No. 23-825

IN THE

Supreme Court of the United States

SALVATORE DELLIGATTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

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

NACDL advances its charitable purposes in part through education of the general public and select amicus filings in important cases. NACDL and its 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 its missions and memberships, NACDL will continue to have an interest in future decisions involving the ACCA.

This case is of utmost importance to NACDL because ensuring that sentencing provisions are applied in

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

a consistent, predictable manner, respecting the rule of lenity and Congress's clear intent advances NACDL's mission of "identifying and reforming flaws and inequities in the criminal legal system." NACDL, *Mission and Vision*, https://www.nacdl.org/Landing/Mission-and-Vision (last visited Feb. 5, 2024). A system in which individuals are sentenced to an additional fifteen years' incarceration based on an interpretation of a statute that contradicts its plain meaning and interprets ambiguities against the accused is deeply flawed and inequitable.

SUMMARY OF ARGUMENT

The Second Circuit held in this case that a conviction for New York attempted murder in the second degree is a crime of violence under the ACCA, 18 U.S.C. § 924(c)(3)(A), even though one can commit that crime without taking any action or using any force at all. *See, e.g.*, *People* v. *Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992) (parents' failure to provide child with adequate medical care "can form the basis of a homicide charge"). That decision continues an intractable split among courts of appeals as to whether crimes that can be committed by inaction alone categorically have as an element the "use of physical force." That split is deeply consequential, subjecting criminal defendants in some jurisdictions—but not all—to lengthy mandatory minimum sentences for crimes no ordinary person would understand to qualify for such automatic, draconian penalties.

For the reasons persuasively argued in the petition (at 20-26), New York attempted second-degree murder, N.Y. Penal Law § 125.25(1), is not a predicate offense under the ACCA. Prior offenses count as predicate violations under the ACCA's so-called "use-of-force clause"—which defines "crime of violence" for purposes of sentence enhancement—only if the "use of physical force"

(or "attempted" or "threatened" use) is an element of that crime. 18 U.S.C. § 924(c)(3)(A). Because New York attempted second-degree murder can be committed by complete inaction, it cannot be a predicate violation under the plain text of this clause.

This brief focuses on the importance of the question presented in light of the rule of lenity and its animating principles. The force clause is at most ambiguous as to whether crimes that can be committed by inaction involve the "use of physical force." And as the petition explains (at 25-26), the Second Circuit's decision failed to construe that ambiguity "'strictly' against the government and in favor of individuals." *Bittner* v. *United States*, 598 U.S. 85, 101 (2023) (quoting *Commissioner* v. *Acker*, 361 U.S. 87, 91 (1959)). Individuals in the Second Circuit thus lack "fair warning" that they may be subject to a mandatory sentence enhancement under the ACCA. *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).

The question presented implicates the rule of lenity for three reasons.

First, even if the ACCA did not clearly exclude crimes of omission from the "violent felony" definition, the rule of lenity should apply to precisely this type of ambiguity, meaning courts should read this sentencing provision in the less punitive manner. To appreciate the ambiguity, the Court need look no further than the strained interpretations of commonplace words that the circuits on the wrong side of the split have offered.

Second, to avoid the rule of lenity, courts have interpreted the phrase "use of physical force" in light of a specialized legal meaning of what counts as "action"—namely, that having certain legal duties means one's *inaction* can be treated like *action*. That interpretation is

divorced from the common meaning of the terms that are actually in the statute. A statute that is only clear to attorneys with specialized knowledge is not clear at all. The rule of lenity squarely applies in this situation.

Third, the rule of lenity is particularly important for statues imposing mandatory minimums, like the ACCA, because categorical imposition of mandatory minimums regardless of the individual facts increases the risk of inconsistent outcomes among otherwise similarly situated defendants, lengthy sentences imposed without fair notice, and an imbalance between the institutional roles of Congress, prosecutors, and the courts.

ARGUMENT

No one would reasonably think the ACCA's force clause covers crimes where no action is taken and no force is used. Under 18 U.S.C. § 924(c)(3)(A), a felony qualifies as a "crime of violence" only if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." This Court has repeatedly explained that the "ordinary meaning" of the term "physical force" in the ACCA refers to "'violent, active crimes.'" *Borden* v. *United States*, 593 U.S. 420, 437-438 (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010) and *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004)). Eight circuits have nonetheless held that an omission involving no force can somehow involve the "use of physical force." Delligatti persuasively argues (Pet. 20-26) that crimes of omission cannot be ACCA predicate violations under this Court's precedent. NACDL writes to expand on a supplemental reason identified in the petition (at 25-26) 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

The rule of lenity is "a new name for an old idea—the notion that 'penal laws should be construed strictly.'" *Wooden* v. *United States*, 595 U.S. 360, 388 (2022) (Gorsuch, J. concurring) (quoting *The Adventure*, 1 F. Cas. 202, 204 (C.C. Va. 1812) (No. 93) (Marshall, C.J.)). Under that age-old rule, courts determining a criminal statute's scope or its penalties must resolve ambiguities "in the defendant's favor." *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019); *see also Bittner* v. *United States*, 589 U.S. 85, 101 (2023) ("Under the rule of lenity, this Court has long held, statutes imposing penalties are to be 'construed strictly' against the government and in favor of individuals."); *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (rule applies to sentencing statutes as well as 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. *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971)).

The rule of lenity stems from three fundamental tenets that have long been part of our legal tradition. *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). Each tenet counsels in favor of holding that the ordinary meaning of "use of physical force" does not cover crimes of omission.

First, the rule of lenity ensures the laws provide "'fair warning,'" in "'language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner*, 598 U.S. at 102 (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J)); *see also Wooden*, 595 U.S. at 389 ("Among those 'settled usages' [of the common law] is the ancient

rule that the law must afford ordinary people fair notice of its demands."). To ensure the warning is fair, "'the line should be clear.'" *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27)); *see also 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."). United States courts as far back as 1815 have interpreted criminal laws consistent with this rationale: "Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid." *United States* v. *Sharp*, 27 F. Cas. 1041, 1043 (C.C. Pa. 1815) (No. 16,264) (Washington, J.).

Second, requiring that ambiguities be resolved against more expansive liability and harsher sentences "minimize[s] the risk of selective or arbitrary enforcement" of criminal laws and penalties, *Kozminski*, 487 U.S. at 952 (1988), thereby "fostering uniformity in the interpretation of criminal statutes," *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). The rule thus "generate[s] greater objectivity and predictability" in applying criminal laws. Eskridge, *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. Chi. L. Rev. 671, 678-679 (1999). Ensuring "the integrity and uniformity of federal law" is a fundamental goal of the judicial function. *Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring).

Third, the rule of lenity ensures that "legislatures and not courts … define criminal activity," as is appropriate given the "seriousness of criminal penalties" and associated "moral condemnation of the community." *Bass*, 404 U.S. at 348. "Since the founding, lenity has sought to ensure that the government may not inflict

punishments on individuals without … the assent of the people's representatives." *Wooden*, 595 U.S. at 392 (Gorsuch, J. concurring). Individuals should not be "languishing in prison unless the lawmaker has clearly said they should.'" *Id.* (cleaned up); *see also Davis*, 139 S. Ct. at 2333 ("'[T]he power of punishment is vested in the legislative, not in the judicial department.'" (quoting *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820))). The rule of lenity thus "maintain[s] the proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952; *see Wooden*, 595 U.S. at 391 ("Closely related to its fair notice function is lenity's role in vindicating the separation of powers.").

II. THE RULE OF LENITY REQUIRES REVERSAL HERE

Whether an omission can count as a "use of physical force" under the ACCA is, at best, ambiguous. Under the ordinary meaning of the words, omissions do not involve the "use of physical force." Yet eight circuit courts have held to the contrary. These courts reach their counterintuitive conclusion only importing into the phrase specialized legal meanings of what can constitute "action" under the criminal law, and fully redefining the word "force" so that it no longer refers to acceleration or impact. At a minimum, this interpretation resolves ambiguities in favor of the more punitive reading. The rule of lenity requires that courts do precisely the opposite, and this Court should grant *certiorari* to make that clear.

A. The ACCA Is At Best Ambiguous As To Whether Crimes Of Omission Can Constitute Predicate Offenses

As the petition lays out (at 20-26), crimes of omission—*i.e.*, where a defendant "fail[ed] to take any action," Pet. 21—are not violent felonies under the ACCA's force clause. In interpreting the ACCA in

Johnson, for example, Justice Scalia explained that "force" in "general usage" connotes "*active* power," and "physical force" likewise suggests a "physical act," such as a "'violent act directed against a robbery victim.'" 559 U.S. at 139 (quoting *Black's Law Dictionary* 717 (9th ed. 2009) (emphasis added)). Similarly, in *Leocal*, Chief Justice Rehnquist explained that the "ordinary meaning" of the term "crime of violence" refers to a "category of violent, *active* crimes." 543 U.S. at 11 (emphasis added). State and federal laws similarly reflect the common understanding that "physical force" requires defendants to actively exert or apply force.[2] *See Borden*, 593 U.S. at 428 (collecting exemplar state laws). Crimes that involve neither action nor force thus cannot be "violent felonies" that require the "use of physical force."

Legislative history is used only when a statute is ambiguous, never to create ambiguity. *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 539-540 (2004). Regardless, here, the legislative history confirms the ordinary meaning of the term is the intended one. The legislative history further confirms that Congress did not clearly intend crimes of omission to constitute predicate violent felonies under ACCA. 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

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

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, *2011 Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, ch. 12, at 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 … .”).

Indeed, the “intractable divi[sion]” among the courts of appeals on this issue confirms that the phrase “use of physical force” in the ACCA is at best ambiguous. Pet. 14. As the petition details (at 16-18), two circuits have held that a crime capable of being committed by omission cannot categorically be considered a “crime of violence” because it does not involve the “use of physical force.” *United States* v. *Mayo*, 901 F.3d 218, 227 (3d Cir. 2018); *United States* v. *Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017).[3] But eight others, interpreting the same text, have held that even an “‘omission

[3] *Martinez-Rodriguez* involved the Immigration and Nationality Act (“INA”), 8 U.S.C. § 16, which has an identical use-of-force clause.

to act' … require[s] physical force." *See, e.g.*, *United States* v. *Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017); Pet. 15. And the question has fractured even the circuits themselves. *See, e.g.*, *United States* v. *Rumley*, 952 F.3d 538, 549-552 (4th Cir. 2020) (Motz, J. dissenting); *United States* v. *Scott*, 990 F.3d 94, 133-138, 138-152 (2d Cir. 2021) (Leval, J. dissenting; Pooler, J. dissenting); *United States* v. *Harrison*, 54 F.4th 884, 891-895 (6th Cir. 2022) (Cole, J. concurring in part and concurring in the judgment).

This split confirms that it is, at a minimum, unclear whether Congress intended to include crimes of omission within the force clause of the ACCA. And as a practical matter, the split also means that offenders are subject to the ACCA's mandatory sentence enhancement depending not on the offense of conviction, but on the jurisdiction where they are convicted.

B. Circuits On The Wrong Side Of The Split Give The Words In The Force Clause The Opposite Of Their Common Meaning

The Court should also grant certiorari to reaffirm the bedrock principle that criminal statutes must give "fair warning" in "'language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Bittner*, 598 U.S. at 102 (quoting *McBoyle*, 283 U.S. at 27). "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." *Wiltberger*, 18 U.S. (5 Wheat.) at 96; *see also Wooden*, 595 U.S. at 390-391 (Gorsuch, J., concurring) ("Lenity's emphasis on fair notice isn't about indulging a fantasy. It is about protecting an indispensable part of the rule of law—the promise that, whether or not

individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance.").

The "rule of lenity means that we can't give the words of a criminal statute 'a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.'" *Abramski* v. *United States*¸ 573 U.S. 169, 203 (2014) (Scalia, J. dissenting). But this is exactly what the courts on the wrong side of the split have done, rejecting common usage to hold that an individual can "use physical force" without moving a muscle.

1. The specialized legal meaning of "action" cannot mean that "use of physical force" clearly includes omissions

In *United States* v. *Scott*, the first Second Circuit decision holding that crimes of omission could constitute violent felonies under ACCA, the court 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." 990 F.3d 94, 119 (2d Cir. 2021). According to the Second Circuit, offenders can "use" an existing force simply by knowing or intending that the force results in a harmful outcome and not preventing it. *See id.* at 109 ("it is not that 'use' must be physical but, rather, that it must be conscious"); *id.* at 112 ("a defendant's 'use' of violent force depends on his knowing or intentional causation of bodily injury, not on his own physical movements"). On the majority's reasoning, a defendant can "use" physical force by simply appreciating the likely consequences of a force that has already been initiated. *See* Pet. 22.

While the Second Circuit in some parts of its opinion said that this interpretation reflects the phrase's "ordinary meaning," 990 F.3d at 108, in others it made clear

that this counterintuitive reading of the word "use" relied on how lawyers steeped in the doctrine would understand what counts as "action"—not how the "common world," *Bittner*, 598 U.S. at 102, would interpret the word "use." "Using physical force" is an active concept. *See Johnson*, 559 U.S. at 138 ("The phrase 'physical force' … plainly refers to force exerted by and through physical bodies."); Pet. 23. And the Second Circuit recognized that an "omission" is "the failure to act when the law imposes a duty to act." *Scott*, 990 F.3d at 114. But it then held that the active phrase "use" can nonetheless cover these failures to act because "*the law* views [an omission] as action sufficient to support criminal culpability." *Id.*

The court expressly recognized that it was not applying the common meaning of the term "use," but rather importing into the ACCA a "'specialized meaning.'" *Scott*, 990 F.3d at 115). That specialized meaning was not of the phrase "use of force" itself—a phrase no one has argued is a standalone legal term of art—but rather required overlaying the legalistic conception of what counts as "action." *See id.* at 114 (section containing this analysis entitled "The Law Equates Omission with Action"); *id.* at 114-115 ("[I]n the eyes of the law, a 'failure to act where there is a duty to act is the equivalent of affirmative action'"); *id.* at 115-116 (relying on assumption that Congress and the Supreme Court understood this "equivalency, rooted in common law" between certain inaction and action). Thus, while the Second Circuit purported to give the words in the force clause their "ordinary meaning," *id.* at 108, in fact it squarely relied on a niche legal interpretation of what constitutes "action" to expand the meaning of "use of force" well beyond what an ordinary person would understand it to mean.

Judge Menashi, concurring in *Scott*, made precisely this point. He reasoned that, "[e]ven though the ordinary meaning of the phrase 'use of physical force' entails a physical act, the legal meaning of that phrase includes culpable omissions," and noted that the "court's opinion articulates the reasons why." 990 F.3d at 131. He nonetheless concurred because he saw nothing wrong with interpreting the phrase "use of force" not by giving the phase its common meaning, but instead based on the potential conclusion of "a reasonable legal interpreter familiar with the *corpus juris*" that inaction can sometimes count as action. *Id.* That is precisely backwards when interpreting criminal statutes, where the rule of lenity requires resolving ambiguities in favor the more lenient reading in part so individuals governed by those laws are on notice. *See Santos*, 553 U.S. at 511 ("When a term is undefined, we give it its ordinary meaning.")*; see also Wooden*, 595 U.S. at 390 (Gorsuch, J. dissenting) ("[T]he connection between lenity and fair notice was clear: If the law inflicting punishment does not speak plainly to the defendant's conduct, liberty must prevail.").

Indeed, it is not only the rule of lenity that requires courts to enforce the commonly understood meaning, but also the void-for-vagueness doctrine: "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *see also Davis*, 139 S. Ct. at 2325 ("[v]ague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them" (citing *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926) and *Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914))). Without a showing

that ordinary people would understand "action" to include a complete use of force, the government's interpretation must fail.

2. The common meaning of "physical force" requires some concrete movement and impact

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

Yet the First Circuit did not apply the statute's ordinary meaning because it considered itself bound by dicta in *Castleman*, which in fact decided only whether the *indirect* use of force qualified under ACCA. *See* 950 F.3d at 132. It is one thing to say that a common understanding of the phrase "use of force" encompasses the indirect application of force. It is quite another to say it covers no application of force at all. This Court in *Castleman* did not consider the problem of omissions, nor did it address "violent force" as is at issue here. *See* Pet. 24-25. And the rule of lenity does not allow a legalistic interpretation known only to subject matter experts to resolve statutory ambiguities in favor of a more punitive interpretation.

Other circuits have avoided this issue by simply redefining the words "physical force" based on nothing but their own say-so.

The Seventh Circuit admitted it was "difficult to identify the particular 'force' involved" when a defendant "withhold[s] something that is necessary to sustain life." *United States* v. *Jennings*, 860 F.3d 450, 459 (7th Cir. 2017). But rather than applying the rule of lenity and stopping there, it then tried to square the circle by reasoning that, where a victim is "subject to the defendant's control," the "relevant 'force' may simply be the exertion of that control with the aim of physically harming the victim." *Id.* That is not a definition of "physical force" that one would find in common parlance or the dictionary. The Fourth Circuit similarly redefined "force" not to mean some actual movement or impact (as any common person would understand the word) but instead to mean "simply the mechanism by which the harm is imposed.'" *Rumley*, 952 F.3d at 549-551 (quoting *Castleman*, 572 U.S. at 171). That too is not what "use of physical force" means.

This results-oriented reasoning to reach a more punitive interpretation is flatly inconsistent with the rule of lenity. No ordinary person would think a person who starved to death by neglect was murdered by the "use of physical force." Indeed, the Fifth Circuit thought the point so obvious that it didn't even address it, simply listing crimes of omission and stating, "as these examples illustrate, the offense of injury to a child does not involve … the use of force." *United States* v. *Gracia-Cantu*, 302 F.3d 308, 313 (5th Cir. 2002) (interpreting 18 U.S.C. § 16, a statute with identical wording to ACCA), *overruled on other grounds by United States* v. *Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018).

C. The Court Should Interpret The Force Clause 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 with no action or force at all. *Bass*, 404 U.S. at 348. The Court should therefore grant the petition to resolve the question presented by application of 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 3-4; *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, including because the phrase "crime of violence" indicates a "category of violent, active crimes." 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 "any ambiguity in the statute" in the offender's favor. *Id.* at 11 n.8. So too here.

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; *see also United States* v. *Batchelder*, 442 U.S. 114, 121 (1979) ("this principle of construction applies to sentencing as well as substantive provisions."). And in *Ladner* v. *United States*, the Court explained that "[t]his policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress

intended." 358 U.S. 169, 178 (1958) (holding limited by . These principles squarely apply to the ACCA's force clause and require reversal.

III. THE RULE OF LENITY IS ESPECIALLY IMPORTANT IN THE CASE OF MANDATORY MINIMUMS

Statutes "imposing harsh mandatory sentences present a particularly compelling need for invocation of the rule of lenity." *Scott*, 990 F.3d at 137 (Leval, J. dissenting). Mandatory minimums increase the risks of "selective or arbitrary enforcement," *Kozminski*, 487 U.S. at 952, and of lengthy sentences imposed without fair notice. The rule of lenity mitigates these risks, promoting greater "uniformity" in criminal punishment, *Bryan*, 524 U.S. at 205 (Scalia, J., dissenting), and ensuring the "proper balance between Congress, prosecutors, and courts." *Kozminski*, 487 U.S. at 952.

The principal federal sentencing statute requires judges to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). An interpretation of an ambiguous law that limits the scope of mandatory minimums thus still permits sentencing judges to impose the statutory sentence when called for. But it also leaves courts free to vary downward in unusual cases where Congress would not have intended to punish so harshly—for example, cases that do not involve "the eponymous 'armed career criminal.'" *Borden*, 593 U.S. at 438. An interpretation that broadens the scope of mandatory minimums, by contrast, forces trial court judges to impose longer sentences than are justified by application of the § 3553 factors to the facts of the case and the person standing before them for sentencing. *See* Conrad, *Testimony to the U.S. Sentencing Comm'n* 4 (Feb. 11, 2009) (stating that the "myopic focus" required

by mandatory minimums "excludes other important sentencing factors normally taken into view by the Guidelines … such as role in the offense, use of violence, … and use of special skill").

As a consequence, mandatory minimums lead to "sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record." Hatch, *The Role of Congress in Sentencing*, 28 Wake Forest L. Rev. 185, 194-195 (1993). In these situations, "a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator." *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 38 (2009); *see id.* ("The ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct."). Thus, "the main practical effect of such statutes is to cause serious injustice in a minority of cases by requiring far harsher sentences than the facts of the case can justify," *Scott*, 990 F.3d at 137, and indeed harsher sentences than Congress would have intended.

Punitive interpretations of ambiguous mandatory sentencing statutes also unfairly deprive defendants of fair notice. When defendants consider defense strategies, they should know whether the conviction they are pleading to or risking conviction of can serve as a predicate for lengthy sentencing enhancements. *See U.S.S.C. Report*, ch. 5, at 97 & nn.523-524. In making that decision with respect to a crime of omission where no force was used, defendants were unlikely to think that their decision could "come back to haunt [them] in an ACCA sentencing 30 years in the future." *Descamps* v. *United*

States, 570 U.S. 254, 270-271 (2013). 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.

Finally, mandatory minimums disrupt the balance between prosecutors and courts, which in turn widens the gap between actual application of the laws and what Congress intended. Prosecutors can and do threaten to bring—or offer to dismiss—charges carrying mandatory minimums in order to obtain guilty pleas from defendants who otherwise would exercise their constitutional right to trial to advance legitimate defenses. *U.S.S.C. Report*, ch. 5, at 97 & nn. 523-524 (the threat of mandatory minimums can be wielded as a "trial tax" to pressure defendants into accepting plea bargains). Similarly, prosecutors use the threat of mandatory penalties to coerce cooperation, even though cooperation motivated by fear and self-interest creates a dangerous risk of dishonesty. Osler, *Must Have Got Lost*, 54 S.C. L. Rev. 649, 663 & n.78 (2003) (mandatory minimums create "as much of an incentive to [provide] dishonest information as honest information," motivating defendants to "lie to give prosecutors what the defendant thinks the prosecutor wants"). What is more, unlike sentencing decisions by trial courts, charging decisions "are made outside of public view." *U.S.S.C. Report*, ch. 5, at 97 ("66 percent" of judges ranked charging decisions "among the top three factors contributing to sentencing disparities").

These unjust results from mandatory minimums exemplify the types of "moral condemnation" that the rule of lenity is designed to cabin. *Bass*, 404 U.S. at 348. Courts should thus be certain that Congress intended to replace judicial discretion with blunderbuss mandatory

minimums before imposing those minimums across the board. Limiting mandatory minimums to only those predicate offenses clearly intended by Congress respects the distinct roles of Congress, the courts, and prosecutors; ensures fair notice for the individuals facings application of these harsh minimums; and more broadly helps restore credibility to the justice system.

CONCLUSION

Amicus respectfully urges the Court to grant the petition.

Respectfully submitted.

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MARCH 2024