No. 20-294

IN THE
Supreme Court of the United States

LAMONT KORTEZ GAINES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the Fourth Circuit Court of Appeals

REPLY BRIEF FOR PETITIONER

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Both questions presented in this case warrant this Court's review.

First, contrary to the government's assertion, the circuits are demonstrably split over whether the equipoise rule is required by *Jackson v. Virginia*, 443 U.S. 307, 315–16 (1979). For example, the Fifth Circuit has rejected the equipoise rule, holding that it is "not helpful in applying" *Jackson*, *United States v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc), whereas the Tenth Circuit has held that when the evidence in a criminal case gives "equal or nearly equal" support to a theory of guilt and a theory of innocence, *Jackson requires* reversal of a defendant's conviction because "under these circumstances a reasonable jury *must necessarily entertain* a reasonable doubt," *United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009) (Gorsuch, J.) (citation omitted). The government characterizes this split as "illusory" (Opp. 9), but it is no such thing. The Third and Fifth Circuits have unequivocally rejected the equipoise rule, while the First, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have all held that *Jackson* requires it. The Court should grant the petition to resolve this circuit split.

Second, now that virtually every court of appeals has ruled, and ruled incorrectly, on whether Hobbs Act robbery is categorically a "crime of violence" under 18 U.S.C. § 924(c), the time is right for this Court to take up that question. The government dismisses petitioner's arguments by pointing out that the courts of appeals agree on the answer. *See* Opp. 16. But this Court has not shied away from reviewing important

questions on which the courts of appeals have reached the wrong conclusion. *See, e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191 (2019). Moreover, a district court in the Ninth Circuit, after fully considering the issue, recently held that Hobbs Act robbery is *not* a crime of violence. *United States v. Chea*, 2019 WL 5061085, at *1 (N.D. Cal. Oct. 2, 2019). This Court should grant the petition and take this opportunity to correct a misinterpretation of the relationship between the Hobbs Act and § 924(c) in the courts of appeals.

I. The Court Should Grant Certiorari to Resolve the Circuit Split Over the Equipoise Rule.

A. The Circuits Are Split Over Whether *Jackson v. Virginia* Requires the Equipoise Rule.

The government argues that the circuit split over the equipoise rule does not warrant the Court's review because the courts of appeals agree that the *Jackson* standard ultimately governs whether evidence was sufficient to sustain a criminal conviction. *See* Opp. 13. This argument misses the point. To be sure, *Jackson* provides the general, overarching standard to evaluate sufficiency of the evidence. But in applying this high-level standard, the circuits are split over whether the equipoise rule is required.

As the government recognizes (Opp. 12), the Fifth Circuit abandoned the equipoise rule, deeming the rule in "tension, in practical if not theoretical terms, with the *Jackson* standard." *Vargas-Ocampo*, 747 F.3d at 302. The Third Circuit similarly rejected the equipoise rule as "inconsistent with the proper inquiry

for review of sufficiency of the evidence challenges." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 432 (3d Cir. 2013) (en banc).

By contrast, in the majority of circuits, "equipoise is tantamount to reasonable doubt." *Linton v. Saba*, 812 F.3d 112, 123 (1st Cir. 2016). Indeed, at least seven circuits have held that the *Jackson* standard requires the equipoise rule. *See, e.g.*, *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010); *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982); *see also* Pet. 9. As the First Circuit explained, "The rationale for this rule is simple: A criminal trial ought not be an arbitrary exercise, and where" the evidence is in equipoise, "a reasonable jury must necessarily entertain a reasonable doubt." *Winfield v. O'Brien*, 775 F.3d 1, 8 (1st Cir. 2014) (cleaned up). Thus, even as *Jackson* also supplies the high-level standard for sufficiency of the evidence, this Court's review is needed to resolve the deep circuit split over whether *Jackson* necessarily demands application of the equipoise rule.[1]

While minimizing the circuit split, the government also relies on *Vargas-Ocampo* to challenge the wisdom of the equipoise rule, arguing that the rule is difficult to apply, usurps the jury's function, and undermines *Jackson*. *See* Opp. 12 (citing *Vargas-Ocampo*, 747 F.3d at 301). In doing so, the government ignores the

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[1] Citing a footnote in an unpublished, per curiam opinion, the government suggests that the Fourth Circuit implicitly favors the equipoise rule. *See* Opp. 12–13 (citing *United States v. Christian*, 452 F. App'x 283, 286 n.2 (4th Cir. 2011) (per curiam)). This is simply wrong. The Fourth Circuit has never adopted the equipoise rule and certainly did not do so in this footnote in its nonprecedential opinion in *Christian*.

clear majority of circuits, which disagree and rely on the rule because it is required under the *Jackson* standard. *See* Pet. 9. Moreover, federal district court judges who have presided over hundreds of criminal trials have noted that "[t]he equipoise rule has proved to be administrable, respects the constitutional role of the jury as ultimate factfinder, and enforces the constitutional underpinnings of our criminal justice system." Brief of Retired Federal Judges as *Amici Curiae* in Support of Petitioners at 12, *Hoffman v. United States*, No. 18-1049 (Mar. 13, 2019).

Rather than try to resolve this profound disagreement among the circuits here, this Court should grant the petition and consider the question on the merits.[2]

B. This Petition Presents a Good Vehicle for Review.

The government further contends that, even if the circuits are split, this case is an "unsuitable vehicle" (Opp. 10) for review because the courts below did not make a direct finding that the evidence of guilt and innocence was in equipoise. *See* Opp. 9, 13–15. The government is correct that neither the district court nor the court of appeals articulated the appropriate legal standard. The reason is clear: the Fourth Circuit has not adopted the equipoise rule. That is

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[2] Citing *Schaffer v. Weast*, 546 U.S. 49, 58 (2005), the government also asserts that "very few cases will be in evidentiary equipoise." Opp. 13. *Schaffer* involved hearings to resolve parental disagreement over individualized education programs for disabled children under the Individuals with Disabilities Education Act. *See* 546 U.S. at 51. It has no bearing on the prevalence of such situations in the criminal context.

precisely one of the reasons why this Court should grant the petition.

The absence of a finding of evidentiary equipoise with respect to the carjacking count in this case is irrelevant, given that the courts below did not apply the equipoise rule. Because the Fourth Circuit had not adopted the rule, the district court had no reason to make a finding of equipoise when ruling on petitioner's Rule 29 motion. For the same reason, the court of appeals did not consider the evidence in light of the equipoise rule, simply concluding that it was "more than adequate" to support petitioner's conviction. Pet. App. 9a. More is required under *Jackson*.

Moreover, even though there was no finding of evidentiary equipoise below, the district court specifically recognized the frailty of the evidence on the carjacking count, stating, "[i]f there is an unfavorable verdict on [the carjacking] . . . you should focus on that as to whether that's sufficient to warrant the guilty verdict. . . . But as I said, you got my attention on that." C.A. J.A. 1617–18. This was as close as the court could come to finding that the evidence was in equipoise without explicitly stating so.

In addition, even though the court of appeals concluded that the evidence was "more than adequate" to support a conviction, this conclusion, when reached through application of the wrong standard, does not preclude a finding of equipoise. By definition, any case implicating the equipoise rule will have evidence supporting a theory of guilt that offsets evidence supporting a theory of innocence. In such a scenario, without the benefit of the equipoise rule, a court could

easily find that the evidence was "adequate" to sustain a conviction even if the evidence was also in equipoise.

In this case, the evidence supporting a theory of guilt was thin, and would have supported a finding that it gave "equal or nearly equal" support to a theory of innocence: the victim's description of the perpetrator was wrong in several key respects; the FBI's cell site analysis placed petitioner's co-defendants at the scene, but *not* petitioner himself; and the text message petitioner sent one of his co-defendants that night—"I[']m hip"—was ambiguous at best. *See* Pet. App. 3a–6a; Reply Brief for Appellant at 2–6, *United States v. Gaines*, 815 F. App'x 709 (4th Cir. 2020) (No. 19-4782), Doc. 30. On remand and under the correct standard, the district court would be well-positioned to find that the evidence on the carjacking count was in equipoise.

II. Whether Hobbs Act Robbery Is a Crime of Violence Is an Important, Recurring Question That Warrants This Court's Review.

The government attempts to dismiss the importance of whether Hobbs Act robbery is a crime of violence by pointing to the decisions of the courts of appeals and this Court's denial of other petitions for certiorari. *See* Opp. 16. But this Court has never ruled on the question, and a federal district court in the Northern District of California recently held, after a thorough analysis, that Hobbs Act robbery is *not* a categorical crime of violence. *See Chea*, 2019 WL 5061085, at *1.

This Court has not hesitated to decide important questions even when there is no divergence among the

courts of appeals. To take a recent example, in *Rehaif v. United States*, the Court decided an important issue of criminal law despite the government's contention that "every court of appeals that has addressed the question over the past 30 years" had adopted the government's position. Brief for the United States in Opposition at 6, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (No. 17-9560) (opposing petition for writ of certiorari); *see also* 139 S. Ct. at 2200 (ultimately reversing the courts of appeals' consensus). Likewise, the Court answered the question presented in *Gundy v. United States* even though the courts of appeals had been unanimous. *See* 139 S. Ct. 2116, 2122–23 (2019).

In other words, in appropriate circumstances this Court has not hesitated to grant review even when there is general agreement among the courts of appeals. This case presents such a circumstance. The courts of appeals have coalesced around an erroneous interpretation of § 924(c) as applied to the Hobbs Act, and defendants will continue to have their arguments defeated under the controlling precedent of the circuit courts unless and until this Court acts.

The district court's decision in *Chea* correctly analyzed the question presented here. *See* Pet. 21–22. When evaluating a statute under the categorical approach, a court must analyze "nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by" the crime of violence definition. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (cleaned up). Because the plain language of the Hobbs Act would allow for a conviction even when the offender only causes someone to have "fear" of "future" injury to their "property," 18 U.S.C. § 1951(b)(1), Hobbs Act robbery cannot be considered

a categorical crime of violence. *See Chea*, 2019 WL 5061085, at *8–9; Pet. 14–20.

Contrary to the government's assertion (Opp. 17), *Chea* remains valid despite the Ninth Circuit's opinion in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020). In *Dominguez*, the court did not analyze the arguments raised in *Chea* in depth because the defendant-appellant there failed to point to realistic scenarios in which Hobbs Act robbery could be committed by fear of injury to property. *See id.* at 1260–61. Chea's appeal, however, is still pending before the Ninth Circuit. Therefore, the defendant in *Chea* still very much has the opportunity to distinguish *Dominguez* and present such realistic scenarios before the Ninth Circuit. Alternatively, Chea may be able to persuasively argue that the statutory text of Hobbs Act robbery is sufficiently clear to eliminate the need to show cases in which the statute was applied in the precise manner described. *Compare Dominguez*, 954 F.3d at 1260–61, *with Bourtzakis v. U.S. Att'y Gen.*, 940 F.3d 616, 620 (11th Cir. 2019) (describing a notable "exception to th[e] rule" that the defendant present other cases in which the statute has been applied in a particular manner "when the statutory language itself . . . creates the realistic probability" that the statute would apply to the proscribed conduct (cleaned up)). But even if Chea is unsuccessful, this Court could still take notice of the arguments made by the district court in *Chea* in deciding whether or not to grant review.[3]

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[3] The government appears to contend, by reference to an opposition it filed in another case, that *Stokeling v. United States*, 139

Now that the courts of appeals have spoken as they have, this is the right time and the right case for the Court to determine that Hobbs Act robbery is not a categorical "crime of violence."

CONCLUSION

For the foregoing reasons, and those stated in the petition, petitioner respectfully requests that the Court grant this petition.

S. Ct. 544 (2019), lends support to its position that Hobbs Act robbery is a crime of violence under § 924(c) because the "elements of common-law robbery track the elements of Hobbs Act robbery in relevant respects." Opp. 15 (incorporating by reference pages 6–12 of brief in opposition to petition for writ of certiorari in *Steward v. United States*, No. 19-8043 (May 21, 2020)). But as courts have recognized, *Stokeling* has no bearing on this question because "the Hobbs Act robbery statute, by its express terms, is broader" than common-law robbery. *United States v. Eason*, 953 F.3d 1184, 1192 (11th Cir. 2020); *see also United States v. Taylor*, 979 F.3d 203, 209 n.3 (4th Cir. 2020) (rejecting *Stokeling*'s relevance to Hobbs Act robbery).

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