No. 18-163

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

GERALD SCOTT,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICI CURIAE DEFENSE ORGANIZATIONS IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel states that *amici curiae* National Association for Public Defense, Arizona Attorneys for Criminal Justice, Human Rights Defense Center, Illinois Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, National Legal Aid & Defender Association, and Office of the Defender General in Vermont have no corporate parents, and no publicly held corporation holds 10% of any stock these entities might issue.

Respectfully submitted,

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IDENTITY AND INTERESTS OF AMICI*

Amici are organizations whose members represent a broad cross-section of the criminal defense bar. All have a strong interest in this case because the panel opinion correctly held that crimes that can be committed by omission—that is, with no action at all on the part of a defendant—do not contain an element requiring the use of violent force, such that they are not predicate offenses under the force clauses of the Armed Career Criminal Act of 1984 and the career offender provision of the relevant U.S. Sentencing Guidelines. Moreover, the panel correctly held that first degree manslaughter in New York is not an enumerated offense under the career offender Guidelines. A contrary holding would violate the text of the Armed Career Criminal Act and the text of the career offender Guidelines, and would misapply the Supreme Court's precedents—severely prejudicing amici's members and those who they represent. Amici are:

- **National Association for Public Defense (NAPD)** is an association of more than 15,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social

* Pursuant to Fed. R. App. P. 29(a)(4)(E), amici curiae state that no party or party's counsel authored this brief in whole or in part, and that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. This brief is submitted by leave of the Court pursuant to the July 27, 2020 order inviting amicus curiae briefs from interested parties. Doc. 129.

workers, administrators, and other support staff who are responsible for providing and protecting the constitutional right to effective assistance of counsel. NAPD members are advocates in jails, in courtrooms, and in communities. They are experts in theoretical best practices, as well as in the practical, day-to-day delivery of legal services.

- **Arizona Attorneys for Criminal Justice (AACJ)**, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.
- **The Human Rights Defense Center (HRDC)** is a nonprofit charitable organization headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC engages in state and federal

court litigation on prisoner rights issues, including wrongful death, public records, class actions, and Section 1983 civil rights litigation concerning the First Amendment rights of prisoners and their correspondents. HRDC's advocacy efforts include publishing two monthly publications, *Prison Legal News*, which covers national and international news and litigation concerning prisons and jails, as well as *Criminal Legal News*, which is focused on criminal law and procedure and policing issues, as well as publishing and distributing self-help and legal reference books for prisoners.

- **The Illinois Association of Criminal Defense Lawyers (IACDL)** is a nonprofit organization dedicated to defending the rights of all individuals as guaranteed by the United States' Constitution and the Constitution of the State of Illinois. The organization's membership consists of private criminal defense attorneys and public defenders throughout the State of Illinois. The IACDL's mission is to preserve and improve our adversarial system of justice, to foster and support independent and able criminal defense professionals, and to ensure all persons accused of a criminal offense are afforded due process and a fair trial.
- **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. NACDL files numerous amicus briefs each year in the Second Circuit, the U.S. Supreme Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in the scope of criminal statutes and sentencing enhancements, including those at issue here with respect to what constitutes a "crime of violence."

- **The National Legal Aid & Defender Association (NLADA)**, founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services for those who cannot afford counsel. For 100 years, NLADA has pioneered initiatives that promote access to justice and right to counsel at the national, state and local level through the creation of public defender systems and the development and refinement of nationally applicable standards for legal representation. NLADA serves as a collective

voice for our country's public defense providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. NLADA's members include front-line public defenders who fight to uphold their clients' constitutional rights in courtrooms across the United States on a daily basis. NLADA stands alongside them to preserve the constitutional rights of criminal defendants.

- **The Office of the Defender General (ODG) in Vermont** provides effective representation to persons entitled to appointed counsel in Vermont, including needy persons charged with serious crimes. ODG provides legal representation to each of its clients with reasonable diligence, promptness, and a zealous commitment to their interests. Since its creation in 1972, ODG has evolved into a complex service delivery system consisting of two separate programs, Public Defense and Assigned Counsel. ODG has seven county staff offices with 35 attorneys and a variety of support staff, including investigators, secretaries, case managers and case aides. In addition, the Office manages over 100 contractors under both programs, and more than 100 ad hoc counsel handling conflict cases. In total, the Office handles approximately 20,000 cases each year. There are also two offices that handle matters post adjudication: the Appellate Defender handles appeals to the Supreme Court, while the Pris-

oners' Rights Office represents persons in the custody of the Commissioner of Corrections. ODG's mission dictates a firm commitment to the fair treatment and zealous representation of people accused of crimes.

I. NEW YORK FIRST DEGREE MANSLAUGHTER IS NOT AN ACCA PREDICATE.

A. First Degree Manslaughter Can Be Committed In New York With No Action At All.

Although the Government vigorously argued to the panel that New York's first degree manslaughter statute requires more than an omission alone, it has abandoned that argument in its en banc opening brief. *See* Br. 21-32 (arguing that it does not matter whether omission alone is sufficient). And for good reason. New York's highest court has held that first degree manslaughter can be committed by omission in the State. In other words, first degree manslaughter can be committed in New York with a complete lack of action on the part of a defendant. This Court should not revisit the issue.

"In Armed Career Criminal Act ('ACCA') cases, . . . the Supreme Court and other Courts of Appeals have recognized that federal courts are bound by the highest state court's interpretations of state law." *Matthews v. Barr*, 927 F.3d 606, 622 n.11 (2d Cir. 2019) (citing cases), *cert. denied*, 2020 WL 3492659 (U.S. June 29, 2020). Thus, to determine the minimum conduct necessary for a conviction, this Court looks to the state "statute, as interpreted by the New York Court of Appeals." *Id.* at 621;

see also United States v. Drummond, 925 F.3d 681, 689-90 (4th Cir. 2019) ("When evaluating a state court conviction for ACCA predicate offense purposes, a federal court is bound by the state court's interpretation of state law, including its determination of the elements of the potential predicate offense. . . . For statutory offenses, we look to the physical actions specified in the statute, and any state court decisions interpreting its terms.") (quotation marks, alterations, and citations omitted), *cert. denied*, 140 S. Ct. 976 (2020).

In New York, "[a] person is guilty of manslaughter in the first degree when," "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person." N.Y. Penal Law § 125.20(1). Thus, by its plain terms, a person need not intend to cause death, as is generally the case for state voluntary manslaughter and murder statutes. *See infra* Part II.A. An intent to cause serious physical injury is enough. And in explaining the *actus reus* required for first degree manslaughter, the Court of Appeals of New York has held that harm caused by omission is sufficient. In other words, a defendant can be found guilty of first degree manslaughter in New York without taking any action at all, so long as there is a duty of care. *See People v. Steinberg*, 595 N.E.2d 845, 847 (N.Y. 1992).

Thus, for example, a parent who declines to seek medical care for a child who has been severely injured may be found guilty of first degree manslaughter in New York. *Steinberg*, 595 N.E.2d at 847. As put by the State's highest court, "the failure

to obtain medical care" by a legal caretaker—*i.e.*, taking zero action in the face of a legal duty to act—"can . . . support a first degree manslaughter charge, so long as there is sufficient proof of the requisite *mens rea*—intent to cause serious physical injury." *Ibid.* "[I]f the objective is to cause serious physical injury, the mental culpability element of first degree manslaughter is satisfied—whether or not defendant had knowledge that the omission would in fact cause serious injury or death." *Id.* at 848.

The Court of Appeals of New York reiterated *Steinberg*'s holding just a year later. According to the court, even a "'passive' defendant" can be criminally liable "predicated on an 'omission.'" *People v. Wong*, 619 N.E.2d 377, 381 (N.Y. 1993). Thus, "where the requisite proof [of intent] is present," the court explained, "a person in the position of the 'passive' defendant here may be held criminally liable for failing to seek emergency medical aid for a seriously injured child." *Ibid.* So long as a passive defendant can be shown to be "personally aware" of the danger to the victim, the defendant may be found "criminally liable for failing to seek medical help" for the victim to whom he owes a duty of care. *Id.* at 381-82.

Here, the Government argued to the panel that the State's case failed in *Wong* because there was insufficient proof of the requisite *actus reus*. But that is incorrect. The court of appeals made clear that doing nothing when there is a duty of care is sufficient to commit the crime. Rather, it was the lack of proof as to the requisite

mens rea that doomed the case, because there was no proof to show—beyond shadow of doubt—that the passive caretaker in *Wong* was aware of the victim's injuries. 619 N.E.2d at 381-82.

These pronouncements of the law of first degree manslaughter—from the State's highest court—are all that this Court needs to find a "realistic probability" "that the State would apply its statute" to criminalize omissions. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (quotation marks omitted). "Decisions from the state supreme court best indicate a 'realistic probability' . . . ." *United States v. Harris*, 844 F.3d 1260, 1264 (10th Cir. 2017). Because the Court of Appeals of New York has defined the *actus reus* for first degree manslaughter in the State, that is all that is necessary to show the minimum conduct criminalized by the state statute. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133, 138, 140 (2010) (*Johnson I*) (holding that Florida battery is not an ACCA predicate because the Florida Supreme Court had held "that the element of 'actually and intentionally touching' under Florida's battery law is satisfied by *any* intentional physical contact, no matter how slight") (quotation marks omitted). "We do not need to hypothesize about whether there is a 'realistic probability' that [New York] prosecutors will charge defendants" for omissions; "we know that they can because the state's highest court has said so." *See United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc).

If that weren't enough, we also know "that the State actually prosecutes the relevant offense," *Moncrieffe*, 569 U.S. at 206, based on omission, as both of the cases from New York's highest court evidence. The defendants in *Steinberg* and *Wong* were "actually prosecuted" based on theories of the case that an omission alone is enough to charge, and take to a jury, the crime of first degree manslaughter in New York. *Wong*, 619 N.E.2d at 380; *Steinberg*, 595 N.E.2d at 847. This is thus an *a fortiori* case. The State actually prosecutes first degree manslaughter for omissions, and in cases in which that occurred, the State's highest court has held that an omission is enough to meet the crime's required *actus reus*. There is thus more than a "realistic probability" that defendants will be prosecuted for manslaughter in the first degree in New York based on omission. Prosecutors in the State have done so. *See also, e.g.*, *Williams v. Att'y Gen.*, 880 F.3d 100, 106 (3d Cir. 2018) ("Inasmuch as both the *Warren* indictment and the opinion of the Court of Appeals of Georgia support Williams' view, and the Government has not offered anything to rebut that evidence, we conclude that Williams has established a sufficiently 'realistic probability' that Georgia would apply its forgery statute to false agency endorsement."), *cert. denied*, 139 S. Ct. 863 (2019).

B. Crimes That Require Zero Action On The Part Of The Defendant—Like First Degree Manslaughter In New York—Are Not Predicates Under The ACCA's Force Clause.

As the parties agree, New York first degree manslaughter only counts as a predicate offense for purposes of the ACCA if the crime "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). And as the parties further agree, the Court looks to the minimum conduct necessary to be convicted of first degree manslaughter under N.Y. Penal Law § 125.20(1), which, again, provides that "[a] person is guilty of manslaughter in the first degree when," "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person."

It is important to start, as always, with the text. State convictions are predicate "violent felonies" for the purposes of ACCA when they have, as an "element," the "*use*" of *"physical force* against" another. 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). Crimes that can be committed by a complete lack of action necessarily are not a "use" of "physical force." As the Supreme Court has noted, "use" in this context means "active[] employ[ment]." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). One cannot "use . . . force against" another by doing nothing, any more than one can accidentally "use" force as the text of the ACCA requires. *See ibid.* (holding that negligently or accidentally causing damage does not "use" force as required in analogous provision of 18 U.S.C. § 16(a)).

Indeed, describing complete inaction as the "use" of "physical force" is perplexing—fairly described as a "comical misfit" for the ACCA's text. *Johnson I*, 559 U.S. at 145. As the Supreme Court explained in *Johnson I*, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. When one does nothing, it is not a use of force at all, let alone a use of "*violent* force." If "[d]e minimus physical force, such as mere offensive touching, is insufficient to trigger the ACCA's force clause because it is not violent," *United States v. Middleton*, 883 F.3d 485, 489 (4th Cir. 2018) (explaining *Johnson I*), then *a fortiori*, no physical force whatsoever (either direct or indirect) cannot be considered "*violent*" force as required for force-clause predicates under the ACCA.

The Government points to *United States v. Castleman*, 572 U.S. 157 (2014), to suggest that the *harm* to the victim is all that is required to show that the defendant "used *violent* force" against the victim. But that misunderstands *Castleman*. *Castleman* did not purport to overrule *Johnson I*, *Leocal*, or the like—which require the "active employment" of "*violent* physical force." In fact, the Court expressly reserved the question. *Id.* at 170 (whether resultant injury "necessitate[s] violent force, under *Johnson[I]*'s definition of that phrase" is "a question we do not decide").

Rather, *Castleman* addressed (a) the level of force necessary for a different statute that, unlike the ACCA, does not require violent force, and (b) whether an

active employment of force that *indirectly* results in injury constitutes a use of force against another, in the common-law sense. *Castleman* simply doesn't answer the question whether an omission satisfies the force-clause requirement of the ACCA.

For the reasons stated in the panel's majority opinion—which aligns with the Third Circuit's reasoning in *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018)—an omission is insufficient. To conclude otherwise would "conflate" an "omission with the use of force, something that *Castleman*, even if it were pertinent, does not support." *Id.* at 230 (citing and quoting *Castleman*, 572 U.S. at 170-71, as "likening 'the act of employing poison knowingly as a device to cause physical harm' or firing a bullet at a victim, to 'a kick or punch, as each act involves the 'application' or 'use of force,' even though the resulting harm might occur indirectly"); *cf. Villanueva v. United States*, 893 F.3d 123, 129 (2d Cir. 2018) (reasoning that "the use of a 'substance' . . . constitutes use of physical force, for federal law purposes, because the relevant force is the impact of the substance on the victim, not the impact of the user on the substance").

First of all, *Castleman* dealt with the meaning of force as defined for misdemeanor crimes of domestic violence under 18 U.S.C. § 922(g)(9). As the Court noted, that statute does not require a use of *violent* force, unlike the force clause of the ACCA. Rather, in distinguishing the ACCA, the Court held that Section 922(g)(9) only requires the *de minimus* level of force that the common-law required.

572 U.S. at 163-65 (distinguishing *Johnson I*, where the Court "declined to read the common-law meaning of 'force' into ACCA's definition of a 'violent felony,' because [the Court] found it a 'comical misfit with the defined term'"). The Court explained that the word "'violence' standing alone 'connotes a substantial degree of force,'" but domestic violence is not just a type of "violence" but rather "a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." *Id.* at 164-65 (quoting *Johnson I*, 559 U.S. at 140). *Castleman*'s conclusion that causing bodily injury required the application of physical force was based on this broader definition of "physical force," as the Court repeatedly emphasized. *See, e.g.*, *id.* at 170 ("It is impossible to cause bodily injury without applying force *in the common-law sense*.") (emphasis added); *ibid.* ("[T]he *common-law* concept of 'force' encompasses even its indirect application.") (emphasis added).

Second of all, *Castleman* dealt with whether a *commission*—not inaction—could meet the force clause of the misdemeanor crime of domestic violence definition in 18 U.S.C. § 921(a)(33)(A)(ii), even if that action injured the victim indirectly. Because, unlike in the ACCA, the misdemeanor crime of domestic violence definition imported the common-law definition of force (the level rejected in *Johnson I*), the Court had to grapple with whether the common-law concept of force encompassed only direct applications of force—such as a kick or punch—or whether it also encompassed indirect applications of force—such as poisoning someone's food or

drink. 572 U.S. at 170. "It was in that context that the Court concluded, '[i]t is impossible to cause bodily injury without applying force in the *common-law sense*.'" *Mayo*, 901 F.3d at 228 (quoting *Castleman*, 572 U.S. at 170) (emphasis added); *see also Castleman*, 572 U.S. at 170 (noting that the element of "force" in common-law battery "need not be applied directly to the body of the victim") (citation omitted).

Thus, the Government erroneously conflates the use of violent force—as required by the ACCA and *not* for the misdemeanor crime of violence definition—with the causation of injury. "[A]n offense that results in physical injury, but does not involve the use or threatened use of force, simply does not meet the" force-clause requirement in the ACCA. *United States v. Torres-Miguel*, 701 F.3d 165, 168 (4th Cir. 2012) (emphasis omitted), *abrogated on other grounds by Castleman as recognized in United States v. Covington*, 880 F.3d 129, 134 n.4 (4th Cir. 2018) ("*Castleman* did not however abrogate the causation aspect of *Torres-Miguel* . . . ."). "Of course, a crime may *result* in death or serious injury without involving *use* of physical force." *Ibid.*

In short, *Castleman*'s concept of "indirect force" focuses on commissions (*e.g.*, employing poisons or pulling the trigger on a gun), not omissions, and does so in the context of a statute that only requires the common-law concept of force, not the violent force required under the ACCA. *Castleman* did not address the issue presented here: Whether causing injury without applying any force at all, but rather

by inaction, is a use of violent (not common law) force. *Johnson I* answers that question in the negative.

C. Congress Has Had Multiple Opportunities To Amend The ACCA In The Face Of Seemingly Unsatisfying Results And Chosen Not To Do So.

To be sure, the categorical approach can sometimes lead to seemingly odd or perhaps discomforting results. But those results are merely the byproduct of Congress's chosen text—text it has left undisturbed despite courts' long-standing application of the categorical approach.

The Supreme Court has repeatedly found that the ACCA's text requires the elements-focused inquiry. *See, e.g.*, *Shepard v. United States*, 544 U.S. 13, 19-20 (2005). The ACCA, by its plain terms, enhances the sentence for a criminal defendant with certain "previous *convictions*" rather than "one who has thrice committed that crime." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (citing 18 U.S.C. § 924(e)(1)) (emphasis added). The focus, then, is on the criminal statute's elements, not on "what the defendant had actually done." *Ibid.* Congress very well could have constructed an alternate system for establishing predicate offenses. And had it wished to do something different, "Congress well knows how to instruct sentencing judges to look into the facts of prior crimes" as "different language" in other statutory schemes requires as much. *Ibid.* But "Congress chose another course in ACCA." *Ibid.*

In case there is any doubt of Congress's intent, *Taylor v. United States*, 495 U.S. 575 (1990), which "set out the essential rule governing ACCA cases," was decided "more than a quarter century ago." *Mathis*, 136 S. Ct. at 2251. In the time since, Congress has not legislated around the categorical approach. *See id.* at 2258 (Kennedy, J., concurring) (noting that "Congress is capable of amending the ACCA"); *cf. Shepard*, 544 U.S. at 23 ("In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed since *Taylor* came down, without any action by Congress to modify the statute as subject to our understanding that it allowed only a restricted look beyond the record of conviction under a nongeneric statute."). That absence of contrary legislation is further evidence of Congress blessing the categorical approach, warts and all. *See, e.g.*, *Neal v. United States*, 516 U.S. 284, 295-96 (1996) (noting that the Court "give[s] great weight to *stare decisis* in the area of statutory construction" because Congress "has the responsibility for revising its statutes").

Judges have sometimes expressed frustration with the results of categorical-approach inquiries. This is true, for example, with the Third Circuit in its on-point opinion in *Mayo*. It reached that result in part because convictions under the Pennsylvania statute at issue in the case had been upheld for omissions like "the deliberate failure to provide food or medical care." 901 F.3d at 227. That result, the court acknowledged, might be seen as "wholly unsatisfying and counterintuitive." *Id.* at

230. "But that's the categorical approach for you." *Ibid.*; *see also United States v. Evans*, 924 F.3d 21, 31-32 (2d Cir.) (expressing frustration with the categorical approach and urging Congress or the Supreme Court to alter it, but continuing to faithfully apply it), *cert. denied*, 140 S. Ct. 505 (2019). And that's the approach that Congress has chosen to leave in place—and the one this Court, too, must faithfully apply.

This is not to say that the categorical approach does not have "certain practical advantages," for example, avoiding Sixth Amendment concerns. *See United States v. Kroll*, 918 F.3d 47, 53 (2d Cir. 2019) (applying the categorical approach under 18 U.S.C. § 3559(e)). But all this is beside the fundamental point—faithfully applying the categorical approach and the text of the ACCA, as interpreted by the Supreme Court, ought clearly to lead this Court to conclude that crimes that can be committed by inaction, as a categorical matter, simply do not have the "use" of "violent force" as an element.

II. NEW YORK FIRST-DEGREE MANSLAUGHTER IS NOT A PREDICATE UNDER THE CAREER OFFENDER GUIDELINES.

Relevant here, the career offender U.S. Sentencing Guidelines at the time of Scott's resentencing specified that a predicate "crime of violence" for the sentencing enhancement is "any offense under federal or state law, punishable by imprisonment for a term exceeding one year." U.S. Sent'g Guidelines Manual § 4B1.2(a) (U.S. Sent'g Comm'n 2016) (U.S.S.G.). In defining what qualifies as a predicate, the Guidelines contain the same force clause as the ACCA. For the reasons above, first

degree manslaughter in New York is no more a predicate under the Guidelines' force clause than it is under the ACCA's. *See United States v. Moore*, 916 F.3d 231, 241 n.8 (2d Cir. 2019) (there is "no reason why the reasoning of" prior ACCA force-clause cases "should not apply with equal force to the materially identical force clause of the Career Offender Guidelines in § 4B1.2").

"The government bears the burden of showing that a prior conviction counts as a predicate offense for the purpose of a sentencing enhancement." *United States v. Savage*, 542 F.3d 959, 964 (2d Cir. 2008). And to qualify as a predicate here, the Government must establish that New York first degree manslaughter fits within—that is, sweeps no more broadly than—one of the generic offenses enumerated in the Guidelines. *Descamps v. United States*, 570 U.S. 254, 261 (2013) (question is whether "the statute sweeps more broadly than the generic crime"). If instead the crime is broader than the generic definition, then it is not a predicate under the career offender Guidelines.

The enumerated offenses in the career offender Guidelines are "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." U.S.S.G. § 4B1.2(a)(2). Among those, the Government argues that New York first degree

manslaughter is no broader than the combined generic offenses of murder and voluntary manslaughter. In other words, the Government contends, the minority of jurisdictions in which murder may be committed with intent to do serious bodily injury (short of intent to kill as required in most jurisdictions), combined with the minority of jurisdictions in which voluntary manslaughter may be committed with that same, lesser *mens rea*, together make New York's first degree manslaughter the law in a majority of jurisdictions. The Government also argues that, independently, New York's first degree manslaughter definition fits the generic definition of aggravated assault. The Government is wrong on both counts.

A. The Crime Does Not Fit Within The Definition Of Generic Voluntary Manslaughter Or Generic Murder.

As the panel majority rightly pointed out, 42 States "do not penalize [New York first degree manslaughter] as 'voluntary manslaughter.'" *United States v. Scott*, 954 F.3d 74, 89 (2d Cir. 2020). The Government agrees (at 38)—only eight States criminalize voluntary manslaughter the way New York does.

That is because "[m]ost jurisdictions hold that first degree or voluntary manslaughter involves an intent to kill." *United States v. Leaverton*, 895 F.3d 1251, 1257 (10th Cir. 2018) (quotation marks omitted); *see* Wayne R. LaFave, 2 *Substantive Criminal Law* § 15.2, Westlaw (3d ed. database updated Oct. 2019) ("Voluntary manslaughter in most jurisdictions consists of an intentional homicide committed

under extenuating circumstances which mitigate, though they do not justify or excuse, the killing."); *see also* 40 Am. Jur. 2d *Homicide* § 45, Westlaw (database updated Aug. 2020) ("A conviction for voluntary manslaughter requires that the defendant acted either with an intent to kill or with conscious disregard for life, i.e., the mental state ordinarily sufficient to constitute malice aforethought."); Ninth Cir. Jury Instructions Comm., *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit* 8.109 (2010 ed., updated May 2020) (federal voluntary manslaughter is "the unlawful killing of a human being without malice" "upon a sudden quarrel or heat of passion," 18 U.S.C. § 1112(a), which requires proof of either intent to kill or recklessness with extreme disregard for human life). Because first degree manslaughter in New York does not require the intent to *kill*, it sweeps more broadly than the generic definition of voluntary manslaughter.

So too, first degree manslaughter in New York sweeps more broadly than generic "murder." Only a minority of States criminalize murder the way New York's first degree manslaughter statute does—to wit, intent to cause serious bodily injury and conduct that results in death. *See* Br. 36-37. As with voluntary manslaughter, most States require an intent to *kill* to be convicted of murder. Thus, the Government cannot establish that first degree manslaughter in New York fits *either* the generic definition of murder or the generic definition of voluntary manslaughter, as those terms are used in the Guidelines.

Only by adding the minority of States that criminalize murder and the minority of States that criminalize voluntary manslaughter for the intent to cause serious bodily injury is the Government able to get just a little over half of States doing so. But that fails to give separate effect to each term in the Guidelines.

The Government says this is okay, because the Sentencing Commission likely included "both 'murder' and 'voluntary manslaughter' in the list of enumerated offenses" "to avoid any implication that offenses labeled 'murder' are not covered by the clause." Br. 44. But the upshot of the Government's position is that "murder" need not have been included as an enumerated offense at all. Their own argument—that "[m]urder is effectively an aggravated version of voluntary manslaughter—without the mitigating factor of heat of passion or extreme emotional disturbance," *ibid.*—is tantamount to saying "murder" is always narrower than the generic definition of "voluntary manslaughter." Thus, if the Government's mix and match theory is correct, the Commission could have accomplished the same ends by excluding murder from the list and keeping voluntary manslaughter alone. Indeed, if this Court buys the Government's argument, the Commission need not have included voluntary manslaughter either—both murder and voluntary manslaughter are narrower than and thus included within the definition of generic "aggravated assault," under the Government's reasoning. *Infra* Part II.B.; *see* Br. 46-49.

True, *Taylor v. United States* suggests that courts ought not to be too formalistic about the precise labels used by States. *See* Br. 43-44. However, *Taylor* does not say to do so at the expense of giving meaning to each individual enumerated offense. Rather than accept a reading that makes the inclusion of any enumerated offense superfluous, and especially in light of the rule of lenity, this Court should accept the perfectly sensible alternative explanation for why the Commission included both murder and voluntary manslaughter as separately enumerated generic offenses: murder, as enumerated in the Guidelines, covers previous convictions where the defendant intended the killing, and voluntary manslaughter, as enumerated in the Guidelines, covers previous convictions where the defendant intended the killing but did so in the heat of passion. That is the majority view for each enumerated offense. A predicate conviction based on such intent—if the conduct were also sufficient—would count, whether called murder or voluntary manslaughter, or not. That is what *Taylor* meant by looking beyond "the labels employed by the various States' criminal codes." 495 U.S. at 592. The Government ultimately wishes to sweep in crimes that include a lower *mens rea* by combing the two, but as noted above, that would render the inclusion of both murder and voluntary manslaughter superfluous, as those crimes—without their labels—could fairly be described as aggravated versions of aggravated assault.

Separately, the Government cites this Court's decision in *United Sates v. Castillo*, 896 F.3d 141 (2d Cir. 2018), in arguing that "it is black-letter law that voluntary manslaughter" can be committed by omission. Br. 45. But *Castillo* dealt with a broader generic crime of "manslaughter" under an earlier version of the Guidelines, which is not applicable here. *Castillo* was applying the 2015 edition of the Sentencing Guidelines and its now defunct "residual clause," which has commentary that includes "manslaughter" (not "voluntary manslaughter") among "[c]rime[s] of violence." Thus, in *Castillo*, this Court determined that first degree manslaughter in New York qualified for the previous, broader enumerated offense. 896 F.3d at 154. In 2016, though, the Sentencing Commission removed the residual clause.

Therefore, this Court did *not* determine in *Castillo* that first degree manslaughter in New York is narrower than the generic definition of *voluntary* manslaughter. As the *Castillo* Court explained, common-law manslaughter served as a "catch-all category" before it "was later subdivided into voluntary and involuntary varieties." 896 F.3d at 151. Of "voluntary manslaughter," *Castillo* merely states, in accord with the above, that at common law "[v]oluntary manslaughter was the intentional killing 'in a heat of passion upon adequate provocation.'" *Id.* at 151 (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.1, at 566 (3d ed. 2017)). Accordingly, the definition of "manslaughter" stated in *Castillo* is not applicable

here. The upshot of the Government's argument is that because New York first degree manslaughter fits the previous, *broader* crime of manslaughter, it necessarily fits the *narrower*, applicable version of voluntary manslaughter. That is obviously incorrect.

B. New York First Degree Manslaughter Does Not Fit Within The Definition Of Generic Aggravated Assault.

The Government also fails to meet its burden to show that New York first degree manslaughter is a predicate offense that fits within the generic definition of aggravated assault, because the Government has not shown that a majority of States criminalize aggravated assault by omission.

The Government argues that most States track "the Model Penal Code's definition of 'aggravated assault' as the generic definition of the offense." *See* Br. 48. We can assume that is true, and under the Model Penal Code, "aggravated assault" includes "attempt[ing] to cause serious bodily injury to another" or "caus[ing] such injury purposely [or] knowingly." Model Penal Code § 211.1(2)(a). Thus, according to the Government, the Model Penal Code and New York first degree manslaughter are coterminous. Br. 49.

However, the Government fails to show that a majority of States would allow an aggravated assault conviction to stand based on an omission, the way New York provides that first degree manslaughter can be committed based on omissions. *Supra* Part I.A. The Government is only able to identify 11 States with case law to support

its conclusion. Br. 50-51 & n.27. To this, the Government adds that "[a]t least 28 states include statutes that, like New York Penal Law Section 15.00," provide that "crimes can be committed by omission or failure to act." Br. 50.

The logical (and absurd) end of the Government's argument is that any crime committed in any State that includes such a statute may be committed by an omission. Of course, that isn't the case, and the Government would not say so. New York's statute generally defining a criminal act as one that may be done by omission is relevant only because, as set forth *supra* pp. 7-8, the State's highest court has applied that general definition specifically to New York first degree manslaughter. *See Steinberg*, 595 N.E.2d at 680 (noting that New York "Penal Law provides that criminal liability may be based on an omission (*see*, Penal Law § 15.05), which is defined as the failure to perform a legally imposed duty (Penal Law § 15.00[3])," in holding that first degree manslaughter can be committed by omission in New York).

It should not be lost on the Court that the Government attempts to assert that a number of jurisdictions must allow convictions for omissions because their criminal laws separately provide that criminal acts—generally—include omissions, as in New York, while at the same time it argued to the panel that this is insufficient to show that first degree manslaughter in New York may be committed by omission. The Government cannot have it both ways—on the one hand, arguing that this is insufficient for purposes of the ACCA, but for purposes of meeting its burden under

the Guidelines, arguing that it is "clear" on this basis that "aggravated assault—like murder, voluntary manslaughter, and other intentional crimes—can be committed by omission in the face of a duty to act, provided the *mens rea* requirement is satisfied." Br. 51, 53; *see Wong*, 619 N.E.2d at 381 ("where the requisite proof [of intent] is present, a person in the position of the 'passive' defendant here may be held criminally liable for failing to seek emergency medical aid for a seriously injured child"); *Steinberg*, 595 N.E.2d at 847 (omission by a caretaker "can . . . support a first degree manslaughter charge, so long as there is sufficient proof of the requisite *mens rea*").

Worse, the Government points to unrelated sections of the Model Penal Code—that have nothing to do with the Code's definition of aggravated assault—to show that criminal conduct, generally, may include the failure to act in the face of a duty to do so. *See* Br. 50 (quoting Model Penal Code §§ 1.13, 2.01); *see also ibid.* (citing LaFave for the proposition that criminal battery may be committed by "act *or omission*" and *American Jurisprudence* for the proposition that battery—not aggravated battery—may be committed even though "*force* is applied" indirectly) (second emphasis added). This is even further removed from state statutes that generally define a criminal act as including omissions.

It is the Government's burden to show that a majority of States would uphold aggravated assault convictions based on omission. It has failed to do so. New York

first degree manslaughter thus is not a predicate offense that falls within the generic enumerated crime of "aggravated assault."

CONCLUSION

The panel majority correctly applied the modified categorical approach to determine that first degree manslaughter in New York is not a predicate offense under the force clause of the ACCA or the force clause of the career offender Guidelines, nor an enumerated offense in the Guidelines.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Local Rule 29.1(c) because it contains 6,644 words, excluding the parts exempted by Fed. R. App. P. 32(f).

Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced 14-point Times New Roman typeface using Microsoft Word 2010.

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