No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARNOLD COUNCIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Hobbs Act robbery qualifies as a "crime of violence" under the elements clause in 18 U.S.C. § 924(c)(3)(A) as to either direct or accomplice liability?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were Petitioner Arnold Council, Respondent United States of America, and co-Appellants Gregory Chester, Paris Poe, Gabriel Bush, William Ford, Derrick Vaughn, Stanley Vaughn, Byron Brown, and Rodney Jones.

While Petitioner was tried together in district court with Gregory Chester, Paris Poe, Gabriel Bush, William Ford, and Derrick Vaughn and joined together with them in a consolidated appeal along with Appellants Stanley Vaughn, Byron Brown, and Rodney Jones the issue herein relates to Arnold Council alone. No other defendant at trial or on appeal were charged in violation of 18 U.S.C. § 924(c), previously raised this issue, or joined in it below. Therefore, no other parties below have an interest in the outcome of this petition aside from Petitioner Arnold Council and Respondent United States of America.

RELATED PROCEEDINGS

United States District Court for the Northern District of Illinois, Eastern Division:

United States v. Arnold Council, 13 CR 774-2

United States Court of Appeals for the Seventh Circuit:

United States v. Arnold Council, 19-2918

Consolidated with co-Appellants:

United States v. Gregory Chester, 17-3063

United States v. Paris Poe, 17-2877

United States v. Gabriel Bush, 17-2858

United States v. William Ford, 17-2854

United States v. Derrick Vaughn, 17-2899

United States v. Stanley Vaughn, 17-2917

United States v. Byron Brown, 17-1650

United States v. Rodney Jones, 17-3449

United States Supreme Court

Arnold Council joins in the Petitions for Writ of Certiorari filed by certain co-Appellants, arising from the same judgment:

Gregory Chester, Arnold Council, Gabriel Bush, William Ford, Derrick Vaughn v. United States, No. _____ (to be filed)

Paris Poe, Gregory Chester, Arnold Council, Gabriel Bush, William Ford, Derrick Vaughn v. United States, No. _____ (to be filed)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arnold Council respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on August 28, 2020, and the denial of his petition for rehearing entered on February 1, 2021.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 973 F.3d 667. The district court's opinion denying the defendant's motion for judgment of acquittal, App. 88, is unreported, but available at 2017 WL 3394746, and its oral and written rulings on Mr. Council's motion to dismiss are unreported. App. 205; App. 202.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2020. App. 1. The court denied a timely-filed petition for rehearing en banc on February 1, 2021. App. 208. The time for filing a petition for writ of certiorari was extended to 150 days by order of this Court on March 19, 2020 because of the COVID-19 pandemic. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause to the Fifth Amendment to the Constitution, and statutes codified at 18 U.S.C. § 924(c) and 18 U.S.C. § 1951.

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Title 18, United States Code, section 924(c)(1)(A), prohibits "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm[.]" That section penalizes by conferring a mandatory minimum consecutive sentence for firearm use (5 years), brandishing (7 years), or discharge (10 years). 18 U.S.C. § 924(c)(1)(A).

Title 18, United States Code, section 924(c)(3), defines a "crime of violence":

> (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.

Hobbs Act robbery, embodied at Title 18, United States Code, section 1951, is defined in relevant part as: "the 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).

STATEMENT OF THE CASE

This case presents an issue regularly encountered in the lower courts but not yet decided by this Court, which is of paramount importance to personal liberty and which implicates doctrines of statutory construction. That is, whether Hobbs Act robbery, 18 U.S.C. § 1951(a), can lawfully serve as a predicate offense for 18 U.S.C. § 924(c) liability, whether directly or as an aider and abettor.

A. Legal Background

Since *Samuel Johnson v. United States*, 135 S. Ct. 2551, 2558-63 (2015), this Court has been grappling with what precisely constitutes a "crime of violence" in similarly worded predicate statutes. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1211-12 (2018) (18 U.S.C. § 16); *United States v. Davis*, 139 S.Ct. 2319 (2019) (18 U.S.C. § 924(c)(3)(B)). At issue here is the application of Hobbs Act robbery, 18 U.S.C. § 1951(a), to 18 U.S.C. § 924(c)(1)(A), which criminalizes use of a firearm during and in relation to a crime of violence. To date, this Court has declined to explicitly address this interplay, allowing the lower courts to work through such analysis.

"To decide whether an offense satisfies the elements clause, courts use the categorical approach." *United States v. Borden*, — S.Ct. — (2021), 2021 WL 2367312, at *3. An offense qualifies as a crime of violence under the elements clause, embodied at 18 U.S.C. 924(c)(3)(A), if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). If, after a focused elements-centered inquiry, any

of the acts criminalized by the predicate offense do not entail that kind of physical force, then the statute does not meet the constitutional threshold. *See Borden*, 2021 WL 2367312, at *3. Hobbs Act robbery—whether with direct or accomplice liability—does not pass this test.

B. Factual Background

As this Court recently reaffirmed in *Borden*, the categorical analysis is used to analyze whether an offense satisfies the elements clause. *Borden*, 2021 WL 2367312, at *3 (interpreting the identical elements clause of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i)). Under the categorical approach, "the facts of a given case are irrelevant." *Id.* Thus, Petitioner limits the factual discourse below.

Defendant Arnold Council was charged along with Gregory Chester, Paris Poe, Gabriel Bush, Stanley Vaughn, William Ford, Gary Chester, Rodney Jones, and Derrick Vaughn with racketeering conspiracy in violation of 18 U.S.C. § 1962(d).[1] In Count One of the Superseding Indictment, the government alleged that these men were part of a criminal organization known as the Hobos and that the alleged conspiracy included illegal trafficking of controlled substances, obstruction of justice, and acts of robbery and murder. In Count Two, Mr. Council was further charged, along with Paris Poe, with murdering Wilbert Moore in aid of racketeering

[1] No. 13-cr-774-2 D. Ct. Doc. 1-2 (Sept. 26, 2013) (original indictment); No. 13-cr-774-2 D. Ct. Doc. 169 (Sep. 4, 2014) (superseding indictment).

in violation of 18 U.S.C. § 1959(a)(1) and the federal aiding and abetting statute, 18 U.S.C. § 2. No. 13-cr-774-2 D. Ct. Doc. 169, at 16-17.

At issue here is the last offense Mr. Council was charged with in Count Seven: using, carrying, or brandishing a firearm in furtherance of a crime of violence—as to a robbery of a clothing store on November 8, 2008,[2] in violation of 18 U.S.C. § 924(c)(1)(A) and the federal aiding and abetting statute, 18 U.S.C. § 2. The predicate offense alleged therein was Hobbs Act robbery, 18 U.S.C. § 1951(a). Mr. Council went to trial on all charges.

C. Pre-Trial Proceedings

On September 1, 2016, prior to trial, Mr. Council filed a motion to dismiss Count Seven because Hobbs Act robbery is not categorically a crime of violence, and therefore could not serve as the predicate offense for the section 924(c) charge. App. 202. *See also* No. 13-cr-774-2 D. Ct. Doc. 766 (Sept. 1, 2016). Mr. Council argued that Count Seven failed to state a claim because the provision was unconstitutionally vague and categorically barred in derogation of his Fifth Amendment right to due process pursuant to *Samuel Johnson*, 135 S. Ct. 2551. *Id.* Mr. Council argued that Hobbs Act robbery is categorically not a crime of violence under either the force clause of § 924(c)(3)(A) or the residual clause of § 924(c)(3)(B). *Id.* at 202-03. The district court agreed that the residual clause was unconstitutionally vague but permitted prosecution to commence under the

[2] The clothing store was called Collections, and the robbery was sometimes referred to below as the Collections store robbery.

elements clause. *Id.* at 203-04. Its ruling was issued orally on September 2, 2016, and in a written order on September 6, 2016. App. 202, 205-07.

In upholding the elements clause, the district court reasoned that no appellate circuit court had yet held that Hobbs Act robbery was not a crime of violence under the force clause and that some had ruled to the contrary. App. 203-04. The trial court read implicit violent physical force into the Hobbs Act language of "fear of injury," influenced by the reasoning of a local district court and courts of appeals that had considered the issue.[3] App. 204. It thus concluded that all aspects of Hobbs Act robbery involved "'a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, as required for conviction under § 924(c)(3)(A)." *Id.* (quoting "substantial risk" language from § 924(c)(3)(B), but citing to § 924(c)(3)(A)).

D. Trial

The government proceeded to trial on all counts against Arnold Council and his-codefendants.[4] As to Count Seven, the section 924(c) offense, it pursued the theory of accomplice liability. Specifically, it alleged that confederates of Mr.

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[3] The court relied on *United States v. Coleman,* 14 CR 664, 2016 WL 1435696, at *1 (N.D. Ill. Apr. 12, 2016). The court also found persuasive the Second Circuit's opinion in *United States v. Hill*, 2016 WL 4120667, at *7 (2d Cir. Aug. 3, 2016) (eventually amended), and the Ninth Circuit's opinion in *United States v. Howard*, 650 F. App'x 466, 468 (9th Cir. 2016), as amended (June 24, 2016) (unpublished).

[4] Specifically, Gregory Chester, Paris Poe, Gabriel Bush, William Ford, and Derrick Vaughn. Gary Chester pleaded guilty early in the case and did not go to trial. Byron Brown and Rodney Jones likewise pleaded guilty pursuant to cooperation agreements.

Council brandished a firearm in furtherance of the clothing store robbery and that he aided and abetted them. The jury was instructed that Mr. Council had to have advance knowledge that the person would use, carry, or brandish the firearm. No. 13-cr-774-2 D. Ct. Doc. 1087 (Jan. 4, 2017). On January 4, 2017, the jury found Mr. Council guilty of that count, as well as Count One (racketeering) and Count Two (murder in aid of racketeering). No. 13-cr-774-2 D. Ct. Doc. 1089, at 2 (Jan. 4, 2017). In special findings, the jury also found that the government proved all its allegations against Mr. Council, including aiding and abetting in brandishing a firearm in relation to Hobbs Act robbery. No. 13-cr-774-2 D. Ct. Doc. 1089, at 14-15 (Jan. 4, 2017).

E. Post-Trial Proceedings

In post-trial motions, Council reasserted and preserved his prior written pleadings, which included his motion to dismiss. App. 177; No. 13-cr-774-2 D. Ct. Doc. 1186, at 21 (Apr. 7, 2017). The district court denied every defendant's motion for new trial and judgment of acquittal on August 3, 2017, and issued a corrected order on August 8, 2017. Appendix C. On August 11, 2017, Mr. Council was sentenced to two concurrent life sentences as to Count One and Count Two, consecutive to an eighty-four month sentence as to Count Seven. App. 84, 85. Judgment was entered on the docket on September 7, 2017. App. 84.

F. Appeal

Arnold Council timely appealed on September 16, 2017. No. 13-cr-774-2 D. Ct. Doc. 1369 (Sept. 16, 2017). Before the United States Court of Appeals for the Seventh Circuit, Mr. Council and co-defendants challenged a number of issues,[5] including issues raised in Petitions for Writ of Certiorari before this Court by Petitioners Gregory Chester and Paris Poe, in which Mr. Council joins. Mr. Council individually challenged the sufficiency of his § 924(c) conviction and continued to press his concern that Hobbs Act robbery could not lawfully serve as a predicate offense.[6] In its response the government argued that his conviction should be upheld because while the residual clause was unconstitutionally vague, Hobbs Act robbery qualified as a crime of violence under the remaining elements clause and conviction under that provision could be sustained via accomplice liability.[7]

Consistent with its prior rulings, the Seventh Circuit upheld the district court's conclusion that aiding and abetting Hobbs Act robbery was categorically a crime of violence. App. 40-41. In doing so it offered two short bases and scant reasoning: (1) the court had previously rejected the argument that Hobbs Act robbery could be committed without violence, App. 40, and (2) aiding and abetting does qualify as a crime of violence, App. 41.

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[5] Defendant-appellants' joint brief was filed at No. 17-2918 C.A. Doc. 36 (Apr. 12, 2019).

[6] Mr. Council's supplemental brief was filed at No. 17-2918 C.A. Doc. 60 (May 24, 2019).

[7] Appellee's brief was filed at No. 17-2854, C.A. Doc. 90, at 138-41 (May 24, 2019).

SUMMARY OF ARGUMENT

The Seventh Circuit erred in upholding Council's conviction for aiding and abetting Hobbs Act robbery. Under the *Samuel Johnson*, 135 S. Ct. 2551 line of cases and principles of due process, Hobbs Act robbery cannot serve as a predicate offense to 18 U.S.C. § 924(c)(3)(A)'s elements clause because it categorically fails to qualify as a crime of violence.

Rigorous application of the elements-based categorical analysis yields various means of violating Hobbs Act robbery that do not require the violent physical force to sustain conviction. Fear of future injury to person or to property are statutory-based text examples of how Hobbs Act can be violated without using the quantum of physical force required. Aiding an abetting liability in this context creates an impermissibly tenuous relationship to actual physical force. Thus, a Hobbs Act conviction, whether through direct or accomplice liability, cannot be constitutionally sustained under the elements clause, or at all.

REASONS FOR GRANTING THE PETITION

Precisely applied, the categorical approach forecloses Hobbs Act robbery as a predicate crime of violence as defined by 18 U.S.C. § 924(c)(1)(A). The Court should grant certiorari, vacate the opinion of the Seventh Circuit, and remand in light of this Court's consistent line of cases emanating from *Samuel Johnson*, relating to what constitutes a "crime of violence." 135 S. Ct. 2551. Whether Hobbs Act robbery can constitutionally serve as a predicate offense to the force clause of 18 U.S.C. §

924(c) is an issue which has not been explicitly addressed by this Court, although not for lack of invitation. While numerous petitions have sought the Court's insight on this open question, the Court has not yet weighed in. Arnold Council's liberty interest is a compelling reason to grant a writ of certiorari, as is the clarity the Court would bring to an issue frequently litigated by federal criminal practitioners. As discussed below, a rigorous application of the elements-based categorical approach, consistent with this Court's jurisprudence and the rule of lenity means Hobbs Act cannot constitutionally be employed as the predicate to a conviction under section 924(c)(1)(A).

A. Hobbs Act Robbery Cannot Categorically Qualify as a Crime of Violence Under 18 U.S.C. § 924(c)(3)'s Force Clause

Under the Court's recent precedent in *Samuel Johnson*, 135 S. Ct. 2551, *Dimaya*, 138 S.Ct. 1204, *Davis*, 139 S.Ct. 2319, and related line of cases,[8] Mr. Council's conviction for aiding and abetting the use, possession, or brandishing of a firearm in furtherance of a Hobbs Act robbery cannot constitutionally stand. The asserted predicate offense to this 18 U.S.C. § 924(c) conviction is aiding and abetting a Hobbs Act robbery, 18 U.S.C. § 1951(a), which categorically fails to qualify as a crime of violence.

[8] This lineage is also rooted in *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (construing almost identical language defining a crime of violence in 18 U.S.C. § 16); *Curtis Johnson v. United States*, 559 U.S. 133 (2010), (discussing necessary quantum of physical force in context of ACCA), *Descamps v. United States*, 570 U.S. 254 (2013) (employing categorical approach as to ACCA), *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (applying the categorical approach to ACCA).

As written, section 924(c)(3) sets forth two different bases under which a defendant can be liable—either the elements clause or the residual clause—18 U.S.C. §§ 924(c)(3)(A) and (B), respectively. In *Davis*, the Court dispatched with the latter residual clause as unconstitutional, leaving only the elements clause intact. *Davis*, 139 S.Ct. at 2336. The elements clause requires that a predicate offense have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

This Court has repeatedly held that an elements-centered categorical analysis is required to evaluate whether a particular predicate offense meets this definition of a crime of violence. *Borden*, 2021 WL 2367312 at *3; *Davis*, 139 S.Ct. at 2328 ("It's not even close; the statutory text [of § 924(c)(3)(B)] commands the categorical approach."); *Descamps v. United States*, 570 U.S. 254, 257 (2013); *Taylor v. United States*, 495 U.S. 575, 600 (1990). Hobbs Act robbery, as defined by section 1951, does not categorically meet this force requirement.

To date, the Court has not explicitly ruled on whether Hobbs Act robbery is a crime of violence, nor on the interplay of accomplice liability with this "double-barreled crime." *Rosemond v. United States*, 134 S.Ct. 1240, 1245 (2014). Nearly every circuit court of appeals to consider the issue has considered Hobbs Act robbery a crime of violence, as defined by section 924(c)'s elements clause.[9] Likewise as to aiding and abetting Hobbs Act robbery.[10]

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[9] *See United States v. Walker*, 990 F.3d 316, 325 (3d Cir. 2021); *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020); *Brown v. United States*, 942 F.3d

Yet, a growing body of categorical analysis precedent counsels otherwise, no matter how popular the statute. In *Borden*, the Court recognized that the categorical approach is "under-inclusive by design." *Borden*, 2021 WL 2367312 at *11 (stating that existence of violent, non-qualifying predicate offenses "is neither here nor there"). This Court's categorical approach jurisprudence focuses on coherence and consistency: "whether for good or for ill, the elements-based approach remains the law." *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016). The categorical approach favors simplicity and clarity over contortionist readings to save an otherwise doomed statute. *See Davis*, 139 S.Ct. at 2329 ("Once again, the

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1069, 1075 (11th Cir. 2019), *cert. denied*, 577 U.S. 1091 (2016); *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019), *cert. denied sub nom. Uhuru v. United States*, 140 S. Ct. 639, and *cert. denied sub nom*. *Stokes v. United States*, 140 S. Ct. 640 (2019); *United States v. St. Hubert*, 909 F.3d 335, 345 (11th Cir. 2019); *United States v. Bowens*, 907 F.3d 347, 353 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1299 (2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1208 (2019); *United States v. Hill*, 890 F.3d 51, 56 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 844 (2019); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1065–66 (10th Cir.), *cert. denied*, 139 S. Ct. 494 (2018); *Diaz v. United States*, 863 F.3d 781, 783 (8th Cir. 2017); *United States v. Anglin*, 846 F.3d 954, 965 (7th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017), *cert. denied*, 137 S. Ct. 2230.

[10] *See United States v. Ali*, 991 F.3d 561, 573 (4th Cir. 2021); *United States v. McCoy*, 995 F.3d 32, 58 (2nd Cir. 2021); *United States v. Cole*, 849 F. App'x. 205, 205 (9th Cir. 2021) *United States v. Hall*, 845 F. App'x 644, 645 (9th Cir. 2021); *United States v. Richardson*, 948 F.3d 733, 741-42 (6th Cir. 2020); *Smiley v. United States*, 819 F. App'x. 850, 852 (11th Cir. 2020); *United States v. Grissom*, 760 F. App'x 448, 454 (7th Cir. 2019); *United States v. McKelvey*, 773 F. App'x 74, 75 (3rd Cir. 2019); *United States v. Deiter*, 890 F.3d 1203, 1215-16 (10th Cir. 2018) (discussing Hobbs Act robbery as compared to a offense of bank robbery, 18 U.S.C. § 2113); *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016).

government asks us to overlook this obvious reading of the text in favor of a strained one.") Simply put, "[a]n offense does not qualify as a 'violent felony' unless the least serious conduct it covers falls within the elements clause." *Borden*, 2021 WL 2367312 at *11.

With those strictures in mind, we turn to applying the categorical approach to the statute at issue. In a categorical analysis, one looks to the statutory elements of the predicate offense to discern whether it satisfies section 924(c)(3)(A). *Descamps*, 570 U.S. at 260-61. In this analysis, alleged facts are not considered; they are "extraneous to the crime's legal requirements." *Mathis*, 136 S. Ct. at 2248. *See also Borden*, 2021 WL 2367312, at *3. Instead, what is examined is whether the predicate offense, here Hobbs Act robbery, sweeps more broadly than the physical force required under § 924(c)(3)(A). Constitutional issues of due process, fundamental fairness, and separation of powers are all implicated when one is held responsible for conduct beyond what has been proscribed by the Legislative branch. *See, e.g.*, *Dimaya*, 138 S.Ct. at 1212. Thus, "[i]f any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard," and cannot serve as a predicate offense." *Borden*, 2021 WL 2367312, at *3 (construing the identically-worded ACCA).

For an offense to qualify as a "crime of violence" under § 924(c)(3)'s force clause, "physical force" is required. 18 U.S.C. § 924(c)(3)(A). The Court has defined "physical force" in an identical statute as "violent force." *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original). "Violent force" means

"strong physical force" that is "capable of causing physical pain or injury to another person." *Id. See also Borden*, 2021 WL 2367312, at *12 ("the active employment of force"). In addition to this measure of force, section 924(c)(3)(A) requires that its use, attempted use, or threatened use must be intentional. As this Court just clarified in *Borden*, a lower mental state of recklessness cannot suffice. 2021 WL 2367312, at *12.

As elucidated below, because it is possible to accomplish Hobbs Act robbery without "physical force," it cannot categorically qualify as a crime of violence. Further, the government did not allege that Council personally carried or brandished a weapon, but rather that he acted as an aider and abettor. Under either direct or accomplice liability, Hobbs Act robbery cannot constitutionally serve as the predicate offense.

1. Hobbs Act Robbery Can be Accomplished Without Violent Physical Force

To begin, Hobbs Act robbery does not require violent physical force. The plain statutory text prohibits the: "unlawful taking or obtaining of personal property from the person 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) (emphasis added). Such can be broken down into five discrete means by which to violate the provision: (1) actual force; (2) threatened force; (3) violence; (4) fear of immediate injury; or (5) fear of future injury—applied against either (a) the person or (b) their

property. A fact-finder must find the existence of one of these means for that element to be met and conviction to be sustained. Congress chose to use the phrasing of "force" in only two on these iterations, and omitted it as to the others. As with the predicate offense at issue in *Mathis v. United States,* Hobbs Act robbery does not list "multiple elements disjunctively, but instead . . . enumerates various factual means of committing a single element." 136 S. Ct. at 2249.

This language is not superfluous. Federal juries are routinely instructed that a defendant can violate Hobbs Act in multiple manners,[11] as was the jury who sat in judgment of Mr. Council. No. 13-cr-774-2 D. Ct. Doc. 1089, at 22 (Jan. 1, 2017). These instructions show a number of ways to violate the statute, violent and nonviolent alike.[12] Hence, physical force is just one possible way to violate statute, not the only way.

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[11] *See, e.g.,* Pattern Crim. Jury Instr. 1st Cir. 4.16 (1998); Model Crim. Jury Instr. 3rd Cir. 6.18.1951-1 (2020), Pattern Crim. Jury Instr. 5th Cir. 2.73B (2019); Pattern Crim. Jury Instr. 6th Cir. 17.03 (2021 ed.); The William J. Bauer Pattern Fed. Crim. Jury Instr. 7th Cir. 1951[4] (2020 ed.); Model Crim. Jury Instr. 8th Cir. 6.18.1951A (2020); Model Crim. Jury Instr. 9th Cir. 8.143A (2021); Pattern Crim. Jury Instr. 10th Cir. 2.70 (2021); Pattern Crim. Jury Instr. 11th Cir. OI O70.3 (2020).

[12] *See, e.g.*, Model Crim. Jury Instr. 8th Cir. 6.18.1951A (2020):

> "Robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against the person's will. The unlawful taking or obtaining must occur by means of *[actual force] [threatened force] [violence] [fear of injury]*, whether immediately or in the future, to the person's *[body] [property] [property in the person's custody or possession]*. [The *[actual force] [threatened force] [violence] [fear of injury]* can also be to the *[person] [property]* of *[a relative or member of the person's family] [anyone in the person's company at the time of the taking or obtaining]*.]"

(italics in original).

a. Fear of injury to person or property does not require the use or threatened use of violent force

For instance, the plain language of 18 U.S.C. § 1951 provides that the offense can be accomplished by placing another in fear of injury to a person or property. Fear of injury to a person does not require the intentional use, attempted use, or threatened use of violent physical force against the person, as section 924(c)(3)(A) mandates. Courts below have often sidestepped this issue, preferring to read an unwritten element of force into the fear of injury to person,[13] although Congress expressly declined to extend that language to that phrase. 18 U.S.C. § 1951(b)(1) (using "force" in one clause, but not in others). A plain reading of the statute provides no support for the theory that fear of future injury to person requires the use or threatened use of "violent force."

Hobbs Act robbery also encounters an acute categorical problem when a different means—fear of injury of property—is analyzed under the elements clause. Hobbs Act robbery is broad enough to commit a robbery by inducing fear of injury to property, rather than to people, without force. The Hobbs Act has historical roots in progenitor New York state statutes. *United States v. Local 560 of Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, & Helpers of Am.*, 780 F.2d 267, 281 (3d Cir.

[13] *See, e.g.*, *United States v. McHaney*, — F.3d —, 2021 WL 2410685, at *2 (7th Cir. June 14, 2021) ("putting any person in fear in the context of robbery necessarily involves 'the use, attempted use, or threatened use of physical force against the person of another.'") (citing *United States v. Armour*, 840 F.3d 904, 907, 909 (7th Cir. 2016) (construing Indiana robbery and federal bank robbery) and *Anglin*, 846 F.3d at 965 (adopting Armour's reasoning)).

1985). From its inception there, no distinction was made between tangible and intangible property. *Id.* at 281-82. "The concept of 'property' under the Hobbs Act is an expansive one" that includes "intangible assets, such as rights to solicit customers and to conduct a lawful business." *United States v. 0Arena*, 180 F.3d 380, 392 (2d. Cir. 1999), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8, 402, 412 (2003) (property "encompasses the intangible right to exercise exclusive control over the lawful use of business assets").

The mere fact that Hobbs Act robbery protects intangible property negates any argument that physical or violent force is categorically required. And, "[e]ven tangible property can be injured without using violent force. For example, a vintage car can be injured by a mere scratch, and a collector's stamp can be injured by tearing it gently." *United States v. Chea*, 2019 WL 5061085, at *8 (N.D. Cal. Oct. 2, 2019).

b. Not all physical force is violent force

Finally, not all physical force or threats of physical force meet the threshold of violent force. As discussed above, not just any physical force will do. It must be intentional and sufficiently strong. The requisite level of force has been called "*violent* force" or "strong physical force," the kind "capable of causing physical pain or injury to another person." *Curtis Johnson*, 559 U.S. at 140 (emphasis in original). *See also Borden*, 2021 WL 2367312, at *12 ("the active employment of force"). Moreover, section 924(c)(3)(A) requires the *intentional* use, attempted use, or threatened use of physical force.

Yet, Hobbs Act convictions can stem from much less. For instance, one defendant was convicted of Hobbs Act robbery for the conduct of demanding money from a store clerk. *United States v. Smith*, 1995 WL 534713, *2 (5th Cir. 1995) (unpublished) (ordering, with both hands in his pockets, the clerk to "give me what you've got"). Another defendant was convicted for mere pushing. *United States v. Smith*, 141 F. Appx. 83 (4th Cir. 2005) (unpublished) (affirming conviction where the Defendant "pushed [the victim] with a box back through the doorway into some steel drums"). In *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir.), the Fourth Circuit explained that even a threat of harm—such as a threat to poison someone—"involves no use or threatened use of force." 701 F.3d at 168–69, While the same court later abandoned this line of reasoning, *United States v. Allred*, 942 F.3d 641, 653 (4th Cir. 2019), its analysis remains apropos.

While Hobbs Act robbery may be committed through violence, it can also be committed without it. Under the categorical approach, the whole of Hobbs Act robbery cannot qualify as a crime of violence if any one of its enumerated aspects fails. Because the full spectrum of conduct covered by section 1951 is broader than "violent force," Hobbs Act robbery cannot constitutionally qualify under § 924(c)(3)'s force clause as a "crime of violence."

B. Aiding and Abetting a Hobbs Act Robbery Also Does Not Qualify as a Crime of Violence

Additionally, under accomplice liability, one can be convicted of Hobbs Act robbery without personally using physical force. Deriving from common law, the federal aiding and abetting statute punishes one who furthers an offense—by aiding, abetting, counseling, commanding, inducing or procuring—as if the principal offender. *Rosemond*, 134 S.Ct. at 1245; 18 U.S.C. § 2. As with conspiracy, an aider and abettor can be convicted of a crime in which they did not physically participate. While it is ordinarily permissible to saddle an accomplice with the responsibility of the principal, when this means of liability gets applied to a combination crime like § 924(c), the physical force required for conviction becomes attenuated. Innate complications of a statute like Hobbs Act robbery—with nonviolent means of offense—are compounded when viewed through the kaleidoscope of accomplice liability. One who aids and abets a robbery could do so in numerous ways without personally using, attempting to use, or threatening violent force. Therefore, the predicate offense here—aiding and abetting a Hobbs Act robbery—does not qualify as a crime of violence.

In sum, a violation of Hobbs Act robbery—whether through direct or accomplice liability—fails to qualify as a "crime of violence" under the § 924(c)(3)(A) force clause because one can violate it without use of violent physical force, or even a threat of force. While courts of appeals seek to rescue the viability of related Hobbs Act and section 924(c) prosecutions, a correct application of the categorical

approach plainly forecloses this partnership. Courts have generally obscured this other statutory language, preferring instead to read force into statutory language that is starkly naked on that point. *See, e.g.*, *United States v. Garcia-Ortiz*, 904 F.3d 102 (1st Cir. 2018) (finding that threats of force and fear of injury satisfies as a crime of violence "as long as we construe robbery's "force, or violence, or fear of injury" as requiring the use or threat of "physical force."). *See also Gooch*, 850 F.3d at 291 (6th Cir. 2017) (concluding without analysis or explanation that 18 U.S.C. § 1951(b)(1) "clearly" comports with the elements clause). "[S]tatutory construction does not work that way: A court does not get to delete inconvenient language and insert convenient language to yield the court's preferred meaning." *Borden*, 2021 WL 2367312, at *12. Mr. Council and all criminal defendants confronting this double-barreled prosecution, should have "ambiguity concerning the ambit of criminal statutes" "resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000). "The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.). *See also Davis*, 139 S.Ct. at 2333.

Doctrines of due process, fundamental fairness, and separation of powers require reversal of the Seventh Circuit's judgment. Where a statute's plain language permits conviction without requiring violent physical force, it cannot be a

predicate crime of violence for 18 U.S.C. § 924(c). For all of the forgoing reasons, Mr. Council prays this Court grant his petition for a writ of certiorari.

CONCLUSION

Mr. Council's conviction as to this count should be vacated and the matter remanded.

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Respectfully Submitted,

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