No. 20-1459

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUSTIN EUGENE TAYLOR

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 979 F.3d 203. The opinion of the district court (Pet. App. 13a-23a) is not published in the Federal Supplement but is available at 2019 WL 4018340.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2020. A petition for rehearing was denied on December 11, 2020 (Pet. App. 24a). The petition for a writ of certiorari was filed on April 14, 2021, and was granted on July 2, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 924 provides in pertinent part:

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(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.

18 U.S.C. 1951 provides in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, 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.

(b) As used in this section—

(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.

* * * * *

Other pertinent statutory provisions are reproduced in the appendix to the petition for a writ of certiorari. See Pet. App. 25a-26a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Virginia, respondent was convicted of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951, and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2000). C.A. App. 52. He was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. *Id.*

at 54-55. The court of appeals dismissed respondent's direct appeal, 09-4468 C.A. Doc. 55-1 (Jan. 7, 2011), and this Court denied certiorari, 564 U.S. 1029. The district court subsequently denied a motion by respondent for collateral relief under 28 U.S.C. 2255. 08-cr-326 D. Ct. Doc. 70 (July 7, 2015). The court of appeals later authorized respondent to file a second or successive Section 2255 motion. C.A. App. 59-60. The district court denied the second motion, but the court of appeals reversed and remanded with instructions to vacate respondent's Section 924(c) conviction and resentence him accordingly. Pet. App. 1a-12a.

1. In the early 2000s, respondent was a drug dealer in the Richmond, Virginia, area who sold wholesale quantities of marijuana to regular purchasers for redistribution. C.A. App. 48-49. He financed his drug-trafficking business in part by stealing money from other would-be marijuana buyers. *Id.* at 48; see also Presentence Investigation Report (PSR) ¶ 36.

In August 2003, respondent and an accomplice hatched a plan to steal marijuana-purchase money from would-be customer Martin Silvester. C.A. App. 49; cf. Pet. App. 15a-17a & n.2 (misspelling victim's name). Respondent arranged a meeting between the accomplice and Silvester for the ostensible purpose of completing a sale of marijuana, but respondent and his accomplice planned instead for the accomplice—armed with a nine-millimeter semiautomatic pistol—to take the purchase money by force and then flee with respondent in respondent's car. C.A. App. 49-50.

The accomplice and Silvester met at the appointed location while respondent waited nearby in his car. C.A. App. 50. As planned, the accomplice displayed the pistol

and demanded money from Silvester. *Ibid.* When Silvester resisted, the accomplice shot him. See *ibid.*; PSR ¶ 36. The accomplice then fled the scene with respondent, having failed to collect Silvester's cash. *Ibid.* Silvester died of the gunshot wound five hours later. PSR ¶ 36; see 979 F.3d at 205.

2. A grand jury returned a seven-count indictment charging respondent with conspiring to distribute and to possess with the intent to distribute marijuana, in violation of 21 U.S.C. 846; attempting to distribute marijuana, in violation of 21 U.S.C. 846; possessing a firearm in furtherance of a drug-trafficking crime (the drug conspiracy), in violation of 18 U.S.C. 924(c) (2000); using and carrying a firearm during and in relation to a drug trafficking crime (the attempted distribution), in violation of 18 U.S.C. 924(c) (2000); conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; attempting to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 2; and using and carrying a firearm during and in relation to a crime of violence (the conspiracy to commit Hobbs Act robbery and the attempted Hobbs Act robbery), in violation of 18 U.S.C. 924(c) (2000). C.A. App. 11-14.

Respondent pleaded guilty, pursuant to a plea agreement, to the Hobbs Act conspiracy and the final Section 924(c) offense. C.A. App. 32-33. As a condition of his plea agreement, respondent waived his right to challenge his convictions on appeal and additionally waived his right to challenge any sentence within the applicable statutory range. *Id.* at 35. The government, for its part, agreed both to dismiss the remaining counts of the indictment and to forgo additional related charges, including for the murder of Martin Silvester. *Id.* at 37-38;

PSR ¶ 29. The district court accepted the plea agreement and sentenced respondent to 240 months of imprisonment for the Hobbs Act conspiracy and a consecutive 120 months of imprisonment for the Section 924(c) offense, to be followed by three years of supervised release. C.A. App. 54-55.

Respondent appealed, contending that the district court had erred in calculating his Sentencing Guidelines range. 09-4468 C.A. Doc. 35, at 1 (Mar. 16, 2010). The court of appeals dismissed the appeal as barred by the appeal waiver in respondent's plea agreement. 09-4468 C.A. Doc. 54, at 1 (Jan. 7, 2011). This Court denied certiorari. 564 U.S. 1029.

3. Respondent later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court denied. 08-cr-326 D. Ct. Doc. 70. In 2016, respondent requested authorization from the court of appeals to file a second Section 2255 motion seeking vacatur of his Section 924(c) conviction, based on intervening case law interpreting a similar statute. See C.A. App. 59; see also 28 U.S.C. 2255(h) (requiring pre-filing certification from court of appeals that second or successive Section 2255 motion satisfies statutory criteria).

Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The term "crime of violence" is defined in 18 U.S.C. 924(c)(3). Section 924(c)(3)(A)—which courts often refer to as containing the "elements clause," see *United States* v. *Davis*, 139 S. Ct. 2319, 2324 (2019)—specifies that the term includes any federal "offense that is a felony" and that "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). Section 924(c)(3)(B)—which courts often refer to as containing the "residual clause," see *Davis*, 139 S. Ct. at 2324—specifies that the term also includes any federal "offense that is a felony and * * * 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," 18 U.S.C. 924(c)(3)(B).

Respondent sought in his second Section 2255 motion to raise a claim that the charged predicate offenses for his Section 924(c) conviction—conspiring to commit Hobbs Act robbery and attempting Hobbs Act robbery—did not qualify as "crime[s] of violence," 18 U.S.C. 924(c)(3), in light of *Johnson* v. *United States*, 576 U.S. 591 (2015), and that the conviction was therefore invalid. See 16-9177 C.A. Doc. 2-1 (June 13, 2016). In *Johnson*, this Court concluded that the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii)—which is worded similarly to the residual clause in Section 924(c)(3)(B)—is unconstitutionally vague. 576 U.S. at 606. The court of appeals authorized respondent to file the successive Section 2255 motion. C.A. App. 59-60.

While respondent's motion was pending in the district court, the Fourth Circuit relied on *Johnson* to hold that Section 924(c)(3)(B) is unconstitutionally vague, and further held that conspiracy to commit Hobbs Act robbery did not satisfy the alternative definition of "crime of violence" in Section 924(c)(3)(A). See *United States* v. *Simms*, 914 F.3d 229, 233-234, 236-237 (en banc), cert. denied, 140 S. Ct. 304 (2019). Shortly after

the Fourth Circuit's decision, this Court itself held in *United States* v. *Davis* that the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. 139 S. Ct. at 2324.

The district court subsequently determined that *Davis*'s holding did not invalidate respondent's Section 924(c) conviction, and it denied his successive Section 2255 motion. Pet. App. 13a-23a. The court acknowledged that conspiracy to commit Hobbs Act robbery no longer qualified as a "crime of violence" that might support the conviction, because its qualification depended solely on Section 924(c)(3)(B)'s residual clause. *Id.* at 21a (citing *Simms*, *supra*). The court explained, however, that attempted Hobbs Act robbery was and still is a "crime of violence" under the alternative definition in Section 924(c)(3)(A), because it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* at 20a (quoting 18 U.S.C. 924(c)(3)).

4. The court of appeals reversed, taking the view that the offense of attempted Hobbs Act robbery cannot qualify as a crime of violence under Section 924(c)(3)(A). Pet. App. 2a & n.1. The court recognized that completed Hobbs Act robbery "'categorically' qualifies as a 'crime of violence' under § 924(c)(3)(A)" because it "'involves,'" at the least, "'the threat to use [physical] force.'" Pet. App. 7a (quoting *United States* v. *Mathis*, 932 F.3d 242, 266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019)) (brackets in original). But the court posited that attempted Hobbs Act robbery might not require "the use, attempted use, or threatened use of physical force." 18 U.S.C. 924(c)(3)(A); see Pet. App. 8a.

The court of appeals identified the elements of attempted Hobbs Act robbery as "(1) the defendant had

the culpable intent to commit Hobbs Act robbery; and (2) the defendant took a substantial step toward the completion of Hobbs Act robbery that strongly corroborates the intent to commit the offense." Pet. App. 6a. The court viewed those elements as permitting conviction based solely on "a nonviolent substantial step toward threatening to use physical force," and it characterized such a crime as an "*attempt[] to threaten* to use physical force" that it deemed to be beyond the scope of Section 924(c)(3)(A). *Id.* at 8a.

The court of appeals accordingly vacated respondent's Section 924(c) conviction and remanded his case for resentencing. Pet. App. 12a. The court acknowledged, however, that its decision conflicted with the decisions of every other court of appeals that had considered whether attempted Hobbs Act robbery is a crime of violence under Section 924(c)(3)(A). *Id.* at 8a-9a (citing *United States* v. *Dominguez*, 954 F.3d 1251, 1255 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021), *United States* v. *Ingram*, 947 F.3d 1021, 1026 (7th Cir.), cert. denied, 141 S. Ct. 323 (2020), and *United States* v. *St. Hubert*, 909 F.3d 335, 351-353 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019), and 140 S. Ct. 1727 (2020)). The court subsequently denied a petition for rehearing en banc. See *id.* at 24a.

SUMMARY OF ARGUMENT

The court of appeals' decision to excise attempted Hobbs Act robbery from the "crime of violence" definition in 18 U.S.C. 924(c)(3) is an unprecedented and unjustifiable carve-out. Section 924(c)(3) applies only to federal felonies, and the inclusive text of Section 924(c)(3)(A)'s elements clause does not exclude the main federal attempted robbery offense. To the contrary, the definition was designed, and has consistently

and correctly been understood, to include federal attempted robbery. The Fourth Circuit's contrary decision rests on a strained reading of the Hobbs Act and Section 924(c)(3)(A) that is both textually unsound and at odds with the statutory context, history, and this Court's precedents. This Court should reverse the decision below and reaffirm that attempted Hobbs Act robbery—a common and violent federal crime—is a "crime of violence."

A. Under the categorical approach, a federal offense is a "crime of violence" under Section 924(c)(3)(A) if the offense entails the "use, attempted use, or threatened use of physical force against the person or property of another." The courts of appeals have unanimously recognized, and respondent does not dispute, that completed Hobbs Act robbery satisfies that definition. All completed Hobbs Act robberies involve "actual * * * force" or "violence," or "threatened force * * * or fear of injury," 18 U.S.C. 1951(b)(1), sufficient to satisfy Section 924(c)(3)(A)'s elements clause. That remains true even if a Hobbs Act robber obtains his victim's property through a threat of force on which he never intends to act, because the existence of a "threat" does not turn on the threatener's willingness to actually cause physical harm. See, *e.g.*, *Elonis* v. *United States*, 575 U.S. 723, 731, 737 (2015). This Court's precedents accordingly make clear that crimes like Hobbs Act robbery are among the "quintessential" predicate crimes of violence covered by elements-clause language. *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019).

Attempted Hobbs Act robberies are likewise "crimes of violence" under Section 924(c)(3)(A). The three-part structure of Section 924(c)(3)(A)'s elements clause—which covers the use, attempted use, and

threatened use of force—makes clear that it reaches all crimes involving substantial efforts to instrumentalize force to obtain others' property, even if those efforts fail. It makes no difference whether the force is direct, indirect, or unconsummated, as the text makes clear that the "category of violent, active crimes" that Section 924(c)(3)(A) defines as "'crime[s] of violence,'" *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004), equally encompasses all such uses of force. As this Court has observed, the elements clause's explicit reference to "attempted use[s]" of force indicates the "express inclusion of attempt offenses." *James* v. *United States*, 550 U.S. 192, 198 (2007) (citation and emphasis omitted), overruled on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015). That common-sense reading of the statutory text is consistent with the plain meaning of words like "use" and "attempt," as well as with the specialized legal meaning of "attempt."

In addition, as a textual and practical matter, any plausible case of attempted Hobbs Act robbery entails at least "threatened use" of force. In order to be convicted of attempted Hobbs Act robbery, a defendant must specifically intend to take the property of another, against the victim's will, through actual or threatened violence, and then take action substantial enough that it strongly corroborates his specific intention to complete every element of that crime. See 18 U.S.C. 1951. Conduct substantial enough to satisfy those requirements at least "threaten[s]" the use of force, as it "conveys the notion of an intent to inflict harm" as it "would be understood by a reasonable person," *Elonis*, 575 U.S. at 731, 737 (citation omitted).

B. The inclusion of attempted Hobbs Act robbery within Section 924(c)(3)(A) reflects conscious congressional design. The record of Section 924(c)(3)(A)'s enactment shows that Congress crafted the elements clause to reach attempt offenses. That legislative design makes sense, as attempts to commit some felonies—including Hobbs Act robberies—are often *more* violent than the completed felonies, because a violent confrontation is what prevents the defendant from completing his crime.

Numerous real-world examples confirm Congress's common-sense judgment that attempted Hobbs Act robberies are "crimes of violence" under Section 924(c)(3)(A). Many defendants, like respondent and his accomplice, kill the targets of their would-be robberies without actually obtaining their property. In other cases, would-be robbers provoke resistance from victims and others, producing violent encounters that interfere with the robbery. Other attempted Hobbs Act robberies are stopped before anyone gets hurt, through the happenstance of a sensitive alarm, vigilant law-enforcement, a jammed weapon, or an absent victim. All of those cases reinforce that conduct substantial enough to cause a defendant to be apprehended and convicted of attempted Hobbs Act robbery entails at least attempted or threatened use of force.

C. The Fourth Circuit's contrary reasoning reflects a flawed understanding of Hobbs Act robbery, attempt liability, and the analysis required by the categorical approach. The court appeared to overlook the Hobbs Act's definition of robbery as taking or obtaining property "against [the victim's] will," 18 U.S.C. 1951(b)(1), instead stating that Hobbs Act robbery "contains no similar requirement" to the common-law requirement

that a robber "'overcome the victim's resistance.'" Pet. App. 11a n.3 (citation omitted). The Fourth Circuit then hypothesized a category of pure "attempted threat" (*id.* at 9a-10a) cases in which a defendant could be convicted of attempted Hobbs Act robbery without using, threatening, or attempting to use force. But given the actual requirements of Hobbs Act robbery and attempt liability, such a case is implausible at best. As this Court has explained, the categorical approach "is not an invitation to apply 'legal imagination,'" *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (citation omitted). The importance of that directive is particularly obvious here, where the Fourth Circuit's mental exercise has yielded the perverse across-the-board rule that the common and violent crime of attempted Hobbs Act robbery is not a "crime of violence."

That error is causing real-world harm, foreclosing prosecutions for violent gun crimes and vacating convictions for currently incarcerated violent offenders. By any count, the number of cases affected by the question presented here is substantial. The decision below misreads the statutory text, ignores statutory history, and defies logic. This Court should reject it.

ARGUMENT

ATTEMPTED HOBBS ACT ROBBERY IS A "CRIME OF VIOLENCE" UNDER 18 U.S.C. 924(c)(3)

For decades, federal courts have adhered to the common-sense understanding that attempted Hobbs Act robbery—a frequent and violent federal crime—fits squarely within the text of 18 U.S.C. 924(c)(3)'s definition of a "crime of violence." Every court of appeals, including the court below, recognizes that completed Hobbs Act robbery is a "crime of violence" under Sec-

tion 924(c)(3)(A), and the plain text of that provision expressly encompasses "attempted use" or "threatened use," as well as the actual use, of force. The statutory context and background underscore that Section 924(c)(3)(A)'s comprehensive definition covers frustrated robberies, which are often *more* violent than the ones that go smoothly. The Fourth Circuit's excision of such crimes from Section 924(c)(3) rests on a strained and unrealistic analysis that misapprehends the elements of attempted Hobbs Act robbery, the paradigmatic position of robbery offenses within the framework of the elements clause, and this Court's precedents. Its decision should be reversed.

A. Attempted Hobbs Act Robbery Is A Crime Of Violence Because It Entails The Use, Attempted Use, Or Threatened Use Of Physical Force

Section 924(c)(3)'s definition of "crime of violence" reflects the "ordinary meaning" of that term as including "a category of violent, active crimes." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004). Completed and attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), are not only two of the more violent felonies in the federal code, but are also "quintessential" robbery offenses of the sort that Section 924(c)(3)(A)'s language was specifically designed to cover. *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019).

1. This Court employs a "categorical approach" to determine whether an offense is a crime of violence under Section 924(c)(3)(A), asking whether the offense elements "entail," *Borden* v. *United States*, 141 S. Ct. 1817, 1822 (2021) (plurality opinion), 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). The courts of appeals have unanimously recognized—and

respondent has not disputed—that *completed* Hobbs Act robbery is covered under that approach. See Pet. App. 7a (reaffirming that completed Hobbs Act robbery "'categorically' qualifies as a 'crime of violence' under § 924(c)(3)(A)") (quoting *United States* v. *Mathis*, 932 F.3d 242, 266 (4th Cir.), cert. denied, 140 S. Ct. 639, and 140 S. Ct. 640 (2019)); see, *e.g.*, *United States* v. *Dominguez*, 954 F.3d 1251, 1260-1261 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021); *United States* v. *Richardson*, 948 F.3d 733, 742 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020); *Brown* v. *United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam); *United States* v. *García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018), cert. denied, 139 S. Ct. 1208 (2019); *United States* v. *Melgar-Cabrera*, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018); *United States* v. *Hill*, 890 F.3d 51, 56-60 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019); *United States* v. *Buck*, 847 F.3d 267, 274-275 (5th Cir.), cert. denied, 137 S. Ct. 2231, and 138 S. Ct. 149 (2017); *Diaz* v. *United States*, 863 F.3d 781, 783 (8th Cir. 2017); *United States* v. *Rivera*, 847 F.3d 847, 848-849 (7th Cir.), cert. denied, 137 S. Ct. 2228 (2017).

The Hobbs Act defines "robbery" as 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." 18 U.S.C. 1951(b)(1). The language of Section 924(c)(3)(A)'s elements clause—which expressly covers crimes involving "the use, attempted use, or threatened use" of force

against persons or property—plainly encompasses that offense. See, *e.g.*, *Hill*, 890 F.3d at 57 (observing that the elements of Hobbs Act robbery "would appear, self-evidently, to satisfy" the definition of a "crime of violence" in Section 924(c)(3)(A)).

As the text of the Hobbs Act makes clear, all completed Hobbs Act robberies involve "the use" of force, "threatened use" of force, or both. Those in which the robber employs "actual * * * force" or "violence," 18 U.S.C. 1951(b)(1), plainly involve "the use" of force. See *Stokeling*, 139 S. Ct. at 550 (noting that "force" and "violence" are equivalent common-law terms) (citation omitted). And those in which the robber employs "threatened force * * * or fear of injury," 18 U.S.C. 1951(b)(1), involve at least "threatened use" of force. A threat (*e.g.*, "Your money or your life") is still a threat regardless of whether the threatener intends to carry it out. See, *e.g.*, *Virginia* v. *Black*, 538 U.S. 343, 360 (2003) (recognizing that a "speaker need not actually intend to carry out [a] threat"). A robber's actions or words constitute a "threat" so long as they objectively "convey[] the notion of an intent to inflict harm" as it "would be understood by a reasonable person." *Elonis* v. *United States*, 575 U.S. 723, 731, 737 (2015) (citation omitted); see *id.* at 732 (surveying dictionary definitions of "threat" and "threaten"); *Black's Law Dictionary* 1783 (11th ed. 2019) (a "threat" may be embodied in "a declaration, express or implied, of an intent to inflict loss or pain on another" or instead take the form of "[a]n indication of an approaching menace").

This Court's precedent specifically recognizes that crimes like Hobbs Act robbery are at the very core of what elements-clause language covers. In general, "[r]obbery * * * has always been within the 'category

of violent, active crimes'" at which such language is directed. *Stokeling*, 139 S. Ct. at 553 (citation omitted). Accordingly, in defining "'physical force'" in the ACCA's elements clause, which is worded similarly to Section 924(c)(3)(A)'s, this Court has "itself relied on a definition * * * that specifically encompassed robbery: '[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim.'" *Ibid.* (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010)) (emphases omitted, brackets in original) (quoting *Black's Law Dictionary* 717 (9th ed. 2009)). And the Court has explained that the incorporation of an elements clause into the ACCA was an expansion on the ACCA's prior specification of "robbery or burglary" as the predicate offenses that could trigger an ACCA sentencing enhancement. See *Stokeling,* 139 S. Ct. at 551-552; see also 18 U.S.C. App. 1202(c)(8) (Supp. II 1984).

The language that Congress used to effectuate that expansion largely replicated the language in Section 924(c)(3)'s preexisting "crime of violence" definition. See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 456-457 (copying elements clause from 18 U.S.C. 16(a) into 18 U.S.C. 924(c)(3)(A)); Career Criminals Amendment Act of 1986, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39 to 3207-40 (later addition of elements clause to the ACCA). The main difference between Section 924(c)(3)(A)'s elements clause and the ACCA's is that the former is even broader, encompassing crimes that have "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) (emphasis added); see 18 U.S.C. 924(e)(2)(B)(i) (omitting reference to property). It is also exclusively focused on federal felonies, see 18 U.S.C. 924(c)(3), a context in

which the Hobbs Act is the principal statute that criminalizes business or commercial robberies. See generally *Taylor* v. *United States*, 136 S. Ct. 2074, 2077 (2016). Thus, Hobbs Act robbery ranks among the "quintessential" federal crimes of violence, *Stokeling*, 139 S. Ct. at 551, that is covered by Section 924(c)(3).

2. Attempted Hobbs Act robberies are likewise elements-clause crimes under Section 924(c)(3)(A). To be convicted of an attempt crime under federal law, a defendant must have (1) intended to commit each element of the completed crime, and (2) taken a "substantial step" toward the crime's completion. See *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-107 (2007) (citation omitted); *Braxton* v. *United States*, 500 U.S. 344, 349 (1991). As applied to Hobbs Act robbery, conduct satisfying those requirements—*e.g.,* where the victim turns out not to have the property, the police intervene to stop the crime, the victim runs away or resists, or the planned robbery fails in some other unanticipated way—would entail "the use, attempted use, or threatened use" of force, 18 U.S.C. 924(c)(3)(A). The Hobbs Act treats attempted robberies as equally culpable to completed ones, see 18 U.S.C. 1951(a), and so does Section 924(c)(3)(A)'s elements clause.

The tripartite structure of the elements clause makes clear that it covers the waterfront of substantial efforts to instrumentalize force to obtain others' property, irrespective of whether those substantial efforts succeed. The mutually supportive and overlapping terms of Section 924(c)(3)(A)—the "use," "attempted use," and "threatened use" of force—together emphasize the breadth of the statutory definition. See, *e.g.*, *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141 (2018) (recognizing that a list read as a whole "bespeaks

breadth"). Even if the initial reference to "the use" of force is limited to the actual, direct application of "force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140 (citation omitted), the references to "attempted use" and "threatened use" clearly are not. They establish, for example, that a "crime of violence" may involve swinging a baseball bat at someone and connecting, swinging and missing, or having a bat at the ready to do so. Indeed, much archetypical conduct in either completed or attempted robbery—*e.g.*, rushing into a convenience store armed to the teeth, or discharging a gun into the air—could easily be described as involving any or all of "the use," "attempted use," or "threatened use" of force. The text of Section 924(c)(3)(A) makes clear that it does not matter which way a crime is viewed—the "category of violent, active crimes" that Section 924(c)(3)(A) defines as "crime[s] of violence," *Leocal*, 543 U.S. at 11, equally encompasses all of them.

By including "attempted use" of force in particular, the elements clause sweeps in inchoate invocations of force in which the ultimate outcome of the attempted crime, had the activity not been interrupted, remains unknown. This Court has itself described the term "attempted use" in the ACCA's elements clause as indicating the "express inclusion of attempt offenses." *James* v. *United States*, 550 U.S. 192, 198 (2007), overruled on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015); see *ibid.* (noting that the elements clause "specif[ies] exactly what types of offenses—*including attempt offenses*—are covered by its language") (emphasis added). The elements clause makes clear Congress's determination that "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), and thereby reaches all attempts to commit crimes that involve physical force. See, *e.g.*, *United States* v. *Walker*, 990 F.3d 316, 329 (3d Cir. 2021) (explaining that "read[ing] the words 'attempted use' in the elements clause of § 924(c) to capture attempt offenses" is consistent with Congress's general practice of "interweav[ing] prohibitions on attempted crimes within the statutes defining the underlying substantive offenses"), petition for cert. pending, No. 21-102 (filed July 22, 2021); see also 18 U.S.C. 1951(a) (interweaving prohibition on attempted and completed robbery).

That is particularly so given that the phrase "use * * * of physical force against the person or property of another," even in isolation, could be understood to encompass inchoate or indirect uses, as well as direct applications, of physical force. 18 U.S.C. 924(c)(3)(A); see, *e.g.*, *Voisine* v. *United States*, 136 S. Ct. 2272, 2278 & n.3 (2016) (noting consistent dictionary and precedential definitions of "'use' to mean the 'act of employing' something") (citation omitted). A normal speaker of English could readily describe, for example, pointing a gun at someone and demanding money as the "use" of physical force against the person of another to obtain their property, in the same way that, say, a country might "use" its powerful military to secure diplomatic concessions from an adversary even if it does not actually go to war. Indeed, in interpreting the phrase "uses * * * a firearm" in the neighboring description of the Section 924(c) offense itself, this Court explained that a defendant "uses" a gun in furtherance of a crime if he

actively "makes the firearm an operative factor in relation to the predicate offense"—for example, by making "a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense." *Bailey* v. *United States*, 516 U.S. 137, 142-143, 148 (1995); see, *e.g.*, *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning.").

Thus, whether or not the trigger is pulled, conduct like demanding money at gunpoint can reasonably be understood to involve the "'volitional' or 'active' employment of force," *Borden*, 141 S. Ct. at 1825 (plurality opinion) (quoting *Voisine*, 136 S. Ct. at 2278-2280), even though the "force" involves no actual physical contact. As a result, the phrase "attempted use of physical force" is best understood as capturing substantial steps in a crime in which physical force will be "an operative factor," *Bailey*, 516 U.S. at 143, even if the interruption of the crime makes it impossible to know for certain whether it would have escalated into direct physical contact. It would be entirely natural, for example, to say that a gang of armed robbers arrested at the entrance to the store they were planning to rob had attempted to use force—and that would be equally true even if they had hoped only to brandish their guns, not to fire them. On that understanding, which is consistent with either a specialized legal or plain-English meaning of the phrase "attempted use," the term includes all attempts to commit crimes otherwise covered by the elements clause.

3. In any event, even if "attempted use" were construed more narrowly, any plausible case of attempted

Hobbs Act robbery would nevertheless involve at least "threatened use" of force. Attempted Hobbs Act robbery, like other attempt crimes, requires both "a specific intent to commit the unlawful act," *Braxton*, 500 U.S. at 351 n.*, and a "substantial step" that "strongly corroborat[es] * * * the actor's criminal purpose." Model Penal Code § 5.01(2) (1985). Thus, in order to be guilty of attempted Hobbs Act robbery, a defendant must specifically intend to take the property of another, against the victim's will, through actual or threatened violence, and then take a substantial step that strongly corroborates his specific intention to complete every element of that crime. See 18 U.S.C. 1951. A defendant's particular substantial step in furtherance of Hobbs Act robbery need not be violent in and of itself. But it must be significant enough that the jury—which stands in the shoes of a reasonable person, see *Hana Fin., Inc.* v. *Hana Bank*, 574 U.S. 418, 422-423 (2015)—finds that the step establishes a course of action that is, at least, objectively threatening. See *Resendiz-Ponce*, 549 U.S. at 107 (explaining that "[a]s was true at common law," the requisite intent must be "accompanied by significant conduct").

Specifically, conviction for attempted Hobbs Act robbery requires the jury to find that the defendant engaged in a course of action that was sufficiently certain, if unchecked, to culminate in taking property through physical harm or the threat of it. See, *e.g.*, *Swift & Co.* v. *United States*, 196 U.S. 375, 402 (1905) ("The distinction between mere preparation and attempt is well known in the criminal law."). Anyone observing a course of action that has progressed to such a point would naturally describe it as involving at least "threatened use" of force.

The objective manifestation of a defendant's determination to rob someone is itself a threat of force in the ordinary sense—*i.e.*, an action that "conveys the notion of an intent to inflict harm" as it "would be understood by a reasonable person." *Elonis*, 575 U.S. at 731, 737 (citation omitted). The substantial-step element exists precisely to ensure that the subjective-intent element is corroborated by conduct that strongly and objectively manifests to a reasonable observer the defendant's resolve to carry out the completed crime. See Model Penal Code § 5.01(2) (1985). A reasonable person would surely interpret the actions of would-be robbers who, say, acquire guns, ammunition, and zip ties and are arrested en route to their target, see *United States* v. *Washington*, 869 F.3d 193, 198-199 (3d Cir. 2017), cert. denied, 138 S. Ct. 713 (2018), as a threat to the physical well-being of innocent people.

That is true whether or not the robbers themselves specifically intend the substantial step alone to be perceived as a threat. The definition of a threat speaks to "what the statement conveys—not to the mental state of the author." *Elonis*, 575 U.S. at 733. Someone who reasonably interprets a defendant's statements or actions to convey a threatening message "has received a threat, even if the [defendant] believes (wrongly) that his message will be taken as a joke." *Ibid.* And because a "speaker need not actually intend to carry out [a] threat," *Black*, 538 U.S. at 360, an attempted robbery entails "threatened use" of physical force even if the ultimate plan is only to intimidate, rather than harm, the victims. Perhaps (although it is exceedingly unlikely, see pp. 35-37, *infra*) the would-be robbers, in their own minds, hoped to treat their loaded guns and zip ties as

mere props, planned to give up at the first sign of resistance, and disavowed even pushing someone out of the way in order to escape. See *United States* v. *Reid*, 517 F.2d 953, 965 (2d Cir. 1975) (Friendly, J.) ("The escape phase * * * is part of the robbery.") (citation omitted). But a reasonable observer, lacking any objective assurance of such pacifism, would nonetheless perceive their conduct as involving "threatened use" force.

Indeed, a defendant who attempts a Hobbs Act robbery in which the plan is to take property by threat of force *specifically designs* his conduct to be objectively perceived as threatening. As a result, any defendant who is far enough along in that conduct to have taken a substantial step toward its completion has engaged in at least "threatened use" of force. The elements clause, like other statutes addressing threats, does not require that a threat actually reach the intended victim. See, *e.g.*, *United States* v. *England*, 507 F.3d 581, 589 (7th Cir. 2007) (declining to "[a]dd[] a requirement that the would-be victim himself actually perceive the threat" to the statutory phrase "'use . . . the threat of physical force'") (brackets omitted); *United States* v. *Spring*, 305 F.3d 276, 280 (4th Cir. 2002) ("[A] statement may qualify as a threat even if it is never communicated to the victim."); *United States* v. *Martin*, 163 F.3d 1212, 1216 (10th Cir. 1998) ("This court has not required that true threats be made directly to the proposed victim."), cert. denied, 526 U.S. 1137 (1999); *United States* v. *Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (explaining that it is "not necessary that [the] President 'be harmed or made aware of [a] threat'" under 18 U.S.C. 871 (1988)) (citation omitted); *United States* v. *Smith*, 928 F.2d 407

(7th Cir.) (Tbl.) (explaining that targeted judge's awareness of a threat is not relevant under 18 U.S.C. 115(a)(1)(B)), cert. denied, 501 U.S. 1237 (1991).

It is instead sufficient that the jury in a criminal case, having examined the conduct, found it "substantial" enough to confirm an intent to carry out a Hobbs Act robbery. A defendant has engaged in "threatened use" of force even if the police arrest him before he enters the store that he intends to rob. Conduct does not cease to be objectively threatening simply because it was unsuccessful in persuading the victim to part with his property, or was interrupted before it could be fully effectuated.

B. Excision Of Attempted Hobbs Act Robbery From Section 924(c)(3)'s "Crime Of Violence" Definition Would Subvert Congress's Common-Sense Design

The elements clause's inclusion of attempted Hobbs Act robbery is not mere technical happenstance, but instead the product of deliberate congressional design. As previously noted, see pp. 17-18, *supra*, Congress has treated elements-clause language as precisely suited to covering robbery. See *Stokeling,* 139 S. Ct. at 551-552. And it naturally understood a clause that expressly sweeps in offenses involving "attempted use" or "threatened use" of force to encompass crimes like attempted robberies.

1. The record of Section 924(c)(3)(A)'s enactment shows that it was crafted in part to cover attempt crimes, such as "a threatened or attempted simple assault or battery on another person." S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (citing 18 U.S.C. 113(d) and (e) (1982) as examples, which criminalized "[a]ssault by striking, beating, or wounding" and "[s]imple assault") (footnotes omitted); see *Armed Career Criminal*

Legislation: Hearing on H.R. 4639 and H.R. 4678 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 46-47 (1986) (testimony of Sen. Specter) (same). Congress therefore understood the elements clause's language to encompass crimes like attempted assault even though assault—like robbery—can be carried out "by putting another in apprehension of harm," rather than actually inflicting it. *Ladner* v. *United States*, 358 U.S. 169, 177 (1958); see, *e.g.*, *United States* v. *Knife*, 592 F.2d 472, 482 n.12 (8th Cir. 1979) ("When he forced the officer into the patrol car at the point of a shotgun and waved the gun in the officer's face, Iyotte committed the offense of simple assault set forth in 18 U.S.C. § 113(e).").

Congress understood attempted assaults to entail "attempted use," or at least "threatened use," of force, because force, whether direct or indirect, is central to their commission. The same understanding applies to attempted Hobbs Act robbery. That common-sense understanding of the elements clause's terminology is also reflected in the Sentencing Commission's longstanding interpretation of the elements clause in the "crime of violence" definition in Section 4B1.2 of the federal Sentencing Guidelines. Sentencing Guidelines § 4B1.2 (1989). The Application Note to that provision has for decades expressly included "attempt[s]," *id.* § 4B1.2, comment. (n.1); the Commission has repeatedly published that Application Note for comment and submitted it to Congress for review; and Congress has consistently allowed the Note to remain in force even while disapproving other aspects of the Guidelines. See Gov't Br. in Opp. at 19-22, *Lovato* v. *United States*, No. 20-6436 (Feb. 26, 2021).

2. Congress thus did not leave a gaping hole in the definitions of a "crime of violence" or "violent felony" by excluding the commonplace violent offense of attempted Hobbs Act robbery. "Ultimately, context determines meaning," and the terminology here is "used in defining" a "category of violent, active crimes." See *Borden*, 141 S. Ct. at 1830 (plurality opinion) (citations omitted). As this Court has recognized, attempts to commit certain felonies are often *more* violent than the completed felonies, because "outside intervention"—such as a confrontation with a victim or the police—is what "prevents the attempt from ripening into completion." *James*, 550 U.S. at 204 (construing the ACCA's residual clause).

That is particularly true of attempts "where the offender has been apprehended, prosecuted, and convicted." *James*, 550 U.S. at 204. No would-be robber whose preparatory efforts are private, and discarded before anyone else learns of them, is apprehended and convicted of attempted robbery. And as a practical matter, the danger of violence is particularly acute in cases of attempted robbery that serve as the predicate "crime[s] of violence" for convictions under Section 924(c)(3)(A), since the defendant in such cases was, by necessity, carrying, brandishing, or discharging a gun—a weapon whose presence is itself powerful evidence of the defendant's intent to use force if necessary to overcome his victim's will.

Under the approach suggested by Justice Thomas in *Borden*, attempted Hobbs Act robbery would unquestionably be a "crime of violence" under a constitutionally valid application of Section 924(c)(3)(B)'s residual clause. See *Borden*, 141 S. Ct. at 1834-1837 (Thomas, J., concurring in the judgment). And as with the violent

offense of completed robbery, see *Stokeling*, 139 S. Ct. at 550-553, Congress designed the elements clause to likewise encompass attempted robberies as well—underscoring that respondent's crime is a "crime of violence," "as Congress defined the term." *Borden*, 141 S. Ct. at 1836.

Numerous real-world examples confirm Congress's common-sense judgment that attempted Hobbs Act robberies are "crime[s] of violence" that necessarily entail "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). Indeed, in line with this Court's own understanding of the association between attempts and violence, see *James*, 550 U.S. at 204, many attempted Hobbs Act robberies involve more *actual* force—let alone attempted or threatened force—than the completed crime.

When a defendant specifically intends to overcome his victim's will through force or the threat thereof, takes a substantial step toward doing so, and then encounters some obstacle—like a victim who resists the robbery—the likelihood of a violent physical confrontation increases. See, *e.g.*, Gov't C.A. Br. at 5-9, *United States* v. *Rose*, No. 08-4762 (4th Cir. Dec. 15, 2008) (defendant committed multiple completed Hobbs Act robberies by brandishing a shotgun and obtaining money from compliant store clerks, and one attempted Hobbs Act robbery in which the store's co-owner refused the defendant's demands and threw a jar of pickled pigs' feet at him, at which point the defendant shot the store owner in the abdomen and fled), conviction vacated, *United States* v. *Rose*, 832 Fed. Appx. 814, 815 (4th Cir. 2021) (per curiam) (applying decision below to vacate

the Section 924(c) conviction predicated on attempted Hobbs Act robbery).

Many defendants have, like respondent and his accomplice, killed their targets in the course of attempted Hobbs Act robberies. See, *e.g.*, *United States* v. *Sherrill*, 972 F.3d 752, 758-759 (6th Cir. 2020); *United States* v. *Reed*, 756 F.3d 184, 186 (2d Cir.), cert. denied, 574 U.S. 985 (2014); *United States* v. *Parkes*, 497 F.3d 220, 223-224 (2d Cir. 2007), cert. denied, 552 U.S. 1220 (2008); see also *United States* v. *Walker*, 657 F.3d 160, 166 (3d Cir. 2011) (co-conspirator died in shootout, but target survived). Even in cases where everyone survives the attempted robbery, any would-be Hobbs Act robber plans to confront a victim, and others nearby, who could respond in numerous and unpredictable ways that result in violence. See, *e.g.*, Gov't Br. in Opp. at 2, *Wheeler* v. *United States*, No. 17-5660 (Dec. 5, 2017) (defendant, startled by store owner emerging from storage room into the scene of an ongoing attempted Hobbs Act robbery, shot him in the chest and then fled).

Would-be robbers routinely provoke forceful resistance from other citizens, such as business owners, store clerks, and bystanders. The perpetrator then often responds in kind. See, *e.g.*, *United States* v. *Clancy*, 979 F.3d 1135, 1136-1137 (6th Cir. 2020) (armed defendants attempted to rob a cell phone store, at which point the manager and an employee drew their own weapons and a shootout ensued, leaving both an employee and a robber with gunshot wounds); *United States* v. *Maddox*, 803 F.3d 1215, 1217 (11th Cir. 2015) (defendant and an accomplice entered a drugstore, pulled a gun on the manager, ordered him to open the store's safe, and threatened to shoot the manager if he did not retrieve the money inside; when the manager pulled out a box-

cutter to defend himself, the accomplice pistol-whipped him in the head, and the would-be robbers then fled the store), cert. denied, 577 U.S. 1085 (2016); *United States* v. *Brown*, No. 3:11-cr-63-1, D. Ct. Doc. 124 ¶¶ 18-20 (E.D. Va. Nov. 29, 2011) (armed defendant threatened and shot at feet of truck-plaza cashiers while demanding money; customer approached from behind and hit defendant in the head with beer bottles, at which point defendant shot customer four times at close range and then fled), appeal pending, 19-4918, C.A. Doc. 38 (4th Cir. Apr. 28, 2021) (holding in abeyance defendant's challenge to his Section 924(c) conviction pending the outcome of this case).

Fortunately, many attempted Hobbs Act robberies are foiled before anyone gets hurt. But those cases are no less "crime[s] of violence," involving "attempted use" or "threatened use" of force, than their even more regrettable counterparts. In *United States* v. *Wrobel*, 841 F.3d 450 (7th Cir. 2016), for example—a case on which respondent himself relies, see Resp. Br. in Opp. 16—the defendants planned to rob a diamond merchant as follows: "We drive up, the doors are open; we throw the Jew [*i.e.*, the diamond merchant] inside . . . we take the diamonds." 841 F.3d 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 crime plainly involved "attempted use" or "threatened use" of force. See *Stokeling*, 139 S. Ct. at 553, 555 ("'physical force'" includes "the amount of force necessary to overcome a victim's resistance" to a robbery) (citation omitted). And the same is true of other violent robberies thwarted only by the vigilance of law enforcement. See, *e.g.*, *Washington*, 869 F.3d at 198-199 (defendants arrested

en route to target with guns, ammunition, and zip ties); *Dominguez*, 954 F.3d at 1254-1255, 1257 (defendants abandoned armored-car robbery due to law-enforcement presence, after dressing in body armor, packing weapons, driving toward target, and confirming hideout); *United States* v. *LiCausi*, 167 F.3d 36, 42-43, 47-48 (1st Cir.) (defendants, who prepared weapons and stole a car for robbery, abandoned plan after overhearing police transmission about stolen vehicle), cert. denied, 528 U.S. 827 (1999).

In other cases, the would-be robbers got even closer to using force directly against a victim, and were thwarted only by their own bad luck (or, put another way, the victim's good luck). For example, in *Beale* v. *United States*, No. 4:10-CR-49, 2013 WL 1209620 (E.D.N.C. Jan. 8, 2013)—in which a Section 924(c) conviction has now been vacated in light of the decision below, see *United States* v. *Beale*, 840 Fed. Appx. 747, 748 (4th Cir. 2021) (per curiam)—the robbers fired at, but missed, a pawn-shop owner, then fled when he returned fire and struck one of them. See also, *e.g.*, *United States* v. *Johnson*, 645 Fed. Appx. 954, 956-957 (11th Cir.) (per curiam) (defendants stole getaway cars, planned to rob an armored vehicle, donned disguises and bullet-proof vests, but target armored car did not show up), cert. denied, 137 S. Ct. 234 (2016); *United States* v. *Celaj*, 649 F.3d 162, 166 (2d Cir. 2011) (defendants, armed with guns and fake police shields, knocked on drug dealer's door and announced themselves as "police," but target was not home), cert. denied, 565 U.S. 1235 (2012); *United States* v. *Adams*, 214 F.3d 724, 726-727 (6th Cir. 2000) (defendants, armed with handguns, cut a hole in the roof of a grocery store, but alarm sounded); *LiCausi*, 167 F.3d at 42-43, 47-48 (defendants (1) cased

a store and acquired masks, gloves, pistols, a police scanner, and radios, but abandoned their attempt for fear that truck in front of the store contained police; (2) entered a store with a shotgun but left when the manager immediately picked up phone).

Nothing in the text, design, or history of the elements clause suggests that the classification of an offense as a "crime of violence" should turn on the random happenstances—often themselves quite violent—that prevent would-be robbers from actually obtaining their victims' property. As this Court has emphasized, the inclusion of elements-clause language in the ACCA's definition of "violent felony" serves to identify "'the kind of person who,' when armed, 'might deliberately point the gun and pull the trigger.'" *Borden*, 141 S. Ct. at 1822 (plurality opinion) (quoting *Begay* v. *United States*, 553 U.S. 137, 146 (2008)). A person who takes a substantial step toward robbing someone by actual force or the threat of it, and intends to complete the crime, fits that description regardless of whether his earnest efforts are frustrated by events beyond his control. "The elected lawmakers wanted to categorically include attempt crimes" like attempted Hobbs Act robbery "in the statutory definition, and they said so plainly." *Walker*, 990 F.3d at 330.

C. The Fourth Circuit's Reasoning Is Unsound

The Fourth Circuit provided no sound basis for vacating respondent's Section 924(c) conviction. Had Martin Silvester acquiesced to the demands of respondent's accomplice and handed over his cash peacefully, respondent would have been liable for completed Hobbs Act robbery, which even the Fourth Circuit recognized as a crime of violence under Section 924(c)(3)(A). See

Pet. App. 7a. The provision's coverage of "the use, attempted use, or threatened use of physical force against the person * * * of another" likewise encompasses respondent's attempted Hobbs Act robbery, in which Silvester resisted, was shot, and died. 18 U.S.C. 924(c)(3)(A). Contrary to the Fourth Circuit's conclusion, Congress did not fail in its efforts to craft language that would cover both scenarios. The Fourth Circuit's reasoning instead reflects a flawed understanding of Hobbs Act robbery, attempt liability, and the analysis required by the categorical approach.

1. The Fourth Circuit acknowledged that this Court's decision in *Stokeling* classified a common-law robbery offense as a violent felony under the ACCA's elements clause. Pet. App. 11a n.3; see 139 S. Ct. at 550-552. But the Fourth Circuit's attempts to minimize the relevance of that precedent reflect a misunderstanding of the Hobbs Act.

The Fourth Circuit did not directly dispute that the language of the ACCA's elements clause would be sufficient to cover attempted common-law robbery. Instead, it posited that Section 924(c)(3)(A)'s more capacious elements clause nevertheless fails to include attempted Hobbs Act robbery, on the theory that the Hobbs Act "contains no similar requirement" to the common-law requirement that a robber "overcome the victim's resistance." Pet. App. 11a n.3. But "Hobbs Act robbery is defined as common-law robbery that affects interstate commerce." *Melgar-Cabrera*, 892 F.3d at 1064. And the Hobbs Act specifically defines robbery as taking or obtaining property "against [the victim's] will." 18 U.S.C. 1951(b)(1).

As the Fourth Circuit implicitly recognized (Pet. App. 7a-8a), that requirement ensures that the force—

whether actual or threatened—involved in a *completed* Hobbs Act robbery is sufficient in degree to qualify as "physical force" for elements-clause purposes. See also *Stokeling*, 139 S. Ct. at 553 (distinguishing between the force required to effect a robbery against a victim's will, and the force required for a battery that "does not require resistance or even physical aversion on the part of the victim"). If a "threatening note to a store cashier," Pet. App. 10a, did not constitute "threatened use" of force, 18 U.S.C. 924(c)(3)(A), "capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140, then even a successful Hobbs Act robbery committed by means of such a note would not qualify as a crime of violence under Section 924(c)(3)(A).

The relevant statutory definitions in the Hobbs Act are precisely the same for attempted and completed robberies. See 18 U.S.C. 1951(a) and (b)(1). As a result, physical force in an *attempted* Hobbs Act robbery would itself necessarily be sufficient in degree to qualify as "physical force" under the elements clause. Attempted Hobbs Act robberies are not crimes in which a defendant plans to take property by "the merest touching," *Johnson*, 559 U.S. at 139, or the threat of it. They are instead crimes in which a defendant engages in conduct that includes "the use, attempted use, or threatened use," 18 U.S.C. 924(c)(3)(A), of force sufficient to overbear someone's will, see 18 U.S.C. 1951(b)(1)—and are thus crimes of violence under the elements clause.[*]

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[*] The Fourth Circuit's passing suggestion (Pet. App. 9a) that attempted bank robbery and attempted carjacking may not be "crimes of violence" likewise cannot be squared with an analysis of the relevant statutes. Federal carjacking, for example, requires

2. The Fourth Circuit's exclusion of attempted Hobbs Act robbery from Section 924(c)(3)(A)'s elements clause ultimately rests on the unsound premise that the Hobbs Act reaches a set of pure "attempted threat" cases that would not involve "the use, attempted use, or threatened use" of force. See Pet. App. 10a. But the court of appeals failed to identify any actual litigated case fitting that description. And given the requirements of Hobbs Act robbery and attempt liability, the pure "attempted threat" cases envisioned by the Fourth Circuit are implausible at best. As the Second Circuit recently observed, it is "difficult even to imagine a scenario in which a defendant could be engaged in conduct that would 'culminate' in a robbery and that would be 'strongly corroborative of' his intent to commit that robbery, but where it would also be clear that he only 'attempt[ed]' to 'threaten[],' and neither used nor even actually 'threatened' the use of force." *United States* v. *McCoy*, 995 F.3d 32, 57 (2021) (brackets in original).

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that the defendant possess "the intent to cause death or serious bodily harm." 18 U.S.C. 2119; see *Holloway* v. *United States*, 526 U.S. 1, 11 (1999). And the precise location of the word "attempt[]" in the federal bank robbery statute has sometimes been read to specifically require that attempts themselves be effected through the use or threat of force. See, *e.g.*, *United States* v. *Thornton*, 539 F.3d 741, 746-747 (7th Cir. 2008). Indeed, because those statutes are worded differently from the Hobbs Act and from each other, even if this Court were to affirm the decision below, it should make clear that the Fourth Circuit erred in automatically likening attempted Hobbs Act robbery to attempted carjacking and attempted bank robbery—an error that has already led to the erroneous vacatur of Section 924(c) convictions. See, *e.g.*, *Hines* v. *United States*, No. 16-1752, 2021 WL 2291804, at *1-*2 (D. Md. June 4, 2021), reconsideration denied, No. 16-1752, 2021 WL 2589807 (D. Md. June 23, 2021).

The hypotheticals proffered by the Fourth Circuit (Pet. App. 10a) do not show otherwise. For reasons explained above, see pp. 16-17, 23, *supra*, an "attempt to threaten to use force by, for example, attempting to use a threatening note, itself constitutes a 'threatened use of physical force'" that satisfies the elements clause. *United States* v. *Thrower*, 914 F.3d 770, 777 n.6 (2d Cir.) (per curiam), cert. denied, 140 S. Ct. 305 (2019). The ultimate lack of success in obtaining the property that the note demands—due, *e.g.*, to a mishap in its delivery, or a particularly resilient victim—does not nullify the note's own objective qualities as "threatened use of physical force."

Conduct such as a defendant's "cas[ing] the store that he intends to rob, discuss[ing] plans with a co-conspirator, and buy[ing] weapons to complete the job," Pet. App. 10a, likewise satisfies the elements clause. The court of appeals offered no explanation for why such steps—which, in order to sustain a conviction, must have "strongly corroborate[d]" the defendant's specific intent to overcome his victim's will, see *id.* at 6a—would not entail "attempted use" or "threatened use" of force. Particularly when taken in concert, they at least "convey[] the notion of an intent to inflict harm," *Elonis*, 575 U.S. at 732, and thus constitute a "threatened use of physical force," 18 U.S.C. 924(c)(3)(A), from the perspective of an ordinary observer.

Even if truly nonthreatening "attempted threat" cases could be imagined, this Court's precedents make clear that application of the categorical approach does not turn on unlikely hypotheticals. See, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The categorical approach's "focus on the minimum conduct criminalized by [a] statute is not an invitation to apply 'legal

imagination,'" but instead requires "'a realistic probability, not a theoretical possibility,'" that the statute "'would apply * * * to conduct that falls outside'" the relevant category of offenses. *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (citation omitted); see *Duenas-Alvarez*, 549 U.S. at 193. No such showing has been made here. The Fourth Circuit accordingly erred in positing a set of wholly nonthreatening attempted Hobbs Act robberies, committed by defendants who specifically intend to overcome their victims' will by threatening force but have quixotically sworn off any resort to actual force, and relying on that mental exercise to carve out a paradigmatically violent federal crime from the scope of Section 924(c)(3).

3. The real harms that the decision below is causing illustrate the importance of this Court's directive to ground application of the categorical approach in reality rather than legal imagination. In preferencing the latter, the Fourth Circuit has foreclosed Section 924(c)(3) prosecutions for real and violent criminal conduct. It is clear from the face of Section 924(c)(3)(A) that Congress intended the provision to apply to offenders who employ firearms in the course of committing violent crimes, including violent attempt crimes. But under the decision below, defendants—like respondent—who participate in attempted robberies that result in murder or other forms of violence are exempt from liability under Section 924(c), while their counterparts who complete robberies without anyone getting hurt continue to face charges for carrying, brandishing, or discharging a firearm while doing so.

The number of prosecutions and convictions affected by the Fourth Circuit's rule, if applied nationwide, would be substantial. As the petition for certiorari (at

20-21) explained, the government frequently prosecutes Section 924(c) offenses connected to attempted Hobbs Act robberies. Exact numbers of such prosecutions are difficult to find based on existing records, because defendants convicted of attempted robberies are convicted under the very same statutes and face the same penalties as defendants convicted of completed robberies. But for some perspective, data from the U.S. Sentencing Commission indicate that in Fiscal Year 2019 alone, 813 federal defendants were convicted under both Section 924(c) and a federal statute that criminalizes both completed and attempted robberies (18 U.S.C. 1951, 2111, 2113, 2118, or 2119). In a random sample of 100 of those cases, approximately 13% included a Section 924(c) conviction predicated on an attempted robbery.

That reflects just one year out of the nearly four decades of "crime of violence" prosecutions under Section 924(c). The number is likely underinclusive because—as this case demonstrates—a defendant may be convicted of a Section 924(c) charge based on a robbery or attempted robbery without also being separately convicted of the robbery or attempt itself. See *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); see, *e.g.*, *United States* v. *Hill*, 971 F.2d 1461, 1467 (10th Cir. 1992). Those numbers also do not include all of the ACCA defendants whose classification was based in part on an attempted common-law robbery offense, and who might seek a shorter sentence if the ACCA's elements clause were similarly construed not to cover such crimes. In general, robbery is a very common crime and ACCA predicate; the Bureau of Justice Statistics reports 613,840 robberies in the United States in 2017, and 573,100 in 2018. See Bureau of Justice Statistics,

U.S. Dep't of Justice, *Criminal Victimization, 2018*, at 4 (Sept. 2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf.

However one might slice the numbers, the excision of attempted Hobbs Act robbery from the "crime of violence" definition in Section 924(c)(3)(A), let alone the excision of attempted robberies from the ACCA's elements clause, would inevitably exclude many serious violent criminals. The decision below is thus not only contrary to a common-sense reading of the statutory text, but leads to results that no Congress would have intended. Although "applying the categorical approach" has been known to result in occasional case-specific "absurdity," *Quarles* v. *United States*, 139 S. Ct. 1872, 1880 (2019) (Thomas, J., concurring), the Fourth Circuit's decision yields the perverse across-the-board rule that the common and violent crime of federal attempted Hobbs Act robbery is not a "crime of violence." See *Walker*, 990 F.3d at 330 ("Even in the odd realm of the categorical approach, 'we shall not read into the statute a definition . . . so obviously ill suited to its purposes.'" (quoting *Taylor* v. *United States*, 495 U.S. 575, 594 (1990)). That rule has no sound basis in text, history, or logic. This Court should reject it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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