No. 20-_____

In the
Supreme Court of the United States

Gerald Scott,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In most states, physical inaction can be criminal. But an oft-invoked provision of federal law is triggered only by crimes that require the "use of physical force against the person or property of another." In the split en banc decision here, the Second Circuit ruled a crime requiring "no physical action" nonetheless requires "the use of physical force."

The question presented is:

Does a crime of physical inaction, in which the inaction is deemed the cause of injury or death, have as an element the "use of physical force against the person of another" under 18 U.S.C. § 924(e)(2)(B)(i) and equivalent provisions at § 16(a), § 924(c)(3)(A) and § 3156(a)(4)(A)? Four circuits say no, six circuits say yes, and one circuit says both.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

State Cases

Federal Statutes

TABLE OF AUTHORITIES (cont.)

Page(s)

State Statutes

Rules

Other Authorities

OPINIONS BELOW

The majority, concurring and dissenting opinions of the en banc United States Court of Appeals for the Second Circuit are reported at 990 F.3d 94 and appear at Petitioner's Appendix ("Pet. App.") 1a-120a.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 2255 and entered judgment on January 12, 2018. The Second Circuit had jurisdiction under 18 U.S.C. § 3742(b) and 28 U.S.C. § 1291. A three-judge panel affirmed on March 31, 2020, in a split decision. The en banc court then reversed in another split decision on March 2, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The Armed Career Criminal Act ("ACCA") defines a "violent felony" in relevant part as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). Equivalent text appears in the definition of a "crime of violence" found at § 16(a), § 924(c)(3)(A), § 3156(a)(4)(A) and U.S.S.G. § 4B1.2(a)(1).

INTRODUCTION

In most states, one person's physical inaction can be deemed the legal cause of another's injury or death. But is such physical inaction a "use of physical force against the person of another" under the federal laws here?

The Third, Fifth, Sixth and Ninth Circuits say no; the First, Second, Seventh, Eighth, Tenth and Eleventh Circuits say yes; and the Fourth Circuit says both. *See United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) (no); *United States v. Resendiz-*

Moreno, 705 F.3d 203 (5th Cir. 2013) (no); *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc) (no); *United States v. Trevino-Trevino*, 178 F. App'x 701 (9th Cir. 2006) (no); *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020) (yes); *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc) (yes); *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016) (yes); *United States v. Peeples*, 879 F.3d 282 (8th Cir. 2018) (yes); *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017) (yes); *United States v. Sanchez*, 940 F.3d 526 (11th Cir. 2019) (yes); *United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012) (no); *United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020) (yes).

The circuits that say "no" are correct. Ordinary English and this Court's rulings thoroughly confirm that physical inaction is not a "use of physical force against the person of another." As Justice Scalia put it, "acts of omission" and other "*nonphysical* conduct . . . cannot possibly be relevant to the meaning of a statute requiring 'physical force.'" *United States v. Castleman*, 572 U.S. 157, 181 (2014) (Scalia, J., concurring) (emphasis in original). A state's deeming physical inaction the legal cause of injury or death does not change that, as it does not change the everyday meaning of the words Congress chose here: complete physical inaction is no "use of physical force against" anyone. And lenity dispels any doubts about that.

The circuits that disagree cite one line in *Castleman*, yet "*Castleman* avowedly did not contemplate th[is] question," *Mayo*, 901 F.3d at 228, as it did "not address whether an omission, standing alone, can constitute the use of force." *United States v. Reyes-Contreras*, 910 F.3d 169, 181 n.25 (5th Cir. 2018) (en banc).

These 11 circuits can't all be right. And their decisions reflect more than enough percolation. A resolution is needed, especially given the confusion over *Castleman* and the fact that the clause of ACCA at issue appears in equivalent form in § 16(a), § 924(c)(3)(A), the Bail Reform Act (at § 3156(a)(4)(A)), and the Career Offender Guideline (at U.S.S.G. § 4B1.2(a)(1)).

These laws arise daily in criminal and immigration cases across the country. The need for a uniform understanding of them is plain.

STATEMENT OF THE CASE

1. Gerald Scott tried to rob a jewelry store in 2006: just after he pointed a gun at the store's owner and demanded the money in the register, a police officer happened in and thwarted the robbery. No one was hurt. *See* Pre-Sentence Report ¶¶ 2-6, 10; Appendix to Government's En Banc Brief ("En Banc App."), 2d Cir. No. 18-163, Docket Entry 131 at 30-31.

In addition to charging violations of 18 U.S.C. § 1951 and § 924(c), the latter of which carried a 7-year consecutive minimum sentence for brandishing the gun, the government charged Scott with violating ACCA, which has a 15-year minimum, for possessing the gun after sustaining three convictions for a "violent felony." Two were for manslaughters Scott committed 35 years ago, when he was 21.

Scott pleaded guilty to the jewelry store charges. The district court imposed the 22-year mandatory minimum sentence.

2. In *Johnson v. United States*, 576 U.S. 591 (2015), this Court ruled the "residual clause" of ACCA's "violent felony" definition, found at § 924(e)(2)(B)(ii), is

"unconstitutionally vague." *Johnson*, 576 U.S. at 597. Scott then filed a petition under 28 U.S.C. § 2255. He argued he was not subject to ACCA, as two of his three "violent felonies" were for a crime that qualifies only under ACCA's residual clause: manslaughter in violation of New York Penal Law § 125.20(1). A person commits that offense when, "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person."

The district court granted Scott's petition. A "prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than," ACCA's requirements. *Descamps v. United States*, 570 U.S. 254, 257 (2013). This "'categorical approach' . . . 'look[s] only to the statutory definitions' – *i.e.*, the elements – of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" *Id.* at 261 (emphasis and citation omitted).

Applying that approach, the district court ruled New York manslaughter does not have "as an element the . . . use of physical force against the person of another." § 924(e)(2)(B)(i). The court cited *People v. Steinberg*, 79 N.Y.2d 673 (1992), which holds the offense can be committed by physical inaction: a "parent's failure to fulfill his non-delegable duty to provide his child with medical care, which is an omission, can form the basis of a . . . charge of first degree manslaughter." En Banc App. 55 (citing *Steinberg*, 79 N.Y.2d at 680). And an "omission," the district court explained, "does not involve an act of any kind, let alone the use of force." *Id.* at 56.

The district court rejected the government's argument that this Court's decision in *Castleman* compels a contrary ruling. The government had seized on

one line in *Castleman* that says the "intentional causation of bodily injury necessarily involves the use of physical force." 572 U.S. at 169. But as Scott explained to the district court, *Castleman* says that in the context of discussing a Tennessee assault offense that requires an "application of force," *id.* at 170, and thus cannot be committed by inaction. *Castleman* had no occasion to consider if physical inaction is a "use of physical force." The district court agreed that the "*Castleman* Court did not address inaction at all." En Banc App. 56.

At resentencing, the district court found Scott's overall Sentencing Guidelines range to be 121-130 months. *Id.* at 86. After hearing from the parties and from Scott himself, the court resentenced him to time served (roughly 134 months).

Scott left prison and began his five-year term of supervised release on January 5, 2018. He has maintained clear conduct throughout the three-plus years since then. He is now 56 years old.

3. The government appealed, challenging the court's determination that New York manslaughter is not an ACCA predicate.

A three-judge panel of the Second Circuit (Pooler, J., joined by Leval, J.; Raggi, J., dissenting), affirmed. It noted New York's highest court has explained "on two occasions that New York first-degree manslaughter may be committed by a defendant's failure to act" in the face of a "'legally imposed duty.'" *United States v. Scott*, 954 F.3d 74, 81 (2d Cir. 2020) (quoting *Steinberg*, 79 N.Y.2d at 680). *See also People v. Wong*, 81 N.Y.2d 600, 608 (1993) (A "'passive' defendant [] may be held criminally liable for failing to seek emergency medical aid."). And federal courts

must "construe New York law following what New York's highest court has explicitly held." *Id.* at 83.

As the "minimum criminal conduct required for a defendant to be held liable under New York Penal Law § 125.20(1) is a failure to act in the face of a duty," *id.* at 80, the panel agreed with the district court that the offense is not within the scope of ACCA's existing text. The "ordinary meaning" of ACCA's requirement that a crime necessitate the "use of physical force" means "only an active crime constitutes a 'violent felony.'" *Id.* at 84-85.

The panel rejected the government's claim that the one line in *Castleman* compels otherwise. That line "must be considered in the light of the facts of th[at] case[]," which gave no indication the Tennessee crime there could be committed by inaction. *Id.* "Unlike New York first-degree manslaughter, the acts discussed in *Castleman* . . . require *some* action that initiates a harmful consequence. By contrast, a defendant who commits a crime by omission definitionally takes no action and thus initiates nothing." *Id.* at 86 (emphasis in original).

The "ordinary meaning of the terms of ACCA are not satisfied by inaction." *Id.* at 87. And "to the extent that [] may be seen as a close question," the "rule of lenity . . . requires construing that ambiguity in the defendant's favor." *Id.*

Indeed, in a two-judge "concurrence," the panel explained why "statutes such as ACCA, when their applicability is not clearly commanded by the words of the statute, present a particularly compelling ground for the application of the rule of lenity." *Id.* at 93 (Leval, J., joined by Pooler, J., concurring).

Judge Raggi dissented, arguing physical inaction is a "use of physical force against the person of another." *See id.* at 95-110 (Raggi, J., dissenting).

4. The government sought rehearing en banc, which was granted. Following argument on November 6, 2020, the circuit reversed by a vote of 9-5.

Judge Raggi this time wrote for the majority (which included Livingston, Ch. J., Cabranes, J., Chin, J., Sullivan, J., Bianco, J., Park, J., Nardini, J., and was joined in part by Menashi, J.). The majority concluded *Castleman* "foreclosed" the rulings of the district court and panel, Pet. App. 7a, even though *Castleman* never "addressed crimes that can be committed by omission." *Id*. at 33a.

"An 'omission' is a failure to act, but it is not a failure to act," the majority said, when a "law views it as *action* sufficient to support criminal culpability." *Id.* (emphasis in original). New York has a law that so "equates" an omission "not to *inaction*, but to *action*." *Id*. at 24a (emphasis in original). That law says "to act" means "either to perform an act or to omit to perform an act." N.Y. Penal Law § 15.00(5). And an "omission" is "a failure to perform an act as to which a duty of performance is imposed by law." N.Y. Penal Law § 15.00(3).

The majority said this "specialized meaning," Pet. App. at 24a, which calls inaction an "act," was "originally rooted in common law," *id*. at 34a, and it used this feature of New York law for the purpose of "construing ACCA's force clause." *Id*. at 35a. "We assume," it said, "that when Congress amended ACCA to add the force clause, it was aware of these background principles." *Id*. at 35a-36a.

Thus, despite this Court's unanimous ruling in *Chambers v. United States*,

555 U.S. 122 (2009), that "inaction" is not a "use of physical force against the person of another" under ACCA, *id.* at 127-28, the majority ruled New York manslaughter, which it noted "require[s] no *physical* action," Pet. App. 27a (emphasis in original), nonetheless requires the "use of physical force" within ACCA's meaning. Inaction "is not a 'form of inaction'" under New York's special law, the majority reasoned, so *Chambers* does not "control[] here." *Id.* at 37a (quoting *Chambers*, 555 U.S. at 128).

The majority then argued several other of this Court's rulings do not "support[] Scott's argument," *id.* at 38a, despite also construing the same text and also favoring Scott. *See id.* at 37a-44a.

Finally, after acknowledging the circuit split here, s*ee id.* at 9a n.5, the majority deemed its reversal of the district court and panel so clearly correct that "there is no need to resort to the rule of lenity." *Id.* at 44a (capitalization omitted).

Five judges (Leval, J., Pooler, J., Katzmann, J., Lohier, J., and Carney J.) dissented: "The majority opinion performs contortions in an effort to demonstrate that any inaction that is intended to cause serious physical injury and causes death necessarily utilizes physical force." *Id.* at 75a. The "rule of lenity has a special importance when the legislature has passed harsh mandatory sentences which are then imposed for crimes to which they do not clearly apply." *Id.* at 72a. And ACCA's "requirement of 'use of physical force against the person of another' does not clearly apply to a crime that can be committed by doing nothing." *Id.* at 82a.

Three of the five dissenting judges (Pooler, J., Leval, J., and Carney, J.) wrote further to detail why, lenity aside, "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 85a. "Because [] manslaughter may be committed by omission – e.g., intentionally refusing to obtain medical attention for a child who is experiencing an unprovoked serious medical condition – it fails to reach the [requisite] threshold of great force, power, and violence." *Id.* at 90a.

"Both the government and the majority rely heavily on one line in *United States v. Castleman*" to argue otherwise, but "*Castleman* interpreted a different statute with a different historical context and nowhere indicated that it sought to impact [the] interpretation of 'violent felony'" in ACCA. *Id.* at 91a. Moreover, all the "examples cited by the *Castleman* Court" as being a use of physical force "require *some* action on the part of the defendant. Here, we instead consider a situation where the defendant does nothing at all in the face of a legal duty to act." *Id.* at 94a (emphasis in original; citation omitted).

Further, "the majority conflates actus reus, the physical act involved in committing a crime, and mens rea, the defendant's mental intention." *Id.* at 95a. Specifically, ACCA "reaches a particular subset of crimes, those that involve a violent and forceful physical component, or actus reus. But the majority believes that an intent to kill or seriously injure – the mens rea – necessarily involves a violent physical act— the actus reus. This is simply not true." *Id.* at 96a.

In sum, New York's offense "is not a violent felony. That answer is not a judgment on Scott's actions, but rather a consequence of the ACCA's limited scope" in the post-*Johnson* world. *Id.* at 105a.

REASONS FOR GRANTING THE WRIT

I. Eleven Circuits Are Divided Over Whether Physical Inaction is a "Use of Physical Force Against the Person of Another"

Is physical inaction a "use of physical force against the person of another?" This straightforward question has split the circuits into two camps, with one dismissing the other's straightforward answer – "no" – given one line in *Castleman*.

Yet "*Castleman* avowedly did not contemplate the question before us." *United States v. Mayo*, 901 F.3d 218, 228 (3d Cir. 2018). Because the *Castleman* Court did not address crimes of inaction, "*Castleman* 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.* The Third Circuit rejects that notion, which "conflate[s] an act of omission with the use of force, something that *Castleman*, even if it were pertinent, does not support." *Id.* at 230.

Looking to the ordinary meaning of ACCA's existing text, the Circuit explains why Pennsylvania aggravated assault is not an ACCA predicate: the offense "does not necessarily require proof that a defendant engaged in any affirmative use of 'physical force' against another." *Id.* at 226. It can be committed by a failure to act, but "the use of physical force required by the ACCA cannot be satisfied by a failure to act." *Id.* at 230. "As used in the ACCA, the words 'physical force' have a particular meaning," namely "'[p]ower, violence, or pressure directed against a person or thing, . . . consisting in a physical act.'" *Id.* at 226 (citation omitted). Crimes of inaction do not qualify.

It makes no difference that Pennsylvania's offense requires a defendant to

"'cause serious bodily injury,'" or that Pennsylvania law deems certain inaction a cause of such injury. *Id*. (citation omitted). "Mayo argues, and we must agree, that '[p]hysical force and bodily injury are not the same thing.'" *Id* at 227. When it comes to a crime of omission, in which injury to a victim is attributed by operation of law to a person's failure to act, the person is guilty "not because [he] used physical force against the victim, but because serious bodily injury occurred, as with the deliberate failure to provide food or medical care." *Id*. Thus, "'the use of force or the threat of force is not an element of the crime.'" *Id*. (citation omitted).[1]

The Third Circuit's ruling in *Mayo* accords with its prior ruling in *United States v. Oliver*, 728 F. App'x 107 (3d Cir. 2018), and with rulings from the Fifth, Sixth and Ninth Circuits, that physical inaction is not a "use of physical force against the person of another."

As the Fifth Circuit explains as to a Georgia offense, "the statute makes clear that 'the use, attempted use, or threatened use of physical force' is not necessary to commit the crime. Specifically, a person can commit first-degree child cruelty and maliciously inflict excessive pain upon a child by depriving the child of medicine or by some other act of omission that does not involve the use of physical force."

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[1] *Mayo* might be revisited in *United States v. Harris*, 3d Cir. No. 17-1861, which was argued en banc on October 16, 2019, and is stayed pending this Court's ruling in *Borden v. United States*, No. 19-5410 (argued Nov. 3, 2020). *Borden* will decide if ACCA reaches "crimes with a *mens rea* of mere recklessness." Cert. Pet. at ii. If this Court says no, that will dispose of *Harris*. And if this Court says yes, the Third Circuit, if it reaches the merits, will again ask whether physical inaction is a use of physical force against another person. Five of its judges have said no; not one has said yes. *See Mayo*; *United States v. Oliver*, 728 F. App'x 107 (3d Cir. 2018).

United States v. Resendiz-Moreno, 705 F.3d 203, 205 (5th Cir. 2013).[2]

Likewise, as the en banc Sixth Circuit explains, an Ohio assault offense is not an ACCA predicate given that it punishes a "'failure to act' to prevent serious physical harm to a victim when the defendant has a legal duty to do so." *United States v. Burris*, 912 F.3d 386, 398 (6th Cir. 2019) (en banc). Because the offense can be committed by someone who "did not have any physical contact" with the victim, and thus "without any 'physical force' whatsoever," it is "too broad to categorically qualify as [a] violent-felony predicate[] under the ACCA." *Id*. at 399.

The Ninth Circuit also agrees "one cannot use, attempt to use or threaten to use force against another in failing to do something." *United States v. Trevino-Trevino*, 178 F. App'x 701, 703 (9th Cir. 2006). Thus, a North Carolina manslaughter offense requires no "'use, attempted use, or threatened use of physical force against the person of another,' because a defendant can be convicted of [it] for an omission." *Id*.

The Fourth Circuit has also said inaction is not a use of physical force— and the opposite. *Compare United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (An offense requiring "physical injury . . . does not require the use of physical force" if it reaches "neglecting to act," which does not "require[] the use of physical force."),

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[2] The en banc Circuit overruled one part of *Resendiz-Moreno*: given *Castleman*, "there is no valid distinction between direct and indirect" applications of force. *United States v. Reyes-Contreras*, 910 F.3d 169, 182 (5th Cir. 2018) (en banc). The Circuit did not disturb *Resendiz-Moreno*'s ruling on inaction: "*Castleman* does not address whether an omission, standing alone, can constitute the use of force, and we are not called on to address such a circumstance today." *Id*. at 181 n.25.

with United States v. Rumley, 952 F.3d 538, 551 (4th Cir. 2020) ("[T]here is just as much a 'use of force' when a murderous parent uses the body's need for food to intentionally cause his child's death [by not feeding the child] as when that parent uses the forceful physical properties of poison.") (*Rumley* does not mention *Gomez*).

On the other side of the split here, the First, Seventh, Eighth, Tenth and Eleventh Circuits say physical inaction is a "use of physical force against the person of another" under federal law if a state's law deems the inaction the cause of injury or death. All those circuits cite *Castleman* as compelling that reading.

The First Circuit, for example, observes that "several courts – including our own – have at least suggested that crimes that can be completed by omission fall outside the scope of the force clause," and "common sense and the laws of physics support [that] position." *United States v. Baez-Martinez*, 950 F.3d 119, 131 (1st Cir. 2020). But "in *Castleman*, the Supreme Court declared: '[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force.'" *Id*. (quoting *Castleman*, 572 U.S. at 169). *See also United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir. 2016) (The "U.S. Supreme Court recently confirmed that 'the act of employing poison knowingly as a device to cause physical harm' is a use of force. Likewise, withholding medicine causes physical harm, albeit indirectly, and thus qualifies as the use of force under *Castleman*.") (citation omitted); *United States v. Peeples*, 879 F.3d 282, 287 (8th Cir. 2018) (In failing to feed someone, "it is the act of withholding food with the intent to cause the dependent to starve to death that constitutes the use of force. *See Castleman*."); *United States v. Ontiveros*, 875

F.3d 533, 538 (10th Cir. 2017) (Because in *Castleman* "the Court held that '[i]t is *impossible* to cause bodily injury without applying force,'" an "omission to act . . . must also require physical force.") (emphasis in *Ontiveros*; citation omitted); *United States v. Sanchez*, 940 F.3d 526, 535 (11th Cir. 2019) (The "intentional causation of bodily injury or death, even by indirect means such as withholding medical treatment or food, necessarily involves the use of physical force. *See Castleman*.").

These circuits can't all be right. Physical inaction that a state law deems the cause of injury or death either is or is not a "use of physical force against the person of another" under federal law. And *Castleman* either "compels" the answer, Pet. App. 27a, or "avowedly did not contemplate the question." *Mayo*, 901 F.3d at 228.

Only this Court can resolve these disputes. It should do so.

II. The Text at Issue Here Arises Daily in the Federal Courts

The Second Circuit cited 26 states that call "failing to perform a legal duty" either an "'act'" or "'conduct.'" Pet. App. 34a; *id.* at 35a n.25 (listing the states).

And in addition to featuring in ACCA, the "use of physical force against the person of another" provision appears in the general "crime of violence" definition at 18 U.S.C. § 16(a) and the definitions in § 924(c)(3)(A), the Bail Reform Act (at § 3156(a)(4)(A)), and the Career Offender Guideline (at U.S.S.G. § 4B1.2(a)(1)).

These laws arise daily in criminal and immigration cases across the country. Over 70,000 bail determinations were made in the federal courts in 2020. *See* https://www.uscourts.gov/statistics-reports/pretrial-services-judicial-business-2020. Over 6,600 people were charged in 2020 with violating 18 U.S.C. § 922(g)— many of

whom were alleged to be subject to ACCA. *See* https://www.uscourts.gov/sites/default/files/data_tables/jb_d2_0930.2020.pdf. Over 2,600 people were charged in 2020 with violating § 924(c). *See id*. And over 1,700 people were found subject to the Career Offender Guideline in 2019, meaning more were alleged to be subject. *See* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY19.pdf.

These laws cannot mean one thing in one part of the country and another someplace else: "the application of federal legislation is nationwide." *Jerome v. United States*, 318 U.S. 101, 104 (1943). The need for a common understanding of these provisions, which feature daily in federal jurisprudence, is clear. *See also, e.g., Becker v. Montgomery*, 532 U.S. 757, 762 (2001) ("We granted certiorari to assure the uniform interpretation of the governing Federal Rules."); *Logan v. United States*, 552 U.S. 23, 27 (2007) (In interpreting a federal criminal statue, "we noted that our decision would ensure greater uniformity in federal sentences."); *Danforth v. Minnesota*, 552 U.S. 264, 292 (2008) (noting the Court's "responsibility and authority to ensure the uniformity of federal law") (Roberts, C.J., dissenting); Sup. Ct. R. 10(a), 10(c) (Certiorari is warranted where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," or where it "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

III. The Second Circuit Majority Opinion is Wrong

"An 'omission' is a failure to act, but it is not a failure to act," the majority said, if "the law" – here, New York law – "views it as *action* sufficient to support criminal culpability." Pet. App. 33a (emphasis in original).

Given New York's "specialized meaning," *id.* at 24a, which calls some "'failure[s] to perform an act'" an "'act,'" *id.* at 35a (quoting N.Y. Penal Law §§ 15.00(3), (5)), and which the majority said was "originally rooted in common law," *id.* at 34a, the majority ruled that New York manslaughter, which "require[s] no *physical* action," *id.* at 27a (emphasis in original), nonetheless requires the "use of physical force against the person of another" under 18 U.S.C. § 924(e)(2)(B)(i).

The contrary view, the majority said, is "foreclosed by the Supreme Court's decision in *United States v. Castleman*," Pet. App. 7a, even though *Castleman* never "addressed crimes that can be committed by omission." *Id.* at 33a.

And the majority found its reading of ACCA – that complete physical inaction is a "use of physical force against" someone – so unambiguously correct that there is "no need to resort to the rule of lenity." *Id.* at 44a (capitalization omitted).

"The majority opinion performs contortions," the five dissenting judges said, Pet. App. 75a, to reach its conclusion that "a failure to act" is not only "not a failure to act," *id.* at 33a, but also a "use of physical force against the person of another." Among other things, the majority ignored the ordinary meaning of the words here, used state law to interpret a federal statute, and brushed aside unanimous rulings of this Court – along with the rule of lenity – to reach its conclusion.

A. The Majority Ignored the Ordinary Meaning of the Words Here

"It is a 'fundamental canon of statutory construction'" that "words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The majority broke this fundamental rule.

"Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). The "critical aspect" of the phrase here requires "the 'use . . . of physical force *against the person [] of another*.'" *Id*. (emphasis in *Leocal*). "As we said in a similar context in *Bailey*, 'use' requires active employment." *Id*. (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). All the "various definitions of 'use' imply action." *Bailey*, 516 U.S. at 145. As such, the "ordinary meaning of the word 'use' in th[e] context" of "use of physical force" means "an act of force." *Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016). And as the clause here requires force to be used "against" someone, the force must "actually be applied." *Leocal*, 543 U.S. at 11.

Indeed, the "ordinary meaning" of "force" is "'active power'" that is "'exerted upon'" or "'directed against a person'"; namely, "'[f]orce consisting in a physical act.'" *Johnson v. United States*, 559 U.S. 133, 138-39 (2010) (citations omitted). Thus, the "knowing or intentional application of force is a 'use' of force" even if "indirect," as with poisoning. *Castleman*, 572 U.S. at 170. And though contact may be indirect, ACCA requires more than "nominal contact" given its concerning "violent" crimes. *Stokeling v. United States*, 139 S. Ct. 544, 553 (2019). Poisoning someone obviously

qualifies, just as inaction obviously does not: that is not even "nominal contact." As this Court held in *Chambers v. United States*, 555 U.S. 122 (2009), a crime "does not have 'as an element the use, attempted use, or threatened use of physical force against the person of another'" if it "amounts to a form of inaction." *Id.* at 127-28.

In short, the "ordinary meaning" of the clause here limits the clause to "violent, active crimes." *Leocal*, 543 U.S. at 11.

New York manslaughter is no such crime. Consider first the statutory text: "A person is guilty of manslaughter in the first degree when[,] [w]ith intent to cause serious physical injury to another person, he causes the death of such person." N.Y. Penal Law § 125.20(1). No "use of physical force against the person" is required. Consider next how New York's highest court has interpreted the offense: an entirely "'passive' defendant" can commit it by "failing to seek emergency medical aid" for someone in his care. *Wong*, 81 N.Y.2d at 608 (citing *Steinberg*, 79 N.Y.2d at 680).

Such passivity is no "violent, active crime[]." *Leocal*, 543 U.S. at 11. It is plainly vile and rightly punished. "In no 'ordinary or natural' sense," however, "can it be said that [the] person . . . 'use[d]' physical force against another person." *Id.* "While one may, in theory, actively employ *something*" without taking any action, "it is much less natural to say that a person actively employs *physical* force against another person by," *id.* at 9 (second emphasis added), as the majority here put it, taking literally "no *physical* action." Pet. App. 27a (emphasis in original). That construction flouts everyday English, "common sense and the laws of physics." *Baez-Martinez*, 950 F.3d at 131.

At first, the majority said its reading is "the 'ordinary,' 'natural,' 'everyday'" one, Pet. App. 22a, citing a line in *Smith v. United States*, 508 U.S. 223 (1993), that one definition of "use" means simply "to avail oneself of." *Id*. at 229. Yet *Smith* concerned "whether the exchange of a gun for narcotics constitutes 'use' of a firearm." *Id*. at 225. That is no "form of inaction," *Chambers*, 555 U.S. at 128, nor is it a "use of physical force against" anyone. § 924(e)(2)(B)(i). "Language, of course, cannot be interpreted apart from context." *Smith*, 508 U.S. at 229.

The context here is a provision this Court has repeatedly limited to "violent, active crimes," *Leocal*, 543 U.S. at 11, that require a "physical act," *Johnson*, 559 U.S. at 139, and more than "nominal contact." *Stokeling*, 139 S. Ct. at 553.

A crime of inaction does not fit that bill. No force is "exerted upon a person," *Johnson*, 559 U.S. at 139, or "actually [] applied," *Leocal*, 543 U.S. at 11, when a caregiver sits still while his charge has an asthma or heart attack. Such inaction, though contemptible, "is not naturally described as an active employment of force." *Voisine*, 136 S. Ct. at 2279. If the attack proves fatal, New York law punishes the caregiver by deeming his inaction the cause of death. Yet that is a function of public policy; as far as ordinary English is concerned, physical inaction is not a "use of physical force against" anyone.

But "Congress intended for crimes intentionally causing at least serious physical injury," the majority here said, "to be recognized as categorically violent whether committed by acts of omission or by acts of commission." Pet. App. 26a. Congress reached such crimes of omission, however, with ACCA's residual clause,

which covered a felony that "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). The "proper inquiry" under that clause was whether the crime, "in the ordinary case, presents a serious potential risk of injury." *James v. United States*, 550 U.S. 192, 208 (2007). Obviously, the "ordinary case" of a *death* resulting from deliberate "conduct," whether action or inaction and whether a "use of physical force" or not, poses "a serious potential risk of injury." ACCA's residual clause thus covered New York manslaughter.

The residual clause, however, is "unconstitutionally vague." *Johnson*, 576 U.S. at 597. So are the equivalent provisions at § 16(b), *see Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and § 924(c)(3)(B). *See United States v. Davis*, 139 S. Ct. 2319 (2019). And in 2016, the Sentencing Commission deleted the residual clause formerly at U.S.S.G. § 4B.1.2(a)(2). *See* U.S.S.G. Amdt. 798.

Given all this, the government has on recent occasions tried "shoehorning" a crime "into statutory sections where it does not fit." *Leocal*, 543 U.S. at 13. Courts have blocked those attempts regardless of how "violent" the crime might sound to, as the majority here invoked, "a man on the street." Pet. App. 5a.[3]

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[3] *See, e.g., Cole v. United States*, ___ F. App'x ___, 2021 WL 118849 (11th Cir. Jan. 13, 2021) (Alabama attempted rape in the first degree not an ACCA offense); *United States v. Al-Muwwakkil*, 983 F.3d 748 (4th Cir. 2020) (Virginia attempted rape not an ACCA offense); *United States v. Cordero*, 973 F.3d 603 (6th Cir. 2020) (murder for hire under 18 U.S.C. § 1958 not a Guideline offense); *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020) (California carjacking not a Guideline offense); *United States v. Williams*, 949 F.3d 1056 (7th Cir. 2020) (Illinois aggravated criminal sexual abuse not a Guideline offense); *United States v. Young*, 809 F. App'x 203 (5th Cir. 2020) (Louisiana aggravated assault with a firearm not an ACCA offense); *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019) (murder

These rulings, that certain types of murder, manslaughter, rape, carjacking and armed assault require no "use of physical force against the person of another," confirm that the "man on the street" does not decide the legal question here: the fact that those crimes are "violent" in common parlance has no bearing on whether they fit within the particular text Congress crafted.

That text "says nothing about" physical inaction being a use of physical force, and the Court "decline[s] to read any implicit directive into [] congressional silence."

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under 18 U.S.C. § 1111 not a § 924(c) offense); *Weeks v. United States*, 930 F.3d 1263 (11th Cir. 2019) (Massachusetts assault and battery not an ACCA offense); *Lofton v. United States*, 920 F.3d 572 (8th Cir. 2019) (Illinois aggravated criminal sexual abuse not an ACCA offense); *Lowe v. United States*, 920 F.3d 414 (6th Cir. 2019) (Tennessee rape by coercion not an ACCA offense); *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington murder not a Guideline offense); *United States v. Jones*, 914 F.3d 893 (4th Cir. 2019) (South Carolina assault, beating or wounding police officer not an ACCA offense); *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc) (Ohio felonious assault not an ACCA offense); *United States v. Rosales-Orozco*, 794 F. App'x 369 (5th Cir. 2019) (Pennsylvania attempted sexual assault not a Guideline offense); *Dunlap v. United States*, 784 F. App'x 379 (6th Cir. 2019) (Tennessee voluntary manslaughter not an ACCA offense); *Mountain v. United States*, 774 F. App'x 317 (8th Cir. 2019) (North Dakota aggravated assault not an ACCA offense); *United States v. Johnson*, 911 F.3d 1062 (10th Cir. 2018) (Oklahoma battery not an ACCA offense); *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) (Pennsylvania aggravated assault not an ACCA offense); *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018) (Rhode Island assault with a dangerous weapon not an ACCA offense); *United States v. Oliver*, 728 F. App'x 107 (3d Cir. 2018) (Pennsylvania aggravated assault not an ACCA offense); *United States v. Davis*, 875 F.3d 592 (11th Cir. 2017) (Alabama sexual abuse by forcible compulsion not an ACCA offense); *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017) (Washington assault not a Guideline offense); *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (Massachusetts assault and battery with a dangerous weapon not an ACCA offense); *United States v. Mason*, 709 F. App'x 898 (10th Cir. 2017) (Oklahoma assault and battery of police officer not an ACCA offense); *United States v. Jordan*, 812 F.3d 1183 (8th Cir. 2016) (Arkansas aggravated assault not an ACCA offense); *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) (Texas aggravated sexual assault of child not a Guideline offense).

Kimbrough v. United States, 552 U.S. 85, 103 (2007). "Drawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how" to reach crimes of inaction. *Id*. Besides doing so in ACCA's residual clause, it has done so elsewhere in the U.S. Code.[4]

The clause here, in contrast, does not reach crimes of inaction. And though 26 states punish inaction as an "act" or "conduct," *see* Pet. App. 35a n.25, that does not mean Scott's reading "would have rendered [ACCA] inoperative in many States at the time of its enactment." *Castleman*, 572 U.S. at 167. As shown, its residual clause covered crimes of inaction. That ended only with the 2015 *Johnson* ruling.

"Since *Johnson*, federal prosecutors have attempted to stretch the bounds of the force clause to compensate for the now-invalid residual clause." *United States v. Middleton*, 883 F.3d 485, 492-93 (4th Cir. 2018). But this Court has rejected "shoehorning" a crime "into statutory sections where it does not fit." *Leocal*, 543 U.S. at 13. The "word 'use,'" in particular, "cannot support the extended applications that prosecutors have sometimes placed on it." *Bailey*, 516 U.S. at 150.

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[4] *See, e.g.,* 18 U.S.C. § 228(a)(1) ("Any person who willfully fails to pay a support obligation with respect to a child who resides in another State . . . shall be punished."); § 755 ("Whoever, having in his custody any prisoner . . . , voluntarily suffers such prisoner to escape, shall be fined under this title or imprisoned."); § 842(k) ("It shall be unlawful for any person who has knowledge of the theft or loss of any explosive materials from his stock, to fail to report such theft or loss."); § 2191 ("Whoever, being the master or officer of a vessel of the United States, . . . withholds from [the crew] suitable food and nourishment . . . shall be fined under this title or imprisoned."); § 2250(a) ("Whoever is required to register under the Sex Offender Registration and Notification Act" and "knowingly fails to register . . . shall be fined under this title or imprisoned."); 26 U.S.C. § 7203 ("Any person required under this title to pay any estimated tax or tax . . . who willfully fails to pay such estimated tax or tax" shall "be guilty.").

Ultimately, the majority admitted it was relying not on ordinary meaning but a "specialized meaning" under New York law, which equates an omission "not to *inaction*, but to *action*." Pet. App. 24a (emphasis in original). "[T]he New York Court of Appeals relied on this specialized meaning in ruling that first-degree manslaughter can be committed by omission." *Id.* (citing N.Y. Penal Law § 15.00). The omission "may require no *physical* action by a defendant, but it is *culpable* action in the eyes of the law." *Id.* at 27a (emphasis in original). New York treats "such an omission [a]s the action that causes death by the use of violent force. And so, whether committed by omission or commission, first-degree manslaughter is a categorically violent crime" under ACCA. *Id.* That was the majority's next mistake.

B. The Majority Used New York Law to Interpret ACCA

"The meaning of 'physical force' in § 924(e)(2)(B)(i) is a question of federal law, not state law. And in answering that question we are not bound by a state court's interpretation of a similar – or even identical – state statute." *Johnson*, 559 U.S. at 138. It is thus irrelevant for purposes of interpreting ACCA that New York Penal Law § 15.00 upends ordinary English by calling inaction an "act."

The question here is whether utterly "no *physical* action," Pet. App. 27a (emphasis in original), is a "use of physical force against the person of another" under § 924(e)(2)(B)(i). In answering that question, courts must "give the phrase its ordinary meaning." *Johnson*, 559 U.S. at 138. As shown, the ordinary meaning of "use of physical force against the person of another" does not include its opposite: "no *physical* action." Pet. App. 27a (emphasis in original).

The majority still defended its reliance on New York's "specialized meaning," *id*. at 24a, claiming that meaning was "originally rooted in common law," *id*. at 34a, and "assum[ing] that when Congress identified violent crimes by reference to an element requiring a use of force, it legislated against the common law background recognizing omission as action." *Id*. at 25a. That was the majority's next mistake.

C. The Common Law Plays No Role in this Case

There is no "common law background recognizing omission as action." *Id*. That inversion is the handiwork of modern statutes like N.Y. Penal Law § 15.00.

The source the majority cited for its claim is a footnote in *Samantar v. Yousuf*, 560 U.S. 305 (2010), that says "when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Id*. at 320 n.13. That doesn't say the common law viewed "omission as action." Pet. App. 25a. And ACCA doesn't "cover[] an issue previously governed by the common law." ACCA mandates at least 15 years in prison for someone who possesses a gun and has "three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1). There is no common-law equivalent of ACCA.

The majority cited nothing showing the common law viewed physical inaction either "as action," Pet. App. 25a, or as a "use of physical force against" anyone. Rather, to the extent "certain specific failures to take action are punishable," they are "*exceptions* to the general act requirement" reflected in both the common law and modern statutes. Samuel Freeman, *Criminal Liability and the Duty to Aid the*

Distressed, 142 U. Pa. L. Rev. 1455, 1456 (1994) (emphasis added).

"Roman law knew little of criminal liability for omissions," and the "early English institutional writers [] show little awareness of criminal omissions as a field of liability of any special significance. Coke, in his *Third Institute*, seems to regard positive action as an almost inevitable element of guilt. He always insists on the overt deed." Graham Hughes, *Criminal Omissions*, 67 Yale L.J. 590, 590-91 (1958) (citing Edward Coke, *The Third Institute of the Laws of England* (1817)). Hawkins found a "slightly expanded catalogue of offenses of failure to act," such as breach of the "duty imposed by the common law on parishioners or the inhabitants of a county to keep highways and bridges in good repair," *id*. at 591, but he "never suggests liability for homicide through neglect of children. He seems to demand a positive act of dangerous exposure by the parent." *Id*. at 594 (citing William Hawkins, *Pleas of the Crown* (Curwood ed. 1824)).

It was only in the late nineteenth century that "a broadening of liability for homicide through failure to act" began. *Id*. at 596. "In the middle of [that] century, English judges directed their juries to acquit mothers and grandmothers who, being penniless, preferred to let their children and grandchildren die rather than apply for relief." Otto Kirchheimer, *Criminal Omissions*, 55 Harv. L. Rev. 615, 622 (1942). Likewise, those judges "held that a mother who willfully abstained from taking the precautions necessary to preserve the life of the infant before birth could not be convicted of homicide when the child died after birth as a result of such neglect. The matter has now been regulated in [various] Act[s]" that "place[] omissions on

the same footing as wilful acts and appl[y] to infanticide the punishment of manslaughter." *Id.* at 623. "Modern legislation tends to increase the number of [] affirmative duties," and consequently "the penal sanction creeps in." *Id.* at 620. By the middle of the twentieth century, "a steady increase in the number of affirmative duties established by statute [wa]s discernible everywhere." *Id.* at 642.

This Court acknowledged this change in *Morissette v. United States*, 342 U.S. 246 (1952). "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand," and this concept "took deep and early root in American soil." *Id.* at 251-52. But the Court noted the "accelerating tendency, discernible both here and in England, to call into existence new duties and crimes." *Id.* at 253 (footnotes omitted). "Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." *Id.* at 255.

New York's highest court also noted this change, citing an 1881 penal statute under which "the duty of parents to furnish medical attendance for their children is expressly provided for, and is made obligatory upon them, even if they were exempt from such duty under the common law." *People v. Pierson*, 176 N.Y. 201, 206 (1903). Thus, "a homicide charge" based on a violation of parents' statutory "duty to provide their children with adequate medical care" is not a product of the common law. *Steinberg*, 79 N.Y.2d at 680 (citing N.Y. Fam. Ct. Act § 1012(f)(i)(A) and N.Y. Penal Law § 15.00). *See also* Wayne LaFave, 1 *Substantive Criminal Law* § 6.2 (3d ed.)

("Most crimes are committed by affirmative action rather than by non-action. But there are a number of statutory crimes which are specifically defined in terms of failure to act.") (citing N.Y. Penal Law § 15.10).

New York law calls certain "failure[s] to perform an act" an "act." N.Y. Penal Law §§ 15.00(3), (5). But that joining of opposites is not a common-law principle, and there is no sign Congress incorporated § 15.00 – or any state law – into ACCA.

Quite the contrary, this Court has explained that in ACCA Congress wanted to cover "crimes having certain common characteristics – the use or threatened use of force, or the risk that force would be used – regardless of how they were labeled by state law." *Taylor v. United States*, 495 U.S. 575, 589 (1990). So Congress wrote ACCA's "violent felony" definition to reach certain crimes "that involve violence . . . regardless of technical definitions and labels under state law." *Id.* at 590.

New York's "technical definition," which calls certain inaction an "act," is neither a product of the common law nor a feature Congress wrote into ACCA.

Of course, when ACCA took effect in 1982 it applied only to someone with prior convictions "'for robbery or burglary,'" and its robbery "definition mirrored the elements of the common-law crime of robbery." *Stokeling*, 139 S. Ct. at 550 (citation omitted). But that simply exemplified the principle that, "'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *Id.* at 551 (citation omitted). Unlike "robbery," the "use of physical force against the person of another" is not something "obviously transplanted from another legal source." *Id.*

Moreover, this Court has already rejected the view that "'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," which covered "even the slightest offensive touching." *Johnson*, 559 U.S. at 139. ACCA, which concerns "violent" crimes, instead requires "the use of force sufficient to overcome a victim's resistance." *Stokeling*, 139 S. Ct. at 548. It requires more than the "nominal contact" of an "'unwanted'" touching. *Id.* at 553. Florida robbery thus qualifies, as it "requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Id.* at 555 (citation omitted).

But New York manslaughter requires no "physical force of the offender." *Id.* Sitting and watching a person in one's care have an asthma or heart attack suffices. As horrible as such inaction is, it is not a "use of physical force against the person of another" within ACCA's meaning: it is not even "nominal contact." *Id.* at 553.

Unable to show ACCA's "use of physical force against the person of another" is a common-law term that means "no *physical* action," Pet. App. 27a (emphasis in original), the majority said it was "compelled [] by *United States v. Castleman*" to rule against Scott. *Id.* That was its next error.

D. *Castleman* Does Not Address this Question

As the Third Circuit noted when considering a crime of inaction, "*Castleman* avowedly did not contemplate the question before us." *Mayo*, 901 F.3d at 228. The en banc Fifth Circuit agrees that "*Castleman* does not address whether an omission, standing alone, can constitute the use of force." *Reyes-Contreras*, 910 F.3d at 181 n.25. Even the majority here had to agree: *Castleman* never "addressed crimes that

can be committed by omission." Pet. App. 33a.

Nonetheless, the majority said *Castleman* "compelled" it to rule against Scott, *id*. at 27a, citing one line in that opinion: "the 'knowing or intentional causation of bodily injury *necessarily* involves the use of physical force.'" *Id*. (quoting *Castleman*, 572 U.S. at 169) (emphasis in *Scott*). "Language, of course, cannot be interpreted apart from context." *Smith*, 508 U.S. at 229.

At issue in *Castleman* was a statute that "made it a crime to 'commi[t] an assault . . . against'" a person. 572 U.S. at 168 (quoting Tenn. Code Ann. § 39-13-111(b), which "incorporate[s] by reference § 39-13-101"). There was no suggestion the offense can be committed by inaction, and indeed it cannot. *See State v. Sudberry*, 2012 WL 5544611, at *16 (Tenn. Crim. App. 2012) ("[N]eglect" under § 39-15-402(a)(1) "is founded upon 'neglect,' or an absence of action," but "assault" under § 39-13-101(a)(1) requires "an affirmative action.").

It was thus in the context of a crime of commission, rather than omission, that this Court said the "intentional causation of bodily injury necessarily involves the use of physical force." *Castleman*, 572 U.S. at 169. The Court explained: "First, a 'bodily injury' must result from 'physical force.' . . . Second, the knowing or intentional *application of force* is a 'use' of force." *Id*. at 170 (emphasis added).

According to the majority here, *Castleman* means "a defendant's use of force does not depend on his own actions in initiating or applying injurious force." Pet. App. 8a. Yet the majority cited no such statement, as this Court said no such thing. Just the opposite, every "use" of force this Court referred to was a direct or indirect

"application of force"— "administering a poison," "infecting with a disease," pointing "a laser beam," delivering "a kick or punch," "pulling the trigger on a gun." 572 U.S. at 170-71. "It is impossible to cause bodily injury without *applying* force." *Id*. at 170 (emphasis added). This followed from *Leocal*: to "use" force, one must "actively employ[] physical force against another person." 543 U.S. at 9. The force must "actually be applied." *Id*. at 11.

Castleman never considered an offense that can be committed without physical force "actually be[ing] applied," *id.*, and thus without either a direct or "indirect application" of force. *Castleman*, 572 U.S. at 170. As such, nothing in *Castleman* suggests – let alone "compel[s]," Pet. App. 27a – the logically and linguistically awkward conclusion that "no *physical* action," *id*. (emphasis in original), is a "use of physical force against the person of another." On the contrary, "*nonphysical* conduct" like "acts of omission," Justice Scalia observed, "cannot possibly be relevant to the meaning of a statute requiring 'physical force.'" *Castleman*, 572 U.S. at 181 (Scalia, J., concurring) (emphasis in original).

This Court's other rulings likewise confirm that self-evident point.

E. *Chambers*, *Leocal*, *Voisine*, *Bailey*, 2010 *Johnson* and *Stokeling* Unambiguously Support Scott

"The question before us," this Court said in *Chambers*, "is whether a 'failure to report' for penal confinement [in violation of Illinois law] is a 'violent felony' within the terms of the Armed Career Criminal Act. We hold that it is not." 555 U.S. at 123. The offense does not fit ACCA's now-defunct residual clause, and it "does not have 'as an element the use, attempted use, or threatened use of physical

force against the person of another.'" *Id.* at 127-28. As the unanimous Court said, "the crime amounts to a form of inaction." *Id.* at 128.

That observation, the majority here noted, appears in the Court's discussion of why the offense "pos[es] no 'serious potential risk of physical injury.'" Pet. App. 37a (quoting *Chambers*, 555 U.S. at 128). Yet the offense's being a crime of "inaction" is also why the Court ruled it requires no "'use of physical force against the person of another.'" *Chambers*, 555 U.S. at 127-28. The Court did not belabor the obvious: taking no physical action is no "use of physical force against" anyone.

And taking no action in violation of New York's duty to help a person in one's care is just as much a crime of "inaction," *id.* at 128, as taking no action in violation of Illinois's duty to report to prison. Nonetheless, the majority said New York's crime "is not a 'form of inaction'" because the "crime's *actus reus*, far from proscribing a defendant's failure to do something, such as failing to report to prison, proscribes his doing something, specifically, causing the death of another person." Pet. App. 37a (quoting *Chambers*, 555 U.S. at 128).

Yet "causing the death" is, the majority acknowledged, a result of the defendant's *inaction* and the "specialized meaning" New York gives it. *Id.* at 24a. "New York's Penal Law states that, '"[t]o act' means either to perform an act or to omit to perform an act,'" and it "defines 'omission' as 'a failure to perform an act as to which a duty of performance is imposed by law.'" *Id.* at 35a (quoting N.Y. Penal Law §§ 15.00(5), (3)). Thus, inaction is instead an "act" – and *actus reus* – because New York law says so, not because of any "use of physical force." § 924(e)(2)(B)(i).

Indeed, it is precisely because a duty-bound defendant does *not* "use physical force" to help his charge that he is guilty: his "failure to do something" in the face of his duty to act is exactly what New York law "proscrib[es]." Pet. App. 37a.

Such inaction, the majority said, "require[s] no *physical* action by a defendant, but it is *culpable*." *Id*. at 27a (emphasis in original). Yet punishing "*culpable*" inaction, and calling it an "act" pursuant to New York's "specialized" law, *id*. at 24a, does not make it a "use of physical force against the person of another" for purposes of ACCA. As shown, the ordinary meaning of that clause requires an active use of force: applying force to a person, directly or indirectly. The majority "conflate[d] an act of omission with the use of force." *Mayo*, 901 F.3d at 230.

It also refused to heed, in addition to *Chambers*, every other relevant ruling.

In *Leocal*, as discussed above, this Court unanimously reaffirmed that the ordinary meaning of the word "'use' requires active employment." 543 U.S. at 9 (quoting *Bailey*, 516 U.S. at 145). Thus the "ordinary meaning of [the clause here], combined with [its] emphasis on the use of physical force against another person," limits the clause to "violent, active crimes." *Id*. at 11.

Indeed, even when force "against another person" is not necessary, the "ordinary meaning of the word 'use' in th[e] context" of "use of physical force" requires "an act of force." *Voisine*, 136 S. Ct. at 2279. "Dictionaries consistently define the noun 'use' to mean the 'act of employing' something," and "[i]n cases stretching back over a century, this Court has followed suit." *Id*. at 2278 & n.3.

The majority dismissed *Leocal* and *Voisine* as holding only that a "use of

physical force causing bodily injury must be more than accidental or negligent." Pet. App. 42a. That gives rather "short shrift to [their] principle" that a use of force requires action, "and to [this Court's] precedents in this area." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982). Lower courts should "follow both the letter and the spirit of [this Court's] decisions." *Id.*

This Court has never held – or even hinted – that the ordinary meaning of "use" includes total inaction.

This Court again rejected that suggestion in *Bailey*, ruling that the mere presence of a gun "where [someone] can grab and use it if necessary" is no "use" of the gun. 516 U.S. at 149. "If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not 'used.' To conclude otherwise would distort the language of the statute." *Id.* All the "various definitions of 'use' imply action." *Id.* at 145. "Use" means "'use' in the active sense." *Id.* at 150.

The majority launched a three-pronged attack on *Bailey*. "First, the object of required use in *Bailey* was a gun, a specific, tangible object," whereas physical force can be "intangible power." Pet. App. 41a. Yet *Bailey* makes clear tangibility is irrelevant: "mention[ing]" a gun is "active[] employ[ment]." 516 U.S. at 149. The point is that one must take some "action," verbal or physical, to "use" something. *Id.* at 145. But New York's crime can be committed by total inaction. "Second," the majority said as to *Bailey*, "an unused gun can be inert. By contrast, the very essence of violent force is power in physical motion, specifically, power that, once unleashed or unchecked, is capable of causing physical pain or injury." Pet. App.

41a. But one needn't have "unleashed" anything to be guilty of New York's offense. And allowing, by inaction, an asthma attack to proceed "unchecked" is no "use of physical force against the person," as "inaction" is no such use of force. *Chambers*, 555 U.S. at 128. "Third, and perhaps most important," the majority said, "serious physical injury can, but need not, involve the use of a gun. But, as *Castleman* . . . recognize[s], serious physical injury necessarily involves the use of violent force." Pet. App. 41a. Yet that just repeats the majority's error that *Castleman* "foreclosed" Scott's argument, *id*. at 7a, despite never "address[ing]" it. *Id*. at 33a.

Another ruling the majority tried to distinguish is the 2010 *Johnson* decision. "Section 924(e)(2)(B)(i) does not define 'physical force,' and we therefore give the phrase its ordinary meaning. The adjective 'physical' is clear," as it "plainly refers to force exerted *by and through* concrete bodies." 559 U.S. at 138 (emphasis added). Likewise, "force" means "'*active* power; vigor; often an unusual degree of strength or energy,'" and "'[p]ower, violence, compulsion, or constraint *exerted upon* a person,'" and "'[p]ower, violence, or pressure *directed against* a person or thing,'" and "'[f]orce consisting in a *physical act*.'" *Id*. at 139 (emphasis added; citations omitted).

Per the majority: "The case says nothing about what constitutes a use of physical force." Pet. App. 38a.

As with its dismissive treatment of *Leocal*, the majority's citing *Johnson*'s holding on "physical force," *id*., as reason to ignore everything it says about force requiring a "physical act" of power "exerted upon" or "directed against" a person is "slicing the baloney mighty thin." *Dimaya*, 138 S. Ct. at 1215.

And the majority did not even try to distinguish *Stokeling*, in which this Court once again reaffirmed that the "modern legal and colloquial usage" of "'[f]orce' means '[p]ower, violence, or pressure *directed against* a person or thing.'" 139 S. Ct. at 551 (emphasis added; citation omitted). There must be "'a physical act'" and more than "nominal contact" with another person., *id*. at 553 (citation omitted), as the clause of ACCA here concerns "'violent, active crimes,'" *id*. (citation omitted), that require "'the physical force of the offender.'" *Id*. at 555 (citation omitted).

At the end of the day, the majority's having to wade through or ignore many adverse rulings of this Court is further grist for the dissent's mill: the rule of lenity resolves any doubt in Scott's favor.

F. If Doubt Exists, The Rule of Lenity Dispels it in Scott's Favor

As the majority acknowledged, it interpreted ACCA through the lens of the "specialized meaning" New York law gives certain inaction. Pet. App. 24a. That improper reliance on state law to construe a federal statute, to reach a result that "might appear obvious to a man on the street," *id*. at 5a, also led to the majority's not-at-all-obvious view that "no *physical* action," *id*. at 27a (emphasis in original), is a "use of physical force against the person of another." § 924(e)(2)(B)(i). And to get there, the majority had to distinguish away several rulings of this Court, including that a crime "of inaction" requires no use of force at all. *Chambers*, 555 U.S. at 128.

The majority's long and difficult slog, the dissent noted, says it all: this case "is a textbook example of where the rule of lenity should apply." Pet. App. 112a.

The majority rejected lenity, citing "*Castleman*'s clear pronouncement." *Id*.

at 45a. As shown, however, there is no "pronouncement" in *Castleman* – clear or otherwise – that "no *physical* action," *id*. at 27a (emphasis in original), is a "use of physical force against the person of another." § 924(e)(2)(B)(i). Justice Scalia even said the opposite in his concurrence.

Lenity, a rule "'perhaps not much less old than' the task of statutory 'construction itself,'" says "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333 (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)).

There is no real ambiguity here: the ordinary meaning of a "use of physical force against the person of another" does not include total physical inaction. This Court has never suggested otherwise, and it said plainly in *Chambers* that inaction is no such use of force. New York's "specialized" rule, Pet. App. 24a, which calls a "'failure to perform an act'" an "'act'" in certain situations, *id*. at 35a (quoting N.Y. Penal Law §§ 15.00(3), (5)), injects no uncertainty into this case, as Congress did not adopt New York's special rule when it wrote ACCA. Rather, it limited ACCA to crimes that "involve violence," and it did so "regardless of technical definitions and labels under state law." *Taylor*, 495 U.S. at 590.

The "time-honored" rule of lenity, *United States v. Kozminski*, 487 U.S. 931, 952 (1988), does have a part to play here, however, as it "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). That describes this case to a tee.

The majority's deeming "no *physical* action," Pet. App. 27a (emphasis in original), a "use of physical force against the person of another," § 924(e)(2)(B)(i), is a "novel" reading indeed: ACCA does not say that, this Court has never said that, and in *Chambers* it unanimously said the opposite. The "grievous ambiguity" here, *Castleman*, 572 U.S. at 173, is the majority's saying Scott is nonetheless subject to ACCA's 15-year mandatory minimum. The rule of lenity says otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 31, 2021