No. _____

In the Supreme Court of the United States

CONSTANTIN CHEESE, ANDRE BARNABY, BRANDON DARBY, ANTONIO DAVIS, AVERY MITCHELL, NAHJUAN PERRY, PIERRE RAYMOND, JAMES ROBERSON, AND SHAMEL SIMPKINS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

NICOLAS BOURTIN
Counsel of Record
AMANDA SHAMI
TREVOR A. CHENOWETH
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
bourtinn@sullcrom.com

Counsel for Petitioner Constantin Cheese

[Additional parties and counsel listed on signature page]

QUESTION PRESENTED

The question presented here is identical to the question presented in *United States* v. *Taylor*, No. 20-1459, in which this Court granted certiorari on July 2, 2021: Whether attempted robbery under the Hobbs Act, 18 U.S.C. § 1951, qualifies as a "crime of violence," meaning that it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," *id.* § 924(c)(3)(A).

PARTIES TO THE PROCEEDING

Petitioners are Constantin Cheese, Andre Barnaby, Brandon Darby, Antonio Davis, Avery Mitchell, Nahjuan Perry, Pierre Raymond, James Roberson, and Shamel Simpkins.

Respondent is the United States of America.

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

United States v. *Hytmiah, et al.*, No. 18 Cr. 33 (NGG) (Feb. 12, 2020)

United States Court of Appeals (2d Cir.):

United States v. *Hytmiah, et al.*, No. 20-923 (June 28, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Constantin Cheese, joined by his co-petitioners Andre Barnaby, Brandon Darby, Antonio Davis, Avery Mitchell, Nahjuan Perry, Pierre Raymond, James Roberson, and Shamel Simpkins, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (App. 1a–4a) is available at 849 F. App'x. 19 (2d Cir. June 7, 2021). The district court's decision (App. 5a–23a) is not reported, but is available at 2020 WL 705217.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2021. The jurisdiction of this Court is invoked under 28 § U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 18 U.S.C. §§ 924(c) and 1951 are reproduced in the appendix (App. 24a–29a).

INTRODUCTION

This case involves an acknowledged circuit conflict over whether attempted Hobbs Act robbery, 18 U.S.C. § 1951, categorically constitutes a "crime of violence" for purposes of enhanced sentencing under 18 U.S.C. § 924(c). This Court has already granted certiorari to resolve this conflict, *see United States* v. *Taylor*,

No. 20-1459 (July 2, 2021), and petitioners respectfully request that the Court hold this petition pending its resolution of the question presented in *Taylor*.

Contrary to the Fourth Circuit, the Second Circuit here followed the Seventh, Ninth, and Eleventh Circuits in holding that attempted Hobbs Act robbery is a "crime of violence" as defined by 18 U.S.C. § 924(c)(3)(A) because a *completed* Hobbs Act robbery is such a crime. The Fourth Circuit in *Taylor* expressly disagreed, instead holding instead that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the categorical approach." *Taylor*, 979 F.3d at 208. The Fourth Circuit's holding is correct. This Court should affirm the Fourth Circuit's holding in *Taylor*, then grant, vacate, and remand this petition for proceedings consistent with such a ruling.

Determining whether an offense is a crime of violence under § 924(c)(3)(A) requires application of the categorical approach, established in *Taylor* v. *United States*, 495 U.S. 575, 588–89 (1990), and recently affirmed in *United States* v. *Davis*, 139 S. Ct. 2319 (2019). The categorical approach involves two steps: first, identifying the elements of the predicate conviction by determining the minimum criminal conduct a defendant must commit to be convicted; and second, determining whether that minimum criminal conduct has, as an element, the use, attempted use, or threatened use of physical force. To qualify as "an element," the offense must require that the jury necessarily find (or that the defendant necessarily admit) the use, attempted use, or threatened use of force.

Attempted Hobbs Act robbery has two elements: (1) the intent to commit a robbery that affects interstate commerce; and (2) a substantial step toward the completion of that crime. The first element clearly does not need to involve the use, attempted use, or threatened use of force. Intent, by definition, is not an act, but rather the motivation behind a person's act.

This means that the categorical approach as applied here turns entirely on the second element, the "substantial step" requirement. A "substantial step" toward the commission of a robbery likewise need not involve the use, attempted use, or threatened use of force. Thus, attempted Hobbs Act robbery is not categorically a crime of violence.

The Second Circuit below incorrectly reached a contrary conclusion by focusing not on the elements of *attempted* Hobbs Act robbery, but on the elements of a *completed* Hobbs Act robbery. The Second Circuit applied a principle found nowhere in the statute or this Court's precedent—that any attempt to commit a crime of violence necessarily involves an attempt to use "physical force." To do so, the Second Circuit relied on its recent decision that, "for substantive crimes of violence that include the use of physical force as an element, defendants also commit crimes of violence when commission of those crimes is attempted." *United States* v. *McCoy*, 995 F.3d 32, 55 (2d Cir. 2021). The court of appeals supported that conclusion by finding that "such attempts necessarily require (a) an intent to complete the substantive crime (including an intent to use physical force) and (b) a substantial step towards completing the crime (which logically means a

substantial step towards completion of all of that crime's elements, including the use of physical force)." *Id.* That holding both conflates intent with attempt and evades the categorical approach's mandate. In short, for purposes of attempted Hobbs Act robbery, one can intend to use force without ever actually attempting to use force, and one can take a substantial step towards committing a Hobbs Act robbery—for example, proceeding to the location of the crime—without ever actually attempting to use force.

This question has importance beyond the Hobbs Act. Courts have applied the same reasoning that the Second Circuit employed here to hold that attempted carjacking and attempted bank robbery also are categorically crimes of violence, as well as to analyze other statutes, including 18 U.S.C. § 924(e) and certain immigration statutes, that rely on the categorical approach in defining whether an offense qualifies as a "crime of violence."

Accordingly, the petition for a writ of certiorari should be held pending this Court's decision in *Taylor* and then granted, vacated, and remanded in light of the Court's decision in that case.

STATEMENT OF THE CASE

A. Attempted Hobbs Act Robbery

The Hobbs Act provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do" shall be guilty of an offense. 18 U.S.C. § 1951(a). The term "robbery," as used in the Act, means:

> [T]he unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

Id. § 1951(b)(1). Under federal law, criminal attempt liability requires both intent to complete the object offense and a substantial step toward the commission of that offense. *United States v. Resendiz-Ponce*, 549 U.S. 102, 106–07 (2007). "[T]he mere intent to violate a federal criminal statute is not punishable as an attempt unless" a defendant has also taken a substantial step towards completing the attempted crime. *Id.* at 107.

B. Enhanced Sentences Under 18 U.S.C. § 924(c)

Title 18, United States Code, Section 924(c) provides for enhanced penalties for defendants who use or carry a firearm in relation to, or who possess a firearm in furtherance of, a federal "crime of violence or drug trafficking crime." It imposes a mandatory minimum sentence of at least five years, with a minimum of seven years if the firearm is brandished and ten years if the firearm is discharged, to run consecutively to the punishment for the underlying crime. *Id.* § 924(c)(1)(A)(i)–(iii). Section 924(c) further

imposes a minimum sentence of 25 years for repeat violations. *Id.* § 924(c)(1)(C).

Under § 924(c)(3), a "crime of violence" is a felony offense that either

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The first clause, § 924(c)(3)(A), is referred to as the elements clause, and the second clause, § 924(c)(3)(B), as the residual clause. In *United States* v. *Davis*, 139 S. Ct. 2319 (2019), this Court found the second clause to be unconstitutionally vague in light of the Court's decisions in *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson* v. *United States*, 576 U.S. 591 (2015). Thus, only offenses that are crimes of violence under the elements clause can qualify as § 924(c)(3) predicates.

To determine whether an offense constitutes a crime of violence under § 924(c)(3)(A), courts use what is known as the "categorical approach." *Davis*, 139 S. Ct. at 2329. Under the categorical approach, a court "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe* v. *Holder*, 569 U.S. 184, 190–91 (2013)

(alterations in original) (quoting *Johnson* v. *United States*, 559 U.S. 133, 137 (2010)) (internal quotation marks omitted); *see also United States* v. *Moore*, 916 F.3d 231, 240 (2d Cir. 2019) (holding that the categorical approach "involves two steps: first we identify the elements of the predicate conviction by determining the minimum criminal conduct a defendant must commit to be convicted; second, we determine whether that minimum criminal conduct has as an element the use, attempted use, or threatened use of physical force" (internal quotation marks omitted)).

When applying the categorical approach, courts must "'look only to the statutory definitions'—*i.e.*, the elements—of [the] . . . offense[ ], and not 'to the particular [underlying] facts.'" *Descamps* v. *United States*, 570 U.S. 254, 261 (2013) (quoting *Taylor*, 495 U.S. at 600). The "elements" of the crime are the "constituent parts" of its legal definition. *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). Therefore, under the categorical approach, an offense constitutes a "crime of violence" under § 924(c)(3)(A) if it has as an element the use, attempted use, or threatened use of physical force.

C. The Proceedings Below

On July 11, 2019, a grand jury in the Eastern District of New York returned a superseding indictment charging, as relevant here, petitioners with attempted Hobbs Act robbery and the use of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c)(3)(A), as relevant here, the attempted Hobbs Act robbery counts. *See* App. 2a, 8a.

At issue here are the attempted Hobbs Act robberies described in Counts Seven, Nine, Eleven, and Thirteen and the four § 924(c) charges at Counts Eight, Ten, Twelve, and Fourteen that the Government alleges were in furtherance of the attempted Hobbs Act robbery counts. *See* App. 2a–3a. In the relevant counts of the superseding indictment, the Government alleges that firearms were brandished in furtherance of the attempted Hobbs Act robberies. *See* App. 8a.

On August 7, 2019, Mr. Cheese moved to dismiss Count Twelve of the superseding indictment on the grounds that attempted Hobbs Act robbery is not a crime of violence under § 924(c)(3)(A) in light of the Supreme Court's decision in *Davis*, specifically in furtherance of the aforementioned Hobbs Act robbery on October 16, 2017. *See* App. 2a. Defendants Barnaby, Perry, Darby, and Raymond filed letters joining Mr. Cheese's motion. *See* App. 2a–3a.

On February 12, 2020, the Hon. Nicholas G. Garaufis granted Mr. Cheese's motion and dismissed the § 924(c) charges against all defendants named in Counts Eight, Ten, Twelve, and Fourteen—that is, all the § 924(c) counts that were predicated on attempted Hobbs Act robbery. *See* App. 3a. The district court undertook the analysis adopted by the Second Circuit in *United States* v. *Hill*, 890 F.3d 51, 55 (2d Cir. 2018) (and recently reaffirmed in *Davis*): the categorical approach, which asks whether the minimum conduct necessary for an attempted Hobbs Act robbery conviction satisfies the elements clause. *See* App. 9a.

In applying the categorical approach, the district court outlined the requirements of federal attempt—an intent to commit a crime and a substantial step towards the commission of that crime—and concluded that there are multiple scenarios, including actual cases in the Second Circuit and elsewhere, that demonstrate that the minimum conduct for an attempted Hobbs Act robbery conviction need not require evidence of any use, attempted use, or threatened use of force. *See* App. 14a. In other words, "[b]ecause a defendant who takes a substantial step in furtherance of Hobbs Act robbery can do so without the use, threatened use, or attempted use of force, attempted Hobbs Act robbery cannot be a crime of violence under the categorical analysis." App. 12a. In so holding, the district court rejected the Government's reasoning that attempted Hobbs Act robbery is a crime of violence in that "it requires proof of intent to commit all the elements of the completed crime," App. 10a, because such reasoning "collapses the distinction between acts constituting an underlying offense and acts constituting an attempt of the underlying offense, which does not square with the Supreme Court's decision in *Davis*." App. 11a.

On June 7, 2021, the Second Circuit vacated the district court's decision and remanded for further proceedings in a summary order. *See* App. 1a–4a. In its order, the court acknowledged that the question of "[w]hether an offense is a 'crime of violence' under 18 U.S.C. § 924(c)" was a question of law for the court to decide *de novo*. App. 3a. Relying on its recent decision in *McCoy*, which held that "an attempt to commit Hobbs Act

robbery . . . categorically qualifies as a crime of violence," 995 F.3d at 55, the Second Circuit concluded that the district court erred in its dismissal of the § 924(c) charges against defendants. App. 3a–4a. The court found that "Counts Eight, Ten, Twelve, and Fourteen of the superseding indictment were properly predicated, respectively, on Counts Seven, Nine, Eleven, and Thirteen alleging attempted Hobbs Act robberies." App. 3a.

REASONS FOR GRANTING THE PETITION

I. AS THE COURT HAS ALREADY DETERMINED WHEN GRANTING CERTIORARI IN *TAYLOR*, THE QUESTION PRESENTED WARRANTS REVIEW.

The courts of appeals are squarely conflicted over whether attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A). The Second Circuit's decision that an attempt to commit Hobbs Act Robbery categorically qualifies as a crime of violence follows the decisions of the Seventh, Ninth, and Eleventh Circuits, which have reached the same conclusion. *See United States* v. *Ingram*, 947 F.3d 1021 (7th Cir. 2020); *United States* v. *Dominguez*, 954 F.3d 1251 (9th Cir. 2020) *petition for cert. filed*, No. 20-1000 (Jan. 26, 2021); *United States* v. *St. Hubert*, 909 F.3d 335 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019). By contrast, the Fourth Circuit correctly held in *Taylor* that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the categorical approach." 979 F.3d at 208. The Fourth Circuit

emphasized that the Seventh, Ninth, and Eleventh Circuits failed to apply the categorical approach as directed by this Court in *Davis*, instead adopting a "flawed premise" and "rest[ing] their conclusion on a rule of their own creation." *Id.*

Recognizing the importance of this issue, this Court has already granted certiorari to resolve that conflict in *Taylor*. The Court should hold this petition pending its ruling in *Taylor*, and reject the reasoning by the Second, Seventh, Ninth, and Eleventh Circuits as inconsistent with the categorical approach.

In *St. Hubert*, for example, written pre-*Davis*, the Eleventh Circuit effectively eviscerated the distinction between *intent* to complete every element of Hobbs Act robbery and *attempt* to complete those elements. The Eleventh Circuit found that "[w]hen the intent element of the attempt offense includes intent to commit violence against the person of another, . . . it makes sense to say that the attempt crime itself includes violence as an element." 909 F.3d at 352 (alteration in the original) (quoting *Hill* v. *United States*, 877 F.3d 717, 719 (7th Cir. 2017)). Compounding this false equivalency, the Eleventh Circuit concluded that "even if the completed substantial step falls short of actual or threatened force, the robber has attempted to use actual or threatened force because he has attempted to commit a crime that would be violent if completed." *Id.* at 353.

The Seventh and Ninth Circuit decisions are similarly flawed. The Seventh Circuit's decision in *Ingram* failed even to discuss *Davis* or to apply the categorical approach at all. 947 F.3d 1021.

Rather, without much discussion, the *Ingram* court concluded that because the Seventh Circuit had previously found that completed Hobbs Act robbery was a crime of violence and an attempt to commit a crime of violence under § 924(e) was itself a crime of violence, attempted Hobbs Act robbery must also be a crime of violence. *Ingram*, 947 F.3d at 1025–26.

Similarly, in *Dominguez*, the Ninth Circuit first correctly applied the categorical approach to completed Hobbs Act robbery, 954 F.3d at 1258, but did not apply the same analysis to attempted Hobbs Act robbery. Rather, the court acknowledged that attempted Hobbs Act robbery could be committed without any violence, stating that "[i]t does not matter that the substantial step . . . is not itself a violent act or even a crime," *id.* at 1255, and then simply relied on *St. Hubert* and *Ingram* to hold that attempted Hobbs Act robbery was a crime of violence, *id.* at 1261. As the *Dominguez* dissent rightly highlighted, the Ninth Circuit "failed to apply the categorical analysis" for attempted Hobbs Act robbery, and "failed to consider the 'least serious form' of attempted Hobbs Act robbery," instead conflating intent and attempt in its analysis. *Id.* at 1266.

In direct conflict with the flawed reasoning of these decisions, the Fourth Circuit correctly held that attempted Hobbs Act robbery did not qualify as a crime of violence. *Taylor*, 979 F.3d at 203. The Fourth Circuit recognized:

> [A] straightforward application of the categorical approach to attempted Hobbs Act robbery yields a different

> result . . . because, unlike substantive Hobbs Act robbery, attempted Hobbs Act robbery does not invariably require the use, attempted use, or threatened use of physical force. The Government may obtain a conviction for attempted Hobbs Act robbery by proving that: (1) the defendant specifically intended to commit robbery by means of a threat to use physical force; and (2) the defendant took a substantial step corroborating that intent. The substantial step need not be violent. Where a defendant takes a nonviolent substantial step toward threatening to use physical force—conduct that undoubtedly satisfies the elements of attempted Hobbs Act robbery—the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely *attempted to threaten* to use physical force. The plain text of § 924(c)(3)(A) does not cover such conduct.

979 F.3d at 208 (citations omitted). *Taylor* stressed that attempted Hobbs Act robbery may not necessarily include the use of force, and that nonviolent conduct, including discussing plans, assembling weapons, and proceeding to the location of the crime would satisfy the government's burden for attempted Hobbs Act robbery. *Id.* The Fourth Circuit expressly declined to follow the Seventh, Ninth, and Eleventh Circuits, finding that these circuits had

adopted the flawed premise "that an attempt to commit a 'crime of violence' *necessarily* constitutes an attempt to use physical force." *Id.*

As this Court recognized when granting certiorari in *Taylor*, this circuit conflict requires this Court's resolution, and correcting the court of appeals' improper application of the categorical approach would allow this Court to provide clarification on which attempt crimes are *necessarily* crimes of violence under § 924(c)(3)(A).

II. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT.

A. The Circuit Split Creates Disparity Between Defendants Across the Country Given the Government's Frequent Use of § 924(c) in Attempted Hobbs Act Robbery Cases.

Because of the circuit split, defendants across the country are being treated unequally in sentencing. In circuits where attempted Hobbs Act robbery is categorically a crime of violence, a conviction carries numerous onerous sentencing consequences. First, a defendant with two prior felony convictions who is convicted of attempted Hobbs Act robbery will be considered a career offender, which results in an increased sentence compared to a non-career offender in 90.7% of cases. *See* U.S. SENT'G COMM'N, *Quick Facts: Career Offenders* 1 (May 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf. Additionally, the government frequently charges § 924(c) offenses connected to Hobbs Act robberies. Petition for Writ of Certiorari by the United States

of America, *Taylor*, No. 20-1459, at 20–21 (Apr. 14, 2020). Defendants charged with attempted Hobbs Act robbery and § 924(c) in the Second, Seventh, Ninth, and Eleventh Circuits will thus face mandatory five-, seven-, or ten-year consecutive sentences that defendants in the Fourth Circuit will not.

B. This Question Could Have Implications Beyond Attempted Hobbs Act Robbery.

This question also has implications beyond attempted Hobbs Act robbery. Not only does the question impact how other attempt crimes are analyzed as crimes of violence under 18 U.S.C. § 924(c)(3)(A), but it also impacts other statutes that look to the same or similar definition of crime of violence. For example, the Armed Career Criminal Act, 18 U.S.C. § 924(e) uses a test "nearly identical to that for § 924(c) to determine what constitutes a crime of violence for purposes of punishing repeat offenders." Petition for Writ of Certiorari, *Dominguez*, No. 20-1000, at 20 (Jan. 21, 2021); *Davis*, 139 S. Ct. at 2327. Furthermore, the § 924(c) crime of violence classification has implications in the immigration context, namely whether a noncitizen would be removable for committing a crime of violence. *See, e.g.*, *Flores-Vega* v. *Barr*, 932 F.3d 878, 882 (9th Cir. 2019) ("To determine whether a conviction under O.R.S. § 163.187(1) is for a crime of violence, without regard to the facts underlying the particular conviction we apply the categorical approach from *Taylor*."); *Evanson* v. *Attorney General*, 550 F.3d 284, 286 (3d Cir. 2008) ("[T]he BIA erred in failing to apply the modified categorical approach set

forth in *Taylor* . . . and therefore erred when it considered [petitioner's] sentencing document to determine whether he had been convicted of an aggravated felony."). The question presented thus provides the opportunity to clarify the categorical approach for attempt crimes across a number of different contexts that will substantially impact criminal defendants and potentially removable noncitizens across the country.

III. THE SECOND CIRCUIT'S DECISION IS FLAWED.

In light of this Court's invalidation of § 924(c)(3)(B)'s residual clause, only offenses that are crimes of violence under the elements clause can qualify as § 924(c)(3)(A) predicates. *Davis*, 139 S. Ct. at 2336. An "element" means "[a] constituent part of a claim that *must be proved for the claim to succeed*." *Element*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added); *see also Mathis*, 136 S. Ct. at 2248 ("'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'") (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)). And as this Court has explained, "'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140.

Davis reaffirms that the proper analytic framework for determining whether an offense meets the definition of "crime of violence" under § 924(c)(3)(A) is the categorical approach established in *Taylor*, 495 U.S. at 588–89. *Davis*, 139 S. Ct. at 2328 ("[T]he statutory text [of

§ 924(c)(3)] commands the categorical approach" with respect to conspiracy to commit Hobbs Act robbery.). The categorical approach requires a comparison of "the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps*, 570 U.S. at 257. In applying the categorical approach, "a conviction rests on nothing more than the minimum conduct required to secure a conviction." *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 763 (2021).

Relevant here, the Hobbs Act punishes "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do." 18 U.S.C. § 1951(a). The Hobbs Act then defines robbery as "[t]he unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession." 18 U.S.C. § 1951(b)(1).

Further, to prove an attempt to commit a crime, the Government need only prove that a defendant (i) had the intent to commit the object crime, here Hobbs Act robbery, and (ii) engaged in an "overt act," that is, a "substantial step" towards its commission. *See Resendiz-Ponce*, 549 U.S. at 107. "[A] 'substantial step' must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime." *United States* v. *Farhane*, 634 F.3d 127, 147 (2d Cir. 2011) (quoting *United*

States v. *Manley*, 632 F.2d 978, 987 (2d Cir. 1980)) (internal quotation marks omitted).

With these legal principles in mind, the reasoning of *Davis* compels the conclusion that attempted Hobbs Act robbery cannot serve as a predicate to § 924(c). Indeed, the reasoning of the Second Circuit (and Seventh, Ninth, and Eleventh Circuits) directly conflicts with the holding in *Davis*. That is because the Second Circuit's decision rested in part on a determination that is foreclosed by *Davis*—namely, that an intent to commit a crime of violence and a substantial step towards completing that offense themselves constitute a crime of violence.

That reasoning cannot be squared with *Davis*, which held that *conspiracy* to commit Hobbs Act robbery is categorically not a crime of violence. In the wake of that decision, courts across the country, including the Second Circuit, have vacated convictions for conspiracy to commit Hobbs Act robbery, even where there was evidence of violent intent. *See, e.g.*, *United States* v. *Barrett*, 937 F.3d 126, 128 (2d Cir. 2019) (ruling that, as a result of *Davis*, a "violent, even murderous" intent to commit conspiracy Hobbs Act robbery is insufficient to find a defendant has committed a crime of violence under § 924(c)(3)(A)). Like conspiracy, attempt is an inchoate offense, and there is no arguable basis to draw a distinction between the intent of a defendant charged with attempted Hobbs Act robbery and the intent of a defendant charged with conspiracy to commit Hobbs Act robbery—both intend to commit a crime of violence.

If intent to commit Hobbs Act robbery cannot itself support a finding that a defendant has committed a crime of violence, then what remains is the substantial step element. But that element likewise need not involve any use, attempted use, or threatened use of force. The "substantial step" requirement derives from the American Law Institute's Model Penal Code ("MPC"), and Section 5.01 of the MPC lists the substantial steps that are sufficient to prove attempt under the law:

> (a) lying in wait, searching for or following the contemplated victim of the crime; (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (c) reconnoitering the place contemplated for the commission of the crime; (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances; (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (g) soliciting

> an innocent agent to engage in conduct constituting an element of the crime.

Model Penal Code § 5.01(2).

The MPC identifies multiple acts that noticeably lack any kind of "physical force"—that is, "force capable of causing physical pain or injury to another person," *Johnson*, 559 U.S. at 140—including, inter alia, "lying in wait," "reconnoitering," and "possession of materials." *Id.* at § 5.01(2)(a), (c), (e). This Court reaffirmed the MPC's "substantial step" requirement in *Resendiz-Ponce*, holding that "the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct." *Resendiz-Ponce*, 549 U.S. at 107 (citing MPC § 5.01(2)(c)) (defining "criminal attempt" to include "an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime").

Thus, applying the categorical approach to the minimum criminal conduct that can be charged as a substantial step in furtherance of attempted Hobbs Act robbery, it is clear that there are innumerable variations whereby a defendant can be guilty of attempted Hobbs Act robbery *without* using, attempting to use, or threatening to use force for purposes of § 924(c)(3)(A). While the categorical approach's "focus on the minimum conduct criminalized by the [relevant] statute is not an invitation to apply 'legal imagination' to the . . . offense," *Moncrieffe*, 569 U.S. at 191, no such imagination is required here.

This straightforward concept is amply illustrated by convictions from across the country for attempted Hobbs Act robbery without any evidence of use, attempted use, or threatened use of force. *See, e.g.*, *United States* v. *Gonzalez*, 441 F. App'x 31, 36 (2d Cir. 2011) (upholding attempted Hobbs Act robbery conviction where defendant was casing a location and began preparations to commit robbery); *United States* v. *Paris*, 578 F. App'x 146, 147–48 (3d Cir. 2014) (surveilling the robbery location crossed the line from mere preparation to substantial step); *United States* v. *Wrobel*, 841 F.3d 450, 453–55 (7th Cir. 2016) (defendants planned a robbery of a diamond merchant and traveled across state lines to commit the robbery, but were arrested before the robbery was committed with hooded sweatshirts, a black hat, three pairs of gloves, and a pry bar); *United States* v. *Muratovic*, 719 F.3d 809, 815–16 (7th Cir. 2013) (defendant finalized plans, conducted surveillance, procured supplies, and arrived at destination point on the day set for the robbery before abandoning the plan). Convictions for attempted bank robbery provide similar examples. *See*, *e.g.*, *United States* v. *Jackson*, 560 F.2d 112, 120–21 (2d Cir. 1977) (upholding an attempted bank robbery conviction where the defendants "reconnoitered the place contemplated for the commission of the crime and possessed the paraphernalia to be employed in the commission of the crime," adding that "either type of conduct, standing alone, was sufficient as a matter of law to constitute a substantial step" (internal quotation marks omitted)); *United States* v. *Stallworth*, 543 F.2d 1038, 1041 (2d Cir. 1976)

(upholding an attempted bank robbery conviction where the defendants "reconnoitered the bank, discussed (on tape) their plan of attack, armed themselves and stole ski masks and surgical gloves," had a getaway car ready, and "moved ominously toward the bank"); *Paris*, 578 F. App'x at 48 n.2 (citing cases).

In all of these cases, there was plainly no requirement that the Government prove the use—or even the attempted or threatened use—of force in order to convict the defendants of attempted Hobbs Act robbery (or attempted bank robbery). Nor has the Government argued that the use, attempted use, or threatened use of force is a requisite "element" that the Government needs to prove for the charge to succeed. *See Mathis*, 136 S. Ct. at 2248. It is thus clear that the minimum conduct necessary for conviction does not require the use, attempted use, or threatened use of force, and attempted Hobbs Act robbery cannot be a crime of violence under § 924(c)(3)(A).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Taylor*, and then granted, vacated, and remanded in light of the Court's decision in that case.

Respectfully submitted.

NICOLAS BOURTIN
Counsel of Record
AMANDA SHAMI
TREVOR A. CHENOWETH
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4000
bourtinn@sullcrom.com

Counsel for Petitioner
Constantin Cheese

MEHDI ESSMIDI
GRECO NEYLAND, P.C.
521 Fifth Avenue
New York, NY 10017
(212) 951-1300
mehdi@gnlaw.nyc

Counsel for Petitioner
Andre Barnaby

JOEL MARK STEIN
LAW OFFICES OF JOEL M. STEIN, ESQ.
30 Wall Street, 8th Floor
New York, NY 10005
(212) 344-8008
jmsteinesq@aol.com

Counsel for Petitioner
Brandon Darby

JEFFREY G. PITTELL
MAHER & PITTELL LLP
42-40 Bell Boulevard, Suite 302
Bayside, NY 11361
(516) 829-2299
jp@jpittell.com

Counsel for Petitioner Antonio Davis

RICHARD B. LIND
RICHARD B. LIND, ESQ.
880 Third Avenue, 13th Floor
New York, NY 10022
(212) 888-7725
rlindesq@aol.com

Counsel for Petitioner Avery Mitchell

MURRAY SINGER
MURRAY E. SINGER, ESQ.
14 Vanderventer Avenue, Suite 147
Port Washington, NY 11050
(516) 869-4207
msingerlaw@gmail.com

Counsel for Petitioner Nahjuan Perry

JOHN S. WALLENSTEIN
JOHN S. WALLENSTEIN, ESQ.
1100 Franklin Avenue, Suite 100
Garden City, NY 11530
(516) 742-5600
JSWallensteinEsq@outlook.com

Counsel for Petitioner Pierre Raymond

AVRAHAM C. MOSKOWITZ
MOSKOWITZ & BOOK, LLP
345 Seventh Avenue, 21st Floor
New York, NY 10001
(212) 221-7999
amoskowitz@mb-llp.com

Counsel for Petitioner James Roberson

ARTHUR KENNETH WOMBLE, JR.
ZEMAN & WOMBLE, LLP
20 Vesey Street, Room 400
New York, NY 10007
(917) 231-4198
womble@zemanwomblelaw.com

Counsel for Petitioner Shamel Simpkins

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