No. 20-1000

IN THE

Supreme Court of the United States

MONICO DOMINGUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. The government acknowledges the clear circuit conflict on the question presented, and it "agrees" with petitioner that the question "is a recurring issue of substantial importance that warrants this Court's review." Opp. 6. These points suffice to justify granting the petition.

2. The government argues, however, that *United States* v. *Taylor*, No. 20-1459 (U.S.)—in which the government has sought certiorari on the same question—is a better vehicle "because petitioner did not raise his claim in the district court, and it is therefore subject to review only for plain error." Opp. 6-7. The government recognizes (Opp. 8-9) that the Ninth Circuit reviewed petitioner's claim de novo rather than for plain error, Pet. App. 8a. But the government contends (Opp. 9) that the court of appeals erred in doing so, and that this Court cannot decide the question presented without first resolving whether the Ninth Circuit erred in conducting de novo review. That is incorrect.

As this Court has explained, "[a]ny issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari[.]" *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (citation omitted). Here, the question presented was indisputably both pressed below, *see* C.A. Doc. 38, at 12-14 (Nov. 5, 2015) (petitioner's first supplemental brief); C.A. Doc. 107, at 6-10 (Aug. 16, 2019) (petitioner's second supplemental brief), *and* passed upon by the court of appeals, *see* Pet. App. 18a-20a.

Moreover, this Court can (and should) resolve the question presented without addressing whether the

plain-error standard applies. That is because "whether 'error' exists" is distinct from "whether the error was 'plain.'" *Henderson* v. *United States*, 568 U.S. 266, 275 (2013). And in terms of sequencing, whether there was "an error or defect" is the "[f]irst" question under plain-error review. *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (citing *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993)); *see also Jones* v. *United States*, 527 U.S. 373, 389 (1999) ("Under [plain-error] review, relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights."). In other words, de novo consideration of the question presented would also be the first step of plain-error review. *See Jones*, 527 U.S. at 389-390 (petitioner's claim "falls short of satisfying even the first requirement of the plain-error doctrine, for we cannot see that any error occurred"). Accordingly, the Court should resolve the question presented and then remand for the Ninth Circuit to decide in the first instance whether the plain-error standard applies at all and, if so, whether it is satisfied here. That is the proper course because the latter two questions are not "fairly included" in the question presented, and thus should not "be considered by the Court." S. Ct. R. 14.1(a).

3. It is in fact *Taylor* that is the inferior vehicle. The Fourth Circuit there reached the question presented here only because this Court, in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), invalidated the "residual clause" of 18 U.S.C. §924(c)(3)(B), which provided an adequate alternative basis to deem an offense a "crime of violence," *see United States* v. *Taylor*, 979 F.3d 203, 206-207 (4th Cir. 2020). But because *Taylor* involves a successive motion for collateral relief pursuant to 28 U.S.C. §2255, *see id.* at 205-206, *Davis*'s invalidation of the residual clause creates an occasion to decide the

question presented in *Taylor* (and here) only if this Court first holds that that *Davis* applies retroactively on collateral review. *See* 28 U.S.C. §2255(h)(2) (absent newly discovered evidence, successive §2255 motions are permitted only when there is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"). Whether *Davis* does apply retroactively, however, is a question this Court has not decided. *See, e.g.*, *Davis*, 139 S. Ct. at 2354 (Kavanaugh, J., dissenting). Consequently, if the Court granted review in *Taylor*, it would have to resolve the retroactivity question before addressing the question presented. And the retroactivity question was neither pressed nor passed upon by the lower courts in *Taylor*.

Additionally, this case better illustrates the error of deeming attempted Hobbs Act robbery to be a crime of violence in all circumstances. To fall outside the definition of a crime of violence under the categorical approach, there must be "a realistic probability, not a theoretical possibility," that an offense encompasses conduct not entailing the use, attempted use, or threatened use of force. *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). And this case shows that to be more than a realistic probability, because Mr. Dominguez's conviction did not rest on conduct involving the use, attempted use, or threatened use of force. Mr. Dominguez made no threat, drew no weapon, and fired no shot. All he did was "dr[i]ve toward [a] Garda warehouse." Pet. App. 4a-5a; *compare Taylor*, 979 F.3d at 205 (Taylor's co-conspirator fired the fatal gunshot).

4. In the alternative, if the Court decides to grant the petition in *Taylor*, it should adopt the government's suggestion (Opp. 9) to hold Mr. Dominguez's petition

pending the decision in *Taylor* and then dispose of it as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held pending disposition of *United States* v. *Taylor*, No. 20-1459.

Respectfully submitted,

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MAY 2021