No. 20-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

TUAN NGOC LUONG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

GEOFFREY A. HANSEN
Acting Federal Public Defender
Northern District of California
JOHN PAUL REICHMUTH*
ROBIN PACKEL
Assistant Federal Public Defenders
1301 Clay Street, Suite 1350N
Oakland, California 94612
(510) 637-3500
John_Reichmuth@fd.org

** Counsel of Record for Petitioner*

QUESTION PRESENTED

The federal Hobbs Act "makes it a crime for a person to affect commerce, or attempt to do so, by robbery." *Taylor v. United States*, 136 S. Ct. 2074, 2077 (2016). The question presented is: Does Hobbs Act jurisdiction extend to a local robbery, of a local individual not engaged in interstate commerce or any federally regulated activity, by a defendant from the same state who facilitated the robbery through a false used car listing on a local Craigslist website, simply because that local site was theoretically accessible to out-of-state readers and the listing advertised a "commercial transaction"?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption.

DIRECTLY RELATED LOWER-COURT PROCEEDINGS

United States v. Luong, No. 15-cr-00178 HSG (N.D. Cal.)

Luong v. United States District Court, No. 15-73113 (9th Cir. Dec. 9, 2015)

United States v. Luong, No. 16-10213 (9th Cir. July 17, 2020)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Tuan Ngoc Luong respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion affirming Mr. Luong's conviction, *United States v. Luong*, 965 F.3d 973 (9th Cir. 2020), is attached at Appendix [App.] 1. The court's order denying rehearing and rehearing en banc is attached at App. 2.

JURISDICTION

The Ninth Circuit entered its judgment on July 17, 2020. It denied Mr. Luong's petition for rehearing en banc on December 11, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13.3 and the Court's Order of March 19, 2020, regarding filing deadlines.

RELEVANT STATUTORY PROVISIONS

The Hobbs Act provides, in relevant part:

> 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 to do so, 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 [punished].

18 U.S.C. § 1951(a).

"Commerce," for the purposes of the Hobbs Act, is defined as:

> commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce

> between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. § 1951(b)(3).

STATEMENT OF THE CASE

I. Legal background

Unlike federal statutes that prohibit certain uses of the means or instrumentalities of interstate commerce, the federal Hobbs Act prohibits only acts that actually "*obstruct[], delay[], or affect[]* commerce or the movement of any article or commodity in commerce, by robbery," or attempt to do so. 18 U.S.C. § 1951(a) (emphasis added). The Act's focus on actual effects or threatened effects balances the Act's purpose of "punish[ing] interference" with interstate commerce, *Stirone v. United States*, 361 U.S. 212, 215 (1960), with the concern that the act would otherwise federalize the quintessentially local crime of robbery. *See, e.g., United States v. Culbert,* 435 U.S. 371, 379-80 (1978) (noting lawmaker resistance to the Hobbs Act, given "concern about disturbing the federal-state balance"); *Taylor v. United States*, 136 S. Ct. 2074, 2085 (2016) (Thomas, J., dissenting) ('Sweeping in robberies that do not affect interstate commerce comes too close to conferring on Congress a general police power over the Nation.").

The only instance in which this Court has upheld a Hobbs Act prosecution of a purely intrastate robbery was in *Taylor. See* 136 S. Ct. at 2082 (holding that an intrastate robbery of drugs or drug proceeds from a drug dealer "affects" commerce because the robbery itself relates to a heavily federally regulated interstate

activity). But *Taylor* did not address whether the Hobbs Act extends to a local robbery where the only connection to commerce is *use of some channel* of interstate commerce, such as a long-distance phone service, a federal highway, or the Internet. Nor did it address what other sorts of purely local robberies, not using any channels of interstate commerce, might fall within the Act by virtue of their connection to a federally regulated activity other than drugs. *See id.* ("We do not resolve what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted.").

Five years after *Taylor*, federal courts of appeals remain divided on the Hobbs Act's application to local robberies of individuals. Some courts prohibit Hobbs Act prosecutions of robberies of individuals unless the robbery itself had at least some actual effect on commerce, such as because of the victim's interstate business; the full depletion of assets of someone engaged in interstate commerce; or the effect on commerce of a large number of robberies of separate victims. *See, e.g., United States v. Collins,* 40 F.3d 95 (5th Cir. 1994). Some courts also allow prosecution based on a "potential" effect, but only where the case involves an attempted or threatened robbery, or conspiracy, where the "potential" effect or "natural result," if the robbery or extortion had been successful, would have been to affect commerce. *See, e.g., United States v. Foster,* 443 F.3d 978, 984 (8th Cir. 2006).

Other courts have gone further, allowing prosecutions for robberies of individuals so long as the robbery involved an interstate communication, travel, or transmission, such as a long-distance phone call to an accomplice. These courts reason that such interstate activities have at least a "probable or potential" impact

on commerce, construing "potential" broadly to mean the completed robbery might potentially have some minimal effect on commerce. *See, e.g., United States v. Toles,* 297 F.3d 959, 969 (10th Cir. 2002).

Additionally, two circuits, including the Ninth Circuit in this case, have even more broadly held that a local robbery is covered by the Hobbs Act so long as the robber *used a channel open to* interstate commerce, even if it involved no interstate communication or travel. *United States v. Luong*, 965 F.3d 973 (9th Cir. 2020); *see United States v. Horne*, 474 F.3d 1004 (7th Cir. 2007) (holding that a purely intrastate robbery facilitated through an advertisement on the "international" website eBay is covered by the Hobbs Act); *cf. United States v. Person*, 714 F. App'x 547 (6th Cir. 2017) (unpublished) (intrastate robbery of used car sellers after responding to Craigslist ads). The panel here went a final step further, construing *Taylor* to allow a prosecution of a local robbery facilitated by use of a commercial site, *even if the site "is facilitating only local transactions*," so long as the robber used it to advertise a fake "commercial transaction." *Luong*, 965 F.3d at 982 (emphasis added).

II. Factual and procedural history

Mr. Luong was charged with one count of violating the Hobbs Act based on a local robbery of a local individual in California's San Francisco Bay Area.[1]

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[1] These facts are taken from government witnesses' testimony or from the panel's opinion and viewed "in the light most favorable to the government." *Luong*, 965 F.3d at 979. Mr. Luong also was ultimately convicted of two other counts, the first dependent on the Hobbs Act count: brandishing a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii); and being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). *Id.* at 978.

Specifically, he posted a "for sale" listing for a used 1996 Acura Integra, for "$1100 or OBO [or best offer] cash only," on the local "Dublin/Pleasanton/Livermore" subsection of the "East Bay" section of the "S.F. Bay Area" Craigslist advertising website. *Luong*, 965 F.3d at 978-80. A Bay Area resident, Joel Montellano, saw the listing and arranged to meet Mr. Luong at a nearby BART local transit station to see the car. *Id.* After taking the car for a test-drive, Mr. Montellano agreed to buy it. *Id.* The men then drove to Mr. Luong's house to pick up the title. *Id.* When they arrived, Mr. Luong robbed Mr. Montellano at gunpoint, taking his cell phone, his girlfriend's debit card, and his U.S. Department of Veterans Affairs medical card. *Id.* Mr. Montellano gave Mr. Luong an incorrect PIN number for the debit card. *Id.* When Mr. Luong tried to use the debit card at two nearby ATM machines, he was unable to withdraw any money. *Id.* at 979-80. Mr. Luong acknowledged the robbery; the sole issue at trial was whether the robbery "affected commerce."

The government's sole theory as to why this local robbery "affected commerce" was that Mr. Luong had used an Internet site to facilitate the robbery, and that the Internet is a means of interstate commerce. Yet, as the jury heard, Craigslist is actually "not one national or worldwide site." *Id.* Rather, it is "multiple local sites around the world," with about 28 in California alone, and prides itself on both "retain[ing] that focus on local searches and local postings," and "emphasiz[ing] and encourage[ing] local face-to-face transactions." *Id.* Upon visiting the site, users must select a particular local site before they can search, and they cannot search multiple Craigslist sites at once. *Id.* Indeed, the website's policies prohibit "[n]onlocal content" and "[p]osting the same ad to multiple locations." *Id.*

To be sure, the government offered evidence that a proactive out-of-state potential buyer could access a local listing. Specifically, all local Craigslist sites include links that "allow users to access easily the Craigslist sites associated with nearby physical locations." *Id.* For example, on the San Francisco Craigslist site for cars, a user can find a link to the Reno, Nevada, Craigslist site for cars, and vice-versa, and the jury heard of examples of cars from California and Oregon offered for sale on the Reno, Nevada, Craigslist site by unknown parties. *Id.* The government also offered anecdotal evidence of specific users, including the victim himself, who had bought or sold a car by accessing a Craigslist site in another state. *Id.* at 980, 982.

But the government offered no evidence to suggest that Mr. Luong's local listing was viewed by anyone from out of state, nor that his specific robbery of Mr. Montellano had, or would ever have, any effect on interstate commerce. Nor did its Craigslist witness offer any information on the frequency of interstate searches on Craigslist, "clicks" on out-of-state Craigslist ads, ER 972, or the likelihood of someone coming to the San Francisco Bay Area more than 200 miles from Nevada in response to an ad for a car – like the one listed here – that was 19 years old with 224,000 miles on it and a salvage title. ER 973. The trial court denied Mr. Luong's motion for judgment of acquittal. ER 30.

The government's evidence failed to unanimously persuade the jury. After being instructed that "[o]nly a de minimis effect on interstate commerce is required to establish jurisdiction for these charges and the effect need only be probable or potential, not actual," ER 632-33, the jury returned a note during deliberations

asking for definitions of "de minimis" and "interstate commerce" and whether "initiating contact or viewing an ad from another state ha[s] a potential effect on interstate commerce." ER 642-61. In response to the note, the district court defined "de minimis" as "slight" but not "fortuitous or speculative," and "interstate commerce" as "commerce from one state to another." ER 649, 660. The jury ultimately failed to reach a verdict on the Hobbs Act and dependent § 924(c) counts, 965 F.3d at 979, and the district court declared a mistrial. *Id.* Although the district court denied Mr. Luong's post-trial motion for judgment of acquittal, it expressed serious doubt about the sufficiency of the evidence. *See* ER 555 ("I don't know that the facts could be weaker. I think it's as borderline a case as you could have.").

At Mr. Luong's retrial, not at issue here, the government expanded its jurisdictional theory, arguing that the robbery affected commerce not only because Mr. Luong used the Internet, but because his attempted use of the ATM card in California triggered electronic transmissions to travel to out-of-state servers. *Luong*, 965 F.3d at 979. Without specifying which jurisdictional theory it relied on, the jury convicted Mr. Luong of Hobbs Act robbery and the dependent § 924(c) count. *Id.* He was sentenced to 144 months' imprisonment and three years of supervised release. *Id.*

On appeal, the Ninth Circuit rejected Mr. Luong's sufficiency argument as to the first trial on two grounds. First, it held that, assuming the Craigslist website "operated as an interstate market," *id.* at 982, any robbery facilitated by an item-for-sale Craigslist ad is a Hobbs Act robbery. *See id.* ("By using a website that facilitates interstate commerce (like Craigslist) to advertise a commercial

transaction, Luong necessarily affected or potentially affected 'commerce' . . . ."); *id.* ("Craigslist transactions are 'commerce' . . . and a robbery" during "such a transaction 'affects commerce' . . . ."). As evidence that the local East Bay Craigslist site was an interstate market, the panel cited only the anecdotal evidence showing that specific users, including the victim on prior occasions, had successfully navigated to an out-of-state local site, as well as a Seventh Circuit opinion holding that an eBay-facilitated robbery violated the Hobbs Act. *Id.* at 982 (citing *Horne*, 474 F.3d at 1006).

Second, the court held that, even viewing Craigslist as a purely local site and the robbery as a purely local incident, the robbery was still facilitated by an advertisement for a "commercial transaction" and thus "affected commerce" under the rule of *Taylor*. *See* 136 S. Ct. at 2082 (upholding a Hobbs Act prosecution of a purely intrastate robbery of a marijuana dealer). While acknowledging that the *Taylor* Court declined to extend its holding to crimes other than robbery of drugs or proceeds, the panel declared, without further analysis, that *Taylor's* "logic . . . readily applies to the facts of this case," and that the Hobbs Act applies wherever "a person used a commercial website to advertise a commercial transaction in order to facilitate a robbery." *Luong*, 965 F.3d at 983.

REASONS FOR GRANTING THE WRIT

Although the Hobbs Act grants the federal government important powers to ensure that robbery and extortion do not impede the free flow of interstate trade, its extension to local robberies of local individuals – a domain traditionally left to the States – raises sensitive issues of federalism. To be sure, some otherwise local

robberies affect interstate commerce because of, say, the victim's role in interstate commerce. Or, as this Court held in *Taylor*, even a purely intrastate robbery might affect commerce in the special circumstance where a drug dealer is robbed of drugs or drug proceeds, given that the items themselves are the target of a broad federal regulatory scheme. But this Court has never otherwise approved the extension of the Hobbs Act to purely intrastate robberies.

Nonetheless, some federal courts of appeals, including the Ninth Circuit in this case, have interpreted the Hobbs Act as reaching intrastate robberies where (unlike in *Taylor*) the local person robbed and items taken have no connection to interstate commerce or a federally regulated activity. These courts have reasoned that robbery of a local individual affects or at least potentially affects commerce, and thus falls within the Hobbs Act, *so long as it is facilitated by use of a channel of interstate commerce*. Under this approach, a local robbery of a local individual driving from one California town to another a few miles away is transformed into a federal crime so long as it occurred, say, on an interstate highway, regardless of whether it involved any interstate travel or communication whatsoever. Indeed, the Ninth Circuit in this case went even one step further, holding that even a local robbery that uses only a *local* commercial service (such as a purely local website, or presumably, a purely local newspaper) is a Hobbs Act robbery so long as it was committed by advertising a "commercial transaction." Other circuits have declined to extend the Act so far, and require that the particular charged robbery actually affect, or at least potentially (by an attempt or threat) affect, commerce.

This case – involving a purely local robbery of a local individual using a quintessentially local website targeted at local readers – is an ideal vehicle for this Court to offer much needed guidance on the scope of the Hobbs Act, and *Taylor*, in the Internet age. Without such guidance, lower courts' overbroad extensions of the Hobbs Act threaten to completely usurp states' traditional authority over local robberies. Moreover, the Ninth Circuit's approach in this case – extending *Taylor* to essentially any advertisement of a would-be commercial transaction – is particularly troubling and in need of correction.

I. Federal circuits disagree, in several key respects, on the Hobbs Act's application to purely local robberies of individuals.

A. Some circuits prohibit Hobbs Act prosecutions for local robberies of individuals unless the robbery itself actually affects or threatens to affect commerce because of the victim's role in interstate commerce.

Significant confusion surrounds lower courts' application of the Hobbs Act to local robberies of local individuals. This confusion is understandable, given that "robbery and extortion, particularly of individuals, have traditionally been the province of the states." *United States v. Lynch ("Lynch I")*, 282 F.3d 1049 (9th Cir. 2002). Nonetheless, some robberies of individuals have an indirect effect on commerce, because of, for example, the victim's special role in an interstate business or, as in *Taylor*, the robbery of a person and assets involved in a heavily federally regulated activity such as the drug trade.

Accordingly, some circuits have held that a robbery of an individual does not fall under the Hobbs Act unless the defendant "target[ed] the assets of a business, rather than an individual's personal assets, and [that] those assets would have been

used to purchase supplies that traveled in interstate commerce." *United States v. Wilkerson*, 361 F.3d 717, 734 (2d Cir. 2004); *see also United States v. Singleton*, 178 F. App'x 259, 263-64 (4th Cir. 2006) (distinguishing between robberies of individuals that occur "by happenstance" and those in which a defendant "target[s]" a victim "particularly because of" the victim's relationship to commerce); *United States v. Buffey*, 899 F.2d 1402, 1406 (4th Cir. 1990) ("Extorting [or robbing] money to be devoted to personal use from an individual does not affect interstate commerce.").

Other circuits impose similar limits, allowing Hobbs Act prosecutions for robberies of individuals only if the robbery directly affects, or has a substantial connection with, a business. *See, e.g., Collins,* 40 F.3d at 100-01 (requiring proof of a direct effect on a business where a robbery is of an individual, either through the individual's role in interstate commerce, depletion of assets of someone who would have entered interstate commerce, or affecting commerce through sheer number of victims); *United States v. Wang*, 222 F.3d 234, 239 (6th Cir. 2000) ("[A] small sum stolen from a private individual does not, through aggregation, affect interstate commerce merely because the individual happens to be an employee of a national company, or happens to be on his way to a store, or happens to be carrying proceeds from a restaurant."); *id.* at 239-40 (requiring proof of a "substantial" rather than "speculative" connection between the robbery of an individual and a business) (relying on *United States v. Lopez*, 514 U.S. 549 (1995));[2] *United States v. Quigley*,

[2] In *Lopez,* this Court held that the Gun-Free School Zones Act exceeded Congress's Commerce Clause power, rejecting the government's argument that gun possession in school zones would, in the aggregate, affect interstate commerce. 514 U.S. at 551,

53 F.3d 909, 910-11 (8th Cir. 1995) ("[T]he theft of an individual's car did not affect interstate commerce within the meaning of [the Hobbs Act] even though the theft prevented the individual, a national computer company employee, from attending a business meeting and using his cellular telephone to make business calls").

In all these cases, courts have required some evidence that the charged robbery directly affected a business or indirectly affected interstate commerce through special showings of the robbery's impact. Even in *Taylor*, which was a purely intrastate robbery of a local drug dealer, this Court relied on the fact that the victim was a drug dealer engaged in a heavily federally regulated activity, and the charged robbery was of drug proceeds, the fruits and fuel of that activity. 136 S. Ct. at 2082.

B. Other circuits allow Hobbs Act prosecutions based solely on the robbery's facilitation by an interstate communication or movement, or even mere use of a channel of commerce.

On the other hand, some circuits have upheld Hobbs Act prosecutions based on robberies of individuals even in the absence of any direct or indirect effect on commerce from the victim's relationship to interstate commerce or a heavily federally regulated activity.

One group of courts has upheld Hobbs Act convictions for local robberies of individuals so long as the defendant engaged in an interstate communication, movement, or transmission *during the course of the robbery. See, e.g., United*

563-64. *Lopez* made clear that this aggregation principle raised serious constitutional concerns when applied to fundamentally local non-economic criminal conduct: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

States v. Atcheson, 94 F.3d 1237, 1243 (9th Cir. 1996) (long distance phone calls and use of an ATM that triggered interstate electronic transmissions, during an otherwise local robbery, were sufficient for Hobbs Act purposes); *United States v. Lynch ("Lynch II")*, 437 F.3d 902, 908 (9th Cir. 2006) (holding that intrastate robbery fell under Hobbs Act because defendant came from out of state; victim was lured from out of state, robber used a debit card that caused interstate transmissions; and robber was engaged in the drug trade); *United States v. Carcione*, 272 F.3d 1297, 1301 (11th Cir. 2001) (stating that, in reference to defendant's out-of-state telephone calls, "the use of interstate . . . transportation and communication facilities . . . to carry out a scheme of robbery . . . may constitute – in conjunction with other facts – a sufficient effect upon commerce for a Hobbs Act conviction" (internal quotation marks omitted)); *cf. United States v. Hernandez*, 306 F. App'x 719 (3d Cir. 2009) (unpublished) (holding that robbery of items from a New Jersey home was covered by the Hobbs Act because robbers used long-distance cell service and led police on a chase to Pennsylvania on an interstate highway).

The Seventh and Ninth circuits (and the Sixth Circuit, in a recent unpublished decision) have gone a step further, upholding Hobbs Act convictions so long as the defendant makes *use of a channel* of interstate commerce, even if the robbery itself involves no alleged interstate communication or transmission. In *Horne*, the Seventh Circuit upheld Hobbs Act jurisdiction where the defendant facilitated several local robberies by posting a fictitious used car for sale on eBay. 474 F.3d at 1006. Although the court acknowledged that all of the defendant's robberies "occurred in Indianapolis in face-to-face encounters with his victims and no car or

cash or any other object was transported across state lines," it held that the use of eBay was sufficient proof of an effect on commerce. *Id.* (reasoning that "the Internet . . . is the communication channel that people use in transacting through eBay, [which] crosses state and indeed international boundaries"). The Ninth Circuit, in Mr. Luong's case, held that mere use of a ruse advertisement on a local Craigslist site to facilitate a robbery, without any proof that any out-of-state reader even saw the post, was sufficient, citing *Horne*. *Luong*, 965 F.3d at 982. And in *Person*, the Sixth Circuit upheld a Hobbs Act prosecution of a man who, with a group of co-conspirators, responded to Craigslist used car listings and then robbed the victims of their cars. 714 F. App'x at 551. Citing *Horne*, the court held that "[t]he government proved the commerce element in this case by showing that Person's crimes involved the internet, which is a channel of interstate commerce." *Id.*

Of course, the panel in this case went yet one more step further than the *Horne* or *Person* courts, holding that even if Craigslist were a *purely local* site with "only local" listings, the defendant's robbery still was properly prosecuted under the Hobbs Act because it was facilitated by a false listing for a "commercial transaction" on that site. In so holding, the panel relied on this Court's decision in *Taylor*, reasoning that its logic applies not only to purely intrastate robberies of drug dealers of their drugs or drug proceeds, but also to any "commercial transaction" advertised on a "commercial site." 965 F.3d at 982-83.

The underlying theory of how the defendants "affect[ed] commerce" in each of these three cases is not entirely clear. In *Horne*, the court appeared to rest its holding on the premise that eBay is an international site and the robber's false

eBay advertisement might have some effect on interstate eBay sales. 474 F.3d at 1006 ("[T]he buy and sell offers communicated over [the Internet] in this case created interstate transactions and were affected by the defendant's fraud."). But the government in *Horne* had offered no proof of such an effect at trial. Nor did the *Person* court elaborate on how the mere use of a local Columbus, Ohio, Craigslist site to facilitate local car robberies affected interstate commerce. 714 F. App'x at 551. Finally, in this case, the Ninth Circuit appeared to rest its holding on the premise that Craigslist was an "interstate market for used vehicles," reasoning in turn that "Craigslist transactions are 'commerce over which the United States has jurisdiction'" and that "a robbery occurring within the context of such a transaction 'affect[s] commerce.'" *Luong*, 965 F.3d at 982. But the panel did not explain why a purely local Craigslist interaction between a local buyer and seller, ending in a robbery rather than a commercial transaction, would affect interstate commerce.

C. This rift appears related to confusion among circuits about whether it is sufficient for Hobbs Act purposes – and if so, what it means – for a robbery to have a "potential" effect on commerce.

The willingness of some circuits to extend the Hobbs Act to local robberies of individuals, even without proof of any actual relationship to a business, interstate trade, or heavily federally regulated activity, may be related in part to yet another disagreement among the circuits: whether it is sufficient for Hobbs Act purposes – and if so, what it means – for a robbery merely to "potentially" affect commerce.

Several circuits have maintained that "the [Hobbs Act's] plain language requires an actual effect on interstate commerce, not just a probable or potential impact," for any alleged completed robbery. *United States v. Williams*, 308 F.3d

833, 838 (8th Cir. 2002); *see also United States v. Di Carlantonio*, 870 F.2d 1058, 1061 (6th Cir. 1989) ("[A] substantive Hobbs Act violation requires an actual effect on interstate commerce"). The Fifth Circuit, meanwhile, is split about whether the aggregation principle, allowing federal regulation of intrastate activities that separately have only a *de minimis* effect, allows Hobbs Act jurisdiction where an individual robbery's effect on commerce is only probable or potential. *See United States v. McFarland*, 311 F.3d 376, 414 (5th Cir. 2002) (en banc) (per curiam) (Garwood, J., dissenting) (noting evenly divided court on affirmance of defendant's conviction, disagreeing on whether the "affects-commerce" element should require substantial effects).

To the extent these circuits allow Hobbs Act prosecutions of robberies that have only a "potential" effect on commerce, it is only where the robbery is merely attempted or threatened or agreed upon, and *if successful*, would have had an actual effect on commerce. *See, e.g., United States v. Foster*, 443 F.3d 978, 984 (8th Cir. 2006); *Carcione*, 272 F.3d at 1300 n.5 ("Where conspiracy is charged under the Hobbs Act, the interstate nexus may be demonstrated by evidence of potential impact on interstate commerce, ... [but a] substantive violation of the Hobbs Act requires an actual, de minimis [e]ffect on commerce"); *cf. United States v. Re*, 401 F.3d 828, 835 (7th Cir. 2005) ("[T]he impact on commerce need not be actual; given that the Hobbs Act criminalizes attempts as well as completed crimes, it is enough that the conduct (here, the conspiracy to extort) had the potential to impact commerce"); *accord United States v. Vigil*, 523 F.3d 1258, 1267 (10th Cir. 2008).

Still other circuits, including the Ninth Circuit, have more broadly held that even a completed robbery falls under the Hobbs Act so long as it has some "probable or potential" impact on commerce. *See, e.g.*, *Luong*, 965 F.3d at 982 (noting the Ninth Circuit's rule that the robbery must have, "in the absence of actual impact, . . . a probable or potential impact"); *United States v. Verbitskaya*, 406 F.3d 1324, 1335 (11th Cir. 2005) ("potential impact on interstate commerce"); *United States v. Urban*, 404 F.3d 754, 765-66 & n.3 (3d Cir. 2005) ("a 'de minimis effect' in an individual Hobbs Act case need only be 'potential'"); *Re*, 401 F.3d at 835 ("[I]t is enough [under the Hobbs Act] that the conduct . . . had the potential to impact commerce . . . ."); *United States v. Rivera-Rangel*, 396 F.3d 476, 482 (1st Cir. 2005) ("The government need only show a realistic probability of a de minimis effect on interstate commerce" (internal quotation marks omitted)); *United States v. Perrotta*, 313 F.3d 33, 36 (2d Cir. 2002) (holding evidence sufficient if the robbery has any effect, "whether slight, subtle or even potential"); *Toles*, 297 F.3d at 969 (requiring "only a potential effect on commerce); *Wang*, 222 F.3d at 237 (requiring either an actual effect or a "realistic probability"); *United States v. Brantley*, 777 F.2d 159, 162 (4th Cir. 1985) ("The jurisdictional predicate may be satisfied though the impact upon commerce is small, and it may be shown by proof of probabilities without evidence that any particular commercial movements were affected.").

In fact, the panel in this case appears to have taken an even broader view of what "potential" means. It held that the Hobbs Act applies to a local robbery of a local non-business-person, facilitated by a false advertisement for a "commercial transaction" on a "commercial site," even if that site conducts "only local

transactions." 965 F.3d at 982. The court's theory as to how such a robbery would even potentially affect commerce seems to be that the robber's false listing *could have, in retrospect, potentially affected interstate commerce had it instead lured an out-of-state individual.* Put differently, the Ninth Circuit's concept of "potential effect" seems to venture well beyond the charged completed robbery to counterfactual scenarios involving hypothetical robberies that never happened.

II. The decision below is wrong.

A. Mere use of a means of interstate commerce to facilitate a local robbery of a local individual is insufficient for Hobbs Act jurisdiction.

The panel below upheld Mr. Luong's federal conviction for a purely intrastate robbery of an individual without finding any business-related targeting of the victim or direct effect on a business, as some circuits have required. Nor did it even require a showing that the robbery involved some interstate travel, communication, or transmission. Rather, it found the affects-commerce element satisfied based solely on use of the Internet to facilitate the crime. This Court has never stretched so far the meaning of "affects commerce" in defining the scope of Hobbs Act jurisdiction over robberies of individuals, nor should it. The Ninth Circuit's unwarranted expansion of the Hobbs Act raises grave questions concerning the federal government's ability to prosecute purely local robberies that have none but the most attenuated or speculative connection to interstate commerce.

The Ninth, Seventh, and Sixth circuits' overbroad extension of the Hobbs Act to mere use of an Internet site to facilitate a robbery appears to stem from improper reliance on cases involving statutes that – unlike the Hobbs Act – focus on

possession of items transported across state lines, or the use of means of interstate commerce, rather than effects on commerce. In fact, the panel below, and the *Person* court, offered no authority other than *Horne* for the proposition that mere use of the Internet to facilitate a robbery is enough under the Hobbs Act. In turn, none of the cases cited in *Horne* for this proposition was a Hobbs Act case; rather, they all addressed interstate commerce in the context of child-pornography statutes that criminalize possession of materials transported across state lines through the Internet. *See Horne*, 474 F.3d at 1006 (citing, *e.g.*, *United States v. Sullivan*, 451 F.3d 884 (D.C. Cir. 2006) (upholding constitutionality of possession of child pornography statute under the Commerce Clause)). Notably, the jurisdictional elements in the child-pornography statutes in such cases require only some movement across state lines, transportation in interstate or foreign commerce "by computer" or other means, or other "us[e of] any means or facility of interstate . . . commerce." *See* 18 U.S.C. § 2252A. Several other federal statutes similarly criminalize use of means or instrumentalities of commerce and, thus, are satisfied by proof that the defendant used a long-distance service, federal highway, or the Internet. *See, e.g., United States v. Mejia,* 545 F.3d 179, 203 (2d Cir. 2008) (holding that "[u]se of an instrumentality of commerce, such as telephone lines" is sufficient under the Violent Crimes in Aid of Racketeering statute, 18 U.S.C. § 1959); 18 U.S.C. §§ 1952, 2422(b) (authorizing federal jurisdiction under the federal Mann Act, and the law prohibiting travel in aid of racketeering, upon proof that the defendant "us[ed] the mail or any facility or means of interstate ... commerce"). Although Congress could have extended the Hobbs Act to cover robberies that

merely *use* a means or channel of commerce, as it did with other federal criminal statutes, it did not.

The panel's proposed limiting principle, that use of a channel of interstate commerce to facilitate a robbery will trigger the Hobbs Act only where that use is "integral" rather than a "peripheral afterthought" to the robbery, offers little comfort. *Luong*, 965 F.3d at 984. That rule would still extend federal authority over run-of-the-mill street or car robberies where the robber meets a victim on a highway exit after the victim drove five miles, in the same town, on the highway; meets a victim through a false listing in a local newspaper that has a few out-of-state subscribers; searches for a local target using an online map service; checks a local victim's (such as a relative's) bank balance using a bank website; or uses e-mail or a cell phone to make a local call or send a message to a local accomplice or local potential victim, or to check to see if someone is home. These actions are criminal, to be sure, but they are squarely within a state's police power to regulate and have at most a speculative, attenuated, theoretical effect on interstate commerce.

In analogous situations, this Court has stepped in to ensure that lower courts do not "render [] traditionally local criminal conduct . . . a matter for federal enforcement." *Jones v. United States*, 529 U.S. 848, 858 (2000) (holding that arson of a private residence did not fall under 18 U.S.C. § 844(i)'s prohibition on malicious burning of a property "used in . . . any activity affecting interstate commerce"); *see also Loughrin v. United States*, 573 U.S. 351, 361-62 (2014) (rejecting a construction of the federal bank fraud statute that would cover any fraud where payment is made by check, and noting that "even the Government expresse[d] some mild

discomfort with 'federalizing frauds that are only tangentially related to the banking system'"). As this Court reasoned in *Jones*, "hardly a building in the land would fall outside the federal statute's domain" if it reached arson of private residences, given that "[p]ractically every building . . . is constructed with supplies that . . . bear[] some . . . trace of interstate commerce." 529 U.S. at 857.

In the same respect, interpreting the Hobbs Act to reach every modern local robbery of a private person in an age of cell phones and the Internet would widely and irreversibly federalize a quintessentially local crime. After all, in passing the Hobbs Act, Congress could not have anticipated the growth of the Internet as a means of interstate commerce. It therefore cannot be said that Congress intended to further disrupt the sensitive relation between federal and state criminal jurisdiction where, as here, the sole basis for doing so is the defendant's use of the Internet. Because "[t]he forces and directions of the Internet are so new, so protean, and so far reaching," the Hobbs Act should be construed so as to avoid effecting such a change. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

Even if the language of the Hobbs Act could arguably be read expansively to reach any robbery involving mere use of a channel of commerce, the Ninth Circuit was obligated to resolve any ambiguity against an expansion of federal authority. For example, in *United States v. Enmons,* this Court declined to interpret the Hobbs Act as reaching a labor union's intrastate violent acts in furtherance of otherwise legitimate attempts to secure higher wages, absent statutory "language much more explicit" showing that "Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes." 410 U.S. 396,

411 (1973); *see also id.* (applying the rule of lenity where the government's "broad concept of extortion" would "cover all overtly coercive conduct in the course of an economic strike," and where such an expansion would be "an unprecedented incursion into the criminal jurisdiction of the States"); *Jones*, 529 U.S. at 858 (declining to interpret 18 U.S.C. § 844 as covering arsons of private residences, applying the rule of lenity that "when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative," to insist on "language that is clear and definite"); *Bond v. United States*, 572 U.S. 844, 860 (2014) (requiring a clear statement that Congress "meant to reach purely local crimes" before it would extend the Chemical Weapons Convention Implementation Act to the typically local crime of simple assault); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (rejecting reading of federal mail fraud statute that would have invited a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress"); *United States v. Bass*, 404 U.S. 336, 349 (1971) (requiring clear indication that Congress intended to make it a federal crime for a convicted felon to possess a firearm "absent a demonstrated nexus with interstate commerce" before adopting a lesser showing); *Cf. McFarland*, 311 F.3d at 387 (Garwood, et al., JJ., dissenting) (finding nothing in legislative history suggesting that Congress intended the Hobbs Act to apply to "discrete intrastate actions which individually have only a minimal, indirect and attenuated effect on interstate commerce").

B. *Taylor* does not extend Hobbs Act jurisdiction to an intrastate robbery facilitated through use of a channel of *local* commerce, merely because the robbery involved advertising a "commercial transaction."

The Ninth Circuit also incorrectly held below that the Hobbs Act's affects-commerce element is satisfied in all "cases like this one, where the government demonstrates that a person used a commercial website to advertise a commercial transaction in order to facilitate a robbery," even assuming that website "*is facilitating only local transactions*." *Luong*, 965 F.3d at 982-83 (emphasis added). The panel relied only on *Taylor* for the proposition that a (false) commercial advertisement through a channel of *local* commerce would be covered by the Hobbs Act, stating without further analysis that "the logic employed in *Taylor* readily applies to the facts of this case." *Id.* at 984.[3]

Contrary to the panel's ruling, *Taylor* in no way suggests that a purely local robbery of a private citizen of personal items (cash, a debit card, and cell phone) with no connection to any business, much less a heavily federally regulated activity like the drug trade, is somehow a Hobbs Act robbery. *Taylor* held only that the Hobbs Act covers a purely intrastate robbery of drugs or drug proceeds from a narcotics trafficker. While this Court explicitly left open "what the Government must prove to establish Hobbs Act robbery where some other type of business or

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[3] In reaching this issue, the panel appeared to implicitly acknowledge the government's failure to prove at trial that Mr. Luong actually used any channel of *interstate* commerce. And that is because, as the government's witnesses acknowledged, Craigslist brands itself as a quintessentially local site, or, rather, a host of local sites. While a local Craigslist site is theoretically accessible to any Internet user, each local site prohibits non-local listings and requires navigation to other pages to see any other listings. The government in this case did not allege that Mr. Luong's false listing was targeted at anyone but local buyers, nor that any out-of-state user had seen the listing.

victim is targeted," *Taylor*, 136 S. Ct. at 2082, its holding rested on the fact that the robber's "gang" in that case "intentionally targeted drug dealers to obtain drugs and drug proceeds." *Id.* at 2081. In turn, because "the sale of marijuana is unquestionably an economic activity," and specifically "commerce over which the United States has jurisdiction," *id.* at 2080, the Court reasoned that the affects-commerce element is satisfied "when a defendant commits a robbery that *targets* a marijuana dealer's drugs or drug proceeds." *Id.* at 2078 (emphasis added).

Such logic has no application to a local robbery of a private citizen of personal items, based on a pretextual local used car listing.[4] First, unlike the drug dealer in *Taylor,* the victim and items here (debit card, phone, cash) were not targeted because of any role they play in interstate commerce. Even the subject of the false advertisement, a used car, is not a heavily regulated federal area. Although Congress has passed "comprehensive regulation of controlled substances," *Lee*, 834 F.3d at 151, it has not asserted authority over the market for used cars, or even Internet advertising. *See generally* Michael Munoz, Taylor v. United States: *In*

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[4] The panel made no effort to define what it meant by a "commercial website," and it is not clear that Craigslist would qualify as one. As the undisputed evidence at trial established, Craigslist is "primarily community moderated and mostly free." *Luong*, 965 F.3d at 980. The platform does not charge users who post ads, and it receives no money from transactions. Unlike websites like eBay, once the ad is posted, Craigslist plays no role in connecting potential buyers with sellers, in closing deals, or in collecting or processing any payments. In contrast, eBay is an "online auction house" that allows users to arrange for shipping and provide payment remotely via PayPal and wire transfers. *See Horne*, 474 F.3d at 1006 ("The people who buy and sell through eBay are scattered around the world—indeed most of the vehicle sales made through eBay are interstate or international"). Such functional differences between websites are significant to the affects-commerce determination, and courts should not assume they are all "commercial."

Federal Criminal Law, "Commerce Becomes Everything," 15 Geo. J.L. & Pub. Pol'y 475, 478 (Winter 2017) (explaining that *Taylor* "determined that the regulation of marijuana [was] the ultimate factor in determining Congress's commerce power"). Although Congress may have the *authority* to "[p]rohibit[] the intrastate" trade in used cars, *see Gonzales v. Raich*, 545 U.S. 1, 26 (2005),[5] it has not done so.

Of course, in the future there might be other heavily regulated areas analogous to the drug trade that could bring additional intrastate robberies, targeted at people engaged in those trades, within the ambit of the Hobbs Act under the logic of *Taylor*. For example, targeting a pornography distributor to rob him of images or proceeds of child pornography, or targeting someone engaged in human trafficking to rob them of proceeds of their trade, might qualify. But whatever the wisdom of these future potential applications of *Taylor*, the case has no application to a local robbery of a private citizen of personal items such as a debit card, phone, or cash, simply because it was facilitated by a false local used car listing.

III. The question presented is critically important.

This Court should grant review not only because the panel's decision upholding Mr. Luong's Hobbs Act conviction was wrong, but because the issues raised in this case are critically important. The decision below, if allowed to stand, will turn the Hobbs Act from a statute that reasonably – if not entirely uncontroversially –

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[5] The result in *Taylor* was "dictated" by this Court's decision in *Raich*. 136 S. Ct. at 2077. *Raich* upheld Congress' Commerce Clause authority "to prohibit local cultivation and use of marijuana" based on the legitimate, comprehensive and largely unchallenged federal regulation of illicit drugs through the Controlled Substances Act. 545 U.S. at 5, 10-15, 20-22, 24-28. With the CSA, *Raich* held, Congress constitutionally "directly regulates economic, commercial activity." *Id.* at 26.

targets robberies and extortions that impose "destructive burdens" on the free flow of trade, *Stirone*, 361 U.S. at 215, into an expansive federal regime that potentially criminalizes nearly all robberies in the era of highways, cell phones, and the Internet.

Extending the Hobbs Act to any local robbery of any individual facilitated by the Internet, especially as to local sites like Craigslist, would be an unwarranted shift of police power to the federal government. The Internet is now "a pervasive and insistent part of daily life," *Riley v. California*, 573 U.S. 373, 385 (2014), and an ever-increasing percentage of commercial activity is conducted online.[6] To be sure, such technological advances often expand the ways in which our activities affect interstate commerce, and thus might be expected to naturally, even if troublingly, expand federal reach over some otherwise local crimes. But if there are to be any limits on federal power over robberies in the modern age, this Court must enforce the basic limits that remain. *Cf. Carpenter v. United States*, 138 S. Ct. 2206, 2222 (2018) ("When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents."). In the Hobbs Act context, those basic limits include requiring an actual or threatened effect on commerce and not merely use of its channels, and confining reachable intrastate robberies to those targeting commercial entities, such as drug dealers, and their items when involved in a heavily federally regulated activity.

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[6] The Census Bureau recently estimated retail e-commerce sales to make up approximately 14% of all retail sales in 2020. U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales, 4th Quarter 2020*, https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf (viewed March 1, 2021).

This concern is not hypothetical; Hobbs Act prosecutions have risen dramatically over the past twenty years and increasingly target local criminal conduct that Congress did not contemplate as within its reach.[7] This Court should therefore grant the petition for certiorari to define the outer limits of congressional authority over wholly intrastate robberies of individuals that involve the Internet or other electronic communications.

IV. This case is an ideal vehicle for resolving the question.

The facts and procedural posture of this case make it an ideal vehicle to offer guidance to lower courts on how to apply the Hobbs Act to intrastate robberies of individuals facilitated by a channel of interstate commerce, in the absence of any interstate communication, movement, or transaction. First, the question is squarely presented and preserved by the defense below and on direct appeal. The case presents no thorny issues of preservation or complications of collateral review.

Second, the issue is dispositive of the case, in a trial where the government's evidence was marginal at best. Specifically, the government acknowledged that neither the petitioner nor the victim or any other involved party engaged in any interstate communication, travel, or transaction. The government also offered no evidence that the robbery actually affected, or threatened to affect, commerce, nor that the victim had any connection to interstate commerce or any federally regulated activity. The only theory upon which the jury could have found a Hobbs Act violation was that the petitioner facilitated the robbery by posting a used car

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[7] There were 895 Hobbs Act cases in fiscal year 2020, a 102% increase from twenty years ago. *Prosecutions for 2020*, Transactional Records Access Clearinghouse, https://tracfed.syr.edu/results/9x70606b7ccfb6.html (viewed Apr. 5, 2021).

listing on a local Craigslist site, targeted at local individuals. And the jury, on that theory, failed to convict at the first trial. As Internet-facilitated Hobbs Act cases go, Mr. Luong's case is as local as it gets.

Third, the Ninth Circuit, as evidenced by the panel's decision below, has gone further even than other circuits in expanding the reach of the Hobbs Act and application of *Taylor*. Although the Seventh and Sixth circuits have approved Hobbs Act prosecutions based solely on a robber's use of the Internet to facilitate a local robbery, only the Ninth Circuit has construed *Taylor* to extend not only to robbery of drugs and drug proceeds, but to any advertised (false) commercial transaction on a commercial site, even a local listings site, that ends in a robbery. The extreme position taken by the panel below merits review in this case.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

GEOFFREY A. HANSEN
Acting Federal Public Defender
Northern District of California

May 7, 2021

JOHN PAUL REICHMUTH
ROBIN PACKEL
Assistant Federal Public Defenders