No. 23-825

In the Supreme Court of the United States

SALVATORE DELLIGATTI, PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Under 18 U.S.C. § 924(c)(3)(A), a felony qualifies as a "crime of violence" if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Courts have disagreed about how to apply use-of-force language to crimes that require proof of a victim's bodily injury or death but can be committed by *failing* to take action. In the decision below, the Second Circuit held that any crime requiring proof of death or bodily injury categorically involves the use of physical force, even if it can be committed through inaction—such as by failing to provide medicine to someone who is sick or by failing to feed a child.

The question presented is:

Whether a crime that requires proof of bodily injury or death, but can be committed by failing to take action, has as an element the use, attempted use, or threatened use of physical force.

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OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 16a-33a) is reported at 36 F.4th 423 (2d Cir. 2022). The amended opinion of the court of appeals (Pet. App. 1a-15a) is reported at 83 F.4th 113 (2d Cir. 2023).

JURISDICTION

The amended judgment of the court of appeals was entered on October 2, 2023. The court of appeals denied a timely petition for rehearing on December 15, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 924 of Title 18 of the United States Code provides:

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> > **(i)** be sentenced to a term of imprisonment of not less than 5 years;
> >
> > **(ii)** if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > **(iii)** if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> * * *
>
> **(3)** For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
>
> > **(A)** has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > **(B)** that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT

Under 18 U.S.C. § 924(c), a defendant who commits a "crime of violence" with a firearm is subject to a mandatory-minimum sentence and the potential for life in prison. Befitting its intention to reserve this sanction for especially dangerous criminals using deadly weapons, Congress defined "crime of violence" narrowly. As relevant here, it includes a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

This definition, known as the elements clause, identifies a category of active crimes. Indeed, every part of the definition requires affirmative conduct: This Court has held that "use" means *active* employment; that "physical force" means *violent* force; and that "against . . . another" means *directed at* another. A defendant actively directs violent force at another by taking a step to unleash the force at, or to channel the force towards, a target. While the defendant need not personally administer the final blow, he or she must do *something* that results in force being applied to the victim.

In the decision below, the court of appeals nevertheless held that the elements clause can be satisfied by crimes in which the defendant *fails* to act, despite a duty to do so, if the crime requires proof of bodily injury or death. Under this view, a defendant who intentionally does not counteract forces unleashed by someone or something else still has used violent force. Indeed, this construction would expand the elements clause to include offenses that may involve no force *at all*. Where a defendant fails to provide medical care or nutrition to a dependent, for instance, the victim's injuries may originate from a wholly internal biological process, rather than from contact with the external world.

The Court should reject the court of appeals' attempt to turn words into their opposites. A person who fails to act does not thereby actively use violent force against another. Congress created the elements clause to target "a category of violent, active crimes," *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004), not offenses that can be committed by remaining motionless.

A. Legal Background

Section 924(c) makes it a federal offense to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, any "crime of violence" or "drug trafficking crime" that can be prosecuted in federal court. 18 U.S.C. § 924(c)(1)(A). The offense carries a mandatory-minimum sentence of five years of imprisonment and a maximum sentence of life. *Id.* § 924(c)(1)(A)(i). The statutory minimum increases to seven years if the firearm is "brandished," and to ten years if it is "discharged." *Id.* § 924(c)(1)(A)(ii)-(iii). Section 924(c) sentences must run consecutively to any other sentence. *Id.* § 924(c)(1)(D)(ii).

A "crime of violence" is a felony offense that satisfies one of two definitional clauses:

- under the so-called *elements clause*, the offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," *id.* § 924(c)(3)(A);
- under the so-called *residual clause*, the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *id.* § 924(c)(3)(B).

In *Johnson* v. *United States*, 576 U.S. 591 (2015), this Court invalidated the similarly worded residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), finding it unconstitutionally vague. The Court extended that ruling to Section 924(c)'s residual clause in *United*

States v. *Davis*, 588 U.S. 445 (2019). As a result, to qualify as a crime of violence under Section 924(c), an offense must satisfy the definition provided by the elements clause of Section 924(c)(3)(A).

In determining whether an offense satisfies the elements clause, this Court uses the familiar categorical approach, which requires examining the elements of the offense, rather than the particular facts involved in the defendant's crime. See *United States* v. *Taylor*, 596 U.S. 845, 850 (2022). Under the categorical approach, "[t]he only relevant question is whether the . . . felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force" against another. *Ibid.* "And answering that question does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime." *Ibid.*

B. Proceedings Below

On May 12, 2016, petitioner Salvatore Delligatti was charged in a superseding indictment with racketeering conspiracy, conspiracy to commit murder in aid of racketeering, attempted murder in aid of racketeering, conspiracy to commit murder for hire, operating an illegal gambling business, and—as most relevant here—using a firearm in furtherance of a crime of violence under Section 924(c). See C.A. App. 38-61.

1. As predicates for Mr. Delligatti's Section 924(c) charge, the Government relied on four of the other charged offenses. Mr. Delligatti moved to dismiss prior to trial, arguing that none of the charged predicates qualified as a crime of violence—either under Section 924(c)'s elements clause or under its residual clause. *Id.* at 69-71. The district court denied his motion, determining that the four other charged offenses were valid predicates under both clauses. *Id.* at 70-71.

Mr. Delligatti proceeded to trial and was convicted on all charges in March 2018. *Id.* at 449-52. He was sentenced to 300 months of imprisonment, which included "a consecutive sentence of 60 months" for his conviction under Section 924(c). *Id.* at 516.

2. While Mr. Delligatti's appeal was pending, this Court invalidated the residual clause in *Davis*, and the Second Circuit ruled that conspiracy offenses do not satisfy the elements clause, see *United States* v. *Laurent*, 33 F.4th 63, 86 (2d Cir. 2022). As a result, most of the charged predicate offenses could no longer support Mr. Delligatti's conviction under Section 924(c). The Government was left to rely on his conviction for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5), which itself was based on a charge of attempted second-degree murder under N.Y. Penal Law § 125.25(1).

Mr. Delligatti argued to the Second Circuit that attempted second-degree murder under New York law is not a crime of violence because it can be committed "by way of affirmative acts *or omissions*." Def. C.A. Br. 48. Crimes predicated on a defendant's failure to act do not satisfy the elements clause, Mr. Delligatti explained, because they "do not involve either direct or indirect force" in all cases. Def. C.A. Reply Br. 15.

The Second Circuit rejected Mr. Delligatti's argument as foreclosed by its decision in *United States* v. *Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc). See Pet. App. 14a-15a. *Scott* held that any crime involving "at least serious physical injury," in which the defendant intended for the injury to occur, "necessarily involv[es] a use of force—to be recognized as categorically violent whether committed by acts of omission or by acts of commission." 990 F.3d at 110.

Applying *Scott* to the state offense underlying Mr. Delligatti's Section 1959(a)(5) conviction, the Second Circuit concluded:

> Because Delligatti's conviction for attempted murder in aid of racketeering under 18 U.S.C. § 1959(a)(5) is premised on the predicate crime of attempted murder under New York law, which constitutes a crime of violence as defined in the elements clause of section 924(c), we conclude that Delligatti's conviction for attempted murder in aid of racketeering under section 1959(a)(5) is necessarily a crime of violence.

Pet. App. 15a (brackets omitted). The court thus "uph[e]ld the section 924(c) conviction and affirm[ed] the judgment of the district court." *Id.* at 15a.

SUMMARY OF ARGUMENT

Crimes that require proof of bodily injury or death, but can be committed by failing to take action, do not satisfy Section 924(c)'s elements clause.

I. A "crime of violence" under the elements clause must have, as an element, the "the use . . . of physical force against the person or property of another." Each individual component of that definition requires active conduct. In combination, they overwhelmingly reinforce the conclusion that the elements clause does not apply to crimes of omission.

A. To "use" force, an offender must act: The offender must engage in affirmative conduct that converts force to his or her service. That aptly describes a crime, like strangulation or poisoning, in which the offender applies force to another person or object directly (strangulation), or takes a step that ultimately causes force to be applied indirectly (poisoning). But it does not describe a crime of omission, in which the offender merely fails to curb forces initiated by someone or something else. The fact that the same force (and resulting injury) would have occurred even if the offender was absent, or was present but unable to stop it, shows that the offender did not "use" the force in the ordinary sense of the word.

This Court has further clarified that the relevant use of force is limited to circumstances in which "a person *actively employs* physical force." *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (emphasis added). Active employment requires action. Indeed, since the elements clause also applies to crimes involving the "*attempted* use" or "*threatened* use" of force—crimes that require the defendant to take "specific actions against specific persons or their property," *United States* v. *Taylor*, 596 U.S. 845, 856 (2022)—it would be odd if the actual *use* of force could be accomplished by remaining motionless.

Crimes that can be committed by failing to act also do not categorically involve "physical force." Even under the most minimal definitions of that term—a cause of the acceleration of mass, or the merest touching—using physical force requires an act; nonfeasant offenders do not cause mass to accelerate. And a crime of omission may in fact involve no physical force from *any* cause: Where the offense is failing to provide medical care or nutrition to a dependent, for instance, the victim's injuries may originate from an internal biological process, rather than from contact with the external world.

In any event, in the context of defining a crime of violence, "physical force" means *violent* force. If the "snatching of property from another [does] not suffice" to constitute violent force, *Stokeling* v. *United States*, 586 U.S. 73, 86 (2019) (quotation marks omitted), then neither does failing to provide medical care or nutrition.

Finally, Section 924(c)(3)(A)'s requirement that the physical force be used "against the person or property of another" confirms that the offender must have "directed force at another." *Borden* v. *United States*, 593 U.S. 420, 432 (2021). *Directing* force—channeling it towards someone or something—necessitates affirmative conduct.

B. Section 924(c)(3)(A)'s structure, purpose, and history reinforce this activity-based reading of the elements clause.

Section 924(c) prohibits the use or carrying of a firearm "during and in relation to" a crime of violence. It also imposes enhancements for brandishing or discharging the firearm, or for employing a particularly dangerous weapon like an assault rifle or machinegun. The focus of the provision is thus on the type of crime likely to involve especially dangerous behavior, not the type of offense that can be committed by sitting still.

Congress designed Section 924(c)'s elements clause, much like the similar clause of the Armed Career Criminal Act, to target the kind of offenders who are especially likely to inflict grave harm when in possession of a firearm. That purpose does not apply to nonfeasant offenders, who do not shape events through their own affirmative conduct but must rely on forces set in motion by someone or something else.

The history of Section 924(c)'s enactment supports this view. At the same time Congress defined "crimes of violence" via the elements clause, it expressly distinguished them from offenses in which the defendant's intentional inaction was "dangerous to human life." S. Rep. No. 97-307, at 591 (1981). Congress recognized that, in the latter category of offense—dangerous nonfeasance—the offender "d[oes] not use or threaten to use physical force." *Ibid.*

II. The Government's contrary interpretation of the elements clause is unpersuasive.

A. The Government argues that offenders "use" force whenever they *benefit from* that force. But this Court has rejected the Government's prior attempts to assign the word such an expansive meaning. The Government similarly errs in seeking to redefine "physical force" in terms

of an offender's harmful mental state. A low level—or even absence—of force does not become "violent force" merely because the defendant wished harm on the victim. Nor does the nature of violent force depend solely on whether injury results; "eggshell" victims can suffer grievous harm from only minimal force. Finally, the Government is wrong that the "against another" phrase is satisfied by offenders who direct their *harmful intentions* towards the victim. A crime of violence requires the offender to direct *physical force*.

B. The Government overreads this Court's statement in *United States* v. *Castleman*, 572 U.S. 157, 170 (2014), that "[i]t is impossible to cause bodily injury without applying force in the common-law sense." That statement reflects a common-sense point: Unless a person does something to unleash the movement of concrete bodies, he or she cannot "cause" anything to happen. But crimes that can be committed by failing to act do not "cause" bodily injury in that sense.

Castleman's statement was also expressly limited to offenses involving "force in the common-law sense," rather than the type of active, violent physical force required by Section 924(c)'s elements clause. And in any event, the provision at issue in *Castleman*—unlike the elements clause—lacked a requirement that force be used "against the person or property of another."

C. The Government argues that reading the elements clause to exclude crimes of omission involving bodily harm would produce unjustifiable results and defy common sense. But the exclusion of such crimes is a consequence of this Court's invalidation of Section 924(c)'s residual clause. That clause applied to an offense even if it did not *always* involve physical force, but only a *risk* of it in the *ordinary* case. That is a much lower standard, which sentencing courts routinely found satisfied for crimes involving bodily harm.

Because this Court invalidated the residual clause, offenses involving bodily injury now must qualify, if at all, under Section 924(c)(3)(A). But that *practical* consequence of the Court striking down the residual clause sheds no light on the meaning of the elements clause. It certainly provides no warrant for shoehorning offenses that previously qualified as "crimes of violence" under the residual clause into a definition where it does not fit.

D. If the Court has any remaining doubts about whether the elements clause encompasses crimes that can be committed by failing to act, it should resolve them under the rule of lenity. Lenity principles have particular force where, as here, a mandatory-minimum sentence is at stake: Such sentences are not necessary to punish adequately those who deserve harsh sentences, and they prevent case-specific leniency even where merited.

ARGUMENT

I. CRIMES THAT CAN BE COMMITTED BY FAILING TO ACT DO NOT CATEGORICALLY INVOLVE THE USE OF PHYSICAL FORCE AGAINST ANOTHER

A crime that can be committed through inaction does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Offenses of nonfeasance, such as failing to provide a dependent with necessary medical care or nutrition, may be morally reprehensible and, in some jurisdictions, may subject the defendant to severe punishment. But they do not categorically involve the use of *any* force, much less the type of violent physical force necessary to satisfy the elements clause.

A. The Elements Clause's Text Requires Affirmative Conduct

Under Section 924(c)'s elements clause, a "crime of violence" must have "as an element [1] the use, attempted

use, or threatened use of [2] physical force [3] against the person or property of another." Each of those requirements—separately, but especially in combination—points to a crime consisting of affirmative conduct (*i.e.*, activity). It defies normal speech to say that an offender who remains motionless, thereby failing to counteract harm unleashed by someone or something else, has used physical force against another.

1. *Use*

a. "The word 'use' in the statute must be given its ordinary or natural meaning," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (quotation marks omitted), which is "'to convert to one's service' or 'to employ,'" *Smith* v. *United States*, 508 U.S. 223, 229 (1993) (quoting Webster's New International Dictionary 2806 (2d ed. 1950)) (brackets omitted). To use someone or something, this Court has explained, "requires a volitional *act*." *Borden* v. *United States*, 593 U.S. 420, 443 (2021) (plurality op.) (emphasis added); see *Voisine* v. *United States*, 579 U.S. 686, 693 (2016) ("volitional *conduct*") (emphasis added). And where the thing being used is *force*, "the person applying [the] force" at issue is the relevant "actor." *Voisine*, 579 U.S. at 693.

To "use" force, therefore, an actor must engage in affirmative conduct that converts force to his or her service. That requirement is readily satisfied by crimes in which the offender directly administers force, or takes a step that causes force to be administered, to a person or object. See, *e.g.*, N.Y. Penal Law § 121.12 (strangulation); *id.* § 130.35(1) (rape); *id.* § 150.15 (arson). In these examples, the offender pursues a course of action that channels force in a manner designed to alter the course of events in a desired direction. "The 'use of force'" thus consists of "*the act* of employing [it] knowingly as a device *to cause* physical harm." *United States* v. *Castleman*, 572 U.S. 157, 171 (2014) (emphases added).

A person who commits an offense by *failing* to take action has not "use[d]" force in this ordinary sense. Such an offender, by definition, engages in no "act" and is not an actor. Nor has he or she "cause[d]" force to be applied in a plain-language sense: The relevant force has been unleashed into the world by someone or something else; the nonfeasant offender has merely failed to stop it. See *Burrage* v. *United States*, 571 U.S. 204, 211 (2014) (defining "actual causality" to mean "the harm would not have occurred in the absence of—that is, but for—the defendant's conduct") (quotation marks omitted). Indeed, the fact that the same force (and resulting injury) would have occurred even if the offender was *absent*, or was present but *unable* to stop it, shows that the offender did not "use" the force in any ordinary sense of the word.

To be sure, an offender may "use" force to injure or kill a victim without *directly* applying the force that causes the victim's injuries. As this Court has explained, a person may use force "indirectly, rather than directly (as with a kick or punch)." *Castleman*, 572 U.S. at 171. For instance, someone who "pull[s] the trigger on a gun" has engaged in affirmative conduct designed to make force his instrument, even though "it is the bullet, not the trigger, that actually strikes the victim." *Ibid.* So, too, someone who "sprinkles poison in a victim's drink" thereby "employ[s] poison knowingly as a device to cause physical harm." *Ibid.* (quotation marks omitted).

But even where physical force is invoked only indirectly, the offender must still be the one who invoked it: He or she must be the person who unleashed the force that ultimately resulted (however circuitously) in the victim's injuries. An offense committed solely by failing to counteract forces brought into existence by someone or something else—for instance, sitting by silently while a victim consumes a drink laced with poison by an unrelated

third party—does not constitute the "use" of force in the ordinary sense.

b. The activity-based sense of the word "use" is reinforced by this Court's interpretation of the same word in a related provision of Section 924(c). See *Dubin* v. *United States*, 599 U.S. 110, 120 (2023) ("It is statutory context . . . that determines what kind of active employment or conversion to one's service" qualifies as use).

In *Bailey*, the Court construed Section 924(c)(1)'s provision for a heightened penalty when a defendant has "use[d] . . . a firearm" during and in relation to a crime of violence or drug trafficking crime. The Government argued that the provision encompassed "mere possession of a firearm by a person who commits a drug offense." 516 U.S. at 143. But this Court disagreed, noting that "various definitions of 'use' imply action and implementation." *Id.* at 145. And contextual clues, including the word's "placement and purpose in the statutory scheme," further confirmed this "ordinary or natural meaning." *Ibid.* (quotation marks omitted).

The Court accordingly interpreted "the 'use' prong of § 924(c)(1)" to require proof "that the defendant *actively employed* the firearm during and in relation to the predicate crime." *Id.* at 150 (emphasis added). It further explained that, while "the active-employment reading of 'use'" encompasses conduct such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm," it does *not* include "hiding [the gun] where [the defendant] can grab and use it if necessary." *Id.* at 148-50.[1] *Bailey*'s interpretation of

[1] Congress amended Section 924(c)(1) in the wake of *Bailey*. See Pub. L. 105-386, § 1, 112 Stat. 3469, 3469-70 (1998). The statute now also covers a defendant "who, in furtherance of [a crime of violence or drug trafficking crime], possesses a firearm." 18 U.S.C. § 924(c)(1)(A).

the word "use" in subsection (c)(1) supports "the conclusion that Congress intended 'use' in the active sense" in subsection (c)(3)(A) as well. *Id.* at 150; cf. *Smith*, 508 U.S. at 235 (rejecting the proposition "that using a firearm has a different meaning in § 924(c)(1) than it does in § 924(d)"). And, to state the obvious, active use entails "activit[y]," not inaction. *Bailey*, 516 U.S. at 148.[2]

This Court adopted *Bailey*'s definition of "use" when construing use-of-force language in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). At issue there was the definition of "crime of violence" in 18 U.S.C. § 16(a), which—like Section 924(c)(3)(A)—includes a felony offense that "has as an element the use . . . of physical force against the person or property of another." Relying on *Bailey*'s construction of the word in a "similar context," the Court concluded that " 'use' requires active employment." *Leocal*, 543 U.S. at 9. The Court accordingly excluded accidental uses of force, finding it "less natural to say that a person actively employs physical force against another person by accident." *Ibid.* Having adopted "active employment" as the "ordinary or natural meaning" of the word "use" in Section 16(a)'s elements clause, *ibid.* (quotation marks omitted), the Court should read Section 924(c)(3)(A)'s functionally identical language the same way.[3]

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[2] Even the overly expansive interpretation of "use" for which the Government unsuccessfully advocated in *Bailey* was limited to affirmative conduct. See *id.* at 145 ("Under the Government's reading of § 924(c)(1), 'use' includes even the action of a defendant who puts a gun into place to protect drugs or to embolden himself."); U.S. Br. at 10, *Bailey* v. *United States*, 516 U.S. 137 (1995) (Nos. 94-7448, 94-7492) ("[A] defendant who places a gun and drugs or proceeds in proximity to each other . . . has 'used' the gun.").

[3] The Court also relied on *Bailey*'s definition of "use" when construing the phrase "use . . . of physical force" in 18 U.S.C. § 921(a)(33)(A). See *Voisine*, 579 U.S. at 692 n.3. The Court again defined the use of force as "an active employment of force," such

c. Further confirmation of the activity-based sense of "use" comes from the word's reappearance in Section 924(c)'s elements clause: In addition to crimes involving the "use" of physical force, Section 924(c)(3)(A) also applies to crimes involving the "attempted use, or threatened use of physical force." As this Court recently explained, those associated categories require the offender to have taken "specific actions against specific persons or their property." *United States* v. *Taylor*, 596 U.S. 845, 856 (2022).

An offender who *attempts* to use force under Section 924(c) must "complete[] a 'substantial step' toward that end," and the step must be "significant" and "unequivocal." *Id.* at 851 (citation omitted); see *ibid.* ("[A] substantial step demands something more than mere preparation.") (quotation marks omitted). An offender who *threatens* to use force must have "communicated [the] threat to a second person." *Id.* at 855 (brackets and citation omitted); see *ibid.* (listing, as examples of threats, "pointing a gun at a cashier" or "passing a note reading 'your money or your life'"). Thus, the use of physical force cannot be attempted or threatened under Section 924(c) without engaging in affirmative, active conduct. And since the attempt to use force and the threat to use force both necessarily involve activity, it would be strange if the use of force *simpliciter* could be accomplished by failing to act. Cf. *id.* at 856 ("It's a reading that would defy our usual rule of statutory interpretation that a law's terms are best understood by the company they keep.") (cleaned up).

This Court essentially said as much in *Taylor*. There, the Government proposed to construe "threatened use of physical force" in Section 924(c)(3)(A) as encompassing

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that a person who engages in non-volitional conduct "has not actively employed ('used') force," even if a victim has been injured. *Id.* at 693.

conduct that merely posed an "abstract risk" of harm, even if the risk was never communicated to another person. *Id.* at 855. The Court disagreed, relying on the fact that the clause's other prongs require concrete steps towards a particular deployment of force:

> The statute speaks of the "use" or "attempted use" of "physical force against the person or property of another." Plainly, this language requires the government to prove that the defendant took specific actions against specific persons or their property. Reading the statute's remaining reference to the "threatened use of physical force against the person or property of another" as requiring a communicated threat fits with this design.

Id. at 856. The Court's reference to "specific actions" is itself highly indicative. At a minimum, the Court's reasoning—that if two prongs of the elements clause share a key feature, the third likely does as well—supports giving "use" an activity-based reading.

2. *Physical force*

a. The phrase "physical force" similarly must be given its "ordinary meaning." *Johnson* v. *United States*, 559 U.S. 133, 138 (2010). The fact that force is *physical* means it is "exerted by and through concrete bodies." *Ibid.* Force has a "specialized meaning in the field of physics" ("a cause of the acceleration of mass"), as well as a "specialized legal usage" in the common law of battery ("the slightest offensive touching"). *Id.* at 139. Thus, under even the most minimal definition, "physical force" means that one object has touched another and applied pressure to it.

Crimes that can be committed by failing to act, however, do not necessarily involve that minimal degree of physical force, even when a victim suffers bodily injury.

For instance, Mr. Delligatti's predicate offense of second-degree murder, see N.Y. Penal Law § 125.25(1), can be committed by "failure to perform a legally imposed duty," such as "withholding medical care" from a sick dependent, *People* v. *Steinberg*, 595 N.E.2d 845, 847-48 (N.Y. 1992); see *People* v. *Best*, 609 N.Y.S. 2d 478, 480 (N.Y. App. Div. 1994) (upholding conviction of mother who "fail[ed] to seek medical attention for [her] boy"). The need for medical care may originate from an internal condition, such as congenital epilepsy, rather than from contact with the external world. In such a case, a caregiver's intentional failure to intervene will amount to a crime even though no pressure has been exerted on the dependent's body.

Other violations of the New York statute under which Mr. Delligatti was convicted similarly may be accomplished without the application of force. One striking example comes from Judge Leval:

> Suppose a 70-year-old woman's [crime] occurred as follows. Her father, age 95, afflicted with an incurable degenerative disease that left him paralyzed, suffering, without hope for better, and facing a certain, imminent, and excruciatingly painful death, begged his loving caregiver-daughter to cease putting nutrition in his IV, to allow him to escape the torture by starving. After watching her father suffer as she wrestled with her moral dilemma, she eventually complied as an act of love and mercy.

United States v. *Scott*, 990 F.3d 94, 135 (2d Cir. 2021) (en banc) (Leval, J., dissenting). In such a case, the father's "death would result from lack of nutrition needed to fuel the operation of the body," *ibid.*, not from any contact with his daughter (or anyone else). While New York is entitled to criminalize the daughter's failure to add nutrition to her

father's IV, no English speaker would describe her offense as the use of "physical force."[4]

b. In any event, the type of "physical force" required to satisfy the elements clause is *not* the infinitesimal acceleration of mass reflected in the phrase's "specialized meaning in the field of physics"; nor is it "the merest touching" involved in common-law battery. *Johnson*, 559 U.S. at 138-39. Instead, in the context of a provision defining a felony crime of violence, like Section 924(c)'s elements clause, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140.

This Court has so held twice. The first time was in *Leocal* where, as noted above, the Court interpreted the identically worded elements clause of 18 U.S.C. § 16(a). In addition to relying on the active-employment sense of the word "use," the Court was mindful that "ultimately [it was] determining the meaning of the term 'crime of violence.'" *Leocal*, 543 U.S. at 11. Based on "[t]he ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime)," the Court concluded that the statute's elements clause "suggests a category of violent, active crimes." *Ibid.*

The Court reached a similar conclusion in *Johnson* when interpreting "physical force" in the elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i). The Court relied on dictionary definitions denoting the phrase's "general usage," which refers to

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[4] Some States separately criminalize the intentional or knowing "failure by a responsible person to provide treatment, care, goods, or services which results in injury to the health or endangers the safety of a vulnerable adult" or other dependent. Va. Code Ann. § 18.2-369(C); see *id.* § 18.2-369(B); see, *e.g.*, Conn. Gen. Stat. Ann. §§ 53a-320(6), 53a-322; 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(B); Or. Rev. Stat. Ann. § 163.205(1)(b)(A).

"'force consisting in a physical act, esp. a violent act directed against a robbery victim.'" 559 U.S. at 139 (quoting Black's Law Dictionary 717 (9th ed. 2009)). And the Court again emphasized that the phrase appears "in the context of a statutory definition of '*violent* felony,'" which further "connotes a substantial degree of force." *Id.* at 140. The Court accordingly declined to give the phrase either its "meaning in the field of physics" or "the specialized meaning that it bore in the common-law definition of battery," which could be satisfied by "the merest touching." *Id.* at 139. Instead, the Court construed physical force to mean "*strong* physical force." *Id.* at 140 (emphasis added).

The same reasoning applies here to the elements clause under Section 924(c)(3)(A). That provision is worded identically to the clause at issue in *Leocal*, and it likewise defines "the meaning of the term 'crime of violence.'" 543 U.S. at 11. Thus, the "ordinary meaning" of that term, "combined with [Section 924(c)(3)(A)'s] emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes." *Ibid.* And violent, active crimes necessarily involve affirmative conduct resulting in the external application of strong physical force against the person or property of another.

In past cases, this Court has used different verbal formulations to "specif[y] the degree of 'physical force' required" to qualify as violent force. *Johnson*, 559 U.S. at 142; see, *e.g.*, *Stokeling* v. *United States*, 586 U.S. 73, 83 (2019) ("force necessary to overcome a victim's physical resistance"); *Johnson*, 559 U.S. at 142 ("force strong enough to constitute 'power'"); cf. *Castleman*, 572 U.S. at 165-66 ("[I]t [would be] hard to describe as 'violence' a squeeze of the arm that causes a bruise.") (cleaned up). It is not necessary for present purposes to reconcile these various formulations. What matters is that all of them contemplate *affirmative* conduct that *causes* the application of significant *external* force. Yet all three of those features

may be absent for an offense that encompasses the failure to prevent harm, including harm originating from an internal biological process. Such an offense thus does not necessarily involve the use of any force, much less "violent force" as this Court has understood that term.

c. The exclusion of crimes that can be committed by failing to act also follows from this Court's decision in *Stokeling*. There, the Court considered application of the ACCA's elements clause to a conviction for robbery under Florida law, Fla. Stat. § 812.13(1) (1995), which could be committed by taking money or property from another through "the use of force." See 586 U.S. at 75-77. The defendant argued that the "force" required to commit such a robbery was less than the violent force necessary to satisfy the ACCA. *Id.* at 77.

This Court disagreed, holding that "the 'force' required to commit robbery under Florida law qualifies as 'physical force' for purposes of the elements clause." *Ibid.* Key to the Court's decision was the fact that "[m]ere snatching of property from another will not suffice" to establish robbery under Florida law. *Id.* at 86 (quotation marks omitted); see *ibid.* ("[A] defendant who merely snatches money from the victim's hand and runs away has not committed robbery."). Instead, the Court explained, state law required a heightened "degree of force"—namely, at least the amount of force required to overcome "resistance by the victim." *Ibid.* And "that same degree of force," the Court concluded, was enough to qualify as "'physical force'" under the ACCA. *Id.* at 86-87. The Court's holding thus rested on a distinction between mere-snatching force and enough-to-overcome-resistance force: While the latter qualified as violent force, the former did not.

If the amount of force involved in the "snatching of property from another" falls short of satisfying the elements clause, *id.* at 86 (citation omitted), then *a fortiori* so

does the amount of force required for a crime that can be committed by failing to provide nutrition or medical assistance. Indeed, unlike purse snatching, failing to provide nutrition or medical assistance does not even involve the "merest touching" that would be required for conduct to constitute "force" under the common law. *Id.* at 83 (quoting *Johnson*, 559 U.S. at 139). Nor does such nonfeasance involve "force *consisting in a physical act*." *Johnson*, 559 U.S. at 139 (emphasis added) (quoting Black's Law Dictionary 717 (9th ed. 2009)).

3. *Against the person or property of another*

Still more reinforcement for an activity-based reading of Section 924(c)(3)(A) comes from its requirement that the use of force must be "against the person or property of another." As a plurality of the Court recently explained in *Borden*, "the 'against another' phrase" provides a "critical" textual clue regarding the clause's reach. 593 U.S. at 428 (quoting *Leocal*, 543 U.S. at 9). When paired with "use of physical force," it indicates that the offender "*directed* force at another." *Id.* at 431-32 (emphasis added); see *id.* at 436-37 ("the 'against' phrase is most naturally read" as "requir[ing] that force be directed at . . . an object").

"Direct[ing] force" is affirmative conduct. It requires taking some affirmative step, however minimal, to channel the force towards someone or something else. For instance, a driver who sees a pedestrian but "plows ahead" anyway has directed force by "consciously deploy[ing] the full force of [the] automobile at another person." *Id.* at 432. But a person has not "directed or targeted [force] at another" if, through his inaction, he merely failed to divert forces already set in motion by someone or something else. *Id.* at 433.[5]

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[5] Justice Thomas concurred in *Borden*, reiterating his view that "'use of physical force' . . . has a well-understood meaning applying

Finally, even the dissenting Justices in *Borden*, who would have given the "against" phrase a more limited construction, agreed that it requires "making contact with" someone or something. *Id.* at 465 (Kavanaugh, J., dissenting) (cleaned up); see *id.* at 470 ("[I]n ordinary parlance, each of those defendants used force against their victims when they made physical *contact* with those victims as a direct result of their reckless behavior."). But crimes that can be committed purely through nonfeasance, such as failing to provide nourishment or administer medical care to a dependent, need not involve *any* "physical contact."

B. Other Statutory Clues Confirm the Plain Text of the Elements Clause

Section 924(c)'s structure, purpose, and history reinforce the conclusion that the elements clause does not apply to predicate offenses that can be committed by failing to act. Congress created the elements clause to target "a category of violent, active crimes," *Leocal*, 543 U.S. at 11, not crimes that can be committed by remaining motionless.

1. *Structure*

Section 924(c)'s elements clause must be considered in connection with its function within the statutory scheme. See *Johnson*, 559 U.S. at 139 ("Ultimately, context determines meaning."). A defendant whose predicate offense meets the definition of a "crime of violence" is not automatically subject to an enhanced sentence. The defendant must also have "use[d] or carrie[d]" a firearm "during and in relation to" the crime of violence, or else must have "possesse[d]" the firearm "in furtherance of . . . such crime." 18 U.S.C. § 924(c)(1)(A). If the defendant "brandished" or "discharged" the firearm, an even stiffer

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only to intentional acts designed to cause harm." 593 U.S. at 446 (quotation marks omitted). That view similarly excludes crimes that may be committed without undertaking "acts" that "cause" the application of force.

punishment applies. *Id.* § 924(c)(1)(A)(ii) and (iii). And further enhancements apply if the defendant used a particularly dangerous weapon, like a short-barreled shotgun or machinegun, see *id.* § 924(c)(1)(B), or armor piercing ammunition, see *id.* § 924(c)(5). These provisions plainly contemplate especially dangerous criminals who commit crimes of violence with the aid of deadly weapons.[6]

An activity-based interpretation of the elements clause sits comfortably alongside these provisions. Most straightforwardly, the firearm might itself be deployed as a means of using, attempting, or threatening force. For instance, a robber might use a gun to overcome the victim's resistance—a form of "active employment" that would constitute "use" of the firearm "during and in relation to" the crime under subsection (c)(1)(A), as well as the "use" or "threatened use of physical force" under subsection (c)(3)(A). See *Bailey*, 516 U.S. at 148 ("The active-employment understanding of 'use' certainly includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm."). Or the offender might facilitate the crime with the firearm but deploy force a different way, such as an arsonist who brings a gun along for protection but does not point it at anyone.

Crimes of omission, by contrast, are at best an awkward fit for this framework. Because such offenses consist of *not* acting, there is no required offense conduct "during and in relation to" which the offender might have "use[d] or carrie[d]" the firearm. Even constructing a scenario in which the firearm plays a "detectable role in the crime's commission," *id.* at 147, can be challenging.

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[6] Unlike the elements clause, these requirements are not subject to the categorical approach and instead must be satisfied by the defendant's own conduct, as established through evidence introduced at trial (or via guilty plea). See *Bailey*, 516 U.S. at 143.

To be sure, it is theoretically possible to use a gun "during and in relation to" nonaction. (Perhaps a nurse who carries a gun for protection during a shift in which he or she intends not to administer needed medication?) But that hardly seems what Congress had in mind when it enacted Section 924(c). See *Dubin*, 599 U.S. at 120 ("[A] statute's meaning does not always turn solely on the broadest imaginable definitions of its component words.") (citation omitted). The focus of that provision is on the type of dangerous crimes likely to be committed with a gun—and possibly an assault rifle or armor piercing ammunition—not the type of crime that can be committed by sitting still. Reading the elements clause as defining a category of active crimes thus "gives the provision a substantive effect that is compatible with the rest of the law." *Campos-Chavez* v. *Garland*, 144 S. Ct. 1637, 1649 (2024) (quotation marks omitted).

2. *Purpose*

This Court has not yet had occasion to address the statutory purposes underlying Section 924(c), but it has extensively discussed Congress's reasons for enacting Section 924(e) in the ACCA. Both subsections have their origin in the same legislation, see Gun Control Act of 1968, Pub. L. 90-618, § 102, 82 Stat. 1213, 1224 (1968), and their respective elements clauses contain "similar language," which the Court has accordingly interpreted in parallel, *United States* v. *Davis*, 588 U.S. 445, 456 (2019) (citation omitted). The statutory aims of the ACCA's elements clause can accordingly help inform the meaning of Section 924(c). As the Court has explained, those statutory aims are not implicated by a "crime [that] amounts to a form of inaction." *Chambers* v. *United States*, 555 U.S. 122, 128 (2009), *abrogated by Johnson* v. *United States*, 576 U.S. 591 (2015).

"Congress enacted ACCA to address the special danger posed by the eponymous 'armed career criminal,'"

based on its view that such offenders "are especially likely to inflict grave harm when in possession of a firearm." *Wooden* v. *United States*, 595 U.S. 360, 375 (2022) (cleaned up). When interpreting the definition of "violent felony" in Section 924(e)—including its elements clause—the Court has accordingly focused on the "particular subset of offenders" that "the statute targets." *Ibid.* (quotation marks omitted).

This Court has described the relevant features of that particular subset in consistent terms:

- "those who commit a large number of fairly serious crimes as their means of livelihood," *Taylor* v. *United States*, 495 U.S. 575, 587 (1990);
- "the kind of person who might deliberately point the gun and pull the trigger," *Begay* v. *United States*, 553 U.S. 137, 146 (2008);
- "[someone with] a prior record of violent and aggressive crimes," *id.* at 148;
- "'career criminals,' 'repeat offenders,' 'habitual offenders,' 'recidivists,' 'revolving door' offenders, and 'three time losers,'" *Wooden*, 595 U.S. at 372 (quoting legislative history) (brackets omitted).

This profile, in describing the type of offender that Congress targeted, also indicates the "kind of 'violent felony' the statute covers"—namely, the kind of offense that involves "violent, aggressive, and purposeful 'armed career criminal' behavior." *Begay*, 553 U.S. at 147-48.

Crimes that can be committed through inaction, and the type of offender likely to perpetrate them, are of a far different sort. For one thing, a nonfeasant offender does not shape events through his or her own affirmative conduct, but must rely on forces set in motion by someone or something else. As a result, the offender is unlikely to be the type of "recidivist[]" or "revolving door" offender who commits the same type of offense time and time again.

Wooden, 595 U.S. at 372 (citation omitted). Nor are nonfeasant offenders likely to be the type of professional criminals "who commit a large number of fairly serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587.

More fundamentally, an offender whose crime consists of failing to act is not "the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146. Even where serious harm is involved, a failure to act cannot be described as "violent, aggressive . . . behavior." *Id.* at 148. Indeed, the two are essentially literal opposites. As a result, the nonfeasant offender is not within the "particular subset of offender" who might pose a "special danger" when armed. *Id.* at 147, 146.

3. *History*

Section 924(c)'s legislative history confirms that Congress did not intend for the elements clause to apply to crimes of omission.

As originally enacted, Section 924(c) punished using or carrying a firearm during the commission of "any felony for which he may be prosecuted in a court of the United States." 18 U.S.C. § 924(c) (1970). In 1981, as part of an overhaul of federal criminal law, Congress proposed to create the analogous offense of "Using a Weapon in the Course of a Crime," in which "any felony" would be replaced with "crime of violence." Criminal Code Reform Act of 1981, S. 1630, 97th Cong. § 1823 (1981). The bill defined "crime of violence" via the now-familiar elements clause and an associated residual clause. *Id.* § 111. As the accompanying Senate Report explained, those definitions were "designed to refine the offense by confining it to its proper and practical boundaries as a means of deterring and punishing the employment of a firearm in relation to an offense that, by its nature, involves physical force or a substantial risk thereof." S. Rep. No. 97-307, at 889 (1981).

Notably, the 1981 bill also would have added a new offense of "Terrorizing," which would have prohibited the communication of "a threat to commit, or to continue to commit, a federal, State, or local *crime of violence* or unlawful conduct dangerous to human life." S. 1630, 97th Cong. § 1615(a)(1) (emphasis added). The Senate Report explained that

> the term "crime of violence" would have the same meaning as in the gun offense, but the term "unlawful conduct dangerous to human life" was intended to be broader—in part because the latter term was meant to include omissions:
>
> > The alternative phrase "unlawful conduct dangerous to human life" is not defined. Normally, such a threat will be to commit a crime of violence. However, the alternative provision may have a broader application. For example, *an operator of a dam could threaten to refuse to open the floodgates during a flood*, thereby placing the residents of an upstream area in jeopardy of their lives. Assuming the operator had some legal duty to act (whether under the civil or criminal law), his threat would be to engage in unlawful conduct dangerous to human life *which is not a crime of violence (since he did not use or threaten to use physical force)*.

S. Rep. at 591 (emphasis added). The Senate Report thus reflected the understanding that the dam operator who "refuse[d]" to take action necessary to avoid "jeopardy" to human life did not thereby "use or threaten to use physical force."

The 1981 bill was not enacted. But Congress incorporated much of it (though not the "Terrorizing" offense) into the Comprehensive Crime Control Act of 1984—including by adopting "crime of violence," and thus by reference the associated elements and residual clauses, into

Section 924(c). Pub. L. 98-473, § 1001(a), 98 Stat. 1837, 2136 (1984); see S. Rep. No. 98-225, at 307 (1983) ("The definition [of crime of violence] is taken from" the 1981 bill). It is therefore appropriate to assume that Congress understood those terms in 1984 the same way it did in 1981. And with remarkable specificity, the record reflects the understanding that crimes of omission were *not* crimes of violence, even when they resulted in harm to human life, because they did not involve the use of force.

II. THE GOVERNMENT'S CONTRARY INTERPRETATION OF THE ELEMENTS CLAUSE IS UNPERSUASIVE

The court of appeals below, and the Government in its certiorari-stage brief, have offered an alternative interpretation in which any intentional offense that involves bodily harm always constitutes the use of violent force, even if the offender took no action and unleashed no force—indeed, even if the victim's injuries were of an entirely internal nature, rather than resulting from contact with an external source. Where, as here, "the Government argues for a result that the English language tells us not to expect, we must be very wary of the Government's position." *Dubin*, 599 U.S. at 124 (cleaned up).

A. The Government Misreads the Elements Clause

The Government's interpretation of the elements clause rests on "the broadest imaginable definitions of its component words." *Dubin*, 599 U.S. at 120 (citation omitted). But reading those words in light of their "linguistic and statutory context . . . point[s] to a more targeted reading." *Ibid.* (cleaned up).

1. *Use*

a. The Government starts by acknowledging that the "'use of physical force' means 'volitional' or 'active' employment of force," U.S. Cert. Br. 11 (quoting *Borden*, 593 U.S. at 430) (ellipsis omitted), but it makes no attempt to explain how the absence of activity can be described as

"active." Instead, the Government argues that any offense involving intentional or knowing physical harm "necessarily" qualifies as the use of physical force "because in all such cases the physical force has been made the user's instrument." *Ibid.* (quoting *Castleman*, 572 U.S. at 169, 171) (brackets and quotation marks omitted). The Government thus equates *using* force with *benefitting from* force, even if only passively. See *id.* at 14 (arguing that a defendant who "deliberately takes advantage of certain forces" has used force).

The Court rejected this very argument in *Bailey*. There, the Government argued that "a person 'uses' an object when he avails himself of it or employs it to facilitate a goal he has in mind." U.S. Br. at 10, *Bailey* v. *United States*, 516 U.S. 137 (1995) (Nos. 94-7448, 94-7492); see *id.* at 12 (citing dictionary definitions that "share the idea of employing an object to serve a particular function or purpose"). A defendant who "place[s] a firearm near his drugs or drug proceeds" thereby *uses* the gun in connection with an associated drug deal, the Government argued, because he "avails himself of [the] gun to provide security." *Id.* at 13. In the alternative, the Government argued that placing a gun nearby would qualify "even if the statute included an additional requirement of 'active' use," since "[t]here is nothing 'passive' about a defendant's positioning of a gun to make it available to provide security for his drug trafficking crimes." *Id.* at 19.

This Court disagreed with both arguments. On the meaning of "use," the Court noted that dictionary "definitions of 'use' imply action and implementation." *Bailey*, 516 U.S. at 145. Consistent with those definitions, the Court adopted an "active-employment understanding of 'use.'" *Id.* at 148. It also rejected the Government's alternative suggestion that "placement of a firearm to provide a sense of security or to embolden" was sufficiently active to satisfy that standard. *Id.* at 149. Merely benefiting from

the firearm's "inert presence" was insufficiently active, the Court explained, even in a scenario "where an offender conceals a gun nearby to be at the ready for an imminent confrontation." *Ibid.*

The interpretation of "use" urged by the Government here is thus similar to the one it advocated for—and the Court declined to adopt—in *Bailey*. In both contexts, the Government argued that something has been "used" if the defendant intentionally derived a benefit from it. But the Court disagreed, instead adopting a definition that requires not merely employment, but *active* employment. Nor did the Court consider the nearby placement of a gun for protection to be "active" use in *Bailey*; here, neither is "deliberately tak[ing] advantage of" forces set in motion by someone or something else, U.S. Cert. Br. 14. Indeed, stashing a gun in anticipation of an imminent confrontation is substantially *more* active than failing to provide medical care or nutrition. See note 2, *supra*.

b. The Government has offered examples in which a person supposedly "used" force without acting, but they only reinforce how divorced its interpretation is from common speech. The Government draws an analogy between someone who "fail[s] to feed or render medical treatment to another person while under a duty to do so" and someone who "'sprinkles poison in a victim's drink,'" calling the two scenarios "materially identical." U.S. Cert. Br. 9 (quoting *Castleman*, 572 U.S. at 171). In the former case, the Government says, "'poison employs forceful physical properties as a matter of organic chemistry'"; in the latter case, "starvation and untreated injuries employ forceful physical properties as a matter of biology." *Id.* at 10 (quoting *Castleman*, 572 U.S. at 171) (quotation marks omitted).

The Government's analogy is phrased unnaturally in order to elide the key distinction between those two scenarios. In the first part of its analogy, "poison" is the

subject of the verb "employs," as if it were irrelevant how the poison got into the victim's drink. But that fact makes all the difference. The poison-sprinkler takes the fateful step of introducing a foreign substance into the drink, without which no harm would result. He or she thus "actively employs" the poison—and hence force—under any reasonable understanding of that term. The nonfeasant offender in the second part of the analogy, by contrast, benefits from circumstances ("starvation and untreated injuries") that may arise wholly independently.

The Government's other example of non-active "use" reflects a similar sleight of hand:

> Just as a person sitting on a raft may make use of the force of the river's natural current to carry him forward, so too may a defendant make use of the natural physical forces of another person's body to cause that person's death by starvation or other similar means.

U.S. Cert. Br. 14. This example *starts* with the raft in the middle of the river, without acknowledging the rafter's antecedent activity necessary to produce that positioning. And in any event, the force of the river's current pushing the raft forward—one body pushing on another—is not comparable to starvation or disease, which may result from processes wholly internal to the victim, rather than from contact with an external source of harm.

c. The Government further argues that whether a defendant used force does not depend on "whether his conduct is characterized as 'commission' or 'omission'" because the statute itself "does not distinguish between" those categories, and "the common law has long rejected such a distinction." *Id.* at 11. The Government's first point, of course, assumes its own conclusion: The very question presented in this case is whether the statute applies differently to crimes involving affirmative conduct than it does to crimes that can be committed by failing to act.

The Government's reliance on the common law fares no better. There is no dispute here that a legislature may criminalize omissions, as many jurisdictions historically have done in appropriate circumstances. But the choice to treat some omissions as *legally* culpable has little bearing on whether such omissions are properly described as the "use of physical force against the person or property of another." Indeed, the fact that the Model Penal Code and the laws of New York (and several other states) expressly "defin[e] 'acted' to include, where relevant, 'omitted to act,'" *id.* at 12 (quoting Model Penal Code § 1.13(7) (1985)), shows that "act" otherwise *would not* include omissions.

In any event, the elements clause does not apply to defendants who "act" according to common-law meanings, but rather to those who use physical force against another. "The first precondition of any term-of-art reading is that the term be present in the disputed statute." *Borden*, 593 U.S. at 435.

2. *Physical force*

The Government argues that "'violent' force is simply physical force distinguished by the degree of harm *sought to be caused*," such that any "attempt to cause death" necessarily "involves 'violent' force." U.S. Cert. Br. 15 (emphasis added) (cleaned up). But this Court has repeatedly made clear that "violent" force is defined not by the defendant's injurious desires, but by the "degree of power" actually involved. *Stokeling*, 586 U.S. at 83 (quoting *Johnson*, 559 U.S. at 139); see *Johnson*, 559 U.S. at 140 ("Even by itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force."). Indeed, this Court has decided several cases that address "how different mental states map onto the [elements] clause's demand that an offense entail the 'use . . . of physical force against the person of another,'" *Borden*, 593 U.S. at 425 (quoting Section 924(e)(2)(B)(i)) (ellipsis in original), without ever

suggesting that the defendant's mental state determined the type of force at issue. See *id.* at 427-29 (summarizing other mental-state cases). Nor, as a matter of plain language, would a low level of force be described as "violent force" merely because the defendant wished harm on the victim.

The Government is no more accurate in proposing that "the 'force' in question is measured not by what the defendant did, but by how it affected the victim." U.S. Cert. Br. 9. To be sure, the effect of a crime on a victim can be *relevant* to whether the crime involved "the degree of 'physical force' required." *Johnson*, 559 U.S. at 142. But violent force need not cause harm, and harm need not be caused by violent force. The familiar "eggshell skull" rule from tort law, for instance, is premised on a category of persons who might suffer serious bodily harm or death even where only minimal (non-violent) force is applied to them. See Restatement (Second) of Torts § 461; see also *Stokeling*, 586 U.S. at 91 (Sotomayor, J., dissenting).

In any event, a test that looks to "how [physical force] affected the victim" would work only if the victim were affected by *physical force*—that is, only if the victim's injury stems from "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140. As explained, offenses that can be committed by failing to act need not involve such force, or indeed *any* force. See pp. 17-19, *supra*.

3. *Against the person or property of another*

The Government argues that whenever a defendant employs force "knowingly as a device to cause physical harm to [a] victim, it qualifies as the use of physical force 'against the person . . . of another,' because it is 'directed or targeted at another.'" U.S. Cert. Br. 11 (quoting *Borden*, 593 U.S. at 443 (plurality opinion)) (citations and quotation marks omitted). The Government's argument hides

behind ambiguity regarding the "it" that is directed at another. For a crime of omission involving intentional or knowing harm, the offender's *harmful intention* may be directed at the victim. But the elements clause "requires that *force* be directed at . . . an object." *Borden*, 593 U.S. at 437 (emphasis added). For that to be the case, the defendant must take some step to channel the force towards the victim.

Even the *Borden* dissenters, moreover, would have read the "against" phrase as requiring defendants to "ma[k]e physical *contact* with [their] victims as a direct result of their reckless behavior." *Id.* at 470 (Kavanaugh, J., dissenting). But crimes of omission need not always involve physical contact. See p. 23, *supra*.

B. *Castleman* Does Not Support the Government's Interpretation

The Government's argument relies heavily on *United States* v. *Castleman*, and in particular on its statement that "[i]t is impossible to cause bodily injury without applying force in the common-law sense." 572 U.S. at 170. Although *Castleman* did not address crimes involving the failure to act, the Government contends that "[t]he key reasoning of *Castleman*—that intentionally causing physical harm is necessarily the use of physical force—is equally applicable to omissions." U.S. Cert. Br. 14. The Government's reliance on *Castleman* is misplaced.

1. *Castleman* involved a prosecution under 18 U.S.C. § 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." Congress defined that term to include a misdemeanor offense that "has, as an element, the use or attempted use of physical force" if the offense was committed by a person with a particular type of domestic relationship to the victim. *Id.* § 921(a)(33)(A)(ii). The question in *Castleman* was whether the defendant's prior state conviction for "having 'intentionally or knowingly caused

bodily injury to' the mother of his child" satisfied that definition. 572 U.S. at 161 (brackets and citation omitted).

The defendant claimed that his prior offense did not satisfy Section 921(a)(33)(A)'s use-of-force requirement. The "physical force" necessary to satisfy that requirement, he argued, was the same "*violent* force" required for a "violent felony" under the ACCA. *Id.* at 162. And he argued that his prior offense did not necessarily include such violent force, even though it had resulted in bodily injury, "because one can cause bodily injury without 'violent contact.'" *Id.* at 161 (cleaned up).

This Court disagreed. Rather than adopt the ACCA's definition of "physical force" as "violent force," the Court explained, "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" *Id.* at 162-63. And since the *Castleman* defendant's offense resulted in bodily injury, the Court concluded that it must have involved "'physical force,'" on the ground that "[i]t is impossible to cause bodily injury without applying force in the common-law sense." *Id.* at 170.

2. *Castleman*'s statement that an offender cannot cause bodily injury without applying common-law force does not help the Government here.

First, the Court's statement, by its terms, only addresses circumstances in which the defendant "*cause*[*d*] bodily injury." *Castleman* was making a common-sense point: Unless a defendant unleashes the movement of concrete bodies into the world ("appl[ies] force"), he or she cannot "cause" anything to happen in this sense.[7]

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[7] In his concurring opinion, Justice Scalia made the same point that "it is impossible *to cause* bodily injury without using force capable of producing that result." *Castleman*, 572 U.S. at 174 (emphasis added) (quotation marks omitted).

But that observation does not bear on crimes that can be committed by failing to act, which do not "cause" bodily injury in a real (*i.e.*, non-legal) sense. A defendant who fails to administer medicine to someone in need, for instance, does not set anything in motion; the same injury might have occurred even if the defendant were absent or otherwise unable to stop the injury from occurring. See pp. 13-14, *supra*. That makes crimes of omission different from the types of offenses discussed by *Castleman*, all of which involved an "act" by the defendant that "cause[d] physical harm." 572 U.S. at 171; see, *e.g.*, *id.* at 166 ("a squeeze of the arm that causes a bruise") (cleaned up); *id.* at 169 ("assault"); *id.* at 170 ("administering a poison") (quotation marks omitted).

Second, *Castleman*'s observation only concerns applications of "force in the common-law sense," *ibid.*, not the type of *violent* force at issue here. Indeed, the Court expressly reserved the question of whether a defendant can cause bodily injury without applying "violent force." See *id.* at 167 ("Whether or not the causation of bodily injury necessarily entails violent force" is "a question we do not reach."). And the Court repeatedly stated that its ruling was limited to applications of "force in the common-law sense." *Id.* at 170; see, *e.g.*, *id.* at 168 ("the common-law meaning of 'force'"); *id.* at 170 ("the common-law concept of 'force'"). Thus, the Court could not have been clearer that its observations were confined to common-law force.

The Court had good reason for that limitation. The automatic connection between causation of bodily injury and force holds true only for the "minimal" level of force necessary to set concrete bodies into motion. *Id.* at 171. As with the "eggshell" victim discussed above, see p. 34, *supra*, it *is* possible to cause bodily injury—even serious bodily injury or death—without applying the degree of "*violent* force necessary to overcome resistance by a

victim." *Stokeling*, 586 U.S. at 82 (emphasis added). Indeed, almost all of *Castleman*'s reasoning depends on the distinction between common-law force and violent force:

- "[T]he common law gave peculiar meaning" to force in the context of "common-law battery"—the quintessential domestic-violence offence—and Congress presumably intended "to incorporate that misdemeanor-specific meaning of 'force' in defining a 'misdemeanor crime of domestic violence.'" 572 U.S. at 164 (quoting *Johnson*, 559 U.S. at 141).

- "'Domestic violence' is not merely a type of 'violence,'" but rather "a term of art encompassing acts that one might not characterize as 'violent' in a non-domestic context." *Id.* at 165. For that reason, Section 922(g)(9) was designed to include "[m]inor uses of force [that] may not constitute 'violence' in the generic sense." *Ibid.*[8]

- Section 922(g)(9) had the distinctive purpose of "clos[ing] a dangerous loophole in the gun control laws," because "many perpetrators of domestic violence are convicted only of misdemeanors." *Id.* at 160 (cleaned up). That purpose could not be achieved, the Court explained, if the provision were limited to crimes involving felony-level force. See *id.* at 167-68.

[8] Justice Scalia warned against relying on the term-of-art meaning of "domestic violence" for precisely this reason: The phrase encompasses "such a wide range of nonviolent and even *nonphysical* conduct"—including, notably, "acts of omission." *Castleman,* 572 U.S. at 181 (quotation marks omitted). Such nonphysical behavior, he argued, "cannot possibly be relevant to the meaning of a statute requiring 'physical force.'" *Ibid.*

None of those rationales applies here. To the contrary, in the context of defining a felony crime of violence, all three point in the opposite direction. So whereas common-law force "fits perfectly" when defining misdemeanor crimes of domestic violence, it is a "comical misfit" here. *Id.* at 163 (quoting *Johnson*, 559 U.S. at 145).

Third, and in any event, *Castleman* did not consider what is required for force to be used "*against* the person or property of another." The definition at issue in *Castleman*, Section 921(a)(33)(A)(ii), requires the "use of physical force," but does not require that such force be used "against" anyone or anything, as Section 924(c)(3)(A) does. As the *Borden* plurality explained, that textual difference is "critical," 593 U.S. at 431, because pairing use-of-force language with an "against" phrase indicates that the offender must "*actively* employ[] physical force," *id.* at 432 (emphasis added), not merely passively benefit from it. See *id.* at 437 (the phrase "requires that force be directed at . . . an object").

Therefore, because the statute at issue in *Castleman* lacked the critical "against another" qualification, the Court could not—and did not purport to—address a statute like Section 924(c)(3)(A) that *does* include such language. Here, as in *Borden*, "the Government's argument" simply "ignores the textual difference between the two statutes." *Id.* at 442.

C. Practical Considerations Do Not Justify Abandoning the Text

The Government argues that reading the elements clause as being limited to offenses that involve affirmative conduct "would produce unjustifiable results that defy common sense to lay and legal observers alike." U.S. Cert. Br. 13. According to the Government, such a reading would exclude "some of the most serious crimes like murder and attempted murder," which would "completely untether the categorical approach from reality."

Ibid. The supposedly "unjustifiable results" on which the Government relies, however, are the consequence of this Court's decision invalidating Section 924(c)'s residual clause on constitutional grounds.

In addition to its elements clause, Section 924(c)(3) defines "crime of violence" in its residual clause to include a felony offense "that *by its nature*, involves a *substantial risk* that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B) (emphasis added). The italicized language has its counterpart in the ACCA's residual clause. *Id.* § 924(e)(2)(B)(ii) ("otherwise *involves conduct* that presents a *serious potential risk* of physical injury to another") (emphasis added).

As this Court explained in *Johnson* v. *United States*, 576 U.S. 591 (2015), the italicized language required a sentencing court to go beyond the statutory elements of a predicate crime in two important respects. First, the court had to identify "a judicially imagined 'ordinary case' of a crime," rather than the least-culpable version of the offense that would satisfy the "statutory elements." *Id.* at 597. Second, the focus on "risk" required the court to decide "how much risk it takes for a crime to qualify." *Id.* at 598. These features of the inquiry, especially when "combin[ed]," significantly broadened the residual clause's scope—allowing the clause to be applied to an offense even if it did not *always* involve physical force or injury, but merely a *risk* of it in the *ordinary* case. *Ibid.*

Crimes involving bodily harm as an element were a ready fit for that inquiry: If every version of the offense necessarily involves bodily harm or death, then the offense would also involve a significant risk of force or injury in the ordinary case. Courts thus routinely held that such offenses satisfied the residual clauses of Section 924(c)(3)(B) and (e)(2)(B)(ii). See, *e.g.*, *United States* v. *Walker*, 442 F.3d 787, 788 (2d Cir. 2006) (addressing

Section 924(e)(2)(B)(ii)); *United States* v. *Williams*, 343 F.3d 432, 432 (5th Cir. 2003) (addressing Section 924(c)(3)(B)); see also *United States* v. *Ramirez*, 606 F.3d 396, 397 (7th Cir. 2010) (addressing residual clause of career offender Sentencing Guideline); *United States* v. *Verbickas*, 75 Fed. App'x 705, 707 (10th Cir. 2003) (addressing residual clause of 18 U.S.C. § 3156(a)(4)(B)).

In *Johnson*, 576 U.S. at 606, this Court held that the ACCA's residual clause is unconstitutionally vague, and in *Davis*, 588 U.S. at 470, the Court extended that holding to Section 924(c)'s residual clause. Because Congress has not modified Section 924(c)(3) since, offenses involving bodily injury and death that formerly would have qualified as "crimes of violence" under the residual clause now must qualify, if at all, under the elements clause.

That fact, however, has only *practical* significance, not *legal* significance: Consequences stemming from the Court's ruling on the residual clause, decades after Section 924(c)'s enactment, cannot shed light on the meaning of the elements clause. In absence of new legislation, the elements clause should not be expected to have the same scope that the entirety of Section 924(c) originally did. Indeed, this Court recently warned the Government against trying to stretch the text of the elements clause in order to "effectively replicat[e] the work formerly performed by the residual clause." *Taylor*, 596 U.S. at 847.

In any event, "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage*, 571 U.S. at 218 (quotation marks omitted). In past cases, the Government has argued that reading Section 924 in the narrow manner advocated by the defendant would "defy common sense" or produce "[u]ntenable" results. U.S. Reply Br. at 20-21, *United States* v. *Taylor*, 596 U.S. 845 (2022) (No. 20-1459); see, *e.g.*, U.S. Br. at 32, *Borden* v. *United States*, 593 U.S. 420 (2021) (No. 19-5410) (arguing that

defendant's interpretation "would lead to nonsensical results"). In *Borden*, for instance, the Government argued that "[i]nterpreting Section 924(c) to exclude crimes committed with a mens rea of recklessness" could lead to "the exclusion of second-degree murder from Section 924(c)'s elements clause," which the Government called a "glaringly absurd result[]." U.S. Br. at 37 (quotation marks omitted). The Court was not moved by such hyperbole.

D. Doubts about the Elements Clause's Scope Must Be Resolved under the Rule of Lenity

If the Court has any remaining doubt after examining the "text, structure, and history" of the elements clause, it must "apply the rule of lenity and resolve the ambiguity in [Mr. Delligatti's] favor." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). The rule is a "canon of strict construction of criminal statutes," *United States* v. *Lanier*, 520 U.S. 259, 266 (1997), under which "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor," *Davis*, 588 U.S. at 464. The principle of lenity "arises both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed." *Dubin*, 599 U.S at 129 (cleaned up). In view of this well-established principle, the "Court has traditionally exercised restraint in assessing the reach of a federal criminal statute." *Ibid.* (citation omitted).

The rule of lenity carries "special force" here because applications of the elements clauses of Section 924(c)(3)(A) and (e)(2)(B)(i) result in mandatory-minimum sentences. *Dean* v. *United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting). As Judge Leval explained, "statutes imposing harsh mandatory sentences present a particularly compelling need for invocation of the rule of lenity." *Scott*, 990 F.3d at 137 (Leval, J., dissenting). Mandatory sentencing under such statutes is unnecessary to punish

"offenders who deserve . . . harsh sentences," because sentencing judges will generally give them "harsh sentences regardless of whether the sentence was mandatory." *Ibid.* And in an unusual case where the offender merits special leniency, mandatory sentences "cause serious injustice . . . by requiring far harsher sentences than the facts of the case can justify." *Ibid.*

Even accepting that the rule of lenity is to be "sparingly employed," it appropriately applies here, where the "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." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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