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

REPLY BRIEF FOR THE PETITIONER

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Under the Government's strained reading of Section 924(c)'s elements clause, doing nothing at all can amount to the use of violent physical force against another person. This counterintuitive outcome requires the Government to isolate the clause's component words and give each of them idiosyncratic definitions, some of which this Court has already rejected. Unable to appeal to plain meaning, the Government misreads *United States* v. *Castleman*, 572 U.S. 157 (2014), conflates the indirect use of force with omissions, and repeatedly invokes a legal principle—omissions can be criminally culpable—that has no bearing on the clause's text.

The Court should stick with the ordinary meaning of the words Congress chose. Using physical force against another requires *doing* something: unleashing or channeling force in a way that results in contact with the victim. A murder defendant has not used force against another whose death would have occurred even if the defendant had been absent or tried to stop it—much less where the

victim's death results from an internal biological process, rather than from contact with the external world.

The Government's appeal to practical consequences does not justify distorting the text. When the residual clause was still operational—the relevant time period for interpretive purposes—reading the elements clause to exclude crimes of omission would have had *no* practical effect. And careful review of the statutes the Government believes to be "at risk" of exclusion indicates that reading the clause narrowly will have minimal effect now.

The judgment below should be reversed.

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

The Government's interpretation of Section 924(c)(3)(A) relies on "the broadest imaginable definitions of its component words," *Dubin* v. *United States*, 599 U.S. 110, 120 (2023) (citation omitted), including some that defy common sense. Stretching to achieve a broad construction makes particularly little sense when construing a felony "crime of violence."

A. The Elements Clause's Text Refers to Affirmative Conduct that Unleashes or Channels Violent Force

1. *Use*

The Government rejects the activity-based sense of "use" adopted in *Bailey* v. *United States*, 516 U.S. 137 (1995), in favor of a capacious sense in which a defendant uses force merely by passively benefiting from it. That overbroad interpretation lacks a basis in text or precedent.

a. The Government cites (at 18-19) various definitions of "use," including those offered in *Smith* v. *United States*, 508 U.S. 223, 228-29 (1993). But *none* of those

definitions excludes the activity-based sense of the word: Some are consistent with both senses ("avail oneself"), while others are consistent *only* with the narrower sense ("convert to one's service," "apply to a given purpose"). The Government does not explain, for instance, how a defendant can be described as "converting" force to his or her service by doing nothing, including where the defendant's presence has no effect on how—or even whether—force is applied.

The Government also ignores what this Court has said the relevant definitions *mean*: "These various definitions of 'use' imply action and implementation." *Bailey*, 516 U.S. at 145. In *Bailey*, the Court held that "use" in Section 924(c)(1) must be given the "more limited, active interpretation" to be consistent with its "ordinary or natural meaning," *id.* at 145-46, rejecting the Government's "broader" interpretation that would have treated firearms as having been "use[d]" by drug traffickers whenever their presence "facilitated" or "further[ed] the drug offenses," *id.* at 141-42.

The Government attempts (at 38) to evade *Bailey* by noting that the holding there also relied on "context"—namely, the absence in Section 924(c)(1) of a separate prohibition on "possession." But *Bailey* "start[ed]" with the dictionary definitions that "imply action and implementation," 516 U.S. at 145, and the Court viewed the provision's "language" as being "*supported by* its history and context," *id.* at 150 (emphasis added). What the Court said about the ordinary meaning of "use" in subsection (c)(1) thus applies to subsection (c)(3)(A) too.

In any event, the Court endorsed *Bailey*'s active-employment interpretation when construing materially identical use-of-force language in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). The provision at issue there did not apply to possession, but the result was the same: "As we said in a similar context in *Bailey,* 'use' requires active employment."

Id. at 9. And the Court adopted the same active sense when construing use-of-force language in *Voisine* v. *United States*, 579 U.S. 686, 693 (2016) ("active employment of force"), and *Borden* v. *United States*, 593 U.S. 420, 430 (2021) ("'active' employment of force").[1]

The Government asks the Court to ignore its prior endorsement of "active" use in *Leocal*, *Voisine*, and *Borden* because those cases "focused on the degree of intent that the statute required." Br. 37 (quotation marks omitted). But the first time the Court "included the modifier 'active'" (*ibid.*) was in *Bailey*, which concerned conduct, not intent. It cannot be that the elements clause incorporates the active sense of "use" *only* for purposes of describing the required mental state (which *Bailey* did not address), but *not* for purposes of describing the required conduct (which *Bailey* did address). Rather than embrace the Government's tortuous logic, the Court should keep things simple. The use of force consists of using force actively—that is, engaging in *activity* that makes force an operative factor.[2]

b. The Government confuses omissions with the indirect use of force. As a result, the examples it offers to show that it is "unexceptional" to describe an actor's "'use'

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[1] The Government gamely suggests (at 38) that "*Bailey*'s 'active employment' requirement would be satisfied in this context." But passively benefiting from force initiated by someone or something else is the literal opposite of "active employment." The Government says "force is always an 'operative factor' in a crime in which the victim is injured or killed." Br. 38-39 (quoting *Bailey*, 516 U.S. at 413) (citation omitted). But in an omission scenario, it is not the "active employment of the [force] *by the defendant* … that makes the [force] an operative factor." 516 U.S. at 143 (emphasis altered). See pp. 10-11, *infra*.

[2] Oddly, the Government argues (at 21) that *Castleman*'s poisoning example suggests that conduct is not a precondition for using force. But "*the act* of employing poison knowingly as a device to cause harm" obviously involves conduct. 572 U.S. at 171 (emphasis added).

of forces that the actor did not 'unleash,'" Br. 22 (cleaned up), inadvertently prove the opposite. In *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, 569 U.S. 576, 582 (2013), this Court described how scientists "use[] the natural bonding properties of nucleotides to create a new, synthetic DNA molecule." While the Government is correct (at 22) that "[t]hose natural properties long predate the scientists," it ignores that the properties are activated to create synthetic DNA only if a scientist actively introduces an mRNA molecule to which the nucleotides are drawn. See 569 U.S. at 582. Absent employment of these "laboratory methods," *ibid.*, nothing would happen.[3]

The Government's other examples similarly involve forces unleashed or channeled by an actor's affirmative conduct. NASA will "us[e] lunar gravity to sling [its Orion capsule] back to Earth" only after it has been vaulted skyward by "NASA's huge Space Launch System rocket" and aimed at the right spot in the moon's gravitational field.[4] Gangs who "us[ed] the darkness and crowds as cover to settle scores" did not passively wait for their rivals to expire; they "shot" them.[5] Sally the sea lion "used the flooding to escape briefly from her enclosure"[6] by "breach[ing]

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[3] The need to actually cause something to happen answers the Government's argument (at 11) that the distinction between actions and omissions is "a meaningless word game." If "the same force (and resulting injury) would have occurred even if the offender was absent, or was present but unable to stop it," Pet. Br. 7, the offender's failure to act is not a use of physical force—whether described as an omission or an act of withholding.

[4] Kenneth Chang, *NASA Delays Artemis Astronaut Moon Missions*, N.Y. Times, Jan. 10, 2024, at A11.

[5] William Neuman & Natalie Keyssar, *Despite Tighter Security, J'Ouvert Revelers Feel the Rhythm*, N.Y. Times, Sept. 4, 2018, at A15.

[6] Hurubie Meko, *Prospect Park Zoo Remains Closed After Severe Flood Damage*, N.Y. Times, Oct. 14, 2023,

her pool and ventur[ing] out."[7] Greenhouses are carefully constructed to "use energy from the sun to grow plants."[8] The human body "tries to use all its metabolic resources to fight off disease"—*i.e.*, it seeks out and kills pathogens.[9] And rafters "paddle" themselves into a position where they can "use the current" to help them cross a river.[10]

As these examples illustrate, a defendant may "'use'" force to achieve a desired result "without *directly* applying the force that causes [the result]." Pet. Br. 13. But in such a case, affirmative conduct is still required to situate a person or object in a position where contact with the force will occur. Like *Castleman*'s references to poisonings and shootings, 572 U.S. at 171, the Government's own examples offer no support for—indeed, they refute—its suggestion (at 23) that using force under those circumstances "does not depend on some preceding action."

c. The Government recounts (at 23-28) the longstanding practice of treating "omissions" as criminally culpable, though without ever attempting to connect this history to the elements clause. The question here is not whether defendants who intentionally fail to prevent harm may be held criminally liable—they may—but whether such defendants categorically "use[d] … physical

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https://www.nytimes.com/2023/10/14/nyregion/prospect-park-zoo-closed-flooding.html.

[7] Michael Wilson & Hurubie Meko, *Friday's Rainfall in New York Broke Records*, N.Y. Times, Sept. 29, 2023, https://www.nytimes.com/live/2023/09/29/nyregion/nyc-rain-flash-flooding.

[8] Amrith Ramkumar & Patrick Thomas, *Funds Dry Up for High-Tech Farm Startups*, Wall St. J., May 26, 2023, at B1.

[9] Angela Chen, *The Real Season for Bad Colds*, Wall St. J., Aug. 27, 2013, at D1.

[10] Neil Ulman, *Surviving White Water*, Wall St. J., June 7, 1996, at A10.

force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

None of the Government's proffered authorities describes an omission as a "use of force," much less a "use of force *against another*." And the only case that even employed the terms "use" and "force" in proximity undermines the Government's argument. In *Territory* v. *Manton*, 19 P. 387 (Mont. 1888), a husband committed manslaughter when he "left [his wife] on the ice to spend the night":

> The 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.

Id. at 394, 392. The court thus described how the husband's "volition" was "transferred," via legal fiction, to the actual cause of her death ("the elements"), such that he "*is made to use* their forces"—that is, in the eyes of the law, he was *treated as if* he had unleashed the forces himself.

The Government relies on the truism that "Congress is understood to legislate against a background of common law principles." Br. 29 (cleaned up). But this Court has invoked that rule to interpret Section 924 only when giving meaning to common-law terms that actually appear in the text. See, *e.g.*, *Stokeling* v. *United States*, 586 U.S. 73, 78-80 (2019). A general principle that culpable "omissions" may sometimes be treated as "acts" is of no help in construing the elements clause, because neither term "makes [an] appearance there." *Borden* v. *United States*, 593 U.S. 420, 435 (2021). And in any event, the Court has already said that "[t]he word 'use' in the statute must be

given its ordinary or natural meaning." *Bailey*, 516 U.S. at 145 (quotation marks omitted).

d. The "use" of force also must be read in conjunction with the elements clause's other two prongs: "attempted use, or threatened use." As this Court has explained, "[p]lainly this language requires the government to prove that the defendant took specific actions against specific persons or their property." *United States* v. *Taylor*, 596 U.S. 845, 856 (2022).

The Government perceives (at 39) "no sound reason why the unmodified meaning of 'use' should import a meaning from separate instances of the same word that have adjectival modifiers." Yet that was *Taylor*'s exact logic—that all three prongs "are best understood by the company they keep." 596 U.S. at 856 (cleaned up). The Government is also wrong about the limiting effect of adjectival modifiers: A reference to "actors, aspiring actors, and retired actors" is clearly talking about thespians, not "actors" in the broader sense of those who engage in activity.

Finally, the Government disputes (at 39) that the "attempted use" of force requires affirmative conduct, because "New York attempted murder … can be committed by 'omission.'" But "attempted," as used in the elements clause, must be given its "federal generic definition," *Taylor*, 596 U.S. at 858, not a state-law definition. And a "substantial step" under the federal definition requires "specific actions against specific persons." *Id.* at 855-56. Cf. U.S. Reply Br. at 15, *Taylor*, *supra* (20-1459) (noting that "threatened use of physical force" under Section 924(c)(3)(A) is broader than "threatened force" under the Hobbs Act). Remaining motionless does not satisfy that generic definition.

2. *Physical force*

Dictionaries "define[] 'physical force' as 'force consisting in a physical act, esp. a violent act directed against a robbery victim.'" *Johnson* v. *United* States, 559 U.S. 133, 139 (2010) (quoting Black's Law Dictionary 717 (9th ed. 2009)). This requires force of greater intensity than the physics-based definition ("a cause of the acceleration of mass") or common-law definition ("the slightest offensive touching"). *Ibid.* Crimes that can be committed by failing to act, however, satisfy *none* of those definitions. The Government does not argue otherwise.

Instead, the Government opts (at 15-17) to interpret "physical force" through a syllogism: *Castleman* says that a person cannot "cause bodily injury without the 'use of physical force,'" 572 U.S. at 170 (cleaned up), and *Johnson* says that such force in this context is "force capable of causing physical pain or injury," 559 U.S. at 140. Since some crimes require proof of bodily injury or death, the Government concludes, they must necessarily involve physical force. This argument fails on multiple levels.

As an initial matter, it makes no sense to back into a definition of "physical force" without first considering what the term actually means. The Government never even attempts to define it. If a failure to act cannot satisfy the most basic Newtonian definition of "physical force," then it necessarily falls short of the heightened version required for a felony crime of violence.

Second, the Government confuses a sufficient condition (all violent force is capable of causing injury) with a necessary one (all injury comes from violent force). *Johnson*'s observation that "*violent* force … [is] force capable of causing physical pain or injury," *ibid.*, does not imply that physical pain or injury can *only* result from violent force—just like the statement "'all pickpockets are criminals' does not validly imply that 'all criminals are pickpockets.'" *United States* v. *Harris*, 88 F.4th 458, 465 (3d

Cir. 2023) (en banc) (Jordan, J., concurring in denial of rehearing). For similar reasons, *Castleman*'s statement that "[i]t is impossible to cause bodily injury without applying force in the common-law sense," 572 U.S. at 170, does not imply that *every* bodily injury results from force—much less from *violent* force.

The Government's argument also proves too much. As the Government explains (at 16), "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)." But *every* death involves the cessation of physical functioning from *some* cause. In the Government's view, every death involves violent physical force—even when a centenarian slips away peacefully in his sleep. That is certainly a "result that the English language tells us not to expect." *Dubin*, 599 U.S. at 124.

Third, the Government's syllogism fails on its own terms. *Castleman*'s statement about the impossibility of "*caus*[*ing*] bodily injury without the use of 'physical force,'" is inapplicable to crimes in which the defendant does not "cause" anything to happen. To presume the use of violent physical force from the presence of injury in the absence of "actual causality," *Burrage* v. *United States*, 571 U.S. 204, 211 (2014), would turn *Castleman*'s commonsense point into nonsense.[11]

In the Government's view, for instance, a caretaker who leaves town for a beach vacation without

[11] Notably, Justice Scalia's concurrence in *Castleman* said *both* that "it is impossible to cause bodily injury without using force capable of producing that result," *and* that "acts of omission" "cannot possibly be relevant to the meaning of a statute requiring 'physical force.'" 572 U.S. at 174, 181 (cleaned up).

administering necessary medication to her dependent would be using violent physical force while she relaxes on the beach—though *only* if she desired harm to her dependent, *not* if the omission resulted from mere forgetfulness. And her friends relaxing alongside her would *not* have used violent force, even if they shared her injurious desire, because they were under no legal obligation to the dependent. Another unexpected result.

The Government's only response (at 36-37) is to again invoke "background legal principles treating 'omissions' as the equivalent of affirmative acts." In other words, the Government argues that these "background legal principles" inform not just the elements clause itself, but the proper reading of *Castleman*. This Court has admonished the Government about reading its opinions that way: "Better to heed the statutory language proper." *Borden*, 593 U.S. at 443 n.9.

Finally, the Government is wrong that physical force need not "originate from contact with the external world." Br. 33 (cleaned up). Oddly, the Government defends that proposition (*ibid.*) by pointing to *Castleman*'s poisoning example. But someone who "sprinkles poison in a victim's drink" has thereby brought a foreign substance with "forceful physical properties" into contact with the victim. 572 U.S. at 171 (quotation marks omitted). To be sure, the poisoner may achieve this result "without making contact of any kind" himself, such as by "deceiving the victim into drinking a poisoned beverage." *Id.* at 170 (cleaned up). But the harmful forces still originated from the external world—and would not have made contact with the victim absent the poisoner's affirmative conduct. Where a defendant fails to provide medical care or nutrition, by contrast, the harm may derive from natural processes wholly independent of anything put in motion by the defendant (or anyone else). Yet again, the Government conflates the indirect use of force with omissions.

3. *Against the person or property of another*

Castleman is also of limited use to the Government because the statute at issue there lacked a "critical" textual clue: "the 'against another' phrase." *Borden*, 593 U.S. at 428 (quoting *Leocal*, 543 U.S. at 9). In conjunction with "'use of physical force,'" that phrase "is most naturally read to encompass" conduct in which "force [is] directed at, rather than just happen[s] to hit, an object." *Id.* at 436-37. It does not apply to forces that make contact with an object independently of the defendant—regardless of how the defendant feels about the result.

The Government identifies no instance in which the "against" phrase was actually used to describe an omission in combination with "use of physical force"—or even just "use." Instead, the Government invents (at 36) an example: "he used the victim's disease against her." But "against" in that phrase refers to the victim's interests, not her person. So while it might aptly describe a boss who fires an employee for taking too many sick days, no one would describe a failure to provide medical care that way. Using something *against* someone requires conduct.

The Government also accepts the *Borden* dissenters' view "that the word 'against' … mean[s] 'making contact with.'" Br. 35 (quoting 593 U.S. at 465 (Kavanaugh, J.)). "[T]hat view," the Government argues (*ibid.*), "does not suggest that the elements clause necessitates *external* contact." True enough, if the Government means that force can be applied to a victim via *internal* contact, such as deceiving a victim into swallowing poison. But where harm does not originate from the external world *at all*—such as where a person succumbs to a fit of congenital epilepsy—there has been no "contact," internal or otherwise.

B. Other Statutory Clues Confirm the Text

1. *Structure*

The Government does not dispute that the various provisions in Section 924(c) describing conduct "during and in relation to" which a crime of violence must occur all contemplate dangerous gun-related activity. 18 U.S.C. § 924(c)(1)(A). But the Government rejects (at 40) the relevance of that fact, since the gun-related conduct (unlike the elements clause) is not subject to the categorical approach, and in practice such conduct will almost always be active—and violent.

The Government misses the point. These neighboring provisions are relevant because they indicate the *type* of crime that Congress had in mind when defining "crime of violence." All agree that Congress was focused on the kind of dangerous offenses often committed with a gun—*not* omission-based offenses. So the agreed-upon meaning of those neighboring provisions helps inform the nearby elements clause, regardless of whether an omission offense would satisfy the categorical approach if it were applied to those neighboring provisions. This Court believes in *noscitur a sociis*, see *Taylor*, 596 U.S. at 856, even if the Government does not.

For similar reasons, the Government is misguided in accusing (at 41) Mr. Delligatti of taking a "blinkered view of murder and similar crimes." The Government argues as if the statute mentions "murder." It doesn't. Cf. U.S.S.G. Am. 798 (2023) (amending Sentencing Guidelines "crime of violence" definition to add murder as enumerated offense). But it *does* reference "brandish[ing]" and "discharg[ing]" a gun. 18 U.S.C. § 924(c)(1)(A)(ii)-(iii). The focus must be on the words Congress actually chose.

2. *Purpose*

The Government accepts that Section 924(c)(3)(A) has the same underlying purpose as the ACCA's elements

clause, which "attempts to describe recidivists who are 'the kind of person who might deliberately point the gun and pull the trigger.'" Br. 42 (quoting *Begay* v. *United States*, 553 U.S. 137, 146 (2008)). It nevertheless argues (at 42-43) that "a person who commits or attempts to commit murder is precisely that sort of person."

Yet again, the Government argues as if murder were an enumerated offense. The relevant question is not whether a particular reading of the elements clause might exclude some "classically violent crimes." *Borden*, 593 U.S. at 441 (quoting Government brief). The categorical approach "is under-inclusive by design: It *expects* that some violent acts, because charged under a law applying to non-violent conduct, will not trigger enhanced sentences." *Id.* at 442.

The real question is how to view the "subset of cases" actually in dispute—those "involving the withholding of required conduct." Br. 43. When faced with *that* question, the Government moves the goalposts, arguing that "petitioner is wrong to suggest that such offenses *necessarily* do not involve 'violent, aggressive, and purposeful armed career criminal behavior.'" *Ibid.* (quoting *Begay*, 553 U.S. at 148) (emphasis added) (cleaned up). But regardless of whether *some* omission crimes involve violent, recidivist-type conduct, omission crimes *as a group* do not. Nor does the typical nonfeasant offender fall within the "particular subset of offender[s]" who pose a "special danger" when armed. *Begay*, 553 U.S. at 147, 146.

3. *History*

Rarely does the legislative record speak so precisely to a disputed question of interpretation. Congress first proposed the "crime of violence" category in the Criminal Code Reform Act of 1981, S. 1630, § 1823, 97th Cong., 1st Sess. (1981), defined via the now-familiar elements clause, *id.* at § 111. As the Senate Report explained, a person who "refuse[s]" to take action to avoid "jeopardy" to human

life—for instance, a dam operator who fails to open floodgates during a flood—"d[oes] not use or threaten to use physical force." S. Rep. No. 97-307, at 591 (1981).

The Government doubts (at 44) that "Congress had the same understanding years later" (three years later), when it "enact[ed] a wholly different provision" (an identically worded elements clause) in the Comprehensive Crime Control Act of 1984. Beyond blinking reality, that argument misses the point. Whether or not the Report is considered *authoritative*, it is an indisputably clear example of how the relevant words were used and understood in relevant context. Particularly given the Government's inability to identify a single real-world counterexample, see pp. 4-6, *supra*, this contemporaneous usage speaks volumes.

For the same reason, the Government is wrong (at 45) that the Senate Report should be disregarded because it ignores the possibility that the nonfeasant dam operator would have been covered by the residual clause. Mr. Delligatti asks the Court to use the Report to help discern the elements clause's common meaning, not to adopt it as a manual for deciding which specific crimes do or do not satisfy Section 924(c)(3).

II. PRACTICAL CONSIDERATIONS DO NOT JUSTIFY ABANDONING THE TEXT

The Government predicts (at 11) that if the elements clause is read to exclude crimes of omission, "calamitous consequences" will ensue. Such arguments are "beside the point," because "[t]he role of this Court is to apply the statute as it is written," rather than to make "good policy." *Burrage*, 571 U.S. at 218 (quotation marks omitted). But the Government's policy concerns are also misguided. The Government has identified only a handful of affected statutes. And even in cases where such a statute will not support a Section 924 charge, the defendant will likely receive

a severe sentence if merited—as the Government's own examples show.

A. The Government's argument misconstrues the significance of practical consequences when interpreting Section 924. As the Government has previously explained, "jurisdictional surveys … can sometimes be useful when interpreting a federal provision that has a well-established meaning under state law," U.S. Br. at 10, *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385 (2017) (No. 16-54). See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 598 (1990) ("We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States."). But where the interpretation of term-of-art language is *not* at issue, the Court has read Section 924's text narrowly even if doing so would exclude offenses "in many States," including serious offenses like "second-degree murder and manslaughter." *Borden*, 593 U.S. at 482 (Kavanaugh, J., dissenting).

The Government says that "[t]his Court has 'repeatedly declined to construe' elements clauses 'in a way that would render them inapplicable' to crimes in numerous States." Br. 32 (quoting *Stokeling*, 586 U.S. at 81) (brackets omitted). But *Stokeling* addressed the meaning of a statutory term that appeared *both* in the elements clause *and* in many state criminal statutes. The question was whether "force" under the elements clause "requir[es] force that overcomes a victim's resistance." 586 U.S. at 80-81. The Court accordingly found it significant that most States at the time of the clause's enactment "defined force as overcoming victim resistance." *Id.* at 81. And since "robbery" was an enumerated offense "in the original ACCA," *id.* at 79, the Court also emphasized that a narrow interpretation of force "would disqualify more than just basic-robbery statutes" in those States—indeed, *all* robbery, even armed robbery, *id.* at 81. Those text-based considerations are inapplicable here.

The Government's practical argument also ignores that most of the supposedly excluded state offenses would have satisfied the residual clause operative at the time of Section 924(c)'s enactment. The Government concedes (at 46) that consequences stemming from this Court's invalidation of the residual clause "cannot shed light on the meaning of the elements clause," Pet. Br. 41. And the Government admits (at 46) that "most, if not all" of the relevant state offenses "would likely also have satisfied the residual clause." It nevertheless argues (*ibid.*) that the overlap in coverage is no reason "to deny the elements clause its proper scope." But that argument simply begs the question presented here regarding the clause's scope.

The Government also says (at 40, 45-46) there is something "self-contradictory" about Mr. Delligatti's argument that Section 924(c) is not aimed at crimes of omission, yet the residual clause is a "natural home" for such a crime if it "involves causation of bodily injury or death." The contradiction is imaginary. The residual clause includes a 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) (emphases added). Because of the italicized language—which the elements clause lacks—the residual clause requires a very different inquiry: identifying "a judicially imagined 'ordinary case' of a crime," and deciding "how much risk it takes for a crime to qualify." *Johnson* v. *United States*, 576 U.S. 591, 597-98 (2015).

That qualitatively different inquiry explains why the residual clause is a natural fit for crimes that can be committed via omissions. Unlike the elements clause, the residual clause's risk-based focus allows for arguments, like the Government's here, that only a "*small subset* of [murder] cases involv[e] the withholding of required conduct." Br. 43 (emphasis added). So too the Government's

argument that "*many* murders committed by 'omission' … are among the most heinous homicides imaginable." *Ibid.* (emphasis added). Concerns about a crime's frequency and typicality are hallmarks of the residual clause, not the elements clause.[12]

B. The Government's consequences-based argument also fails on its own terms. The Government argues (at 29) that reading the elements clause as encompassing only active crimes would threaten exclusion of "quintessentially violent offenses like murder, assault, and robbery," a result the Government calls (at 44) "bizarre and unjust." This refrain might sound familiar. See, *e.g.*, U.S. Br. at 18, *Taylor*, *supra* (No. 20-1459) ("Hobbs Act robbery ranks among the 'quintessential' federal crimes of violence"); U.S. Br. at 37, *Borden*, *supra* (No. 19-5410) ("glaringly absurd results").

But while dire predictions from the Government are common, here the Government cries wolf only half-heartedly: It says various offenses "would be *at risk of* exclusion under petitioner's reading." Br. 29 (emphasis added). This tentativeness stands in notable contrast to other categorical-approach cases, where the Government argued that a defendant-favorable interpretation "*would exclude* all but a handful of [relevant] state" offenses. U.S. Br. at 27, *Stokeling*, *supra* (No. 17-5554) (emphasis added).

The Government has good reason for hedging here, because its practical objections are seriously overstated. The asserted (at 27-28) risk of exclusion is based on state statutes and judicial rulings that define "acts" to include "omissions" or otherwise treat omissions as culpable. But it is a non-sequitur to assume that all offenses requiring

[12] The Government's argument (at 46 n.9) that the decision below "could … alternatively be affirmed on the ground that murder would be encompassed by a constitutionally valid application of the residual clause" is foreclosed by precedent and waived many times over.

proof of harm can be satisfied by omissions, because such statutes are often phrased in ways that require affirmative conduct.

For example, Louisiana is one of the States where "a failure to act that produces criminal consequences" can constitute "[c]riminal conduct." La. Rev. Stat. Ann. § 14:8. Yet because its murder statutes require "the *killing* of a human being," *id.* § 14:30.1 (emphasis added), its courts require affirmative conduct, see *State* v. *Small*, 100 So.3d 797, 810 (La. 2012) ("[N]eglect in the form of lack of supervision simply cannot supply the direct act of killing needed for a second degree felony murder conviction."). The same is true for other jurisdictions the Government invokes in support of its consequence-based argument. See, *e.g.*, *Avellaneda* v. *State*, 496 S.W.3d 311, 318 (Tex. Crim. App. 2016) ("Injury to a child may serve as the underlying crime in a felony murder prosecution, but only if the injury is based on an act, not an omission."); *State* v. *Miranda*, 878 A.2d 1118, 1122 (Conn. 2005) (per curiam) (first-degree assault cannot be based on "failing to protect the victim from physical abuse"); *Bradley* v. *United States*, 856 A.2d 1157, 1162 (D.C. 2004) ("simple assault requires an affirmative act involving 'force or violence,'" so may not be satisfied by "failing to provide adequate food and nutrition"). The upshot: A jurisdiction may generally accept the possibility of criminal liability for omissions that cause harm, yet reject that *particular* harm-based offenses can be satisfied via omission.

Indeed, the Government's appendix of statutes that supposedly "would be at risk of exclusion," Br. 11a (capitalization altered), identifies only four States, other than New York, where courts have actually held that murder offenses can be committed via omission—including one later overruled on other grounds. *Id.* at 11a-15a (Alabama, Arkansas, Georgia, Minnesota). In footnotes, the Government identifies (at 28 nn.4-5) three other such

jurisdictions (Massachusetts, Nevada, North Carolina).[13] This showing suggests that New York is in a distinct minority of jurisdictions allowing murder convictions based on intentional omissions. Beyond that, the Government identifies no case upholding omission-based convictions for assault, battery, robbery, or the federal offenses it claims are at risk. See *id.* at 18a-24a.

For similar reasons, the Government is wrong (at 32) that "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)." The assault statute at issue in *Castleman*, for instance, requires "an affirmative action." *State* v. *Sudberry*, No. M2011-432, 2012 WL 5544611, at *16 (Tenn. Crim. App. Nov. 14, 2012). Section 922(g)(9) is also distinguishable: In defining a *misdemeanor* crime of domestic violence, its "context and purpose … diverge from those of [the] elements clause," *Borden*, 593 U.S. at 442, and it "lack[s] the 'against another' phrase" this Court has deemed "critical," *id.* at 428 (quotation marks omitted).

C. Finally, any lingering practical concerns have diminished force here because defendants who merit long sentences will get them even where a predicate offense does not satisfy the elements clause. As amicus explains, "judges impose long prison sentences for defendants

[13] Most footnoted cases did not involve convictions for omissions under statutes requiring intentional harm. See *State* v. *Spates*, 405 A.2d 656, 659 (Conn. 1978) (conviction based on robber's "act of binding [victim] and placing him in extreme fright and shock, which act was the proximate cause of [victim's] heart attack"); *State* v. *Smith*, 65 Me. 257 (1876) (negligent manslaughter); *Faunteroy* v. *United States*, 413 A.2d 1294 (D.C. 1980) (involuntary manslaughter); *State* v. *Valley*, 571 A.2d 579 (Vt. 1989) (reckless manslaughter); *Davis* v. *Commonwealth*, 335 S.E.2d 375 (Va. 1985) (involuntary manslaughter); *State* v. *Williquette*, 385 N.W.2d 145 (Wis. 1986) (child abuse); see also *State* v. *Barnes*, 212 S.W. 100 (Tenn. 1919) (indictment for misdemeanor child neglect).

perceived as dangerous even if their crimes are not technically ones of 'violence'" under Section 924. Fed. Pub. Defs. Br. at 2. For instance, where this Court's rulings have led to the exclusion of some state murder, manslaughter, and rape offenses, affected defendants still received severe sentences. See *id.* at 4-13 (providing examples).

The Government's own examples (at 41-42) prove the point. The Tree of Life Synagogue shooter may have avoided "one federal predicate for the Section 924(c) charges against [him]," Br. 41, but he still received 22 death sentences and 28 consecutive life-without-parole sentences, plus 20 years. Amended Judgment at 4, *United States* v. *Bowers*, No. 18-cr-292 (W.D. Pa. Oct. 23, 2023), ECF No. 1592.

The Buffalo grocery-store shooter faces capital charges predicated not on New York murder, but the federal hate-crime statute, 18 U.S.C. § 249(a)(1)(B)(i). See Indictment at 3-4, *United States* v. *Gendron*, No. 22-cr-109 (W.D.N.Y. July 14, 2022), ECF No. 6. That statute is limited to "violent acts," not omissions. Pub. L. No. 111–84, div. E § 4710(2), 123 Stat. 2841. In any event, even without those charges, he would still face fourteen consecutive life sentences. Indictment at 3, 5-6, 7. Hardly a "calamitous" result.

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The court of appeals' judgment should be reversed.

Respectfully submitted.

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