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 FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMM AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOSHUA L. DRATEL
CO-CHAIR, NACDL
AMICUS CURIAE
COMMITTEE
LAW OFFICE OF DRATEL
& LEWIS
29 Broadway, Suite 1412
New York, NY 10006

MARY PRICE
SHANNA RIFKIN
COUNSEL FOR FAMM
1100 H Street, NW
Washington, DC 20005

ALAN SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

THAD EAGLES
MEGAN GARDNER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and up to 40,000 including affiliates. Among NACDL's members are private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

FAMM (formerly known as Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization whose mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM has over 75,000 members and supporters. By mobilizing people in prison and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing and advocates for its reform.

Amici advance their charitable purposes in part through education of the general public and select

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[1] Counsel for the parties received timely notice of amicus's intent to file this brief. Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

amicus filings in important cases. Amici and their members have a substantial legal interest in the rules governing the Armed Career Criminal Act (ACCA), including ensuring that its sentencing provisions are applied in a consistent, predictable manner that respects the statute's plain language and comports with the rule of lenity. Given their missions and memberships, amici will continue to have an interest in future decisions involving the ACCA.

SUMMARY OF ARGUMENT

Under 18 U.S.C. § 924(c)(3)(A), a felony qualifies as a "crime of violence" only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Second Circuit held in this case that a conviction for New York attempted murder in the second degree is a crime of violence under this use-of-physical-force clause even though one can commit that crime, as a matter of settled state law, without taking any action or using any physical force at all. *See, e.g.*, *People* v. *Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992) (parents' failure to provide child with adequate medical care "can form the basis of a homicide charge"). As Mr. Delligatti rightly explains, the court of appeals' holding below was in error. This Court should reverse.

This brief focuses on the rule of lenity and its animating principles. Lenity is an ancillary principle to the ancient doctrine commanding strict construction of criminal statutes. Pursuant to that rule, courts "cannot give the [words of a criminal statute] a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." *Burrage* v. *United States*, 571 U.S. 204, 216 (2014). The rule stems from three core principles: (1) ensuring defendants are on fair notice of the

consequences of their conduct, (2) protecting against arbitrary imposition of criminal penalties by promoting consistent interpretation of the criminal laws, and (3) ensuring that Congress, rather than the courts, determines the appropriate criminal sanctions. *See infra* Section I. Each of those considerations counsels in favor of reversal here.

As to fair notice (*see infra* Section II), this Court has repeatedly explained that the "ordinary meaning" of the term "physical force" in the ACCA refers to "violent, active crimes." *Borden* v. *United States*, 593 U.S. 420, 437-438 (2021) (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010) and *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004)). That is how an ordinary person reading the law would interpret it, and that is the interpretation that should govern. Crimes that can be committed by omission—by doing nothing—are not "active" and so do not involve the "use of physical force."

Rather than give the words in the statute the ordinary meaning, as this Court has instructed, the Second Circuit instead invented a purported specialized legal meaning of what counts as "action"—namely, that having certain legal duties means one's *inaction* can be treated like *action*—to stretch the phrase "use of physical force" beyond its ordinary meaning. That interpretation is wrong on its own terms: the fact that both (i) inaction (when accompanied by a duty to act) and (ii) action can lead to criminal culpability does not transform these opposites into synonyms. It means only that the Legislature may choose in special cases to criminalize inaction, if it does so by plain language. In any event, that erroneous interpretation of the word "action" is entirely divorced from the common meaning of the terms that are actually in the statute.

Other courts on the wrong side of the split have held that doing nothing involves "using physical force" if doing nothing causes harm. But no ordinary person (or even legal scholar) would agree that "using physical force" means "causing harm" regardless of method. This interpretation is also squarely inconsistent with this Court's precedent giving the phrase "use of physical force" in ACCA and other statutes an appropriately narrow construction.

At most, these decisions and the Government's arguments gin up some marginal ambiguity. Any such ambiguity, if it in fact exists, must be resolved in favor of the defendant. Whatever else it may be able to say, the Government cannot reasonably contend that an ordinary person reading the ACCA would be on notice that a crime of omission would count as a crime that "has as an element the use … of physical force." 18 U.S.C. § 924(c)(3)(A).

The rule of lenity is particularly important in this case, which involves determining when harsh mandatory minimums will apply across the board—*i.e.*, to entire categories of defendants—without any opportunity for examination of individualized factors. *See infra* Section III. Adopting a more punitive interpretation of the ACCA that ignores its ordinary meaning thus poses particularly great risks of arbitrary enforcement and imprisoning individuals in unique circumstances when Congress did not clearly intend to impose such harsh punishment.

For these reasons, and those ably expressed in the Petitioner's brief, this Court should apply the rule of lenity and reverse.

ARGUMENT

Petitioner Salvatore Delligatti persuasively explains that New York attempted second-degree murder, N.Y. Penal Law § 125.25(1), is not a predicate offense under the ACCA because it can be committed by complete inaction. Amici write to expand on a reason identified in the brief (at 42-43) supporting reversal: the rule of lenity. The Second Circuit's holding below defies the ordinary meaning of the words in the ACCA. Crimes that can be committed by inaction alone do not *categorically* have as an element the "use of physical force." Even if there were some ambiguity in the words "use of physical force"—and there is not—the rule of lenity requires resolving that ambiguity in favor of the defendant. Application of that rule is particularly important here, in the context of a law imposing mandatory, lengthy terms of incarceration regardless of individualized circumstances.

I. THE RULE OF LENITY REQUIRES GIVING THE WORDS IN CRIMINAL STATUTES THEIR COMMON MEANING AND RESOLVING AMBIGUITIES IN THE DEFENDANT'S FAVOR

The rule of lenity is "a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden* v. *United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (quoting *The Adventure*, 1 F. Cas. 202, 204 (C.C. Va. 1812) (No. 93) (Marshall, C.J., on Circuit)); *see also Bittner* v. *United States*, 598 U.S. 85, 101 (2023) ("Under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals."); *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (recognizing that the rule of lenity applies to sentencing provisions as well as offense elements).

Pursuant to this "canon of strict construction of criminal statutes," *United States* v. *Lanier*, 520 U.S. 259, 266 (1997), courts cannot give the words of a criminal statute "a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant," *Burrage*, 571 U.S. at 216. The rule of lenity thus requires that courts (1) give words in criminal statutes their ordinary, common meaning and then (2) interpret ambiguities in favor of the defendant's liberty.

The requirement of strict construction and rule of lenity stem from three fundamental tenets that have long been part of our legal tradition. *See United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). As explained further in the following sections, each tenet counsels in favor of holding that the ordinary meaning of "use of physical force" does not cover crimes of omission, especially when the opposite holding would result in mandatory minimums that do not permit the typical judicial consideration of individualized factors as to each defendant.

First, the rule of lenity "protect[s] the Due Process Clause's promise 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.'" *Bittner*, 598 U.S. at 102 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). It does so first by requiring that courts give the words of a criminal statute "their ordinary acceptation" or "plain meaning." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). As one court recognized two hundred years ago, criminal laws "ought to be so explicit … that all men, subject to their penalties, may know what acts it is their duty to avoid." *United States* v. *Sharp*, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) (No. 16,264) (Washington, J.). Or as this Court stated more recently, criminal laws must provide "fair notice" and cannot "create traps for [the]

unwary." *Snyder* v. *United States*, 144 S.Ct. 1947, 1957 (2024).

A criminal law fails to "afford ordinary people fair notice of its demands" if courts assign its words obscure meanings that differ from what an ordinary member of the public would understand from reading the statute. *Wooden*, 595 U.S. at 389-390 (Gorsuch, J., concurring). "'Penal statutes … providing a punishment … should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.'" *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 393 (1926). The rule of lenity properly focuses courts on what the "words" in the criminal statute "evoke in the common mind." *McBoyle*, 283 U.S. at 27.

If a statute remains ambiguous even when its terms are given their common meaning, then fair notice likewise requires resolving those ambiguities "in the defendant's favor." *United States* v. *Davis*, 588 U.S. 445, 464 (2019).[2] Before interpreting an ambiguous criminal statute to impose a "'harsher alternative,'" courts must find that Congress has spoken in "'clear and definite'" language. *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971). And "where the legislature has not plainly spoken its will," then the interpretation "favorable … to the

[2] The rule of lenity applies "where text, structure, and history fail to establish that the Government's position is unambiguously correct," *United States* v. *Granderson*, 511 U.S. 39, 54 (1994), and "a reasonable doubt persists about a statute's intended scope," *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). While the Court has on occasion suggested that lenity is reserved for "grievously ambiguous" statutes, that terminology does not establish some higher standard; it simply underscores the importance of adopting the construction favorable to the defendant where a reasonable doubt remains after consulting "context, precedent, and statutory design." *Brown* v. *United States*, 144 S.Ct. 1195, 1210 (2024).

accused" controls. *United States* v. *Mann*, 26 F. Cas. 1153, 1157 (C.C.D. N.H. 1812) (No. 15,718) (Story, J., on Circuit).[3]

Second, the rule of lenity "minimize[s] the risk of selective or arbitrary enforcement" of criminal laws and penalties, *Kozminski*, 487 U.S. at 952, thereby "fostering uniformity in the interpretation of criminal statutes," *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). By laying a bedrock interpretive rule that requires giving the terms in criminal statutes their common meanings and resolving any remaining ambiguity in favor of liberty, the rule of lenity "generate[s] greater objectivity and predictability" in applying criminal laws. Eskridge, *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-679 (1999). Ensuring "the integrity and uniformity of federal law" is a fundamental goal of the judicial function. *Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

Third, the rule of lenity ensures that "legislatures and not courts … define criminal activity." *Bass*, 404 U.S. at 348. After all, "'the power of punishment is vested in the legislative, not in the judicial department.'" *Davis*, 588 U.S. at 464-465 (quoting *Wiltberger*, 18 U.S. at 95). Giving penal laws their common meaning and resolving any ambiguity in favor of liberty "places the weight of inertia upon the party that can best induce

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[3] In this regard, the rule dovetails with the void-for-vagueness doctrine, which "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *Sessions* v. *Dimaya*, 584 U.S. 148, 155-156 (2018) (quoting *Papachristou* v. *Jacksonville*, 405 U.S. 156, 162 (1972)); *see also Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.").

Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States* v. *Santos*, 553 U.S. 507, 514 (2008). And it "prevent[s] judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." *Wooden*, 595 U.S. at 391 (Gorsuch, J. concurring) (quoting *Mann*, 26 F. Cas. at 1157). Put simply, individuals should not be "languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (cleaned up). The rule of lenity thus "maintain[s] the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952.

II. GIVING THE WORDS IN THE ACCA THEIR ORDINARY MEANING, AS STRICT CONSTRUCTION DEMANDS, REQUIRES REVERSAL

Under the ordinary meaning of the words in the statute, omissions do not involve the "use ... of physical force." Courts that have reached the contrary, counter-intuitive conclusion did so either by importing into the phrase specialized (and erroneous) understandings of what can constitute "action" under the criminal law, or by fully redefining the phrase "physical force" so that it does not require any acceleration or impact at all. They then resolved this manufactured ambiguity in favor of the more punitive reading. The rule of lenity requires precisely the opposite approach.

A. Crimes Committed By Doing Nothing Do Not Involve The "Use Of Physical Force"

The ordinary interpretation of the phrase "use of physical force" unambiguously requires an action. Therefore, crimes of omission—*i.e.*, where a defendant did not take any action, much less "use" any "physical force"—are not violent felonies under the ACCA's force clause.

As this Court has repeatedly recognized, the ordinary, accepted meaning of the key phrase at issue in this case involves affirmative acts. In interpreting the ACCA in *Johnson*, Justice Scalia explained that the word "force" in "general usage" connotes "*active* power," meaning "[p]ower, violence, or pressure directed against a person or thing," and "physical force" likewise suggests a "physical act," such as a "violent act directed against a robbery victim." 559 U.S. at 139 (quoting *Black's Law Dictionary* 717 (9th ed. 2009) (emphasis added)). Similarly, in *Leocal*, Chief Justice Rehnquist explained that the "'ordinary or natural meaning'" of the term "crime of violence" refers to a "category of violent, *active* crimes." 543 U.S. at 11 (emphasis added). Federal and state laws also reflect this common understanding that "physical force" requires the active exertion or application of force.[4]

No ordinary person would think that neglect—for example, a legal guardian's "deliberate failure to provide food or medical care," *United States* v. *Mayo*, 901 F.3d 218, 227 (3d Cir. 2018)—involves the "use of physical force." That is not to deny that the guardian's conduct was both morally wrong and criminally culpable. It was both. But such omissions plainly involve "a failure to act—the complete absence of any force—rather than …

[4] *See, e.g.*, Del. Code Ann. tit. 11, § 222(26) ("Physical force" requires the "application of force upon or toward" another); Fla. Stat. § 914.21(5) ("Physical force" requires "physical action against another"); Ohio Rev. Code § 2901.01(1) ("Force" must be "physically exerted" upon another); 10 U.S.C. § 920(g)(5) ("'[U]nlawful force' means an act of force"); 18 U.S.C. § 1515(a)(2) ("'[P]hysical force' means physical action against another"); Colo. Rev. Stat. § 24-31-901(4) ("'Physical force' means the application of physical techniques or tactics" upon another); Nev. Rev. Stat. § 193.303 (similar); Okla. Stat. tit. 44, § 920(F)(5) ("[U]nlawful force" requires "an act of force").

the application of force." *United States* v. *Harris*, 88 F.4th 458, 464 (3d Cir. 2023) (Jordan, J., concurring in denial of reh'g en banc); *see also United States* v. *Gracia-Cantu*, 302 F.3d 308, 312-313 (5th Cir. 2002) (conviction does not categorically involve the use of physical force where it can "involve an omission," such as "failing to remove [a child] from the presence of [the defendant's] abusive boyfriend"), *overruled on other grounds by United States* v. *Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018).

The First Circuit similarly recognized that a straightforward reading of the ACCA's force clause does not cover crimes that can be committed without any "force" at all: "When a child dies from not being fed, the death is not—in nonlegal terms—a result of 'force.' Nor is it the result of 'forceful physical properties as a matter of organic chemistry' as where a defendant 'sprinkles poison in a victim's drink.'" *United States* v. *Báez-Martínez*, 950 F.3d 119, 131 (1st Cir. 2020) (quoting *United States* v. *Castleman*, 572 U.S. 157, 171 (2014)). Applying "common sense and the laws of physics," such crimes should not be covered by the ACCA's force clause because "'[f]orce' has nothing to do with it." *Id.*[5]

That is exactly right. The common meaning of the phrase "use of physical force" means the active, physical employment of pressure affirmatively exerted by and through concrete bodies. *See Johnson*, 559 U.S. at 138-

[5] The First Circuit reluctantly went on to hold that omissions do involve the use of physical force under ACCA, but only because it misread *Castleman* as controlling here. *See Baez-Martinez*, 950 F.3d at 132. *Castleman* decided only whether the *indirect* use of force qualified under ACCA. *See* 572 U.S. at 170. It is one thing to say that a common understanding of the phrase "use of force" encompasses the indirect application of force, such as poisoning. It is quite another to say it covers the *absence of force altogether*.

140. Crimes that can be committed by omission do not involve the use of physical force under that plain meaning. The analysis should end there.

B. Courts That Have Adopted The Government's Argument Ignore The Common Understanding Of The Phrase "Use Of Physical Force"

Courts that have rejected this straightforward reading improperly ignore the ACCA's ordinary meaning to reverse-engineer a contrived ambiguity that they then resolve in favor of the more punitive interpretation. This may satisfy a moral urge to punish reprehensible behavior, but it does not conform to the legal requirement of strict construction.

For example, in *Scott*, the Second Circuit held that the phrase "use of violent force" includes passively "deriv[ing] service from" an external "force already in motion." 990 F.3d at 119. According to the Second Circuit, offenders can "use" an existing force simply by knowing or intending that the force will result in a harmful outcome and not stepping in to prevent it. *See id.* at 109 ("it is not that 'use' must be physical but, rather, that it must be conscious"); *id.* at 112 ("a defendant's 'use' of violent force depends on his knowing or intentional causation of bodily injury, not on his own physical movements"). On the majority's reasoning, a defendant can "use" physical force by simply appreciating the likely consequences of some external force that the defendant otherwise has nothing to do with.

The Second Circuit in some parts of its opinion took the view that this counterintuitive interpretation reflects the "ordinary meaning" of "use of physical force." *Scott*, 990 F.3d at 108. But in others it expressly recognized that it was in fact importing into the ACCA a "'specialized meaning,'" *id.* at 115, based not on the phrase

"use of physical force" itself—a phrase no one has argued is a standalone legal term of art—but instead based on the Second Circuit's (erroneous) view of what lawyers steeped in the doctrine would understand to count as "action." *See id.* at 114 (section containing this analysis entitled "The Law Equates Omission with Action"); *id.* at 114-115 ("[I]n the eyes of the law, a 'failure to act where there is a duty to act is the equivalent of affirmative action'"); *id.* at 115-116 (relying on "equivalency, rooted in common law" between certain inaction and action). The Second Circuit recognized that an "omission" is "the *failure* to act when the law imposes a duty to act." *Id.* at 114 (emphasis added). But it then held that the active phrase "use of physical force" can nonetheless cover these failures to act because "*the law* views [an omission] as action sufficient to support criminal culpability." *Id.* (emphasis added).

Thus, while the Second Circuit purported to give the words in the force clause their "ordinary meaning," 990 F.3d at 108, in fact it expanded the meaning of the phrase "use of physical force" well beyond what an ordinary person would understand it to mean by relying on an assumption about what it believed legal scholars would deem to constitute "action" under the law.

Judge Menashi, concurring in *Scott*, made just this point. He "disagree[d]" with the majority's opinion "insofar as it insists" that its holding followed "from the "'ordinary," "natural," "everyday meaning'" of the statutory language." 990 F.3d at 127. He instead acknowledged that "the ordinary meaning of the phrase 'use of physical force' entails a physical act." *Id.* at 131. But Judge Menashi set aside the fact that "an ordinary speaker of English might assume that a 'use of physical force' entails a physical act," reasoning instead that "the legal meaning of the phrase includes omissions because

the law treats an omission the same as a physical act." *Id.* at 128. This "specialized meaning" arose from Judge Menashi's (erroneous) belief that "a reasonable legal interpreter familiar with the *corpus juris*" would know that inaction is sometimes really action. *Id.* at 131.

The Second Circuit's and Judge Menashi's atextual gloss on what counts as "action" is both contrary to the law and "physically and factually impossible." *Id.* at 143 (Pooler, J. dissenting). "The law does not view inaction as action," even if inaction is accompanied by a duty to act; the law simply "creates *culpability* in both situations." *Id.* Being criminally culpable for an omission does not convert that omission into an action. To state the obvious, "action" and "omission" are antonyms, as confirmed by numerous state criminal codes (including New York's) that expressly define omissions as the "failure" to act.[6]

Regardless, this whole exercise is misguided. The word "action" does not even appear in the ACCA's use-of-force provision, so any hypothetical specialized legal meaning of the word is irrelevant. The legal definition of a term of art at common law (such as "larceny" or "murder") informs how those phrases should be interpreted in criminal statutes. *See, e.g.*, *Johnson*, 559 U.S. at 139-140; *United States* v. *Turley*, 352 U.S. 407, 411 (1957); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). But nobody argues that the phrase "use of

[6] *E.g.*, Ala. Code § 13A-2-1(1), (3); Alaska Stat. § 11.81.900(44); Ariz. Rev. Stat. § 13-105(2), (28); Ark. Code Ann. § 5-2-201(1), (4); Colo. Rev. Stat. § 18-1-501(1), (7); Haw. Rev. Stat. § 701-118; Neb. Rev. Stat. § 28-109(1), (14); N.J. Rev. Stat. § 2C:1-14(b)-(c); N.Y. Penal Law § 15.00(1), (3); N.D. Cent. Code § 12.1-01-04(1), (22); Or. Rev. Stat. § 161.085(1), (3); 18 Pa. Stat. and Cons. Stat. § 103; Tex. Penal Code § 1.07(a)(1), (34); Utah Code Ann. § 76-1-601(1), (7); Wash. Rev. Code § 9A.04.110(14).

physical force" is a term of art at all, much less that at common law the phrase referred to doing *nothing* while having a duty to act. The Second Circuit's invented equivalency between the specialized legal concepts of action and omission has no bearing on the meaning of the phrase actually in the statute: "the use of physical force."

Plain English words in criminal statutes are given their plain English meaning, not a meaning conjured up through convoluted legalese. Yet the Second Circuit adopted an interpretation of the force clause that is both wrong on its own terms and that Judge Menashi admitted contradicts how individuals "of common intelligence" would understand its ordinary meaning of the law. *Connally*, 269 U.S. at 391. That was error. In fact, this Court has already rejected a similar attempt to import "a more specialized legal usage of the word 'force'" into the ACCA and directed that courts instead "give the phrase its ordinary meaning." *Johnson*, 559 U.S. at 138-139. The Court should do the same here.

Other circuits that have held that doing nothing can constitute the "use of physical force" did so by simply redefining the words "physical force" based on their own judicially created gloss. The Seventh Circuit conceded it was "difficult to identify the particular 'force' involved" when a defendant "withhold[s] something that is necessary to sustain life." *United States* v. *Jennings*, 860 F.3d 450, 459 (7th Cir. 2017). But rather than applying the rule of lenity and stopping there, it tried to square the circle by reasoning that, where a victim is "subject to the defendant's control," the "relevant 'force' may simply be the exertion of that control with the aim of physically harming the victim." *Id.* That is not a definition of "physical force" that one would find in common parlance or the dictionary. Worse, it contradicts this

Court's clear holding that "'physical force' … plainly refers to force exerted by and through concrete bodies," and is distinguished from, "for example, intellectual force or emotional force." *Johnson*, 559 U.S. at 138.

The Fourth Circuit similarly redefined "force" not to mean some actual movement or impact (as any common person would understand the word) but instead to mean "simply the mechanism by which the harm is imposed." *United States* v. *Rumley*, 952 F.3d 538, 549-551 (2020). But no ordinary person would agree that "*physical* force," in particular, extends to cover any "mechanism by which … harm is imposed," *id.*, especially because harm "can and does result from inaction, or, in other words, from the absence of any force at all," *Harris*, 88 F. 4th at 464 (Jordan, J. concurring in denial of reh'g en banc).

This results-oriented reasoning that discards the common meaning of the words in the statute is flatly inconsistent with the rule of lenity, which prohibits imposing criminal punishment "by straining the words so as to reach some conjectural policy, not avowed on the face of the statute." *United States* v. *Open Boat*, 27 F. Cas. 354, 357 (C.C.D. Me. 1829) (No. 15,968) (Story, J., on Circuit). "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." *Wiltberger*, 18 U.S. at 96. The case must be even stronger here, as this Court has repeatedly embraced the ACCA's ordinary meaning—that "physical force" requires "violent, active crimes." *Borden*, 593 U.S. at 437-438 (2021) (quoting *Johnson*, 559 U.S. at 139 and *Leocal*, 543 U.S. at 11).

There is no such strong case here. The "use of physical force" requires just that—the use of physical force. The Government's arguments can only highlight that the ACCA does not provide "a fair warning … to the world in language that the common world will understand," *McBoyle*, 283 U.S. at 27, that crimes of omission categorically involve the "use of physical force." The rule of strict construction therefore requires reversal.

III. The Rule Of Lenity Is Particularly Important In The Context Of Mandatory Minimums, Which Uniquely Threaten Arbitrary Consequences That Congress Did Not Intend

If the Court were to find that the Government's atextual gymnastics give rise to some manufactured ambiguity, then the rules of lenity and strict construction demand rejecting the interpretation "that disfavors the defendant." *Burrage*, 571 U.S. at 216. This conclusion is especially true here, as 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).

First, mandatory minimums increase the risks of "selective or arbitrary enforcement," *Kozminski*, 487 U.S. at 952, and of lengthy sentences imposed without fair notice. The rule of lenity mitigates these risks, promoting greater "uniformity" in criminal punishment, *Bryan*, 524 U.S. at 205 (Scalia, J., dissenting), and ensuring the "proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

The principal federal sentencing statute requires judges to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Limiting the scope of mandatory minimums thus still permits sentencing judges to

impose the statutory sentence when called for. But it also leaves courts free to employ sound, case-specific discretion where Congress would not have intended to punish so harshly—for example, in cases that do not involve "the eponymous 'armed career criminal.'" *Borden*, 593 U.S. at 438. An interpretation that broadens the scope of mandatory minimums, by contrast, forces trial court judges to impose longer sentences than are justified by application of the § 3553 factors to the facts of the case and the characteristics of the individual person standing before them for sentencing. *See* Conrad, *Testimony to the U.S. Sentencing Comm'n* 4 (Feb. 11, 2009) (stating that the "myopic focus" required by mandatory minimums "excludes other important sentencing factors normally taken into view by the Guidelines … such as role in the offense, use of violence, … and use of special skill").

As a consequence, mandatory minimums lead to "sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record." Hatch, *The Role of Congress in Sentencing*, 28 Wake Forest L. Rev. 185, 194-195 (1993). In these situations, "a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator." *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 38 (2009); *see id.* ("The ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct."). Thus, "the main practical effect of such statutes is to cause serious injustice in a minority of cases by requiring far harsher sentences than the facts of the case can

justify," *Scott*, 990 F.3d at 137 (Leval, J., dissenting), and indeed harsher sentences than Congress would have intended and that would be effectuated through strict construction of the statutory language.

Punitive interpretations of ambiguous mandatory sentencing statutes also unfairly deprive defendants of fair notice in the context of their disposition of the offenses that serve as the earlier predicate for ACCA treatment. When defendants consider defense strategies, they should know whether the conviction they are pleading to or risking conviction of can serve as a subsequent predicate for lengthy sentencing enhancements. *See* U.S. Sentencing Commission, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, ch. 5, at 97 & nn.523-524 (2011) ("*U.S.S.C. Report*"). In making that decision with respect to a crime of omission where no force was used, defendants were unlikely to think that their decision could "come back to haunt [them] in an ACCA sentencing 30 years in the future." *Descamps* v. *United States*, 570 U.S. 254, 270-271 (2013). The Court should thus reverse, draw a "clear" and restrictive line for crimes that qualify as predicate offenses, and avoid severely penalizing individuals who had no reason to know that they would later be at risk for increased sentences. *McBoyle*, 283 U.S. at 27.

Second, another core purpose of the rule of lenity is to "maintain the proper balance between Congress, prosecutors and courts." *Kozminski*, 487 U.S. at 952. This is especially important when a statute involves a mandatory minimum, which disrupts the balance between prosecutors and courts, and, in turn, widens the gap between actual application of the laws and what Congress intended. Prosecutors can and do threaten to bring—or offer to dismiss or reduce—charges carrying

mandatory minimums in order to obtain guilty pleas from defendants who have legitimate defenses and otherwise would exercise their constitutional right to go to trial. *U.S.S.C. Report*, ch. 5, at 97 & nn. 523-524 (the threat of mandatory minimums can be wielded as a "trial tax" to pressure defendants into accepting plea bargains).

Similarly, prosecutors use the threat of mandatory penalties to coerce "cooperation," even though cooperation motivated by fear and self-interest creates a dangerous risk of dishonesty. Osler, *Must Have Got Lost*, 54 S.C. L. Rev. 649, 663 & n.78 (2003) (mandatory minimums create "as much of an incentive to [provide] dishonest information as it is to honest information," motivating defendants to "lie to give prosecutors what the defendant thinks the prosecutor wants"). And unlike sentencing decisions by trial courts, charging decisions "are made outside of public view." *U.S.S.C. Report*, ch. 5, at 97; *see id.* ("66 percent" of judges ranked charging decisions "among the top three factors contributing to sentencing disparities").

"[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor." *Dubin* v. *United States*, 599 U.S. 110, 131 (2023). The rule of lenity prevents this usurping of power from Congress by ensuring that "legislatures … define criminal activity." *Bass*, 404 U.S. at 348.

These unjust results from mandatory minimums exemplify the types of "moral condemnation" that the rule of lenity is designed to cabin. *Bass*, 404 U.S. at 348. A court should have no reasonable doubts that Congress in fact intended to replace tailored judicial discretion with

blunderbuss mandatory minimums before the court imposes those minimums across the board, to be wielded by prosecutors "engaged in the often competitive enterprise" of obtaining convictions. *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). Limiting mandatory minimums to only those predicate offenses clearly intended by Congress respects the distinct roles of the legislature, the courts, and prosecutors; ensures fair notice for the individuals facings application of these harsh minimums; and more broadly helps build faith in the justice system.

CONCLUSION

Amici respectfully urge the Court to reverse the decision below.

Respectfully submitted.

JOSHUA L. DRATEL
CO-CHAIR, NACDL
AMICUS CURIAE
COMMITTEE
LAW OFFICE OF DRATEL
& LEWIS
29 Broadway, Suite 1412
New York, NY 10006

ALAN SCHOENFELD
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

MARY PRICE
SHANNA RIFKIN
COUNSEL FOR FAMM
1100 H Street, NW
Washington, DC 20005

THAD EAGLES
MEGAN GARDNER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037

AUGUST 2024