

No.

In The Supreme Court Of The United States

Brian Fierro, Kacy Sapp, Damir Vucic, Bailey Aaron Hall, and Mati Sefo,

Petitioners,

v.

United States of America,

Respondent.

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

Joint Petition for a Writ of Certiorari

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Question Presented for Review

By its plain language, Hobbs Act robbery does not require as an element the use, attempted use, or threatened use, of violent physical force. The plain language of the Hobbs Act robbery statute, 18 U.S.C. § 1951(b)(1), encompasses future threats to injure intangible property and does not require violent physical force.

The question presented is whether the Circuits have interpreted the *actus reus* of Hobbs Act robbery too narrowly and against its plain language by requiring violent physical force as an element.

Related Proceedings

Petitioners Brian Fierro, Kacy Sapp, Damir Vucic, Bailey Aaron Hall, and Mati Sefo each separately moved to vacate their 18 U.S.C. § 924(c) convictions under 28 U.S.C. § 2255 in the District of Nevada. Petitioners are not co-defendants, and their cases are not factually related. However, Petitioners' legal claims for relief under 28 U.S.C. § 2255 are identical. The details of each Petitioner's case are:

United States v. Brian Fierro: The district court denied Fierro's motion to vacate under 28 U.S.C. § 2255 and granted a certificate of appealability (COA) on March 31, 2021, in Case Nos. 2:17-cv-00742-KJD, 2:09-cr-00240-KJD-PAL-1 (BF-Dkt. 143).¹ Pet. App. C. The Ninth Circuit denied Fierro's request for an initial hearing en banc on March 5, 2021 and affirmed the denial of § 2255 relief on May 21, 2021, in Case No. 20-16058 (Dkts. 22, 23). Pet. App. A, B. Fierro filed an emergency motion for compassionate release in district court on February 17, 2021 that remains pending. BF-Dkt. 154, 161, 164, 168.

United States v. Kacy Sapp: The district court denied Sapp's motion to vacate under 28 U.S.C. § 2255, and denied him a COA on November 10, 2020, in Case Nos. 3:20-cv-00367-HDM, 3:18-cr-00073-HDM-WGC-1 (KS-Dkt. 41). Pet. App. E. The Ninth Circuit denied Sapp a COA on June 17, 2021, in Case No. 21-15049 (Dkt. 3). Pet. App. D.

¹ Citations to district court docket documents are preceded by the respective Petitioner's initials, *e.g.*, "BF-Dkt."

United States v. Damir Vucic: The district court denied Petitioner Vucic's motion to vacate under 28 U.S.C. § 2255 and denied him a COA on November 16, 2020, in Case Nos. 2:18-cv-02296-KJD, 2:15-cr-00332-KJD-NJK-1 (DV-Dkt. 89). Pet. App. G. The Ninth Circuit denied Vucic a motion for COA on June 17, 2021, in Case No. 21-15095 (Dkt. 5). Pet. App. F.

United States v. Bailey Aaron Hall: The district court denied Petitioner Hall's motion to vacate under 28 U.S.C. § 2255 and denied him a COA on January 22, 2021, in Case Nos. 2:20-cv-01062-JAD, 2:16-cr-00321-JAD-GWF-1 (BH-Dkt. 87). Pet. App. I. The Ninth Circuit denied Hall a motion for COA on August 16, 2021, in Case No. 21-15520 (Dkt. 3). Pet. App. H.

United States v. Mati Sefo: The district court denied Petitioner Sefo's motion to vacate under 28 U.S.C. § 2255 and denied him a COA on December 17, 2020, in Case Nos. 3:20-cv-00380-LRH, 3:16-cr-00052-LRH-WGC-1 (MS-Dkt. 41). Pet. App. K. The Ninth Circuit denied Sefo a motion for COA on August 16, 2021, in Case No. 21-15259 (Dkt. 3). Pet. App. J.

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Petition for Certiorari

Petitioners Brian Fierro, Kacy Sapp, Damir Vucic, Bailey Aaron Hall, and Mati Sefo jointly petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit. A joint petition is proper under Supreme Court Rule 12.4, as Petitioners each challenge their respective judgments on identical legal issues.

Opinions Below

The Ninth Circuit Court of Appeals opinions denying habeas relief to Petitioners Fierro, Vucic, and Sefo are not published in the Federal Reporter but are reprinted at: *United States v. Fierro*, 848 F. App'x 337 (9th Cir. May 21, 2021); *United States v. Vucic*, No. 21-15095, 2021 WL 3077590 (9th Cir. June 17, 2021); and *United States v. Sefo*, No. 21-15259, 2021 WL 3629279 (9th Cir. Aug. 16, 2021). *See* Pet. App. A, F, J. The Ninth Circuit orders denying a COA to Petitioners Sapp and Hall are unpublished and not reprinted. *See* Pet. App. D, H.

The district court's orders denying habeas relief to Petitioners Fierro, Vucic, Hall, and Sefo are unreported but reprinted at: *United States v. Fierro*, No. 2:09-cr-0240-KJD-PAL, 2020 WL 1531162 (D. Nev. Mar. 31, 2020); *United States v. Vucic*, No. 2:15-cr-00332-KJD-NJK 2020 WL 6729275 (D. Nev. Nov. 16, 2020); *United States v. Hall*, No. 2:16-cr-00321-JAD-GWF, 2021 WL 230046 (D. Nev. Jan. 22, 2021); and *United States v. Sefo*, No. 3:16-cr-00052-LRH-WGC, 2020 WL 7409595 (D. Nev. Dec. 17, 2020). *See* Pet. App. C, G, I, K. The district court's order denying habeas relief to Petitioner Sapp is unpublished and not reprinted. *See* Pet. App. E.

Jurisdiction

The Ninth Circuit Court of Appeals entered final orders denying habeas relief to Petitioners under 28 U.S.C. § 2255 on:

- May 21, 2021, as to Fierro. Pet. App. A: 1a.
- June 17, 2021, as to Sapp. Pet. App. D: 8a.
- June 17, 2021, as to Vucic. Pet. App. F: 12a.
- August 16, 2021, as to Hall. Pet. App. H: 17a.
- August 16, 2021, as to Sefo. Pet. App. J: 22a.

This Court’s jurisdiction is invoked under 28 U.S.C. § 1254. This joint petition is timely per Supreme Court Rule 13.1 because the petition is filed within 90 days of the lower court’s orders denying discretionary review.

Constitutional and Statutory Provisions Involved

1. U.S. Const. amend. V: “No person shall . . . be deprived of life, liberty, or property, without due process of law.
2. Title 18, Section 924(c), of the United States Code provides in relevant part:
 - (3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—
 - (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.
3. Hobbs Act robbery, 18 U.S.C. § 1951, provides in relevant part:
 - (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.

Statement of the Case

Petitioners are just five of the many defendants convicted and sentenced to mandatory minimum sentences under 18 U.S.C. § 924(c) where the predicate offense no longer qualifies as a crime of violence. Section 924(c) provides graduated, mandatory, consecutive sentences for using a firearm during and in relation to a crime of violence. These five Petitioners have been sentenced to collectively serve over 56 years in prison. But 64% of this total consists solely of the mandatory sentences imposed under 18 U.S.C. § 924(c).

I. Petitioners are each serving mandatory minimum sentences imposed under 18 U.S.C. § 924(c).

Petitioners’ cases individually originate from the District of Nevada, though Petitioners are not co-defendants and their cases are not factually related. The common thread among Petitioners is they are each serving mandatory minimum sentences for § 924(c) convictions predicated on Hobbs Act robbery:

Petitioner Brian Fierro: A jury found Fierro guilty of four counts in 2009: interference with commerce by robbery under 18 U.S.C. § 1951 (“Hobbs Act robbery”) (Count One); discharging a firearm during a crime of violence, under 18 U.S.C. § 924(c)(1)(A)(ii) (Count Two); and two counts of unlawful firearm possession under 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Counts Three and Four). BF-Dkt. 16, 56. The offense underlying the § 924(c) count is Count One’s Hobbs Act robbery. BF-Dkt. 16. Fierro pursued a direct appeal and the Ninth Circuit vacated in part, instructing the district court to omit one of the multiplicitous firearm possession convictions. BF-Dkt. 90. The district court resentenced Fierro to concurrent sentences of 10-years for the Hobbs Act robbery (Count One) and one firearm count (Count Three), and a 10-year mandatory consecutive prison sentence for the § 924(c) count (Count Two)—totaling 20 years. BF-Dkt. 94. Fierro has served approximately 146 months of his 240-month sentence. His estimated release date is July 13, 2026, after which he will serve five years of supervised release.

Petitioner Kacy Sapp: Sapp pled guilty in 2019 to one count of use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) (Count Two). KS-Dkt. 23, 25. The offense underlying the § 924(c) count was Hobbs Act robbery, as alleged in Count One. KS-Dkt. 1. Count One was ultimately dismissed. KS-Dkt. 33. The district court sentenced Sapp in May 2019 to a mandatory 84 months’ imprisonment. KS-Dkt. 31, 33. Sapp has served approximately 39 months of his sentence. Sapp’s estimated release date is April 24, 2024, after which he will serve five years of supervised release.

Petitioner Damir Vucic: Vucic pled guilty in 2017 to one count of Hobbs Act robbery under 18 U.S.C. § 1951 (Count One) and one count of possession of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c) (Count Two). DV-Dkt. 57. The offense underlying the § 924(c) count is Count One's Hobbs Act robbery. DV-Dkt. 56, 57. The district court sentenced Vucic in December 2017, to 27 months on the Hobbs Act robbery count, followed by a mandatory consecutive 60-month sentence on the § 924(c) count—for a total 87 months in prison. DV-Dkt. 71, 73. Vucic has served approximately 69 months of his sentence. His estimated release date is December 5, 2021, after which he will serve three years of supervised release.

Petitioner Bailey Aaron Hall: Hall pled guilty in 2017 to one count of brandishing a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A) (Count Two) and three counts of Hobbs Act robbery under 18 U.S.C. § 1951 (Counts One, Five, and Seven). BH-Dkt. 42, 43. The offense underlying the § 924(c) count is Count One's Hobbs Act robbery. BH-Dkt. 14. The district court sentenced Hall in May 2019, to concurrent sentences of 96 months' imprisonment on the Hobbs Act robbery counts, and a mandatory consecutive 84-month sentence for the § 924(c) conviction—totaling 180 months. BH-Dkt. 74, 77. Hall has served approximately 59 months of his sentence. His estimated release date is September 20, 2029, after which he will serve three years of supervised release.

Petitioner Mati Sefo: Sefo pled guilty in 2017 to one count of use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii)

(Count Two). MS-Dkt. 1, 18, 19. The offense underlying Count Two was Hobbs Act robbery, as alleged in Count One. MS-Dkt. 1, 19. Count One was ultimately dismissed. MS-Dkt. 35. On July 10, 2017, the district court sentenced Sefo to 84 months' imprisonment. MS-Dkt. 33, 35. His estimated release date is July 20, 2022, after which he will serve five years of supervised release.

II. Petitioners seek to vacate their § 924(c) convictions and sentences under this Court's *Johnson* and *Davis* decisions.

In 2015, this Court held the Due Process Clause precluded imposing an increased sentence under the residual clause of the Armed Career Criminal Act's ("ACCA") violent felony definition. *Johnson v. United States*, 135 S. Ct. 2551 (2015). This Court later issued *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016), holding *Johnson* announced a new substantive rule that applies retroactively to cases on collateral review. In June 2019, this Court issued *United States v. Davis*, 139 S. Ct. 2319 (2019), holding the similar residual clause of 18 U.S.C. § 924(c)(3)(B) violates the Constitution's guarantee of due process.

Petitioners sought relief from their § 924(c) convictions by filing timely motions to vacate under 28 U.S.C. § 2255 in Nevada federal district court.² Each Petitioner asserted, under *Johnson* and *Davis*, Hobbs Act robbery no longer

² BF-Dkt. 119, 120, 124; KS-Dkt. 35, 40; DV-Dkt. 75, 79, 82; BH-Dkt. 82,85; MS-37, 40.

qualifies as a crime of violence.³ The district court denied each motion on its merits, denying a COA in all but Fierro’s case. Pet. App. C, E, G, I, K.

III. Petitioners appealed, and the Ninth Circuit denied relief.

Petitioner Fierro timely appealed, and Petitioners Sapp, Vucic, Hall, and Sefo timely requested a COA from the Ninth Circuit.

The Ninth Circuit affirmed denial of § 2255 relief for Petitioner Fierro based on its precedent holding Hobbs Act robbery is a crime of violence under the § 924(c)(3)(A) physical force clause. Pet. App. A (citing *United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020), *petition for cert. filed*, No. 20-1000 (Jan. 21, 2021)). The Ninth Circuit denied COAs for Sapp, Vucic, Hall, and Sefo, finding Petitioners did not make a substantial showing of the denial of a constitutional right. Pet. App. D, F, H, J.

Reasons for Granting the Petition

The Court should determine whether the Circuits properly interpret the Hobbs Act robbery statute, 18 U.S.C. § 1951. The current federal circuit consensus that Hobbs Act robbery necessarily requires the use, attempted use, or threatened use of violent physical force conflicts with the plain language of § 1951. To make the Hobbs Act robbery statute “fit” the 18 U.S.C. § 924(c)(3)(A) physical force clause definition of a crime of violence, the current Circuit interpretations have narrowed the conduct that Hobbs Act robbery used to cover. It is imperative this Court decide

³ BF-Dkt. 119, 124, 128, 131, 133, 137, 140, 142 (raising claims originally under *Johnson* and latter supplementing with *Davis*); KS-Dkt. 35, 40; DV-Dkt. 75, 79, 82; BH-Dkt. 82,85; MS-37, 40.

the proper interpretation of Hobbs Act robbery, so defendants are not mandatorily incarcerated for an overbroad offense that does not fit the § 924(c) crime of violence statutory definition.

I. The Circuits have narrowed the scope of Hobbs Act robbery, contravening the statute’s plain language.

In *Davis*, 139 S. Ct. 2319, this Court struck 18 U.S.C. § 924(c)(3)(B)’s residual clause as vague and in violation of the Due Process Clause. U.S. Const. amend. V. Petitioners expect the government will concede, as it has done here and elsewhere, that *Davis* pronounced a substantive rule applying retroactively to motions to vacate brought under 28 U.S.C. § 2255. See Brief for the United States, *United States v. Davis*, S. Ct. No. 18-431, p. 52 (Feb. 12, 2019) (“A holding of this Court that Section 924(c)(3)(B) requires an ordinary-case categorical approach—and thus is unconstitutionally vague—would be a retroactive substantive rule applicable on collateral review.”) (citing *Welch*, 136 S. Ct. at 1267).⁴

Therefore, to qualify as a § 924(c) predicate crime of violence, Hobbs Act robbery must meet the physical force clause of the crime of violence definition at § 924(c)(3)(A). To qualify under the force clause, the offense must 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 means the offense

⁴ Every circuit to address this question in a published opinion agrees *Davis* applies retroactively. See *King v. United States*, 965 F.3d 60, 64 (1st Cir. 2020); *In re Thomas*, 988 F.3d 783, 788-89 (4th Cir. 2021); *In re Franklin*, 950 F.3d 909, 910-11 (6th Cir. 2019); *Cross v. United States*, 892 F.3d 288, 294-94 (7th Cir. 2018); *United States v. Bowen*, 936 F.3d 1091, 1100 (10th Cir. 2019); *In re Hammoud*, 931 F.3d 1032, 1039 (11th Cir. 2019).

must necessarily require two elements: (1) violent physical force capable of causing physical pain or injury to another person or property, *Stokeling v. United States*, 139 S. Ct. 544, 554 (2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)); and (2) the use of force must be intentional and not merely reckless or negligent, *Borden v. United States*, 141 S. Ct. 1817 (2021).

A. Hobbs Act robbery plainly encompasses causing fear of future injury to property—either tangible or intangible.

Hobbs Act robbery, 18 U.S.C. § 1951(a), can be committed by causing fear of future injury to intangible property and thus is not a § 924(c) crime of violence. The Hobbs Act prohibits “obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery.” 18 U.S.C. § 1951(a). “Robbery” is defined 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, 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.

18 U.S.C. § 1951(b)(1) (emphases added). Hobbs Act robbery fails to qualify under § 924(c)’s force clause for at least five reasons.

First, the Hobbs Act’s plain language criminalizes a threat of “injury, immediate or future, to his person *or property*.” 18 U.S.C. § 1951(b)(1) (emphasis added). Based on its plain language, Hobbs Act robbery can be committed by threats to property. *See United States v. O’Connor*, 874 F.3d 1147, 1154, 1158 (10th Cir. 2017) (holding “Hobbs Act robbery criminalizes conduct involving threats

to property,” and “Hobbs Act robbery reaches conduct directed at ‘property’ because the statute specifically says so”).

Second, the Hobbs Act’s plain language does not require the use or threats of violent physical force, as defined by *Stokeling*, 139 S. Ct. at 554, when causing fear of future injury to property. “When interpreting a statute, we must give words their ‘ordinary or natural’ meaning.” *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

Third, “fear of injury” to property includes not only a fear of future physical damage to tangible property, but also a fear of future economic loss or damage to intangible property. Federal circuits have long been in accord, unanimously interpreting Hobbs Act “property” to broadly include “intangible, as well as tangible, property.” *United States v. Local 560 of the Int’l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) (collecting cases and describing the Circuits as “unanimous” on this point); *see also, e.g., United States v. Brown*, No. 11-cr-334-APG, Dkt. 197 (D. Nev. July 28, 2015) (providing Hobbs Act robbery jury instruction that “property” includes “money and other tangible and intangible things of value” and fear as “an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm”); *United States v. Nguyen*, 2:03-cr-00158-KJD-PAL, Dkt. 157 at p. 28 (D. Nev. Feb. 10, 2005) (providing Hobbs Act robbery jury instruction that “fear” includes “worry over expected personal harm or business loss, or over financial or job security”).

Fourth, “fear of injury” does not encompass violent force. Instead, the Hobbs Act expressly provides alternative means encompassing violent force: “actual or

threatened force, or violence.” 18 U.S.C. § 1951(b)(1). Canons of statutory interpretation require giving each word meaning: “Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting, and resistance should be heightened when the words describe an element of a criminal offense.” *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute.”) (cleaned up). Interpreting “fear of injury” as requiring the use or threat of violent physical force would render superfluous the other alternative means of committing Hobbs Act robbery.

Fifth, intangible property—by definition—cannot be in the victim’s physical custody. This preempts any argument that the fear of injury to property necessarily involves a fear of injury to the victim (or another person) by virtue of the property’s proximity to the victim or another person. *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018) (noting Hobbs Act robbery can be committed by “threats to property alone,” and such threats—“whether immediate or future—do not necessarily create a danger to the *person*”), *cert. denied*, 139 S. Ct. 845 (2019).

Hobbs Act robbery, therefore, can be committed via non-violent threats of future harm to an intangible property interest. Such threats are not threatening physical force—let alone the violent physical force against a person or property the § 924(c)(3)(A) physical force clause requires.

C. To hold the offense is a crime of violence, Circuits have narrowly interpreted the Hobbs Act robbery statute, in conflict with its plain language.

To hold that Hobbs Act robbery qualifies as a crime of violence under the physical force clause, the Circuits erroneously interpret the Hobbs Act robbery statute to be limited to conduct involving violent physical force. *See United States v. García-Ortiz*, 904 F.3d 102, 106–09 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2016); *United States v. Walker*, 990 F.3d 316, 325–26 (3d Cir. 2021), *petition for cert. filed*, No. 21-102 (July 26, 2021); *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019); *United States v. Buck*, 847 F.3d 267, 275 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *Dominguez*, 954 F.3d at 1260; *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060–66 (10th Cir. 2018); *In re St. Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016).

For example, in declaring Hobbs Act robbery meets the § 924(c) physical force clause’s requirements, the Fourth Circuit noted both the Hobbs Act robbery statute and § 924(c)’s physical force clause use the term “property,” without further definition, and reasoned there was no reason to assume a different definition of property applied to each. *Mathis*, 932 F.3d at 266. The Fourth Circuit failed to acknowledge the impossibility of using, attempting to use, or threatening to use physical force against intangible property, which defies physical force.

In holding the same, the Ninth Circuit recognized: “Fear of injury is the least serious way to violate [Hobbs Act robbery], and therefore, the species of the crime

that we should employ for our categorical analysis.” *Dominguez*, 954 F.3d at 1254, 1260. However, the Ninth Circuit erroneously focused on fear of injury to persons, not property, expressly admitting it did “*not* analyze whether the same would be true if the target were ‘intangible economic interests,’ because” it found appellant “Dominguez fail[ed] to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest.” *Id.* (emphasis added).

The Ninth Circuit’s “realistic scenario” requirement conflicts with this Court’s precedent. When a statute’s plain statutory language includes conduct broader than the crime of violence definition, “the inquiry is over” because the statute is facially overbroad. *Descamps v. United States*, 570 U.S. 254, 265 (2013). The realistic scenario requirement applies only when the breadth of the statute is not evident from its plain text. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (instructing that courts cannot find a statute is overbroad based on “legal imagination”). Because Hobbs Act robbery does not *necessarily* require the use of intentional violent force against a person or property of another—as an element—it does not qualify as a crime of violence under § 924(c)’s physical force clause. *Moncrieffe v. Holder*, 569 U.S. 184, 184 (2013).

Circuit model jury instructions also demonstrate the plain overbreadth of Hobbs Act robbery. The Third, Fifth, Tenth, and Eleventh Circuits use pattern Hobbs Act jury instructions defining Hobbs Act robbery to include fear of future injury to intangible property. *See* Third Circuit Model Criminal Jury Instructions,

6.18.1951-4 and 6.18.1951-5 (Oct. 2017)⁵ (defining “fear of injury” as when “a victim experiences anxiety, concern, or worry over expected personal physical or economic harm” and “[t]he term ‘property’ includes money and other tangible and intangible things of value”); Fifth Circuit, Pattern Jury Instructions (Criminal Cases) 2.73A (2019)⁶ (“The term ‘property’ includes money and other tangible and intangible things of value.”); Tenth Circuit Criminal Pattern Jury Instructions, 2.70 (Apr. 2021)⁷ (“‘Property’ includes money and other tangible and intangible things of value that are transferable – that is, capable of passing from one person to another. ‘Fear’ means an apprehension, concern, or anxiety about physical violence or harm or economic loss or harm that is reasonable under the circumstances.”); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (Aug. 2021)⁸ (“‘Property’ includes money, tangible things of value, and intangible rights that are a source or element of income or wealth. ‘Fear’ means a state of anxious concern, alarm, or anticipation of harm. It includes the fear of financial loss as well as fear of physical violence.”).

⁵ Available at <https://www.ca3.uscourts.gov/model-criminal-jury-table-contents-and-instructions>.

⁶ Available at <https://www.lb5.uscourts.gov/JuryInstructions/>.

⁷ Available at <https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20Version.pdf>.

⁸ Available at <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsRevisedAUG2021.pdf>.

The Modern Federal Criminal Jury Instructions also define Hobbs Act robbery as fear of future harm to intangible property. *See* 3 Modern Federal Jury Instructions-Criminal, § 50-2 (June 2021). The Modern Instructions define “property” as “includ[ing] money and other tangible and intangible things of value which are capable of being transferred from one person to another.” *See* 3 Modern Federal Jury Instructions-Criminal, § 50-4 (June 2021). Robbery by “fear” is defined as “fear of injury, whether immediately or in the future,” and explains “[t]he use or threat of force or violence might be aimed at . . . causing *economic* rather than physical injury.” *See* 3 Modern Federal Jury Instructions-Criminal, § 50-5 (June 2021) (emphasis added). And the “fear of injury” sufficient for Hobbs Act robbery is further defined as “[f]ear exists if a victim experiences anxiety, concern, or worry over expected personal harm or business loss, or over financial or job security.” *See* 3 Modern Federal Jury Instructions-Criminal, § 50-6 (June 2021).

A majority of federal circuits hold that when a statute’s plain language sufficiently establishes overbreadth, the categorical approach does not require a “realistic scenario.” *See Zhi Fei Liao v. AG U.S.*, 910 F.3d 714, 723 n.11 (3d Cir. 2018) (collecting circuit cases); *see also United States v. O’Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017) (rejecting government’s argument that defendant was required to “demonstrate that the government has or would prosecute’ threats to property as a Hobbs Act robbery” because the defendant “does not have to make that showing” under the categorical approach.); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States v.*

Stitt, 139 S. Ct. 399 (2018). Yet these same Circuits hold Hobbs Act robbery is a § 924(c) crime of violence. This Court’s intervention is necessary to correct the Circuits’ misapplication of the categorical approach.

II. Petitioners raise an issue of exceptional importance this Court has not yet addressed, particularly given § 924(c)’s consecutive, mandatory minimum sentences.

The question presented is of exceptional important to federal courts and defendants because of the graduated mandatory minimum sentences ranging from five years to life imprisonment that § 924(c) requires.⁹ Petitioners are just five of the thousands of defendants currently serving consecutive mandatory minimum sentences for § 924(c) convictions. According to the Sentencing Commission’s latest statistics, approximately 21,700 individuals (14.3% of the federal prison population) are serving a § 924(c) mandatory sentence. U.S. Sent. Comm’n, *Quick Facts: Federal Offenders in Prison* (March 2021).¹⁰ In Fiscal Year 2020, over 2500 individuals were convicted of a § 924(c) offense, at least 22% of which involved a robbery offense, with an average sentence of 138 months (11½ years) in prison.

⁹ Petitioners’ convictions under § 924(c) also resulted in higher supervision terms than would have been imposed for Hobbs Act robbery. Because 18 U.S.C. § 924(c) carries a statutory imprisonment maximum of life imprisonment, it is a Class A felony with a five-year maximum supervised release term. In contrast, Hobbs Act robbery, with a 20-year imprisonment statutory maximum, is a Class C felony and carries a three-year maximum supervised release term. *See* 18 U.S.C. § 1951(a); 18 U.S.C. § 3559(a) (felony classifications); 18 U.S.C. § 3583(b) (authorized terms of supervised release).

¹⁰ Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_March2021.pdf.

U.S. Sent. Comm’n, *Quick Facts: 18 U.S.C. § 924(c) Firearms Offenses* (May 2021).¹¹

While this Court has interpreted the Hobbs Act statute over the years, this Court has not yet addressed whether the plain language of the Hobbs Act necessarily meets the 18 U.S.C. § 924(c)(3)(A) physical force clause definition of a crime of violence. *See, e.g., McDonnell v. United States*, 136 S. Ct. 2355, 2365, 2367-70 (2016) (interpreting “official act” of Hobbs Act extortion); *Taylor v. United States*, 136 S. Ct. 2074, 2079-82 (2016) (interpreting commerce element of the Hobbs Act); *Sekhar v. United States*, 570 U.S. 729, 730 (2013) (holding that attempting to compel a person to recommend his employer approve an investment does not attempt to “obtain[] the property of another” under the Hobbs Act).

The Circuits’ unanimous overbroad interpretation that the Hobbs Act necessarily requires violent force is akin to the uniform misinterpretation of 18 U.S.C. § 922(g), the prohibited person in possession of a firearm statute this Court corrected in 2019. *Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019). The proper interpretation of the Hobbs Act similarly requires this Court’s review and intervention.

¹¹ Available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY20.pdf.

Conclusion

Petitioners request the Court grant this joint petition for a writ of certiorari.

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Respectfully submitted,
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