No._____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID COPES,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Hobbs Act robbery is a predicate crime of violence under the elements clause of 18 U.S.C. § 924(c).

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID COPES,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner David Coped respectfully requests that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 6, 2021.

OPINION BELOW

The not-precedential opinion of the court of appeals is available at 837 F. App'x 898 (3d Cir. 2021), and is attached as Appendix A.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)(1)(A)(ii) prohibits the brandishing of a firearm "during and in relation to any crime of violence or drug trafficking crime." "Crime of violence," in turn, is defined as any felony offense that:

> (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.

18 U.S.C. § 924(c)(3).

The Hobbs Act provides as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> > (1) The term "robbery" means 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, 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.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951.

STATEMENT OF THE CASE

The Court is currently considering granting *certiorari* on a question that has split the courts of appeals and on which the United States has petitioned—whether *attempted* Hobbs Act robbery is a predicate "crime of violence" under 18 U.S.C. § 924(c). *See United States v. Taylor*, No. 20-1459 (U.S. petition, brief in opposition filed May 21, 2021); *Dominguez v. United States*, No. 20-1000 (defendant petition, distributed for conference of June 3, 2021). Fairly included in that question—indeed a logically prior matter, as the Third Circuit recently recognized—is whether *completed* Hobbs Act robbery is a § 924(c) predicate. *See United States v. Walker*, 990 F.3d 316, 325-26 (3d Cir. 2021) ("Our reasoning begins with a consideration of whether Hobbs Act robbery as a completed act, rather than an attempt, is categorically a crime of violence."). As such, Mr. Copes's petition should be held pending disposition of *Taylor* and *Dominguez*.

Alternatively, Mr. Copes's petition should be granted now. In *United States v. Davis*, 139 S. Ct. 2319 (2019), the Court held the so-called residual clause in § 924(c) to be unconstitutionally vague. An offense is therefore a predicate crime of violence under § 924(c) only if it qualifies under the elements clause, meaning 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).

To date, every court of appeals to have considered the question—including the Third Circuit below and, precedentially, in *Walker*—has held that completed Hobbs Act robbery in violation of 18 U.S.C. § 1951 qualifies as a crime of violence under the elements clause. Those courts are wrong. The text of § 1951 and courts' longstanding construction of it to reach threats to intangible property, use of nonviolent force, and unintentional application of force establish that Hobbs Act robbery does not qualify under the elements clause.

By striking down half of § 924(c)'s crime-of-violence definition as unconstitutionally vague, *Davis* created a hole in the statute through which Hobbs Act robbery has fallen. Given the lower courts' insistence on ignoring § 1951's text and plain meaning in an attempt to save the statute as an elements-clause predicate, it is left to this Court to recognize that Hobbs Act robbery is not a § 924(c) predicate in light of *Davis*. Then, the proper branch of government—Congress, not the courts—may address the matter through legislation as it sees fit.

1. Mr. Copes was charged with two counts of Hobbs Act robbery (in violation of 18 U.S.C. § 1951(a)); one count of brandishing a firearm during a crime of violence (in violation of 18 U.S.C. § 924(c)); and one count of being a felon in possession of a firearm (in violation of 18 U.S.C. § 922(g)). He moved to dismiss the § 924(c) charge on the ground that Hobbs Act robbery is no longer a crime of violence after this Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied that motion, and Mr. Copes thereafter entered into a guilty plea agreement with respect to all charges, stipulating to an aggregate custodial sentence of 114 months' imprisonment and preserving the right to appeal the denial of his motion to dismiss. The district court accepted the plea agreement and sentenced Mr. Copes as stipulated.

2. On appeal, Mr. Copes challenged his brandishing conviction on the ground that Hobbs Act robbery is not a § 924(c) predicate, because it is not categorically a crime of violence after *United States v. Davis*, 139 S. Ct. 2319 (2019), which was decided after the district court proceedings and extended *Johnson* by holding the residual clause in § 924(c) to be unconstitutionally vague. Specifically, Mr. Copes argued that (1) the text of § 1951 proscribes takings by threat to injure the victim's *intangible* property, which by definition does not involve

physical force; (2) conviction under § 1951 may be predicated on the use of nonviolent force; and (3) conviction under § 1951 may be predicated on the unintentional application of force.

3. A panel of the Third Circuit affirmed in a not-precedential opinion. The panel held that Hobbs Act robbery qualifies as a predicate crime of violence under § 924(c)'s elements clause, reasoning that "fear of injury" as used in the Hobbs Act "cannot occur without at least a threat of physical force." App. A at 3-5. The panel did not address Mr. Copes's specific arguments, other than to assert that he used "the wrong definition of physical force" and cited no Hobbs Act robbery prosecutions involving threats to intangible property, nonviolent force, or unintentional force. App. A at 4-5.

REASONS FOR HOLDING OR GRANTING THE PETITION

This petition should either be held pending disposition of *United States v. Taylor*, No. 20-1459 and *Dominguez v. United States*, No. 20-1000, or should be granted now to address whether Hobbs Act robbery is a predicate crime of violence under 18 U.S.C. § 924(c) after *United States v. Davis*, 139 S. Ct. 2319 (2019).

A. The petition should be held pending disposition of *Taylor* and *Dominguez*.

Attempted Hobbs Act robbery cannot be a § 924(c) predicate if *completed* Hobbs Act robbery is not. That truism recently led the Third Circuit to begin its analysis of attempted Hobbs Act robbery's § 924(c) status by considering "whether Hobbs Act robbery as a completed act, rather than an attempt, is categorically a crime of violence." *United States v. Walker*, 990 F.3d 316, 325-26 (3d Cir. 2021).

The courts of appeals are split on whether attempted Hobbs Act robbery is a § 924(c) predicate, and the United States has petitioned for *certiorari* on this issue. *See United States v.*

Taylor, No. 20-1459 (brief in opposition filed May 21, 2021). The same question is presented in a fully briefed defendant petition. *See Dominguez v. United States*, No. 20-1000 (distributed for conference of June 3, 2021).

If the Court grants *certiorari* in *Taylor* or *Dominguez*, it is likely the resulting merits decision will at least shed new and authoritative light on whether completed Hobbs Act robbery is a § 924(c) predicate—in which case the Court should then grant Mr. Copes's petition, vacate the judgment below, and remand ("GVR") for the Third Circuit to reconsider in light of the merits decision. Or this Court might, like the Third Circuit in *Walker*, decide completed Hobbs Act robbery's § 924(c) status in the *ratio decidendi* of its merits decision on attempted Hobbs Act robbery—in which case a *certiorari* denial or GVR would be appropriate, depending on the outcome. In all events, the most prudent course at present is to hold Mr. Copes's petition pending disposition of *Taylor* and *Dominguez*.

B. Alternatively, the petition should be granted now.

As noted above, to date every court of appeals to have considered the question has held that Hobbs Act robbery is a § 924(c) predicate under the elements clause.[1] That result cannot be squared with the text of § 1951 and courts' longstanding construction of the statute's plain meaning—as was recently recognized by a district court. *See United States v. Chea*, Nos. 98-

[1] *See United States v. García-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 56-60 (2d Cir. 2018); *United States v. Walker*, 990 F.3d 316, 325-26 (3d Cir. 2021); *United States v. Mathis*, 932 F.3d 242, 265-66 (4th Cir. 2019); *United States v. Buck*, 847 F.3d 267, 274-75 (5th Cir. 2017); *United States v. Richardson*, 948 F.3d 733, 742 (6th Cir. 2020); *United States v. Rivera*, 847 F.3d 847, 848-49 (7th Cir. 2017); *Diaz v. United States*, 863 F.3d 781, 783 (8th Cir. 2017); *United States v. Dominguez*, 954 F.3d 1251, 1260-61 (9th Cir. 2020); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060-66 (10th Cir. 2018); *Brown v. United States*, 942 F.3d 1069, 1075 (11th Cir. 2019).

20005 & 40003, 2019 WL 5061085 (N.D. Cal. Oct. 2, 2019) (holding Hobbs Act robbery not § 924(c) predicate; government appeal stayed pending *certiorari* proceedings in *Dominguez*). As nearly every court of appeals has already weighed in, only this Court can settle the matter and place Hobbs Act robbery's ultimate post-*Davis* status before the appropriate branch of government—Congress.

To reprise: Hobbs Act robbery proscribes, *inter alia*, takings by placing the victim in fear of injury to his property, and the elements clause of § 924(c) requires physical force. 18 U.S.C. § 1951(b)(1); 18 U.S.C. § 924(c)(3)(A). The key to Hobbs Act robbery's § 924(c) status lies in two definitions: "property" under the Hobbs Act and "physical force" under § 924(c)(3)(A). "Property" includes intangible as well as tangible property. *See, e.g., Scheidler v. National Organization for Women, Inc*., 537 U.S. 393, 404-05 (2003) ("property" includes exclusive control of business assets).[2] And "physical force" "plainly refers to force exerted by and through concrete bodies." *Johnson v. United States*, 559 U.S. 133, 138 (2010) (construing 18 U.S.C. § 924(e)(2)(B)(i)); *accord Stokeling v. United States*, 139 S. Ct. 544, 552 (2019). The question, then, is whether a Hobbs Act robbery conviction necessarily involves force exerted by and through concrete bodies. Plainly, it does not: by definition, *physical* force and *intangible* property do not mix.

Even with respect to takings by threat against tangible property, Hobbs Act robbery does not require the degree of force demanded by this Court. "Physical force" means "violent force."

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[2] While *Scheidler* involved Hobbs Act extortion, the term "property" has only one meaning in § 1951. *See, e.g*., *Gustafson v. Alloyd Co., Inc*., 513 U.S. 561, 570 (1995) ("[T]he normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)).

Johnson, 559 U.S. at 140. In the context of the Armed Career Criminal Act, which requires force against persons, the quantum of force that will be deemed "violent" is relatively low: "force capable of causing physical pain or injury to another person," which is satisfied in the robbery context by force sufficient to overcome resistance of the victim. *Stokeling*, 139 S. Ct. at 550-53 (quoting *Johnson*, 559 U.S. at 140). But the situation is different with statutes—such as § 1951—that address force against property in addition to force against persons. *See United States v. Bowen*, 936 F.3d 1091, 1103-08 (10th Cir. 2019) (witness retaliation through property damage, in violation of 18 U.S.C. § 1513(b)(2), not crime of violence under § 924(c)'s elements clause). Property can be damaged by applying slight force that is not inherently violent, such as the "force" of spray paint touching a car. *Id*. at 1107 (citing *United States v. Edwards*, 321 F. App'x 481 (6th Cir. 2009) (§ 1513(b)(2) conviction upheld based on threat to spray paint victim's car)). *Johnson*'s definition "capable of causing physical pain or injury *to another person*" therefore cannot simply be recast as "capable of causing injury *to property*." *Id*. at 1104-08. Instead, in the property context, "physical force" means force that is inherently violent, strong, and substantial. *Id*. (citing *Johnson* and *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)).

Finally, unintentional application of force suffices for liability under the Hobbs Act insofar as the defendant need only objectively place his victim in fear of injury. *See, e.g.*, *Popal v. Gonzales*, 416 F.3d 249, 254 (3d Cir. 2005) (construing identical § 16(a)); *United States v. Otero*, 502 F.3d 331, 335 (3d Cir. 2007) (construing similar U.S.S.G. § 2L1.2); *United States v. Brown*, 765 F.3d 185, 192 (3d Cir. 2014) (construing similar U.S.S.G. § 4B1.2). That is a negligence *mens rea*, which is insufficient under the elements clause. *Cf. Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015); *Leocal*, 543 U.S. at 11-12.

CONCLUSION

For all of the foregoing reasons, this petition should either be held pending disposition of *United States v. Taylor*, No. 20-1459 and *Dominguez v. United States*, No. 20-1000, or should be granted to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 6, 2021.

Respectfully submitted,

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