No: _____

In the
Supreme Court of the United States

KEPA MAUMAU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Circuit courts have historically interpreted the Hobbs Act (18 U.S.C. § 1951(a)) to include threats to harm "intangible property" (economic harm). Some circuits have recognized that applying this definition to Hobbs Act robbery creates at least a theoretical possibility that it could be used in a way that does not come within the force clause of 18 U.S.C. § 924(c). Other circuits have concluded that Hobbs Act robbery by its own terms categorically requires the use of violent physical force. These circuits have ignored the fact that the broad definition of property has been used for many years in pattern jury instructions and in trials for Hobbs Act robbery around the country.

Following this Court's decision in *United States v. Taylor*, 142 S.Ct. 2015 (2022), it is clear that the "realistic probability" test does not apply to the Hobbs Act and that courts must decide what the elements of Hobbs Act robbery are when they apply the categorical approach under § 924(c), which the Tenth Circuit here did not do.

Insofar as Hobbs Act robbery has historically been understood to reach threats to harm intangible property, is it categorically a "crime of violence" under the force clause of § 924(c)?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other

PETITION FOR WRIT OF CERTIORARI

Petitioner Kepa Maumau respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Tenth Circuit's unpublished first decision in this case is available at is available at 822 Fed.Appx. 848 and is included in the appendix at A1. The second, published decision, which reaffirmed the holding in the first, unpublished decision, if available at 3 F.4th 1277 (10th Cir. 2022) and is attached in the Appendix at A10.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its decision on January 31, 2022, and denied Petitioner's request for rehearing on April 5, 2022. On July 28, 2022, Justice Gorsuch granted Mr. Maumau's motion to extend the filing deadline until September 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

> **(c)(1)(A)** Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug

trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

. . .

(c)(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 . . . .

18 U.S.C. § 1951. Interference with commerce by threats or violence.

(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 family or anyone in his company at the time of the taking or obtaining.

Tenth Circuit Pattern Jury Instruction 2.70

[ROBBERY] [EXTORTION] BY FORCE, VIOLENCE, OR FEAR 18 U.S.C. § 1951(a) (HOBBS ACT)

The defendant is charged in count ___ with a violation of 18 U.S.C. section 1951(a), commonly called the Hobbs Act.

This law makes it a crime to obstruct, delay or affect interstate commerce by [robbery] [extortion].

To find the defendant guilty of this crime you must be convinced that the government has proved beyond a reasonable doubt that:

First: the defendant obtained [attempted to obtain] property from another [without][with] that person's consent;

Second: the defendant did so by wrongful use of actual or threatened force, violence, or fear; and

Third: as a result of the defendant's actions, interstate commerce, or an item moving in interstate commerce, was actually or potentially delayed, obstructed, or affected in any way or degree;

[Robbery is the unlawful taking of personal property from another against his or her will. This is done by threatening or actually using force, violence, or fear of injury, immediately or in the future, to person or property.]

[Extortion is the obtaining of or attempting to obtain property from another, with that person's consent, induced by wrongful use of actual or threatened force, violence, or fear. The use of actual or threatened force, violence, or fear is "wrongful" if its purpose is to cause the victim to give property to someone who has no legitimate claim to the property.]

"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.

"Force" means an act capable of causing physical pain or injury to another person. This requires more than the slightest offensive touching, but may consist of only the degree of force necessary to inflict pain.

"Obstructs, delays, or affects interstate commerce" means any action which, in any manner or to any degree, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in interstate commerce.

> The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the government has proved beyond a reasonable doubt that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and you find those actions actually or potentially caused an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

STATEMENT OF THE CASE

I. Criminal Trial and Appeal

Petitioner Kepa Maumau was prosecuted for his involvement in the Tongan Crip Gang (TCG). He was charged with eight crimes: Racketeering Conspiracy (Count 1); Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count 21); VICAR Assault (Counts 22, 24, 26); possessing a firearm in connection with the VICAR assaults and Hobbs Act robbery in violation of 18 U.S.C. § 924(c) (Counts 23, 25, 27).

This appeal focuses on Mr. Maumau's conviction for attempted Hobbs Act robbery and its associated § 924(c) conviction. Although Count 29 was labeled "Hobbs Act robbery," it alleged both completed and attempted Hobbs Act robbery, alleging that Mr. Maumau "did take *and attempt to take* from employees at the Gen X Clothing store . . . by physical and threatened physical violence, U.S. currency and commodities." (App. A49 (emphasis added).)

At trial, the jury was instructed that it should convict Mr. Maumau of Hobbs Act robbery if it found that he "*attempted* to obtain property from another" by use of "force, violence, or fear of injury, immediately *or in the future*, to person *or*

property." (App. A56 (emphasis added).) The court defined "property" as "money and other tangible *and intangible* things of value." (App. A54 (emphasis added).) And "fear" included "an apprehension, concern, or anxiety about . . . economic loss." (*Id.*)

At trial, these instructions were unobjectionable for two reasons. First, they tracked the Tenth Circuit's pattern jury instructions. See Tenth Circuit, Criminal Pattern Jury Instructions §2.70. Second, the residual clause of §924(c) applied to any crime (like robbery) "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)(B).

The jury found Mr. Maumau guilty of all five counts. As a result of the three § 924(c) convictions, Mr. Maumau was sentenced to 57 years in prison: 7 years for the first § 924(c) conviction, 25 years for the second and third, and no additional time for the other counts of conviction. He appealed his conviction and sentence, and the outcome of that appeal was that his 7-year sentence was reduced to a 5-year sentence, resulting in a total sentence of 30 years in prison.[1]

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[1] Mr. Maumau's sentence was subsequently reduced pursuant to 18 U.S.C. § 3582(c)(1)(A), but his § 924(c) conviction based on Hobbs Act robbery remains intact.

II. Post-conviction Proceedings and First Appeal

In 2015, this Court held that the residual clause in the Armed Career Criminal Act (ACCA) residual clause was unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591 (2015). Within one year of *Johnson*, but more than a year after the judgment was final, Mr. Maumau sought relief from his § 924(c) convictions under 28 U.S.C. §2255. Among other things, he argued that they were unconstitutionally based on §924(c)'s residual clause because neither VICAR nor the Hobbs Act categorically required the intentional use of violent force against person or property. The district court denied the claims as untimely, reasoning that *Johnson* did not create a new rule applicable to §924(c).

While their appeal to the Tenth Circuit was pending, this Court decided *United States v. Davis*, 139 S.Ct. 2319 (2019), which concluded the residual clause of §924(c) was also unconstitutionally vague. Considering *Davis*, the government waived the argument that the due process claims were untimely, but the Tenth Circuit denied relief on the merits in an unpublished decision. *United States v. Toki*, 822 Fed. App'x 848 (10th Cir. Aug. 11, 2020) (*Toki I*). Mr. Maumau sought a writ of certiorari, and this Court granted certiorari, vacated, and remanded in light of its recent decision in *Borden v. United States*, 141 S.Ct. 1817 (2021). *Maumau v. United States*, Case No. 20-7749 (U.S. Oct. 4, 2021).

III. Remand and Second Petition for Certiorari

The order from this court vacated *Toki I* in its entirety. On remand to the Tenth Circuit, Mr. Maumau argued that his § 924(c) convictions based on VICAR

was unconstitutional after *Borden*, and the government agreed. The Tenth Circuit issued a second decision, this time published. In addition to ruling on the VICAR §924(c) convictions, it reaffirmed "those portions of our Order and Judgment denying relief on petitioners' other claims," including Mr. Maumau's claim that his Hobbs Act robbery conviction did not qualify categorically as a crime of violence under the force clause of § 924(c). 23 F.4th 1277, 1282 (10th Cir. 2022) (*Toki II*).

IV. Hobbs Act Robbery Analysis

With respect to Hobbs Act robbery, Mr. Maumau argued below that Hobbs Act robbery did not qualify categorically as a crime of violence under § 924(c)'s force clause. The district court had instructed the jury that to convict Mr. Maumau of Hobbs Act robbery, it must find:

> *First:* the particular Defendant obtained or attempted to obtain property from another without that person's consent as alleged in the particular Count;
>
> *Second:* the particular Defendant did so by wrongful use of actual or threatened force, violence, *or fear*.

(App. A55, JI 38 (emphasis added).) The court further instructed the jury that "property" was "money and other tangible and *intangible things of value*." (App. A54, JI 36 (emphasis added).) And "fear" included "an apprehension, concern, or anxiety about . . . economic loss." *Id.* Thus, the jury was told to convict Mr. Maumau if it found that he had caused anxiety about economic loss caused by future economic harm to intangible things of value. And with the residual clause in force,

the court instructed the jury that Hobbs Act robbery was a crime of violence. (App. A58, JI 43.)

Mr. Maumau argued in his § 2255 motion that this broad understanding of the Hobbs Act (which included threats of future economic harm) took it beyond the reach of § 924(c)'s force clause. Thus, his conviction violated due process inasmuch as it was necessarily based on the unconstitutionally vague residual clause.

Without analyzing the breadth of the Hobbs Act robbery, the Tenth Circuit in *Toki I* relied uncritically on its prior decision in *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), which had held that Hobbs Act robbery is categorically a crime of violence under § 924(c). (App. A16-17.) The court "acknowledged that *Melgar-Cabrera* did not address the argument that Hobbs Act robbery is not a crime of violence because it can be accomplished by threatening injury to intangible property," but it nevertheless concluded that *Melgar-Cabrera* controlled. (App. A17 (discussing *United States v. Dubarry*, 741 Fed. App'x 568 (10th Cir. 2018).) When the case came back on remand in *Toki II*, the Tenth Circuit did not give any reason for reaffirming *Toki I's* Hobbs Act ruling, other than noting parenthetically that *Melgar-Cabrera* had held "that Hobbs Act robbery is a crime of violence under § 924(c) based on the elements of the offense." (App. A9.)

After the decision in *Toki II*, this Court issued its decision in *United States v. Taylor*, 142 S.Ct. 2015 (2022). *Taylor* held that attempted Hobbs Act robbery is not categorically a crime of violence under the force clause of 18 U.S.C. § 924(c) and that

the "realistic probability test" does not apply to the categorical analysis of federal crimes. *Id.* at 2024. Rather, the test for § 924(c)'s force clause was simply "whether the elements of one federal law align with those prescribed in another." *Id.* at 2025. Mr. Maumau asked the Tenth Circuit to recall the mandate in light of *Taylor*, but that motion was denied.

Mr. Maumau filed this petition for a writ of certiorari to get relief from his § 924(c) conviction that is unconstitutionally predicated on his conviction for attempted Hobbs Act robbery.

REASONS FOR GRANTING THE WRIT

I. Mr. Maumau is entitled to relief under *Taylor*.

The first reason for granting certiorari is that Mr. Maumau is entitled to relief under *Taylor*. *Taylor's* central holding was that attempted Hobbs Act robbery does not qualify categorically as a crime of violence. *Id.* at 2021. Unfortunately, *Taylor* was issued after the decision below, so the Tenth Circuit did not address this aspect of Mr. Maumau's conviction. However, the record plainly shows that Mr. Maumau was charged and convicted of attempted Hobbs Act robbery.

His indictment alleges both completed and attempted robbery as alternative means of committing this crime. (App. A49.) The jury instructions directed the jury to convict if it found that a "particular Defendant obtained *or attempted* to obtain property from another without that person's consent as alleged in the particular Count." (App. A49.) On this record, the jury was instructed to convict if it concluded

that Mr. Maumau was guilty of attempted Hobbs Act robbery but not completed Hobbs Act robbery. Under the categorical approach, courts must look at "the '*least* serious conduct [the prior conviction or predicate offense] covers' and decide whether that conduct 'falls within the elements clause [also known as the force clause]." *Taylor*, 142 S.Ct. at 2028 (Thomas, J., dissenting) (quoting *Borden v. United States*, 141 S.Ct. 1817, 1827 (2021). Because Mr. Maumau's Hobbs Act conviction does not categorically establish *completed* Hobbs Act robbery, he is entitled to relief under *Taylor*. This Court should grant certiorari, vacate, and remand.

II. *Taylor's* categorical analysis of § 924(c)'s force clause conflicts with the analysis below, which did not address the elements of Hobbs Act robbery.

The decision below holds that Hobbs Act robbery is *always* a crime of violence under § 924(c)'s force clause. However, the rationale behind this decision has been undermined by *Taylor*. This Court should grant certiorari because the Tenth Circuit has decided an important federal question in a way that conflicts with *Taylor*.

A. Under Taylor, the Tenth Circuit should have decided what the elements of Mr. Maumau's Hobbs Act conviction were, regardless of whether there was a "realistic probability" that prosecutions would be brought under a theory that did not fit within § 924(c).

In *Taylor*, one of the government's central arguments was that no realistic probability exists that the government would prosecute anyone for attempted Hobbs Act robbery based on an attempted threat of force—conduct this Court ultimately held does not constitute a "crime of violence." 142 S. Ct. at 2024. The government

complained that the defense did not cite to a single case in which a defendant was prosecuted for attempted Hobbs Act robbery based solely on an attempted threat of force. *Id.* Thus, according to the government, attempted Hobbs Act robbery would be a "crime of violence" even if a theoretical possibility exists that it can be committed by an attempted threat of force. *Id.*

This Court, however, firmly rejected the government's argument and, in so doing, threw out the realistic probability test altogether for federal offenses. The Supreme Court described multiple problems with the test including the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits" and "the practical challenge such a burden would present" when most cases end in pleas and are not available on Westlaw or Lexis. *Id.*

But the most damning problem for the Court was that the realistic probability test contravenes the categorical approach, which merely looks at "whether the government must prove, as an element of its case, the use, attempted use, or threatened use of force." *Id.* (emphasis in original). As this Court held, § 924(c) "asks only whether the elements of one federal law align with those prescribed in another." *Id.* It is error to look beyond the elements and "say[] that a defendant must present evidence about how his crime of conviction is normally committed or usually prosecuted." *Id.*

Therefore, this Court in *Taylor* eliminated the realistic probability test from the "crime of violence" analysis—at least for federal offenses. In so doing, the Court acknowledged that it previously applied a limited version of the realistic probability test in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 185-189 (2007), to determine whether a prior state offense qualified as a generic theft, but the Court explained that *Duenas-Alvarez* arose of out of federalism concerns not relevant to interpretation of federal statutes: "[I]t made sense to consult how a state court would interpret its own State's laws. . . . Meanwhile no such federalism concern is in play here. *The statute before us [§ 924(c)(3)(A)] asks only whether the elements of one federal law align with those prescribed in another*." *Taylor*, 142 S. Ct. at 2025 (emphasis added).

B. The Tenth Circuit failed to decide what were the elements of Hobbs Act robbery.

The problem here is that the Tenth Circuit failed to decide what the elements of Hobbs Act robbery generally are, and it ignored how those elements were applied in this case. Passed in 1946, the Hobbs Act makes it a federal crime to obstruct, delay, or affect commerce—or attempt or conspire to do so—through robbery or extortion.

> (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 commit 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.

18 U.S.C. § 1951(a). The Hobbs Act defines only three of these terms: "robbery," "extortion," and "commerce." *Id.* § 1951(b)(1)-(3).

In contrast to generic robbery, which requires a threat to harm a person, Hobbs Act robbery can be committed by causing or threatening harm to property. *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017). Because the Hobbs Act does not define "property," this term had to be defined in caselaw.

For more than 50 years, courts have understood the term "property" in the Hobbs Act to include "intangible, as well as tangible property." *United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 780 F.2d 267, 281 (3d Cir. 1986) (describing the circuits as "unanimous" on this point). "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. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added) (citing 18 U.S.C. §1951(a)), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.* 537 U.S. 393, 401 n.8 (2003); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction for threat "to slow down or stop construction projects unless his demands were met"). Thus, a defendant may commit a Hobbs Act robbery via threats to harm some intangible economic interest like a stock option or a contract right. Injury to intangible property is not necessarily accomplished through the use of physical force as required by §924(c)(3)(A).

To determine how these definitions translate to criminal elements, courts rely heavily on model jury instructions. *See, e.g., United States v. Hamilton*, 889 F.3d 688, 693 (10th Cir. 2018) ("[U]niform jury instructions provide useful guidance on the content of state law."); *United States v. Hopper*, 723 Fed. App'x 645, 646 (10th Cir. 2018) (relying on Tenth Circuit pattern jury instructions to hold that 18 U.S.C. § 1201(a) was broader than the force clause of § 924(c)); *United States v. Libby*, 880 F.3d 1011, 1015-16 (8th Cir. 2018) (relying on pattern jury instructions, among other things, to conclude that Minnesota robbery falls within the ACCA's force clause); *United States v. Titties*, 852 F.3d 1257, 1270 (10th Cir. 2017) ("Oklahoma's Uniform Jury Instructions provide an additional source of state law guidance."); *De Leon v. Lynch*, 808 F.3d 1224, 1231 n.9 (10th Cir. 2015) ("[T]he uniform jury instructions have often guided both the [Oklahoma Court of Criminal Appeals] and our court in defining the bounds of Oklahoma criminal law.").

Consistent with the way courts had understood the term "property" in the Hobbs Act, several circuits—including the Tenth—promulgated pattern jury instructions that extended Hobbs Act *robbery* to conduct that cause anxiety about future economic harm to intangible property. For example, in the Tenth Circuit, the "fear" required for Hobbs Act robbery may be fear of injury "immediately *or in the future*," and the court defines "property" to include other "intangible things of

value." 10th Cir., Crim. Pattern Jury Instr. §2.70 (2021) (emphasis added).[2] This "fear" required for robbery is not limited to a fear of violence but includes "anxiety about . . . economic loss." *Id.*

Similarly, the Fifth and Eleventh Circuits also adopted pattern jury instructions that extend Hobbs Act robbery to situations where the defendant causes fear of future injury to intangible property. 5th Cir., Pattern Jury Instr. (Crim. Cases), 2.73A (2015 ed.);[3] 11th Cir., Pattern Jury Instr. (Crim. Cases), O70.3 (2020).[4] And a leading jury instruction treatise does the same. 3-50 Leonard B. Sand et al., Modern Fed. Jury Instr. Crim. ¶ 50.03 (2007).

To be sure, not all circuits have explicitly included intangible property in their model jury instructions for Hobbs Act robbery. The most interesting data point

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[2] *Available at* https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20Version.pdf (last accessed Sep. 2, 2022).

[3] *Available at* http://www.lb5.uscourts.gov/juryinstructions/Fifth/crim2015.pdf (last accessed Sep. 2, 2022). The Note following Instruction 2.73A explains that for robbery cases, the instruction should be modified in the second element to replace "extortion" and its definition for "robbery" and its definition, but it calls for no change to the definition of "property" in the first element.

[4] *Available at* https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227 (last accessed Sep. 2, 2022).

on this question is the Fifth Circuit. Presumably recognizing how the old instruction would fare if the residual clause were eliminated in the wake of *Johnson*, it promulgated a model definition of Hobbs Act robbery that requires injury to tangible property. 5th Cir., Pattern Jury Instr. (Crim. Cases), 2.73B (2019 ed.).[5] But this new instruction does not change the fact that the old instruction that was used for many years explicitly extended Hobbs Act robbery to intangible property. The Fifth Circuit's new instruction creates a split of authority about the breadth of Hobbs Act robbery that this court must resolve.

These pattern instructions show that Hobbs Act robbery extends beyond the limits of § 924(c)'s force clause, at least in some circuits. *See Davenport v. United States*, No. 16-15939, Order at 6-7 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting COA on whether Hobbs Act robbery is an offense that categorically meets § 924(c)'s force clause, given the breadth of Eleventh Circuit pattern jury instruction).

And for many years, federal district courts around the country used these instructions in Hobbs Act robbery trials. *See, e.g., United States v. Baker*, 2:11-cr-20020, Doc. 53 at 20 (D. Kan Sep. 15, 2011) (allowing conviction based on causing anxiety about future harm to intangible property); *United States v. Hennefer*, 1:96-

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[5] *Available at* https://www.lb5.uscourts.gov/viewer/?/juryinstructions/Fifth/crim2019.pdf (last accessed Sep. 2, 2022).

cr-24 DS, Doc. 195 at 32, 35, 36 (D. Utah Jul. 9, 1997) (same); *United States v. Nguyen*, 2:03-cr-158 Doc. 157 at 28 (D. Nev. Feb. 10, 2005) (same); *United States*, 1:11-cr-20678, Doc. 229 at 12-13 (S.D. Fl. Feb. 6, 2012) (same); *United States*, 1:11-cr-94, Doc. 211 at 142 (D. Md. Jan. 29, 2013) (same); *United States*, 11-cr-334-APG, Doc. 197 at 15 (D. Nev. July 28, 2015) (same). The fact that federal courts around the country for years have defined Hobbs Act robbery to include threats to harm intangible property establishes that Hobbs Act robbery does not fall categorically within the force clause of §924(c).

Notwithstanding the widespread and historical use of these instructions to define Hobbs Act robbery, the Tenth Circuit ruled without confronting what the elements of Hobbs Act robbery were at the time Mr. Maumau was convicted. In *Toki I*, the Tenth Circuit explained:

> In *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), we held that Hobbs Act robbery is a crime of violence under the force clause of § 924(c). Maumau and Maumau argue we should hold that Hobbs Act robbery is not a crime of violence, relying on *United States v. Dubarry*, 741 F. App'x 568 (10th Cir.). In that case, we acknowledged that *Melgar-Cabrera* did not address the argument that Hobbs Act robbery is not a crime of violence because it can be accomplished by threatening injury to intangible property. *Id.* at 570.

(App. A16-17.) One would expect that when presented with the pattern jury instructions, the Tenth Circuit would have recognized that Hobbs Act robbery can be accomplished by a threat to cause economic harm, so it does not come within the force clause of § 924(c).

C. The Tenth Circuit failed to decide what is required to establish a Hobbs Act robbery based on a threat to harm property.

Nevertheless, despite this acknowledgement that *Melgar-Cabrera* had *not* decided whether Hobbs Act robbery can be accomplished by threatening injury to intangible property, the Tenth Circuit relied on it to deny relief:

> But in *Melgar-Cabrera*, we categorically held that Hobbs Act robbery is a crime of violence based on the elements of the offense. *Id.* at 1061-66. "[W]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Strauss v. Angie's List, Inc.*, 951 F.3d 1263, 1269 (10th Cir. 2020) (quotation omitted). We conclude that under our binding precedent in Melgar-Cabrera, the constitutionality of Maumau and Maumau's § 924(c) convictions predicated on Hobbs Act robbery is not reasonably debatable.

(App. A17.) The court in *Toki II* did not revisit this issue, resting again on the authority of *Melgar-Cabrera*. (App. A9.)

This reasoning is unsustainable after *Taylor*. The Hobbs Act's definition of "property" was not before the court in *Melgar-Cabrera*, and it said nothing about what type or quality of harm to property was required under the Hobbs Act. *Dubarry* and *Toki I* acknowledged as much.

Rather, *Melgar-Cabrera* address only one element of Hobbs Act robbery: the use or threat of force against a person. *Melgar-Cabrera* rejected the argument that Hobbs Act can be accomplished by an "offensive touching," which would not have risen to the level of violent force required by §924(c)(3)(A). 892 F.3d at 1064 And I rejected the claim that Hobbs Act robbery could be committed by "placing a victim in fear of injury by threatening the indirect application of physical force." *Id.* at

1065. Nothing in *Melgar-Cabrera* even hints at a decision about Hobbs Act robbery involving threats to property.

Simply put, *Melgar-Cabrera* did not consider or decide whether Hobbs Act robberies based on a threat to harm property categorically threaten the use of *violent* force under §924(c)(3)(A). *Melgar-Cabrera* resolved only two arguments, neither of which is advanced here. It did not speak to other arguments not before it. The failure to decide what the elements of Hobbs Act robbery really are was shortsighted in light of the Tenth Circuit's pattern jury instruction and the instructions given in this case. More significantly, the Tenth Circuit's failure to analyze the Hobbs Act's definition of property and decide the elements of Hobbs Act robbery is unsustainable after *Taylor*. The Court should grant certiorari, vacate the decision below, and remand in light of *Taylor*.

III. This court should grant certiorari to resolve a circuit split about the elements of Hobbs Act robbery.

A third reason for granting certiorari is that the circuits are split in their rationale for fitting Hobbs Act robbery into § 924(c)'s force clause. To be sure, the circuits appear to be unanimous in their view that Hobbs Act robbery is categorically a crime of violence under the force clause. But their rationales to support this conclusion diverge in a way that is material in light of *Taylor*.

Several circuits have acknowledged that Hobbs Act robbery has been defined such that it theoretically can be accomplished by threats to harm intangible property. However, these circuits then ignore this breadth under the "reasonable

probability" test, reasoning that there is no "realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020) (citing *Duenas-Alvarez*, 549 U.S. 183), *vacated by* 142 S.Ct. 2857 (2022); *United States v. Garcia-Ortiz*, 904 F.3d 102, 107 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51, 57 n.9 (2d Cir. 2018).

Other circuits have concluded (without acknowledging the pattern jury instructions discussed above) that Hobbs Act robbery is a categorically a crime of violence. *See e.g., United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019); *United States v. Walker*, 990 F.3d 316, 326 n.12 (3d Cir. 2021), *vacated by* 142 S.Ct. 2858 (2022); *United States v. Rivera*, 847 F.3d 847, 849 (7th Cir. 2017); *In re Fleur*, 824 F.3d 1337, 1340–41 (11th Cir. 2016).

The Court should grant certiorari to resolve this split—does Hobbs Act robbery reach threats to harm intangible property or not? If it does, then defendants like Mr. Maumau should be entitled to relief because we now know that *Duenas-Alvarez's* "realistic probability" test does not apply to Hobbs Act. After *Taylor*, those courts that have recognized but ignored the Hobbs Act's breadth under the realistic probability test must revisit their decisions. *Cf. Dominguez*, 142 S.Ct. 2857 (granting certiorari, vacating the judgment, and remanding in light of *Taylor*).

The Tenth Circuit appears to be in the second group of cases. *Melgar-Cabrera's* apparent holding that Hobbs Act robbery is always a crime of violence did

not have the benefit of arguments about the definition of property. When the definitional argument was raised in *Dubarry*, the court did not discuss the pattern jury instructions to see that the broad definition has long been used in robbery cases, so it concluded that the broad definition was limited to extortion cases. 741 Fed. App'x at 570. And it said that "the cases he cites do not call into question *Melgar-Cabrera's* holding that Hobbs Act robbery is categorically a crime of violence." *Id.* A review of the briefing in *Dubarry* shows that the petitioner in that case did not discuss jury instructions as part of his argument. When given the opportunity in this case to consider the elements of Hobbs Act robbery in light of the model jury instructions, the court declined to do so.

In light of those circuits that *have* recognized at least the theoretical application Hobbs Act robbery to threats of economic harm, this Court should grant certiorari. It should hold that, given the way the Hobbs Act has been interpreted over the years in caselaw and model jury instructions, it reaches conduct that does not fall categorically within § 924(c)'s force clause. And because *Duenas-Alvarez's* realistic probability test does not apply to the Hobbs Act after *Taylor*, it should reverse.

IV. By ignoring the jury instructions that *it* promulgated, the Tenth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Finally, the Court should grant certiorari because the Tenth Circuit has departed so far from the accepted and usual course of judicial proceedings as to call

for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a). Rightly or wrongly, Mr. Maumau was convicted under a version of the Hobbs Act that undeniably fell outside § 924(c)'s force clause, and it resulted in the mandatory imposition of 30 years in prison. This outcome was a result of the Tenth Circuit's pattern instruction, yet the Tenth Circuit has ignored its role in promulgating the pattern instruction and has not even attempted to address the merits of this argument.

As noted above, the instructions given *in this case* permitted the jury to convict Mr. Maumau if it found that he had caused anxiety about economic loss caused by future economic harm to intangible things of value. Consistent with the Tenth Circuit pattern instructions, the district court told the jury that to convict Mr. Maumau of Hobbs Act robbery, it must find:

> *First:* the particular Defendant obtained or attempted to obtain property from another without that person's consent as alleged in the particular Count;
>
> *Second:* the particular Defendant did so by wrongful use of actual or threatened force, violence, *or fear*.

(App. A56, JI 38.) The court further instructed the jury that "property" was "money and other tangible and *intangible things of value*." (App. A54, JI 36 (emphasis added).) And "fear" included "an apprehension, concern, or anxiety about . . . economic loss." *Id.*

Despite the fact that these instructions tracked its own pattern instruction §2.70, the Tenth Circuit avoided discussing the contours of Hobbs Act robbery by

taking refuge in *Melgar-Cabrera*, 892 F.3d 1053. It did so even though it "acknowledged that *Melgar-Cabrera* did not address the argument that Hobbs Act robbery is not a crime of violence because it can be accomplished by threatening injury to intangible property." (App. A17.) For years, the Tenth Circuit had directed the lower courts through its pattern jury instructions that "property" threatened by a Hobbs Act robbery can be an intangible economic interest. The Tenth Circuit's refusal to consider how that breadth was unconstitutionally used to impose a mandatory 30-year prison sentence calls for this Court to exercise its supervisory authority and grant certiorari.

This Court should not be concerned that it could jeopardize the validity of § 924(c) convictions based on Hobbs Act robbery. For one thing, the problem here is the result of *the courts'* broad construction of the Hobbs Act. It would hardly be fair for courts to broadly construe the Hobbs Act when defendants go to trial, but then suddenly reverse course when they realize that this broad crime cannot then be used constitutionally as a § 924(c) predicate. To allow the Tenth Circuit to ignore what it "has understood [Hobbs Act robbery] to mean" for all these years "would indeed be 'surprising' and 'extraordinary.'" *See Davis v. United States*, 139 S. Ct. 2319, 2333 (2019).

Furthermore, the unavailability of § 924(c) in Hobbs Act robbery prosecutions does not undermine the government's ability to seek long sentences for Hobbs Act robbery defendants who possess a firearm. The Sentencing Commission did not

need congressional intervention to provide enhanced penalties for possessing a firearm during a robbery. USSG §2B3.1(b)(2). This enhancement does not apply if a defendant is also convicted of § 924(c), USSG §2K2.4, cmt. n.4, but the mandatory penalties under § 924(c) drastically overstate the weight the Sentencing Commission assigned to the gun in §2B3.1(b)(2).

Courts and commentators have long recognized that mandatory minimums disrupt the rational application of the federal sentencing Guidelines. *See, e.g.,* Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (And a Critique of Federal Mandatory Minimums)*, 56 Stan. L. Rev. 1017, 1044-48 (2004). In particular, § 924(c) and its mandatory stacking can result in sentences far greater than what 18 U.S.C. § 3553(a) requires. *See, e.g., United States v. Angelos*, 345 F. Supp. 2d 1227, 1245-46, Table I (D. Utah 2004) (comparing sentences under "stacked" § 924(c) counts with some of the most serious violent crimes). In those rare cases where a sentence within the guideline range is not enough, the government can always ask the court to vary upward.

The constitutional error raised here—convicting Mr. Maumau under the residual clause of § 924(c)—resulted in the mandatory imposition of decades in prison. This error occurred because the district court followed the Tenth Circuit's definition of Hobbs Act robbery. Yet the Tenth Circuit has given no reason for deviating from what it always "has understood [Hobbs Act robbery] to mean." *See Davis*, 139 S. Ct. at 2333.

Even if this Court ultimately were "to give [Hobbs Act robbery] a new meaning different from the one it has borne for the last three decades," it would be "surprising" and "extraordinary" for this Court to allow the lower courts to quietly do so by judicial fiat and without any explanation. *See id.* This Court must grant certiorari to resolve the inconsistency in their definitions of Hobbs Act robbery.

V. This case is an excellent vehicle to resolve these questions.

This case is an ideal vehicle to resolve the conflict. The issue was presented and preserved below, and there are no procedural hurdles to this Court's review of those questions. This case is also an excellent vehicle because Mr. Maumau was convicted at trial, and the jury was explicitly instructed that it should convict him if it found he had caused fear of future harm to intangible property. In contrast to cases where the defendant pleaded guilty, here it is not merely a theoretical possibility that Mr. Maumau could be convicted under the residual clause of § 924(c). The jury was specifically charged in a way that could be sustained *only* under the residual clause of § 924(c). As a matter of law, he should be entitled to relief.

CONCLUSION

The Court should grant the writ to resolve these important questions.

Respectfully submitted,

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Salt Lake City, Utah
September 2, 2022

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC KAMAHELE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

AFFIDAVIT OF SERVICE

Benjamin C. McMurray, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Elizabeth B. Prelongar
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Parcel Service on September 2, 2022, and all parties required to be served have been served.

/S/ Benjamin C. McMurray
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Clerk of Court
Supreme Court of the United States
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Washington, D.C. 20543

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