No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

DENIS NIKOLLA,

Petitioner,

– v. –

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), an immigration case, this Court held that when a federal court applies the categorical approach to determine whether a *state-law* offense is described by a generic federal definition, the court must determine whether the state has in fact applied its law more broadly than the federal definition — an analysis known as the "realistic probability" test. The question presented here is whether, in a criminal case, when the plain language of a *federal* criminal statute is broader on its face than the generic definition in the federal offense of conviction, a court applying the categorical approach may nevertheless use *Duenas-Alvarez*'s "realistic probability" test to limit the plain language of the predicate offense.

LIST OF PARTIES

In addition to the parties identified in the caption to this petition, parties to the proceeding below include Mr. Nikolla's two codefendants:

Besnik Llakatura

and

Redinel Dervishaj

LIST OF RELATED PROCEEDINGS

- *United States v. Denis Nikolla, et al.*, No. 13 Cr. 668 (ENV), U.S. District Court for the Eastern District of New York. Judgment filed July 13, 2017.

- *United States v. Denis Nikolla, et al.*, No. 17–2206, U.S. Court of Appeals for the Second Circuit. Opinion issued February 19, 2020. Order denying petition for *en banc* rehearing issued April 1, 2020.

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The petitioner, Denis Nikolla, respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in *United States v. Denis Nikolla, et al.,* No. 17–2206, 950 F.3d 51 (2d Cir. 2020), which is attached to this petition as Appendix A.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was published in the Federal Reporter at 950 F.3d 51. It is attached as Appendix A to this petition. Mr. Nikolla's petition for *en banc* review was denied by the Second Circuit on April 1, 2020. A copy of the Second Circuit's order denying the *en banc* petition is attached as Appendix B.

The Court of Appeals' opinion affirmed a judgment entered July 13, 2017, by the Honorable Eric N. Vitaliano of the United States District Court for the Eastern District of New York, in case number 13-cr-668 (ENV). A copy of the district court's judgment is attached as Appendix C.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of New York assumed jurisdiction over Mr. Nikolla's criminal trial pursuant to 18 U.S.C. § 3231. The district court pronounced Mr. Nikolla's sentence on March 10, 2017, and docketed its judgment on July 13, 2017.

Mr. Nikolla filed a notice of appeal to the United States Court of Appeals for the Second Circuit on April 21, 2017. The Second Circuit assumed jurisdiction pursuant to 28 U.S.C. § 1291 and affirmed the district court's judgment in an opinion dated February 19, 2020. Mr. Nikolla filed a petition for *en banc*

rehearing to the Second Circuit on March 4, 2020. The Second Circuit denied Mr. Nikolla's petition for *en banc* rehearing in an order dated April 1, 2020.

Mr. Nikolla invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1), through the timely filing of the instant petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(3)(A) defines a "crime of violence," in relevant part, as "a felony [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. § 1951(a), the "Hobbs Act," states:

> 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.

STATEMENT OF THE CASE

On March 23, 2016, petitioner Denis Nikolla pleaded guilty to four counts of a Third Superseding Indictment, which charged Mr. Nikolla and a pair of codefendants with offenses relating to a scheme to extort several night clubs in Queens, New York. Only two of those counts are relevant to the instant petition: count 7 of the indictment charged Mr. Nikolla with threatening physical violence

in furtherance of a plan to commit extortion, in violation of 18 U.S.C. § 1951(a) ("the Hobbs Act"); and count 8 charged Mr. Nikolla with brandishing a firearm in connection with the Hobbs Act offense charged in count 7, in violation of 18 U.S.C. § 924(c).

At a sentencing hearing conducted on March 10, 2017, Judge Vitaliano sentenced Mr. Nikolla principally to concurrent terms of 132 months' incarceration on Count 7 and the two additional Hobbs Act conspiracy counts to which he had pleaded guilty. (Appendix C at 2.) Judge Vitaliano additionally imposed the mandatory-minimum consecutive sentence of 84 months' incarceration on Count 8, the § 924(c) count. (*Id.*.) Mr. Nikolla noticed his appeal to the Second Circuit.

The principal issue before the Second Circuit was whether count 7 satisfied the generic definition of a "crime of violence" provided in 18 U.S.C. § 924(c)(3)(A). That section defines a "crime of violence," in relevant part, as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property ***of another***." *See* 18 U.S.C. § 924(c)(3)(A) (emphasis added).

In contrast, the Hobbs Act does *not* require that physical force be directed against the person or property "of another." Rather, the Hobbs Act, in relevant part, imposes criminal liability on a person who

> 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 <u>any person or property</u>*** in furtherance of a plan or purpose to do anything in violation of this section.

See 18 U.S.C. § 1951(a) (emphasis added). While the phrase "of another" in § 924(c)(3)(A) plainly imposes the limitation that the threatened person or property be other than *the defendant's own* person or property, the Hobbs Act's plain language contains no such limitation. Rather, as Mr. Nikolla argued to the Second Circuit, the Hobbs Act's explicit reference to "*any* person or property" contemplates that the target of the prohibited threat may be the defendant's own person or property, so long as the defendant makes the threat in furtherance of a plan or purpose to obstruct, delay, or affect commerce. *See* 18 U.S.C. § 1951(a).

In a published opinion issued February 19, 2020, the Second Circuit denied Mr. Nikolla's appeal and affirmed the district court's judgment. *See* Appendix A. The Court of Appeals acknowledged that the Hobbs Act's relevant language is facially broader than § 924(c)'s "crime of violence" definition, as a defendant could be liable under the Hobbs Act "if a defendant's plan of extortion involved a threat of violence to the defendant himself or his property." *See id*. at 9. Nevertheless, citing this Court's opinion in *Duenas-Alvarez*, the Second Circuit upheld the count 7 (Hobbs Act) conviction as a predicate "crime of violence" for the § 924(c) conviction in count 8, on the basis that Mr. Nikolla had not identified

any prior case prosecuted under the Hobbs Act where the target of the unlawful threat was the defendant's own person or property:

> Nikolla, however, does not cite to any case that applied the Hobbs Act in this way, and we are aware of none. *Gonzales v. Duenas-Avarez*, 549 U.S. 183, 193 (2007) (requiring "cases in which [] courts in fact did apply the statute in the . . . manner for which [the defendant] argues"); *Hill*, 890 F.3d at 56 (same).

See id. (punctuation is at it appears in the order).[1] Thus, the Second Circuit held that "the offense specified in the clause of 18 U.S.C. § 1951(a) by the language '[w]hoever . . . commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of [§ 1951]' is categorically a 'crime of violence'" under § 924(c). *See id.* (punctuation is at it appears in the order).

Mr. Nikolla filed a petition for an *en banc* rehearing on March 4, 2020, which the Second Circuit denied in a three-sentence order dated April 1, 2020. (Appendix B.) Mr. Nikolla, through counsel appointed pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, now files this petition *in forma pauperis* for a writ of certiorari to the Second Circuit.

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[1] Saliently, the Second Circuit's quotation of *Duenas-Alvarez* omits two critical words, "the state." The full sentence as it appears in *Duenas-Alvarez* reads, "But he must at least point to his own case or other cases in which ***the state*** courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *See Duenas-Alvarez*, 549 U.S. at 193 (emphasis added).

REASONS FOR GRANTING THE WRIT

The Second Circuit's interpretation of *Duenas-Alvarez* as requiring federal courts to disregard the plain language of a federal statute when applying the categorical approach not only conflicts with authoritative decisions from at least five other U.S. Courts of Appeals; it also conflicts with several of the Second Circuit's own recent precedential opinions. Accordingly, petitioner respectfully requests that this Court grant certiorari, pursuant to U.S. Sup. Ct. R. 10(a), to resolve this conflict between the Circuit Courts of Appeals, as well as to provide its supervisory guidance to the courts below.

A. The Second Circuit's opinion in the case below conflicts with authoritative opinions of several Circuits, including the Second Circuit itself.

As this Court recently reaffirmed, the question of whether a predicate criminal offense qualifies as a "crime of violence" under 18 U.S.C. § 924(c) is determined using the "categorical approach." *See United States v. Davis*, 588 U.S. ___; 139 S. Ct. 2319, 2327–28 (2019). Under the categorical approach, courts examine the elements of the predicate offense of conviction, rather than its particular underlying facts, to determine whether the elements of the offense are coextensive with or subsumed by the federal generic definition. *See, e.g., Descamps v. United States*, 570 U.S. 254, 261 (2013); *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013); *Taylor v. United States*, 495 U.S. 575 599–600 (1990).

In *Duenas-Alvarez*, however, this Court identified an additional consideration — referred to as a "realistic probability" analysis — to guide a federal court's interpretation of the scope of a *state-law* statute in the immigration-law context. As *Duenas-Alvarez* explains,

> to find that ***a state statute*** creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to ***a state statute's*** language. It requires a realistic probability, not a theoretical possibility, that ***the State would apply its statute*** to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which ***the state courts*** in fact did apply the statute in the special (nongeneric) manner for which he argues.

See Duenas-Alvarez, 549 U.S. at 193 (emphasis added). Applying this analysis in a criminal-law context, however, the Second Circuit determined that the federal Hobbs Act, despite its plain language referring broadly to "*any* person or property," must nevertheless be construed only to involve threats specifically to the person or property "of another," for purposes of applying 18 U.S.C. § 924(c)(1)(A).

Such an application of *Duenas-Alvarez*, however, departs from the Second Circuit's own recent precedents, as well as from authoritative opinions of the First, Third, Fourth, Ninth, and Eleventh Circuits. Thus, the Second Circuit itself, in its 2018 opinion in *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018), held that *Duenas-Alvarez*'s "realistic probability" test does not apply when the greater breadth of the

underlying criminal statute is apparent from "the statutory language itself." *See Hylton*, 897 F.3d at 63 (quoting *Ramos v. United States AG*, 709 F.3d 1066, 1072 (11th Cir. 2013)); *see also United States v. Thompson*, 961 F.3d 545, 554 (2d Cir. 2020) (explaining that when the language of the predicate offense is broader on its face than the federal generic definition, "no legal imagination is necessary to find that the state statute is overbroad."); *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017) (same). In holding the "realistic probability" unnecessary when the predicate statute is facially broader than the federal generic definition, the *Hylton* Court echoed the Ninth Circuit's opinion in *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015), which explained that that "When 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 non-generic manner." *See Hylton*, 897 F.3d at 64.

In addition to these precedential opinions from Ninth and Eleventh Circuits, the Second Circuit in *Hylton* relied on a recent opinion from the First Circuit to reject the government's contention that, in applying the categorical approach, predicate statutes "should not be given their plain meaning." *See id.* (quoting *Swaby v. Yates*, 847 F.3d 62, 66 & n.2 (1st Cir. 2017)). *Hylton* also followed the Third Circuit, which explained, "Here, the elements of the crime of conviction are not the same as the elements of the generic federal offense. The Supreme Court

has never conducted a 'realistic probability' inquiry in such a case." *See id.* at 63–64 (quoting *Singh v. AG of the United States*, 839 F.3d 273, 286 n.10 (3d Cir. 2016)). And *Hylton* also followed the Fourth Circuit's determination that, "By demanding that [the defendant] produce old state cases to illustrate what the statute makes punishable by its text, the Government's argument misses the point of the categorical approach and wrenches the Supreme Court's language in *Duenas-Alvarez* from its context." *See id.* at 64 (quoting *United States v. Aparicio-Soria*, 740 F.3d 152, 157 (4th Cir. 2014); internal quotation marks omitted). The *Hylton* opinion concluded its analysis by noting the "nearly unanimous disagreement" that other circuits have taken to imposing "a supplemental, individualized burden" on a defendant or petitioner under the categorical approach. *See id.* at 65.

The Second Circuit's precedential opinion in Mr. Nikolla's case below, however, makes no mention of its contrary holding in *Hylton*. Nor does the opinion provide any basis for limiting the scope of the Hobbs Act's plain language — language that the Second Circuit explicitly acknowledges is broader on its face than the definition of a "crime of violence" provided in § 924(c)(1)(A) — other than its misplaced reliance on *Duenas-Alvarez*. Respectfully, this Court should grant certiorari to clarify that *Duenas-Alvarez* does not authorize a federal court to disregard the plain statutory language of an Act of Congress.

B. The concerns animating the "realistic probability" test are at their nadir when federal courts apply the categorical approach to construe the breadth of another federal statute.

As apparent from its repeated references to "state statutes" and "state courts," *Duenas-Alvarez* implicates issues unique to the situation where a federal court is charged with construing the scope of a *state-law* offense. *See Duenas-Alvarez*, 549 U.S. at 193. Those same issues do not arise, however, when both the predicate criminal statute and the federal generic definition were both drafted by Congress. Rather, "*Duenas-Alvarez* dealt with a specific aiding-and-abetting theft statute, in which the boundaries of the offense conduct were ill-defined and the court was tasked with an interpretive dilemma." *See Hylton*, 897 F.3d at 64. In the all-federal situation, however, "the 'sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance.'" *See id.* (quoting *Swaby*, 847 F.3d at 66).

Two important considerations distinguish the situation where a federal court applies the categorical approach to construe a statute enacted by a distinct *state* legislature. First, and most obviously, federal courts cannot rely on many of the ordinary canons of statutory interpretation that apply when the predicate offense and the federal generic definition were both drafted by Congress. In the all-federal situation, courts routinely apply a presumption that the statutory text should be construed as a whole, so that when Congress uses broader language in one

statutory section than in another section in the same title, the variance is meaningful; likewise, when the same word used in two related statutes, it is presumed to have the same, consistent meaning. *See, e.g.,* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, §§ 24, 25 (2012). Neither of these presumptions can apply, however, when the relevant language of the two statutes was drafted by two distinct legislative bodies representing different sovereigns: in such situations, even an identical word appearing in both statutes may denote separate meanings; alternatively, Congress and a state legislature may employ very different verbiage to denote the same meaning. Thus, in the absence of the usual interpretive presumptions, a federal court construing the scope and breadth of a *state* statute may often require recourse to the enacting state's own application of the statute to determine how its language is meant to be construed. No similar such concern applies, however, where Congress has enacted both the Hobbs Act and the definition of "crime of violence" provided in § 924(c)(A)(1), and where Congress has explicitly included an element in the generic definition (i.e., that the target of violent force be the person or property "of another") that is plainly absent from the Hobbs Act.

In addition, when a federal court applies the categorical approach to construe a litigant's prior conviction, it does so to determine whether the litigant is subject to separate *federal* criminal or immigration consequences. In the event that the

federal court incorrectly construes the breadth of the state-law statute, however, there is nevertheless no harm to the state's sovereign prerogative to construe its own laws. A federal court's decision construing the breadth of a state statute is not binding on that state's own courts or prosecutors, and thus imposes no substantive limitation on the state's future application of its own statute to broader or narrower conduct. In contrast, where, as here, a federal court applies *Duenas-Alvarez* to construe a federal criminal statute more narrowly than the statute's plain language covers, its limiting interpretation infringes directly on Congress's prerogative to enact legislation.

Is is plain from the face of the statute that the Hobbs Act's language — covering threats to "*any* person or property" — is broader than § 924(c)'s generic definition of a "crime of violence." That alone should be dispositive of the issue under the categorical approach. Of course, were Congress later to decide that the definition provided in § 924(c) should cover the offense charged in this case, it has numerous options allowing it to do so. Congress could, for example, amend the Hobbs Act's verbiage to conform it to the definition provided in § 924(c), explicitly limiting the Hobbs Act's scope only to threats directed at the person or property "of another." Alternatively, Congress could remove the "of another" limitation from the definition in § 924(c), expanding its definition of a "crime of violence" to cover threats directed more broadly against "any" person or property,

assuming this were indeed Congress's intent. Or Congress could simply cross-reference § 1951(a) in § 924(c)'s definition of a "crime of violence." But saliently, it must be *Congress itself* that chooses to make (or not make) any of these various legislative decisions; the Second Circuit may not simply substitute its own preferred revision of a federal criminal statute in place of the statute Congress in fact enacted.

That is especially so with respect to the Hobbs Act: a statute, this Court has explained, that "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" *See Stirone v. United States*, 361 U.S. 212, 215 (1960). The gravamen of an extortion offense is that an offender coerces property from a victim by inducing in them a state of *fear*, including through threats of harm to persons or objects the victim cares about — including, potentially, the defendant themself, if the defendant is someone for whom the threat of injury would cause the victim harm. Thus, the Hobbs Act defines "extortion" in broad terms as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *See* 18 U.S.C. § 1951(b)(2). This definition closely reflects the definition of "Theft by extortion" provided in the Model Penal Code, which similarly defines the offense, in relevant

part, as "purposely obtain[ing] property of another by threatening to . . . inflict bodily injury ***on anyone***." *See* MODEL PENAL CODE § 223.4(1) (2017) (emphasis added). Notably, neither the Hobbs Act's definition nor the definition in the Model Penal Code recognizes any defense to liability where the threat of violence is made solely to the *defendant's own* person or property. Nor is there any basis to suggest that the fear induced in a victim in such situations is any less psychologically effective in coercing that victim's property than when the threat is made to the person or property "of another." Accordingly, there is no basis in the statute from which the Second Circuit could infer that Congress intended to limit the Hobbs Act's scope only to such threats involving another person or their property. Rather, it is "realistic" to assume that Congress meant what it said when it used broader language in the Hobbs Act than the generic definition it employed in § 924(c).

CONCLUSION

For the foregoing reasons, Mr. Nikolla respectfully prays that this Court grant a writ of certiorari to the Second Circuit to resolve the Question Presented.

Respectfully submitted,

/s/ Daniel S. Nooter

Date: August 31, 2020

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CERTIFICATION OF COMPLIANCE WITH RULE 33(G)

Undersigned counsel hereby certifies that this petition for certiorari complies with the word-limitation provision of Supreme Court Rule 33(g)(1), as it contains 3,466 words, including footnotes.

/s/ Daniel S. Nooter
Daniel S. Nooter, Esq.