No. 20-7998

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Reflecting lower courts' confusion over the Hobbs Act's application to local robberies and purely intrastate activities, the Ninth Circuit erroneously interpreted the Act in this case to cover a local robbery of a local individual of cash, a debit card, and a cell phone, facilitated through a false used car listing on a locally targeted website. The government offered no proof that the advertisement was seen by anyone out of state, nor any proof that the robber targeted proceeds or inventory of someone (like a drug dealer) engaged in a federally regulated activity (like drug trafficking). If this street robbery of items in a man's pocket is covered under the Hobbs Act merely because the robber used a fake used car listing on a local website to target the victim, then the Act surely extends to nearly all modern robberies. That result would stretch federal Hobbs Act jurisdiction deep into criminal-prosecution territory that properly rests with the States.

The government's arguments against review are unpersuasive. Although three circuits have now allowed prosecutions like the one in this case, and no circuit has expressly held that the Hobbs Act does not cover a local-website-facilitated local robbery, that is because many circuits have properly interpreted the Hobbs Act as applying only to robberies that actually affect interstate commerce by, say, targeting a business owner or, by their multiple nature, having a large aggregate effect. Other circuits, which have erroneously interpreted the Hobbs Act to extend to local robberies of individuals based on mere use of the channels of commerce, or a mere potential impact on commerce, require this Court's guidance. On the merits, the government ignores the critical fact distinguishing this case from *Taylor v.*

United States, 136 S. Ct. 2074 (2016): that it does not involve the targeting of proceeds or inventory of someone engaged in a currently federally regulated activity like drug trafficking. Finally, this case presents an unusually procedurally clean and efficient means of addressing both critical issues together: the application of *Taylor* beyond drug trafficking and the Hobbs Act's application to local robberies that at most use the channels of interstate commerce.

ARGUMENT

I. The Ninth Circuit's Opinion Reflects Conflict in Lower Courts over the Hobbs Act's Application to Local Robberies of Individuals.

The government offers two arguments, both unpersuasive, as to why this case presents no conflict. It first attempts to portray as significant the fact that no court of appeals has "found an insufficient nexus to interstate commerce for Hobbs Act robbery where the crime occurred during a sales transaction initiated through an online interstate marketplace." U.S. Br. Opp. 11. But it is precisely because several circuits have interpreted the Hobbs Act differently from the Ninth Circuit that such a case does not exist. As petitioner explained in his brief, several circuits interpret the Act to require an actual (or attempted) effect on interstate commerce, rather than the mere use of the channels of commerce or a potential, hypothetical effect on commerce. As a result, one would not expect in those circuits to see a Hobbs Act conviction for luring a single robbery victim through a fake local listing in a newspaper or website that merely *could have* reached out-of-state individuals.

The government' second claim, equally unavailing, is that the Ninth Circuit's opinion is consistent with other jurisdictions' reversals of Hobbs Act convictions for

local robberies of individuals, because in those other cases "the crime had only a speculative effect on a business engaged in interstate commerce." U.S. Br. Opp. 13 (citing cases relied on by petitioner from the Fifth, Sixth, and Eighth circuits). In the government's telling, this case is different because the victim was robbed "during a 'commercial transaction facilitated by a website that forms an interstate market'" for used cars, U.S. Br. Opp. 14 (citing *Luong*, 965 F.3d at 983), a market that "Congress can regulate." *Id.* The government also suggests that *Taylor* "may resolve" any "substantial disagreement" among lower courts on the Hobbs Act's reach because, in the government's view, *Taylor* extends the Hobbs Act to all individual robberies using the Internet to advertise anything that Congress can regulate. U.S. Br. Opp. 16.

This argument substantially misconstrues both the holding of *Taylor* and the basic objection several circuits have to applying the Hobbs Act to local robberies of individuals. *Taylor* did not hold that the Hobbs Act "extends to all robberies that affect any of the 'categories of activity that Congress may regulate under its commerce power.'" U.S. Br. Opp. 9 (quoting *Taylor*, 136 S. Ct. at 2079, 2080). The relevant passage from *Taylor* simply noted the three categories of activities "Congress may regulate under its commerce power": uses of channels of commerce, instrumentalities of commerce, and activities that substantially affect commerce. *Taylor*, 136 S. Ct. at 2079. Although intrastate robberies of individuals generally do not substantially affect interstate commerce, *Taylor* noted that in the special case where such a robbery "targeted a marijuana dealer's drugs or illegal proceeds" and thus affected the "market for marijuana," *id.* at 2080-81, and where the "sale of

marijuana is commerce over which the Federal Government *has jurisdiction*," *id.* at 2080 (emphasis added), even an intrastate robbery of a marijuana trafficker will affect interstate commerce.

Nothing in *Taylor*, then, casts doubt on the common-sense limits imposed by other circuits in declining to extend the Hobbs Act to local robberies of individuals absent an actual effect on interstate commerce. To be sure, *Taylor* recognizes such an actual (or potential) effect where the robbery targets the proceeds or inventory of a drug trafficker. But *Taylor* in no way suggests that the Hobbs Act extends to a local robbery of an individual of typical wallet items (cash, ATM card, phone) merely because it was facilitated through a fake local website listing for an item – a used car –not currently regulated by Congress. Even the two other circuits that have upheld a Hobbs Act conviction for an Internet-facilitated robbery have not relied on *Taylor*; rather, they deemed the robber's use of the channels of interstate commerce sufficient.[1] In short, the conflict in lower courts over the Hobbs Act's application to individual local robberies is real, significant, and in need of resolution.

II. The Ninth Circuit's Opinion Is Wrong on the Merits.

The government's sole argument on the merits is that *Taylor* resolves this case, because it, in the government's words, involves a "sales transaction for a used car"

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[1] *See United States v. Horne*, 474 F.3d 1004, 1006 (7th Cir. 2007) (relying pre-*Taylor* on eBay being "an avenue of interstate commerce"; "the buy and sell offers communicated over it in this case created interstate transactions and were affected by the defendant's fraud"); *United States v. Person*, 714 F. App'x 547, 551 (6th Cir. 2017) (relying on the robberies having "involv[ed] the internet, which is a channel of interstate commerce").

on an interstate-accessible website and the "interstate market for resale of used cars" is "a subject that 'Congress may regulate under its commerce power.'" U.S. Br. Opp. 10 (quoting *Taylor*, 136 S. Ct. at 2080). Again, this argument substantially misstates the holding of *Taylor*. *Taylor* did not hold that any robbery involving an item that *may* be regulated by Congress is a federal Hobbs Act robbery. Rather, *Taylor* held that because Congress constitutionally determined a need to regulate even local drug trafficking through the Controlled Substances Act ["CSA"], then a robbery that targets a drug trafficker's inventory or proceeds "necessarily affects . . . commerce over which the United States has jurisdiction." 136 S. Ct. at 2078.

Neither of the two critical facts in *Taylor* – an activity regulated by Congress, and the robber's targeting of the proceeds or inventory of a person engaged in that activity – is present here. On the first point, *Taylor* relied heavily on Congress's determination that it had to regulate the intrastate drug market because of its effect on the interstate drug market. The *Taylor* Court described its holding as "dictated by" the Court's prior determination in *Gonzales v. Raich*, 545 U.S. 1 (2005). 136 S. Ct. at 2077. In *Raich*, this Court went through the analysis -- missing in the opinion below -- to determine that Congress' commerce power "includes the power to prohibit the local cultivation and use of marijuana in compliance with California law" as exercised in the CSA, 545 U.S. at 5, because marijuana cultivation, possession, and consumption are "an economic 'class of activities' that have a substantial effect on interstate commerce" through their "substantial effect on supply and demand in the national market." *Id.* at 17, 19. It is only because of this Commerce-Clause analysis of the CSA that the *Taylor* Court

was able to "graft . . . *Raich* onto the commerce element of the [Hobbs] Act." *Taylor* 136 S. Ct. at 2080. Only when Congress *has* constitutionally legislated, and there is a comprehensive regulatory scheme in place, does the logic of *Taylor* apply.

In contrast, Congress does not regulate the used car market. It has not determined that "leaving [purely intrastate used-car sales] outside the regulatory scheme would have a substantial influence on price and market conditions," *Raich*, 545 U.S. at 19, nor have congressional findings or record evidence "establish[ed] the causal connection between the production for local use and the national market" of used-car sales. *Id.* at 20. Neither Congress, nor any court, nor the government in this case, has provided even "a rational basis for believing that failure to regulate the intrastate [market for used cars] would leave a gaping hole" in any federal regulatory scheme. *Id.* at 22.

The Ninth Circuit's contrary interpretation of *Taylor* would federalize robberies involving anything – banjos, bananas, artisanal soaps – sold on the Internet. After all, Craigslist, eBay, and other Internet sites "facilitate[] commercial transactions beyond the local area and operate[] as an interstate market for" these goods. *Luong*, 965 F.3d at 982. "Thus, [under *Luong*'s and the government's reasoning], these transactions are 'commerce over which the United States has jurisdiction," and "Congress has the authority to regulate the national . . . market [in these goods], including the purely intrastate [transactions therein], based on its aggregate effect on interstate commerce." *Id.* at 982-83. If, as the government says, "[a]n interstate marketplace for used cars falls squarely within" the Hobbs Act's commerce definition, U.S. Br. Opp. 11-12, so does an interstate market for banjos.

Yet that result is absurd. As the government itself acknowledged in *Taylor*,[2] it is only "[w]here the class of activities *is regulated*" by Congress that "the courts have no power to excise, as trivial, individual instances of the class." *Perez v. United States*, 402 U.S. 146, 154 (1971) (internal quotation marks omitted; emphasis added).

On the second point, *Taylor* does not extend to cases, like this one, where the robber did not target the proceeds or inventory of a federally regulated activity. As the government argued in *Taylor*, stealing inventory or proceeds from a trafficker naturally affects the drug business: either the dealer's inventory or assets need to be resupplied.[3] But the same is not true when the robber steals from a person who shows up to buy a used car. As other circuits have recognized, such robberies have no more inherent effect on interstate commerce than any other robbery of an

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[2] *See* Brief for the United States, *Taylor v. United States*, No. 16-6166, 2016 WL 183804, at **11-12 (Jan. 13, 2016) ("Congress exerted such authority over all marijuana distribution in the Controlled Substances Act, and . . . [a]ccordingly, all domestic trade in marijuana, even trade occurring wholly within a single State, constitutes, as a matter of law, 'commerce over which the United States has jurisdiction . . . ."); *id.* at **22-23 ("[B]ecause the [Hobbs] Act's jurisdictional element is also satisfied by showing an effect on any other 'commerce over which the United States has jurisdiction,' . . . the government can carry its burden by presenting proof that the charged robbery has the requisite effect on a particular *type* of economic activity over which, *as a matter of law*, the United States has regulatory 'jurisdiction.' In such instances, federal regulatory jurisdiction exists over the relevant class of economic activities, and individual robberies within that class are encompassed within the Hobbs Act."; emphases in original).

[3] *See* Brief for the United States, *Taylor v. United States*, No. 14-6166, 2016 WL 183804, at *26 (Jan. 13, 2016) ("Marijuana dealers engage in the quintessentially commercial activity of selling a product, and robberies of their marijuana as a matter of practical economics will have a non-de minimis effect on interstate commerce.").

individual.[4] *See, e.g.*, *United States v. Wang*, 222 F.3d 234, 240 (6th Cir. 2000) ("[W]here, as here, the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated."). Absent some showing that the robber targeted the victim because of their business, *id.*, or depleted the assets of an interstate business, *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994), the affects-commerce Hobbs Act element is not satisfied.

III. This Case Is an Ideal Vehicle to Resolve These Critical Issues.

The government's two arguments as to why this case is not an ideal vehicle for review also are misplaced. First, the fact that the Ninth Circuit remanded petitioner's case for resentencing is irrelevant to the reasons to grant review in this case. The issues raised here relate to petitioner's Hobbs Act conviction, which is final and was affirmed by the Ninth Circuit. *Luong*, 965 F.3d at 990; *see Clay v. United States*, 537 U.S. 522, 527 (2003) (noting that a decision is "final[]" for certiorari purposes after "entry of the judgment or order sought to be reviewed") (quoting S. Ct. Rule 13(3)). In affirming petitioner's conviction, the Ninth Circuit "entered a decision" on an "important federal question." S. Ct. Rule 10(a). In turn, the limited remand solely for resentencing in no way affects petitioner's Hobbs Act conviction or the issues raised here. *See Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) ("[T]he mandate of an appellate court forecloses the lower court

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[4] To the extent the government suggests that petitioner's Hobbs Act conviction was based on the victim's being engaged in used-car dealing, U.S. Br. Opp. 2, 6, 14, it is wrong. In fact, the district court explicitly precluded that argument before trial. ER 672-75. During trial, the district court allowed the victim to offer "basic context about the offense" by testifying that he planned to repair and resell the particular listed car, but not "that, as a general matter, he fixes up and sells cars." ER 674-75.

from reconsidering matters determined in the appellate court."). Indeed, this Court has granted review where a sentence was the subject of a federal appellate court's remand. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 484 (2011) (noting that Court granted defendant's petition for writ of certiorari challenging sentence filed only after court of appeals remanded for resentencing, its mandate had issued, and district court had initiated resentencing). Moreover, forcing petitioner to wait until an appeal of his resentencing to seek review could take years, running out his sentence.[5] Thus, the limited remand for resentencing in no way detracts from the reasons to grant review here.

Next, the government unpersuasively insists that the issues in this case are unlikely to recur because, in future Hobbs Act prosecutions involving the Internet, prosecutors could present additional proof of an actual effect on commerce via "data transmissions to computer servers located out of state." U.S. Br. Opp. 17 (noting that such proof was offered at petitioner's retrial). There are two problems with this argument. First, given the government's overbroad reading of *Taylor* as reaching intrastate robberies involving any item capable of regulation by Congress, and given some courts' view of the Hobbs Act as reaching any robbery *using the channels* of interstate commerce, there is no reason to assume the government will limit itself to prosecutions involving actual effects on commerce or will insist on introducing evidence it deems unnecessary to its case. Second, it remains an open

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[5] The offense occurred in early 2015, U.S. Br. Opp. 2; petitioner's first trial was in late 2015, and his second trial was in early 2016; the Ninth Circuit issued its opinion in mid-2020; and petitioner filed his petition for writ of certiorari in mid-2021. U.S. Br. Opp. 1-2. According to the Bureau of Prisons website, petitioner is scheduled to be released from a 144-month sentence of imprisonment in June 2025.

question whether a Hobbs Act conviction for a local robbery of an individual may be based on such a "data-transmission theory." *See Luong*, 965 F.3d at 983 (declining to rely on theory). Several circuits have declined to extend the Hobbs Act to local robberies of individuals based solely on an interstate communication during the robbery, where the robbery itself has no effect on interstate commerce. In addition, even if the government were to present this "traveling electrons" theory in future Internet-facilitated robbery cases, a jury might reject such an argument, leaving trial courts to decide how to instruct jurors on whether a mere potential theoretical effect on commerce, like that in this case, is sufficient. In short, this case remains an ideal vehicle to resolve the recurring issues related both to the scope of *Taylor* and the Hobbs Act's application to local robberies of individuals.

CONCLUSION

For the reasons above and in Mr. Luong's petition, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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September 21, 2021

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