No. 21-8230

In the

Supreme Court of the United States

David Matthews,

Petitioner,

v.

United States of America,

Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The government characterizes Petitioner's arguments as mere complaints about state law. In fact, this case is about the meaning of the term "threat" in the Armed Career Criminal Act's force clause, the Fifth Circuit's direct conflict with this Court's decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022), and the swelling confusion among the circuits over how to apply the *Mathis* divisibility framework. The government's opposition fails to raise any compelling reason why this Court should not, at the very least, give the Fifth Circuit the opportunity to reconsider its threat analysis in light of *Taylor*.

1. The government first asserts that the Fifth Circuit's decision in *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022), is not in conflict with *Taylor* because Texas robbery by "placing in fear of imminent bodily injury" is just an implicit threat. Opp. 6–7. According to the government, when the Texas legislature enacted the robbery statute criminalizing "threaten[ing] or plac[ing] another in fear of imminent bodily injury or death," they meant "threaten[ ]" as a verbal threat and "place[ ] in fear" as a nonverbal threat. *See* Tex. Penal Code § 29.02(a). That position is belied by substantial, undisputed authority from Texas courts, which the government wholly fails to address. *See Williams v. State*, 827 S.W.2d 614, 616 (Tex. App. 1992) ("The general, passive requirement that another be 'placed in fear' cannot be equated with the specific, active requirement that the actor 'threaten another with imminent bodily injury.'"); *id.* ("The factfinder may conclude that an individual perceived fear or was 'placed in fear,' in circumstances where no actual threats were conveyed by the accused."); *Jackson v. State*, No. 05-15-00414-CR, 2016 WL 4010067, at *4 (Tex. App.

2016) ("This is a passive element when compared to the dissimilar, active element of threatening another."); *see also Cooper v. State*, 430 S.W.3d 426, 433 (Tex. Crim. App. 2014) (Keller, P.J., concurring) (citing the unanimous view of the courts of appeal that "a threat is not actually required to establish robbery" because the statute allows conviction for placing another in fear).

Petitioner's argument is not just semantics. When Texas courts said that "place in fear" is not a threat, they meant it. The Texas robbery statute intentionally encompasses a broader swath of conduct. This is obvious when compared to the Texas assault statute, which defines the offense as "intentionally or knowingly threaten[ing] anther with imminent bodily injury." Tex. Penal Code § 22.01(a)(2). The assault statute omits any reference to placing in fear, and yet Texas courts have upheld numerous convictions where the defendant made an implicit or nonverbal threat. *See, e.g., McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984) (en banc) ("It is well established that threats can be conveyed in more varied ways than merely a verbal manner. A threat may be communicated by action or conduct as well as words.") (internal citations omitted); *DeLeon v. State*, 865 S.W.2d 139, 140, 142 (Tex. App. 1993) (affirming assault by threat conviction when the defendant "rapidly exited from his car, brandishing a 'Rambo'-style knife, causing the victim to back away," even though there was no evidence the defendant said anything). And the Texas Court of Criminal Appeals reversed an assault by threat conviction when the defendant undoubtedly scared the complainant but did not actually threaten her. *McGowan*, 664 S.W.2d at 357–58 (holding no threat when the defendant stabbed the

complainant's daughter in front of the complainant and, when the complainant reached down to help her daughter, the defendant stabbed the complainant in the back of the head).

Perhaps the distinction between a threat and placing in fear is made most clear in *Howard v. State*, where the Court of Criminal Appeals affirmed a robbery conviction when the defendant never saw or interacted with the victim, a convenience store clerk who hid in the back and watched the robbery over security video. 333 S.W.3d 137, 140 (Tex. Crim. App. 2011). The government likens the analysis in *Howard* to mere acknowledgment that placing in fear requires an implicit threat. Not so. The court specifically stated the robbery statute is not "limited to situations where the defendant actually threatened the victim." *Id.* at 139. In making this point, the Court of Criminal Appeals discussed *Rayford v. State*, 423 S.W.2d 300 (Tex. Crim. App. 1968), in which the victim was inside a store when she saw her husband get shot in the parking lot, but she did not see the shooter. *Howard*, 333 S.W.3d at 139. The woman ran outside to aid her husband and put her purse on the car seat. *Id.* At some point, unnoticed by the victim, the purse went missing. *Id.* The Court upheld the robbery conviction because the victim was placed in fear of bodily injury. *Id.* The dissent argued the statute required "actual or threatened violence," but the majority rejected that view because the statute's broad language encompasses situations where the defendant made no threat. *Id.*

2. The government next asserts there is no conflict between the Fifth Circuit and *Taylor* because *Taylor* "simply rejected" the argument that a defendant makes a

threat even when no one was placed in fear and the threat would have been evident only to an omniscient objective observer. Opp. 8. But *Taylor* emphasized that a defendant must *communicate* a threat in some way. 142 S. Ct. at 2022–23. And while the government finds it "difficult to see how a victim could be placed 'in fear'" without a threat, that is exactly what the Texas robbery statute criminalizes. *See Olivas v. State*, 203 S.W.3d 341, 346 (Tex. Crim. App. 2006) ("By defining robbery to be theft plus *either* threatening *or* placing another in fear, this statute demonstrates that the term 'threaten' means something other than placing a person 'in fear of imminent bodily injury or death.'").

The Fifth Circuit's holding that robbery by fear qualifies as a threatened use of force patently conflicts with *Taylor*. This Court emphasized that had Congress intended "threatened use of force" to apply more broadly, it would have said so with language like "poses" or "represents" a threat. *Taylor*, 142 S. Ct. at 2023. *Taylor* pointed to two other clues: (1) the statute lists the "use" or "attempted use" of physical force, which requires the government to prove that the defendant took "*specific actions* against specific people or property"; and (2) Congress included the residual clause, which was intended to capture crimes that "by [their] nature, involv[e] a substantial risk that physical force . . . may be used" against a person or their property. *Id.* (emphasis added). Clearly *that* language pointed to an abstract inquiry about whether a crime "poses or presents a risk (or 'threat') of force." *Id.*

And this Court's hypothetical in *Taylor* is strikingly similar to the facts in *Howard*. The hypothetical man in *Taylor* planned to communicate a threat but was

apprehended before he could carry it out. *Id.* at 2021. The defendant in *Howard* apparently planned to carry out a threat, or worse, as he entered a convenience store armed and masked, but the cashier hid in the back and never interacted with the defendant at all. *Howard*, 333 S.W.3d at 137–38. The Court of Criminal Appeals held Howard's behavior was sufficient because the "defendant is aware that his conduct is reasonably certain to place someone in fear, and that someone actually is placed in fear." *Id.* at 140. That is precisely the reasoning this Court rejected in *Taylor*—it is not enough that the action constitutes a risk or objectively poses a threat. The defendant must actually communicate one. *Taylor*, 142 S. Ct. at 2023.

3. The government asks this Court to deny certiorari, claiming this is a paltry dispute over a lower court's interpretation of state law. Opp. 7. Not so. There is no dispute that placing in fear is equivalent to a threat. This case is about the interpretation of the force clause, a thread that weaves through multiple federal sentencing laws. *See, e.g., Borden v. United States*, 141 S. Ct. 1817, 1823 (2021). And the Fifth Circuit did not have the benefit of this Court's analysis in *Taylor* when it decided the issue below. Perhaps, then, it is no surprise that the circuit court adopted the position the government strenuously advocated to this Court in *Taylor*. *See* 142 S. Ct. at 2022. At the very least, this Court should grant the petition, vacate the decision below, and remand for reconsideration in light of *Taylor*.

4. The government also misconstrues Petitioner's second reason to grant the petition regarding the confusion among the circuits in applying the *Mathis* divisibility framework. Petitioner does not contend that federal courts are required to resolve

inconsistent state-court decisions in the defendant's favor when determining whether a state statute is divisible. *See* Opp. 8. The problem is that the circuits are handling conflicting state-court decisions in different ways. When state-court decisions conflict, some circuits continue to the next step in the *Mathis* framework. *See United States v. Cantu*, 964 F.3d 924, 930 (10th Cir. 2020). Others certify the issue to the state supreme court. *See United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018); *United States v. Lawrence*, 905 F.3d 653, 659 (9th Cir. 2018). But the Fifth Circuit will stop at step one and resolve conflicting state-court decisions against the defendant. *See Garrett*, 24 F. 4th at 490. The circuits are still plagued with incongruity when it comes to the first step in the *Mathis* process. *See Mathis v. United States*, 579 U.S. 500, 517 (2016). When does a state-court decision settle the divisibility question such that the inquiry ends and *Taylor*'s demand for certainty is met? *Id.* at 519.

The government contends that the Fifth Circuit is not really out of step with the others and points to two cases: *United States v. Perlaza-Ortiz*, 869 F.3d 375 (5th Cir. 2017) and *United States v. Lobaton-Andrade*, 861 F.3d 538 (5th Cir. 2017). Opp. 9. Those cases are just further proof of the confusion over *Mathis* step one. In *Perlaza-Ortiz*, the court held that the Texas deadly conduct statute is indivisible and looked to Texas law that "without answering definitively," suggested the statute provided alternative means. 869 F.3d at 378. Multiple unpublished decisions from the intermediate courts of appeal confirmed indivisibility, with only one dissent to the contrary. *Id.* at 379 & n.3. The Fifth Circuit also looked to the statute's legislative

history, underlying indictments in other prosecutions, and the record of the prior conviction in Perlaza-Ortiz's case. *Id.* at 379–380. *Perlaza-Ortiz* is evidence of the circuit's ability to apply the *Mathis* framework when state authority does not conflict. The same is true of *Lobaton-Andrade*. There, the court determined the Arkansas manslaughter statute is indivisible by looking to state court authority (which did not conflict) and the *Shepard* documents from Lobaton-Andrade's underlying conviction. 861 F.3d at 543–544.

So the Fifth Circuit applies *Mathis* without issue when there is no conflict. But this case is a prime example of the circuit split when state courts do issue conflicting decisions. Texas intermediate courts have come to diametrically opposed, published holdings over whether a jury must be unanimous as to which alternative listed in the Texas robbery statute the defendant committed. *See, e.g., Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. 2017) (holding jury did not have to unanimously find either bodily-injury- or fear-robbery because "causing bodily injury or threatening the victim are different methods of committing the same offense"); *Woodard v. State*, 294 S.W.3d 605, 608 (Tex. App. 2009) (stating "the robbery statute provides two separate, underlying robbery offenses—robbery causing bodily injury and robbery by threat"). And the state's highest court has not definitively answered the question. *See Cooper v. State*, 430 S.W.3d 426, 434 (Tex. Crim. App. 2014) (Keller, P.J. concurring) ("But this discussion leads me to conclude that the 'threat' and 'bodily injury' elements of robbery are simply alternative methods of committing a robbery."); *id.* at 439 (Cochran, J., concurring) ("I agree with Presiding Judge Keller that 'the "threat" and

"bodily injury" elements of [assault and] robbery are simply alternative methods of committing [an assault] or robbery.'").

5. The government concludes that the circuits are uniformly applying *Mathis*, but that is just not right. The circuits are split when it comes to resolving conflicting state court authority. And only the Fifth resolves conflicts against the defendant and ends the divisibility inquiry at step one.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the alternative, he asks that the Court grant, vacate, and remand for further consideration in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022).

Respectfully submitted,

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