No. 20-1459

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUSTIN EUGENE TAYLOR

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

REPLY BRIEF FOR THE PETITIONER

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As the petition for a writ of certiorari explains, the Fourth Circuit's decision in this case erroneously excised a common and violent federal crime—attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a)—from the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(A). In doing so, it rejected the common-sense reading of Section 924(c)(3)(A) that every other court of appeals to consider the issue has adopted and that has been the basis for hundreds of convictions in the nearly four decades since the statute was enacted. And the court thereby created an indisputable circuit conflict that has continued to expand even as the petition has been pending.

Respondent offers no sound reason for allowing that aberrant decision to go unreviewed. He asserts that this Court's intervention would be premature, but the Fourth Circuit refused to reconsider its decision en banc, and it is highly improbable that the five circuits

that have adopted the opposite rule will all reverse course. Respondent also contends that this case is a poor vehicle for further review because he could prevail on an alternate argument on remand, but his alternative argument lacks merit, and the erroneous precedential decision below would warrant correction irrespective of whether the Fourth Circuit could have found a different ground for granting respondent relief. This Court should reject respondent's call for delay, grant the petition, and reverse.

A. The Decision Below Is Incorrect

The Fourth Circuit misinterpreted the elements clause of Section 924(c)(3)(A) in concluding that attempted Hobbs Act robbery is not a "crime of violence." Every other court of appeals to consider the question has reached the opposite conclusion, which is consistent with the statute's plain text and history. For the reasons explained in the petition (Pet. 10-19), attempted Hobbs Act robbery "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. 924(c)(3)(A).

In contending otherwise, respondent largely rehashes the decision below, without any meaningful attempt to address the flaws that the petition identified. See Br. in Opp. 11-14. In particular, this Court's understanding of the word "threat" supports a broader reading of the "threatened use of physical force" referenced in Section 924(c)(3)(A) than respondent or the Fourth Circuit acknowledge. See Pet. 13-14 (brackets and citations omitted). Furthermore, as other circuits have recognized, "an element of attempted force operates the same as an element of completed force" for the purposes of identifying "crimes of violence." *Hill* v. *United States*, 877 F.3d 717, 719 (7th Cir. 2017), cert. denied, 139 S. Ct.

352 (2018); see Pet. 11-15. And like the Fourth Circuit, respondent disregards the Hobbs Act's requirement that a robbery involve taking or obtaining property "against [the victim's] will." 18 U.S.C. 1951(b)(1); see Pet. 18.

Respondent's hypothetical category of "attempted threat" cases in which the perpetrators would never have done anything forceful, even if the victim resisted, is nonexistent. Like the Fourth Circuit, respondent fails to support his assertion of overbreadth with a citation to even a single example of an attempted Hobbs Act robbery conviction premised on such conduct. To the contrary, respondent's one asserted example—*United States* v. *Wrobel*, 841 F.3d 450 (7th Cir. 2016)—plainly involved attempted violence. Had the attempted robbery of a diamond merchant in that case been carried out, it would have gone according to the following plan: "We drive up, the doors are open; we throw the Jew [*i.e.*, the diamond merchant] inside . . . we take the diamonds." *Id.* at 453 (brackets in original). The defendants were arrested en route, never getting a chance to "throw" the victim into the van that they had rented for that purpose. *Ibid.* But their offense plainly involved the "threatened" or "attempted" use of physical force within the meaning of Section 924(c)(3)(A), as would any conduct that suffices for conviction in light of the Hobbs Act's requirement to take property "against [the victim's] will," 18 U.S.C. 1951(b)(1).

Respondent adopts the Fourth Circuit's hypothetical of a would-be Hobbs Act robber who "case[s] the store that he intends to rob, discuss[es] plans with a coconspirator, and buy[s] weapons to complete the job." Pet. App. 10a; see Br. in Opp. 12. Like the Fourth Circuit, respondent simply asserts that such a defendant has not used, attempted to use, or threatened to use physical

force. Br. in Opp. 12-13. But in normal parlance and under this Court's precedents, such a defendant *has* "threatened" the use of force, 18 U.S.C. 924(c)(3)(A), as his conduct "conveys the notion of an intent to inflict harm" as it "would be understood by a reasonable person," either the victim or someone else who observed it. *Elonis* v. *United States*, 575 U.S. 723, 732, 737 (2015); see Pet. 13-14. And that is true regardless of any private hope to overcome his victim's will without having to physically injure her with his weapons. See *Elonis*, 575 U.S. at 732-733 (explaining that the characterization of a defendant's conduct as a "threat" does not turn on his mental state).

Respondent also posits an attempted Hobbs Act robbery in which the defendant drafts a note threatening force, places it in his pocket, but never "actually delivers that note to anyone," and privately "does not intend to follow through with physical harm." Br. in Opp. 14. To the extent that conduct could amount to an attempted Hobbs Act robbery—and no case showing that has been identified by respondent or the court of appeals—respondent provides no sound reason for excluding such an attempted robbery from Section 924(c)(3)(A)'s elements clause. See Pet. 14-15. Respondent does not identify any statutory language or case law requiring that a "threatened use of physical force," 18 U.S.C. 924(c)(3)(A), be communicated to a particular person. See Br. in Opp. 14 n.5 (acknowledging case law under which a threat need not reach the victim herself). And respondent does not explain why memorializing a threat to use physical force in writing fails to qualify as the "threatened use of physical force," even if the note does not make it all the way to the victim.

Finally, respondent criticizes (Br. in Opp. 15) the government for pointing out that excluding attempted Hobbs Act robbery from Section 924(c)(3)(A) would be inconsistent with statutory history. See Pet. 15-17. But he does not dispute that robbery—including robbery committed by threat of force—is the "quintessential" elements-clause crime. *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019). Nor does he dispute that the legislative record of Section 924(c)(3)(A)'s enactment explicitly shows that it was designed to cover attempt crimes —including attempts to commit crimes that can be committed through threats. See Pet. 17. Acknowledging that history does not atextually "expand the reach of a federal criminal statute," Br. in Opp. 15, but instead simply reinforces that the text does indeed cover attempted robbery, a common and violent federal crime. As the Third Circuit has recognized, the "elected lawmakers wanted to categorically include attempt crimes in the statutory definition, and they said so plainly." *United States* v. *Walker*, 990 F.3d 316, 330 (2021).

B. The Question Presented Warrants Review In This Case

Respondent acknowledges that the Fourth Circuit's decision in this case created a circuit conflict. He provides no sound reason for this Court to delay in resolving it.

1. Respondent does not meaningfully dispute that the courts of appeals are divided—now 5-1, with the decision below as the outlier—on the question presented. See Pet. 19-20; see also *ibid.* (observing that the Fourth Circuit's reasoning is additionally in tension with the logic of two other circuits). As respondent himself observes (*e.g.*, Br. in Opp. 18), the Second Circuit recently joined the Third, Seventh, Ninth, and Eleventh Circuits in recognizing that attempted Hobbs Act robbery is a

crime of violence under Section 924(c)(3)(A). *United States* v. *McCoy*, 995 F.3d 32, 55 (2d Cir. 2021); see Pet. 19. The Second Circuit noted the Fourth Circuit's "attempt-to-threaten theory," but rejected it as unsound. *McCoy*, 995 F.3d at 56-57.

Although the Second Circuit, like the Third and Seventh Circuits, addressed the question presented in a plain-error posture, it resolved the question purely as a matter of law without relying on the any of the specific limitations on plain-error relief for forfeited claims. See *McCoy*, 995 F.3d at 55; *Walker*, 990 F.3d at 321 n.5, 328; *United States* v. *Ingram*, 947 F.3d 1021, 1025-1026 (7th Cir.), cert. denied, 141 S. Ct. 323 (2020). Accordingly, the Second Circuit has since applied its holding in a case on de novo review. See *Hidalgo* v. *United States*, 847 Fed. Appx. 96 (2021). And the Seventh Circuit stated that it would have reached the same result "[r]egardless of the standard of review." *Ingram*, 947 F.3d at 1025. Respondent thus errs (Br. in Opp. 8) in attributing the circuit conflict in part to differences in the standard of review.

Respondent appears to acknowledge that this Court should review the question presented at some point, but asserts that review now would be "premature." Br. in Opp. 7. The circuit conflict, however, is ripe for—and warrants—resolution. The Fourth Circuit has denied en banc review of the decision below, and any speculation that all of the conflicting circuits will overrule their contrary precedents is implausible. Indeed, not only the Second Circuit, but also the Third Circuit, has expressly acknowledged the decision below and rejected its reasoning. See *Walker*, 990 F.3d at 328. And the Ninth Circuit denied a petition for rehearing en banc making the same argument. Appellant's Pet. at 20-22, *United States* v. *Dominguez* (No. 14-10268).

The conflict is thus both square and mature, and no "further percolation" (Br. in Opp. 1) is necessary for it to warrant this Court's intervention. Any "novel[ty]" (*ibid.*) that respondent perceives in the government's specific contentions here is a product only of the Fourth Circuit's outlier decision. Respondent advanced his attempted-threat theory for the first time in his reply brief in the court of appeals (Resp. C.A. Reply Br. 11-12), and the court adopted it. The government then responded in its petition for panel or en banc rehearing, see C.A. Pet. for Reh'g 5-9, which the court refused to grant, see Pet. App. 28a. Following that refusal, nothing but this Court's review will eliminate the conflict.

2. As the petition demonstrates (at 20-23), the question presented is exceptionally important. Although respondent asserts (Br. in Opp. 9) that the government has "overstate[d]" the question's significance, he does not actually dispute the government's estimate of the number of Section 924(c) convictions predicated on attempted robbery. Nor does he suggest a better way of quantifying the number of affected cases than the methodology outlined in the petition. And a legal question that could affect over 100 convictions obtained each year—including, potentially, convictions in otherwise-closed cases like this one—is undoubtedly important. See *id.* at 10.

As explained in the petition (at 21), the United States Attorney's Office in the Eastern District of Virginia has already identified at least 23 affected cases in that district alone. Respondent would subtract (Br. in Opp. 10) one of those cases on the ground that "the defendant has already been resentenced," but the defendant in the cited case was resentenced precisely because the decision below invalidated his Section 924(c) conviction. See *Kargbo* v. *United States*, No. 1:10-cr-177, D. Ct. Doc.

201 (Apr. 23, 2021). In the absence of review from this Court, the same will occur in this case and others involving violent firearm-related conduct. Four of the 23 defendants were involved in a murder during an attempted robbery, see *United States* v. *Murry*, No. 2:11-cr-73-1, D. Ct. Doc. 103 (Oct. 21, 2011), 160 (Jan. 20, 2012); *United States* v. *Stevens*, No. 2:11-cr-73-2, D. Ct. Doc. 276 (Oct. 11, 2012); *United States* v. *Holley*, No. 2:11-cr-73-3, D. Ct. Doc. 274 (Oct. 11, 2012); *United States* v. *Gober*, No. 2:11-cr-73-5, D. Ct. Doc. 157 (Jan. 18, 2012), 185 (Apr. 12, 2012); two were involved in an attempted murder during an attempted robbery, see *United States* v. *Brown*, No. 3:11-cr-63-1, D. Ct. Doc. 124 (Nov. 29, 2011); *United States* v. *Oliver*, No. 3:11-cr-63-2, D. Ct. Doc. 122 (Nov. 28, 2011); and one defendant was involved in three murders during attempted robberies, see *United States* v. *Cook*, No. 1:11-cr-188, D. Ct. Doc. 49 (Sept. 6, 2011), 50 (Nov. 10, 2011).

3. This case is an ideal vehicle for further review. Respondent does not dispute that the question is squarely presented, was thoroughly considered below, and provided the sole basis for the court of appeals' decision. He instead contends (Br. in Opp. 17) that even if attempted Hobbs Act robbery is a valid Section 924(c) predicate, his own Section 924(c) conviction would still be infirm because that conviction rested on two predicate offenses, the other of which is invalid. That is both incorrect and irrelevant.

As multiple circuits have recognized, a defendant's guilty plea to a Section 924(c) offense based on valid and invalid predicates may be upheld if the record establishes that the defendant used a firearm in connection with the valid predicate. See, *e.g.*, *In re: Navarro*, 931

F.3d 1298, 1302 (11th Cir. 2019); *United States* v. *Collazo*, No. 18-2557, 2021 WL 1997681, at *4 (3d Cir. May 19, 2021); *United States* v. *Figueroa*, 813 Fed. Appx. 716, 720 (2d Cir.), cert. denied, 141 S. Ct. 601 (2020). The Fourth Circuit would likely follow that same approach if this Court were to reverse the decision below and remand. The Fourth Circuit has applied harmless-error review in analogous circumstances where the conviction followed a trial, see *United States* v. *Ali*, 991 F.3d 561, 575 (2021); respondent's plea here involved an admission not just to the conspiracy, but to participating in the attempted armed Hobbs Act robbery in which the victim was shot to death, C.A. J.A. 50; and neither of the decisions cited in the petition would entitle respondent to relief, see *United States* v. *Chapman*, 666 F.3d 220, 228 (4th Cir. 2012) (focusing on specific theory of guilt for a defendant who "plead[ed] guilty to a formal charge in an indictment which alleges conjunctively the disjunctive components of a statute"); *United States* v. *Vann*, 660 F.3d 771, 774 (4th Cir. 2011) (en banc) (per curiam) (same).

In any event, even assuming that the Fourth Circuit could have premised relief on an alternative ground, it did not. It instead issued a published decision that relied solely on its erroneous resolution of the question presented, on which it then denied en banc review. It thereby created an entrenched circuit conflict on a highly significant issue. This Court should grant certiorari to review the Fourth Circuit's aberrant and unsound approach.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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