No. 23-825

IN THE

Supreme Court of the United States

SALVATORE DELLIGATTI,

Petitioner,

v.

UNITED STATES,

Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

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

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

INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

ARGUMENT

I. Crimes That Require No Physical Action, Like New York Second Degree Murder, Are Not Predicate Offenses Under The Force Clauses Of Section 924.

Everyone agrees that New York second degree murder only counts as a "crime of violence" for purposes of Section 924(c)(3)(A) if the crime "has as an element the use, attempted use, or threatened use of physical force against the person ... of another." 18 U.S.C. § 924(c)(3)(A); *see* 18 U.S.C. § 924(e)(2)(B)(i) (same as to "'violent felony'"). Everyone also agrees that the Court looks to the minimum conduct necessary to be convicted of second degree murder under New York's penal statute, which provides that "[a] person is guilty of murder in the second degree when," in various scenarios and with different levels of intent, "he causes the death" of another person. *See* N.Y. Penal Law § 125.25. And no one disputes that second degree murder in New York can be committed via omission. *See* Gov't BIO 6-8; Pet. App. 12a-15a.

It is important to start, as always, with the text. An offense is a predicate "crime of violence" for purposes of Section 924(c)(3)(A) when it "has an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Crimes that can be committed by a complete lack of action do not require a "use" of "physical force." As this Court has held, "'use'" in this context "requires active employment." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). One cannot "use physical force against" another by doing

nothing, any more than one can accidentally or even recklessly "use" such force as the text of the force clauses of Section 924 requires. *See ibid.* (holding that negligently or accidentally causing damage does not "use" force under analogous "crime of violence" definition in 18 U.S.C. § 16(a)) (cleaned up); *see also Borden v. United States*, 593 U.S. 420, 423 (2021) ("The question here is whether a criminal offense can count as a 'violent felony'" under 18 U.S.C. § 924(e) "if it requires only a *mens rea* of recklessness—a less culpable mental state than purpose or knowledge. We hold that a reckless offense cannot so qualify.").

Indeed, describing complete inaction as the "use" of "physical force" is perplexing—fairly described as a "comical misfit" for Section 924's text. *See Johnson v. United States*, 559 U.S. 133, 145 (2010) (*Johnson I*) (so holding as to nonviolent touching for purposes of "'violent felony'" definition in Section 924(e)). As the Court explained in *Johnson I*, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis original). When one does nothing, it is not a use of force at all, let alone a use of "*violent* force." If "[d]e minim[is] physical force, such as mere offensive touching, is insufficient to trigger the ACCA's force clause because it is not violent," *United States v. Middleton*, 883 F.3d 485, 489 (4th Cir. 2018) (explaining *Johnson I*), then no physical force whatsoever (either direct or indirect) cannot be considered "*violent*" force as required for force-clause predicates under Section 924.

The Second Circuit cited *United States v. Castleman*, 572 U.S. 157 (2014), to reason that the *harm* to the victim is all that is required to show that

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

Rather, *Castleman* addressed (a) the level of force necessary for a different statute that, unlike Section 924(c)(3)(A), does not require violent force, and (b) whether an *active* employment of force that *indirectly* results in injury constitutes a use of force against another, in the common-law sense. *Castleman* simply doesn't answer whether a failure to act satisfies the force-clause requirement of Section 924.

Castleman dealt with the meaning of force as defined for *misdemeanor* crimes of domestic violence under 18 U.S.C. § 922(g)(9). As the Court noted, that statute does not require the use of *violent* force, unlike the force clauses of Section 924. Rather, in distinguishing Section 924, the Court held that Section 922(g)(9) only requires the *de minimis* level of force that was required at common law. *Castleman*, 572 U.S. at 163-66 (distinguishing *Johnson I*, where the Court "declined to read the common-law meaning of 'force' into [Section 924(e)]'s definition of a 'violent felony,' because we found it a 'comical misfit with the defined term'"). The Court explained that the word "'violence' standing alone 'connotes a substantial degree of force,'" but domestic violence is not just a type of "'violence'" but rather "a term of art

encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* at 164-65 (quoting *Johnson I*, 559 U.S. at 140). *Castleman*'s conclusion that causing bodily injury required the application of physical force was based on this broader definition of "physical force," as the Court repeatedly emphasized. *See, e.g.*, *id.* at 170 ("It is impossible to cause bodily injury without applying force *in the common-law sense*." (emphasis added)); *ibid.* ("[T]he *common-law* concept of 'force' encompasses even its indirect application." (emphasis added)).

And *Castleman* dealt with whether a *commission*—not total inaction—could meet the force clause of the misdemeanor crime of domestic violence definition in 18 U.S.C. § 921(a)(33)(A)(ii), even if that action injured the victim indirectly. Because, unlike the force clauses in Section 924, the misdemeanor crime of domestic violence definition imported the common-law definition of force (the level rejected in *Johnson I*), the Court had to grapple with whether the common-law concept of force encompassed only direct applications of force—such as a kick or punch—or whether it also encompassed indirect applications of force—such as poisoning someone's food or drink. 572 U.S. at 170-71. "It was in that context that the Court concluded, 'it is impossible to cause bodily injury without applying force in the *common-law sense*.'" *Mayo*, 901 F.3d at 228 (quoting *Castleman*, 572 U.S. at 170) (emphasis added; brackets removed); *see also Castleman*, 572 U.S. at 170 (noting that the element of "force" in common-law battery "need not be applied directly to the body of the victim") (citation omitted).

Castleman's concept of "indirect force" focuses on commissions—for example, employing poisons or

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

Thus, as the Third Circuit recently explained, this Court's "*Castleman* decision involved the common-law concept of force, and it 'expressly reserved the question of whether causing "bodily injury" necessarily involves the use of "violent force" under the ACCA.'" *United States v. Harris*, 68 F.4th 140, 148 (3d Cir. 2023) (quoting *United States v. Mayo*, 901 F.3d 218, 228 (3d Cir. 2018)); *see also Mayo*, 901 F.3d at 230 (citing and quoting *Castleman*, 572 U.S. at 170-71, as "likening 'the act of employing poison knowingly as a device to cause physical harm' or firing a bullet at a victim, to 'a kick or punch,' as each act involves the 'application' or 'use of force,' even though the resulting harm might occur indirectly"). "[A]n act of omission does not constitute an act of physical force." *Id.* at 146 (assessing a predicate offense under Section 924(e)); *see also United States v. Harris*, 88 F.4th 458, 459 (3d Cir. 2023) (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, and Matey, JJ.) (same). To conclude otherwise would "conflate the infliction of bodily injury with physical force." *Harris*, 68 F.4th at 148. *Cf. United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (under sentencing guidelines, holding that "an offense

that *results* in physical injury, but does not involve the use or threatened use of force, simply does not meet the" force requirement), *abrogated on other grounds by Castleman as recognized in United States v. Covington*, 880 F.3d 129, 134 n.4 (4th Cir. 2018) ("*Castleman* did not however abrogate the causation aspect of *Torres-Miguel* ... ."). "Of course, a crime may *result* in death or serious injury without involving *use* of physical force." *Ibid.* The Second Circuit erroneously conflated the use of violent force—as required by the force-clause predicates of Section 924 and *not* for the misdemeanor crime of violence definition—with the causation of injury.

II. Congress Has Not Amended The Force Clauses Of Section 924 Since This Court Announced The Categorical Approach Over Thirty Years Ago.

Any perceived oddity of the categorical approach is merely the byproduct of Congress's chosen text—language Congress has left undisturbed despite this Court's long-standing interpretation and application of the categorical approach.

The Court has repeatedly found that Section 924's text requires the elements-focused inquiry. *See, e.g.*, *Shepard v. United States*, 544 U.S. 13, 19-20 (2005). Section 924, by its plain terms, enhances the sentence for a criminal defendant whose predicate offense satisfies certain elements. *See Mathis v. United States*, 579 U.S. 500, 511 (2016). The focus, then, is on the criminal statute's elements, not on "what the defendant had actually done." *Ibid.* Congress could have constructed a different system for establishing predicate offenses. And had it wished to do something

else, "Congress well knows," for example, "how to instruct sentencing judges to look into the facts" of relevant convictions given that "different language" in other statutory schemes requires as much. *Ibid.* But "Congress chose another course" in Section 924(c). *See ibid.*

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

Judges have sometimes expressed frustration with the results of categorical-approach inquiries. This is true, for example, of the Third Circuit in its on-point (and correct) opinion in *Harris*. It reached that result because "the Supreme Court of Pennsylvania," in answering a certified question directly asking

whether the State's first-degree assault statute has the required force element, responded: "'there is no express element in [the Pennsylvania criminal statute] requiring the use or attempted use of physical force, or any reference to force at all.'" *Harris*, 88 F.4th at 463 (quoting *United States v. Harris*, 289 A.3d 1060, 1070 (Pa. 2023)) (Jordan, J., concurring in denial of rehearing en banc, joined by Chagares, C.J., and Hardiman, Krause, Bibas, Porter, and Matey, JJ.). The Pennsylvania high court "observe[d] that 'the General Assembly was cognizant of how to codify the manner of causing a particular bodily injury as an element of the crime.'" *Ibid.* (quoting *Harris*, 289 A.3d at 1070-71). "'The legislature did not restrict the manner of causing or attempting to cause serious bodily injury'" in the statute, so the Supreme Court of Pennsylvania "'decline[d] the invitation to do so by judicial fiat.'" *Ibid.* (quoting *Harris*, 289 A.3d at 1070-71).

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

that Congress has chosen to leave in place—and the one this Court must continue to faithfully apply.

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

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

CONCLUSION

Amicus Curiae NAPD respectfully urges the Court to reverse.

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Respectfully submitted,

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