No. 19-7079

IN THE

SUPREME COURT OF THE UNITED STATES

BRYAN MARK JOHNSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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REPLY BRIEF IN RESPONSE TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The government's brief in opposition does not contest that this issue is one of critical importance that can lead to decades of unlawful incarceration for a single defendant, let alone the systemic impacts of the question presented given the frequency with which the issue arises. Instead, the government posits that further review is unnecessary because the circuits already have the issue well in hand.

In fact, the government's brief in opposition highlights the need for this Court's intervention by establishing that the circuits are entrenched in a position that creates internal inconsistencies between the definition of the "intimidation" element of federal bank robbery for conviction purposes, and the element's definition for purposes of applying the categorical approach. In the conviction context, courts give "intimidation" its broadest meaning, requiring neither a communicated threat of violence nor any culpable mens rea. In the context of the categorical approach, to apply drastic sentencing enhancements, the courts pivot to hold that "intimidation" is narrow enough to satisfy the crime of violence definition in 18 U.S.C. § 924(c)(3)(A). The result puts the government in an unfair "heads I win; tails you lose" position.

The government's brief underscores this inconsistency by supporting its position solely with cases decided in the vacuum of the categorical approach. But the circuits have deviated from this Court's clear instruction that the categorical approach requires courts to consider the outer contours of the

statute's reach based on judicial application of the statute as well. For decades, courts have applied § 2113(a) to convict and incarcerate defendants for conduct that does not involve either violent force or a knowing threat of violence. The government's reliance on categorical approach cases that ignore the statute's real-world application are unfaithful to this Court's controlling precedent.

This Court should grant certiorari to correct the course of the circuits. Exercising the Court's supervisory power to provide a clear and consistent definition of the intimidation element of federal bank robbery will aid the courts and the parties' to further the efficient administration of the law and avoid unlawful incarceration.

The present case is an excellent vehicle for the Court's review of this pure legal question. The issue is preserved and squarely presented and goes to the validity of Mr. Johnson's § 924(c) conviction.

I. The circuits' entrenched position that federal bank robbery is a "crime of violence" under § 924(c)(3)(A) is inconsistent with the expansive conduct punished as "intimidation" under 18 U.S.C. § 2113(a).

The government's brief in opposition to certiorari underscores the divide between precedent in the conviction context and precedent in the categorical approach context by citing only the latter in support of its position that bank robbery is a crime of violence. But this Court has clearly instructed that the categorical approach is concerned with the least culpable conduct criminalized,

which asks how courts have actually applied the law. Contrary to the government's position, as actually applied, the "intimidation" element of § 2113 encompasses a mere demand for money or nonviolent snatching. Likewise, as actually applied, defendants need not have any culpable mens rea as to the "intimidation" element of § 2113, because the courts have only required that conduct that is objectively fear-producing, regardless of the defendant's intent.

This Court's instructions for applying the categorical approach are clear and consistent on the two key points at issue here. First, courts applying the categorical approach must consider the outer contours of the statute and can find a categorical match only when the least culpable conduct punished satisfies the federal definition. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("[W]e must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." (internal quotation marks and alterations omitted)); *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (same).

Second, courts cannot look solely to the title or text of the statute, but must consider how it has actually been applied. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *see also Johnson v. United States*, 559 U.S. 133, 138 (2010) (holding that state court interpretations of a statute are controlling).

When there is "a realistic probability, not a theoretical possibility, that the [government] would apply [the] statute to conduct that falls outside the generic definition of a crime," then there can be no categorical match. *Duenas-Alvarez*, 549 U.S. at 193. A crime is not a categorical match when the defendant can "point to his own case or other cases in which the . . . courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*; *see also Stokeling v. United States*, 139 S. Ct. 544, 563 (2019) (Sotomayor, J., dissenting) (explaining that state robbery statutes with similar wording would not all qualify as violent felonies because "even similarly worded statutes may be construed differently by different States' courts[.]").

The government's argument that the "intimidation" element of armed bank robbery matches the crime of violence definition in § 924(c)(3)(A) ignores these two crucial points. The government, after securing convictions based on precedent applying § 2113(a) expansively to nonviolent conduct, now advocates that the law is more narrow. But the judicial application of § 2113(a) to nonviolent conduct controls.

II. The circuits have wrongly concluded that armed bank robbery by intimidation categorically requires proof a threat of violence

The government defends the view that armed bank robbery by intimidation is a crime of violence by arguing that it necessarily requires proof of the "threat of force" (BIO at 9). It does not. Instead, in sufficiency of the

evidence cases (*i.e.*, the cases that actually define the contours of a crime), the courts of appeal have held that a mere demand for money – uncoupled from any threat, use, or attempt of force – constitutes intimidation. *See, e.g.*, *United States v. Hopkins*, 703 F.2d 1102, 1103 (9th Cir. 1983); *see also United States v. Lucas*, 963 F.2d 243, 244 (9th Cir. 1992). The Eleventh Circuit holds that the mere act of laying across a bank counter and stealing from a till constitutes intimidation – even though no defendant said a word. *See United States v. Kelly*, 412 F.3d 1240, 1244-45 (11th Cir. 2005). In one case, a court of appeals has gone so far as to hold that playing on a teller's *sympathy* constitutes intimidation. *See United States v. Ketchum*, 550 F.3d 363, 365 (4th Cir. 2008) (sufficient evidence of bank robbery by intimidation where defendant gave teller a note that read "[t]hese people are making me do this" and that "[t]hey are forcing me and have a gun. Please don't call the cops. I must have at least $500."). The Tenth Circuit has reached similar results. *See United States v. Slater*, 692 F.2d 107, 107-08 (10th Cir. 1982) (saying "shut up" to teller in response to question while stealing from bank sufficient evidence of intimidation). These cases demonstrate that the least serious conduct encompassed by armed bank robbery by intimidation does not categorically require the use, attempt, or threat of force.

The government argues that these cases all involve "implicit . . . threats of force or violence" (BIO at 11). But the cases actually relieve the prosecutor

of any burden to prove a threat to use force by holding that any demand for money or interaction with a teller in the course of stealing always encompasses an implicit threat. *See United States v. Gilmore*, 282 F.3d 398, 402 (6th Cir.2002) (holding that "unequivocal written and verbal demands for money to bank employees are a sufficient basis for a finding of intimidation" under § 2113(a)). In *United States v. Armour*, for example, the Seventh Circuit held that federal bank robbery "inherently contains a threat of violent physical force" because "[a] bank employee can reasonably believe that a robber's demands for money to which he is not entitled will be met with violent force." 840 F.3d 904, 909 (7th Cir. 2016). When a fact is merely presumed, rather than proven beyond a reasonable doubt, it is not an element sufficient to satisfy the categorical approach. *See United States v. Mathis*, 136 S. Ct. 2243 (2016) (explaining reasons for limiting categorical approach to elements submitted to the jury and proven beyond a reasonable doubt).

While distancing itself from precedent actually applying § 2113(a) to nonviolent conduct, the government asserts that interpreting "intimidation" to require the threatened use of force "is consistent with the text and history of the bank-robbery statute." *Johnson*, Br. in Opp. at 9. That argument is misplaced in the categorical approach analysis. When courts apply the categorical approach, they must ask whether the elements of the underlying offense *as elaborated by case law* necessarily require the prosecutor to prove

the use, attempt, or threat of force. *Johnson*, 559 U.S. at 138. The question is whether there is a "realistic probability"—based on actual dispositions—that a crime encompasses nonviolent conduct. *Gonzalez*, 549 U.S. at 193. While some of the circuits have accepted the government's invitation to focus on the legislative history underlying the bank-robbery statute, *see, e.g.*, *United States v. Carr*, 946 F.3d 598, 602-604 (D.C. Cir. 2020), that is a misguided approach to categorical analysis.

Focusing on a Senate Judiciary Committee report concerning the 1984 amendment to § 924(c), the government next contends that Congress wanted bank robbery to fall within the definition of a crime of violence set forth in § 924(c) (BIO at 15 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983)). This contention again misses the mark. For one thing, the Senate Report is not the statutory text, and, when it wants to, Congress knows precisely how to create a sentencing enhancement for a specific crime. *See* 18 U.S.C. § 924(e)(2)(B)(ii) (listing "burglary, arson, or extortion" as violent felonies for purposes of the armed career criminal enhancement); *see also Stokeling*, 139 S. Ct. at 564 ("Congress could, at any time, []enumerate robbery . . . if it so chose."); *cf.* 18 U.S.C. § 3559(c)(2)(F)(i) (listing "robbery (as described in section 2111, 2113, or 2118) as serious violent felonies for purposes of the three-strikes statute).

More importantly, the Senate Report reflects Congress's recognition that bank robbery qualified as a crime of violence under § 924(c) *when the statute included the residual clause*. From the Senate Report's perspective, bank robbery was a crime of violence due to its "extremely dangerous" nature, not because one of its elements necessarily required the prosecutor to prove the use, attempt, or threat of force. S. Rep. No. 225, 98th Cong., 1st Sess. 312-313; *see also United States v. Stokeling*, 139 S. Ct. 544, 564 (2019) (Sotomayor, J., dissenting) (noting that potential disqualification of robbery offenses as violent felonies "would stem just as much (if not more) from the death of the residual clause as from" the Court's definition of physical force). The Senate Report does not support the conclusion that bank robbery satisfies the force clause.

Finally, the government contends that the "armed" element of armed bank robbery creates a crime of violence because "[t]he display of an inoperable gun during a bank robbery . . . involves at least a threat of physical force" (BIO at 13). But this is not categorically true. *See, e.g.*, *United States v. Martinez-Jimenez*, 864 F.2d 664, 665 (9th Cir. 1989) (defendant guilty of armed bank robbery where holding a toy gun with which he didn't intend to threaten anybody). Instead, courts' concern with toy guns flows *not* from the fact that they inherently constitute a threat of the use of force, but, instead, from their potential to "create an immediate danger that a *violent response* will ensue." *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986). The armed element of

armed bank robbery thus concerns itself with whether the presence of a firearm – operable or toy – means force might be deployed by *another*; it does not categorically require proof that the defendant used a firearm in such a way as to threaten, attempt, or perpetrate violent force.

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In *Stokeling v. United States*, four members of this Court warned against "nostalgia for the residual clause" leading to jurisprudential "confusion in the lower courts." 139 S. Ct. 544, 464 n.2 (2019) (Sotomayor, J., dissenting). The government's argument in this case sounds in precisely this nostalgia – and so do the circuit courts' decisions finding that armed bank robbery is a crime of violence. This Court should intervene to correct this nostalgia-based error, which creates the same vagueness the Court has repeatedly condemned. *See United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 135 S. Ct. 2551 (2015).

III. The circuits have wrongly concluded that armed bank robbery necessarily requires proof that the defendant engaged in knowing intimidation.

Armed bank robbery is also not a crime of violence because a defendant need not *knowingly* intimidate a teller during the course of a bank robbery. The government asks the Court to ignore these cases on the grounds that they "merely establish [that] Section 2113(a) does not require proof of a specific[ ]

inten[t] to intimidate" (BIO at 19). But the reasoning of the courts is that the objective reaction to the conduct itself satisfies the statute, without regard to the defendant's knowledge, the objective standard.

In *United States v. Foppe*, for example, the Ninth Circuit approved a jury instruction that attached no mens rea to the intimidation element. 993 F.2d 1244 (9th Cir. 1993). The court reasoned that the conduct itself satisfied the general intent standard:

> Unarmed bank robbery, as defined in section 2113(a), is a general intent crime, not a specific intent crime. The court should not instruct the jury on specific intent because *the jury can infer the requisite criminal intent from the fact that the defendant took the property of another by force and violence*, or intimidation. . . . "The determination of whether there has been an intimidation should be guided by an objective test focusing on the accused's actions."

993 F.2d at 1451 (emphasis added) (internal citations omitted).

United States v. Kelly is in accord. 412 F.3d 1240, 1244 (11th Cir. 2005). The Eleventh Circuit's rejection of specific intent in *Kelly* was grounded in the conclusion that intimidation is judged objectively: "Whether a particular act constitutes intimidation is viewed objectively, . . . and a defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating." *Id.*

In *United States v. Woodrup*, the Fourth Circuit similarly reasoned that specific intent is not required because intimidation is judged objectively:

> [N]othing in the statute even remotely suggests that the defendant must have intended to intimidate. . . . We therefore reaffirm that the intimidation element of § 2113(a) is satisfied if "an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts[.]"

86 F.3d 359, 364 (4th Cir. 1996).

Thus, although the holdings of *Foppe*, *Kelly*, and *Woodrup* rejected specific-intent claims, the courts interpreted the intimidation element to require no culpable mens rea beyond knowledge of the conduct itself, contrary to the government's position.

In any event, the Eighth Circuit's decision in *United States v. Yockel*, 320 F.3d 818, 823-24 (8th Cir. 2003), is explicit in its rejection of even a knowing mens rea. In that case, the defendant sought to introduce mental health evidence to rebut the government's proof that he knew his conduct was intimidating. The Eighth Circuit affirmed the district court's conclusion that the evidence was "not relevant to any issue in the case," saying that "the mens rea element of bank robbery [does] not apply to the element of intimidation[.]" *Id.*

Armed bank robbery is not a crime of violence because it does not categorically require proof of the intentional or even knowing use, attempt, or threat of force.

IV. It is exceptionally important that the Court take up the circuit courts' error.

The question presented in this case warrants review not only because of the critical inconsistency in the lower courts' treatment of the "intimidation" element of federal bank robbery, but also because of the frequency with which the issue arises and the severity of the consequences. The erroneous decisions below bind sentencing courts to impose mandatory consecutive terms on defendants charged with violating § 924(c) in connection with bank robbery and armed bank robbery. They do not just affect exercises of discretion—or even the calculation of a defendant's advisory range under the Sentencing Guidelines. Instead, they bind judge's hands.

Additionally, the circuit courts' error in this case strikes at the heart of this Court's categorical approach jurisprudence. Because of the grave consequences crime-of-violence determinations carry for human lives, this Court vigilantly guards against the risk that a sentencing enhancement – representing years off a defendant's liberty – might turn on vague language calling for courts to exercise their own subjective, unguided judgment. Indeed, in *Stokeling*, four members of this Court called for continued vigilance, warning against resurrecting the residual clause under force clause's guise.

That is exactly what has happened here. The government and the circuit courts believe that bank robbery and armed bank robbery by intimidation are

crimes of violence because they are "inherently" threatening. Importantly, those evaluations are rooted in neither the "statutory elements" or the "real-world facts" presented in bank-robbery-by-intimidation cases. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Instead, they flow from judicial imaginings about the "potential" for demanding money to, in and of itself, convey a threat. *Id.*

This is the exact mode of analysis that doomed the residual clause. There is no actual *finding* in the sufficiency-of-evidence cases that the bank robbers' conduct conveyed a threat nor do their real-world facts support this. To the contrary. The defendant in *Hopkins* was "nonchalant"; he "spoke calmly, made no threats, and was clearly unarmed." *Hopkins*, 703 F.3d at 1103. The defendant in *Lucas* likewise conveyed no threats. *Lukas*, 963 F.2d 243, 244 (9th Cir. 1992). And the defendant in *Ketchum* was *plaintive* in his request for cash; he, too, plainly made no threats. *Ketchum*, 550 F.3d at 365.

Granting certiorari will thus provide the Court with a critical opportunity to correct the circuits' misguided categorical approach analysis. The circuits have gone astray from the core principles articulated in *Moncrieffe v. Holder*, *Gonzalez v. Duenas-Alvarez*, *Johnson (2010)*, and *Mathis*. The circuits' analysis has allowed a presumed fact to be treated as the equivalent of an element proven beyond a reasonable doubt. The circuits' have ignored expansive judicial construction that permits convictions under § 2113(a) for

nonviolent conduct. And the circuits' have fostered an unfair dual construction of a single statute that differs depending on the context within which the statute is considered.

V. Mr. Johnson's case is an ideal vehicle.

Mr. Johnson's case is an ideal vehicle to resolve this question. The government's brief in opposition claims that Mr. Johnson waived his claim in his plea agreement (BIO at 25). But–on direct appeal–the government declined to assert this waiver. *See* Answering Brief, *Johnson v. United States*, No. 18-35672, Dkt. No. 17 (9th Cir.). The waiver is thus waived. *See United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995) ("This court will not address waiver if not raised by the opposing party."); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (holding government "waived [its] waiver" argument by failing to raise it); *see also United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992) ("[A]n argument not raised on appeal is deemed abandoned."). And, additionally, the court of appeals ruled squarely on the merits of whether armed bank robbery categorically requires proof of the use, attempt, or threat of force.

This case is therefore an ideal vehicle for presentation of the question whether armed bank robbery is a crime of violence. This issue was specifically pressed in the court of appeals. *See* Opening Brief of Appellant, *United States v. Johnson*, Case No. 18-35672, Dkt. No. 6 (9th Cir.). The Ninth Circuit rejected

this argument based on its precedential decision in *Watson*. *See Johnson v. United States*, 778 F. App'x 493 (9th Cir. 2019). And resolution of this issue will be outcome-determinative for Mr. Johnson, as the validity of his § 924(c) conviction depends upon his armed bank robbery conviction.

VI. Conclusion

For these reasons and those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted this 8th day of May, 2020.

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