No. 21-____

IN THE

Supreme Court of the United States

TRAVIS CROFT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Fourth Circuit erred in concluding that a conviction for South Carolina carjacking, S.C. Code § 16-3-1075, is categorically a crime of violence under the force clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), where the state carjacking statute, on its face, criminalizes taking a vehicle by "by force and violence or by *intimidation*."

2. Whether the Fourth Circuit, departing from this Court's instructions that the categorical approach focuses on the usual and customary meaning of a statute's plain text, erred in placing improper weight on Petitioner's failure to identify "actual cases" demonstrating nonviolent applications of South Carolina's carjacking statute—even though the South Carolina statute, on its face, criminalizes acts of "intimidation" that are not necessarily violent.

PARTIES TO THE PROCEEDING

Petitioner is Travis Dequincy Croft.

Respondent is the United States of America.

RELATED PROCEEDINGS

U.S. District Court for the District of South Carolina

Croft v. United States, No. 6:10-CR-01090-JMC, 2019 WL 5157377 (D.S.C. Oct. 15, 2019)

Croft v. United States, No. 6:10-CR-01090-JMC, 2018 WL 4959096 (D.S.C. Oct. 15, 2018)

Croft v. United States, No. 6:10-CR-01090-JMC, 2018 WL 2184397 (D.S.C. May 11, 2018)

U.S. Court of Appeals for the Fourth Circuit

United States v. Croft, 987 F.3d 93 (4th Cir. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The district court's rulings rejecting Petitioner's request for relief under 28 U.S.C. § 2255 are reported at *Croft v. United States*, No. 6:10-CR-01090-JMC, 2019 WL 5157377 (D.S.C. Oct. 15, 2019); *Croft v. United States*, No. 6:10-CR-01090-JMC, 2018 WL 4959096 (D.S.C. Oct. 15, 2018); and *Croft v. United States*, No. 6:10-CR-01090-JMC, 2018 WL 2184397 (D.S.C. May 11, 2018). They are reprinted at Pet. App. 16a-35a.

The Fourth Circuit's ruling affirming the district court is reported at *United States v. Croft*, 987 F.3d 93 (4th Cir. 2021), and reprinted at Pet. App. 1a-15a. The court's denial of Petitioner's *pro se* petition for rehearing *en banc* is reprinted at Pet. App. 40a.

JURISDICTION

The judgment of the Fourth Circuit was entered on January 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves South Carolina's carjacking statute, S.C. Code § 16-3-1075, and the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), which are reprinted at Pet. App. 71a-72a.

INTRODUCTION

This case presents the question whether a conviction under South Carolina's carjacking statute categorically qualifies as a crime of violence under the "force clause" of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i),[1] where the state carjacking statute criminalizes acts of "intimidation" in addition to acts of force and violence, *see* S.C. Code § 16-3-1075. The Fourth Circuit answered this question in the affirmative by focusing on Petitioner's failure to identify "actual cases" in which a defendant was convicted of nonviolent carjacking under South Carolina's statute. But the Fourth Circuit erred in its reasoning and result. The plain text of South Carolina's carjacking statute makes clear that it reaches beyond the physical, violent threats contemplated by ACCA's force clause. And that plain meaning is confirmed by other indicia of statutory meaning, including dictionary definitions and statutory usage in South Carolina and elsewhere. So while the Fourth Circuit placed improper weight on the absence of "actual cases" found in the South Carolina reports, it should have followed this Court's instructions and given effect to the plain and ordinary meaning of South Carolina's carjacking statute.

Petitioner Travis Croft was convicted of carjacking under South Carolina statute, S.C. Code § 16-3-1075.

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[1] The "force clause" provides for a sentencing enhancement for any crime punishable by imprisonment of more than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

The Government relied upon this conviction to obtain a federal sentencing enhancement under ACCA. Petitioner thereafter sought federal habeas relief under 28 U.S.C. § 2255, arguing that his state carjacking conviction did not categorically qualify as a crime of violence under ACCA because carjacking can be accomplished by nonviolent "intimidation." The district court disagreed and denied relief, Pet. App. 26a-35a, and the Fourth Circuit affirmed, Pet. App. 1a-15a. But the Fourth Circuit erred.

To qualify as a predicate offense under ACCA's force clause, a state conviction must have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). As this Court has repeatedly instructed, the match between the state conviction and ACCA's federal enhancement provision must be *categorical*. That is a demanding standard. Under this "categorical approach," if the elements of the state offense, including the minimum conduct necessary to sustain a conviction, are broader than the federal enhancement statute, the state offense is not an ACCA predicate—whatever the nature of the underlying conduct. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990); *Mathis v. United States*, 136 S. Ct. 2243, 2248, 2252-53 (2016) (explaining that the categorical approach comports with ACCA's text, Sixth Amendment principles, and fairness to defendants and efficiency in the courts).

Here, there is no categorical match between South Carolina's carjacking statute and the federal sentencing enhancement set forth by ACCA's force clause. Under ACCA's force clause, the state conviction must

have as an element "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). But South Carolina's carjacking statute is broader because it prohibits taking or attempting to take a motor vehicle "by force and violence *or by intimidation*." S.C. Code § 16-3-1075 (emphasis added). Intimidation, by its plain meaning, encompasses conduct that is not necessarily volent. Nonviolent intimidation can include, for example, coercive pressure of a moral, economic, or social nature. This plain meaning, interpretations by the South Carolina courts of "intimidation" throughout the South Carolina criminal code, and a comparison to other state carjacking laws together demonstrate that "intimidation" is not limited to physical force. And the different *mens rea* requirements in the federal carjacking statute and South Carolina's carjacking statute render the Fourth Circuit's comparison of those statutes in error.

Because carjacking by intimidation plainly encompasses nonviolent conduct, South Carolina carjacking is not categorically a crime of violence under ACCA. In concluding otherwise, the Fourth Circuit committed two fundamental errors.

First, the Fourth Circuit committed a *doctrinal* error by placing improper weight on Petitioner's failure to identify specific cases in which South Carolina's carjacking statute had been applied to nonviolent acts of intimidation. The Fourth Circuit's doctrinal innovation faces a fundamental problem: The plain text of South Carolina's carjacking statute encompasses nonviolent intimidation on its own terms. By placing im-

proper weight on the absence of "actual cases" applying the plain text of South Carolina's statute in this way, the Fourth Circuit departed from this Court's clear instructions that federal courts applying the categorical approach should apply the plain text of statutory provisions as they are written—*Mellouli v. Lynch*, 575 U.S. 798, 809-812 (2015)—and created a conflict in authority with the majority of circuits to have addressed the relevance of "actual cases" to the categorical approach analysis, *United States v. Baldon*, 956 F.3d 1115, 1124 (9th Cir. 2020).

Second, compounding its doctrinal error, the Fourth Circuit committed an *operational* error in concluding that Petitioner's South Carolina carjacking conviction categorically qualified as a crime of violence under ACCA. The plain meaning of "intimidation" in South Carolina's statute does not require violent physical force. South Carolina courts have interpreted "intimidation" elsewhere in the criminal code not to require violent physical force. And other jurisdictions have concluded that similar carjacking statutes requiring force, violence, *or* intimidation are not categorically crimes of violence under ACCA.

STATEMENT

Petitioner Travis Dequincy Croft brought suit under 28 U.S.C. § 2255, arguing that the district court erred in applying a 15-year enhancement for his crime of distributing drugs and using a firearm. Petitioner has three prior convictions that the sentencing court determined were predicate offenses under ACCA, 18 U.S.C. § 924(e): two drug offenses and one South Carolina carjacking charge. Petitioner's § 2255 suit challenged whether his carjacking conviction can serve as

a predicate offense under ACCA because the crime does not meet ACCA's definition of a "violent felony."

A. Factual background

On March 1, 2003, Petitioner was arrested for carjacking in violation of S.C. Code § 16-3-1075. *See* Pet. App. 3a, 16a-17a.[2] The indictment states, "Travis Dequincy Croft did in Greenville County…take or attempt to take a motor vehicle, to wit: a 1988 Chevrolet from Tanesha Wilson by force, and violence or intimidation while, Tanesha Wilson, was operating and/or in the said vehicle." *Id.* at 42a. Petitioner pled guilty to the crime and was sentenced to thirty (30) months in prison.[3] *Id.* at 44a.

In March 2010, Petitioner was indicted for various drug distribution crimes and for possessing a firearm. *Id*. at 46a-48a. Petitioner pled guilty to distribution of crack cocaine and to being a felon in possession of a firearm. *Id*. at 49a-58a. The United States Probation Office's Presentence Investigation Report ("PSR") asserted that Petitioner was an armed career criminal based two prior convictions of distributing crack cocaine and the 2003 South Carolina carjacking conviction. *Id*. at 3a. The district court sentenced Petitioner to 188 months of imprisonment. *Id*. at 3a, 17a, 60a. Petitioner appealed and was resentenced on October

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[2] The documents counsel located from the Greenville County Court are reprinted at Pet. App. 41a-48a.

[3] Counsel for Petitioner attempted to obtain information regarding the set of facts to which Petitioner pled guilty. Unfortunately, the Greenville County Court is no longer in possession of those records.

9, 2012, receiving the same sentence of 188 months of imprisonment. *Id.* at 17a, 27a. The resentencing court affirmed Petitioner's sentence enhancement as an armed career criminal, as did the Fourth Circuit on appeal. *Id.* at 36a-39a.

B. Procedural history

On January 7, 2016, Petitioner filed a *pro se* motion to vacate his sentence pursuant to 28 U.S.C. § 2255, arguing that his carjacking offense did not qualify as a predicate offense under ACCA. Pet. App. 17a, 27a. The government moved for summary judgment. *Id.* at 17a. Though the district court denied Petitioner's motion to vacate (thus finding the Government's motion for summary judgment to be moot), the court emphasized that "[i]t is not a settled point of law that the South Carolina carjacking statute satisfies the physical force requirements in [the Fourth Circuit's precedential case], and reasonable jurists could find Petitioner's constitutional claim debatable." *Id.* at 35a. Petitioner then filed separate motions for reconsideration, which were both denied. *Id.* at 16a-20a, 21a-25a. Petitioner then appealed.

The Fourth Circuit affirmed. In the court's view, it was critical that Petitioner had not identified any "actual cases" applying South Carolina carjacking to nonviolent intimidation. *See* Pet. App. 8a-9a (relying on, *inter alia*, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Although it was "theoretically possible" to violate the statute by nonviolent intimidation, the Fourth Circuit concluded there was no "realistic probability" that this would occur because "no

South Carolina courts have affirmed carjacking convictions that do not involve violence." *Id.* at 8a. It was also critical, in the Fourth Circuit's view, that carjacking was more likely to be associated with violent intimidation than with nonviolent intimidation. *Id*. at 9a. At bottom, the Fourth Circuit concluded that while the plain meaning of "intimidation" could encompass violent and nonviolent intimidation alike, it was simply too unlikely and too theoretical that South Carolina's carjacking statute could be violated by nonviolent intimidation.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for two reasons—both of which raise significant issues of recurring importance.

First, the Fourth Circuit committed a *doctrinal* error by placing improper weight on Petitioner's failure to provide "actual cases" showing nonviolent applications of South Carolina's carjacking statute—despite the fact that the plain text of the statute already covers such applications. That requirement—which strains an already burgeoning circuit split and promises to impact scores of criminal convictions—contradicts this Court's precedent regarding the categorical approach specifically and statutory interpretation more generally. Where the text is plain, it must be given its full effect. Here, because "intimidation" under South Carolina's carjacking statute plainly sweeps in nonviolent conduct, it cannot qualify as a violent felony predicate under ACCA's force clause (which requires a threat of bodily harm).

Second, compounding the errors stemming from its doctrinal deviation, the Fourth Circuit committed an *operational* error by concluding, despite the plain meaning of South Carolina's carjacking statute, that Petitioner had committed three ACCA predicate offenses. That conclusion ignores the plain meaning of South Carolina's carjacking statute and South Carolina judicial interpretations of "intimidation" throughout the criminal code. It, too, should be corrected.

These significant errors justify the Court's intervention. They undermine the efficient, uniform, and fair application of the law that the categorical approach has long been understood to serve. *See, e.g.*, *Mathis*, 136 S. Ct. at 2252-53. This petition presents an opportunity to clarify the doctrine in an area of significant, recurring importance and should be granted.

I. THE FOURTH CIRCUIT ERRED IN PLACING IMPROPER WEIGHT ON PETITIONER'S FAILURE TO IDENTIFY "ACTUAL CASES" OF CARJACKING COMMITTED THROUGH NON-VIOLENT INTIMIDATION

This case begins and ends with the plain text of South Carolina's carjacking statute. To support a sentencing enhancement under ACCA's force clause, a crime must have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). But South Carolina's carjacking statute—which prohibits taking or attempting to take a motor vehicle from another person "by force and violence or by intimidation" while the person is in or operating the vehicle—goes

beyond ACCA's force clause because it prohibits carjacking by mere "intimidation." S.C. Code § 16-3-1075. Intimidation, on its face, can include violent and nonviolent intimidation such as threats of embarrassment or reputational harm, economic threats, or threats to prosecute. *See, e.g., State v. Hamilton*, 276 S.E.2d 784, 786 (S.C. 1981). This usual and customary understanding of "intimidation"—exemplified most directly by considering the difference between the unqualified "intimidation" and the qualified "nonviolent intimidation"—comports with the use of intimidation in lay and legal dictionaries, *see Intimidate*, Webster's Dictionary;[4] *Intimidation*, Black's Law Dictionary (11th Ed. 2019), and throughout most of South Carolina's broader statutory code, *see, e.g.*, *State v. Richardson*, 595 S.E.2d 858, 861 (S.C. Ct. App. 2004) (interpreting S.C. Code § 16-3-654). And while "intimidation" in the carjacking context might ordinarily be expected to emerge in a violent context, the plain text of the statute—which speaks simply of "intimidation"—sweeps in whatever constitutes intimidation, violent or nonviolent. *See, e.g.*, *Smith v. United States*, 508 U.S. 223 (1993); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

The categorical approach limits its analysis to the usual and customary meaning of the statute's plain text to determine whether the elements of the state offense are broader than the federal enhancement statute. Here, the Fourth Circuit erred by expanding beyond that approach, faulting Petitioner for failing

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[4] https://www.merriam-webster.com/dictionary/intimidation.

to identify "actual cases" applying the South Carolina carjacking statute to nonviolent acts of intimidation. Indeed, while the Fourth Circuit acknowledged that the text the statute could theoretically encompass nonviolent intimidation, it held that the statute should not be read to do so because, *inter alia*, there were no "actual cases" applying the statute in that way and no "realistic probability" that it would be applied that way in the future. *See* Pet. App. 8a-9a. But it is of no moment that South Carolina courts have not addressed whether "intimidation" under the carjacking statute includes or excludes nonviolent forms of intimidation. *See, e.g., id.* at 35a (noting that this "is not a settled point of law" under in South Carolina). What matters here—indeed, under this Court's categorical approach, what is dispositive here—is that the uncontradicted plain text of South Carolina's carjacking statute reaches acts of "intimidation" that are not necessarily violent. Under that plain text, Petitioner's carjacking conviction cannot qualify as a violent felony predicate under ACCA's force clause. Ultimately, the Fourth Circuit's doctrinal deviation damages the law, further divides the lower courts, and promises problems for scores of criminal sentencing enhancements. It should be reviewed and rejected.

A. This Court's precedents establish that where "the elements of [the defendant's] crime of conviction . . . cover a greater swath of conduct than the elements of the relevant ACCA offense," that disparity "resolves th[e] case." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). There is no need to look beyond the plain-text comparison—and no need to identify

"actual cases" where that plain text speaks. *See id.* (holding that state statute was overbroad based solely on textual comparison); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (same; petitioner "needs no more to prevail"); *Mellouli v. Lynch*, 575 U.S. 798, 809-812 (2015) (same); *Descamps v. United States*, 570 U.S. 254, 264-65 (2013) (same).

Mellouli affirms this principle. In that case, this Court considered whether a conviction under a Kansas statute was categorically a conviction "relating to a controlled substance (as defined in [federal law])." 575 U.S. at 801. The state statute expressly encompassed several non-federally-controlled substances. Nevertheless, the Government, endorsing the reasoning of the decision below, argued that the state statute was not actually broader than its federal counterpart because the petitioner could identify "no Kansas paraphernalia prosecutions involving non-federally-controlled substances." U.S. Br. 39-40 n.6, *Mellouli v. Lynch*, 575 U.S. 798 (2015) (No. 13-1034). In the Government's view, therefore, "there [was] little more than a 'theoretical possibility' that a conviction under Kansas law will not involve a controlled substance as defined [under its federal counterpart]." *Id.* (quoting *Mellouli v. Holder*, 719 F.3d 995, 997 (8th Cir. 2013)).

This Court rejected that argument. Observing that the text of the state law "was not confined to federally controlled substances," this Court held that the state law was broader than its federal counterpart. *Mellouli*, 575 U.S. at 808. Because the plain text of the state law reached broader than the plain text of

the federal provision, the state offense was not a categorical match—regardless of whether or not 'actual cases' further confirmed that plain-text reading. *See id.* at 811 (reasoning that the categorical approach did not allow the Government to "reach[] state-court convictions . . . in which no controlled substance as defined [in the federal code] figure[d] as an element of the offense").

This plain-text methodology is consistent not only with the categorical approach specifically, but with this Court's broader jurisprudence—which has repeatedly affirmed that the plain meaning of statutes controls. One representative example comes from this Court's decision in *United States v. Stevens*, 559 U.S. 460 (2010). There, a federal statute broadly criminalized any depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Id.* at 465 (quoting 18 U.S.C. § 48(c)). The defendant claimed that the statute violated the First Amendment's overbreadth doctrine, which requires a showing even more demanding than the categorical approach—namely, that "a substantial number of [the challenged statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). This Court ruled in favor of the defendant and deemed immaterial the Government's representation that it "neither has brought nor will bring a prosecution" based on any protected speech. *Id.* at 480 (quoting Government's reply brief). Whatever actual persecutions might exist or emerge, the Court reasoned, it was enough that a "natural

reading" of the statute encompassed such speech. *Id.* at 480-81. That textualist commitment—prioritizing the textual meaning of a statute over expected applications or quintessential examples—is a well-established feature of this Court's jurisprudence. *See, e.g.*, *Smith v. United States*, 508 U.S. 223 (1993) (concluding that a criminal prohibition on "using" a firearm in connection with certain drug offenses encompassed both standard, traditional uses (e.g., using the firearm as a weapon) as well as nonstandard, unexpected uses (e.g., using the firearm as barter for drug paraphernalia); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *compare S.C. Pub. Interest Found. v. Courson*, 801 S.E.2d 185, 187 (S.C. Ct. App. 2017) (affirming South Carolina's commitment to the "plain language" and the "usual and customary meaning" of a statute).

B. There is no doubt that the plain meaning of "intimidation" in South Carolina's carjacking statute is facially broader than the conduct encompassed in ACCA's force clause. The force clause requires a violent threat directed against the person of another, but South Carolina's carjacking statute prohibits acts of "intimidation" that do not necessarily have to be violent in nature (or directed against the person of another). *See infra* at 25-38. But despite the plain meaning of South Carolina's carjacking statute, the Fourth Circuit declined to hold that it reached farther than ACCA—in large part because Petitioner had failed to identify "actual cases" affirming such nonviolent applications. Pet. App. 8a-9a. The court found that because "no South Carolina courts have affirmed carjacking convictions that do not involve violence or the threat of violent force," there was no "realistic

probability" that South Carolina's carjacking statute would be applied to nonviolent conduct. *Id.* Instead, such applications would reflect mere "legal imagination." *Id.* While this absence of case law was "not determinative," it "militate[d] against [Petitioner's] arguments." *Id.*

To support its position, the Fourth Circuit relied on this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). But the Fourth Circuit's reliance on *Duenas-Alvarez* was mistaken. In *Duenas-Alvarez*, this Court reasoned that when a party arguing that a state law is overbroad bases his argument on *something other than statutory language*, he must show a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside [its federal counterpart]." *Id.* at 193. To make that showing, the Court explained, the party must identify "cases in which the state courts" have actually applied the state law in a manner beyond that articulated by its federal counterpart. *Id.* Mere resort to "legal imagination" will not do—the party must provide either text or cases. *Id.*

But as this Court has confirmed and the vast majority of the courts of appeals have held, *Duenas-Alvarez* does not require "actual cases" where, as here, a state statute of conviction itself is facially broader than its federal counterpart. Where "a state statute explicitly defines a crime more broadly than [its federal counterpart], *no 'legal imagination,' is required* to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the [federal] definition of the crime. The state statute's

greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (citation omitted); *accord Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57, 63-64 (2d Cir. 2018); *Singh v. U.S. Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016); *United States v. Henriquez*, 757 F.3d 144 (4th Cir. 2014); *Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007); *Vassell v. U.S. Att'y Gen.*, 839 F.3d 1352, 1362 (11th Cir. 2016); *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013); *but see Vasquez v. Sessions*, 885 F.3d 862, 872-74 (5th Cir. 2018), *cert. denied*, 138 S. Ct. 2697 (2018); *see also* Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 Geo. Mason L. Rev. 625 (2011) (collecting cases and documenting apparent circuit split following *Duenas-Alvarez*). Indeed, as discussed above, that is the very point of *Mellouli*—where the plain text resolves the categorical analysis, that is the end of the analysis. *See supra* 12-13 (discussing *Mellouli*, 575 U.S. at 809-812 (2015)).

For that very reason, the Ninth Circuit—tasked to analyze whether a state carjacking statute was a crime of violence for purposes of the Sentencing Guidelines—explicitly concluded that defendant did not need to produce actual cases showing a particular, overbroad application of the state carjacking statute. *United States v. Baldon*, 956 F.3d 1115, 1124 (9th Cir. 2020). In the Ninth Circuit's view, it was enough that the state statute "explicitly defines carjacking more broadly than [the federal Sentencing Guidelines] by not limiting fear only to persons." *Id.*; *see also id.*

(confirming that, to satisfy the *Duenas-Alvarez* doctrine, a defendant can either produce actual cases or show that a statute explicitly defines a crime in an overbroad manner—and emphasizing that these "two paths" are *alternative* means of satisfying *Duenas-Alvarez*).

In this case, which arises under ACCA's force clause, no South Carolina court has suggested that South Carolina's carjacking statute does not mean what it says: The statute criminalizes taking a car "by force and violence *or by intimidation*." S.C. Code § 16-3-1075 (emphasis added). And the possibility that an individual could commit a carjacking through non-violent intimidation is hardly a speculative machination: South Carolina courts have recognized, for example, that "intimidation" in several other criminal contexts can be non-violent. *See infra* at 30-35. The text of South Carolina's carjacking statute speaks for itself. Any attempt to apply a reported-case requirement here would "wrench[] the Supreme Court's language in *Duenas-Alvarez* from its context." *Hylton*, 897 F.3d at 64 (internal quotation omitted).

D. Lest there be any doubt,[5] conducting the categorical inquiry against the plain text of South Carolina's statute is essential here for at least two reasons

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[5] As discussed, the best interpretation of *Duenas-Alvarez*, read in context, is that it does not impose any "actual cases" requirement where, as here, the text of the statute is plain. To the extent *Duenas-Alvarez* is ambiguous or has unclear application here, the instructions and principles underlying the Supreme Court's categorial-approach doctrine specifically and its broader jurisprudence more generally counsel interpreting *Duenas-Alvarez* to impose such a requirement. *See, e.g.*, *Free Enter. Fund v.*

rooted in the principles served by the categorical approach. *See Mathis*, 136 S. Ct. at 2248, 2252-53 (explaining that the categorical approach, *inter alia*, ensures fairness for defendants and protection for Sixth Amendment values).

1. First, a plain-text comparison is necessary to ensure the "efficiency, fairness, and predictability" that the categorical approach exists to serve. *Mellouli*, 575 U.S. at 806; *see Mathis*, 136 S. Ct. at 2252-53 (explaining that one justification for the categorical approach is that it "avoids unfairness to defendants"). The categorical approach, which properly focuses on the plain text of the state statute, *see Mellouli*, 575 U.S. at 809-812, advances those values "by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe v. Holder*, 569 U.S. 184, 200-01 (2013); *see also Taylor*, 495 U.S. at 601 (categorial approach is designed to avoid "practical difficulties and potential unfairness"). As a result, this Court has consistently rejected conceptions of the categorical approach that would require sentencing courts, "[i]n case after case, . . . to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction,

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Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). In any event, the ambiguity in *Duenas-Alvarez* and the apparent confusion in at least some circuits suggest that, at the very least, this is an important and divisive area of the law that would benefit from this Court's clarification. *See, e.g., Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting).

satisfy an element of the [federal counterpart offense]." *Descamps*, 570 U.S. at 270.

The problems with departing from this Court's plain-text, elements-based categorical approach are well understood where the Government seeks to require a defendant to make showings about his own conviction. But important difficulties—and perhaps greater ones—would arise if defendants claiming the overbreadth of state statutes were always required to make showings (and sentencing courts to make findings and conclusions) regarding the facts or theories of other individuals' past convictions.

a. One problem is that even if "actual cases" supporting a defendant's overbreadth argument exist, it is often famously difficult and costly to locate relevant state conviction or prosecution materials—which are frequently unavailable, unreported, or ambiguous.

To begin, many state criminal convictions do not generate a report or opinion that explains the scope of the state law at issue. Some "ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Such cases rarely, if ever, generate reported decisions concerning the scope of substantive criminal law. Nor do the vast majority of other convictions—either because there is never an appeal or the state courts decline to write an opinion. As a result, a "lack of published cases or appellate-level cases does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1137 n.10 (9th Cir. 2010); *see also Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) ("[W]hile finding a case on point can be telling, not finding a case on point is much less so."); *cf. Hart v. Massanari*, 266 F.3d 1155, 1166 (9th Cir.

2001) (Kozinski, J.) (noting that reporting problems are nothing new).

Additionally, it is not feasible in the vast majority of states to search for or identify records of state indictments or conviction records. *See* Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, Improving Access to and Integrity of Criminal History Records 9 (2005) (discussing the "extensive problem" of state criminal record databases lacking information regarding disposition). For many states, for example, Westlaw does not provide access to any state criminal records. For others, coverage is often limited to specific counties. Even then, criminal indictments and other records will often simply parrot the elements of the statute. *See Mathis*, 136 S. Ct. at 2257 n.7.

And the only other "search" option—word of mouth—is plainly inadequate. Public defenders and other criminal defense lawyers often have limited networks at their disposal. But even with extensive resources, it is extremely difficult to ascertain whether a state has applied a criminal statute in any particular manner. Several years of a defendant's liberty should not hang on the random feedback a listserv inquiry may generate. All the more so where—as is often the case under ACCA—the defense lawyer (and the prosecutor and judge) would need to make such inquiries respecting a far-flung state, with laws and practices that might be totally foreign from the one in which the current proceeding is taking place. In short, even where "actual cases" exist, they are often practically impossible to locate.

b. Another problem, apart from the practical challenges of identifying relevant "actual cases," is that the plain text of a statute may be facially overbroad, but an "actual case" affirming such overbroad applications may not yet exist.

Under the categorical approach, a federal court—tasked to apply state law—must give the state statute its full and plain meaning, at least in the absence of contrary authority instructing otherwise (such as, for example, an authoritative state court decision that resolves the issue, one way or another). Where, as here, state case law has not resolved the issue, the federal court must give full effect to the statute's plain meaning—even if no "actual case" has yet had occasion to consider the full scope of the statute's reach. An overly narrow interpretation of the state law, no less than an overly broad one, fails to fully respect the federal court's obligation to apply the state law it has been handed. Requiring a defendant to identify yet-to-be-decided "actual cases," where the plain text of the state statute demonstrates its overbreadth and no state case law presently resolves the issue therefore runs afoul of an important principle of statutory interpretation—and in the criminal context, no less, where the importance of giving the defendant the benefit of the text is at its most compelling.

But placing improper weight on the absence of "actual cases" affirming what a state statute plainly means is not merely an abstract doctrinal problem—it also risks creating puzzling anomalies that undermine the efficiency, fairness, and predictability that the categorical approach exists to serve. As an initial matter, it creates the odd result of tethering the

meaning of the state statute to what the state courts have so far said about it (in essence, "capping" the interpretation to how far the state courts have gone, even if the state courts have left the issue open), rather than to the federal courts' best understanding of what state law currently requires. Moreover, it also creates the unfair result that two defendants, both convicted under the same state statute which has remained unamended, would receive different treatment if an "actual case" from the state courts finally weighed in on the full scope of the state statute before one defendant's categorical approach challenge but after another's.

An example illustrates the problems with requiring an "actual case" (or placing improper weight on the absence of "actual cases") before affirming a statute's plain meaning. Assume that a non-divisible state statute prohibits "burglarizing" a "boat or house," and a federal sentencing enhancement applies to "burglarizing" a "house," but that, in this state, no "actual case" has yet affirmed a conviction under this statute for burglarizing a "boat." In this example, a federal court could still conclude that the state statute was overbroad—even in the absence of an "actual case" affirming application of the state statute to a "boat" burglary—because the state statute, on its face, plainly reaches such boat burglaries. Any contrary result would be senseless—requiring federal courts to decline to give a state statute its full weight merely because a state court has not yet weighed in, and putting the content of the state variable in the categorical analysis at the mercy of the fortune of what state cases happen to be decided at the

time. That is not the law—and certainly is not consistent with the efficiency, fairness, and predictability called for by the categorical approach.

2. Second, a plain-text comparison is also necessary to safeguard the Sixth Amendment concerns underlying the categorical approach. The Sixth Amendment's jury-trial guarantee forbids imposing punishment based on facts that a prior jury did not "necessarily" find. *Shepard v. United States*, 544 U.S. 13, 14 (2005); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000); *compare Shephard*, 544 U.S. at 28 (Thomas, J., concurring in part and concurring in the judgment) (casting doubt on *Almendarez-Torres v. United States*, 523 U.S. 224 (1999), and suggesting that, "in an appropriate case," the Court should consider whether ACCA is unconstitutional whenever it exposes a defendant to a higher sentence based on the fact of his prior conviction). And a jury verdict (or a guilty plea) establishes nothing beyond the defendant's past commission of the elements of the charged offense. *Shepard*, 544 U.S. at 14. Accordingly, the question under the categorical approach is whether the elements of the prior state offense are the same as or narrower than the elements of the offense articulated by the federal enhancement provision. *Descamps*, 570 U.S. at 257.

The answer to that question comes from the "statutory definitions" of the prior offense. *Descamps*, 570 U.S. at 261 (quoting *Taylor*, 495 U.S. at 600). The statutory elements—set out by the statute's plain text—determine what a jury must have necessarily agreed upon (or a defendant must necessarily have

pleaded guilty to) "as a legal matter." *Mathis*, 136 S. Ct. at 2255 n.6; *see also Descamps*, 570 U.S. at 261.

The upshot is this: When the plain text of a state crime defines an element or an offense more expansively than its federal counterpart, it is irrelevant under the categorical approach whether there is proof that the state statute has been applied in such an overbroad manner. Imagine, for example, that a state "carjacking" statute applied to an unlawfully taking a vehicle "with or without a weapon," but that a federal enhancement statute only applied to taking a vehicle "with a weapon." Even if there were no evidence that any person had ever been charged for taking a vehicle "without a weapon," there would be no Sixth-Amendment-compliant way to know whether a jury convicting under that statute necessarily agreed as a legal matter that a vehicle was unlawfully taken "with a weapon."

That reflects what happened in *Mathis*. There, the parties and this Court agreed that the Iowa burglary statute "cover[ed] more conduct" than its federal counterpart, which required unlawful entry into a "building or other structure," because the Iowa statute, on its face, extended to "any building, structure, [or] land, water, or air vehicle." *Mathis*, 136 S. Ct. at 2250 (quotations omitted). Neither party, nor this Court, thought that a relevant area of analysis was whether anyone had actually ever been charged in Iowa for burglary for breaking into a car, boat, or airplane. It was simply taken as given that the statute was overbroad because the plain text of the statute was overbroad.

The same is true here. The plain text of the South Carolina carjacking statute criminalizes taking or attempting to take a motor vehicle "by intimidation." S.C. Code § 16-3-1075(B). There is simply no way to know from the bare fact of a conviction under this statute whether someone was convicted of intimidation by threat of violence or by some other form of intimidation. In light of that reality, the categorical approach demands reversal of the decision below.

II. THE FOURTH CIRCUIT ERRED IN CONCLUDING THAT PETITIONER COMMITTED THREE ACCA PREDICATE OFFENSES.

The Fourth Circuit's doctrinal error is compounded by its *operational* error here. After placing improper weight on the absence of "actual cases" affirming nonviolent applications of South Carolina's carjacking statute, the Fourth Circuit—continuing its failure to give full effect to the plain text of South Carolina's carjacking statute—committed an operational error by concluding that South Carolina's carjacking statute is categorically a violent felony under ACCA and, thus, that Petitioner committed three ACCA predicate offenses. Under ACCA, a violent felony requires the use of violent, physical force. But South Carolina's carjacking statute sweeps in *non-violent* conduct by criminalizing conduct accomplished "by intimidation." S.C. Code § 16-3-1075(B). The plain meaning of "intimidation," coupled with its interpretation in South Carolina criminal case law and other similar state carjacking statutes, shows that "intimidation" does not require violent, physical force. Thus,

under the categorical approach, South Carolina's carjacking offense is not a violent felony.

Petitioner is not an armed career criminal under ACCA, 18 U.S.C. § 924(e), because he has not committed three predicate offenses. As relevant here, a state offense must constitute a violent felony to be a predicate offense under ACCA. *Id.* § 924(e)(1). But carjacking in South Carolina does not meet the definition of a violent felony under ACCA's "force clause" because it does not require violent, physical force. The force clause requires that an offense "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). This Court has consistently required violent, physical force to satisfy that requirement. Indeed, as this Court held in *Johnson v. United States*, 559 U.S. 133 (2010), "'physical force' means violent force—that is, force capable of causing physical pain or injury to another person," *id.* at 140. This Court further explained that violent force requires more than "the merest touching," or even touching that causes "bodily-injury," as might suffice for common law battery. *Id.* at 141. And in *Stokeling v. United States*, 139 S. Ct. 544 (2019), this Court reaffirmed that "physical force" means "the force necessary to overcome a victim's physical resistance," which is "inherently violent" force, *id.* at 553.

Further, this Court has explained that "a state crime cannot qualify as an ACCA predicate if its elements are broader than" those of a listed federal offense. *Mathis v. United States*, 136 S. Ct. 2243, 2251

(2016). This "categorical approach"[6] applies when, as here, a state statute contains a single indivisible set of elements. *See, e.g.*, *id*. at 2248. South Carolina's carjacking statute reads, in relevant part, "[a] person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force and violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle." S.C. Code § 16-3-1075(B).[7] As the Fourth Circuit properly recognized, Pet. App. 6a, force, violence, and intimidation are a set of alternative methods by which a person can commit carjacking, thus rendering the South Carolina statute indivisible. The categorical approach thus applies.

To apply the categorical approach, courts must "look only to the fact of conviction and the statutory definition of the [] offense" to determine whether the conduct criminalized by the statute, including the most innocent conduct, qualifies as a "crime of violence" under ACCA. *Shepard v. United States*, 544 U.S. 13, 16-17 (2005) (quotation omitted); *see also Mathis*, 136 S. Ct. at 2256-57. Under the South Carolina statute, carjacking is not a violent felony because "intimidation" does not require violent, physical

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[6] Whether a crime is classified as a violent felony is determined by either the "categorical approach," when the statute has an indivisible set of elements, or the "modified categorical approach," for a divisible statute. *See Descamps v. United States*, 570 U.S. 254, 271-72 (2013).

[7] The South Carolina Court of Appeals has interpreted the South Carolina carjacking statute to consist of a single crime with multiple methods for completion, either force and violence or intimidation. *See State v. Elders*, 688 S.E.2d 857, 862 (S.C. 2010).

force. Indeed, the plain meaning of "intimidation" in South Carolina's carjacking statute, other uses of "intimidation" throughout the South Carolina criminal code, and a comparison to other state carjacking laws demonstrate that "intimidation" is not limited to physical force. And meaningful differences between the federal carjacking statute and South Carolina's carjacking statute render the Fourth Circuit's comparison of those statutes in error.

A. The Plain Meaning Of "Intimidation" In South Carolina's Carjacking Statute Does Not Require Physical Force

Absent a definition of "intimidation," which does not appear in South Carolina's carjacking statute, case law, or pattern jury instructions, the court "must look to the usual and customary meaning [] to ascertain the legislature's intent" in determining the definition of a term. *S.C. Pub. Interest Found. v. Courson*, 801 S.E.2d 185, 187 (S.C. Ct. App. 2017); *see also CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 284 (2011) (where a statute does not define a term, courts must "look to the word's ordinary definition"). The usual and customary meaning of "intimidation" reaches far beyond the threat of physical force. Intimidation can include, for example, threats of embarrassment or reputational harm, economic threats, or threats to prosecute. *See, e.g.*, *State v. Hamilton*, 276 S.E.2d 784, 786 (S.C. 1981) (emphasizing that coercion, used interchangeably with intimidation, means "to make a person follow a prescribed and dictated course; to inflict or impose: force one's will on someone." (quotation and alterations omit-

ted)). Petitioner could have been convicted of carjacking by threatening to interfere with the victim's employment, threatening reputational harm to the victim, or threatening to report criminally inculpatory information about the victim to the police. Each of these actions would have intimidated the victim—all without physical force.

This usual and customary understanding of "intimidation" comports with various dictionary definitions. Webster's Dictionary defines "intimidate" as "to make timid or fearful; *especially*: to compel or deter as if by threats; to engage in the crime of intimidating (as a witness, juror, public officer in the performance of his or her duty, or victim of a robbery or other crime)." *Intimidate*, Webster's Dictionary[8] (emphasis in original). And Black's Law Dictionary defines intimidation as "[u]nlawful coercion; extortion." *Intimidation*, Black's Law Dictionary (11th Ed. 2019). Coercion, in turn, is defined as "[c]ompulsion of a free agent *by physical, moral, or economic force* or threat of physical force." *Coercion*, Black's Law Dictionary (11th Ed. 2019) (emphasis added). South Carolina courts have adopted this very definition, noting that moral or economic intimidation can suffice for criminal intimidation to commit sexual assault. *See, e.g., State v. Richardson*, 595 S.E.2d 858, 861 (S.C. Ct. App. 2004) (stating that, in a sexual battery case, "'force' and 'coercion' as used in [S.C. Code §] 16-3-654 have 'basically the same meaning,'" and that a jury

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[8] https://www.merriam-webster.com/dictionary/intimidation.

could infer that the defendant used coercion to accomplish the sexual battery economic and religious based threats).

B. South Carolina Courts Have Interpreted "Intimidation" Throughout The Criminal Code To Encompass Non-Violent Conduct

South Carolina courts interpreting "intimidation" throughout the criminal code have consistently held that the term encompasses far more than physical force. For instance, criminal sexual conduct can be completed by "force or *coercion*," which South Carolina law uses interchangeably with intimidation.[9] S.C. Code § 16-3-654(1)(a) (emphasis added). In *State v. Richardson*, 595 S.E.2d 858 (S.C. Ct. App. 2004), the South Carolina Court of Appeals affirmed a criminal sexual assault conviction that did not involve physical force or coercion; rather, the defendant pastor coerced the victim by "present[ing] himself as

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[9] *See Hamilton*, 276 S.E.2d at 786 (finding that coercion can be used interchangeably with intimidation, which means "to make a person follow a prescribed and dictated course; to inflict or impose: force one's will on someone." (quotation and alterations omitted)). Despite this precedent, and without explaining its departure, the Fourth Circuit concluded that the criminal sexual conduct statute "does not tell us anything about how the legislature meant to define 'intimidation' in carjacking" because the former uses "coercion" and the latter "intimidation." Pet. App 9a. That conclusion plainly contradicts South Carolina precedent interpreting the words as synonymous.

someone who could provide significant financial assistance to [the victim's] family and her church."[10] *Id.* at 861. The court found that the pastor's "repeated threat to withhold his assistance could have *intimidated* [the victim] to the point of overcoming her will." *Id.* (emphasis added).

South Carolina's witness intimidation statute also encompasses non-violent intimidation. That law makes it a crime to "by threat or force . . . intimidate or impede" enumerated types of persons, including witnesses and judges. S.C. Code § 16-9-340(A)(1). In *State v. Inman*, 720 S.E.2d 31 (S.C. 2011), the South Carolina Supreme Court upheld the witness intimidation conviction of a prosecutor who, upon learning that a defense expert had performed the work of a licensed clinical social without a license, mentioned during *voir dire* possible civil and criminal penalties. That conduct "unequivocally constituted witness intimidation." *Id.* at 44. And in *State v. Preslar*, 613 S.E.2d 381 (S.C. Ct. App. 2005), the court of appeals upheld a witness intimidation conviction based on a series of letters that did not threaten violence but which "made [the victim] very uneasy." *Id.* at 384.[11]

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[10] The court applied the reasoning from the Supreme Court of South Carolina, which had previously stressed that coercion means "to make a person follow a prescribed and dictated course; to inflict or impose: force one's will on someone." *Hamilton*, 276 S.E.2d at 786 (quotation and alterations omitted).

[11] The Fourth Circuit distinguished the witness intimidation statute because it "considers 'intimidate' as the ends, not the means, of the criminal conduct." Pet. App. 9a (citing S.C. Code § 16-9-340(A)(1)). But that does not change the plain meaning

The South Carolina statute prohibiting "unlawful use of a telephone" likewise encompasses non-violent intimidation. That statute deems it "unlawful for a person to . . . (2) threaten in a telephonic communication or any other electronic means an unlawful act with the intent to coerce, intimidate, or harass another person." S.C. Code § 16-17-430(A)(2). In *Chassereau v. Glob.-Sun Pools, Inc.*, 611 S.E.2d 305 (S.C. Ct. App. 2005), the Court of Appeals permitted an intimidation claim where the defendants had made "series of harassing and intimidating telephone calls" to the victim and to her workplace, in which they attempted to "intimidate and harass [the victim]," disclosed "private and personal finances to [the victim's] co-employees," and made "false and defamatory statements about [her] during their conversations with [her] co-employees and supervisor." *Id.* at 630-31. The Supreme Court later affirmed. *Chassereau v. Glob.-Sun Pools, Inc.*, 644 S.E.2d 718 (S.C. 2007).[12]

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of "intimidation." In prohibiting a person "by threat or force to intimidate or impede," the statute criminalizes *intimidation by threat* and *intimidation by force*. In the former, the statute plainly contemplates non-violent intimidation.

[12] The Fourth Circuit distinguished the unlawful use of a telephone statute on the same basis that it distinguished the witness intimidation statute. Pet. App. 9a. Again, the context does not change the plain meaning of "intimidation." The telephone provision prohibits a person to "threaten in a telephonic communication or any other electronic means an unlawful act with the *intent to coerce, intimidate*, or harass another person…." S.C. Code § 16-17-430(A)(2) (emphasis added). But just as intimidation may be non-violent, a person may act with intent to intimidate another by non-violent means.

The Fourth Circuit opined that South Carolina's strong-arm robbery statute undermined these interpretations of "intimidation" because it requires a threat of physical force to meet the element of "putting such person in fear" or "intimidation," *see State v. Rosemond*, 589 S.E.2d 757, 758 (S.C. 2003). But because intimidation *regularly* applies to non-violent criminal conduct, *Rosemond* cannot mean that "intimidation" means violent, physical force *throughout* the criminal code.[13] In addition, the meaning of "intimidation" in the strong-arm robbery statute is not as "compelling" as the Fourth Circuit found, Pet. App. 11a, because robbery is a common law offense subject to different interpretive

rules than a statutory offense. The use of "intimidation" in South Carolina's carjacking statute should be read in conjunction with its use in other statutes in South Carolina's criminal code rather than in conjunction with its meaning in strong-arm robbery. *Cf. Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568 (1995) (stressing that terms used throughout the Securities Act of 1933 should be read the same). And while "carjacking is a type of robbery," Pet. App. 11a (citing *Jones v. United States*, 526 U.S. 227, 235 (1999)), the South Carolina legislature distanced those offenses

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[13] The Fourth Circuit has applied the same rationale to assault in South Carolina, explaining that "[n]otwithstanding the existence of some tension between the definitions of 'assault' provided by the South Carolina courts, we are satisfied that an assault under South Carolina can be committed without the use, attempted use, or threatened use of violent physical force." *United States v. Jones*, 914 F.3d 893, 902-03 (4th Cir. 2019).

by choosing not use the term "robbery" in its carjacking statute. That choice must be read as deliberate. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The analysis in *Rosemond* is thus inapplicable here.

Finally, because South Carolina courts, statutes, and jury instructions have not defined "intimidation" in the carjacking context, the Court must apply the plain meaning of "intimidation." With strong-arm robbery, in contrast, *Rosemond*'s interpretation of the statute bound the Fourth Circuit's determination that that crime is a violent felony under ACCA. *See United States v. Doctor*, 842 F.3d 306, 312 (4th Cir. 2006); *see also Johnson*, 559 U.S. at 138 (finding that the Supreme Court was bound by the state's interpretation of the state robbery statute).

C. South Carolina's Carjacking Statute Resembles Those In Other Jurisdictions That Courts Have Declined To Interpret As ACCA Predicate Offenses

Multiple other jurisdictions support the interpretation that "intimidation" in state carjacking statutes does not require violent, physical force. Those jurisdictions have held that state level carjacking statutes are non-violent felonies when the crimes can be completed by intimidation, and this Court should rule similarly.

In *Shropshire v. United States*, the district court found that an offense under Tennessee's carjacking statute, which closely resembles South Carolina's carjacking statute, was not categorically a crime of violence. *Shropshire v. United States*, 259 F. Supp. 3d 798, 802 (E.D. Tenn. 2017), *abrogated on other grounds*, 2019 WL 6749537 (E.D. Tenn. Dec. 9, 2019). Tennessee defined carjacking as "the intentional or knowing taking of a motor vehicle from the possession of another by use of: (1) A deadly weapon; or (2) Force or intimidation." *Id.* (quoting Tenn. Code. Ann. § 39-13-404 (2000)). The court, in reaching its decision, relied in part on Tennessee's pattern jury instructions, which defined intimidation as "unlawful coercion, duress; putting in fear." *Id.* at 804. The pattern jury instructions "went on to define 'coercion' as a threat, however communicated, to: '(A) commit any offense; (B) wrongfully accuse any person of any offense; (C) expose any person to hatred, contempt or ridicule; (D) harm the credit or business repute of any person; or (E) take or withhold action as a public servant or cause a public servant to take or withhold action.'" *Id.* at 804-05 (quotation omitted). Because each of these methods of coercion "are capable of commission without the use, attempted use, or threatened use of force capable of causing physical pain or injury, the [c]ourt [could] not hold that Tennessee carjacking by force or intimidation—which by definition includes carjacking by coercion—categorically qualifies as a violent felony under the use-of-physical-force clause." *Id.* at 805.

The district court in *Beazer v. United States*, 360 F. Supp. 3d 1 (D. Mass. 2019), applied similar reason-

ing to interpret "fear" in the Massachusetts carjacking statute, which defines carjacking as conduct where one "with intent to steal a motor vehicle, assaults, confines, maims, or puts any person in fear for the purpose of stealing a motor vehicle." *Id.* at 15 (quoting Mass. Gen. Law ch. 265 § 21A). The court held that the statute criminalized non-violent conduct, in part, because the "putting in fear" element under Massachusetts law does not require violent force. *Id.* at 16.

Here, the Fourth Circuit diverged from these sensible interpretations. The plain meaning of "intimidation" throughout South Carolina's criminal code commands the same application as in *Shropshire* and *Beazer*. The definitions invoked there reflect the usual and customary meaning of intimidation, which includes "coercion" and "putting in fear." These same definitions of "intimidation" are present throughout the South Carolina criminal code. Because intimidation is not inherently violent, carjacking is not a categorically violent felony under ACCA.

D. The Federal Carjacking Statute Meaningfully Differs From South Carolina's

The Fourth Circuit also erred in relying on purported similarities between the federal carjacking statute and South Carolina's statute. It is of no moment that the South Carolina statute was "enacted shortly after the federal one," Pet. App. 13a, because the South Carolina legislature adopted divergent language from that in the federal statute. Like South Carolina's statute, the federal carjacking statute em-

ploys the language "by force and violence or by intimidation." But critically, the federal statute requires "the intent to cause death or serious bodily harm." 18 U.S.C. § 2119. South Carolina's carjacking statute omits this *mens rea* requirement, and this Court must "respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019). Without the intent requirement, nothing in the plain meaning of "intimidation" requires violent, physical force. And although federal courts have "uniformly understood the 'by force and violence or by intimidation' phrase" to require the use, threat, or attempt of force, Pet. App. 13a, interpreting that phrase within the context of the federal statute's *mens rea* requirement is meaningfully different than interpreting the plain meaning of "intimidation" without it.

III. PETITIONER IS ENTITLED TO A REDUCED SENTENCE BECAUSE HE HAS ONLY COMMITTED TWO PREDICATE OFFENSES

Because carjacking under South Carolina law is not a crime of violence, Petitioner is entitled to relief because he is not an armed career criminal under ACCA. This Court found in *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), that the Court's holding in *Johnson v. United States*, 576 U.S. 591 (2015), established a new rule that new interpretations of predicate findings apply retroactively on collateral review. Petitioner is thus entitled to a reduced sentence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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