No. 20-1459

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

JUSTIN EUGENE TAYLOR,
Respondent.

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

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, nonprofit, volunteer organization made up of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A.[1] Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court, including thousands of individuals charged under the statute at issue here, 18 U.S.C. § 924(c).

The members of NAFD have particular expertise and interest in the subject matter of this litigation.

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[1] Pursuant to Rule 37.6, counsel for amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case concerns whether attempted Hobbs Act robbery is a "crime of violence" as that term is defined in 18 U.S.C. § 924(c)(3)(A): whether it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." In its brief, the government presents three discernible arguments for why attempted Hobbs Act robbery in which the defendant intends to threaten (not use) force could fit this definition. First, the government argues that to threaten force *is* to use force, such that an attempted threat *is* an attempted use of force. (U.S. Br. 19–21). Second, an attempt to threaten force is itself a threatened use of force (U.S. Br. 21–25). And third, there is no realistic probability that anyone would be prosecuted for what the government calls a "pure 'attempted threat.'" (U.S.Br. 35–37).

Respondent's brief addresses each of these arguments. This brief homes in on the realistic-probability issue.

It is not clear whether the government thinks that no prosecutor would actually charge an attempted threat under § 1951 (although they have the discretion to do so), or that no would-be robber

would actually intend to threaten but not use force.[2] Regardless, where a statute is overbroad on its face, it is not necessary to point to a specific prosecution to prove the statute could be applied as written. And even if this were necessary, the government *has* prosecuted "pure attempted threat" cases.

To be sure, we have identified only a small number of cases in which publicly available records indisputably show that the defendant did not intend to use force. But under the categorical approach, *every* case must be treated as if it were for the least serious conduct. And our collective experience reflects that "pure attempted threat" cases are not a figment of the legal imagination. Would-be robbers who intend to threaten (but not use) force are common, and this brief explains why evidence of this intent is unlikely to be memorialized in case records. Simply put, having the intent to threaten (but not use) force is not a defense but rather an admission to the crime of attempted robbery.

Finally, available data confirm that the picture the government attempts to paint of attempted robbery—even attempted armed robbery—as an invariably violent offense is not accurate.

This Court should affirm.

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[2] We do not understand the government to be arguing that this Court should interpret 18 U.S.C. § 1951 to require the government to prove a would-be robber intended actually to use (and not merely threaten) force. Our membership would presumably welcome such an interpretation.

ARGUMENT

I. Attempted Hobbs Act robbery can be committed without the use, attempted use, or threatened use of physical force.

A conviction for possessing or using a firearm in relation to a crime of violence, 18 U.S.C. § 924(c), depends upon a finding that the underlying crime is, as a matter of law, a "crime of violence." This finding relies on the categorical analysis—on an assessment of the elements of the statutory offense, not the facts of the defendant's commission of that offense. *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2327–36 (2019). The question is whether the offense "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). That is, whether it "necessarily involves" the use, attempted use, or threatened use of physical force against the person or property of another. *Borden v. United States*, __ U.S. __, 141 S. Ct. 1817, 1822 (2021) (discussing the analysis as applied to the Armed Career Criminal Act).

This analysis does not depend on—in fact it precludes—an assessment of some sort of "idealized 'ordinary case'" to understand the nature of the statutory offense. *Davis*, 139 S. Ct. at 2326. That's the analysis that was required by the residual clause, and it factored into this Court's determination that the residual clause was void for vagueness. *Id.* at 2326–27, 2336; *see also Johnson v. United States*, 576 U.S. 591, 600–04 (2015) (ACCA's residual clause). Under the elements clause, rather than imagining typical violations of a criminal statute

(much less "archetypical" violations, U.S. Br. 19), the Court assesses the "least serious" violation of the statute. *Borden*, 141 S. Ct. at 1832. If "even the least culpable … of the acts criminalized" does not fit within the elements clause, the offense is not a § 924(c) predicate. *Id.* at 1822; *see also Moncrieffe v. Holder*, 569 U.S. 184, 190–191 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction rested upon nothing more than the least of the acts criminalized[.]").

This case is about attempted Hobbs Act robbery. The completed offense is an

> 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.

18 U.S.C. § 1951(b)(1). As between actual force, threatened force, violence, and fear of injury, the "least serious conduct" covered by § 1951 is threatened force/fear of injury.[3] Words or conduct can

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[3] This brief uses "attempted threats" as shorthand for conduct that might be described as an "attempted threat" or "attempted fear of injury."

amount to "threatened force" without any use, or intent to use, actual force; an "empty threat, or intimidating bluff" is sufficient. *Cf. Holloway v. United States*, 526 U.S. 1, 11 (1999) (discussing the "intimidation" element of 18 U.S.C. § 2119). *See also id.* at 11 n.13 ("courts have held that a threat to harm does not in itself constitute intent to harm or kill"); *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) ("The speaker need not actually intend to carry out the threat" for it to be a "true threat").

To be convicted of *attempted* Hobbs Act robbery, the defendant must have the intent to commit Hobbs Act robbery and also take a "substantial step" toward completing that offense. *See Braxton v. United States*, 500 U.S. 344, 349 (1991). A step is "substantial" if it shows the defendant would have carried out the crime if not interrupted. *United States v. Soto-Barraza*, 947 F.3d 1111, 1120–21 (9th Cir. 2020); *United States v. Del Carmen Ramirez*, 823 F.2d 1, 2 (1st Cir. 1987); *United States v. Gonzalez*, 441 F. App'x 31, 36 (2d Cir. 2011). But, as the government recognizes, the substantial step need not be violent or threatening in itself. (U.S. Br. 22); *see also Soto-Barraza*, 947 F.3d at 1121 (equipped selves with weapons and traveled to area where they expected to find intended victims); *Del Carmen Ramirez*, 823 F.2d at 2 (cased bank, stole car, arrived armed at bank shortly before truck was to arrive); *Gonzalez*, 441 F. App'x at 36 (expressed intent to rob store, possessed tools, went to the scene).

Putting this together, the "least serious conduct" covered by the elements of attempted Hobbs Act robbery is:

- taking a nonviolent substantial step
- with the intent to commit robbery (that meets the Hobbs Act's jurisdictional element) "by means of … threatened force" or "fear of injury," rather than by use of force or violence.

This *attempt to threaten force* does not fit within the text of § 924(c)'s elements clause. It is not the "use" of force. It is not a "threatened use" of force. And it is not an "attempted use" of force. In this "least serious" commission of attempted Hobbs Act robbery, the intent is to "threaten[] force"—not use force—in order to obtain property from a person, against his will. § 1951(b)(1).

II. The government's focus on typical robbery cases gets the analysis all wrong.

The government cites numerous attempted Hobbs Act robbery cases that involved violence in an effort to show that the offense is a quintessentially violent crime, but this gets the elements-clause analysis precisely backwards. It would have made for a reasonable residual-clause argument pre-*Johnson* and *Davis*. But with the elements clause, the Court looks not to a "typical" case of attempted Hobbs Act robbery but to the "least serious" violation of the Hobbs Act statute. *Borden*, 141 S. Ct. at 1832.

So the question is not whether the cases that the government has found on Westlaw "involve at least 'threatened use' of force." (U.S. Br. 22; *see also, e.g.*, *id.* at 30 (describing a particular attempted Hobbs Act robbery case that involved an intent to use actual force as "plainly involv[ing] 'attempted use' or

'threatened use' of force")). The question is whether the statutory offense "*necessarily* involves" the use, attempted use, or threatened use of force. *See Borden*, 141 S. Ct. at 1822 (emphasis added).

A. That many attempted Hobbs Act robberies involve force is irrelevant.

The government's claim that many—or even most—attempted Hobbs Act robbery cases involve the use, attempted use, or threatened use of physical force is irrelevant to the categorical approach. § 924(c)(3)(A). It may be that most Florida felony assaults involve violent force (rather than offensive touching). Nevertheless, the offense does not come within ACCA's elements clause. *Johnson v. United States*, 559 U.S. 133 (2010). Just the same, perhaps:

- most Tennessee aggravated assaults are committed intentionally, rather than recklessly, *but see Borden v. United States*, 141 S. Ct. 1817 (2021);
- most Iowa burglaries involve buildings, not boats, *but see Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243 (2016);
- most Georgia marijuana cases involve ordinary sales, rather than distribution of a small quantity without remuneration, *but see Moncrieffe v. Holder*, 569 U.S. 184 (2013).

This is all beside the point. Or no—it is *contrary to* the point, because a court must err on the side of exclusion by examining the "least serious" conduct covered by statutory elements.

B. The categorical approach does not require an "actual litigated case" to show that the Hobbs Act statute means what it says.

Perhaps recognizing that this is how the analysis works, the government suggests that an "attempted threat" Hobbs Act robbery is a unicorn—that it does not exist at all. Related to this, the government argues that the Fourth Circuit erred because it "failed to identify any actual litigated case" that the government thinks qualifies as a "pure 'attempted threat'" case. (U.S. Br. 13, 35). In fact, as discussed below, there are examples of such cases.

Even if we could find *no* cases, though, that would not mean that the government prevails. The elements clause is concerned with a legal question: whether a statutory offense "has as an element" the use, attempted use, or threatened use of force. Not only is the elements clause not concerned with the facts of the *defendant's* case; it also is not concerned with the facts of *other* cases.

And on the legal question presented here, the government nowhere claims that the "elements" of attempted Hobbs Act robbery do not encompass conduct that it calls a "pure attempted threat." Indeed, the government could ask this Court—in this case—to clarify that § 1951 does not cover such conduct, and save itself a lot of page-space. The government does not make this argument, though, and cannot, because the text of § 1951 plainly criminalizes attempted robbery by threatened force, even where the defendant does not intend to use force.

1. There is no need for "legal imagination" to understand that attempted Hobbs Act robbery encompasses attempted threats.

It is true, of course, that the categorical analysis "is not an invitation to apply 'legal imagination'" to a statutory offense. *Moncrieffe*, 569 U.S. at 191. This unobjectionable principle comes from *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 190–94 (2007). In *Duenas-Alvarez*, the petitioner argued that because California caselaw holds that an aider and abettor is criminally responsible not only for his intended crime but also any crime that "'naturally and probably' results from his intended crime," perhaps it could be interpreted so broadly that "an individual who wrongly bought liquor for an underage drinker" would be held responsible for that "young drinker's later (unforeseen) reckless driving." But California law did not actually support this interpretation. *Id.* at 191–93. And this Court explained that showing that a state statute is overbroad (for categorical-analysis purposes) "requires more than the application of legal imagination." It requires a "realistic probability, not a theoretical possibility," that the state would interpret the statute to reach conduct that falls outside the federal category, with reference to at least one case applying the statute in the overbroad way. *Id.* at 193.

Neither *Duenas-Alvarez* nor *Moncrieffe* suggests that where a statute is overbroad on its face, the defendant must scour legal databases for confirmation that the statute means what it says. As nearly every circuit court has held, where a statute is overbroad

on its face, citation to a factually overbroad application of that statute is unnecessary because "the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition." *Ramos v. U.S. Att. Gen.*, 709 F.3d 1066, 1071–72 (11th Cir. 2013).[4]

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[4] *See also, e.g.*, *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) ("Nothing in *Duenas–Alvarez* … indicates that this state law crime may be treated as if it is narrower than it plainly is."); *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) ("The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the corresponding federal offense."); *Cabeda v. Att'y Gen. of United States*, 971 F.3d 165, 176 (3d Cir. 2020) (where "the textual breadth of a statute is more expansive than the federal generic crime … a petitioner need not show that there is a realistic chance that the statute will actually be applied in an overly broad manner"); *United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) ("We do not need to hypothesize about whether there is a 'realistic probability' that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so."); *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018) (citing an unpublished opinion for the proposition that

Even in *Moncrieffe*, the Court did not investigate whether Georgia had ever actually prosecuted a marijuana-trafficking offense involving the distribution of a small amount of marijuana without remuneration. It merely assured itself that the statute would apply to that conduct, and thus was broader than the

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"where the meaning of the statute is 'plain,' the defendant need not provide a case to demonstrate a realistic probability that the statute is broader than the generic offense"); *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021) ("The government's interpretation invites us to conclude that 'realistic probability' means that petitioners must prove through specific convictions that unambiguous laws really mean what they say. Not only is this proposal contrary to our understanding of *Duenas-Alvarez* and *Moncrieffe*, but it is also at odds with the categorical approach itself, which asks us to focus on the language of the statutory offense, 'not the facts underlying the case.'"); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015) ("[W]hen a state statute's greater breadth is evident from its text, a petitioner need not point to an actual case applying the statute of conviction in a nongeneric manner.") (internal quotation marks and citation omitted); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017) ("This is not a case where we need to imagine hypothetical non-violent facts to take a statute outside the ACCA's ambit. ... The Government gives no persuasive reason why we should ignore [the statute's] plain language to pretend the statute is narrower than it is."). Only the Fifth Circuit has gone the other way. *United States v. Castillo-Rivera*, 853 F.3d 218, 222–24 (5th Cir. 2017) (en banc). And *Castillo-Rivera* remains controversial even in that circuit. *Alexis v. Barr*, 960 F.3d 722, 731–34 (5th Cir. 2020) (Graves, J., concurring); *id.* at 735–36 (Dennis, J., dissenting).

generic offense. *Moncrieffe*, 569 U.S. at 194 (describing state law with citation to *Taylor v. State*, 581 S.E.2d 386, 388 (Ga. Ct. App. 2003) (small quantity, but packaged for sale), and *Hadden v. State*, 353 S.E.2d 532, 533–34 (Ga. Ct. App. 1987) (no remuneration, but large quantity)).

What's more, *Duenas-Alverez*'s discussion of "probability" arose in the context of assessing a *state* offense, where in the absence of definitive state precedent, federal courts must attempt to discern how a state supreme court would answer a legal question if presented with it. *See Mathis v. United States*, 136 S. Ct. 2243, 2256–57 (2016) (describing places that federal courts might find evidence of how state courts would assess divisibility). This case, in contrast, involves *federal* law, and it is currently in the United States Supreme Court—the "final arbiter of federal law." *Danforth v. Minnesota*, 552 U.S. 264, 291–92 (2008) (Roberts, J., dissenting); *see also Marbury v. Madison,* 5 U.S. 137, 177 (1803). So there is no need to resort to probabilities: this Court can simply say what § 1951 does, or does not, encompass.

Again, the government refrains from arguing that attempted Hobbs Act robbery does not encompass attempted threats. Presumably, it would not wish to make this argument: winning that argument would make it harder for federal prosecutors to prove attempted Hobbs Act robbery, and invite attacks on attempted Hobbs Act robbery convictions—doubtless far more than the number of collateral attacks that a defense win in this case would engender. The National Association of Federal Defenders would likely support such an interpretation, but we

accept that it is not compatible with the plain language of § 1951. Under that statute, attempted Hobbs Act robbery can be committed by attempted threats—even "pure" attempted threats.

2. The government's idea that the categorical approach turns on prosecutorial choices is unworkable.

The government dismisses the disconnect between attempted threats and the text of § 924(c)'s elements clause based on the idea that it is "legal imagination" to think that federal prosecutors would actually charge "attempted threat" cases. The next section of this brief identifies such cases. But before getting to that, it must be said that the government's notion that an overbroad statute cannot be treated as overbroad unless a defendant identifies cases where prosecutors used the authority that the statute grants them is unworkable.

First, one can never say with confidence that a particular means of violating a criminal statute has *never* been prosecuted. The normal way of finding cases, through legal databases containing most (although not all) appellate opinions and a selection of district court opinions on disputed issues, cannot uncover the universe of criminal cases. During the 12-month period ending March 31, 2019 (a period not impacted by the pandemic), federal district courts

terminated the cases of 82,298 criminal defendants.[5] During that same period, appeals were commenced by just 9,697 criminal defendants—less than twelve percent.[6] And even within this small subset of criminal cases, one would not expect the parties or the court to highlight facts (or factual ambiguities or disputes) that lack any potential legal relevance. Indeed, the more obvious a legal proposition is (as here, where the plain language of the statute decides it), the less likely it is to get teased out at either the district or the appellate level.

Further, beyond the impossibility of knowing that there has never been a prosecution for conduct that comes within the terms of a statute, even if this were knowable, it could change tomorrow. The many thousands of Assistant United States Attorneys operating in this nation's 94 federal districts cannot be expected to refrain from prosecuting conduct under a statute authorizing such prosecution—forever. Indeed, federal prosecutors often test the limits of their

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[5] Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, U.S. District Courts—Criminal Federal Judicial Caseload Statistics (March 31, 2019) (Table D), *available at* https://www.uscourts.gov/statistics/table/d/federal-judicial-caseload-statistics/2019/03/31.

[6] Administrative Office of the United States Courts, Federal Judicial Caseload Statistics, U. S. Courts of Appeals—Cases Filed, Terminated, and Pending, by Nature of Proceeding (March 31, 2019) (Table B-1), *available at* https://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2019/03/31.

statutory authority—sometimes they even go too far. *See, e.g.*, *Van Buren v. United States*, __ U.S. __, 141 S. Ct. 1648 (2021) (reversing Computer Fraud and Abuse Act conviction based on misusing workplace computer); *Yates v. United States*, 574 U.S. 528 (2015) (reversing Sarbanes-Oxley conviction based on throwing fish overboard). So even if we could be certain that federal prosecutors had never even once charged a defendant with attempted Hobbs Act robbery where the defendant had intended only to threaten force and taken a substantial step that was itself nonviolent and nonthreatening, that would say nothing about what will get prosecuted in the future. The categorical analysis is complicated enough without having to revisit the same offenses year after year, to account for new data.

In sum, it is for good reason that circuit courts have held that *Duenas-Alvarez*'s realistic-probability test is not concerned with facts related to "'enforcement practices'" or with "how often prohibited conduct is prosecuted." *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021) (quoting *Swaby*, 847 F.3d at 66). This endeavor would be "at odds with the categorical approach itself, which asks us to focus on the language of the statutory offense, 'not the facts underlying the case.'" *Id.* at 661 (quoting *Moncrieffe*, 569 U.S. at 190).

III. Attempted Hobbs Act robbery is prosecuted in its least serious form: a nonviolent substantial step toward a threats-only robbery.

As it turns out, there are cases showing that § 1951 means what it says. Thus, if this Court engages in a search for attempted Hobbs Act robbery cases with facts that don't fit into the elements clause, it can find them.

The government chides the Fourth Circuit for inventing "unlikely hypotheticals" and conjuring up a set of "defendants who specifically intend to overcome their victims' will by threatening force but have quixotically sworn off any resort to actual force." (U.S. Br. 36, 37). But our collective experience and available data reflect that the intent to commit a robbery by threats, without resort to actual force, is neither unlikely nor quixotic.

A. The United States prosecutes threats-only attempted Hobbs Act robberies.

The government claims that it would be "implausible at best" for an individual to be prosecuted for attempted Hobbs Act robbery for a "pure 'attempted threat.'" (U.S. Br. 13, 35).

But MW was convicted at trial of just such a robbery, along with a related § 924(c) count, and lost a challenge to his attempted Hobbs Act robbery conviction. *United States v. Williams*, 531 F. App'x 270 (3d Cir. 2013). The facts underlying the attempted robbery, as described by the government, were as follows: MW, a Philadelphia police officer, had been performing fake arrests to steal drugs or money.

Brief for Appellee United States of America, *United States v. Williams*, No. 11-3263 (3d Cir), 2013 WL 1450946, at *9–12 (Mar. 29, 2013). To catch him, law enforcement set up a sting whereby an undercover posing as a Mafia member would be offered as a victim. The plan was for the undercover, traveling with one of MW's confederates, to be stopped by MW and others. MW would perform a fake arrest of his confederate and seize the Mafia proceeds the confederate would be carrying. *Id.* Twice, MW dressed in a police department uniform, carried a firearm (that's the basis of the § 924(c) count), and parked at the agreed-upon location to wait for the person transporting what he thought was Mafia money. *Id.* Twice, law enforcement called off the sting. *Id.*

On appeal, the government defended the attempted Hobbs Act robbery conviction against arguments that the substantial step was insufficient and that no force was contemplated. As to the force element, the government argued that "while the target of the sham arrest was [MW's confederate], the take down would be conducted in close proximity to the mobster, who would be powerless to interfere due to the police presence and the threat that the armed officers would use force if necessary to effectuate the arrest." *Id.* at *29. The Third Circuit accepted the government's contention that this planned threat to the Mafia member satisfied the requirements of attempted Hobbs Act robbery. *Williams,* 531 F. App'x at 272.

To be clear: the government argued that MW planned a robbery that contemplated obtaining the "Mafia" member's property against his will, through

implicit or explicit *threats*, and took a substantial step toward that end. Brief for Appellee, *supra*, at 28. There was no suggestion, much less evidence, that MW intended actually to use force or that he'd threatened anyone. But because he took a substantial but nonviolent step toward committing this robbery, his conduct was sufficient for attempted Hobbs Act robbery.[7]

MW's conviction is not *sui generis*. LS was also convicted of attempted Hobbs Act robbery without using, attempting to use, or threatening to use force. Plea Agreement, *United States v. LS*, No. 20-cr-80083, (S.D. Fl. Mar. 25, 2021), ECF No. 42. LS was indicted for a string of robberies and attempted robberies of gas stations, cell phone stores, and fast-food establishments. Indictment, No. 20-cr-80083 (S.D. Fl. Dec. 1, 2020), ECF No. 35. He pleaded guilty to two of these: a completed robbery of a BP gas station and an attempted robbery of a Boost Mobile store. Minute Entry, No. 20-cr-80083 (S.D. Fl. Mar. 25, 2021), ECF No. 41. The remaining counts were dismissed. Judgment, No. 20-cr-80083 (S.D. Fl. Jun. 3, 2021), ECF No. 52. The BP robbery was committed with a BB gun that resembled a lever-action rifle; LS demanded a shopping bag, placed $800 in currency from the register into the bag, then left. A few weeks later, under surveillance, LS got out of a car and

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[7] MW has filed a motion to vacate his § 924(c) conviction. Motion to Correct Sentence Under 28 U.S.C.§ 2255, *United States v. MW*, No. 10-cr-00427 (E.D. Penn. Nov. 30, 2016), ECF No. 406. That motion is stayed pending this Court's decision here.

walked around a Boost Mobile store. After the store closed, LS paused in front of the store holding what appeared to be a long gun. He then turned around, returned to the car, and left the area still under surveillance. After his arrest, officers found a pump-action BB gun and the manual to a lever-action BB gun rifle in the car. Plea Agreement, *supra,* at 6-9.

As in *Williams*, the evidence in LS's case was sufficient to prove attempted Hobbs Act robbery because he intended to obtain the property of the Boost Mobile store against an employee's will by causing him to fear injury (using the BB gun to scare the employee) and he took a nonviolent substantial step toward committing that robbery (walking around the store carrying the BB gun). But his conduct did not entail the use, attempted use, or threatened use of physical force against the person or property of another. It was a pure attempted threat.

MW's and LS's prosecutions confirm that § 1951 means what it says: people can be convicted of attempted Hobbs Act robbery when they intended only to threaten, rather than use, force—including where the substantial step was nonviolent and not threatening. In other words, the "pure attempted threat" case is not a mere "theoretical possibility."

B. It is common for would-be robbers to intend to threaten (but not use) force, although case records would not document this fact.

MW's and LS's cases are unusual because even the government's version of the facts contained affirmative evidence that the planned robberies were

intended to be threats-only robberies. In the overwhelming majority of attempted robberies interrupted at an early stage—beyond mere preparation but before force is used or threatened—case records would not reveal whether the defendant planned to threaten or use force. And thus they wouldn't reveal whether the case could be classified as an "attempted threat" case (rather than an "attempted force" case).

The government cannot dispute that a "defendant's particular substantial step in furtherance of Hobbs Act robbery need not be violent in and of itself." (U.S. Br. 22). And the government acknowledges that, in these cases "the ultimate outcome of the attempted crime, had the activity not been interrupted, remains unknown." (U.S. Br. 19; *see also id.* at 21 ("the interruption of the crime makes it impossible to know for certain whether it would have escalated into direct physical contact")). Yet the government resists what follows: the most that the government needs to prove for *every* attempted Hobbs Act robbery is that the defendant intended to obtain property against a person's will by means of threatened force, and he took a substantial step. So, under the categorical analysis, *every* attempted Hobbs Act robbery is in effect an attempted threat case.

Pushing against this idea, the government suggests that would-be robbers who do not intend to use force under any circumstance are so "exceedingly unlikely" that their existence can fairly be disregarded. (U.S. Br. 23, 35-37). This suggestion appears to be based on its belief that every would-be robber actually intends to use force and it is the "quixotic"

one who does not. Wherever this belief come from, federal defenders can assure the Court: it is wrong.

1. Case records would not reveal facts that are neither part of the government's accusation nor relevant to a defense.

Perhaps the government's belief that all robbers intend to use force comes from focusing on charging documents. No doubt most attempted Hobbs Act robbery indictments track the language of § 1951(b)(1), alleging that the defendant intends to obtain property "by means of actual or threatened force, or violence, or fear of injury."

But allegations are not proven facts—even when they result in convictions. Where an indictment lists multiple means of committing an offense, jury unanimity is not required as to any particular means. *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2257 (2016); *accord* Dept. of Justice, Criminal Resource Manual 227 (conjunctive and disjunctive elements) (updated January 22, 2020, archived), https://www.justice.gov/archives/jm/criminal-resource-manual-227-conjunctive-and-disjunctive-elements ("If the criminal statute provides that it can be violated in several ways then plead in the conjunctive, but instruct in the disjunctive").

And where the record contains an accusation as to non-elemental facts, "a defendant may have no incentive to contest what does not matter under the law." *Mathis*, 136 S. Ct. at 2253. "[T]o the contrary, he 'may have good reason not to'—or even be precluded from doing so by the court." *Id.* (quoting *Descamps v. United States*, 570 U.S. 254, 270

(2013)). In short, statements as to non-elemental facts are "prone to error precisely because their proof is unnecessary." *Mathis*, 136 S. Ct. at 2253.

2. The intent to threaten, but not use, force is not a defense.

As federal defenders, we are constitutionally obligated to consider facts well beyond the government's accusations, in order to test the veracity of those accusations and investigate potential defenses. But in counseling our clients about the risks and benefits of a trial, and preparing for trial, we must focus on the elements of the offense—not anyone's idea of what a typical commission of the offense looks like. *Cf. Lafler v. Cooper*, 566 U.S. 156, 174 (2012) (accepting parties' concession that it was deficient performance for attorney to advise his client that the facts would not, as a matter of law, support a conviction).

Thus, in an attempted Hobbs Act robbery case, if our client wants to go to trial to present evidence that he planned only to threaten force but would never have used it, we must advise him that such evidence would only prove the government's case—on a threat theory, rather than a force theory. At trial, the court would instruct the jurors that the intent to threaten force is sufficient to establish the element of "by means of actual or threatened force, or violence, or fear of injury." *See* 2A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions: Criminal § 53:05 (6th ed.) (defining Hobbs Act robbery). We would also advise this client

that going to trial without a legally cognizable defense could result in a higher sentence. U.S.S.G. §3E1.1 & comment. (n.2) (providing for a reduced sentence for "acceptance of responsibility," largely precluded after trial).

Likewise, for a client inclined to enter a guilty plea, we would not dissuade him based on a dispute over whether he intended to use or threaten force. *Descamps*, 570 U.S. at 271 (recognizing that defendants who plead guilty cannot have the elements of their offense rewritten). To the contrary, it is our job to know that these are not elements but merely different means of committing the offense. The real-world fact that our client would not, under any circumstance, have used force, is not a defense and would be no reason to reject an otherwise favorable disposition.

3. Not all would-be robbers harbor even a conditional intent to use force.

This is no mere theoretical exercise. It is a rare federal defender who has not had a client explain that the *reason* he chose to rob a supermarket or a bank is because these establishments train their employees to hand over money—not resist. That is, precisely what makes robbing these establishments a federal crime (their operation as established businesses engaged in interstate commerce) also makes them targets for threats-only robberies. But more to the point, our client's explanation that he intended to threaten, but not use, force would be a "slow plea," not a defense.

In our collective experience, would-be robbers who plan to threaten but not use force are plentiful. People plan to commit robbery to get money or property—not to hurt anyone. And, although the government intimates that it is fanciful to suggest that a robber would give up at the first sign of resistance, the fact is, many do. Indeed, the robbers who quickly give up can help the Court understand what many robbers intend—to get easy money via a threat—although their cases may not themselves be "pure attempted threat" cases (because the threats were made).

Consider, for example, SM. SM went into a check-cashing establishment, and walked toward the teller. Joint Statement of Offense in Support of Guilty Plea at 2, *United States v. SM*, No. 18-cr-229, (D.D.C. Nov. 29, 2018), ECF No. 21. He displayed a handwritten note to the teller that read, "I need 10's and 20's. I need money." The teller asked, "Do you need a money order or something?" and SM replied, "I need money; I'm broke; I need money now." Ultimately, the teller pushed the panic alarm to notify police and SM sat on a bench inside the establishment, waiting for the police to arrive. *Id.* at 2-3.

SM pleaded guilty to attempted Hobbs Act robbery. Minute Entry, No. 18-cr-229 (D.D.C. Nov. 29, 2018). Again, his may not have been an attempted threat case; SM conveyed his threat, such as it was. But what SM's case illustrates is that would-be robbers do not, categorically, harbor even the conditional intent to use physical force if they are unable to obtain property via threats. If SM had been arrested just before handing his note to the teller, it

would have been an attempt to threaten. Abandoning his plan, or being arrested, earlier would not have changed the nature of his intent

The case of the threats-only Hobbs Act robber is not "exceedingly unlikely." Indeed, the opposite is true, but this brief will provide only a few more examples:

- KZ, like SM, quickly abandoned his robbery attempt when a demand note did not pay off. *United States v. Zimmerman*, 949 F. Supp. 370, 371 (D.V.I. 1996). KZ handed a note to a bank teller informing her it was a robbery. When the teller drew attention to him, KZ simply left the bank without any money. *Id.* KZ pleaded guilty to attempted Hobbs Act robbery. Judgment, No. 96-cr-107 (D.V.I. Jan. 22, 1998), ECF No. 65.
- GR pleaded guilty to multiple Hobbs Act robberies of grocery stores. Plea Agreement, *United States v. GR*, No. 20-cr-00009 (D. Colo. Sep. 15, 2020), ECF No. 56. He held his hand in his pocket or a block wrapped in a bandana, but he never used force—not even when clerks told him they could not give him any money. *Id.*
- JS left the casino he was trying to rob when the cashier went to tell her supervisor that she was being robbed. *United States v. Smith*, 669 F. App'x 815 (8th Cir. 2016). JS placed on the counter a note that read: "I'm here to collect a debt. Do not make a scene. Empty your drawers. Large bills. Thank you." Brief for the

> United States, *United States v. Smith*, Nos. 15-2889 & 15-2951, 2016 WL 769803, at *8–9 (8th Cir. Feb. 25, 2016). JS told the cashier he had nitroglycerin and would blow up the casino. The cashier, frightened, left her window to tell a supervisor. At that point, JS collected the note and attempted to leave. *Id.* A casino security officer caught up with him in the parking lot. A search of JS revealed that he had no bomb. *Id.* at 10.[8]

We could go on: a great many robbers intend only to make a threat in an effort to get quick money. Likewise, among the robbers who are arrested before either making a threat or using force (where it is theoretically unknowable whether they would have used force), a great many intended only to make a threat.

4. The presence of a firearm is irrelevant.

The government is also wrong to suggest that the presence of a firearm in a § 924(c) prosecution is invariably "powerful evidence of the defendant's intent to use force if necessary to overcome his victim's will." (U.S. Br. 27). This Court has rejected the presence of a weapon (true in every § 924(c) offense) as relevant to whether a predicate offense is, categorically, a crime of violence. *Davis*, 139 S. Ct. at 2331–32. As the government acknowledges, the decision in

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[8] Nearly every robbery involving a bomb threat is a threat-only robbery, since there are few (if any) robbers who actually have a bomb. The same is true for robberies involving simulated or unloaded guns, discussed below.

this case will impact the construction of the ACCA, where defendants will not necessarily have carried, brandished, or discharged a firearm. The presence of a firearm cannot be bootstrapped onto the elements-clause analysis.

Moreover, carrying or even brandishing a firearm during a robbery does not necessarily entail an intent to use it if the carrying or brandishing is unsuccessful. Again, although affirmative proof of what a would-be robber who was interrupted intended to do is hard to find in case records, there are plenty of examples of armed robbers who do not use force even when their threats fail. And these cases prove the government's assumptions false.

Consider MC, who was convicted of attempting to rob a pharmacy and brandishing a firearm. *United States v. Chance*, 277 F. App'x 941, 943 (11th Cir. 2008). MC asked a clerk for cigarettes and then threatened the clerk with a gun and said the clerk had a few seconds to "give [him] the money." But when the clerk was unable to recall the code to open the register, MC just left. *Id.*

Again, the point is not that MC did not threaten force or cause fear: he did. The point is that not even every would-be robber who brandishes a firearm harbors a conditional intent to use that gun if threats do not succeed in obtaining property. Indeed, even unloaded and inoperable firearms meet the definition of "firearm," 18 U.S.C. § 921(a)(3), and it is well-established that these firearms will support a § 924(c) conviction. *See, e.g.*, *United States v. Grace*, 367 F.3d 29, 36 (1st Cir. 2004) (collecting cases).

Simply put, not only does the categorical approach require the Court to assess attempted Hobbs Act robbery based on the least serious conduct to which the statute applies—attempts to threaten; cases involving attempts to threaten are no mere "theoretical possibility."

C. Available data rebut the government's suggestion that attempted Hobbs Act robberies are necessarily violent.

The government paints a picture of attempted Hobbs Act robbery as an invariably (or at least overwhelmingly) violent offense, with citation to cases with violent facts, in an effort to persuade the Court that it is a "quintessential" crime of violence that Congress meant the elements clause to cover.[9] Indeed, the government posits that attempts may be more violent even than completed robbery, based on its assumption that all robbers intend to use force if faced with resistance.

The real response to the government's selective citations to violent cases is that they are irrelevant to the elements-clause analysis. But also, these cases are not representative of attempted Hobbs Act robbery prosecutions more generally.

To be sure, there are violent Hobbs Act robbery cases—completed and attempted. But the United States prosecutes a wide variety of conduct as Hobbs

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[9] The government does not explain why Congress would have wanted the offense to come within the elements clause, rather than the residual clause.

Act robbery. There are the cases discussed above: note and simulated-gun robberies, and attempt cases where defense attorneys have good reasons to believe our clients when they insist they never intended to use force. Then there are the unusual cases. There's *Williams*, with the fake Mafia heist. Recently, the government obtained a Hobbs Act robbery conviction for a woman who shoplifted from a Walgreens, while coughing audibly. Judgment, *United States v. CB*, No. 20-cr-00254 (N.D. Cal. Aug. 6, 2021), ECF No. 206. When the manager told her and her companion to leave, they told him, "We have COVID." Complaint at 3, *United States v. CB*, No. 20-cr-00254, (N.D. Cal. Apr. 21, 2020), ECF No. 1. In "fear[] for [their] personal safety," neither the manager nor the security guard went near them. *Id.* at 3, 4. Where the language of the statute reaches conduct, it is a safe bet that some prosecutor, somewhere, has prosecuted that conduct.

Available data reflect our experience and confirms that the cases the government elected to describe (U.S. Br. 28-32) are not representative of the entire category of Hobbs Act robberies or attempted Hobbs Act robberies.

As the government explains, exact numbers of attempted Hobbs Act robbery prosecutions are difficult to find because defendants convicted of attempted robberies are convicted under the same statute as those convicted of completed robberies. (U.S. Br. 38). But U.S. Sentencing Commission data for those convicted under § 1951 and sentenced under the guideline that applies to robberies reveal some patterns. For example, in 81.0% of the 9,448

such cases sentenced from Fiscal Year 2004 to 2020, the victim sustained no bodily injury.[10] Of cases involving firearms, the percentage remains essentially the same.[11]

While the Sentencing Commission does not distinguish between attempted and completed robberies, the Bureau of Justice Statistics does. According to BJS's most recent National Crime Victimization Survey, 71.8% of robberies resulted in no injury,

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[10] The data used for these analyses were extracted from the U.S. Sentencing Commission's Individual Offender Datafiles, available for download at https://www.ussc.gov/research/datafiles/commission-datafiles.

The analyses used Datafiles FY2004-2020, and filtering to Guideline amendment years 1991 and forward. A total of 9,448 of the defendants convicted of § 1951 were sentenced under the primary guideline of U.S.S.G. §2B3.1, the robbery guideline. This constitutes 72.6% of the defendants convicted of at least one § 1951 charge. The absence of bodily injury was indicated if the defendant received zero levels under the Specific Offense Characteristic (SOC) §2B3.1(b)(3).

[11] *Id.* Defendants were identified as having firearms if they were convicted of § 924(c); received an SOC for §2B3.1(b)(2)(A), (B), or (C); or both.

defined to include even scratches.[12] Although the government argues in its brief that attempts are often *more* violent than completed offenses, as would-be robbers "routinely" provoke forceful resistance (U.S. Br. 12, 14, 30), the survey reflects that 79.5% of attempted robberies resulted in no injury, compared to 67.6% of completed robberies.[13]

And, to put to rest the idea that robberies committed with firearms are categorically more violent, the survey reflects that the presence of a firearm corresponded with a *decreased* likelihood of injuries. Of completed robberies, 79.4% caused no injury when there was a firearm present, versus 42.3% when there was no firearm.[14] For attempted robberies,

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[12] Dept. of Justice, Bureau of Justice Statistics, National Crime Victimization Survey, 2019 Survey (covering crimes experienced from July 1, 2019 to November 30, 2019) (using statistical tables released with survey). The relevant codebook defines a minor injury to include "bruises, black eyes, cuts, scratches, swelling." Bureau of Justice Statistics, National Crime Victimization Survey, 2019: Codebook, at *637 (accompanying NCVS dataset housed with Inter-University Consortium for Political and Social Research, ICPSR 37645).

[13] *Id.*

[14] *Id.* (considering only those cases without missing data in the handgun query; there were no cases reporting a firearm that was not a handgun).

90.9% of those with a firearm resulted in no injury, compared to 70.0% of those without a firearm.[15]

In the end, though, even if the government were correct that the majority of attempted Hobbs Act robberies that the government elects to prosecute involve the use of force—a suggestion that does not align with our experience in defending these cases—the categorical approach does not turn on the facts of the majority of cases. It turns on the least serious conduct covered by the elements of the offense. The elements of attempted Hobbs Act robbery encompass attempted threats, which are not a mere figment of the "legal imagination." And attempted threats do not come within the elements clause at § 924(c)(3)(A).

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[15] *Id.* This correlation has remained consistent over time. *See* Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Robbery Victims, BJS Special Report, p. 1 (Apr. 1987), https://bjs.ojp.gov/content/pub/pdf/rv.pdf ("Offenders with weapons were more likely to threaten than attack their victims.").

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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