No. 22-5451

IN THE SUPREME COURT OF THE UNITED STATES

JOHN THAT LUONG,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit's judgment affirming in petitioner John Luong's appeal relied exclusively on its decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), which this Court vacated following its intervening decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022). The Court should likewise issue a GVR order in light of *Taylor* in this case because the Ninth Circuit's *Dominguez* decision remains vacated, and because the Ninth Circuit refused to address the scope of the federal Hobbs Act robbery statute for reasons this Court held to be improper in *Taylor*.

ARGUMENT

The government argues that the *Dominguez* decision exclusively relied on by the Ninth Circuit below remains good law and does not warrant a GVR order in light of *Taylor* in this case. *See* Memorandum for the United States in Opposition (MIO) 4–5. But after *Taylor* was decided, this Court issued a GVR order in *Dominguez*, leaving the Ninth Circuit's published panel opinion in *Dominguez* vacated. *See Dominguez v. United States*, 142 S. Ct. 2857 (2022). After Luong filed his petition for a writ of certiorari, the Ninth Circuit issued a summary order affirming certain counts of conviction in *Dominguez* "for the reasons explained" in the vacated *Dominguez* opinion. *See United States v. Dominguez*, 48 F.4th 1040 (9th Cir. 2022) (order). Precisely what precedential effect this summary order has is unclear, and even more unclear is what precedential value the original, vacated *Dominguez* opinion retains, particularly given that the post-*Taylor* order makes no mention at all of completed Hobbs Act robbery. *See id.* Accordingly, in light of the

changed legal landscape since the Ninth Circuit issued its decision in Luong's appeal and the unclear status of the decisive *Dominguez* opinion upon which the court relied, this Court should issue a GVR order in light of *Taylor*.

Such a GVR order is all-the-more warranted in light of the *Dominguez* opinion's reliance on an application of the "realistic probability" test based on *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) to a federal criminal offense, which this Court expressly rejected in *Taylor*. *See Taylor*, 142 S. Ct. at 2025. Although the government argues that *Dominguez* did not involve any application of *Duenas-Alvarez*'s "realistic probability" test to the Hobbs Act robbery statute, *see* MIO 5, the government is mistaken. Indeed, the Ninth Circuit in *Dominguez* refused to consider the defendant's argument that the Hobbs Act statute was overbroad because it encompassed robbery committed by means of placing the victim in fear of injury to intangible property. The Ninth Circuit refused to consider this argument precisely because of its broad reading of this Court's decision in *Duenas-Alvarez*, placing the onus on a federal defendant "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." *See* 954 F.3d at 1260 (citing *Duenas- Alvarez*, 549 U.S. at 193).

But it was exactly this sort of application of *Duenas-Alvarez*'s "realistic probability" test that the Court rejected in *Taylor*. The Court emphasized in *Taylor* that *Duenas-Alvarez*'s analysis of whether there was a "realistic probability" that a state criminal statute applied in a particular manner was necessary only because of unique federalism concerns that apply when federal courts are examining the scope

of state laws. *See Taylor*, 142 S. Ct. at 2025. Here, of course, the Ninth Circuit was fully capable of determining the scope of the federal Hobbs Act, yet it refused to do so, wrongly placing the burden on the criminal defendant "to present proof about the government's own prosecutorial habits." *See id*. Further, given that numerous federal appellate courts have model jury instructions for Hobbs Act robbery that define "property" to include intangible property, *see* Pet. 14–15, Luong's contention that one means by which a defendant may commit Hobbs Act robbery is by causing the victim to fear injury to his intangible property is plausible. Accordingly, the Court should issue a GVR order based on the Ninth Circuit's reliance on an application of *Duenas-Alvarez* abrogated by *Taylor*.

Last, the government argues that because the Ninth Circuit characterized *Dominguez* as "reaffirming" that Hobbs Act robbery was a crime of violence, *Duenas-Alvarez* therefore played no role in the court's analysis. *See* MIO 6. Not so. First, in the vacated *Dominguez* opinion, the Ninth Circuit relied expressly on *Duneas-Alvarez* to reject the defendant's argument that Hobbs Act robbery encompassed non-violent conduct. *See Dominguez*, 954 F.3d at 1260 (rejecting defendant's argument that Hobbs Act robbery was non-violent because he "fails 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" (citing *Duenas-Alvarez*, 549 U.S. at 193)). Second, the existence of pre-*Dominguez* Ninth Circuit precedent cited by the government—*United States v. Mendez*, 992 F.2d 1488 (9th Cir. 1993)—does not alter the Ninth Circuit's necessary reliance on an expansive approach to *Duenas-Alvarez* in Luong's own appeal that this Court

rejected in *Taylor*. *Mendez*, moreover, was a residual-clause case, addressing whether conspiracy to commit Hobbs Act robbery was a crime of violence under 18 U.S.C. § 924(c)(3)(B), which provides no independent pre-*Dominguez* authority to support the lawfulness of Luong's section 924(c) convictions based on completed Hobbs Act robbery under the elements clause. *See* 992 F.2d at 1489.

CONCLUSION

The Court should grant this petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of *Taylor*.

Respectfully submitted,
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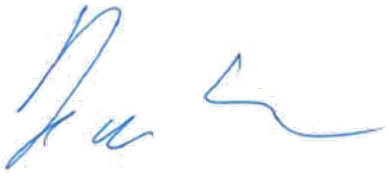
November 8, 2022



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