to seek emergency medical aid for a seriously injured child." *Ibid.* So long as a passive defendant can be shown to be "personally aware" of the danger to the victim, the defendant may be found "criminally liable for failing to seek medical help" for the victim to whom she owes a duty of care. *Id.* at 381-82.

2. These pronouncements of the law of second degree murder and first degree manslaughter in New York—from the State's highest court—are all this Court needs to find a "realistic probability" "that the State would apply its statute" to criminalize omissions. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (quotation marks omitted). "Decisions from the state supreme court best indicate a 'realistic probability,' supplemented by decisions from the intermediate-appellate courts." *United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017).

Because the Court of Appeals of New York has defined the *actus reus* for second degree murder and first degree manslaughter in the State, that is all that is necessary to show the minimum conduct criminalized by the state statute. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133, 138, 140 (2010)

(*Johnson I*) (holding that Florida battery is not a "*violent* felony" under Section 924 because the "Florida Supreme Court has held that the element of actually and intentionally touching under Florida's battery law is satisfied by *any* intentional physical contact, no matter how slight" (quotation marks omitted)).

"We do not need to hypothesize about whether there is a 'realistic probability' that [New York] prosecutors will charge defendants" for omissions; "we know that they can because the state's highest court has said so." *E.g.*, *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (so holding as to Maryland prosecutors) (en banc). The "State actually prosecutes the relevant offense," *see Moncrieffe*, 569 U.S. at 206, based on omission. The defendants in *Steinberg* and *Wong* were "actually prosecuted" based on theories of the case that an omission alone is enough to charge, and take to a jury, the analogous crime of first degree manslaughter. *Supra* pp.5-6. There is thus more than a "realistic probability" that defendants will be prosecuted for these New York crimes despite the lack of any force by the defendant whatsoever. *See Moncrieffe*, 569 U.S. at 191 ("realistic probability" of prosecution enough) (quotation marks omitted). Prosecutors in the State have done so. And the State's highest court has affirmed such convictions thus obtained.

B. Crimes that require zero physical action by the defendant are not predicates under the use-of-force clauses of the ACCA.

Everyone agrees that New York second degree murder only counts as a "crime of violence" for

purposes of the ACCA if the crime "has as an element the use, attempted use, or threatened use of physical force against the person ... of another." 18 U.S.C. § 924(c)(3)(A); *see* 18 U.S.C. § 924(e)(2)(B)(i) (same as to "'violent felony'"). Everyone also agrees that the Court looks to the minimum conduct necessary to be convicted of second degree murder under New York's penal statute, which, again, provides that "[a] person is guilty of murder in the second degree when," in various scenarios and with different levels of intent, "he causes the death" of another person. *See* N.Y. Penal Law § 125.25.

It is important to start, as always, with the text. A previous conviction is a predicate "crime of violence" for purposes of Section 924 when it "has 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). Crimes that can be committed by a complete lack of action necessarily are not a "use" of "physical force." As this Court has held, "'use'" in this context "requires active employment." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). One cannot "use physical force against" another by doing nothing, any more than one can accidentally or even recklessly "use" such force as the text of Section 924 requires. *See ibid.* (holding that negligently or accidentally causing damage does not "use" force as required under analogous "crime of violence" definition in 18 U.S.C. § 16(a)) (cleaned up); *see also Borden v. United States*, 593 U.S. 420, 423 (2021) ("The question here is whether a criminal offense can count as a 'violent felony'" under 18 U.S.C. § 924(e) "if it requires only a *mens rea* of recklessness—a less culpable mental state

than purpose or knowledge. We hold that a reckless offense cannot so qualify.").

Indeed, describing complete inaction as the "use" of "physical force" is perplexing—fairly described as a "comical misfit" for Section 924's text. *See Johnson I*, 559 U.S. at 145 (so holding as to nonviolent touching for purposes of "'violent felony'" definition in Section 924(e)). As the Court explained in *Johnson I*, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis original). When one does nothing, it is not a use of force at all, let alone a use of "*violent* force." If "[d]e minim[is] physical force, such as mere offensive touching, is insufficient to trigger the ACCA's force clause because it is not violent," *United States v. Middleton*, 883 F.3d 485, 489 (4th Cir. 2018) (explaining *Johnson I*), then no physical force whatsoever (either direct or indirect) cannot be considered "*violent*" force as required for force-clause predicates under Section 924.

The Second Circuit cited *United States v. Castleman*, 572 U.S. 157 (2014), to reason that the *harm* to the victim is all that is required to show that the defendant's crime "involve[d] the use of force." Pet. App. 11a-12a. But that misunderstands *Castleman*. *Castleman* did not purport to overrule *Johnson I*, *Leocal*, or the like—which require the "active employment" of "*violent* physical force." On the contrary, the Court expressly reserved the question. *See Castleman*, 572 U.S. at 170 (whether resultant injury "necessitate[s] violent force, under *Johnson[I]*'s definition of that phrase" is "a question we do not decide").

Rather, *Castleman* addressed (a) the level of force necessary for a different statute that, unlike Section 924, does not require violent force, and (b) whether an *active* employment of force that *indirectly* results in injury constitutes a use of force against another, in the common-law sense. *Castleman* simply doesn't answer whether a failure to act satisfies the force-clause requirement of Section 924.

As the Third Circuit recently explained, "an act of omission does not constitute an act of physical force." *United States v. Harris*, 68 F.4th 140, 146 (3d Cir. 2023) (assessing a predicate offense under Section 924(e)); *see also United States v. Harris*, 88 F.4th 458, 459 (3d Cir. 2023) (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, and Matey, JJ.) (same). To conclude otherwise would "conflate the infliction of bodily injury with physical force." *Harris*, 68 F.4th at 148. But this Court's "*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.* (quoting *United States v. Mayo*, 901 F.3d 218, 228 (3d Cir. 2018)); *see also Mayo*, 901 F.3d at 230 (citing and quoting *Castleman*, 572 U.S. at 170-71, as "likening 'the act of employing poison knowingly as a device to cause physical harm' or firing a bullet at a victim, to 'a kick or punch,' as each act involves the 'application' or 'use of force,' even though the resulting harm might occur indirectly"); *Villanueva v. United States*, 893 F.3d 123, 129 (2d Cir. 2018) (reasoning that under *Castleman*, "the use of a 'substance' ... constitutes use of physical force, for federal law purposes, because the relevant force is the

impact of the substance on the victim, not the impact of the user on the substance").

Castleman dealt with the meaning of force as defined for *misdemeanor* crimes of domestic violence under 18 U.S.C. § 922(g)(9). As the Court noted, that statute does not require the use of *violent* force, unlike the force clauses of Section 924. Rather, in distinguishing Section 924, the Court held that Section 922(g)(9) only requires the *de minimis* level of force that was required at common law. *Castleman*, 572 U.S. at 163-66 (distinguishing *Johnson I*, where the Court "declined to read the common-law meaning of 'force' into [Section 924(e)]'s definition of a 'violent felony,' because we found it a 'comical misfit with the defined term'"). The Court explained that the word "'violence' standing alone 'connotes a substantial degree of force,'" but domestic violence is not just a type of "'violence'" but rather "a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* at 164-65 (quoting *Johnson I*, 559 U.S. at 140). *Castleman*'s conclusion that causing bodily injury required the application of physical force was based on this broader definition of "physical force," as the Court repeatedly emphasized. *See, e.g.*, *id.* at 170 ("It is impossible to cause bodily injury without applying force *in the common-law sense*." (emphasis added)); *ibid.* ("[T]he *common-law* concept of 'force' encompasses even its indirect application." (emphasis added)).

And *Castleman* dealt with whether a *commission*—not total inaction—could meet the force clause of the misdemeanor crime of domestic violence definition in 18 U.S.C. § 921(a)(33)(A)(ii), even if that action injured the victim indirectly. Because, unlike

the force clauses in Section 924, the misdemeanor crime of domestic violence definition imported the common-law definition of force (the level rejected in *Johnson I*), the Court had to grapple with whether the common-law concept of force encompassed only direct applications of force—such as a kick or punch—or whether it also encompassed indirect applications of force—such as poisoning someone's food or drink. 572 U.S. at 170-71. "It was in that context that the Court concluded, 'it is impossible to cause bodily injury without applying force in the *common-law sense*.'" *Mayo*, 901 F.3d at 228 (quoting *Castleman*, 572 U.S. at 170) (emphasis added; brackets removed); *see also Castleman*, 572 U.S. at 170 (noting that the element of "force" in common-law battery "need not be applied directly to the body of the victim") (citation omitted).

Castleman's concept of "indirect force" focuses on commissions—for example, employing poisons or pulling the trigger on a gun—not omissions, and does so in the context of a statute that only requires the common-law concept of force, not the violent force required under Section 924. *Castleman* did not address the issue presented here: Whether causing injury without applying any force at all, but by inaction, is a use of violent (not common law) force. *Leocal* and *Johnson I* answer that question in the negative.

Thus, the Second Circuit erroneously conflated the use of violent force—as required by Section 924 and *not* for the misdemeanor crime of violence definition—with the causation of injury. "[A]n offense that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the" force requirement of Section 924. *Cf. United*

States v. Torres-Miguel, 701 F.3d 165, 168 (4th Cir. 2012) (so holding as to sentencing guidelines), *abrogated on other grounds by Castleman as recognized in United States v. Covington*, 880 F.3d 129, 134 n.4 (4th Cir. 2018) ("*Castleman* did not however abrogate the causation aspect of *Torres-Miguel* ... ."). "Of course, a crime may *result* in death or serious injury without involving *use* of physical force." *Ibid.*

II. Congress Has Had Over Thirty Years To Amend The Force Clauses Of Section 924 In The Face Of Seemingly Unsatisfying Results And Chosen Not To Do So.

To be sure, the categorical approach can sometimes lead to seemingly odd or perhaps discomforting results. But those results are merely the byproduct of Congress's chosen text—language it has left undisturbed despite this Court's long-standing interpretation and application of the categorical approach.

The Court has repeatedly found that Section 924's text requires the elements-focused inquiry. *See, e.g.*, *Shepard v. United States*, 544 U.S. 13, 19-20 (2005). Section 924, by its plain terms, enhances the sentence for a criminal defendant with certain "'previous *convictions*.'" *Mathis v. United States*, 579 U.S. 500, 511 (2016) (quoting 18 U.S.C. § 924(e)(1)) (emphasis added). The focus, then, is on the criminal statute's elements, not on "what the defendant had actually done." *Ibid.* Congress could have constructed an alternate system for establishing predicate offenses. And had it wished to do something different, "Congress well knows," for example, "how to instruct sentencing judges to look into the facts of prior

crimes," given that "different language" in other statutory schemes requires as much. *Ibid.* But "Congress chose another course in ACCA." *Ibid.*

In case there were any doubt of Congress's intent, *Taylor v. United States*, 495 U.S. 575 (1990), which "set out the essential rule governing [Section 924] cases," was decided "more than a quarter century ago." *Mathis*, 579 U.S. at 509 (so reasoning almost a decade ago). In the time since, Congress has not legislated around this Court's interpretation of the text. *See id.* at 521 (Kennedy, J., concurring) (noting that "Congress is capable of amending the ACCA"). *Cf. Shepard*, 544 U.S. at 23 ("In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed since *Taylor* came down, without any action by Congress to modify the statute as subject to our understanding that it allowed only a restricted look beyond the record of conviction under a nongeneric statute."). That absence of contrary legislation is further evidence of Congress blessing the categorical approach, warts and all. *See, e.g.*, *Neal v. United States*, 516 U.S. 284, 295-96 (1996) (noting that the Court "give[s] great weight to *stare decisis* in the area of statutory construction" because Congress "has the responsibility for revising its statutes").

Judges have sometimes expressed frustration with the results of categorical-approach inquiries. This is true, for example, with the Third Circuit in its on-point (and correct) opinion in *Harris*. It reached that result because "the Supreme Court of Pennsylvania," in answering a certified question directly asking whether the State's first-degree assault statute has the required force element, responded: "'there is no express element in [the

Pennsylvania criminal statute] requiring the use or attempted use of physical force, or any reference to force at all.'" *Harris*, 88 F.4th at 463 (quoting *United States v. Harris*, 289 A.3d 1060, 1070 (Pa. 2023)) (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, and Matey, JJ.). The Pennsylvania high court "observe[d] that 'the General Assembly was cognizant of how to codify the manner of causing a particular bodily injury as an element of the crime. The legislature did not restrict the manner of causing or attempting to cause serious bodily injury" in the statute, so the Supreme Court of Pennsylvania "'decline[d] the invitation to do so by judicial fiat.'" *Ibid.* (quoting *Harris*, 289 A.3d at 1070-71).

The Third Circuit described this as "yet another absurd result dictated by the categorical approach." *Harris*, 88 F.4th at 465 (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, and Matey, JJ.). "How on Earth did we end up here?," the court asked. *Ibid.* It then answered, in a thorough explanation, that this is the result required by this Court's interpretation of the plain text of Section 924. *See id.* at 465-75. Even when the defendant's previous "crime was violent, even murderous," it does not count as a predicate crime of violence under the ACCA so long as the statute of conviction "encompass[es] acts that do not involve the use of physical force." *Id.* at 473. That is the approach that Congress has chosen to leave in place—and the one this Court, too, must continue to faithfully apply.

Indeed, the categorical approach has "certain practical advantages," for example, avoiding Sixth

Amendment concerns. *See United States v. Kroll*, 918 F.3d 47, 53-54 (2d Cir. 2019) (applying the categorical approach under 18 U.S.C. § 3559(e)). Despite criticizing the method, the Third Circuit recognized that "the result of applying the categorical approach sometimes makes sense." *Harris*, 88 F.4th at 459 (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, and Matey, JJ.).

But all this is beside the point. Faithfully applying the categorical approach and the text of Section 924, as interpreted by this Court, ought clearly to lead the Court to conclude that crimes that can be committed by inaction, as a categorical matter, simply do not have the use of violent force as an element.

CONCLUSION

Amicus Curiae NAPD respectfully urges the Court to grant the petition for a writ of certiorari.

February 29, 2024

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