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 UNITED STATES

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QUESTION PRESENTED

Whether attempted murder, in violation of the Violent Crimes in Aid of Racketeering statute, 18 U.S.C. 1959(a)(5), is a crime of violence under 18 U.S.C. 924(c)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 83 F.4th 113. The withdrawn opinion of the court of appeals is reported at 36 F.4th 423. The summary order of the court of appeals (Pet. App. 16a-33a) is not published in the Federal Reporter but is available at 2022 WL 2068434. The decision and order of the district court (Pet. App. 34a-41a) is not published in the Federal Supplement but is available at 2018 WL 95939130. A subsequent opinion and order of the district court is not published in the Federal Supplement but is available at 2018 WL 1033242.

JURISDICTION

The amended judgment of the court of appeals was entered on October 2, 2023. A petition for rehearing was denied on December 14, 2023 (Pet. App. 42a). The petition for a writ of certiorari was filed on January 29,

2024, and was granted on June 3, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924(c)(1)(A) and (3) provide:

> (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.

Other pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to commit racketeering under the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d); one count of operating an illegal gambling business, in violation of 18 U.S.C. 1955 and 2; one count of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958; one count of conspiring to commit murder, in violation of the Violent Crimes in Aid of Racketeering (VICAR) statute, 18 U.S.C. 1959(a)(5); one count of VICAR attempted murder, in violation of 18 U.S.C. 1959(a)(5); and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i) and 2. Judgment 1-2. The court sentenced him to 300 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-15a, 16a-33a.

1. Petitioner was an associate in the Genovese Crime Family, part of "the larger criminal network known as 'La Cosa Nostra' in New York." Pet. App. 5a. Petitioner worked for Robert DeBello, a "made" member of the Family, and "participated in a variety of criminal activities," including helping to run an illegal sports-gambling operation in Queens. *Ibid.*; Presentence Investigation Report (PSR) ¶ 17.

In 2014, a local "bully," Joseph Bonelli, began causing problems for the owner of a gas station that petitioner and the Family frequented. Pet. App. 6a; see *id.* at 5a-6a. The Family also suspected Bonelli of "cooperating against 'known bookies in the neighborhood,' which made him a potential threat" to the Family's gambling business. *Id.* at 6a (citation omitted); see PSR ¶ 24. The gas-station owner paid petitioner to "organize[] a plot to murder Bonelli." Pet. App. 6a. Petitioner shared the payment with DeBello, received permission to kill Bonelli, and then paid an accomplice $5000 "to coordinate the murder with several members of the 'Crips' gang." *Ibid.*

Once a "murder crew" was assembled, petitioner gave the crew a brown paper bag containing a .38 revolver, provided the crew with a car, and sent the crew to murder Bonelli. Pet. App. 6a; PSR ¶¶ 26, 27. The crew drove to Bonelli's home and waited in a parking lot around the corner in order to ambush Bonelli when he returned. Pet. App. 6a; PSR ¶ 26. When Bonelli arrived home with another person, however, the potential for witnesses led the crew to abort the murder plan. Pet. App. 6a. Upon learning that the crew had not killed Bonelli, petitioner tried to get the crew "to return at once" and kill both Bonelli and his companion. *Ibid.* The crew refused, but agreed to return the next day. *Id.* at 6a-7a.

The next day, the crew reassembled and again drove to Bonelli's home. Pet. App. 7a. The crew brought the gun that petitioner had provided the day before, a change of clothes, and a spray bottle "believed to contain a bleach solution." PSR ¶ 27. While en route, the driver coordinated with petitioner. *Ibid.* But law-enforcement officers had learned of the plot, and they

intercepted and arrested the crew near Bonelli's home. Pet. App. 7a; PSR ¶ 27.

Shortly after the crew's arrest, petitioner "met with several of his co-conspirators and others in the Family to discuss the botched murder attempt." Pet. App. 7a. And when the accomplice petitioner had paid to coordinate the murder was released on bail, petitioner met with him and told him that they should stay in contact so that "maybe [they] could plan to get rid of [Bonelli] for good." *Ibid.* (quoting C.A. App. 154) (brackets in original).

2. A grand jury in the Southern District of New York charged petitioner with one count of conspiring to commit racketeering under the RICO Act, in violation of 18 U.S.C. 1962(d); one count of operating an illegal gambling business, in violation of 18 U.S.C. 1955 and 2; one count of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958; one count of conspiring to commit murder, in violation of the VICAR statute, 18 U.S.C. 1959(a)(5); one count of VICAR attempted murder, in violation of 18 U.S.C. 1959(a)(5); and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i). Second Superseding Indictment 2-20.

a. Section 924(c), the relevant form of which was enacted in 1986, specifies a mandatory consecutive sentence for using or carrying a firearm during and in relation to a "crime of violence," or possessing a firearm in furtherance of a "crime of violence." 18 U.S.C. 924(c)(1)(A); see Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 457. Section 924(c)(3) defines a crime of violence in two ways. First, the "elements clause" encompasses any federal felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of an-

other." 18 U.S.C. 924(c)(3)(A). Second, the "residual clause" includes any federal felony 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). In *United States* v. *Davis*, 588 U.S. 445 (2019), this Court held that the residual clause is unconstitutionally vague. *Id.* at 470.

This Court employs a "categorical approach" to determine whether an offense is a crime of violence under Section 924(c)(3)(A). *United States* v. *Taylor*, 596 U.S. 845, 850 (2022). Under that approach, a court "focus[es] solely" on "the elements of the crime of conviction," not "the particular facts of the case." *Mathis* v. *United States*, 579 U.S. 500, 504 (2016). The categorical approach assesses whether the "least culpable" conduct that could satisfy the offense elements in a hypothetical case would "necessarily involve[ ]" the "'use, attempted use, or threatened use of physical force against the person or property of another.'" *Borden* v. *United States*, 593 U.S. 420, 424 (2021) (plurality opinion) (quoting 18 U.S.C. 924(c)(3)(A)).

b. Although the underlying crime of violence for a Section 924(c) offense need not itself be charged as a separate count, see *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999), the Section 924(c) charge in petitioner's indictment listed several of the other charges as potential predicates. See Second Superseding Indictment 19-20. One of those predicates was the charge of attempted murder under the VICAR statute, 18 U.S.C. 1959(a)(5). See Second Superseding Indictment 20.

Section 1959(a)(5) prohibits, *inter alia*, "attempting * * * to commit murder" of any person, "in violation of

the laws of any State or the United States," "for the purpose of * * * maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. 1959(a)(5). Because the VICAR statute requires an underlying state or federal crime that constitutes attempted "murder," proving a VICAR violation requires showing that a defendant's conduct both qualifies as a violation of a state or federal attempted-murder statute and satisfies a generic federal definition of attempted "murder." See *United States* v. *Keene*, 955 F.3d 391, 398-399 (4th Cir. 2020). As a practical matter, if the relevant state or federal murder prohibition is substantially similar to or narrower than the generic definition, the jury may be instructed only as to the specific state or federal offense.

The charge of attempted murder underlying petitioner's Section 924(c) count was premised on petitioner's commission of New York attempted second-degree murder, in violation of New York Penal Law § 20.00 (McKinney 2009); *id.* § 110.00 (McKinney 2009); *id.* § 125.25(1) (McKinney 2009). Second Superseding Indictment 16-17. The applicable New York definition of second-degree murder covers conduct in which a defendant has "intent to cause the death of another person [and] causes the death of such person or of a third person." N.Y. Penal Law § 125.25(1) (McKinney 2009). Attempt under New York law, in turn, requires specific intent to commit the underlying crime and "conduct which tends to effect the commission of such crime." *Id.* § 110.00 (McKinney 2009); see *id.* § 20.00 (McKinney 2009) (aiding and abetting liability).

c. Before trial, petitioner moved to dismiss the Section 924(c) count, arguing that Section 924(c)'s residual clause was unconstitutionally vague and that none of the

charged predicates qualified as a crime of violence. D. Ct. Doc. 450, at 14-20 (Nov. 22, 2017). The district court denied the motion. Pet. App. 40a-41a.

The jury found petitioner guilty on all counts, with a special verdict form specifying that the verdict on the Section 924(c) charge was supported by each of the four charged predicates (the three conspiracies and the VICAR attempted murder). D. Ct. Doc. 568 (Mar. 29, 2018). The court sentenced petitioner to 300 months of imprisonment, consisting of a term of 240 months on the non-Section 924(c) counts and a consecutive 60-month sentence for the Section 924(c) offense, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-15a.[1]

In light of *Davis*, which was decided while petitioner's appeal was pending, the government acknowledged that the only viable predicate for the Section 924(c) charge was VICAR attempted murder. Oral Argument at 14:36-15:10 (2d Cir. Nov. 18, 2019); see Pet. App. 10a.

On appeal, petitioner asserted that VICAR attempted murder based on New York second-degree murder did not satisfy Section 924(c)'s elements clause because it can, in theory, be committed by "omission." Pet. C.A. Br. 48-49. Under New York law, criminal liability as a general matter can be premised either on "a

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[1] On June 8, 2022, the court of appeals issued both a published opinion rejecting petitioner's challenge to his Section 924(c) conviction, 36 F.4th 423, and a summary order disposing of petitioner's and his co-defendant's other claims, Pet. App. 16a-33a. A few weeks later, when this Court decided *United States* v. *Taylor*, which held that attempted Hobbs Act robbery is not a crime of violence under Section 924(c)(3)(A), see 596 U.S. at 860, petitioner successfully moved for panel rehearing, Pet. App. 4a. The court of appeals withdrew the earlier published opinion and issued an amended opinion that addressed petitioner's arguments "in light of *Taylor*." *Id.* at 5a.

voluntary act or the omission to perform an act which [the defendant] is physically capable of performing," N.Y. Penal Law § 15.10 (McKinney 2009), with the term "omission" defined as the "failure to perform an act as to which a duty of performance is imposed by law," *id.* § 15.00(3) (McKinney 2009).

The court of appeals rejected petitioner's argument. See Pet. App. 10a-15a. The court found "no question that intentionally causing the death of another person involves the use of force." *Id.* at 11a-12a (citing *United States* v. *Castleman*, 572 U.S. 157, 169 (2014)). The court further explained that, as applicable here, New York's attempt law "'categorically requires that a person take a substantial step toward the use of physical force,'" and thus "there can be no doubt that attempt to commit second-degree murder under New York law is itself categorically a crime of violence," *id.* at 12a-13a (citation omitted). And, relying on the recent en banc opinion in *United States* v. *Scott*, 990 F.3d 94 (2d Cir.), cert. denied, 142 S. Ct. 397 (2021), the court emphasized that "whether a defendant acts by commission or omission, in every instance, it is his intentional use of physical force against the person of another that causes death." Pet. App. 14a (quoting *Scott*, 990 F.3d at 123).

SUMMARY OF ARGUMENT

Petitioner's attempted murder offense—which is equivalent for present purposes to a completed murder offense—is a "crime of violence" under 18 U.S.C. 924(c)(3). Murder is a paradigmatically violent crime 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). Intentionally causing someone's body to cease functioning, whether by the "affirmative act" of shooting a gun or the "omis-

sion" of torturously starving a child, inherently involves making physical force the instrument of the victim's death. Text, precedent, context, and history all show that homicide and bodily-injury crimes lie at the core of the elements clause. Excluding such crimes would hollow out not only Section 924(c)(3), but elements clauses in other statutes, such as the prohibition against firearm possession by domestic abusers.

A. Section 924(c)(3)(A)'s text squarely encompasses offenses involving the intentional causation of bodily injury or death. As a threshold matter, such offenses necessarily involve "physical force," which this Court has defined as "force exerted by and through concrete bodies" that is "capable of causing physical pain or injury to another person." *Johnson* v. *United States*, 559 U.S. 133, 138, 140 (2010). Indeed, in a related context, this Court has expressly rejected the proposition that "one can cause bodily injury without the use of physical force." *United States* v. *Castleman*, 572 U.S. 157, 170 (2014) (citation and internal quotation marks omitted). Poisoning, for example, involves "physical force" because it involves "forceful physical properties" inside someone's body. *Id.* at 171 (citations omitted). A "disease," *id.* at 170 (citation omitted), or the starvation of a child, operate similarly.

Offenses involving the intentional causation of injury or death also necessarily involve the "use" of that force as the instrument of injury or death "against" the victim. The ordinary meaning of "use" includes "avail[ing] oneself of," or "carry[ing] out a purpose or action by means of." *Smith* v. *United States*, 508 U.S. 223, 229 (1993) (citations omitted). And the "against" clause simply requires that the victim be "the conscious object (not the mere recipient) of the force." *Borden* v. *United*

States, 593 U.S. 420, 430 (2021) (plurality opinion); *id.* at 446 (Thomas, J., concurring in the judgment). Intentional murder meets those requirements regardless of how it is accomplished.

A murderer "carries out his purpose" to kill his victim through a physical process whether he stabs the victim with a knife or withholds lifesaving medication that he is required to administer. As the Court has recognized, a poisoner uses force "not [by] the act of 'sprinkl[ing]' the poison," but by "the act of employing poison knowingly as a device to cause physical harm." *Castleman*, 572 U.S. at 171 (second set of brackets in original). The proper focus is thus on the physical harm that the defendant intentionally causes, not any "affirmative act" he may take. A defendant "employs" poison whether he places it in the cup or withholds an antidote that the law would require him to provide.

Common parlance, in which one can "use" preexisting forces like river currents, recognizes the equivalence. So does legal tradition, which has for centuries treated "affirmative acts" and "omissions" of required conduct as equivalent. As commentators recognized, a distinction between the two simply invites a meaningless word game: did the parent "omit" to provide food, or affirmatively "withhold" it? By the time Congress enacted Section 924(c)(3), most States had rejected such a distinction, and nothing in the elements clause indicates that Congress was adopting one.

B. Engrafting such a distinction onto the elements clause would not only be atextual, but also ahistorical—with calamitous consequences that Congress could not have intended. The history of Section 924(c)(3) and elements clauses in other statutes confirms that Congress included offenses like murder. Had Congress only in-

cluded "affirmative act" crimes, it would have risked excluding murder offenses in nearly every jurisdiction, along with numerous state assault and robbery offenses and a variety of federal offenses. In addition, petitioner's position here would, among other things, undo the Court's efforts to preserve numerous offenses as "crime[s] of domestic violence" under 18 U.S.C. 922(g)(9).

C. Petitioner provides no sound support for that position. His assertions that physical force must be external, and that "using" force requires taking an affirmative step, have no basis in the statutory text and cannot be squared with this Court's precedent. Nor does anything about the context, history, or purpose of Section 924(c)—an offense directed at using firearms in violent crimes—suggest an elements clause that would treat murder and similar crimes as non-forcible offenses based on a handful of "omission" scenarios that would not involve a firearm. And contrary to petitioner's claim, the elements clause—not the residual clause—is the natural home for a quintessentially violent crime like murder, which involves actual harm, not just the "risk" of it.

D. The traditional tools of statutory construction leave no "grievous ambiguity," *Castleman*, 572 U.S. at 173 (citation omitted), that would allow for application of the rule of lenity. To the contrary, the Court's precedents make particularly clear that a defendant necessarily uses physical force in committing a crime involving the intentional causation of physical injury—like the shooting that petitioner tried to arrange.

ARGUMENT

PETITIONER'S ATTEMPTED MURDER OFFENSE IS A CRIME OF VIOLENCE UNDER 18 U.S.C. 924(C)(3)

At least for purposes of the question presented here, petitioner does not dispute that attempted murder is a crime of violence under 18 U.S.C. 924(c)(3) so long as murder is. See 18 U.S.C. 924(c)(3)(A) (covering both "use" and "attempted use" of force); see, *e.g.*, Pet. Br. 18 (referring to "predicate offense of second-degree murder"). And murder is a quintessential crime of violence under Section 924(c)(3)(A). When a defendant intentionally causes the physical demise of another person, he has "use[d] * * * physical force against the person * * * of another." 18 U.S.C. 924(c)(3)(A). Accordingly, because New York second-degree murder requires intentionally causing the death of another, petitioner committed a crime of violence under Section 924(c).

The text, context, and history of Section 924(c) make clear that a crime like murder is a crime of violence irrespective of whether it can be committed by withholding required conduct, as when a parent torturously starves a child. As this Court's precedents show, deadly force involved in murder (i) may be purely internal (as with poison or a disease), see *United States* v. *Castleman*, 572 U.S. 157, 170 (2014); (ii) necessarily qualifies as "force capable of causing physical pain or injury to another person" when it actually causes death, *Johnson* v. *United States*, 559 U.S. 133, 140 (2010); and (iii) is "employ[ed]" by the defendant "as a device to cause physical harm" when it functions as the murder weapon, *Castleman*, 572 U.S. at 171. Contrary to petitioner's argument, Section 924(c) does not require an "affirmative" act or impose other conditions that would eliminate not

only murder crimes, but also many assault and robbery offenses, as "crime[s] of violence," 18 U.S.C. 924(c)(3), "violent felon[ies]," 18 U.S.C. 924(e)(2)(B), and "crime[s] of domestic violence," 18 U.S.C. 922(g)(9), under statutes specifically designed to cover those offenses.

A. Intentionally Causing Bodily Injury Or Death Requires The Attempted Use Of Physical Force Against The Person Of Another

The language of the elements clause readily encompasses offenses in which a defendant intentionally causes, or attempts to cause, bodily injury or death to another, regardless of how the injury manifests. Whether the injury arises from intentionally firing a bullet or intentionally starving a child, the crime involves the "use" or "attempted use * * * of physical force against the person * * * of another." 18 U.S.C. 924(c)(3). The potential for crimes to be committed by withholding required conduct—a feature of many canonically violent crimes like murder—is no basis for excluding those offenses from the elements clause.

1. Intentionally causing death requires "physical force"

The term "'physical force' * * * refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." *Johnson*, 559 U.S. at 138 (citation omitted). And when used in the context of a statutory definition of a crime of violence, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. As this Court's precedent illustrates, causing a person's body to cease functioning satisfies both requirements.

a. In *United States* v. *Castleman*, the Court addressed the scope of a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. 922(g)(9)'s prohibition against firearm possession by domestic abusers. That term is defined, in part, through an elements clause, which requires that the crime "has, as an element, the use or attempted use of physical force." 18 U.S.C. 921(a)(33)(A)(ii) (2012). In holding that the definition encompasses the crime of "intentionally or knowingly caus[ing] bodily injury" to a domestic partner, the Court recognized that "a 'bodily injury' *must* result from 'physical force.'" *Castleman*, 572 U.S. at 169-170 (emphasis added; citation omitted). The same logic applies here.

As *Castleman* explained, the relevant "physical force" is not the act of the defendant, but the basis for the injury. "That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." *Castleman*, 572 U.S. at 171. The Court squarely rejected the proposition that "one can cause bodily injury without the use of physical force—for example, by deceiving [the victim] into drinking a poisoned beverage, without making contact of any kind." *Id.* at 170 (citation and internal quotation marks omitted; brackets in original). Although the perpetrator may use only intellectual "force" to trick the victim into drinking the beverage, the offense nonetheless categorically involves the "physical force" of the poison "caus[ing] physical harm" to the victim's body. *Id.* at 171. The "physical force" in that scenario is the poison's "forceful physical properties as a matter of organic chemistry." *Ibid.* (citations and internal quotation marks omitted).

What is true for poison is likewise true for other sources of harm, like starvation or disease. Whether by

poison, starvation, or lack of medicine, what causes harm or death is the physical impediment of a bodily process through the presence of a substance harmful to the body's physical functioning (*e.g.*, poison or disease) or the absence of a substance necessary to the body's physical survival (*e.g.*, food or medication). Poisoning involves "a toxic level" of a chemical that "accumulate[s] in the cells of the target or tissue," which "injur[es]" the cells and "disrupts their normal structure or function." Bruce W. Halstead & Curtis D. Klaassen, *Poison*, Encyclopedia Britannica (Sept. 4, 2024), https://www.britannica.com/science/poison-biochemistry. Similarly, starvation involves the "body break[ing] down its own muscles and other tissues." Roopam Bassi & Saurabh Sharma, *Starvation—By "Ill" or by "Will,"* 2 Current Trends in Diagnosis & Treatment 32 (2018), https://www.ctdt.co.in/doi/pdf/10.5005/jp-journals-10055-0034 (*Starvation*); see *id.* at 34-35. And bodily disease is a "condition of the body, or of some part or organ of the body, in which its functions are disturbed or deranged." 3 *The Oxford English Dictionary* 441 (1978) (*OED*).

b. Because *Castleman* involved "physical force" in the context of a misdemeanor, its reasoning looked to the meaning of "applying force in the common-law sense." 572 U.S. at 170. The Court did not address the further requirement, applicable to felony-level force, that it be "*violent* force—that is, force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140; see *Castleman*, 572 U.S. at 163-166. But as Justice Scalia's concurrence in *Castleman* recognized, force that causes bodily harm—or death—satisfies that requirement as well. See 572 U.S. at 174.

As Justice Scalia explained, it "is impossible to cause bodily injury without using force 'capable of' producing

that result." *Castleman*, 572 U.S. at 174 (Scalia, J., concurring in part and concurring in the judgment). Force that causes bodily injury is therefore "violent force," *Johnson*, 559 U.S. at 140 (emphasis omitted)—which is, "after all, * * * simply physical force distinguished by the degree of harm sought to be caused." *United States* v. *Báez-Martínez*, 950 F.3d 119, 132 (1st Cir. 2020), cert. denied, 141 S. Ct. 2805 (2021).

The distinction in the potential *harmfulness* of the force does not suggest a difference in what the relevant force *is*. The focus of the inquiry remains the same as in *Castleman*: on the "'forceful physical properties'" of poison, not the gentle "sprinkling" of it; the "bullet * * * that actually strikes the victim," not the "pulling [of] the trigger"; or the car crash, not the "'intangible' * * * laser beam" that blinds the driver. 572 U.S. at 170-171 (brackets and citations omitted).

Nothing suggests that such injurious or deadly harms would involve "physical force" for misdemeanor purposes, but not felony purposes. Were it otherwise, murder would be disqualified as a crime of violence simply because it can be committed by poisoning (or pulling a trigger)—a result that even petitioner disavows. Br. 7, 13, 31-32.

2. Intentionally causing death requires the "use" of physical force "against the person or property of another"

Ordinary meaning, precedent, and the relevant legal backdrop likewise show that intentionally causing someone's death satisfies Section 924(c)(3)(A)'s requirement that the force be "use[d] * * * against the person or property of another." 18 U.S.C. 924(c)(3)(A). Whether through "act" or "omission," the harm-causing force is the means through which the defendant kills his victim.

a. The deliberate employment of deadly force to kill a victim is the "use" of force "against the person or property of another"

i. As this Court observed in *Smith* v. *United States*, 508 U.S. 223 (1993), the "ordinary," "natural," "everyday meaning" of the word "use" requires only that a person "'make use of'" something, "'convert [it] to one's service,'" "'employ [it],'" "'avail oneself of [it],'" "'carry out a purpose or action by means of [it],'" or "'derive service from [it].'" *Id.* at 228-229 (citations omitted). Dictionaries at the time that Section 924(c)(3)(A) was enacted include similarly expansive definitions. See, *e.g.*, 11 *OED* 471 ("[t]o make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose"; "[t]o employ or make use of (an article, etc.,) esp. for a profitable end or purpose; to utilize, turn to account"); *Black's Law Dictionary* 1381-1382 (5th ed. 1979) ("[t]o make use of, to convert to one's service, to avail one's self of, to employ"; "to employ for or apply to a given purpose"; "to carry out a purpose or action by means of").[2] Accordingly, in *Smith*, the Court interpreted "use" in another (then-current) provision of Section 924(c) as "sweep[ing] broadly" and cautioned against limiting the term to "the example of 'use' that most immediately comes to mind" when doing so would

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[2] See also, *e.g.*, *Webster's Third New International Dictionary of the English Language* 2523-2524 (1986) ("to put into action or service: have recourse to or enjoyment of"; "to carry out a purpose or action by means of: make instrumental to an end or process: apply to advantage"); *Webster's Ninth New Collegiate Dictionary* 1299 (1985) ("to put into action or service: avail oneself of: employ"; "to carry out a purpose or action by means of") (capitalization omitted); *The Random House College Dictionary* 1448 (rev. ed. 1980) ("to employ for some purpose; put into service; make use of"; "to avail oneself of; apply to one's own purposes").

"exclude[] any other use" that is consistent with "dictionary definitions and experience." 508 U.S. at 229-230 (emphasis omitted).

This Court's subsequent decisions illustrate that a similarly broad definition applies here. In interpreting the term "use" in the definition of a misdemeanor crime of domestic violence, the Court in *Voisine* v. *United States*, 579 U.S. 686 (2016), looked to verb forms of the word and embraced prior decisions—including *Smith*—explaining that it means "'to convert to one's service,' 'to employ' or 'to avail oneself of,'" and "to employ or to derive service from." *Id.* at 692 n.3 (2016) (brackets and citations omitted) (quoting *Bailey* v. *United States*, 516 U.S. 137, 145 (1995); *Smith*, 508 U.S. at 229; *Astor* v. *Merritt*, 111 U.S. 202, 213 (1884)).

And as the plurality in *Borden* v. *United States*, 593 U.S. 420 (2021), recognized, the meaning of "use" in the misdemeanor crime of domestic violence provision at issue in *Voisine* is no different from the meaning of "use" in an elements clause like Section 924(c)(3)(A)'s. Construing the nearly identical elements clause in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), the *Borden* plurality made clear that "the word 'use' * * * is indeed the same" there as it was in *Voisine*. 593 U.S. at 442; see *Castleman*, 572 U.S. at 170-171 (relying on *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), in interpreting the word "use" in the definition of a misdemeanor crime of domestic violence).

The "textual difference," *Borden*, 593 U.S. at 442 (plurality opinion), between an elements clause like the ACCA's or Section 924(c)(3)(A)'s and the one in *Voisine* is that Section 924(c)(3)(A)'s requires the "use" (or attempted or threatened use) of force "against the person or property of another," 18 U.S.C. 924(c)(3)(A). But the

additional phrase simply requires that the victim be "the conscious object (not the mere recipient) of the force," necessitating a mens rea greater than recklessness. *Borden*, 593 U.S. at 430 (plurality opinion); see *id.* at 433 (plurality opinion) (suggesting that the additional language would otherwise be "surplusage"); *id.* at 446 (Thomas, J., concurring in the judgment). That phrase does not alter the broad meaning of "use," see *id.* at 442 (plurality opinion), let alone suggest that intentional murder is not a "crime of violence" under Section 924(c)(3) when physical force is deliberately employed to kill a victim.

ii. The statutory text therefore plainly encompasses intentional murder. And it does so irrespective of whether the criminal's conduct can be characterized as an "omission." A defendant who intends to cause death by withholding a duty owed to another can "employ," "utilize," "avail himself of," or "carry out [his] purpose" by means of existing physical force even if he does not directly initiate that force.

For example, a lifeguard who sees his enemy drowning in the water can make use of the force of the water and the lack of oxygen in the victim's lungs to end that enemy's life. A parent who starves his child to death avails himself of the physical processes of the child's body to fulfill his own purposes. See *Starvation* 34-35. And a caretaker intent on ridding himself of a patient can carry out that intent by withholding life-saving medicine, thereby using an existing disease to cause the patient's death. See 3 *OED* 441. In each case, the perpetrator "causes death by breaching a legal duty to check or redress violent force *because* he intends thereby for that force to cause serious physical injury" to his victim. *United States* v. *Scott*, 990 F.3d 94, 101

(2d Cir.) (en banc), cert. denied, 142 S. Ct. 397 (2021). In doing so, he "is making that force his own injurious instrument" against his target. *Ibid.*

The poisoning example from *Castleman* is directly on point. The Court recognized that "the word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." 572 U.S. at 170-171 (citation omitted). And the Court explained that the "use of force" in poisoning "is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm." *Id.* at 171 (brackets in original). Thus, the "use" of force in murder—whether it be committed by poison, gun, starvation, suffocation, or preexisting disease, see *id.* at 170-171—necessarily involves "employing" lethal force to effect the death, *id.* at 171. That can be accomplished by abstaining from a legal duty, so as to allow a physical force to kill the victim, just as much as it can by any other deliberate employment of force.

iii. Notwithstanding the consistent teachings of dictionaries and this Court's precedents construing the relevant terms, petitioner asserts (Br. 12-13) that in common parlance, to "use" force requires an affirmative action to "convert[] force to [the actor's] service" and that Section 924(c)(3)(A) should incorporate such a limitation. That assertion is unsound.

A car owner, for example, can "use" the force of the rain to wash off grime simply by leaving the car parked on the street. A farmer can "use" the force of wind or a rushing stream to power a pump simply by allowing a windmill or water wheel to continue functioning. And a rancher can "use" the force of a natural brush fire to clear unwanted scrub by not taking affirmative steps to put the fire out.

This Court has itself referred to the "use" of forces that the actor did not "unleash[]," Pet. Br. 13. In *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, 569 U.S. 576 (2013), this Court explained how the process of synthetically creating DNA "uses the natural bonding properties of nucleotides to create a new, synthetic DNA molecule." *Id.* at 582. Those natural properties long predate the scientists. The Court's application of "use" reflects unexceptional English terminology.

Newspaper articles report that, for example, the Orion capsule "us[ed] lunar gravity to sling itself back to Earth for a Pacific Ocean splashdown." Kenneth Chang, *NASA Delays Artemis Astronaut Moon Missions*, N.Y. Times, Jan. 10, 2024, at A11. Gangs "us[ed] the darkness and crowds as cover to settle scores." William Neuman & Natalie Keyssar, *Despite Tighter Security, J'Ouvert Revelers Feel the Rhythm*, N.Y. Times, Sept. 4, 2018, at A15. A sea lion at the Central Park Zoo "used the flooding to escape briefly from her enclosure." Hurubie Meko, *Prospect Park Zoo Remains Closed After Severe Flood Damage*, N.Y. Times, Oct. 14, 2023, https://www.nytimes.com/2023/10/14/nyregion/prospect-park-zoo-closed-flooding.html. Modern greenhouses "use energy from the sun to grow plants horizontally." Amrith Ramkumar & Patrick Thomas, *Funds Dry Up for High-Tech Farm Startups*, Wall St. J., May 26, 2023, at B1. The human body "use[s] all its metabolic resources to fight off disease." Angela Chen, *The Real Season for Bad Colds,* Wall St. J., Aug. 27, 2013, at D1.

It is similarly unremarkable to say that river rafters "use the current to paddle from one side of the river to the other." Neil Ulman, *Surviving White Water*, Wall

St. J., June 7, 1996, at A10. And as the government observed in briefing at the certiorari stage (Br. 14), rafters would likewise be "us[ing] * * * the river's natural current" if they were not paddling at all, but simply taking advantage of the current to carry them onward. Petitioner asserts (Br. 32) that the river-rafting example does not count because even if the rafter sits idly on the raft, allowing the current to carry him forward, he must take some action to position himself and the raft in the first instance. But "use" of the current does not depend on some preceding action. A rafter involuntarily thrown off a boat onto the raft could likewise "use" the current to travel downriver.

b. The law of murder and other crimes has traditionally viewed "omissions" as "acts"

Petitioner's effort to introduce an affirmative act requirement into Section 924(c)(3)(A)'s elements clause is not only atextual, but also conflicts with the longstanding legal equivalence between "acts" and "omissions." The criminal law generally does not play word games about whether denying medicine should be described as "failing to provide" it or affirmatively "withholding" it. Either would typically lead to criminal liability, and legal authorities would describe both as the "use" of force. Congress presumably understood that and meant for Section 924(c)(3)(A) to work the same way.

i. Recognition of the equivalence of affirmative acts and acts of omission for purposes of criminal liability dates back at least to Roman times. Roman law "penalized homicide brought about by means of wilful starvation, or by failure to complete a surgical operation." Otto Kirchheimer, *Criminal Omissions*, 55 Harv. L. Rev. 615, 615 (1942).

English law likewise rejected a distinction between affirmative acts and omissions. Blackstone, for example, described a "crime" as "an act committed, or omitted, in violation of a public law, either forbidding or commanding it." 4 William Blackstone, *Commentaries on the Laws of England* 5 (1769) (capitalization omitted). And in addressing murder, Hawkins explained that "he who wilfully neglects to prevent a Mischief, which he may, and ought to provide against, is, as some have said, in Judgment of the Law, the actual Cause of the Damage which ensues." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 79 (1716).

In accord with those authorities, English defendants could be, and were, charged with and convicted of homicide or manslaughter for abstaining from a required duty, such as the duty to feed a child. See *Regina* v. *Conde*, (1867) 10 Cox C.C. 547 (willful murder charge against parents, mother convicted of manslaughter); see also, *e.g.*, *Regina* v. *Marriott*, (1838) 173 Eng. Rep. 559 (defendant convicted of manslaughter for confining an elderly woman without food); *Rex* v. *Saunders*, (1836) 173 Eng. Rep. 122, 123 (noting that if a woman's "husband supplied her with food for [an illegitimate] child, and she wilfully neglected to give it to the child, and thereby caused its death, it might be murder in her"); *Rex* v. *Friend*, (1802) 168 Eng. Rep. 662 (defendant indicted for failure to provide sufficient food and bedding to an apprentice). While some defendants were acquitted for lack of sufficient evidence of a duty, see, *e.g.*, *Saunders*, 173 Eng. Rep. at 123, "omission" of a required act was an accepted basis for homicide liability.

ii. American law followed the same course. In *Territory* v. *Manton*, 19 P. 387 (Mont. 1888), for example, the Supreme Court of the Territory of Montana upheld

a husband's manslaughter conviction for leaving his intoxicated wife lying in the snow, causing her to die from exposure. See *id.* at 393-394. The court explained that "wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting it is guilty of a felonious homicide." *Id.* at 392 (quoting 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 689, at 375 (4th ed. 1868) (Bishop)). The court held that "[t]he very volition of the defendant which led him to refuse aid to his wife, when the law imposed the duty upon him to protect her, is transferred to the violence of the elements, and he is made to *use their forces*, and hence is responsible for the death they immediately caused." *Ibid.* (emphasis added).

The court in *Manton* thus both rejected a distinction between affirmative acts and "'omission[s],'" and expressly described the husband's conduct as a "use [of] force[]" to cause death. 19 P. at 392. Other American jurisdictions similarly based criminal convictions on such "omissions." See, *e.g.*, *People* v. *Beardsley*, 113 N.W. 1128, 1128 (Mich. 1907) ("The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter."); *State* v. *Smith*, 65 Me. 257, 267 (1876) ("It is settled beyond a question that the naked negligent omission of a known duty, when it causes or hastens the death of a human being, constitutes manslaughter.").

As an early treatise cited in *Manton* explained—in a section on "[t]he kinds of force by which life is taken"—"whenever the volition, of whatever kind, put forth by one man, results in the death of another man, the former is to be charged with having committed the homi-

cide." Bishop § 682, at 371. The treatise emphasized that "it is immaterial whether the action be of the mind or the body; whether it operated solely, or concurrently with other things; * * * whether it was a blow, or a drug, * * * or a leaving of a dependent person in a place of exposure, or any omission of a duty which the law enjoins." *Ibid.* (footnotes omitted).

iii. The longstanding refusal to draw a rigid distinction between affirmative "acts" and "omissions" has sound conceptual grounding. As commentators have recognized, "[t]here is no such thing, in fact, as an omission that can be treated as an absolute blank. A man who is apparently inactive is actually doing something, even though that something is the cancelling of something else that he ought to have done." Francis Wharton, *A Treatise on the Law of Homicide in the United States* § 72, at 50 (2d ed. 1875). Put another way, "the relevant 'act' consists not of the forbearance, but of overtly doing something other than what the defendant was legally obliged to do." Jerome Hall, *General Principles of Criminal Law* 198 (2d ed. 1960) (Hall). Nero did not merely "omit" to rescue Rome; he fiddled while it burned.

There is no reason to differentiate between a caregiver who affirmatively removes life-giving medication from a bedridden patient's reach and a caregiver who otherwise withholds the medication in violation of his duty to provide it. The former case might be classified as an affirmative act in which "the defendant initiates the subjection of his victim to certain physical forces or * * * initiates the aggravation of already operative forces." Hall 197. And the latter might be characterized as an "omission," in which the defendant "does not initiate the occurrence of the harm, but he permits cur-

rent forces to take a toll which he could prevent." *Ibid.* But "there is no essential difference in conduct or causation." *Ibid.* In both cases, "there is *use of*, there is 'cooperation with,' *those external forces*." *Ibid.* (emphasis added).

iv. Consistent with that view, by the time Congress enacted Section 924(c) and the "crime of violence" definition, the Model Penal Code had long taken the position that an omission when there is a duty to act should be treated as a criminally culpable action. See Model Penal Code § 1.13(7) (1985) (as adopted at the 1962 Annual Meeting of the American Law Institute, May 24, 1962). And by the time the elements clause was first incorporated into Section 924(c), New York and at least 34 other jurisdictions had likewise enacted statutes adopting that view. See N.Y. Penal Law § 15.00(3) and (5) (1975) ("'Omission' means a failure to perform an act as to which a duty of performance is imposed by law" and "'[t]o act'" includes "omit[s] to perform an act.").[3]

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[3] See Ala. Code § 13A-2-1(3) (1982); Alaska Stat. § 11.81.900(b)(5) and (36) (1983); Ariz. Rev. Stat. Ann. § 13-105(4) (Supp. 1982); Ark. Code Ann. § 41-201 (1977); Cal. Penal Code § 15 (1872); Colo. Rev. Stat. § 18-1-501(7) (1978); Del. Code Ann. tit. 11 § 233(b) (1979 & Supp. 1984); Ga. Code Ann. § 16-2-1 (1984); Haw. Rev. Stat. Ann. § 702-203 (1976); Idaho Code Ann. § 18-109 (1979); Ill. Rev. Stat. ch. 38, tit. II, § 4-1 (1983); Ind. Code § 35-41-2-1(a) (Supp. 1984); Iowa Code § 702.2 (1982); Kan. Stat. Ann. § 21-3105 (Supp. 1984); Ky. Rev. Stat. Ann. § 501.030(1) (1980); La. Rev. Stat. Ann. § 14:8 (1974); Mich. Comp. Laws Ann. § 750.5 (1968); Mo. Rev. Stat. § 562.011 (1978); Mont. Code Ann. §§ 45-2-101, 45-2-202 (1983); Neb. Rev. Stat. Ann. § 28-109(5) and (13) (1979); N.H. Rev. Stat. Ann. § 626:1(I) (Supp. 1971); N.J. Stat. Ann. § 2C:2-1(b) (1982); N.M. Stat. Ann. § 30-1-4 (1978); N.D. Cent. Code § 12.1-02-01(2) (Supp. 1975); Ohio Rev. Code Ann. § 2901.21 (1982); Okla. Stat. tit. 21, § 3 (1958); Or. Rev. Stat § 161.085(3) and (4) (Supp. 1983); 18 Pa. Cons. Stat.

In seven additional jurisdictions, courts had endorsed "omissions" liability in cases of murder or manslaughter.[4] And other jurisdictions have since recognized such liability—in cases that presumably describe what the law has always been, see *George* v. *McDonough*, 596 U.S. 740, 751 (2022) (acknowledging "general principle[]" that "a judicial decision states what [a] statute '*always* meant'") (citation omitted).[5] Indeed, the government is not aware of any jurisdiction that has expressly rejected omissions liability.[6]

When Congress enacted Section 924(c), it presumably "was aware of the[] background principles recognizing that the elements of a crime—including the causation elements of crimes such as murder and manslaughter—can be satisfied by acts of omission as well as acts of commission." *Scott*, 990 F.3d at 115; see, *e.g.*, *Miles* v.

Ann. § 301(a) and (b) (1983); R.I. Gen. Laws § 11-1-1 (1981); Tex. Penal Code Ann. § 6.01(a) and (c) (1984); Utah Code Ann. § 76-1-601(2) and (4) (1978); Wash. Rev. Code § 9A.04.110(1), (2), and (14) (1983); P.R. Laws Ann. tit. 33, § 3041 (1984); V.I. Code Ann. tit. 14, § 1 (1964).

[4] See *State* v. *Spates*, 405 A.2d 656 (Conn. 1978); *State* v. *Smith*, 65 Me. 257 (1876); *Commonwealth* v. *Hall*, 78 N.E.2d 644 (Mass. 1948); *State* v. *Staples*, 148 N.W. 283 (Minn. 1914); *Zessman* v. *State*, 573 P.2d 1174 (Nev. 1978); *State* v. *Barnes*, 212 S.W. 100 (Tenn. 1919); *Faunteroy* v. *United States*, 413 A.2d 1294 (D.C. 1980).

[5] See *State* v. *Evangelista*, 353 S.E.2d 375 (N.C. 1987); *State* v. *Valley*, 571 A.2d 579 (Vt. 1989); *Davis* v. *Commonwealth*, 335 S.E.2d 375 (Va. 1985); *State* v. *Williquette*, 385 N.W.2d 145 (Wis. 1986).

[6] In *State* v. *Miranda*, 878 A.2d 1118 (2005) (per curiam), the Supreme Court of Connecticut reversed an assault conviction premised on "failing to protect the victim from physical abuse," *id.* at 1120, without reaching a consensus about the general issue of "omission" liability. See *id.* at 1123; see *id.* at 1140-1154 (Vertefeuille, J., concurring); *id*. at 1130 (Borden, J., concurring); *id.* at 766-790 (Katz, J., dissenting).

Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."). There is every reason to believe that Congress intended the elements clause to encompass those principles. See *Samantar* v. *Yousuf*, 560 U.S. 305, 320 n.13 (2010) ("Congress 'is understood to legislate against a background of common law . . . principles.'") (citation omitted).

B. Excluding "Omissions" Would Defeat The Design Of Section 924(c)(3)(A) And Similar Elements Clauses By Cutting Out Paradigmatically Violent Crimes

The genesis of the elements clause in Section 924(c), and similarly worded elements clauses, underscores that Congress designed the clause to encompass quintessentially violent offenses like murder, assault, and robbery—many of which would be at risk of exclusion under petitioner's reading. The Court should not adopt an interpretation that would effectively render Section 924(c)—as well as other elements-clause statutes like the domestic-abuser proscription in Section 922(g)(9)—"self-defeating." *Quarles* v. *United States*, 587 U.S. 645, 654 (2019).

1. As petitioner recognizes (Pet. 27-28), adopting his interpretation of the elements clause in Section 924(c)(3)(A) would have broad ramifications for materially identical language in numerous statutes. Analogous clauses appear in, or are cross-referenced by, the ACCA, see 18 U.S.C. 924(e); the pretrial detention statute, see 18 U.S.C. 3142(g); the Immigration and Nationality Act, see 8 U.S.C. 1101(a)(43)(F); the Sentencing Guidelines, see Sentencing Guidelines § 4B1.2(a)(1); and the prohibition on firearm possession by misdemeanant domestic abusers, see 18 U.S.C. 922(g)(9).

Contrary to petitioner's contentions (Br. 25-27), the history of the most similar clause—the ACCA's definition of a potentially sentence-enhancing "violent felony," see 18 U.S.C. 924(e)(2)(B)(i)—cuts against him. The current version of the ACCA was an effort to retain its "original predicate offenses" of robbery and burglary, while also giving the statute "greater sweep" by amending it "to apply to career criminals whose prior offenses may be murder" or "rape." *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 44, 46-47 (1986) (statement of Senator Specter) (*ACCA Hearing*). And the House Report for the relevant 1986 amendment specifically identified "murder, rape, assault [and] robbery" as among the crimes "involving physical force against a person"—*i.e.*, elements-clause crimes. H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986); see *ACCA Hearing* 2 (Rep. Hughes urging amendment of the ACCA to reach "murder, rape, assault, robbery, et cetera," which he viewed as "felonies involving physical force against a person").

The specific definition of "crime of violence" in Section 924(c) has a similar pedigree. In adopting that definition in several places in the code, see *United States* v. *Davis*, 588 U.S. 445, 460 (2019), the Senate Judiciary Committee explained that the elements clause "would include a threatened or attempted simple assault or battery on another person," S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (footnotes omitted). In contrast, "offenses such as burglary * * * would be included in the latter" residual clause, "inasmuch as such an offense would involve the substantial risk of physical force against another person or against the property." *Ibid.*

That explanation indicates that Congress viewed the elements clause as encompassing crimes, like certain forms of battery, in which physical injury necessarily results, or was threatened or attempted, and thus the "use, attempted use, or threatened use of physical force" is always present. 18 U.S.C. 924(c)(3)(A); see 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2(a), at 750 (3d ed. 2018) (describing one form of battery as requiring a "bodily injury"). The residual clause, in contrast, was focused on crimes with merely a "*risk*" that physical force "*may* be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B) (emphases added), and thus bodily injury was not guaranteed.

2. Construing the elements clause to exclude crimes that may be completed by withholding required conduct would eviscerate Section 924(c)(3)(A) and similarly worded elements clauses. Had Congress intended to exclude such crimes at the time it enacted Section 924(c)(3)(A), it would have risked excluding federal offenses such as murder in violation of 18 U.S.C. 1111; voluntary manslaughter in violation of 18 U.S.C. 1112(a); and retaliating against a witness and causing bodily injury in violation of 18 U.S.C. 1513(b). See App., *infra*, 25a-27a; see *United States* v. *Christie*, 717 F.3d 1156, 1160-1161 (10th Cir. 2013) (federal conviction for second-degree murder based on failure to feed a child). And for purposes of offenses incorporated into federal law by the VICAR statute and other statutes—and, even more significantly, for purposes of the ACCA's elements clause—such an approach would have risked excluding murder offenses in 48 jurisdictions, assault or battery offenses in 27 jurisdictions, and robbery offenses in 9 jurisdictions, that involve causing or threatening bodily injury or death. See App., *infra*, 11a-24a.

This Court has "repeatedly declined to construe" elements clauses "in a way that would render [them] inapplicable" to crimes in numerous States. *Stokeling* v. *United States*, 586 U.S. 73, 81 (2019) (declining to construe "physical force" in ACCA's elements clause in a way that would exclude at least 31 States' robbery statutes); see *Voisine*, 579 U.S. at 695 (declining to construe 18 U.S.C. 921(a)(33)(A) (2012) in a way that would "jeopardize" 18 U.S.C. 922(g)'s efficacy in 34 States plus the District of Columbia); *Castleman*, 572 U.S. at 167-168 (declining to construe definition of "misdemeanor crime of domestic violence" in a way that would render Section 922(g)(9) "ineffectual in at least 10 States"). The Court should take the same approach here.

Indeed, excluding "omissions" would largely undo this Court's work in *Castleman* and *Voisine* to preserve the domestic-violence crimes that are predicates under Section 922(g)(9). Because the term "use" is the same there as here, see *Borden*, 593 U.S. at 430 (plurality opinion), petitioner's reading of "use" would appear to exclude many of the very same assault laws that *Castleman* and *Voisine* preserved. The vast majority of those crimes involve causation of injury that might be accomplished by withholding required conduct. See U.S. Br. App. at 10a-29a, *Castleman*, *supra* (No. 12-1371) (gathering state laws); U.S. Br. App. at 7a-24a, *Voisine*, *supra* (No. 14-10154) (same).

That result cannot be squared with Congress's enactment of Section 922(g)(9) "to bar those domestic abusers convicted of garden-variety assault" misdemeanors, which are frequently based on the "infliction of bodily harm," *Voisine*, 579 U.S. at 695—or the Court's approach in *Castleman* and *Voisine*.

C. Petitioner's Reading Of Section 924(c) Is Textually And Practically Unsound

Petitioner provides no sound reason to excise murder and numerous other offenses from elements clauses. Lacking grounding in the text, structure, purpose, or history of Section 924(c) for the extraordinary conclusion that murder is not a crime of violence, petitioner attempts to impose extratextual limitations on the statute, engages in self-contradictory reasoning, and incorrectly assumes that the least-culpable version of the crime is the *only* one Congress would have considered relevant.

1. Physical force does not require external physical contact

Petitioner's assertion that "'physical force'" must originate "from contact with the external world" cannot be squared with either this Court's precedent or common understanding. Br. 17-18 (citation omitted). As previously noted, see p. 17, *supra*, petitioner himself repeatedly acknowledges that poisoning—which can be accomplished through a nonviolent "sprinkling," *Castleman*, 572 U.S. at 171 (brackets omitted)—would involve "physical force." And as previously explained, see p. 21, *supra*, *Castleman* identifies the "physical force" in cases involving poison, disease, and the like as the *internal* force within the body that causes physical injury or death. 572 U.S. at 170-171 (citations omitted).

Despite accepting the poisoning example, petitioner nonetheless insists (Br. 37-38) that *Castleman* is irrelevant because it addressed misdemeanor-level common-law force rather than felony-level violent force. But as already explained, pp. 16-17, *supra*, the only relevant difference between common-law force and violent force is the potential *harmfulness* of the force. The additional

requirement for force to be violent—"force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140—plainly exists when the force actually causes physical pain, injury, or death. See *Castleman*, 572 U.S. at 174 (Scalia, J., concurring in part and concurring in the judgment).[7]

Petitioner finds no support for his position in *Stokeling* v. *United States*. There, the Court held that "force sufficient to overcome a [robbery] victim's resistance" qualifies as violent force, but that "[m]ere 'snatching of property from another,'" without resistance from the victim, does not. 586 U.S. at 75, 85-86 (citation omitted). But petitioner errs in asserting that "[i]f the amount of force involved in the snatching of property from another falls short of satisfying the elements clause, 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." Br. 21-22 (citation omitted). If the only force involved is the snatching, then it is not categorically capable of causing pain or injury. But the op-

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[7] Petitioner notes (Br. 38 n.8) that Justice Scalia's concurrence in *Castleman* criticized an amicus's broad reading of the "misdemeanor crime of domestic violence" definition to include, *inter alia*, "acts of omission," 572 U.S. 181 (citation omitted). But that reference to "acts of omission"—which was listed alongside acts that "humiliate, isolate, [and] frighten" a victim, but may not result in physical harm, *ibid.* (citation omitted)—did not preclude Justice Scalia from recognizing that "it is impossible to cause bodily injury without using force 'capable of' producing that result," *id.* at 174. As discussed above, see pp. 23-26, *supra*, "omission" liability for causation of bodily injury is a longstanding and commonplace feature of the law. Indeed, it was Justice Scalia who authored the Court's precedent on the meaning of "violent" force, which endorsed a definition including "murder" and "assault and battery with a dangerous weapon," *Johnson*, 559 U.S. at 140-141 (citation omitted)—the very crimes that petitioner would cut out.

posite is true where the force is a physical process that injures or kills the victim.

Petitioner similarly errs in relying (Br. 23) on the dissent in *Borden*. In the passage that petitioner cites, the dissent expressed the view that the word "against" in the ACCA's elements clause should not be construed to require that the victim be the defendant's target (as the plurality concluded), but should instead be construed to mean "making contact with." *Borden*, 593 U.S. at 465 (Kavanaugh, J., dissenting) (brackets and citation omitted). But that view does not suggest that the elements clause necessitates *external* contact.

Under the plain language of the clause, it is the "physical force"—not the offender—that makes contact with the victim. 18 U.S.C. 924(e)(2)(B)(i). And in every case involving bodily injury or death, contact between the force and the victim is what causes the injury or death. See pp. 15-16, *supra*. In a poisoning, for example, the relevant contact is simply the *internal* bodily process whereby the poison kills the victim. See *Castleman*, 572 U.S. at 171.

Finally, petitioner's invocation (Br. 34) of the "eggshell skull" victim, who may be seriously injured even by minimal physical force, does nothing to undermine the commonsense proposition that force is necessarily capable of causing injury when injury actually results. The Court rejected a similar argument in *Stokeling*. There, the Court recognized that "the force necessary to overcome a [robbery] victim's physical resistance is inherently 'violent,'" "even" when it involves "a feeble or weak-willed victim" who may not supply much resistance. 586 U.S. at 83.

The same logic applies here. Murder is not excluded from the elements clause simply because a defendant

might kill a victim teetering over the edge of a cliff with a gentle touch, or a deathly allergic victim with peanut oil. Both examples involve "physical force" that is categorically "capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140—the victim who dies.

2. Petitioner's narrow interpretation of "use * * * against the person or property of another" is insupportable

Petitioner errs in insisting that to "'use'" force "'against the person or property of another'" entails "directly administer[ing] force, or tak[ing] a step that causes force to be administered." Br. 12. As already explained, pp. 17-23, *supra*, neither dictionaries nor this Court's precedents support such a constricted view. And petitioner is wrong to contend otherwise.

a. To the extent that petitioner views a phrase like "he used the victim's disease against her" as incorrect or unnatural, that view cannot be squared with *Castleman*. *Castleman* focused on the "physical force" as the action of the disease rather than any conduct of the defendant himself and recognized that when the defendant "employ[s] poison" or "'disease'" "knowingly as a device to cause physical harm," the defendant "us[es]" that internal force. 572 U.S. at 170-171 (citations omitted).

Petitioner asserts (Br. 36-37 & n.7) that *Castleman*'s holding applies only if the defendant causes bodily injury "in a real (*i.e.*, non-legal) sense." But petitioner provides no basis for imposing that restriction, which appears nowhere in *Castleman*'s reasoning. Elements clauses, and the categorical approach that they have been interpreted to require, are creatures of law. And as such, they are informed by background legal princi-

ples treating "omissions" as the equivalent of affirmative acts for purposes of forcible crimes like murder. See pp. 23-29, *supra*.

Petitioner recognizes (Br. 33) the historical legal view of "omissions," but disputes its relevance to the meaning of Section 924(c)(3). In his view (*ibid.*), that long-held legal understanding has no bearing on whether the phrase "use of physical force against the person or property of another" encompasses omissions. But authorities expressly drew the connection between an "omission" and the "use of force." See pp. 25-26, *supra*. And that is how the elements clause is written. It is not written in any special way that would incorporate petitioner's asserted "affirmative conduct" requirement.

b. Petitioner invokes (Br. 12, 15, 22-23) various statements in this Court's opinions defining the "use of physical force against the person or property of another" to require "'volitional' or 'active' employment of force." *Borden*, 593 U.S. at 430 (plurality opinion) (citation omitted); see *Voisine*, 579 U.S. at 692-693 ("use" requires "active employment"); *Leocal*, 543 U.S. at 9 (same). But petitioner errs in asserting (Br. 12-14, 22-24) that by referring to "active employment" that "direct[s] force" against another, the Court excluded acts of "omission."

In each of the relevant cases, the Court was focused on the "'degree of intent'" that the statute required to connect the defendant's conduct with the causation of the victim's injury. *Borden*, 593 U.S. at 434 (plurality opinion) (quoting *Leocal*, 543 U.S. at 9). In that context, the Court included the modifier "active" to contrast with "accidental," "involuntary," or "reckless" employment of force. See *id.* at 430-431; *Voisine*, 579 U.S. at

692-693; *Leocal*, 543 U.S. at 9. The Court did not include the modifier to contrast with the employment of force through "omission," which was not at issue in any of those cases.

c. Petitioner also errs in his reliance (Br. 30-31) on this Court's analysis in *Bailey* v. *United States* of when a defendant "uses * * * a firearm" "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1) (1994). *Bailey*'s conclusion that "use" in that context "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense," 516 U.S. at 143 (emphasis omitted), does not support his argument here.

The Court in *Bailey* explained that "'[u]se' draws meaning from its context" and found that in the particular context of the provision at issue, "'use' must connote more than mere possession of a firearm by a person who commits a drug offense." 516 U.S. at 143. Based on definitions such as "'to carry out a purpose or action by means of,'" the Court observed that "various definitions" of "use" imply "action and implementation." *Id.* at 145 (citation omitted). And the Court reasoned that unlike in other firearm statutes, Congress had not used the word "'possess,'" *id.* at 143; that construing the existing language to include possession could render the statute's reference to "carr[ying]" a firearm superfluous, *id.* at 145-146; and that such an interpretation would create an "impossible line-drawing problem," *id.* at 149.

None of that context exists here. And *Bailey*'s "active employment" requirement would be satisfied in this context because force is always an "operative factor,"

516 U.S. at 143, in a crime in which the victim is injured or killed. It is not possible for force to "play[] no detectable role in the crime's commission." *Id.* at 147. The defendant in such a crime does not simply "possess" the force; instead, the defendant has "carr[ied] out a purpose or action by means of" the force, *id.* at 145 (citation omitted)—specifically, injuring or killing the victim.

d. Finally, petitioner's effort (Br. 16-17) to import an affirmative act requirement from Section 924(c)(3)(A)'s application to crimes involving "attempted use" and "threatened use" of force is misguided. As an initial matter, petitioner is incorrect that an attempt requires affirmative conduct. This very case arises only because New York attempted murder—like attempted murder in an overwhelming majority of other jurisdictions—can be committed by "omission." For example, a defendant may take a "substantial step" toward murder by withholding food from a child, only to be thwarted when the child acquires food some other way. And while it is true that threatening to use force requires affirmative communication of a threat, that requirement is a result of the meaning of "threat," not the meaning of "use." See *United States* v. *Taylor*, 596 U.S. 845, 856 (2022).

In any event, there is no sound reason why the unmodified meaning of "use" should import a meaning from separate instances of the same word that have adjectival modifiers. A reference to "lawyers, former lawyers, and aspiring lawyers" does not suggest any limitation on "lawyers"—it instead expands the phrase to include related, but distinct, categories. The same is true of "use" in Section 924(c)(3)(A)'s elements clause.

3. Petitioner's view of Section 924(c)'s structure, purpose, and history is incorrect and self-contradictory

Petitioner claims (Br. 23-29) that the structure, purpose, and history of Section 924(c) are inconsistent with interpreting the statute to reach crimes like murder, which may be committed by withholding required conduct. Yet at the same time, petitioner also claims (Br. 39-42) that Congress *did* include such crimes, but only in the unconstitutional residual clause. Those claims cannot both be correct. And, in fact, neither is.

a. With respect to the structure of Section 924(c), petitioner contends (Br. 23-25) that other requirements of the Section 924(c) offense, and several of its potential sentence enhancements, "plainly contemplate especially dangerous criminals who commit crimes of violence with deadly weapons." And he argues (Br. 23-24) that a definition of "crime of violence" that includes "omission"-based conduct would be an "awkward fit for this framework." That argument makes little sense.

As petitioner acknowledges (Br. 24 n.6), Section 924(c)'s requirement of using, carrying, or possessing a firearm is "not subject to the categorical approach and instead must be satisfied by the defendant's own conduct." When such firearm-based conduct is proved, there is little risk that the underlying "crime of violence" is in fact something like an "omission"-based withholding of medicine. And with statistics from 2021 showing that more than 80% of murders in the United States that year involved a firearm,[8] it is fanciful to suggest that the

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[8] See John Gramlich, Pew Research Ctr., *What the Data Says About Gun Deaths in the U.S.* (Apr. 26, 2023) https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/ (noting that 20,958 out of 26,031—81%—of U.S. murders in 2021 involved a firearm).

requirement of firearm involvement indicates that Section 924(c) does not reach murder.

b. The same blinkered view of murder and similar crimes likewise pervades petitioner's argument (Br. 25-27) that a crime committable by "omission" does not implicate Section 924(c)'s purposes. When a firearm is used, carried, or possessed in connection with a murder, that murder is obviously violent. Envisioning an "omission"-based murder that involves a firearm in one of those ways is difficult, if not impossible.

It is implausible that Congress would have wanted to exclude murder from Section 924(c)(3) in light of such an unrealistic hypothetical. Petitioner ignores that his arguments in this case would remove from Section 924(c) not just murder committed by withholding required conduct, but (under the prevailing categorical approach) *all* murder—including the firearm-involved murders that would be Section 924(c)'s focus. The consequences of that position are extreme, as recent experience illustrates.

The Third Circuit is the only court of appeals to have adopted petitioner's argument. See *United States* v. *Mayo*, 901 F.3d 218 (2018). Based on that decision, a district court rejected one federal predicate for the Section 924(c) charges against Robert Bowers, who opened fire in the Tree of Life Synagogue in Pittsburgh, killing 11 people and wounding six, see *United States* v. *Bowers*, No. 18-cr-292, 2022 WL 17718686, at *6 (W.D. Pa. Dec. 15, 2022); see Campbell Robertson et al., *Rampage Kills 11 at a Synagogue in Pittsburgh*, N.Y. Times, Oct. 28, 2018, at A1. The district court reasoned that the predicate crime under 18 U.S.C. 249(a)(1), which prohibits "willfully caus[ing] bodily injury to any person * * * because of the actual or perceived race, color, re-

ligion, or national origin of any person," may be accomplished through "omissions" and therefore "cannot be a crime of violence." *Bowers*, 2022 WL 17718686, at *6. Endorsing petitioner's view would also affect other Section 924(c) prosecutions; for example, the government would be required to drop capital murder charges under Section 924(c) and (j) against Payton Gendron, who shot 13 people and killed 10 in a race-motivated shooting in a Buffalo grocery store. See D. Ct. Doc. 180, at 24-25, *United States* v. *Gendron*, No. 22-cr-109 (W.D.N.Y. June 10, 2024) (defendant's motion to dismiss preserving the argument that petitioner makes here).

Petitioner's argument would likewise extend to numerous cases like his own, in which gang members planned to, or did, kill someone with a gun—here, a gun that petitioner himself supplied. See p. 4, *supra*; see, *e.g.*, *United States* v. *Ortiz-Orellana*, 90 F.4th 689, 696 (4th Cir. 2024) (murder of a rival gang member shot three times in the head), petition for cert. pending, No. 24-5040 (filed July 8, 2024); *Allen* v. *United States*, No. 21-5782, 2023 WL 4145321, at *1 (6th Cir. June 23, 2023) (gang shooting with five victims), petition for cert. pending, No. 23-918 (filed Feb. 22, 2024). Petitioner cannot plausibly claim that excluding those offenses would be consistent with the statutory purposes of Section 924(c), or with any sensible meaning of the term "crime of violence."

c. Petitioner's reliance (Br. 26) on the asserted purposes of the ACCA's similarly worded elements clause is likewise misplaced. To the extent that the ACCA's elements clause attempts to describe recidivists who are "the kind of person who might deliberately point the gun and pull the trigger," *Begay* v. *United States*, 553 U.S. 137, 146 (2008), a person who commits or attempts

to commit murder is precisely that sort of person. Indeed, as noted above, about 80% of murders are carried out with a gun. See p. 40 & n.8, *supra*.

Furthermore, even considering the small subset of cases involving the withholding of required conduct, petitioner is wrong to suggest (Br. 26) that such offenses necessarily do not involve "violent, aggressive, and purposeful 'armed career criminal' behavior." *Begay*, 553 U.S. at 148; see *id.* at 147-148. Both cases that petitioner cites (Br. 18) as examples of commission of murder by "omission" involved undeniably violent and aggressive defendants. In each case, a father brutally beat a child and then denied the child medical attention. See *People* v. *Steinberg*, 7595 N.E.2d 845, 846 (N.Y. 1992); *People* v. *Best*, 609 N.Y.S.2d 478, 479-480 (N.Y. App. Div. 1994). Even assuming that the juries in those cases premised their guilty verdicts on the denial of medical care, there is no reason to suppose that those defendants have not exhibited the type of conduct covered by the ACCA. Indeed, many murders committed by "omission"—such as deliberately starving a child—are among the most heinous homicides imaginable, requiring an extended course of premeditated conduct in which the victim is literally tortured to death.

The issue in this case is far afield from the issue in *Chambers* v. *United States*, 555 U.S. 122 (2009), where this Court opined that the crime of failing to report to prison was a "crime [that] amounts to a form of inaction" in the ordinary case and did not fall within the purposes of the ACCA or the text of its residual clause. *Id.* at 128. Instead, adopting petitioner's position here would completely untether the meaning of a "violent felony" or "crime of violence" from reality, leading to be-

wildering and arbitrary sentencing disparities based on hypertechnical distinctions and hypothetical crimes.

d. The legislative history on which petitioner relies provides no meaningful support for the bizarre and unjust result he seeks. Rather than focusing on the history of Section 924(c)(3)(A) or other elements clauses, he principally discusses (Br. 27-29) the history of a different crime in an unenacted provision of an unenacted bill.

In that bill, which predated Section 924(c), a different Congress considered adopting an 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." Criminal Code Reform Act of 1981, S. 1630, § 1615(a)(1), 97th Cong., 1st Sess. (1981). The definition of a "crime of violence" would have been the same as the one later included in Section 924(c), and the Senate Report indicated that the drafters believed that the additional phrase "unlawful conduct dangerous to human life * * * *may* have a broader application." S. Rep. No. 307, 97th Cong., 1st Sess. 591 (1981) (emphasis added). As an example of that possibility, the report hypothesized that if a dam operator "threaten[ed] to refuse to open the floodgates during a flood" and placed residents "in jeopardy of their lives," that would qualify as a threat to engage in unlawful conduct, but would not be a crime of violence because the dam operator "did not use or threaten to use physical force." *Ibid.*

Petitioner's speculation that Congress had the same understanding years later, in enacting a wholly different provision, is unfounded. This Court has repeatedly warned of the "perils of relying on the fate of prior bills

to divine the meaning of enacted legislation." *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 422 (2012). The dangers of misconstruction are multiplied where, as here, the cited legislative history accompanied a prior bill that never became law. The Congress that passed the *relevant* law is unlikely to have had in mind the Senate Report accompanying a proposed offense that was never enacted. And even if it did, the enacting Congress may have disagreed with the report's suggestion that the reference to "unlawful conduct" was necessary given the breadth of the definition of a crime of violence.

In any event, petitioner's own reasoning is inconsistent with his reliance on the Senate Report. Petitioner acknowledges (Br. 40) that committing a murder through the withholding of required conduct would at least fall within Section 924(c)'s residual clause. As a result, even on his view, the hypothetical dam operator would have been covered by the proposed terrorism offense's crime-of-violence definition, even absent a provision reaching unlawful conduct dangerous to human life. Because the Senate Report's reasoning is flawed under both parties' interpretations, it should have no weight in the proper interpretation of Section 924(c).

e. Petitioner's claim (Br. 40) that Congress intended to include crimes committable by "omission" *only* under Section 924(c)'s residual clause is irreconcilable with his arguments that the structure, purpose, and history of Section 924(c) indicate that Congress did not intend to include such offenses at all. The claim is also incorrect.

The residual clause was not the natural home for a crime, like murder, that inherently involves causation of bodily injury or death. The residual clause asks whether an 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." 18 U.S.C. 924(c)(3)(B) (emphases added). That is not a natural way to describe murder and bodily-injury crimes that *always* include physical harm or death.

The residual clause is referred to as "residual" for a reason. Congress designed the *elements* clause to include the most common violent offenses, like murder and robbery. See pp. 29-31, *supra*. The residual clause was added to ensure coverage of crimes in which the use of force was not inherent, but nonetheless substantially risked, like attempted burglary, see *James* v. *United States*, 550 U.S. 192 (2007), or vehicular flight from a law enforcement officer, see *Sykes* v. *United States*, 564 U.S. 1 (2011).

Petitioner therefore cannot blame the unconstitutionality of the residual clause for the unjustifiable results of his interpretation of Section 924(c). Murder—like most, if not all, crimes that satisfy the elements clause—would likely also have satisfied the residual clause.[9] But the Court has never viewed that as a reason to deny the elements clause its proper scope. See, *e.g.*, *Stokeling*, 586 U.S. at 81 ("declin[ing] to construe" the ACCA's elements clause "in a way that would render it inapplicable [to robbery] in many States," without considering the residual clause).

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[9] The decision below could therefore alternatively be affirmed on the ground that murder would be encompassed by a constitutionally valid application of the residual clause. See *Borden*, 593 U.S. at 445-449 (Thomas, J., concurring in the judgment).

D. The Rule Of Lenity Does Not Apply

Petitioner's argument of last resort is that the rule of lenity requires interpreting Section 924(c)'s elements clause to exclude his New York attempted-murder conviction. See Br. 42-43. "But 'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.'" *Castleman*, 572 U.S. at 172 (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)); see *Shular* v. *United States*, 589 U.S. 154, 168 (2020) (Kavanaugh, J., concurring). Petitioner's argument is accordingly misplaced.

For the reasons explained above, no "grievous ambiguity" exists here. Even beyond the text and context, *Castleman* supplies a "clear pronouncement that a defendant 'necessarily' uses physical force in committing a crime involving the intentional causation of physical injury." *Scott*, 990 F.3d at 121. The Court has rejected similar requests for lenity in other "use of physical force" cases, including in *Castleman*. See 572 U.S. at 172-173. It should do so again here, where *Castleman* and the statutory text eliminate any possible need to "simply guess" as to whether Congress intended murder to qualify as a "crime of violence." *Id.* at 173 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX A

1. 8 U.S.C. 1101(a)(43)(F) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

2. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and 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.

[5] So in original. Probably should be preceded by "is".

3. 18 U.S.C. 921(a)(33)(A) (Supp. IV 2022) provides:

Definitions

(a) As used in this chapter—

(33)(A) Except as provided in subparagraphs (B) and (C), the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, Tribal, or local law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, by a person similarly situated to a spouse, parent, or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim.

4. 18 U.S.C. 922(g) provides in pertinent part:

Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

5. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(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.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under 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 armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

6. 18 U.S.C. 1959(a)(5) provides:

Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

* * * * *

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

7. 18 U.S.C. 3142(g)(1) provides:

Release or detention of a defendant pending trial

(g) FACTORS TO BE CONSIDERED.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

8. Sentencing Guidelines 4B1.2(a)(1) provides:

Definitions of Terms Used in Section 4B1.1

(a) CRIME OF VIOLENCE.—The term "crime of violence" means any offense un-der federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

9. New York State Penal Law 20.00 (McKinney 2009) provides:

Criminal liability for conduct of another

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

10. New York State Penal Law 110.00 (McKinney 2009) provides:

Attempt to commit a crime.

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

11. New York State Penal Law 125.25(1) (McKinney 2009) provides:

Murder in the second degree.

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person

in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

APPENDIX B

Offenses In Effect At the Time the Elements Clause Was Incorporated Into 18 U.S.C. 924(c) That Would Be At Risk Of Exclusion[1]

Murder offenses at risk of exclusion

Alabama: Ala. Code § 13A-6-2(a)(1) (1982) (defining murder as when a person "[w]ith intent to cause the death of another person * * * causes the death of that person or of another person"); *Northington* v. *State*, 413 So. 2d 1169, 1172 (Ala. Crim. App. 1981) (holding that a "person who withholds food or medical attention from another to whom a legal duty is owed may be found guilty of murder" if it is shown that "the conduct of the accused was willful or done with malicious intent").

Alaska: Alaska Stat. § 11.41.100(a)(1) (1983) (defining first-degree murder as when a person "with intent to cause the death of another person * * * causes the death of any person").

American Samoa: Am. Samoa Code Ann. § 46.3502 (1981) (a person commits first-degree murder when, "intending or knowing that his conduct will cause death or

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[1] As this Court explained in *United States* v. *Davis*, 588 U.S. 445, 460 (2019), Congress first "employed the term 'crime of violence'" in Section 924(c) in 1984. "At that time, Congress didn't provide a separate definition of 'crime of violence' in § 924(c) but relied on [18 U.S.C.] § 16's general definition." *Ibid.* Section 16's elements clause is materially identical. This appendix thus uses the 1984 enactment as the relevant date. Although there is variation in the dates of the available published codebooks for the various jurisdictions, the statutory language cited herein was in effect in 1984.

serious bodily injury, he causes the death of another person with deliberation").

Arizona: Ariz. Rev. Stat. § 13-1105(A)(1) (1989) (a person commits first-degree murder when, "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation").

Arkansas: Ark. Code § 41-1502(1)(b) (1977 & Supp. 1981) (a person commits first-degree murder when, "with the premeditated and deliberated purpose of causing the death of another person, he causes the death of any person"); *Bowman* v. *State*, 588 S.W.3d 129, 134-35 (Ark. App. 2019) (affirming first-degree murder conviction for failure to feed infant).

California: Cal. Penal Code § 189 (1985) (defining first-degree murder as "[a]ll murder which is perpetrated by means of * * * poison * * * or by any other kind of willful, deliberate, and premeditated killing" and second-degree murder as "all other kinds of murders").

Colorado: Colo. Rev. Stat. § 18-3-102 (1986) (a person commits first-degree murder when, "[a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person").

Connecticut: Conn. Gen. Stat. § 53a-54a (1983) (a person commits murder when, "with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress, or deception").

Delaware: Del. Code Ann. tit. 11, § 636(a)(1) (1979) (defining first-degree murder as when a person "intentionally causes the death of another person").

District of Columbia: D.C. Code § 22-2401 (1981) (defining first-degree murder as when a person "kills another purposely, either of deliberate and premeditated malice or by means of poison").

Florida: Fla. Stat. § 782.04(1)(a)(1) (Supp. 1984) (defining first-degree murder as "[t]he unlawful killing of a human being * * * [w]hen perpetrated from a premeditated design to effect the death of the person killed or any human being").

Georgia: Ga. Crim. Code § 16-5-1 (1984) (defining murder as when a person "unlawfully and with malice aforethought, either express or implied, causes the death of another human being"); see *Sanders* v. *State*, 715 S.E.2d 124, 131 (Ga. 2011) (affirming convictions of parents who starved infant to death), overruled on other grounds by *Pounds* v. *State*, 846 S.E.2d 48 (Ga. 2020).

Guam: Guam Code Ann. tit. 9, § 16.40 (1987) (defining murder as criminal homicide that is "committed intentionally or knowingly").

Hawaii: Haw. Rev. Stat. § 707-701(1) (1976 & Supp. 1984) (defining murder as when a person "intentionally or knowingly causes the death of another person").

Idaho: Idaho Code § 18-4003(a) (1979) (defining first-degree murder as "[a]ll murder which is perpetrated by * * * any kind of wilful, deliberate and premeditated killing").

Indiana: Ind. Code. § 35-42-1-1(1) (1982 & Supp. 1984) (defining murder as when a person "knowingly or intentionally kills another human being").

Kentucky: Ky. Rev. Stat. Ann. § 507.020(1)(a) (1985) (a person commits murder when, "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person").

Louisiana: La. Stat. Ann. § 14:30(4) (Supp. 1984) (defining first-degree murder as "the killing of a human being" in circumstances "[w]hen the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 201(1)(A) (1983) (defining murder as when a person "intentionally or knowingly causes the death of another human being").

Maryland: Md. Code Art. 27 § 407 (1982) (defining first-degree murder as "[a]ll murder which shall be perpetrated by * * * any kind of wilful, deliberate and premeditated killing").

Massachusetts: Mass. Gen. Laws ch. 265, § 1 (1984) (defining first-degree murder as "[m]urder committed with deliberately premeditated malice aforethought").

Michigan: Mich. Comp. Laws Ann. § 750.316 (Supp. 1985) (defining first-degree murder as "[m]urder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing").

Minnesota: Minn. Stat. § 609.185(1) (1984) (defining first-degree murder as "caus[ing] the death of a human being with premeditation and with intent to effect the death of the person or of another"); see *State* v. *Thomas*, 590 N.W.2d 755, 758-59 (Minn. 1999) (affirming

first-degree murder conviction for defendant who left infant to die by starvation).

Mississippi: Miss. Code Ann. § 97-3-19(1)(a) (Supp. 1983) (defining murder as "[t]he killing of a human being * * * [w]hen done with deliberate design to effect the death of the person killed, or of any human being").

Missouri: Mo. Rev. Stat. § 565.020(1) (Supp. 1983) (defining first-degree murder as when a person "knowingly causes the death of another person after deliberation upon the matter").

Montana: Mont. Code Ann. § 45-5-102(1)(a) (1983) (defining deliberate homicide as criminal homicide that is "committed purposely or knowingly"); *id*. § 45-5-101(1) (defining criminal homicide as when a person "purposely, knowingly, or negligently causes the death of another human being").

New Hampshire: N.H. Rev. Stat. Ann. § 630:1-a(I)(a) (1974) (defining first-degree murder as when a person "[p]urposely causes the death of another").

New Jersey: N.J. Stat. Ann. § 2C:11-3(a)(1)-(2) (1982) (defining murder as when a person "purposely causes death or serious bodily injury resulting in death" or when a person "knowingly causes death or serious bodily injury resulting in death").

New Mexico: N.M. Stat. Ann. § 30-2-1(A)(1) (1984) (defining first-degree murder as "the killing of one human being by another * * * by any kind of willful, deliberate and premeditated killing").

New York: N.Y. Penal Law § 125.25(1) (McKinney 1987) (a person commits murder in the second degree

when, "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person").

North Dakota: N.D. Cent. Code § 12.1-16-01(1) (Supp. 1979) (defining murder as when a person "[i]ntentionally or knowingly causes the death of another human being").

Northern Mariana Islands: 6 N. Mar. I. Code § 1101(a)(1) (1984) (defining first-degree murder as murder that is "[w]illful, premeditated, and deliberated").

Ohio: Ohio Rev. Code Ann. § 2903.02(A) (1982) ("No person shall purposely cause the death of another.").

Oklahoma: Okla. Stat. tit. 21, § 701.7(A) (Supp. 1982) (defining first-degree murder as when a person "unlawfully and with malice aforethought causes the death of another human being").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 2502(a) (1983) (defining first-degree murder as "intentional killing").

Puerto Rico: P.R. Laws Ann. tit. 33 § 4002 (1984) (defining first-degree murder as "[a]ll murder which is perpetrated by means of poison, lying in wait or torture or any wilful, deliberate, and premeditated killing").

Rhode Island: R.I. Gen. Laws § 11-23-1 (1981) (defining first-degree murder as "[e]very murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious and premeditated killing").

South Carolina: S.C. Code Ann. § 16-3-10 (1985) (defining murder as "the killing of any person with malice aforethought, either express or implied").

South Dakota: S.D. Codified Laws § 22-16-4 (Supp. 1980) (defining first-degree murder as murder "perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being").

Tennessee: Tenn. Code Ann. § 39-2-202(a) (1982) (defining first-degree murder as "murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing").

U.S. Virgin Islands: V.I. Code Ann. tit. 14, § 922(a)(1) (1964) (defining first-degree murder as murder that is "perpetrated by means of poison, lying in wait, torture or by any other kind of willful, deliberate and premeditated killing").

Utah: Utah Code Ann. § 76-5-202(1)(f) (1984) (defining first-degree murder as when a person "intentionally or knowingly causes the death of another" under various circumstances including if "[t]he homicide was committed for pecuniary or other personal gain").

Vermont: Vt. Stat. Ann. tit. 13, § 2301 (1998) (defining first-degree murder as "[m]urder committed by means of poison, or by lying in wait, or by wilful, deliberate and premeditated killing").

Virginia: Va. Code Ann. § 18.2-32 (1982) (defining first-degree murder as murder "by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing").

Washington: Wash Rev. Code Ann. § 9A.32.030(1)(a) (1985) (a person commits first-degree murder when, "[w]ith a premeditated intent to cause the death of another person, he causes the death of such person or of a third person").

West Virginia: W. Va. Code Ann. § 61-2-1 (1984) (defining first-degree murder as "[m]urder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing").

Wisconsin: Wis. Stat. Ann. § 940.01(1) (1984) (defining first-degree murder as when a person "causes the death of another human being with intent to kill that person or another").

Wyoming: Wyo. Stat. Ann. § 6-2-101(a) (Supp. 1983) (defining first-degree murder as when a person "purposely and with premeditated malice, * * * kills any human being").

Assault or battery offenses at risk of exclusion

Alabama: Ala. Code § 13A-6-20(a)(2) (1982) (a person commits first-degree assault when, "[w]ith intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such an injury to any person").

Alaska: Alaska Stat. § 11.41.200(a)(2) (1983) (a person commits first-degree assault when, "with intent to cause serious physical injury to another, the person causes serious physical injury to any person").

American Samoa: Am. Samoa Code Ann. § 46.3520 (1981) (defining first-degree assault as when a person

"purposely or knowingly causes serious physical injury to another person" or "attempts to kill or to cause serious physical injury to another person").

Colorado: Colo. Revised Stat. Ann. § 18-3-202(b) (1978) (a person commits first-degree assault when, "[w]ith intent to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of his body, he causes such an injury to any person").

Connecticut: Conn. Stat. § 53a-59(a)(2) (1983) (defining first-degree assault as when a person "with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person").

Delaware: Del. Code Ann. tit. 11, § 613(2) (Supp. 1984) (defining first-degree assault as when a person "intentionally disfigures another person seriously and permanently, or intentionally destroys, amputates or disables permanently a member or organ of another person's body").

Florida: Fla. Stat. § 784.021(1) (1983) (defining aggravated assault as an assault "[w]ith an intent to commit a felony"); *id.* § 784.011 (defining "assault" as an "intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent").

Georgia: Ga. Crim. Code § 16-5-21 (1984) (defining aggravated assault as when a person assaults "[w]ith intent to murder, to rape, or to rob"); *id.* § 16-5-20 (defin-

ing assault as when a person "[a]ttempts to commit a violent injury to the person of another" or "[c]ommits an act which places another in reasonable apprehension of immediately receiving a violent injury").

Hawaii: Hawaii Rev. Stat. § 707-710 (1976) (defining first-degree assault as when a person "intentionally or knowingly causes serious bodily injury to another").

Idaho: Idaho Code § 18-4015 (1979) (punishing assault with intent to commit murder); *id.* § 18-901 (defining assault as "[a]n unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another").

Iowa: Iowa Code § 708.4 (1983) (defining willful injury as when a person "does an act which is not justified and which is intended to cause and does cause serious injury to another").

Kansas: Kan. Stat. Ann. § 21-3410(b)-(c) (1981) (defining aggravated assault as "[c]omitting assault by threatening or menacing another while disguised in any manner designed to conceal identity" or "willfully and intentionally assaulting another with intent to commit any felony"); *id.* § 21-3408 (defining assault as "an intentional threat or attempt to do bodily harm to another coupled with apparent ability and resulting in immediate apprehension of bodily harm").

Louisiana: La. Stat. Ann. § 14:34.1 (Supp. 1984) (defining second-degree battery as "a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury").

Michigan: Mich. Comp. Laws § 750.84 (1979) (defining as a felony "assault [of] another with intent to do great bodily harm, less than the crime of murder").

Minnesota: Minn. Stat. § 609.221 (1984) (defining as first-degree assault when a person "assaults another and inflicts great bodily harm"); *id.* § 609.02 (defining assault as "an act done with intent to cause fear in another of immediate bodily harm or death" or "[t]he intentional infliction of or attempt to inflict bodily harm upon another").

Missouri: Mo. Rev. Stat. § 565.050(1) (Supp. 1983) (defining first-degree assault as when a person "attempts to kill or knowingly causes or attempts to cause serious physical injury to another person").

Montana: Mont. Code Ann. § 45-5-202(1)(a) (1983) (defining aggravated assault as when a person "purposely or knowingly causes * * * serious bodily injury to another").

Nebraska: Neb. Rev. Stat. § 28-308(1) (1985) (defining first-degree assault as "intentionally or knowingly caus[ing] serious bodily injury to another person").

New Hampshire: N.H. Rev. Stat. Ann. § 631:1(I) (Supp. 1983) (defining first-degree assault as when a person "[p]urposely causes serious bodily injury to another").

New York: N.Y. Penal Law § 120.10(2) (McKinney 1975) (a person commits first-degree assault when, "[w]ith the intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or a third person").

Oregon: Or. Rev. Stat. § 163.175(1)(A) (1985) (defining second-degree assault as when a person "[i]nten-

tionally or knowingly causes serious physical injury to another").

South Dakota: S.D. Codified Laws § 22-18-1.1(4) (Supp. 1981) (defining aggravated assault as when a person "[a]ssaults another with intent to commit bodily injury which results in serious bodily injury").

Tennessee: Tenn. Code Ann. § 39-2-101(b)(4) (Supp. 1984) (defining aggravated assault to include when a person, "[b]eing the parent or custodian of a child or the custodian of an adult, willfully or knowingly fails or refuses to protect such child or adult from an aggravated assault").

U.S. Virgin Islands: V.I. Code Ann. tit. 14, § 298(4) (1964) (defining aggravated assault and battery as when a person commits assault and battery "being a person of robust health, upon one who is aged or decrepit"); see V.I. Code Ann. tit. 14, § 292 (defining assault and battery as "us[ing] any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used").

Virginia: Va. Code Ann. § 18.2-51 (1982) (defining assault offense as when a person "maliciously shoot[s], stab[s], cut[s] or wound[s] any person or by any means cause[s] him bodily injury with the intent to maim, disfigure, disable, or kill").

West Virginia: W. Va. Code Ann. § 61-2-9(a) (1984) (defining malicious or unlawful assault as when a person "maliciously shoot[s], stab[s], cut[s] or wound[s] any person, or by any means cause[s] him bodily injury with intent to maim, disfigure, disable or kill").

Wisconsin: Wis. Stat. Ann. § 940.19(1m) (1984) (defining aggravated battery as when a person "causes

great bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of that person so harmed").

Robbery offenses at risk of exclusion

Guam: Guam Code Ann. § 40.10(a)(1), (2) (1982) (defining first-degree robbery as when a person, "in the course of committing a theft," "attempts to kill another" or "intentionally inflicts or attempts to inflict serious bodily injury upon another").

Hawaii: Hawaii Rev. Stat. § 708-840 (Supp. 1984) (defining first-degree robbery as when a person, in the course of committing theft, "attempts to kill another, or intentionally inflicts or attempts to inflict serious bodily injury upon another").

Maine: 17-a Me. Stat. § 651(1)(D) (1983) (defining robbery as when a person "commits or attempts to commit theft and at the time of his actions * * * [h]e intentionally inflicts or attempts to inflict bodily injury on another").

Mississippi: Miss. Code § 97-3-73 (1973) (defining robbery as when a person "feloniously take[s] the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person"); see *Crocker* v. *State*, 272 So. 2d 664, 665 (Miss. 1973) (holding that the "three essential elements of robbery are as follows: (1) felonious intent, (2) force or putting in fear as a means of effectuating the intent, and (3) by that means taking and carrying away the property of another from his person or in his presence").

Montana: Mont. Code Ann. § 45-5-401(1)(b) (1983) (defining robbery as when, "in the course of committing a theft," a person "threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury").

New Jersey: N.J. Stat. Ann. § 2C:15-1(a)(2) (1982) (defining robbery as when a person, in the course of committing a theft, "[t]hreatens another with or purposely puts him in fear of immediate bodily injury").

Pennsylvania: 18 Pa. Cons. Stat. § 3701(a)(1)(ii) (1983) (defining robbery as when a person "in the course of committing a theft * * * threatens another with or intentionally puts him in fear of immediate serious bodily injury").

Texas: Tex. Penal Code § 29.02(a) (1984) (defining robbery by threat as when a person, "in the course of committing theft * * * and with intent to obtain or maintain control of the property, he * * * intentionally or knowingly threatens or places another in fear of imminent bodily injury or death").

Vermont: Vt. Stat. Ann. tit. 13, § 608(a) (1998) (defining assault and robbery as when a person "assaults another and robs, steals, or takes from his person or in his presence money or other property which may be the subject of larceny"); see *State* v. *Powell*, 608 A.2d 45, 46 (Vt. 1992) (requiring proof that the "defendant intentionally put the victim in fear of imminent, serious bodily injury and intentionally deprived him of money, intending to do so permanently").

Federal offenses at risk of exclusion

1. 18 U.S.C. 875(b) and (c) (1982):

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 1111(a) (1982 & Supp. II 1984):

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnaping, treason, espionage, sabotage, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

3. 18 U.S.C. 1112 (1982):

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

* * * * *

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years[.]

4. 18 U.S.C. 1114 (1982 & Supp. II 1984):

Whoever kills or attempts to kill [various officers and employees of the United States] * * * engaged in or on account of the performance of his official duties * * * shall be punished * * * .

5. 18 U.S.C. 1116(a) (1982):

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title * * * ."

6. 18 U.S.C. 1513(a) (1982):

(a) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

7. 18 U.S.C. 2111 (1982):

Whoever, within the special maritime and territorial jurisdiction of the United States, by force and violence, or by intimidation, takes from the person or presence of another anything of value, shall be imprisoned not more than fifteen years.