No. 20-7778

IN THE

Supreme Court of the United States

GERALD SCOTT,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF FAMM AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MARY PRICE
FAMM
1100 H Street, NW
Washington, DC 20005

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

Counsel for FAMM

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

JOSHUA L. DRATEL
LAW OFFICE OF DRATEL
& LEWIS
29 Broadway, Suite 1412
New York, NY 10006

Counsel for NACDL

DAVID MARCUS
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Ave.,
Suite 2400
Los Angeles, CA 90071

SAMUEL LEIFER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Counsel for FAMM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

REGULATIONS AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

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

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

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least 10 days prior to its due date and have each consented to its filing.

Amici advance their charitable purposes in part through education of the general public and through select amicus filings in important cases. Amici and their members have a substantial legal interest in the rules governing the Armed Career Criminal Act (ACCA), including ensuring that its sentencing provisions are applied in a consistent, predictable manner, respecting the rule of lenity and Congress's clear intent. Given their missions and memberships, amici will continue to have an interest in future decisions involving the ACCA.

SUMMARY OF ARGUMENT

The en banc Second Circuit held that a conviction for New York first-degree manslaughter is a violent felony under the ACCA, 18 U.S.C. § 924. That decision deepens a split among courts of appeals as to whether crimes that can be committed by omission have, as an element, the "use of physical force." That split is deeply consequential, subjecting criminal defendants in some—but not all—jurisdictions to mandatory minimum sentences for crimes Congress clearly did not intend to warrant these draconian penalties.

This case provides a particularly good vehicle to resolve the split because the government conceded there is a "realistic probability" that New York first-degree manslaughter can be committed by omission. Pet. App. 20a; *see Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (categorical approach requires a "realistic probability" a State would apply its statute in the manner described by defendant). The Second Circuit's ruling that a crime realistically capable of commission by "no physical action at all" can "still *necessarily* involve a defendant's use of force," Pet. App. 21a, thus presents the issue in a clear, straightforward manner.

For the reasons persuasively argued in the petition (at 16-35), New York first-degree manslaughter, N.Y. Penal Law § 125.20, cannot serve as a predicate offense under the ACCA. The ACCA's so-called "force clause"—which defines "violent felony" for purposes of sentence enhancement—allows prior offenses to count as predicate violations only if they have as an element the "use of physical force." 18 U.S.C. § 924(e)(2)(B)(i) (including "attempted" or "threatened" use). Because New York first-degree manslaughter can be committed by omission, it cannot be a predicate violation under this clause. *See* Pet. 30-35.

The Second Circuit's decision is not only inconsistent with the plain text of the ACCA, but as the petition explains (at 35-37), the decision also ignores the rule of lenity, which requires that ambiguities in criminal statutes "be resolved in the defendant's favor." *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019). Accordingly, the decision below adds the Second Circuit to the growing number of jurisdictions where individuals lack "fair warning"—as the rule of lenity requires—that they may be subject to a mandatory 15-year sentence enhancement under the ACCA. *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971). This brief focuses on the importance of the question presented in light of the rule of lenity and the principles animating it. *See* Pet. App. 72a-82a (Leval, J., dissenting).

The question presented implicates the rule of lenity for two reasons. *First*, even if the ACCA did not clearly exclude crimes of omission from the "violent felony" definition, this is precisely the type of ambiguity to which the rule of lenity should be applied, requiring that the Court read this sentencing provision in the less punitive manner. To appreciate the ambiguity at issue, the Court need look no further than the interpretations

of commonplace words the Second Circuit offered. For example, to justify its holding that one can "use" physical force without moving a muscle, the majority defined "omission" and "action" as synonyms, even though they are antonyms. Pet. App. 26a-27a. Similarly, the majority ruled that the "ordinary meaning" of the plainly active phrase "use of violent force" includes passively "deriv[ing] service from" an external "force already in motion" by failing to stop it. *Id.* 7a-8a, 26a. These interpretations are contrary to plain English. No offender can have "fair warning" of an enhanced sentence based upon such illogical interpretations of the ACCA. *Bass*, 404 U.S. at 347-348.

Second, statutes, like the ACCA, "imposing harsh mandatory sentences present a particularly compelling need for invocation of the rule of lenity." Pet. App. 81a-82a (Leval, J., dissenting). In this context, the rule provides important protections against the inconsistent and unpredictable application of such sentences, which judges, legislators, and attorneys have recognized for decades to be "imprudent, unwise and often an unjust mechanism for sentencing." Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent. Rep. 180, 184 (Feb. 1, 1999) (quoting *Hearings before a Subcomm. of the H. Comm. on Appropriations*, 103rd Cong., 2nd Sess. 29 (Comm. Print 1994)).

ARGUMENT

There is no real ambiguity in the phrase "use of physical force" in the ACCA. No one would reasonably think that the statute refers to anyone's "use of physical force" *other* than the defendant's. And as this Court has repeatedly explained, the term "physical force" in the ACCA refers to "violent, active crimes." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004); *see Johnson* v. *United*

States, 559 U.S. 133, 139 (2010) ("'active power'"); *Leocal*, 543 U.S. at 11 ("active violence" (quoting *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992)); *Chambers* v. *United States*, 555 U.S. 122, 127-128 (2009). Scott persuasively argues (Pet. 30-35) that these and similar interpretations by this Court exclude crimes of omission from being ACCA predicate violations. Amici therefore write to expand on a supplemental reason identified in the petition (at 35-37) for granting a writ of certiorari: any ambiguity in the ACCA should be resolved in accord with the rule of lenity.

I. THE RULE OF LENITY REQUIRES RESOLVING AMBIGUOUS CRIMINAL LAWS IN THE DEFENDANT'S FAVOR

In determining both a criminal statute's scope and its penalties, courts apply the rule of lenity to resolve ambiguities "in the defendant's favor." *Davis*, 139 S. Ct. at 2333; *see United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) ("[A]mbiguous criminal laws [should] be interpreted in favor of the defendants subjected to them."); *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (rule applies to sentencing statutes as well as to offense elements). Before interpreting an ambiguous criminal statute to impose a "harsher alternative," courts must find that Congress has spoken in "clear and definite" language. *Bass*, 404 U.S. at 347-348 (quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)).

This rule, "'perhaps not much less old than' the task of statutory 'construction itself,'" *Davis*, 139 S. Ct. at 2333 (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)), is founded on three tenets that have "long been part of our tradition," *Bass*, 404 U.S. at 348, and that underscore the importance of determining whether Congress clearly in-

tended "use of physical force" to include crimes of omission.

First, the rule of lenity enforces the requirement of "fair warning," in "language that the common world will understand," of "what the law intends to do if a certain line is passed." *Bass*, 404 U.S. at 348 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). To ensure the warning is fair, "the line should be clear." *Id.*; see *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[The] rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.").

Second, the rule "minimize[s] the risk of selective or arbitrary enforcement" of criminal laws and penalties. *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). It does so by "fostering uniformity in the interpretation of criminal statutes." *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). Thus, the rule "generate[s] greater objectivity and predictability" in applying criminal laws. Eskridge, *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-679 (1999). This is likewise a fundamental goal of the judicial function more generally. *See Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) ("Our principal responsibility … is to ensure the integrity and uniformity of federal law.").

Third, the rule holds that because the "seriousness of criminal penalties" often represents the "moral condemnation" of the community, "legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348. This policy embodies "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Id.* (quoting Friendly,

Mr. Justice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967)); *see also Davis*, 139 S. Ct. at 2333 ("'[T]he power of punishment is vested in the legislative, not in the judicial department.'" (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95)). Accordingly, the rule "maintain[s] the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952; *see Santos*, 553 U.S. at 514 (plurality opinion) (The rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.").

II. THE ACCA IS AT BEST AMBIGUOUS AS TO WHETHER CRIMES OF OMISSION CAN CONSTITUTE PREDICATE OFFENSES

As the petition convincingly explains (at 28-35), crimes of omission are not violent felonies under the ACCA's force clause. In interpreting the ACCA in *Johnson*, for example, Justice Scalia explained that "force" connotes "active power" and "physical force" likewise concerns a "physical act," such as a "violent act directed against a robbery victim." 559 U.S. at 139 (quotation marks omitted). Likewise, in *Leocal*, Chief Justice Rehnquist explained that the phrase "crime of violence" refers to a "category of violent, active crimes." 543 U.S. at 11; *see also Chambers*, 555 U.S. at 127-128. State and federal laws similarly reflect the common understanding that "physical force" requires defendants to actively exert or apply force.[2] But if the

[2] Del. Code tit. 11, § 222(22) ("Physical force" requires the "application of force" upon or toward another); Colo. Rev. Stat. § 24-31-901(4) (similar); Nev. Rev. Stat. § 193.350(4)(c) (similar); Fla. Stat. § 914.21(5) ("Physical force" requires "physical action against another"); 18 U.S.C. § 1515(a)(2) (same); Ohio Rev. Code

ACCA's force clause does not unambiguously exclude crimes of omission, *i.e.*, "where a defendant engaged in no physical action at all," Pet. App. 21a, the clause is plainly ambiguous on this point.

In the decision below, the majority wrote that this Court "foreclosed" this issue in *United States* v. *Castleman*, 572 U.S. 157 (2014), which purportedly "compelled" the conclusion that crimes of omission can be predicate violations under the ACCA's force clause, Pet. App. 27a. But as the majority conceded, *Castleman* did not "address[] crimes that can be committed by omission." Pet. App. 33a. Instead, *Castleman* concerned whether offenses that require only low-level or indirect force—*e.g.*, "sprinkling" poison into a beverage, 572 U.S. at 170-171—satisfy the use of physical force requirement. *Castleman* thus did not address, and certainly did not "foreclose" inquiry into, whether a caregiver who watches while a patient suffered a fatal allergic reaction, but who took no action to initiate that event, could be convicted of a crime requiring the "use of physical force." Accordingly, the Court has left this question open.

A. The Circuit Decisions Demonstrate The Ambiguity In The ACCA's Force Clause

The circuit split on this issue demonstrates that the phrase "use of physical force" in the ACCA is at best ambiguous. The "use of physical force against the person of another" (including threatened or attempted use) must be an "element" of the predicate offense. 18 U.S.C. § 924(e)(2)(B)(i). As the petition details (at 10-

---

§ 2901.01(1) ("Force" must be "physically exerted" upon another); Okla. Stat. tit. 44, § 920(F)(5) ("unlawful force" requires "an act" of force); 10 U.S.C. § 920(g)(5) (same).

12), several circuits have held that the "'use of force'" is "'not an element'" of crimes capable of being committed by omission. *United States* v. *Mayo*, 901 F.3d 218, 227 (3d Cir. 2018). But others, interpreting the same text, have held that an "'omission to act' … require[s] physical force." *United States* v. *Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017); *see* Pet. 13-14. This split indicates that "it is, at minimum, unclear whether Congress intended to include crimes committed by omission within the force clause of the ACCA." Pet. App. 110a-111a (Pooler, J., dissenting). As a practical matter, the split also means that offenders are subject to the ACCA's 15-year mandatory sentence enhancement depending not upon the offense for which they were convicted, but upon the jurisdiction in which they were later prosecuted.

This ambiguity is further illustrated through the irregular interpretations of everyday words the court below offered to justify holding that an individual can "use" physical force without moving a muscle. For example, the majority rejected the so-called "premise" that "omission is 'inaction,'" instead defining omission as "'equivalent'" to action. Pet. App. 33a-34a; *id.* 27a ("an omission is the action"); *id.* 33a ("The Law Equates Omission with Action"). In doing so, the majority conflated action and culpability. That offenders can be legally culpable for acts and omissions does not make these words synonyms. *See id.* 97a-98a (Pooler, J., dissenting). They are antonyms, as confirmed by numerous state criminal codes (including New York's) that distinguish "acts" from "omissions" and expressly define an omission as the "failure" to act.[3] Were they

[3] Ala. Code § 13A-2-1(1), (3); Alaska Stat. § 11.81.900(44); Ariz. Rev. Stat. § 13-105(2), (28); Ark. Code § 5-2-201(1), (4); Colo.

synonyms, such distinctions would evaporate. But courts should not interpret statutes to render any term "superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001).

Similarly, the majority concluded that the "ordinary meaning" of the phrase "use of violent force" includes passively "deriv[ing] service from" an external "force already in motion" by choosing not to stop it. Pet. App. 26a. According to the majority, offenders can "use" an existing force simply by knowing or intending its harmful outcome and not preventing it. *See id.* 23a ("it is not that 'use' must be physical but, rather, that it must be conscious"); *id.* 30a ("a defendant's 'use' of violent force depends on his knowing or intentional causation of bodily injury, not on his own physical movements"). In other words, the majority reasoned that a defendant can "use" physical force by knowingly taking advantage of a force that has already been initiated.

Under this strained view, a caretaker who watches while his patient suffers an allergic reaction, even one that no other person initiated, has "used" physical force if the caretaker *knew* that the patient would be harmed, but he has not "used" physical force if he was merely *negligent* in recognizing that outcome. In short, the majority has taken the active concept of "using physical force," reframed it as an entirely mental exercise, and then asserted that this interpretation represents the phrase's "ordinary meaning." *See* Pet. App. 26a, 46a. It does not.

Rev. Stat. § 18-1-501(1), (7); Del. Code tit. 11, § 242; Haw. Rev. Stat. § 701-118; Mo. Stat. § 565.002(3); Neb. Rev. Stat. 28-109(1), (14); N.J. Stat. § 2C:1-14(b)-(c); N.Y. Penal Law § 15.00(1), (3); N.D. Cent. Code § 12.1-01-04(1), (22); Or. Rev. Stat. § 161.085(1), (3); 18 Pa. Stat. and Cons. Stat. § 103; Tex. Penal Code § 1.07(a)(1), (34); Utah Code § 76-1-601(1), (10); Wash. Rev. Code § 9A.04.110(14).

Subjecting offenders to harsher punishments through such illogical and unforeseeable statutory interpretation is precisely what the rule of lenity was designed to prevent. Simply put, "the ordinary meaning of 'use of physical force' does not include an omission or failure to act." Pet. App. 61a (Menashi, J., concurring). Review is thus warranted to determine if defendants convicted of New York first-degree manslaughter, or similar crimes capable of being committed by omission, have had "fair warning" in "language that the common world will understand" that their convictions could serve as ACCA predicate offenses, *Bass*, 404 U.S. at 348.

The potential breadth of the decision below further warrants review. The majority interpreted the phrase "use of physical force" for purposes of sentence enhancement, but trial judges may believe themselves obligated to apply this flawed reasoning when interpreting the elements of substantive crimes. For example, a person commits "robbery" in New York "when, in the course of committing a larceny, he uses … physical force upon another" to aid in his larceny. N.Y. Penal Law § 160.00. Following the majority, if a caregiver steals from a client suffering an allergic reaction, the caregiver could be convicted of robbery because he "used" physical force by not mitigating the allergic reaction. While this hypothetical offender is certainly culpable of larceny, he would not have fair warning that he was also committing robbery.

B. Congress Did Not Clearly Intend Omissions To Constitute ACCA Predicate Offenses

Turning to other canons of construction, amici agree with the petition (at 19-20) that Congress did not clearly intend crimes of omission to constitute predicate

violent felonies under ACCA. The majority below assumed that Congress must have so intended because Congress purportedly "legislated against the common law background recognizing omission as action." Pet. App. 25a. But the majority cites nothing showing that Congress thought omissions and actions equivalent under the ACCA, and the legislative history indicates otherwise.

The House Report accompanying the first iteration of the ACCA used unmistakably *active* language to describe predicate offenses. H.R. Rep. No. 98-1073, at 3 (1984) ("Robberies involve physical violence … . Burglaries involve invasion of … homes or workplaces … ."). Those same considerations drove subsequent amendments to the ACCA. *See Taylor* v. *United States*, 495 U.S. 575, 588 (1990) ("Congress singled out burglary … both in 1984 and in 1986, because of its inherent potential for harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation … .").

Even if the Court believes that Congress *may* have intended crimes of omission to satisfy the "use of physical force" requirement, the ACCA does not unambiguously command this interpretation. *See* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, ch. 12 p.363 (2011) ("U.S.S.C. Report") ("[O]ngoing uncertainty exists as to which crimes qualify as underlying and predicate offenses for purposes of … the Armed Career Criminal Act. This uncertainty stems from the difficulty in applying the statutory definition[] of … 'violent felony' [, which] increases the potential for inconsistent application of the mandatory minimum penalties … .").

C. The Court Should Resolve The Question Presented Consistent With The Rule Of Lenity

As shown above, the ACCA's force clause does not "plainly and unmistakably" apply to crimes capable of being committed by omission. *Bass*, 404 U.S. at 348 (quoting *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)). Thus, even if this clause did not clearly exclude crimes of omission, the Court should nevertheless grant the petition to resolve the question presented consistently with the rule of lenity.

This Court has regularly applied the rule of lenity in the sentencing context. In *Leocal*, the Court considered whether a Florida state conviction qualified as a predicate offense under the Immigration and Nationality Act, which has an identical "force clause." 543 U.S. at 3; *see* 18 U.S.C. § 16(a). Chief Justice Rehnquist concluded for the Court that the sentencing statute unambiguously excluded convictions under that Florida law from counting as predicate offenses, including because the phrase "crime of violence" indicates a "category of violent, active crimes." *Leocal*, 543 U.S. at 11, 13. But even if the statute had "lacked clarity" on this point, the rule of lenity would have "constrained" the Court to interpret the clause in the offender's favor. *Id.* at 11-12 n.8.

In *Bifulco*, the Court also "made it clear that [the rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." 447 U.S. at 387. And in *Ladner* v. *United States*, 358 U.S. 169 (1958), the Court explained that the rule of lenity "means that the Court will not interpret a federal criminal statute to increase the penalty when such an interpretation can be based on no more than a guess as to what Congress intended."

Id. at 178; *see also Bennett* v. *United States*, 868 F.3d 1, 3 (1st Cir. 2017) (holding that the court "must apply the rule of lenity to determine whether that offense qualifies as a 'violent felony' under ACCA")[4]; *United States* v. *Thomas*, 211 F.3d 316, 321 (6th Cir. 2000) (Clay, J., concurring) (where ACCA was ambiguous on whether multiple convictions constituted a single predicate offense, "the rule of lenity" required "resolving the ambiguity in favor of the more lenient punishment").[5]

III. MANDATORY MINIMUMS SHOULD NEVER BE APPLIED BEYOND CONGRESS'S CLEAR INTENT

Statutes "imposing harsh mandatory sentences present a particularly compelling need for invocation of

---

[4] The First Circuit withdrew this decision because the defendant passed away before the decision issued, but *Bennett*'s reasoning remains "binding" in the Circuit. *United States* v. *Windley*, 864 F.3d 36, 37 n.2 (1st Cir. 2017) (per curiam).

[5] It is not entirely settled what degree of ambiguity must be present before the rule of lenity is triggered. In some cases, this Court has stated that the rule applies only when there remains a "grievous ambiguity." *Shaw* v. *United States*, 137 S. Ct. 462, 469 (2016). In others, the rule is triggered if there is "any ambiguity." *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 408-409 (2003); *see Crandon* v. *United States*, 494 U.S. 152, 158 (1990)); *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 285 (1978) (Rehnquist, C.J.) (where there is "some doubt" as to the meaning of a criminal statute, ambiguity is "'resolved in favor of the defendant'"). Ultimately, this distinction may provide "little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity." *United States* v. *Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.). But to the extent the Court finds the ACCA unclear on whether omissions can constitute the "use of physical force," the statute has the requisite level of ambiguity to trigger the rule of lenity under any of the above formulations.

the rule of lenity." Pet. App. 81a-82a (Leval, J., dissenting).

In the 1980s, Congress responded to a "perceived political need" to get "tough on crime" by enacting the ACCA and other mandatory minimum laws. Walker, *Testimony to the U.S. Sentencing Comm'n* 43 (May 28, 2009) (transcript); *see* Breyer, 11 Fed. Sent. Rep. at 184 ("Mandatory minimums … are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.'" (quoting Rehnquist, *National Symposium on Drugs and Violence in America* 10 (June 18, 1993)). Legislators touted several reasons for mandatory minimums, including that they would promote uniformity in sentencing, more fairly and adequately punish repeat offenders, and create safer communities. *See* U.S.S.C. Report, ch.5 pp.85-90 (summarizing "the policy views favoring mandatory minimum penalties").

A mountain of empirical studies and other evidence in the decades since, however, has shown that mandatory minimums serve none of their intended purposes. Instead, these harsh penalties have: (A) failed to improve sentencing uniformity, instead shifting discretion from judges to prosecutors; (B) led to disproportionate and unjust sentences by applying one-size-fits-all punishments to widely divergent offenders; (C) contributed significantly to increased prison costs by imposing extra years of confinement, without offsetting societal benefits in crime reduction; and (D) caused harm to the families and communities of sentenced individuals. The decision below exacerbates these failures and undermines the principles behind the rule of lenity. The following sections explain the failures of mandatory minimum sentences and underscore the importance of

granting this petition to ensure that such sentences are imposed no more broadly than Congress intended.

A. Unjustified Shifts In Sentencing Discretion

The principal federal sentencing statute, 18 U.S.C. § 3553, recognizes the fact-intensive inquiry needed to impose just and appropriate sentences. It requires judges to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* § 3553(a)(1). By contrast, mandatory minimums remove judges' discretion to tailor a punishment to these factors. "The proposition that the legislature, necessarily ignorant of the facts of a crime that has not yet occurred, can dictate in advance a more appropriate sentence than the court that studies the facts of the case is, to say the least, not highly persuasive." Pet. App. 79a (Leval, J., dissenting).

Further, although Congress aimed to promote uniformity by removing judicial discretion, mandatory minimums are not "mandatory" at all. Instead of promoting uniformity, they "simply substitute prosecutorial discretion for judicial discretion." Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. Res. Crim. & Delinq. 427, 451 (2007). Prosecutors typically enjoy unreviewable discretion to choose which charges to file. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) ("[T]he decision whether or not to prosecute, and what charge to file … generally rests entirely in [the prosecutor's] discretion."). With mandatory minimums, the prosecutor's charging decision can thus "predetermine" the defendant's sentence, binding the hands of the sentencing judge if the defendant is found guilty. Davis,

The American Prosecutor, 86 Iowa L. Rev. 393, 408 (2001).

This shift in sentencing power and discretion is problematic on several levels. First, it has not improved sentencing uniformity because prosecutors are far from uniform in their decisions whether to charge mandatory-minimum-eligible offenses. *See* Ulmer, 44 J. Res. Crim. & Delinq. at 440 (finding prosecutors brought such charges in response to only "18.4 percent" of eligible conduct). Rather than uniformly applying mandatory minimums based on an offender's conduct, these harsh sentences may be applied according to "prosecutors' perceptions of blameworthiness," or their biases regarding "gender, ethnicity, and age." *Id.* at 450-452 ("Hispanics were considerably more likely to receive mandatory minimums").

Additionally, however well-intentioned, prosecutors generally do not have the same training, experience, or incentives as judges to set appropriate sentences. *See* Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug. 9, 2003) ("The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way."). And unlike judicial decisions, prosecutorial charging decisions "are made outside of public view." U.S.S.C. Report, ch.5 p.97 ("66 percent" of judges ranked charging decisions "among the top three factors contributing to sentencing disparities").

Prosecutors can and do threaten to bring—or offer to dismiss—charges carrying mandatory minimums to coerce guilty pleas from defendants who otherwise would exercise their constitutional right to trial to advance legitimate defenses. U.S.S.C. Report, ch.5 p.97 & nn. 523-524 (the threat of mandatory minimums can be

wielded as a "trial tax" to pressure defendants into accepting plea bargains). Similarly, prosecutors use the threat of unjust mandatory penalties to coerce cooperation, even though cooperation motivated by fear and self-interest creates a dangerous risk of dishonesty. Osler, *Must Have Got Lost*, 54 S.C. L. Rev. 649, 663 & n.78 (2003) (mandatory minimums create "as much of an incentive to [provide] dishonest information as honest information," motivating defendants to "lie to give prosecutors what the defendant thinks the prosecutor wants").

Far from promoting uniformity, mandatory minimums have shifted discretion to prosecutors, whose varying approaches make prison sentences less predictable. Reviewing the question presented through the lens of lenity is thus consistent with Congress's goals in enacting these laws, including minimizing the risk of "selective or arbitrary enforcement," *Kozminski*, 487 U.S. at 952, promoting greater "uniformity" in the application of the criminal code, *Bryan*, 524 U.S. at 205 (Scalia, J., dissenting), and restoring the "proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

B. Arbitrary And Disproportionate Sentences

The Second Circuit dismissed the rule of lenity out of hand, writing that because Scott himself "performed physical acts," he can "hardly claim that *he* was not clearly warned that his manslaughter convictions exposed him to enhanced penalties under the ACCA." Pet. App. 44a-45a. But this misses the rule of lenity's import and ignores this Court's clear edict in applying the categorical approach. Whether Scott had fair warning that his prior convictions constituted ACCA predicates turns on the categorical approach to statutory

construction, rendering his own conduct irrelevant. *See Descamps* v. *United States*, 570 U.S. 254, 263 (2013) ("the categorical approach's central feature[is] a focus on the elements, rather than the facts, of a crime"). Further, because the lower court interpreted a mandatory sentence provision, its impact is not limited to Scott. Instead, the ruling will require the 15-year mandatory imprisonment of *other* defendants, for whom a sentence of such harshness will be "unjust and for whom the statute does not give fair notice." Pet. App. 74a (Leval, J., dissenting).

While Congress intended mandatory minimums to punish more adequately a "very small" group of repeat, dangerous offenders, these laws have instead led to unjust, disproportionate, and often absurd sentences for a much broader population. H.R. Rep. No. 98-1073, at 1, 3. This is in part because these penalties rely on certain triggering facts to the exclusion of all others. *See* Conrad, *Testimony to the U.S. Sentencing Comm'n* 4 (Feb. 11, 2009) (stating that the "myopic focus" required by mandatory minimums "excludes other important sentencing factors normally taken into view by the Guidelines … such as role in the offense, use of violence, … and use of special skill").

Mandatory minimums also lead to disproportionate sentences by creating "sentencing cliffs," which occur when an offender's conduct just barely brings him or her within the requirements of the mandatory minimum. *See* Hatch, *The Role of Congress in Sentencing*, 28 Wake Forest L. Rev. 185, 194-195 (1993) (noting that mandatory minimum penalties do not "provide for graduated increases in sentence severity" and instead provide for "sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record"). In these situations, "a severe

penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator." *Mandatory Minimums and Unintended Consequences*, 111th Cong. 38 (2009) ("The ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct.").

While Congress enacted mandatory minimums to punish the small subset of offenders responsible for a "large percentage" of the most violent crimes, *Taylor*, 495 U.S. at 581 (quoting H.R. Rep. No. 98-1073, at 1, 3), these laws have instead severely penalized a much broader swath of individuals, including those who engaged in conduct sufficiently minor that they were not imprisoned for their predicate offenses. Likewise, while the Second Circuit majority may believe that Scott personally deserves a 15-year sentence, the larger effect of its ruling will be to oblige trial courts to institute harsh mandatory sentences for other less culpable individuals.

Importantly, when defendants consider defense strategies, they are acutely aware of the implications of convictions for violations that can serve as predicates for sentencing enhancements. U.S.S.C. Report, ch. 5 p.97 & nn. 523-524. In deciding to plead to, or risk a conviction of, a crime of omission, defendants are likely not thinking that their decision could "come back to haunt [them] in an ACCA sentencing 30 years in the future." *Descamps*, 570 U.S. at 270-271. By granting review, this Court can draw a "clear" line for crimes that qualify as predicate offenses and avoid severely penalizing individuals who had no reason to know that they would later be at risk for increased sentences. *McBoyle*, 283 U.S. at 27.

C. Severe Societal Costs

The costs of mandatory minimums also extend to society more broadly, including by increasing the number of incarcerated individuals and imposing substantial costs associated with maintaining adequate facilities for them. *See Annual Determination of Average Cost of Incarceration Fee*, 84 Fed. Reg. 63,891 (Nov. 19, 2019) (annual cost between $34,492.50 and $37,449.00 per year per inmate); Pew Charitable Trusts, *Growth in Federal Prison System Exceeds States* (Jan. 22, 2015) ("Between 1980 and 2013, the federal imprisonment rate increased 518 percent.").

When Congress enacted the ACCA, it undertook its own cost-benefit analysis to determine which offenses should merit mandatory sentences. In determining "what particular segment of the career criminal population the federal government should target," Congress enacted mandatory minimums for robbery and burglary predicate offenses in 1984 because Congress believed that those were "the most damaging crimes to society" at that time. H.R. Rep. No. 98-1073, at 3. Limiting mandatory minimums to only those predicate offenses clearly intended by Congress respects the principle that legislatures, not courts, are empowered to "define criminal activity" and undertake the societal cost-benefit analyses implicated by such decisions. *Bass*, 404 U.S. at 348.

D. Harm To Communities

Mandatory minimums also impose severe costs on families and communities generally. Longer sentences "increase the difficulties of reentry after release, as family and community ties, connections to the job market, and the development of job skills are increasingly

frayed by time spent behind bars." Leipold, *Is Mass Incarceration Inevitable?*, 56 Am. Crim. L. Rev. 1579, 1586 (2019). Children of incarcerated individuals are further harmed, as they run greater risks of health and psychological problems, lower economic well-being, and decreased educational attainment. *See* Martin, *Hidden Consequences*, 278 Nat'l Inst. Just. 10, 10-16 (2017).

Additionally, mandatory minimums engender distrust of the justice system, particularly in minority communities, which are often most affected. *See* Vincent & Hofer, *The Consequences of Mandatory Minimum Prison Terms* 23-24 (1994). For example, studies have shown that Hispanic offenders may be four times more likely than Caucasian offenders to receive a mandatory sentence for the same conduct. Ulmer, 44 J. Res. Crim. & Delinq. at 442.

These effects exemplify the types of "moral condemnation" that the rule of lenity is designed to cabin. *Bass*, 404 U.S. at 348. Limiting mandatory minimums consistent with Congress's intent will allow offenders to better reintegrate into society, restoring credibility in the justice system.

CONCLUSION

Amici respectfully urge the Court to grant the petition.

Respectfully submitted.

MARY PRICE
FAMM
1100 H Street, NW
Washington, DC 20005

Counsel for FAMM

JOSHUA L. DRATEL
LAW OFFICE OF DRATEL
& LEWIS
29 Broadway, Suite 1412
New York, NY 10006

Counsel for NACDL

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

DAVID MARCUS
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Ave.,
Suite 2400
Los Angeles, CA 90071

SAMUEL LEIFER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Counsel for FAMM

MAY 2021