No. 18–_____

In the
Supreme Court of the United States

Elvin Hill,

*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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Under the elements clause of 18 U.S.C. § 924(c)(3)(A), an offense qualifies as a "crime of violence" -- required for conviction under § 924(c)(1), prohibiting the use of a firearm during a "crime of violence" -- only if it "has as an element the use, attempted use, or threatened use of *physical* force . . . ." (Emphasis added). Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), is unlawfully taking property from someone "by means of . . . force, or violence, or *fear of injury* . . . to his person or *property* . . . ." *Id.* § 1951(b)(1) (emphases added).

"'Property' has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage, 'property' comprehends anything of material value owned or possessed." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) (internal citation omitted). An asset's "intangible nature does not make it any less 'property.'" *Carpenter v. United States*, 484 U.S. 19, 25 (1987).

The first question presented is whether Hobbs Act robbery, which can be committed by causing the victim to fear economic loss ("injury") to an intangible asset ("property"), categorically qualifies as a crime of violence under § 924(c)'s elements clause, requiring the use of "*physical* force."

2. In *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court ruled that the "force" required in the elements clause of the Armed Career Criminal Act was "*violent* force," that is, "substantial," "extreme," and "strong physical force" "capable of causing physical pain or injury to another person." "Minor uses of force

may not constitute 'violence' in the generic sense." *United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014). For example, "a squeeze on the arm that causes a bruise" is "hard to describe . . . as violence," *id.* (internal quotation marks omitted); so too "relatively minor" "physical assaults" such as "pushing, grabbing, shoving, slapping, and hitting," *id.* at 1411–12.

Hobbs Act robbery is "based on [] New York law." *Evans v. United States*, 504 U.S. 255, 264 (1992). New York robbery may be committed by minor physical exertions such as a bump, *see People v. Lee*, 197 A.D.2d 378, 378 (N.Y. App. Div. 1993); a block, *see People v. Bennett*, 219 A.D.2d 570, 570 (N.Y. App. Div. 1995); or a brief tug-of-war over property, *see People v. Safon*, 166 A.D.2d 389, 892 (N.Y. App. Div. 1990).

The second question presented is whether Hobbs Act robbery, which like New York robbery can be committed by minor exertions of physical force, categorically qualifies as a crime of violence under § 924(c)'s elements clause, requiring the use of "*violent* force."

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## JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered a judgment of conviction on October 6, 2014. The Second Circuit had jurisdiction under 28 U.S.C. § 1291, affirmed on May 9, 2018, and denied a timely petition for panel rehearing and rehearing *en banc* on July 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

On October 2, 2018, Justice Ginsburg granted a 30-day extension of time – until November 21, 2018 – for filing a petition for writ of certiorari. *See* App. No. 18A344. This petition is timely under Supreme Court Rule 13.

## RELEVANT STATUTORY PROVISIONS

The Hobbs Act, 18 U.S.C. § 1951(a), states in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

"Robbery" under the Hobbs Act is defined at § 1951(b)(1):

> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining . . . .

Section 924(c)(1)(A) of Title 18 of the U.S.C. states in part:

> [A]ny person who, during and in relation to a crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, [] or who in furtherance of any such crime, possesses a firearm, [violates this section] . . . .

Section 924(c)(3) defines "crime of violence":

> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and --
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

## STATEMENT OF THE CASE

1. A defendant convicted of using or carrying a firearm during a "crime of violence" faces a minimum consecutive sentence of 5 years' imprisonment and a maximum of life. 18 U.S.C. § 924(c). Section 924(c)(3)(A) defines "crime of violence" as a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," a provision known as the elements clause.

In determining whether an offense satisfies this definition, courts apply the categorical approach, which "'looks only to the statutory definition[]' -- *i.e.*, the elements -- of [the] . . . offense[], and not 'to the particular [underlying] facts.'" *Descamps v. United States*, 570 U.S. 254, 261 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). "A defendant's actual conduct is irrelevant to the inquiry." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015).

The categorical approach requires "the adjudicator [to] 'presume that the [predicate offense] rested upon nothing more than the least of the acts criminalized'" by the relevant law. *Id.* (quoting *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013)). The court then compares the minimum conduct necessary for conviction under that law with the conduct defined by the elements clause. "If the [predicate] statute 'sweeps more broadly' – *i.e.*, it punishes activity that the

[elements clause] does not encompass – then th[at] [] crime cannot count as a predicate ['crime of violence']." *Stuckey v. United States*, 878 F.3d 62, 67 (2d Cir. 2017) (quoting *Descamps*, 570 U.S. at 261).

Facts are irrelevant -- the statutory language controls. But where a law's text is ambiguous and its reach thus indeterminate, the Court has carved out a narrow exception requiring the defendant to show that there is a "realistic probability" that the statute actually encompasses the non-qualifying conduct he claims it reaches. *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). "To show that realistic probability," an offender "must at least point to his own case or other cases in which the [] courts in fact did apply the statute in the special [] manner for which he argues." *Id.*

2. The Court has adopted a narrow construction of the term "physical force" in the ACCA's closely analogous elements clause. "[I]n the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force, that is, force capable of causing physical pain or injury to another person." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010). Not all force is "violent force," and "[m]inor uses of force may not constitute 'violence' in the generic sense." *United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014). For example, "a squeeze on the arm that causes a bruise" is "hard to describe . . . as violence," *id.* (quoting *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)); so too "relatively minor" "physical

assaults" such as "pushing, grabbing, shoving, slapping, and hitting," *id.* at 1411–12.

Rather, the statutory term "violent felony" "suggests a category of violent, active crimes." *Curtis Johnson*, 559 U.S. at 140 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)); *see also id.* ("Even by itself, the word 'violent' in § 924(e)(2)(B) connotes a substantial degree of force. . . . When the adjective 'violent' is attached to the noun 'felony,' its connotation of strong physical force is even clearer."). "Violent felonies" are those "characterized by extreme physical force, such as murder," "forcible rape," and "assault and battery with a dangerous weapon." *Id.* at 140–41 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)).

The Court treats the elements clause of the ACCA and the elements clause at 18 U.S.C. § 16(a) as indistinguishable and uses cases construing one clause to determine the reach of the other. *See, e.g.*, *Curtis Johnson,* 559 U.S. at 140 (relying on § 16(a) to construe ACCA elements clause); *Castleman*, 134 S. Ct. at 1411 n.4 (acknowledging *Johnson*'s use of §16(a) to interpret ACCA). Because § 16(a) is identical to § 924(c)(3)(A), this elements clause, too, must be read to require the use of "*violent* force."

To qualify under § 924(c)'s elements clause, therefore, a crime must require the use of "extreme" and "*violent* force" "capable of causing pain or injury," force "strong enough to constitute 'power,'" a quantum akin to that involved in "murder" and "forcible rape." *Curtis Johnson*, 559 U.S. at 140–42.

3. The indictment charged petitioner Elvin Hill with a single count under 18 U.S.C. § 924(j)(1), violated when "[a] person, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm," where

"the killing is murder (as defined in section 1111)." A violation of § 924(c) is a prerequisite for violating § 924(j).[1]

Section 924(c), in turn, prohibits anyone from using or carrying a firearm during and in relation to "a crime of violence" (or a "drug trafficking crime," not relevant here). Commission of a "crime of violence" is an element of § 924(c) -- and thus of § 924(j) as well. *E.g.*, *United States v. Winston*, 55 F. App'x 289, 300 (6th Cir. 2003).

Specifically, the indictment accused petitioner of violating § 924(j)(1) by using a firearm, "in violation of Title 18, United States Code, Section 924(c)," "during and in relation to" "the robbery of Fredy Cuenca, in violation of Title 18, United States Code, Section 1951(a)," and "in the course of that offense did cause the death of [Cuenca] through the use of a firearm, which killing is murder . . . [under] Section 1111(a)." The "crime of violence" is Hobbs Act robbery, in violation of §§ 1951(a) & (b)(1).

4. Petitioner was tried before a jury in the Eastern District of New York. At the close of evidence, the district judge (Matsumoto, J.) instructed the jury that Mr. Hill was guilty of Hobbs Act robbery if he unlawfully took the victim's property "by threatening or actually using physical force, violence, or fear of injury, immediately or in the future, to person or property." ECF No. 130 at 30, E.D.N.Y. No. 12 Cr. 214 (jury charge). The court explained that "[t]he use or threat of force, violence, or fear is unlawful if it is aimed at causing *economic or physical* injury." *Id.* (emphasis added). Finally, the court told the jury that "the term 'property' includes *money and other tangible and intangible things of value*." *Id.* (emphasis added).

[1] Section 924(j)(1) is in essence a felony-murder statute, where § 924(c) plays the role of the predicate offense. Leonard B. Sand *et al.*, *Modern Federal Jury Instructions - Criminal*, Commentary to Instruction 41-7.

The jury returned a guilty verdict. The court sentenced petitioner to 43 years' imprisonment.

5. On appeal to the Second Circuit, petitioner argued among other things that his conviction could not stand because Hobbs Act robbery is not a "crime of violence." *See* ECF No. 66, 2d Cir. No. 14-3872 (supplemental brief of Nov. 10, 2015). He argued, first, that in light of *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015) (invalidating ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), as void for vagueness), the similar residual clause found at § 924(c)(3)(B) was unconstitutionally vague. He argued, second, that because one can commit Hobbs Act robbery without using violent physical force -- either by causing the victim to fear economic loss to an intangible asset, or by using minimal physical force not amounting to *Curtis Johnson*-level "*violent* force" -- it also did not qualify under the elements clause at § 924(c)(3)(A).

The Second Circuit issued its first opinion affirming the conviction in August 2016. *See United States v. Hill*, 832 F.3d 135 (2d Cir. 2016). The court concluded that Hobbs Act robbery was a "crime of violence" under both the residual and the elements clause of § 924(c)(3).

Petitioner timely sought rehearing and rehearing *en banc*, arguing that the court erred in both respects. *See* ECF No. 127, 2d Cir. No. 14-3872 (filed September 16, 2016).

6. The Second Circuit held that petition for nearly two years. In April 2018, this Court ruled in *Dimaya v. Sessions*, 138 S. Ct. 1204 (2018), that the residual clause of 18 U.S.C. § 16(b) was unconstitutionally vague under *Samuel Johnson*. Section 16(b) is identical to § 924(c)(3)(B).

About a month after *Dimaya*, the Second Circuit issued an amended opinion superceding its 2016 opinion. *See United States v. Hill*, 890 F.3d 51 (2d Cir. 2018).

The new opinion again affirmed the conviction and concluded that Hobbs Act robbery was a crime of violence -- but only under § 924(c)(3)(A)'s elements clause. The court "express[ed] no view" on § 924(c)(3)(B)'s residual clause, *id.* at 52 n.2, and excised that portion of the earlier opinion.

Two points in the amended opinion are relevant. First, the court rejected petitioner's argument that Hobbs Act robbery did not qualify under the elements clause because one can commit this offense by "putting a victim in fear of economic injury to an intangible asset without the use of physical force." 890 F.3d at 57 n.9. This argument fails, the court claimed, because "Hill relies almost exclusively on hypotheticals, not actual cases, to suggest that there is a realistic possibility that Hobbs Act robbery could extend to such a fact pattern." And the actual cases he cites "involved a charge of Hobbs Act *extortion*, not robbery . . . ." *Id.* Citing *Duenas-Alvarez*, the court rejected this argument because petitioner "failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits." *Id.*

Second, the court rejected petitioner's argument that Hobbs Act robbery did not qualify under the elements clause because one can commit this crime by using non-violent physical force, for instance by bumping the victim or by damaging "property through non-forceful means . . . such as threatening to throw paint on the victim's house, to spray paint his car, . . . [or] to 'pour[] chocolate syrup on his passport.'" *Id.* at 57. This argument failed, the court claimed, because *Curtis Johnson* did not "require that a particular quantum of force be employed or threatened to satisfy" the elements clause. *Id.* at 58. Thus, "Hill's hypotheticals . . . do not fail to involve the use or threatened use of physical force." *Id.*

7. Mr. Hill timely petitioned for rehearing and rehearing *en banc* of the amended opinion. *See* ECF No. 186, 2d Cir. No. 14-3872 (filed June 22, 2018).

Among other things, he argued that the court erred in relying on *Duenas-Alvarez* to reject his argument based on causing economic loss to an intangible asset, because the plain text of the Hobbs Act -- violated when a defendant robs "by means of . . . fear of injury, immediate or future, to [the victim's] . . . property" -- authorized a prosecution under this scenario. *Id.* at 13-16. No act of "legal imagination" was required and *Duenas-Alvarez*'s "realistic probability" test was irrelevant.

Petitioner also argued that the court misconstrued *Curtis Johnson*, which increased the quantum of force that a defendant must use to qualify under the elements clause. *Id.* at 5-8. Moreover, Hobbs Act robbery was modeled on New York robbery -- and New York robbery could be committed using non-violent force such as a bump or a shove. *Id.* at 9-11. Because one can commit robbery under the Hobbs Act (and other similar federal statutes) using a degree of force less than the "*violent* force" required by *Curtis Johnson*, Hobbs Act robbery did not qualify under the elements clause. *Id.* at 12-13.

The Second Circuit denied rehearing and rehearing *en banc*. Pet. App. xx.

## REASONS FOR GRANTING THE WRIT

Hobbs Act robbery is perhaps the most commonly used predicate in prosecutions under 18 U.S.C. § 924(c). Whether it qualifies as a "crime of violence" is therefore an important and recurrent question of federal statutory interpretation warranting this Court's review. And although the courts of appeals currently agree that Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c)(3)(A), a split lies within both questions presented in this petition.

First, regarding petitioner's argument that Hobbs Act robbery does not qualify under § 924(c)(3)(A) because it can be committed by causing the victim to fear economic loss to an intangible asset, the courts of appeals disagree over whether *Duenas-Alvarez*'s "realistic probability" test applies when the defendant's example of statutory overbreadth is based on the law's text. Although most circuits have ruled that *Duenas-Alvarez* is irrelevant when the law is facially overbroad, other courts -- like the Second Circuit in this case and the Fifth Circuit, as well as the Board of Immigration Appeals -- demand that the defendant show an actual case within that overbroad portion even when it is grounded on statutory language. *Compare, e.g.*, *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (*Duenas-Alvarez* test irrelevant where statute is facially overbroad; conviction under statute did not categorically qualify as predicate offense even though defendant could not show actual prosecution under overbroad portion of statute); *and United States v. Titties*, 852 F.3d 1257, 1274-75 (10th Cir. 2017) (same) *with United States v. Castillo-Rivera*, 853 F.3d 218, 222-25 (5th Cir. 2017) (*en banc*) (applying *Duenas-Alvarez* test even though statute was facially overbroad and concluding that defendant's conviction qualified as federal predicate because he failed to point to "actual case" where someone was prosecuted under overbroad portion of statute); *and Matter of Ferreira*, 26 I. & N. Dec. 415, 417 (BIA 2014) (same).

Second, regarding petitioner's argument that Hobbs Act robbery does not qualify under § 924(c)(3)(A) because it can be committed using a quantum of force less than the "*violent* force" required by *Curtis Johnson*, the courts of appeals are split on whether New York robbery -- upon which Hobbs Act robbery is based -- requires such force. *Compare United States v. Steed*, 879 F.3d 440, 450–51 (1st Cir. 2018) (holding that New York attempted second-degree robbery is not crime of violence under elements clause of Guidelines) *with Perez v. United States*, 885 F.3d 984, 986 (6th Cir. 2018) (holding that New York second-degree robbery qualifies as violent felony under ACCA's elements clause); *and United States v. Pereira-Gomez*, 903 F.3d 155, 164-66 (2d Cir. 2018) (holding that all degrees of New York robbery qualify as crime of violence under elements clause of Guidelines). The Sixth Circuit acknowledged the split even before the Second Circuit cemented it in *Pereira-Gomez*. *See Perez*, 885 F.3d at 990.

Indeed, a case currently before the Court – *Stokeling v. United States*, No. 17–5554 (argued October 9, 2018) – implicates the nearly identical question of whether Florida robbery qualifies as a violent felony under the ACCA's elements clause in light of *Curtis Johnson*. Florida robbery, like New York robbery (and thus Hobbs Act robbery), can be committed using non-violent means such as bumping or shoving. At a minimum, and in the alternative, therefore, this petition should be held for *Stokeling*.

These square conflicts on important, recurring questions of federal law warrant this Court's review. Moreover, the court below was wrong on the merits: Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A)'s elements clause. First, the text of § 1951(b)(1) proves that one can commit Hobbs Act robbery without using physical force – *i.e.*, by causing the victim to fear injury to her "property," which this Court has long defined expansively to include anything of

transferrable value, including intangible assets such as securities or the right to conduct a business. *Duenas-Alvarez*'s "reasonable probability" test is inapplicable because, given the plain meaning of "property," there is no statutory ambiguity and nothing indeterminate about the Act's reach. And requiring petitioner to show an actual case despite the law's clarity flouts the categorical approach, an *elements*-based inquiry that disregards historic facts. Second, Hobbs Act robbery, which is based on New York robbery, is not a crime of violence because it can be committed with low-level uses of force such as blocking and bumping, well short of the "*violent*" physical force *Curtis Johnson* held necessary under the elements clause.

## I. The Circuits Have Split on Whether *Duenas-Alvarez*'s "Realistic Probability" Test Applies When a Statute Is Facially Overbroad, a Split Embedded Within the Second Circuit's Refusal to Acknowledge that Hobbs Act Robbery Can Be Committed by Causing Fear of Economic Loss to an Intangible Asset.

A. Hobbs Act robbery is "unlawful[ly] taking or obtaining [] personal property from the person . . . of another, against his will, by means of . . . fear of injury, immediate or future, to his . . . property, or property in his custody or possession . . . ." 18 U.S.C. § 1951(b)(1). Plainly, therefore, one violates this law by causing the victim to fear injury to her property. *E.g.*, *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017) ("Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so. We cannot ignore the statutory text and construct a narrower statute than the plain language supports."); *United States v. Camp*, 903 F.3d 594, 600 (6th Cir. 2018) (same).

"Property" is not defined in § 1951 but carries an expansive meaning in ordinary English and common legal usage -- it is anything of value that can be transferred or exchanged, tangible or intangible. This Court, the lower courts, as well as Judge Sand's model federal jury instructions employ this inclusive definition when construing a variety of laws, including the Hobbs Act.

The Act facially covers more conduct than that covered by the elements clause: One can commit Hobbs Act robbery by engaging in behavior, not involving the use of physical force, that causes a victim to fear economic harm to an intangible asset. It thus does not qualify categorically as a crime of violence under the elements clause.

B. "Property" is "something that is or may be owned or possessed." *Webster's Third New International Dictionary* 1818 (1961). The standard legal dictionary explains that this word is "commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal: everything that has an exchangeable value . . . ." *Black's Law Dictionary* 1216 (6th ed. 1990). And "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.").

The Court has long employed this expansive definition. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), for instance, the question was whether a retail consumer, who claimed that defendants (manufacturers of hearing aids) violated antitrust laws, could seek treble damages under § 4 of the Clayton Act, providing this remedy to "[a]ny person who shall be injured in his *business or property* by reason of" defendants' antitrust violation. Because the consumer plaintiff's sole alleged injury was "be[ing] forced to pay . . . [a] higher price[] for [his] hearing aid[]," defendants claimed that he had not suffered injury to his "business or property." *Id.* at 335.

The Court rejected that argument and ruled for the consumer plaintiff because "the word 'property' has a naturally broad and inclusive definition" that

encompassed the economic loss he suffered -- having to spend more money on his hearing aid. *Id.* at 338. "In its dictionary definitions and in common usage 'property' comprehends anything of material value owned or possessed. *See, e.g.*, Webster's Third New International Dictionary 1818 (1961)." And "[m]oney, of course, is a form of property." *Id.* Thus, "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of § 4." *Id.* at 339.

The Court relies on the same expansive definition to construe federal criminal laws, including the Hobbs Act. For instance, in *Carpenter v. United States*, 484 U.S. 19 (1987), the question was whether the defendant, a financial columnist for the Wall Street Journal, violated the mail and wire fraud laws by giving pre-publication confidential information (which he obtained while writing his column) to third parties who then traded securities on that information. Defendant argued that he "did not obtain any 'money or property' from the Journal, which is a necessary element" of mail and wire fraud. *Id.* at 25.

The Court unanimously rejected this argument: "[T]he object of the scheme was to take the Journal's confidential business information – the publication scheme and contents of the [] column – and its intangible nature does not make it any less 'property' . . . ." *Id.* "Confidential business information has long been recognized as property," the Court explained, and the mail and wire fraud laws apply equally to "tangible as [well as] . . . intangible property rights." *Id.* at 25-26. *Accord Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). The Model Penal Code agrees: "'property' means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth . . . ." *Model Penal Code*, Art. 223.0(6).

The Court assumes that "property" in the Hobbs Act carries the same definition. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 405 (2003), for instance, the Court assumed that plaintiff abortion clinics had a "property right of exclusive control of their business assets," but concluded that defendants – protesters at the clinics – did not violate the Hobbs Act because they "merely interfer[ed] with or depriv[ed]" the clinics of that right – "they did not [obtain or] acquire any such property" as the Act requires. Similarly, in *Sekhar v. United States*, 133 S. Ct. 2720, 2726 (2013), the Court described "property" in the Hobbs Act as "something of value . . . that can be exercised, transferred, or sold," thus encompassing a public official's recommendation to another official regarding a particular investment. *See also id.* at 2726 n.5 (property "include[s] anything of value"). But as in *Scheidler*, the Court concluded that defendant did not violate the Hobbs Act by attempting to blackmail the official into making that recommendation: He did not seek to "obtain" that recommendation, only to "coerce" it. *Id.* at 2725-26.

In sum, anything of value that is "transferable" – *i.e.*, "capable of passing from one person or another" – is "property" under the Hobbs Act. *Id.* at 2725.

The lower courts have followed this Court's lead. "The concept of 'property' under the Hobbs Act is an expansive one" that includes "intangible assets, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999). *Accord, e.g.*, *United States v. Local 560 of the International Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1986) (noting that the circuits "are unanimous in extending Hobbs Act to protect intangible, as well as tangible property"). That these cases arose under the Hobbs Act's extortion provision rather than its robbery one is irrelevant. The same term "property" is used in both without qualification. And "it is a normal rule of statutory construction

that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (internal quotation marks omitted). *Accord Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("[I]dentical words and phrases within the same statute should normally be given the same meaning.").

The leading treatise on federal jury instructions agrees that "property" in the Hobbs Act encompasses intangible assets – and thus that one may commit robbery under the Act by causing fear of economic loss. *See* 3 Leonard B. Sand *et al.*, *Modern Federal Jury Instructions - Criminal* (2018). Instruction 50-4 concerns Hobbs Act robbery and defines "property" as "includ[ing] money and other tangible and intangible things of value that are capable of being transferred from one person to another." *Id.* at 50-8 (citing *Scheidler* and *Sekhar*). Instruction 50-5 explains the phrase "taking by force, violence, or fear of injury" in § 1951(b)(1)'s definition of "robbery": "The use or threat of force or violence might be aimed at a third person, *or at causing economic rather than physical injury*." *Id.* at 50-10 (emphasis added). And Instruction 50-6 explains "fear of injury" in the same definition: "Fear exists if a victim experiences anxiety, concern, or worry over expected person harm *or business loss, or over financial or job security*." *Id.* at 50-11 (emphasis added). The commentary adds that "[i]t is widely accepted that instilling fear of economic harm is sufficient to satisfy this element." *Id.* at 50-13.

At least three courts of appeals have adopted model jury instructions for Hobbs Act robbery with similar language. *See* Tenth Circuit, Criminal Pattern Jury Instructions § 2.70 (2018) (defining "property" to include "intangible things of value" and explaining that "fear of injury" includes "anxiety about . . . economic loss"); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases) 070.3 (2016) (defining "property" to include "intangible rights that are a source or element of income or

wealth" and explaining that "fear of injury" "includes the fear of financial loss as well as fear of physical violence"); Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.) (defining "property" to include "money and other tangible and intangible things of value" and explaining that "fear of injury" "includes fear of economic loss or damage, as well as fear of physical harm").

Finally, as noted, the district judge at petitioner's trial told the jury that property includes intangible assets and that Mr. Hill was guilty of Hobbs Act robbery if he caused the victim to fear economic loss to those assets. *See* ECF No. 130 at 30, E.D.N.Y. No. 12 Cr. 214 (jury charge) ("The use or threat of force, violence, or fear is unlawful if it is aimed at causing *economic or physical* injury. . . . [T]he term 'property' includes *money and other tangible and intangible things of value*.") (emphases added).

In sum, Hobbs Act robbery is facially broader than the elements clause because the unadorned term "property" universally carries an expansive meaning. One violates this law by engaging in non-physical conduct, not involving the use of physical force, that causes a victim to fear economic loss to an intangible asset. Hobbs Act robbery thus does not qualify categorically under the elements clause. *Cf. United States v. McKibbon*, 878 F.3d 967, 974 (10th Cir. 2017) (Colorado's drug law is broader than federal law barring drug "distribution" because "the plain language of [the state] statute makes it unlawful to 'offer' to sell controlled substances. The law does not further modify or limit the term 'offer.' Without any Colorado case law to the contrary, we have no authority on behalf of Colorado to insert any new limiting adjective such as 'bona fide' adjacent to the unadorned word, 'offer'.").

C. The Second Circuit refused to accept this conclusion because petitioner did not offer an "actual case" in which someone was prosecuted for Hobbs Act robbery by causing the victim to fear economic loss to intangible assets. Citing and

relying on *Duenas-Alvarez*, the court claimed that petitioner's argument was based on "legal imagination" and that there was no "realistic probability that a perpetrator could effect such a robbery in the manner he posits." 890 F.3d at 57 n.9.

The courts of appeals are split on whether *Duenas-Alvarez* applies when the defendant's hypothetical of a predicate statute's overbreadth is based on the law's text. The Fifth Circuit and the BIA, as well as Second Circuit in the case below, demand that the defendant show an "actual case" to prove that a predicate statute is overbroad, even when the overbreadth is grounded on statutory language. In *United States v. Castillo-Rivera*, 853 F.3d 218, 222-23 (5th Cir. 2017 (*en banc*), the Fifth Circuit ruled that there was "no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face." Thus, even though the state law was facially broader than the federal definition, the court ruled that defendant's state conviction qualified as a federal predicate because he failed to find an "actual case" where someone was prosecuted under the overbroad portion. Similarly in *Matter of Ferreira*, 26 I. & N. Dec. 415, 417 (BIA 2014), the Board of Immigration Appeals rejected an immigrant's argument that his Connecticut drug conviction did not categorically qualify as a federal "controlled substance offense" because Connecticut criminalized two substances not regulated federally. The Board concluded that "even where a State statute on its face" is broader than the federal definition, "there must be a realistic probability that the State would prosecute conduct falling outside" the federal definition. Because the immigrant could not prove that Connecticut prosecuted anyone for distributing those two substances, his conviction qualified. *Id.* at 421-22.

At least five circuits, as well as the Second Circuit in a different case, hold otherwise: A predicate statute is categorically overbroad when its text supplies the overbreadth, even in the absence of actual cases applying the law in that manner.

*See Swaby v. Yates*, 847 F.3d 62, 65-66 (1st Cir. 2017) (*Duenas-Alvarez* is implicated only where state law is "ambiguous" and has "no relevance" when statutory language is facially overbroad); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009) (*Duenas-Alvarez* irrelevant when "elements" of state law "are clear"); *United States v. Grisel*, 488 F.3d 844, 849 (9th Cir. 2007) (*en banc*) ("Where, as here, a state statute explicitly defines a crime more broadly than the [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition . . . . The state statute's greater breadth is evidence from its text."); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017) (same when state law's "plain language" was overbroad); *Ramos v. Attorney General*, 709 F.3d 1066, 1072 (11th Cir. 2013) ("realistic probability" requirement satisfied by statutory language itself).

D. On the merits, the court below, the Fifth Circuit, and the BIA misread *Duenas-Alvarez* and flout the categorical approach. *Duenas-Alvarez* concerned the scope of California's aiding-and-abetting doctrine, which the petitioner argued was broader than its federal counterpart. In support, he offered several hypothetical scenarios purportedly covered by California law but not federal law. 549 U.S. at 190-91. But no statutory language buttressed petitioner's claim.

The Court rejected petitioner's argument as an "application of legal imagination to a state statute's language." *Id.* at 193. Because the state law's purported overbreadth was not based on statutory text, petitioner had to offer something else -- such as "his own case or other cases in which the state court in fact did apply the statute in the special [] manner for which he argues" -- to prove

that there was a "realistic probability, not a theoretical possibility, that the state would apply its statute" in that manner. *Id.*

*Duenas-Alvarez*, in sum, applied the "realistic probability" test because petitioner's claim of overbreadth was not based on statutory language. The Court's conclusion, essentially, is that he misread the statute.

The test has no application when a claim of overbreadth rests on statutory language. The text itself creates the "realistic probability" of overbreadth and no "legal imagination" is required to generate that probability.

E. Reading *Duenas-Alvarez* as requiring an actual case even when a law's overbreadth arises from its text flouts the categorical approach. This is an elements-based inquiry that "focus[es] *solely* on whether the elements of the crime of conviction sufficiently match the elements of" the federal definition. *Mathis*, 136 S. Ct. at 2248. It is a legal inquiry, not a factual one. The position taken by the Second Circuit in this case, as well as by the Fifth Circuit and the BIA, is irreconcilable with that elements-based inquiry.

Thus, this Court has consistently applied the elements-based categorical approach since *Duenas-Alvarez* without addressing whether there was an "actual case" showing that a particular law was overbroad. *Mathis*, for instance, held that Iowa's burglary law was broader than generic federal "burglary" because the law on its face criminalized the burglarizing of non-structures such as boats or planes. 136 S. Ct. at 2250. But in so concluding, the Court "did not apply -- or even mention -- the 'realistic probability' test" or "seek or require instances of actual prosecutions" of individuals for burglarizing boats or planes. *Titties*, 852 F.3d at 1275. Likewise, *Mellouli* held that a Kansas law was overbroad because it "include[d] at least nine substances not included in the federal list" -- and never asked whether Kansas actually prosecutes anyone for those nine substances. 135 S. Ct. at 1984.

Here as in *Mathis* and *Mellouli*, the "realistic probability" test is irrelevant because the text of the Hobbs Act shows that it is broader than the elements clause. One plainly commits Hobbs Act robbery when one causes the victim to "fear [] injury . . . to his . . . property," and "property" is universally read as anything of transferable value, tangible or intangible. Thus, the text of the Act creates the "realistic probability" of violating this law by engaging in conduct that causes the victim to fear economic loss to an intangible asset; using physical force is not necessary. No "legal imagination" is at play and Hobbs Act robbery thus reaches activity not encompassed by the elements clause.

## II. The Circuits Have Split on Whether New York Robbery Satisfies the Elements Clause, a Split Embedded within the Second Circuit's Conclusion that Hobbs Act Robbery – Which Is Based on New York Robbery – Requires the Use of "*Violent* Force."

A. As noted, the circuits have split on the question whether New York robbery satisfies the elements clause. While the First Circuit concluded that New York attempted second-degree robbery does not qualify categorically under the Guidelines' elements clause because it can be committed using less than "*violent* force," *United States v. Steed*, 879 F.3d 440, 450–51 (1st Cir. 2018), the Sixth Circuit held that New York second-degree robbery qualifies under the ACCA's elements clause, *Perez v. United States*, 885 F.3d 984, 986 (6th Cir. 2018). The Second Circuit cemented the split in *United States v. Pereira-Gomez*, 903 F.3d 155, 164-66 (2d Cir. 2018), holding that all degrees of New York robbery qualify under the elements clause of the Guidelines.

This conflict exemplifies a broader division among the circuits on whether state robbery offenses that can be committed through relatively minor physical exertions satisfy the elements clause under *Curtis Johnson*'s "*violent* force" requirement. Numerous circuits have held that state robbery offenses, like New

York's, that can be committed with minimal physical force do not qualify as elements-clause predicates. *E.g.*, *United States v. Geozos*, 870 F.3d 890, 901 (9th Cir. 2017) (Florida); *United States v. Strickland*, 860 F.3d 1224, 1227 (9th Cir. 2017) (Oregon); *United States v. Yates*, 866 F.3d 723, 729 (6th Cir. 2017) (Ohio); *United States v. Winston*, 850 F.3d 677, 682–86 (4th Cir. 2017) (Virginia); *United States v. Eason*, 829 F.3d 633, 641–42 (8th Cir. 2016) (Arkansas); *United States v. Gardner*, 823 F.3d 793, 803–04 (4th Cir. 2016) (North Carolina); and *United States v. Parnell*, 818 F.3d 974, 979 (9th Cir. 2016) (Massachusetts). Other circuits have held other offenses to qualify. *E.g.*, *United States v. Pettis*, 888 F.3d 962 (8th Cir. 2018) (Minnesota); *United States v. Swopes*, 886 F.3d 668, 671 (8th Cir. 2018) (Missouri); *United States v. Harris*, 844 F.3d 1260, 1262 (10th Cir. 2017) (Colorado); *United States v. Armour*, 840 F.3d 904, 907 (7th Cir. 2016) (Indiana); *United States v. Fritts*, 841 F.3d 937, 943 (11th Cir. 2016) (Florida).

As noted, before the Court is a case involving this issue -- *Stokeling v. United States*, No. 17–5554 (argued October 9, 2018), concerning whether Florida robbery qualifies under the ACCA's elements clause. As in New York, one commits Florida robbery by bumping or shoving the victim, conduct short of *Curtis Johnson*'s "*violent* force."

B. Hobbs Act robbery is implicated in this split because the Hobbs Act is based on New York law and because Hobbs Act robbery, like other forms of federal robbery, can be committed through minor physical effort.

"[T]he definitions of those terms" in the Hobbs Act -- "robbery and extortion" -- "were based on New York law." *Evans v. United States*, 504 U.S. 255, 264 (1992) (internal quotation marks omitted); *accord United States v. Nedley*, 255 F.2d 350, 357 (3d Cir. 1958) ("'Robbery' under the Hobbs Act is . . . robbery as defined by the New York Penal Laws and construed by the courts of that State."); *United States v.*

*Zappola*, 677 F.2d 264, 268 (2d Cir. 1982) ("'The bill contains definitions of robbery and extortion which follow the definitions contained in the Laws of the State of New York.'") (citation omitted); *United States v. Aguon*, 851 F.2d 1158, 1164 (9th Cir. 1988) (*en banc*) ("Congressman Hobbs said explicitly that the definitions of robbery and extortion were modeled on the New York Penal Code."); *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 813 (7th Cir. 2005) ("Congress used the Penal Code of New York as a model for the Act.").

At the time of the Hobbs Act's passage, the New York robbery statute stated that "the degree of force employed is immaterial," N.Y. Penal Law § 2122 (1946), so long as it is "employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking." *Id.* § 2121. Though the Penal Law was later revised, this feature was not. *See* N.Y. Penal Law § 160.00 (any amount of force sufficient for robbery if used to "[p]revent[] or overcom[e] resistance to the taking of the property or to the retention thereof" or to "[c]ompel[] the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny"). There is no reason to doubt that Hobbs Act robbery incorporates this feature. *See Evans*, 504 U.S. at 264-65 (concluding that Hobbs Act extortion "could be committed by one who merely *received* an unauthorized payment" because this was true under "the statute that was in force in New York when the Hobbs Act was enacted").

C. New York robbery is "forcible stealing," N.Y. Penal Law § 160.00, but New York courts have made clear that "forcible stealing" encompasses conduct short of *Curtis Johnson*'s "*violent* force." Therefore, New York robbery -- and by extension Hobbs Act robbery -- is not a crime of violence under the elements clause.

The argument is straightforward. Under New York's baseline definition of robbery, § 160.00, the "physical force" necessary to accomplish a "forcible stealing"

may be quite modest. For example, a defendant commits robbery if he and his accomplices form a "human wall that block[s] the victim's path as the victim attempt[s] to pursue someone who had picked his pocket." *People v. Bennett*, 219 A.D.2d 570, 570 (N.Y. App. Div. 1995). "The requirement that a robbery involve the use, or the threat of immediate use, of physical force does not mean that a weapon must be used or displayed or that the victim must be physically injured or touched." *Id.; see People v. Patton*, 184 A.D.2d 483, 483 (N.Y. App. Div. 1992) ("By blocking the victim's passage, defendant aided in codefendant's retention of the property, and thereby participated in the robbery."). Likewise, robbery has occurred if the defendant "bumped his unidentified victim, took money, and fled while another forcibly blocked the victim's pursuit." *People v. Lee*, 197 A.D.2d 378, 378 (N.Y. App. Div. 1993). And one commits robbery by engaging in a brief tug-of-war over property: "Proof that the store clerk grabbed the hand in which defendant was holding the money and the two tugged at each other until defendant's hand slipped out of the glove holding the money was sufficient to prove that defendant used physical force." *People v. Safon*, 166 A.D.2d 892, 892 (N.Y. App. Div.1990).

Thus, whether by forming a human wall, bumping the victim, or engaging in a brief tug-of-war over property, robbery can be committed in New York with less than "*violent* force." New York robbery, and its progeny Hobbs Act robbery, therefore do not fall within the elements clause.

D. That Hobbs Act robbery does not require the use of "*violent* force" makes sense -- neither do other federal robbery statutes. *See United States v. Rodriguez*, 925 F.2d 1049, 1052 (7th Cir. 1991) (upholding postal-robbery conviction despite "rather minimal" use of force because postal worker's "key chain was attached to his clothing, and [defendant] had to pull the chain once or perhaps twice to snatch the keys."); *United States v. Depass*, 510 F. App'x 119, 121 (3d Cir. 2013)

(upholding robbery conviction under § 2114(a) "[g]iven that Depass admits that he pushed" victim); *United States v. Alewelt*, 532 F.2d 1165, 1166 (7th Cir. 1976) (upholding bank robbery conviction under § 2113 where defendant "entered [bank], pushed a teller to the floor, and fled" with cash); *see also United States v. Bell*, 158 F. Supp. 3d 906, 920 (N.D. Cal. 2016) (The "force necessary to commit a section 2112 robbery is less than violent force."). Like Hobbs Act robbery, other federal robberies track New York robbery. *See generally Matthews v. United States*, 682 F.3d 180, 182 (2d Cir. 2012) ("[T]he New York Penal Law statutory elements of robbery . . . parallel those required to establish robbery under 18 U.S.C. §§ 2111, 2113(a), and 2118(a).") (internal quotation marks omitted).

E. The Court should therefore review this case. In the alternative, this petition should be held for *Stokeling,* presenting the question whether Florida robbery -- which, like New York robbery, can be committed with minimal physical force, as long as the force suffices to overcome resistance, *compare Robinson v. State*, 692 So. 2d. 883, 886 (Fla. 1997) *with* § 160.00(1) -- is an elements-clause predicate. New York's highest court has recognized that a conviction for Florida robbery is "the equivalent of" a conviction for New York robbery. *People v. Sailor*, 480 N.E.2d 701, 710-11 (N.Y. 1985).

F. Finally, that there exists an alternative basis for Hobbs Act robbery to qualify as a crime of violence -- under the residual clause at § 924(c)(3)(B) – is no impediment to review. As noted, the court below ruled only that Hobbs Act robbery fell within the elements clause.

This Court frequently resolves a predicate issue and then remands the case for the court of appeals to address any remaining issues. *See, e.g.*, *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (resolving the question presented and remanding the case for the lower court to conduct "proceedings consistent with this

opinion"); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1190 (2017) (same); *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 922 (2017) (same). Thus, if this Court grants review and agrees with petitioner that Hobbs Act robbery is not a crime of violence under the elements clause, it would remand this case to the court of appeals for it to answer the residual-clause question.

Additionally, this Court is likely to answer in the near future whether § 924(c)(3)(B)'s residual clause survives *Dimaya*, which invalidated the identically worded residual clause of § 16(b). There is already a 3-to-3 circuit split. *Compare United States v. Salas*, 889 F.3d 681 (10th Cir. 2018) (invalidating § 924(c)(3)(B) in light of *Dimaya*); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (same); *and United States v. Davis*, 903 F.3d 483 (5th Cir. 2018) *with United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) (upholding § 924(c)(3)(B) and distinguishing *Dimaya*); *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (*en banc*) (same); *and United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018) (same). And the Government recently sought this Court's review in two of those cases. *See United States v. Salas*, Docket No. 18-428 (cert. petition filed Oct. 3, 2018); *United States v. Davis*, Docket No. 18-431 (same). Thus, that the court below did not discuss whether Hobbs Act robbery qualified under § 924(c)(3)(B) is no impediment to review in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held for *Stokeling*.

Respectfully submitted,

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