No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

CURTIS D. HALL, MARTINEL LAMAR HILL, DERRICK RYAN JACKSON, DANYEL T. PROCTOR, AND MIGUEL ANGEL ROSARIO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

HEIDI R. FREESE, ESQ.
Federal Public Defender

FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender

QUIN M. SORENSON, ESQ.*
Assistant Federal Public Defender

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
quin_sorenson@fd.org

Counsel for Petitioners

* Counsel of Record

October 25, 2018

QUESTIONS PRESENTED

The "categorical approach," as adopted in *Taylor v. United States*, 495 U.S. 575 (1990), mandates that courts, in determining whether a crime of conviction qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) for purposes of the sentencing enhancement of 18 U.S.C. § 924(c), may consider only the elements of the statute defining the crime, not the actual offense conduct, and may find that the crime is a "crime of violence" only if its necessary elements include the "use, attempted use, or threatened use of physical force."

The questions presented in this case are:

1. Whether (as the court of appeals held) the categorical approach does not apply in any case in which the defendant was also convicted of "use[of] a firearm" under 18 U.S.C. § 924(c)(1) during the crime of conviction, because (in the circuit court's view) in such cases a court may find that the actual offense conduct involved the use or threat of force, meaning that the crime may be deemed a "crime of violence" even if the statute defining the crime does not include the "use, attempted use, or threatened use of physical force" as a necessary element.

2. Whether (as the court of appeals held) the crime of bank robbery under 18 U.S.C. § 2113 qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A) even though the statute defining the crime does not include the "use, attempted use, or threatened use of physical force" as a necessary element.

PARTIES TO THE PROCEEDINGS

The petitioners herein, who were the defendant-appellants below, are Curtis D. Hall, Martinel Lamar Hill, Derrick Ryan Jackson, Danyel T. Proctor, and Miguel Angel Rosario.

The respondent herein, which was the appellee below, is the United States of America.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

GUIDELINE PROVISIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

The petitioners, all of whom were denied postconviction relief under 28 U.S.C. § 2255 from judgments of conviction and sentence, hereby petition this Court for a writ of certiorari to review the final orders of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The orders of the court of appeals are unpublished but are reproduced in the appendix to this petition. Petition Appendix ("Pet. App.") 1a-10a. The opinion and order of the district court is unpublished but is reproduced in the appendix, Pet. App. 11a-16a, and available at 2018 WL 1168696.

JURISDICTION

The orders sought to be reviewed were entered by the court of appeals on June 27, 2018. Pet. App. 1a-10a. An extension of the time within which to file a petition for a writ of certiorari on behalf of all petitioners, to and including October 25, 2018, was granted on September 12, 2018. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions, 18 U.S.C. § 924(c), (e), and 28 U.S.C. §§ 2253, 2255, are reproduced in the appendix to this petition. Pet. App. 17a-21a.

INTRODUCTION

This is a unique case, uniquely deserving of review in light of the circuit court's direct abrogation of this Court's precedent. This Court held unambiguously in *Taylor v. United States*, 495 U.S. 575 (1990), that the language of the "elements clause" of

18 U.S.C. § 924 – defining a "crime of violence" or "violent felony" as one that "has as an element the use, attempted use, or threatened use of physical force against the person ... of another" – mandates application of the so-called "categorical approach." 495 U.S. at 600-02; *see* 18 U.S.C. § 924(c)(3)(A), (e)(2)(B)(i). That approach requires a court to review only the statutory elements of the crime, without regard to the specific facts of the case or the actual offense conduct, and allows for a crime to qualify as a "crime of violence" or "violent felony" only if the statute defining the crime includes as a necessary element the "use, attempted use, or threatened use of physical force." *Id.*; *see also, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018). In no decision has this Court suggested that an exception to the categorical approach applies or may apply to any class of cases, or that courts may decline to utilize the approach in particular instances.

The court of appeals in this case, however, has done precisely that. It held, first in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016), and then in subsequent decisions (including those under review in this matter, Pet. App. 1a-10a), that the categorical approach "is not necessary" and should not be applied in assessing whether a crime of conviction qualifies as a "crime of violence" under § 924(c)(3)(A) when the defendant is also convicted under § 924(c)(1) of "use[o]f a firearm" during the crime. *E.g.*, 844 F.3d at 141-44. It ruled that in such cases it can be presumed that the actual offense conduct involved force, due to the presence of a firearm, and thus the crime can be deemed a "crime of violence" even if the statute defining it does not include force as a necessary element. *Id.*

Phrased differently, the court of appeals carved out a wholesale exception to the categorical approach under which *any* crime will be deemed a "crime of violence," without regard to its statutory elements, if the defendant was also convicted of using a firearm during its commission. Such an approach is manifestly inconsistent with *Taylor*, as one member of the *Robinson* panel noted, *see* 844 F.3d at 148 (Fuentes, J., concurring in judgment), and as other circuits have recognized, *see infra* note 2 (citing cases).

Whether or not the categorical approach should be reconsidered, or limited in scope, is a question for this Court, not a court of appeals, to decide. Certiorari should be granted in this case to address the conflict between the decisions of the Third Circuit and those of this Court, as well as other circuits, and to reaffirm that the holdings of this Court must be followed unless and until revised or reversed by this Court.

STATEMENT OF THE CASE

The relevant facts are simple, and procedural in nature. All of the petitioners entered pleas of guilty in the district court to charges of bank robbery, in violation of 18 U.S.C. § 2113, and to use of a firearm during a "crime of violence," in violation of 18 U.S.C. § 924(c)(1). Pet. App. 12a. They were sentenced independently, but each was subject to a separate term of imprisonment of seven years – to be served consecutive to any other term imposed – by virtue of their convictions under 18 U.S.C. § 924(c)(1). *See* Pet. App. 12a. The judgments of conviction and sentence were affirmed on direct appeal. *See id.*

Following affirmance of the convictions, each of the petitioners filed postconviction motions seeking relief under 28 U.S.C. § 2255, based on the intervening decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). Pet. App. 11a-13a. The motions argued that the statutory definition of "crime of violence" in the "residual clause" of § 924(c)(3)(B) must be declared unconstitutionally vague in light of *Johnson*, which had invalidated a materially identical definition in § 924(e)(2)(B)(ii), and for that reason the clause could not support their convictions under § 924(c)(1). *Id.* They argued, in addition, that the crime of bank robbery under § 2113 did not qualify as a "crime of violence" under the alternative "elements clause" of § 924(c)(3)(A), and therefore their judgments of conviction and sentence under § 924(c)(1) must be vacated as unconstitutional. *Id.*

The district court denied the motions in a consolidated decision. Pet. App. 11a-15a. The court did not address and did not resolve whether the "residual clause" of § 924(c)(3)(B) was unconstitutional; rather, it held that the petitioners were not entitled to relief because bank robbery under § 2113 independently qualifies as a "crime of violence" under the "elements clause" of § 924(c)(3)(A). *Id.* at 13a n.1. In reaching this conclusion, the court did not consider whether § 2113 requires as a necessary element the "use, attempted use, or threatened use of physical force," as mandated under the categorical approach adopted in *Taylor v. United States*, 495 U.S. 575 (1990), but instead held that under binding circuit precedent, including *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016), the categorical approach does not apply in cases, such as this one, in which the petitioners were also convicted of

"use[of] a firearm" during the offense, in violation of § 924(c)(1). Pet. App. 13a-15a. The court reasoned, based on *Robinson*, that bank robbery under § 2113 qualifies as a "crime of violence" in this case – even if it would not otherwise – because a firearm had been used in these particular offenses. *Id.* The district court ruled, further, that the petitioners were not entitled to certificates of appealability on the issue, as (in the court's view) relief was "unequivocally" foreclosed by *Robinson*. *Id.* at 15a-16a.

The petitioners' applications to the Third Circuit for certificates of appealability were denied in summary orders issued on June 21, 2018. Pet. App. 1a-10a. The orders included no substantive analysis of the claims, but simply cited the prior opinion in *Robinson*, as well as *United States v. Wilson*, 880 F.3d 80 (3d Cir. 2018) – a post-*Robinson* opinion holding that bank robbery under § 2113 does not qualify as a "crime of violence" for purposes of the U.S. Sentencing Guidelines. Pet. App. 1a-10a. Those decisions, the orders stated, "independently establish that [the petitioners'] convictions of bank robbery in violation of 18 U.S.C. § 2113(a) constitute 'crimes of violence' under the ... elements clause of 18 U.S.C. § 924(c)(3)(A)." Pet. App. 1a-10a. The orders concluded: "Jurists of reason would not debate that point." *Id.*

REASONS FOR GRANTING THE PETITION

This case fairly demands review by this Court. The court of appeals crafted a wholesale exception to the categorical approach that squarely conflicts with *Taylor v. United States*, 495 U.S. 575 (1990), *see infra* Part I, and that creates and deepens divisions among the circuits, *see infra* Part II. Even if such an exception might be advisable or warranted, it is a matter for either this Court or Congress to decide – not a court of appeals. *See infra* Part III. A writ of certiorari should be granted.

I. THE EXCEPTION TO THE CATEGORICAL APPROACH CRAFTED BY THE THIRD CIRCUIT CONFLICTS WITH *TAYLOR V. UNITED STATES*, 495 U.S. 575 (1990).

The "categorical approach," adopted in *Taylor*, represents a binding interpretation of statutory language – codified in several provisions of the U.S. Code, including 18 U.S.C. § 924(c)(3)(A) and § 924(e)(2)(B)(i) – defining "crime of violence" and "violent felony" as any crime that "has as an element the use, attempted use, or threatened use of physical force against the person ... of another." 495 U.S. at 600-02; *see also, e.g.*, 18 U.S.C. § 16(a). The approach requires courts to consider only the elements of the crime at issue, not the particular facts surrounding the crime or the actual offense conduct, and a crime may be deemed a "crime of violence" or "violent felony" under the approach only if the statute governing the crimes sets forth as a necessary element the use or threat of physical force. *Taylor*, 495 U.S. at 600-02. This interpretation, the Court explained, flows from the express reference in the provisions to the "element[s]" of the crime, as well as the legislative history, which "shows that Congress generally took a categorical approach to predicate offenses." *Id.* In light of this, the Court concluded, "the only plausible interpretation of [this language] is that ... it generally requires the trial court to look only to the fact of conviction and the statutory definition of the ... offense." *Id.*

Notwithstanding this "unequivocal" holding, the Third Circuit ruled, in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016), and other decisions (including those under review here, Pet. App. 1a-10a), that "[w]e do not agree that the categorical approach applies" in assessing whether a crime qualifies as a "crime of violence" under § 924(c)(3)(A) in cases in which the defendant is also convicted of "use[of] a

firearm" during the crime under § 924(c)(1). *E.g.*, 844 F.3d at 141-44; *see also, e.g.*, *United States v. Galati*, 844 F.3d 152, 154-55 (3d Cir. 2016). The court of appeals identified nothing in § 924(c), its legislative history, or *Taylor* supporting an exception to the categorical approach in this class of cases; instead, it reasoned that the exception is warranted because in such cases a court can say with greater certainty that the actual offense conduct involved force, by virtue of the "contemporaneous" use of a firearm. 844 F.3d at 141-44. The court contrasted these cases with those arising under § 924(e), the provision at issue in *Taylor*, which provides for an enhancement when the defendant is convicted of a firearms offense after having been convicted of three or more "violent felonies." *Id.* (quoting 18 U.S.C. § 924(e)(1)). In those cases, as *Taylor* itself remarked, attempting to reconstruct the factual circumstances surrounding the prior convictions to determine whether they involved force implicates "practical difficulties and potential unfairness," supporting application of the categorical approach. *Id.* (quoting *Taylor*, 495 U.S. at 600-02). These concerns are not present in the context of § 924(c), the Third Circuit concluded, because a court can more directly establish that the actual offense conduct of the crime involved force, in light of the separate conviction of "us[e of] a firearm," so the categorical approach need not be employed under *Taylor*. *Id.*

That holding represents an abrogation, not an application, of *Taylor*. While *Taylor* certainly mentioned that the "practical difficulties and potential unfairness" involved in reconstructing past convictions supported its interpretation of § 924(e)(2)(B)(i), the Court did not base its construction on those concerns but, rather,

held that its interpretation was compelled by the statutory text – the same text that appears in § 924(c)(3)(A). *See* 495 U.S. at 600-02. At no point, moreover, did this Court suggest that the text would or could be construed differently if those concerns were no longer present, or if the text appeared in another provision. *See id.* Myriad decisions of this Court, in fact, admonish that statutory language should and generally must be interpreted consistently across provisions, and that policy considerations of the type mentioned in *Taylor* – while they may *support* a particular statutory construction – cannot justify deviation from a statute's plain meaning. *See, e.g.*, *Sekhar v. United States*, 570 U.S. 729, 732-33 (2013); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989).

Indeed, the Third Circuit's interpretation not only conflicts directly with *Taylor*, as well as the text of § 924(c)(3)(A), but fundamentally distorts the operation of the overall statute. Section 924(c) establishes two separate elements, and contemplates two separate inquiries, in determining if its enhancement applies: (i) whether the crime of conviction qualifies as a "crime of violence," and (ii) whether the defendant "use[d] a firearm" during that crime. *See, e.g.*, *Castillo v. United States*, 530 U.S. 120, 124 (2000) (quoting 18 U.S.C. § 924(c)(1)). The Third Circuit's construction, however, elides these inquiries entirely, holding that if the defendant "use[d] a firearm" during the crime of conviction then the crime necessarily constitutes a "crime of violence," regardless of whether it does or could qualify as such under the definition set forth in § 924(c)(3)(A). *See Robinson*, 844 F.3d at 141-44.

This means that *any* crime, including those that have previously been held *not* to qualify as "crimes of violence" and that involve *no* force whatsoever, could nevertheless now be deemed predicate "crimes of violence" under § 924(c)(1). Crimes such as "driving under the influence" and "perjury," for instance, do not themselves involve the use of physical force, *see* 18 U.S.C. § 1621 (perjury); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (driving under influence), but under *Robinson* they could nonetheless be classified as "crimes of violence" whenever they are joined with a charge of "use[of] a firearm" under § 924(c)(1), even though in no other circumstance would or could they be characterized as such. *See, e.g.*, *Robinson*, 844 F.3d at 148 (Fuentes, J., concurring in judgment). That is a facially absurd reading of the statute which cannot be accepted, particularly in light of the especially harsh mandatory minimum sentence contemplated by the provision. *See, e.g.*, *Conn. Nat.*, 503 U.S. at 253; *cf., e.g.*, *United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.").[1]

[1] The interpretation adopted by the court of appeals cannot be justified as a version of the "modified categorical approach," as endorsed by this Court in *Descamps v. United States*, 133 S. Ct. 2276 (2013), notwithstanding *Robinson*'s suggestion to the contrary. *See* 844 F.3d at 141-44. The "modified" categorical approach, just like the standard categorical approach, calls on courts to consider only the elements of the statute of conviction, and differs only insofar as it allows courts – when the statute is divided into several subsections, setting forth distinct elements – to consider aspects of the record of conviction to determine under which of the subsections the defendant was convicted. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133, 144 (2010). The modified approach does not allow the court to consider the actual offense conduct or the elements of other statutes, *see, e.g.*, *id.*, as does the approach adopted by the Third Circuit, *see* 844 F.3d at 841-44.

The Third Circuit's holding conflicts with this Court's opinion in *Taylor*, as well as numerous others directing that statutes must be interpreted in accord with their plain meaning and in such a manner as to avoid absurd results. Those conflicts warrant review.

II. THE HOLDING OF THE THIRD CIRCUIT CREATES AND DEEPENS CONFLICTS AMONG THE CIRCUITS.

Review would be warranted even if the Third Circuit's holding did not represent a clear (if partial) abrogation of *Taylor*. That is because the Third Circuit's interpretation of the "elements clause" of § 924(c)(3)(A) creates a direct conflict with holdings of all other circuits, and deepens a division within the circuits regarding the interpretation of the "residual clause "of § 924(c)(3)(B).

No other circuit has adopted the interpretation of the elements clause of § 924(c)(3)(A) followed by the Third Circuit, or recognized any similar exception to *Taylor* in this context. To the contrary, each circuit has affirmed (often in repeated decisions) that the unambiguous language of the statute and of *Taylor* mandates that the categorical approach must be applied in assessing whether a crime qualifies as a "crime of violence" under the elements clause, without regard to the actual offense conduct or to whether the defendant was also convicted of "us[ing] a firearm" during the crime under § 924(c)(1).[2] The single circuit decision that has even suggested such

[2] *See, e.g.*, *United States v. Taylor*, 848 F.3d 476, 491 (1st Cir. 2017); *United States v. Barrett*, 903 F.3d 166, 175-77 (2d Cir. 2018); *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015); *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 290 (6th Cir. 2017); *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016); *United States v. Mendez*, 992 F.2d 1488, 1490 (9th Cir. 1993); *United States v. Hill*, 722 Fed. App'x 814, 817 (10th Cir. 2018) (citing *United States v. Taylor*, 843 F.3d 1215, 1220 (10th Cir. 2016)); *Ovalles v. United States*, No. 17-

an exception might be warranted, *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018), ultimately rejected it as inconsistent with binding precedent. *Id.* at 1336 (citing *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017) (citing *Taylor*, 495 U.S. at 600)).

Two circuits have, however, adopted an exception similar to *Robinson* in the context of the residual clause of § 924(c)(3)(B). The Second and Eleventh Circuits, in considering constitutional challenges to that provision, reasoned that because the residual clause would likely be unconstitutional under the categorical-approach interpretation, and because the clause does not (unlike the elements clause) by its terms require courts to consider only the "element[s]" of the crime, the residual clause should not – under the doctrine of constitutional avoidance – be construed as mandating application of the categorical approach. *See United States v. Barrett*, 903 F.3d 166, 175-77 (2d Cir. 2018); *Ovalles v. United States*, No. 17-10172, 2018 WL 4830079, at *16 (11th Cir. Oct. 4, 2018).[3] At least eight other circuits have rejected this view, notwithstanding the doctrine of constitutional avoidance, on grounds that the language of the residual clause and of *Taylor* unambiguously mandates the

10172, 2018 WL 4830079, at *2 (11th Cir. Oct. 4, 2018) (citing *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013)); *United States v. Kennedy*, 133 F.3d 53, 57 (D.C. Cir. 1998).

[3] This Court has recently held that two materially identical "residual clauses," in 18 U.S.C. § 16(b) and § 924(e)(1)(B)(ii), are – as construed to mandate the categorical approach – unconstitutionally vague. *Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2557; *cf. Dimaya*, 138 U.S. at 1252-59 (Thomas, J, dissenting) (arguing that § 16(b) should not be construed to mandate the categorical approach, including on grounds of constitutional avoidance, and that the provision should be upheld).

categorical approach.[4] Notably, however, even the Second and Eleventh Circuits agree with all other circuits – except for the Third Circuit – that the categorical approach must yet apply in the context of the elements clause. *See, e.g.*, *Barrett*, 903 F.3d at 178-84; *Ovalles*, 2018 WL 4830079, at *16.

The Third Circuit's holding, beyond creating a conflict with all other circuits over the meaning of § 924(c)(3)(A), lends support to the minority view of § 924(c)(3)(B) and thus deepens the division among the circuits concerning the interpretation and constitutionality of that provision. *See, e.g.*, *Ovalles*, 2018 WL 4830079, at *42 (Pryor, J., dissenting) (identifying this division among the circuits on the interpretation of the residual clause, and noting that the Third Circuit follows the minority view). Those conflicts warrant attention and resolution by this Court.

III. WHETHER AN EXCEPTION TO THE CATEGORICAL APPROACH SHOULD BE RECOGNIZED IS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

Review is also appropriate in this case in light of the exceptional nature of the issue presented, which includes the question of whether a court of appeals may choose to reject or limit this Court's holdings based on a disagreement with the Court's reasoning. That question implicates basic principles concerning the proper institutional roles of the judiciary and the legislature.

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[4] *See, e.g.*, *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015); *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 290 (6th Cir. 2017); *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016); *United States v. Mendez*, 992 F.2d 1488, 1490 (9th Cir. 1993); *United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018); *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018).

The Third Circuit's holding was, it seems, based primarily (if not solely) on straightforward dissatisfaction with the categorical approach adopted in *Taylor*. The court of appeals did not attempt to argue that its holding was required by the language of the statute, and it did not disagree that *Taylor* facially mandates a different reading of the provision. *See Robinson*, 844 F.3d at 441-44. Rather, the court objected to the categorical approach on grounds that it requires courts to ignore the particular circumstances of the offense, and to find that a crime is not a "crime of violence" even if it can be shown that violence was in fact employed during its commission. *See id.* Others have criticized the approach on the same grounds. *E.g.*, *St. Hubert*, 883 F.3d at 1336; *see also, e.g.*, *United States v. Williams*, 898 F.3d 323, 336-37 (3d Cir. 2018) (en banc) (Roth, J., concurring); *United States v. Chapman*, 866 F.3d 129, 136-39 (3d Cir. 2017) (Jordan, J., concurring) (citing *United States v. Faust*, 853 F.3d 39, 60-61 (1st Cir. 2017) (Lynch, J., concurring); *United States v. Doctor*, 842 F.3d 306, 312-19 (4th Cir. 2016) (Wilkinson, J., concurring)).

Whether those criticisms are justified or not, they provide no basis for a court of appeals to overturn or limit holdings of this Court or alter the language of the statute. Those are judgments entrusted solely to this Court or the Congress. *E.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *see also, e.g.*, *United States v. O'Brien*, 560 U.S. 218, 235 (2010). For a court of appeals to act as did the Third Circuit here, intervening unilaterally to revise the law of the land based solely on discretionary disagreements with this Court's interpretation of duly enacted legislative provisions, disregards the unique prerogatives of this Court and Congress, and serves only to

confuse national jurisprudence and complicate congressional action. *See, e.g.*, *Agostini*, 521 U.S. at 237.

Enforcing those prerogatives is especially important in cases, like this one, implicating issues bearing directly on the fundamental rights of thousands of individuals. The statute at issue in this case, the Armed Career Criminal Act, calls for the imposition of a mandatory minimum term of imprisonment of anywhere from five years to life if the defendant is found to have used a firearm during a "crime of violence" (depending on the type of firearm and nature of its usage). *See* 18 U.S.C. § 924(c)(1)(A)-(C). Under the Third Circuit's interpretation of the Act, *any* federal crime may automatically be deemed a "crime of violence" if the defendant used a firearm during its commission, meaning that a defendant could be subject to a mandatory sentence of decades in prison – up to and including life – for a crime that would otherwise carry a maximum sentence of no more than one year's incarceration (and often far less under the U.S. Sentencing Guidelines). *See Robinson*, 844 F.3d at 441-44. Thus, for example, a defendant convicted of "bribery in a sporting contest" would generally face in other circuits a term of imprisonment of no more than six months, *see* 18 U.S.C. § 224; U.S.S.G. § 2B4.1, whereas in the Third Circuit he or she would be subject to a mandatory *minimum* term of at least five years, and perhaps decades more, if a firearm was used in any way during the offense. *See Robinson*, 844 F.3d at 441-44; *see also* 18 U.S.C. § 924(c)(1). If Congress intended for such draconian sentences to be imposed as a matter of mandate in these cases, it would have said so, and indeed should be required by this Court to state that intention

clearly within the statute. *Santos*, 553 U.S. at 514 (addressing rule of lenity); *cf., e.g.*, *United States v. O'Brien*, 560 U.S. 218, 235 (2010) (requiring "clear indication" of congressional intent).

The holding of the Third Circuit, in short, risks enormous discrepancies in sentencing among the circuits and improperly intrudes on the prerogatives of this Court and Congress. Review is necessary.

IV. THE OFFENSE OF CONVICTION, BANK ROBBERY UNDER 18 U.S.C. § 2113, DOES NOT QUALIFY AS A "CRIME OF VIOLENCE" UNDER PROPER APPLICATION OF THE CATEGORICAL APPROACH.

The question would remain, if this Court were to grant a writ of certiorari and reverse the judgment of the Third Circuit on grounds that it erred in refusing to apply the categorical approach, whether the offense of conviction – bank robbery under 18 U.S.C. § 2113 – nevertheless qualifies as a "crime of violence" for purposes of § 924(c) under a proper application of that approach. It is, strictly speaking, unnecessary for the Court to address that issue at this time, since the court of appeals explicitly rested its decision denying a certificate of appealability on *Robinson* and other circuit opinions post-dating *Robinson*, including *United States v. Wilson*, 880 F.3d 80 (3d Cir. 2018); as such, this Court could simply remand the case with instructions for the court of appeals to address the issue based on a proper application of *Taylor*. *See, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508-09 (1998). Nevertheless, the issue is properly presented here, *see supra* p. i, and so the Court may choose to direct merits briefing and argument on the question.

Those arguments would show that bank robbery does not qualify as a "crime of violence" under the categorical approach – or, at the least, that reasonable jurists

could so conclude[5] – because § 2113 does not have as a necessary element the "use, attempted use, or threatened use of physical force against the person or property of another," as required by § 924(c)(3)(A). Section 2113 provides, in pertinent part:

> Whoever, by force and violence, *or by intimidation*, takes, or attempts to take, from the person or presence of another … any property or money or any other thing of value belonging to, or in the care, custody … or possession of, any bank … shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (emphasis added). Under these terms, bank robbery may be committed through "intimidation" alone – indeed, even unintentional intimidation – without any force or threat of force. *See id.*; *see also, e.g.*, *United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) (bank robbery under § 2113(a) does not require that the defendant "intend for an act to be intimidating"); *United States v. Yockel*, 320 F.3d 818, 824 (8th Cir. 2003) (same).

While the Third Circuit suggested in *Wilson* that "intimidation" cannot be established without some threat of physical force, and further that a "knowing" *mens rea* should be read into that element, 880 F.3d at 84-87, those suggestions fly in the face of the statutory language. A person may be "intimidated," in the common sense of the term, by conduct that involves no force whatsoever, including (among many

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[5] *See, e.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1263-64 (2016) ("Th[e] standard [for issuance of a certificate of appealability] is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.' Obtaining a certificate of appealability 'does not require a showing that the appeal will succeed,' and 'a court of appeals should not decline the application ... merely because it believes the applicant will not demonstrate an entitlement to relief.'") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

other examples) a threat against the individual's financial security (as to empty the person's savings or retirement accounts) or against his or her personal relationships (as to disclose an adulterous relationship to the person's spouse). *See, e.g.*, *Oxford English Dictionary* (2d ed. 1989) (defining "intimidate" and "intimidation" as any conduct, including not only "violence" but a "threat" of any type, that "render[s] timid, inspire[s] with fear ... [or] cow[s]"). And there is no reason and no need to read into the statute a requirement that the "intimidation" be done "knowingly," since the statute does not require it and any concern over "separat[ing] wrongful conduct from 'otherwise innocent conduct'" may be addressed by the separate requirement that the defendant must "knowingly" take or attempts to take property or money belonging to the bank. *See, e.g.*, *Carter v. United States*, 530 U.S. 255, 269 (2000) ("The presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'") (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)). The elements of the offense may therefore be satisfied, under the plain meaning of the statutory language, without proof of intentional use of force, or threat thereof.

The decision of the Third Circuit – insofar as it held that bank robbery under 18 U.S.C. § 2113 does not qualify as a "crime of violence" for purposes of 18 U.S.C. § 924(c) under a proper application of the categorical approach, and moreover that reasonable jurists "would consider that conclusion to be beyond all debate," *Welch*, 136 S. Ct. at 1264 – thus reflects a misapprehension and misapplication of the standards set forth by this Court governing both statutory interpretation, *see, e.g.*,

Conn. Nat., 503 U.S. at 253; *Taylor*, 495 U.S. at 601-02, and certificates of appealability, *see, e.g.*, *Welch*, 136 S. Ct. at 1264. A writ of certiorari is warranted on this ground as well.[6]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Quin M. Sorenson
HEIDI R. FREESE, ESQ.
Federal Public Defender

FREDERICK W. ULRICH, ESQ.
Assistant Federal Public Defender

QUIN M. SORENSON, ESQ.*
Assistant Federal Public Defender

Middle District of Pennsylvania
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101
(717) 782-2237
quin_sorenson@fd.org

Counsel for Petitioners

* Counsel of Record

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[6] The district and appeals courts in this case limited their decisions to the elements clause of § 924(c)(3)(A), meaning that this Court may do the same; however, should this Court choose to consider the issue, it is equally clear that the residual clause of § 924(c)(3)(B) could not support the convictions in this case – or, again, at least that jurists of reasons could hold as such – given that this Court has recently invalidated materially identical provisions, in 18 U.S.C. § 16(b) and § 924(e)(1)(B)(ii), as unconstitutionally vague. *See Dimaya*, 138 S. Ct. at 1215; *Johnson*, 135 S. Ct. at 2557.