No. 19-6306

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IN THE SUPREME COURT OF THE UNITED STATES

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JONATHAN MOTA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner's armed robbery of a gas station and convenience store, which serve customers traveling from out of state and acquire a large percentage of goods through interstate commerce, is punishable under the Hobbs Act, 18 U.S.C. 1951, which prohibits robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce."

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

United States v. Mota, No. 13-cr-93 (Nov. 9, 2016)

United States Court of Appeals (9th Cir.):

United States v. Mota, No. 16-10468 (Feb. 20, 2019)

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 2-5) is not published in the Federal Reporter, but is reprinted at 753 Fed. Appx. 470.

## JURISDICTION

The judgment of the court of appeals was entered on February 20, 2019. A petition for rehearing was denied on May 15, 2019 (Pet. App. 1). On July 29, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 12, 2019. The petition for a writ of certiorari

was filed on October 15, 2019 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of robbery affecting interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951(a); use of a firearm during or in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and use of a firearm to commit murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j). Am. Judgment 1. The district court sentenced petitioner to life plus ten years of imprisonment. Id. at 2. The court of appeals affirmed in part, reversed in part, and remanded the case to the district court with instructions to vacate petitioner's conviction and sentence on the Section 924(c) count. Pet. App. 2-5.

1. One evening in January 2013, petitioner, armed with a handgun, robbed the Mount Konocti Gas and Mart in Kelseyville, California. Presentence Investigative Report (PSR) ¶ 6. During the robbery, petitioner shot Forrest Seagrave, a store clerk, in the neck. PSR ¶¶ 6, 24; Trial Tr. 72-75, 175-176. Seagrave later died from the injury. PSR ¶¶ 7, 24; Trial Tr. 175-176. Petitioner stole approximately $200 during the robbery. Trial Tr. 77.

A grand jury indicted petitioner on one count of robbery affecting interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951(a); one count of use of a firearm during and in

relation to a crime of violence, in violation of 18 U.S.C. 924(c); one count of use of a firearm to commit murder during and in relation to a crime of violence, in violation of 18 U.S.C. 924(j); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Superseding Indictment 1-3.

The Hobbs Act prescribes criminal penalties for anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. 1951(a). At trial, the government presented evidence showing that the Mount Konocti Gas and Mart served customers traveling from out of state, that the store acquired a large percentage of its goods from outside the state, and that the store was closed for approximately four days as a result of the robbery and murder. See Pet. App. 19; Trial Tr. 125-126, 421-425. The district court instructed the jury that the Hobbs Act's interstate-commerce element required the government to establish "[o]nly a de minimis effect on interstate commerce," which "need only be probable or potential, not actual." Pet. App. 6.

The jury found petitioner guilty on the Hobbs Act robbery count, the Section 924(c) count, and the Section 924(j) count. Verdict Form 1-3. The government voluntarily dismissed the Section 922(g)(1) count. Am. Judgment 1. The district court sentenced petitioner to a total term of life plus ten years of imprisonment, consisting of 240 months of imprisonment on the Hobbs Act robbery

count, a concurrent term of life imprisonment on the Section 924(j) count, and a consecutive term of 120 months of imprisonment on the Section 924(c) count. Id. at 2.

2. The court of appeals affirmed in part, reversed in part, and remanded the case. Pet. App. 2-5. As relevant here, the court affirmed petitioner's conviction under the Hobbs Act. It rejected petitioner's contention that "the Hobbs Act as applied in this case violates the Commerce Clause," explaining that "Ninth Circuit precedent forecloses [that] argument." Id. at 4 (citing United States v. Atcheson, 94 F.3d 1237, 1242 (9th Cir. 1996), cert. denied, 519 U.S. 1156 (1997)). The court also stated that it had "previously rejected the argument that the Hobbs Act requires more than 'proof of a probable or potential impact on interstate commerce.'" Ibid. (quoting United States v. Lynch, 437 F.3d 902, 909 (9th Cir.) (en banc) (per curiam), cert. denied, 549 U.S. 836 (2006)).

The court of appeals separately concluded, however, that, "[b]ecause conviction under 18 U.S.C. § 924(j)(1) requires proof the defendant also violated 18 U.S.C. § 924(c), [petitioner's] conviction for both offenses [wa]s multiplicitous." Pet. App. 4. The court accordingly remanded the case to the district court with instructions to vacate petitioner's conviction and sentence on the Section 924(c) count. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 4-13) that the effect of his robbery on interstate commerce was insufficient to support a conviction under the Hobbs Act. The petition for a writ of certiorari arises in an interlocutory posture, which is in itself a sufficient basis for denying it. In any event, the court of appeals' rejection of petitioner's contention follows directly from this Court's recent decision in Taylor v. United States, 136 S. Ct. 2074 (2016). Its decision does not conflict with any decision of another court of appeals. This Court has repeatedly denied review in cases raising issues similar to those petitioner presses here. See, e.g., Tkhilaishvili v. United States, No. 19-5888, 2019 WL 5150713 (Oct. 15, 2019); Sejour v. United States, 139 S. Ct. 1465 (2019) (No. 18-1126); McLean v. United States, 139 S. Ct. 213 (2018) (No. 18-5074); Harris v. United States, 139 S. Ct. 126 (2018) (No. 17-9166); Paniry v. United States, 138 S. Ct. 1016 (2018) (No. 17-7227); Martinez v. United States, 137 S. Ct. 1392 (2017) (No. 16-8126). It should follow the same course here.

1. Although the court of appeals affirmed petitioner's conviction for Hobbs Act robbery, it vacated his conviction and sentence under Section 924(c) and remanded the case to the district court with instructions to enter a new judgment. Pet. App. 4-5. The court of appeals' decision is therefore interlocutory. The interlocutory posture of this case, by itself, "furnishe[s]

sufficient ground for the denial" of the petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam). Following the proceedings on remand, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims that may arise from the district court's revised judgment, in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam). No justification exists in this case to depart from this Court's usual practice of declining to review interlocutory petitions.

2. Petitioner's contentions do not warrant further review in any event. The Hobbs Act prohibits robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). The Act defines "commerce" to include, among other things, "all * * * commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). That language "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." Stirone v. United States, 361 U.S. 212, 215 (1960).

In Taylor, this Court explained that, "[t]o determine how far this commerce element extends," the Court "look[s] to [its] Commerce Clause cases." 136 S. Ct. at 2079. For example, the Court observed that, in Gonzales v. Raich, 545 U.S. 1 (2005), it had held that the Commerce Clause empowers Congress to regulate the production, possession, and distribution of marijuana. Taylor, 136 S. Ct. at 2080. Because "[t]he Hobbs Act criminalizes robberies affecting 'commerce over which the United States has jurisdiction,'" and because "[u]nder Raich, the market for marijuana * * * is 'commerce over which the United States has jurisdiction,'" it "follow[ed] as a simple matter of logic that a robber who affects * * * even the intrastate sale of marijuana * * * affects * * * commerce over which the United States has jurisdiction." Ibid. (citation omitted).

The approach set out in Taylor decides this case. This Court has repeatedly held that the Commerce Clause empowers Congress to regulate a commercial enterprise that "serve[s] interstate travelers" or that sells goods, "a substantial portion of which has moved in interstate commerce." Katzenbach v. McClung, 379 U.S. 294, 304 (1964); see, e.g., Daniel v. Paul, 395 U.S. 298, 304 (1969); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 260 (1964). In this case, the government showed, and petitioner acknowledges (Pet. 11-12), both that the Mount Konocti Gas and Mart served customers traveling from out of state and that the store acquired a large percentage of its goods from outside

the State. See Pet. App. 19; Trial Tr. 125-126, 421-425. The government also showed that petitioner affected the store's ability to engage in interstate commerce by killing one of its employees, depleting its assets, and forcing it to close for several days. See Pet. App. 19; see also, e.g., Trial Tr. 125-126, 421-425. Because "[t]he Hobbs Act criminalizes robberies affecting 'commerce over which the United States has jurisdiction,'" and because this Court's cases establish that the store in this case was engaged in "'commerce over which the United States has jurisdiction,'" it "follows as a simple matter of logic" that the robbery in this case "affects * * * commerce over which the United States has jurisdiction," Taylor, 136 S. Ct. at 2080.

Petitioner contends that, under this Court's Commerce Clause cases, the Hobbs Act's commerce element requires proof that his particular robbery had "an actual, substantial impact on interstate commerce" (rather than, as the courts below stated, "'proof of a probable or potential impact'"). Pet. 4-5 (citation and emphasis omitted); see Pet. 9-13. But in Taylor, this Court held that "proof that the defendant's conduct in and of itself affected or threatened commerce is not needed" for a Hobbs Act robbery conviction. 136 S. Ct. at 2081. Instead, "[a]ll that is needed is proof that the defendant's conduct fell within a category of conduct that, in the aggregate, had the requisite effect." Ibid. The Court repeatedly explained that Congress may regulate economic activities on the basis of their effect on interstate

commerce "so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal." Id. at 2079; see id. at 2081 ("[I]t makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal."); ibid. ("Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.") (citation omitted). Taylor thus refutes petitioner's claim that the government was required to prove, as either a statutory or constitutional matter, that his robbery, standing alone, had "an actual, substantial impact on interstate commerce," Pet. 4-5 (emphasis omitted).

3. Contrary to petitioner's contention (Pet. 4-9), the decision below does not conflict with the decision of any other court of appeals. All of the courts of appeals with criminal jurisdiction have upheld Hobbs Act convictions for robberies targeting and depleting the assets of commercial enterprises, even where the depletion is minimal. See, e.g., United States v. Ossai, 485 F.3d 25, 31 (1st Cir.) (robbery targeting doughnut shop), cert. denied, 552 U.S. 919 (2007); United States v. Elias, 285 F.3d 183, 187-189 (2d Cir.) (grocery store), cert. denied, 537 U.S. 988 (2002); United States v. Powell, 693 F.3d 398, 402-406 (3d Cir. 2012) (business owners' homes), cert. denied, 568 U.S. 1111 (2013); United States v. Tillery, 702 F.3d 170, 174-175 (4th Cir. 2012) (dry cleaner), cert. denied, 569 U.S. 985 (2013);

United States v. Robinson, 119 F.3d 1205, 1212-1215 (5th Cir. 1997) (check-cashing stores), cert. denied, 522 U.S. 1139 (1998); United States v. Smith, 182 F.3d 452, 453-454, 456-457 (6th Cir. 1999) (grocery and party stores), cert. denied, 530 U.S. 1206 (2000); United States v. Wrobel, 841 F.3d 450, 455-456 (7th Cir. 2016) (diamond merchant); United States v. Dobbs, 449 F.3d 904, 911-912 (8th Cir. 2006) ("'mom and pop' convenience store"), cert. denied, 549 U.S. 1139, and 549 U.S. 1233 (2007); United States v. Nelson, 137 F.3d 1094, 1102 (9th Cir.) (jewelry store), cert. denied, 525 U.S. 901 (1998); United States v. Curtis, 344 F.3d 1057, 1070-1071 (10th Cir. 2003) (convenience stores and restaurants), cert. denied, 540 U.S. 1157 (2004); United States v. Guerra, 164 F.3d 1358, 1360-1361 (11th Cir. 1999) (gas station); United States v. Harrington, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (restaurant).

Petitioner nonetheless contends that the courts of appeals are in conflict regarding whether the Hobbs Act requires the government to show an "actual" effect on commerce. Pet. 4 (emphasis omitted); see Pet. 4-9. Petitioner acknowledges (Pet. 5) that the majority of courts of appeals have determined that the effect on commerce need only be "probable" or "potential," but he cites cases from the Eighth and Eleventh Circuits stating that the Hobbs Act requires an "actual" effect on interstate commerce. See United States v. Williams, 308 F.3d 833, 837-838 (8th Cir. 2002); United States v. Carcione, 272 F.3d 1297, 1300 n.5 (11th Cir.

2001). As an initial matter, the cases on which petitioner relies long predate this Court's recent decision in Taylor. The Eighth and Eleventh Circuits thus may well reformulate the statements in those cases in light of Taylor -- especially given Taylor's observation that "it makes no difference under [this Court's] cases that any actual or threatened effect on commerce in a particular case is minimal." 136 S. Ct. at 2081 (emphasis added).

In any event, this case does not implicate any conflict of the sort that petitioner asserts. The Eighth and Eleventh Circuits have both determined that the government satisfies the Hobbs Act's commerce element "so long as the commercial establishments [that have been robbed] deal in goods that move through interstate commerce." Dobbs, 449 F.3d at 912 (8th Cir.); see United States v. Ransfer, 749 F.3d 914, 936 (11th Cir.) ("[C]ommerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through [an offense], thereby curtailing the victim's potential as a purchaser of such goods.") (citation omitted; first set of brackets in original), cert. denied, 574 U.S. 947 (2014). As explained above, the facts of this case satisfy those requirements. Petitioner therefore would not have prevailed in the Eighth or Eleventh Circuits.

Petitioner also contends (Pet. 5) that, in United States v. DiCarlantonio, 870 F.2d 1058, cert. denied, 943 U.S. 933 (1989), the Sixth Circuit interpreted the Hobbs Act to require an actual

effect on commerce. Like the Eighth and Eleventh Circuit cases on which petitioner relies, however, DiCarlantonio long predates Taylor. In addition, as petitioner acknowledges (Pet. 5-6), the Sixth Circuit has subsequently held that the commerce element requires "only a realistic probability that [an offense] will have an effect on interstate commerce." United States v. Wang, 222 F.3d 234, 237 (6th Cir. 2000) (citation omitted; brackets in original). Any intracircuit disagreement in the Sixth Circuit would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). Regardless, the Sixth Circuit, like every other circuit, recognizes that the robbery of a business engaged in interstate commerce satisfies the Hobbs Act's commerce requirement. See United States v. Davis, 473 F.3d 680, 682-683 (2007). Petitioner thus would not have prevailed in the Sixth Circuit.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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