No: 22-5538

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

REPLY IN SUSPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

I. Mr. Maumau is entitled to relief under *Taylor* because he was charged and convicted of a Hobbs Act crime that included attempted robbery.

The government objects to Mr. Maumau's claim that he is entitled to relief under *Taylor* because it claims there is no "view of the evidence that could have led a rational jury to find him guilty of attempted, but not completed, Hobbs Act robbery." (Resp. 10.) This argument, however, ignores this Court's decisions that make the categorical analysis of 18 U.S.C. § 924(c)'s "crime of violence" definition a legal, not factual, determination.

It has long been the rule that the categorical approach prohibits courts from looking to the "particular facts" of a defendant's crime to see if it fits within the statutory definition. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). In *United States v. Davis*, 139 S.Ct. 2319 (2019), this Court held that the categorical approach applies to the decision whether a particular offense qualifies as a § 924(c) predicate. *Davis* rejected the government's claim that this could be determined on a "case-specific" analysis, holding instead that the question "turns out to be one of pure statutory interpretation." *Id.* at 2327.

The Court reaffirmed this view in *Taylor*, reiterating that whether a crime qualifies as a § 924(c) predicate under the force clause "does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime." 142 S.Ct. at 2020.

Nevertheless, despite the government's agreement in *Taylor* that this is "how [the Court] should go about deciding it," *id.*, the government now tries to shift the focus from the crime Mr. Maumau was convicted of to the facts of his case. (Resp. 10.) This approach is wrong.

The question under § 924(c)'s force clause is simply: "What are the elements the government must prove to secure a conviction for [the § 924(c) predicate]?" *Taylor*, 142 S.Ct. at 2020. The government does not dispute that the elements alleged in the indictment, as well as those described to the jury, included attempted robbery as means of committing this crime. (Pet. App. A49.) Because the categorical approach focuses on the *elements* of the predicate offense, not the facts, the inclusion of attempted robbery as a means of completing this offense takes it beyond the reach of § 924(c)'s force clause.

The government's position here is inconsistent with the position it has taken in its response to the petition for a writ of certiorari filed in *Kamahele v. United States*, 22-5535. Petitioner Eric Kamahele was Mr. Maumau's codefendant at trial. The government agreed that Mr. Kamahele is entitled to relief under *Taylor* because his § 924(c) conviction "is predicated on attempted Hobbs Act robbery." Govt. Resp. at 1, *Kamahele v. United States*, 22-5535 (U.S. Nov. 25, 2022). In support of its concession, the government cites the indictment, which alleges only an attempted robbery, and the Verdict Form, which it claims included a "special finding that [Mr. Kamahele] committed '[a]ttempted [r]obbery." (*Id.* at 1-2.)

However, the government's effort to distinguish *Kamahele* must fail because it ignores two key aspects of their shared record on appeal. First, with respect to the verdict form, the government fails to point out that the attempt language it cites comes from the description of a predicate act for the Racketeering Conspiracy alleged in Count 1. D. Ct. Doc. 1105 at 2 (Kamahele Verdict Form). However, with respect to Mr. Kamahele's conviction under the Hobbs Act, Count 17, the count of conviction is styled "Hobbs Act Robbery" with no indication that the Hobbs Act crime was limited to attempt. (*Id.*) The indictment also describes Mr. Kamahele's crime as "Hobbs Act robbery," not attempted Hobbs Act robbery. (App. A52-53.)

Furthermore, the government ignores the fact that the same jury instruction was used to instruct the jury about the elements of Mr. Kamahele's attempted Hobbs Act robbery and Mr. Maumau's supposedly completed robbery. The jury was instructed that both defendants were charged with "a violation of the Hobbs Act by committing a Hobbs Act robbery" and that "Hobbs Act robbery" could be accomplished by either an attempted or completed crime. (App. A55-56.)

Mr. Maumau's case is indistinguishable from Mr. Kamahele's. Both petitioners were charged with "Hobbs Act robbery," a crime that could be committed by a completed or attempted taking. Because Mr. Maumau's Hobbs Act crime included attempted robbery as a means of committing the crime, it did not fall categorically within the force clause of § 924(c), and he is entitled to relief under *Taylor*. This court should grant certiorari, vacate, and remand.

II. Pre-*Taylor* denials of relief are inapposite.

The government urges the Court to deny certiorari because it has "recently and repeatedly" done so in challenges to "the application of Section 924(c)(3)(A) to Hobbs Act robbery." (Resp. 11 (citing cases).) However, all the cited denials predate *Taylor*, and the controlling circuit decisions are not good law after *Taylor*.

The government cites *United States v. Hill*, 890 F.3d 51, 57 (2d Cir. 2018) for the proposition that "the elements of Hobbs Act robbery 'would appear, self-evidently, to satisfy' the definition of a 'crime of violence' in § 924(c)(2)(A)." (Resp. 13.) Yet, despite what it calls a "uniform determination" about Hobbs Act robbery (*id.*), the government later acknowledges that there is "a conflict in the court of appeals' 'rationale[s] for classifying Hobbs Act robbery as a crime of violence" (Resp. 15 n.4). The conflicting rationales are highly problematic because after *Taylor* there can be only one reason to conclude that Hobbs Act robbery is categorically a crime of violence: "The only relevant question is whether the federal felony at issue *always* requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force." 142 S.Ct. at 2020.

The different rationales cannot be sustained after *Taylor*. In general, the circuits' approach to the intangible property issue can be summarized in three lines of reasoning. First, those that acknowledge that Hobbs Act robbery can be based on a threat to harm intangible property but then inexplicably find it is still within the force clause. Second, those that reject the argument about threats to intangible

property because they don't see a "realistic probability" that such cases would be prosecuted. And third, those that simply ignore the question of intangible property.

The first type of decisions comes from the Fourth Circuit, which acknowledged that the term "property" in § 1951 does not "draw[] any distinction between tangible and intangible property." *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019). However, it concluded that this breadth was not problematic because the term "property" in § 924(c) also includes intangible property. *Id.* Thus, it held, a threat to harm intangible property falls within the force clause of § 924(c). *Id.* The problem with this analysis is that it ignores § 924(c)'s requirement that a predicate offense must categorically require the use of violent, *physical* force. A threat to harm intangible property does not categorically require the use of physical force at all, as § 924(c) and *Taylor* require. *Mathis* cannot stand after *Taylor*.

The Second Circuit decision in *Hill* is a good example of the second type of case. *Hill* rejected the argument about intangible property in a footnote, explaining that "we need not explicate the statute's outer limits in this regard, as Hill has failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits without employing or threatening physical force." 890 F.3d at 57 n.9. This approach is unsustainable after *Taylor*, which held that courts actually do need to explicate the statute's outer limits. "The statute before us asks only whether the elements of one federal law align with those prescribed in

another." 142 S.Ct. at 2025. The realistic probability test does not apply to § 924(c) after *Taylor*. The reasoning in *Hill* is also unsustainable after *Taylor*.

Finally, the Tenth Circuit's approach has been to ignore the question of threats to intangible property altogether. It has done so by relying repeatedly on *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), which did address the question of intangible property because it was not raised in that case. The panel below acknowledged as much: "In [*United States v. Dubarry*, 741 F. App'x 568 (10th Cir.)], 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." (App. A16-17.) Notwithstanding this gap in *Melgar-Cabrera's* analysis, the Tenth Circuit has continued to rely on *Melgar-Cabrera* as an excuse not to address whether Hobbs Act robbery can be accomplished by threatening harm to intangible property. *See, e.g., United States v. Baker*, 49 F.4th 1348, 1358 (10th Cir. 2022) ("[T]he fact that the defendant in *Melgar-Cabrera* did not provide the same or similar argument as Mr. Baker's argument here is of no moment; we are bound to follow *Melgar-Cabrera* absent a contrary decision by the Supreme Court or en banc reconsideration of *Melgar-Cabrera*."). This approach is problematic after *Taylor* because under *Taylor*, the Tenth Circuit was required to decide what the elements of Hobbs Act robbery were at the time of Mr. Maumau's offense. 142 S.Ct. at 2025. And if Hobbs Act robbery

could be established by a threat to harm intangible property, then that breadth should have taken it beyond the reach of § 924(c)'s force clause.

So, while the circuits are unanimous in their erroneous conclusion, their disparate approaches to reaching that conclusion merit Supreme Court review, especially because none of their analyses are sustainable after *Taylor*. At a minimum, this court should grant certiorari, vacate, and remand to require the Tenth Circuit to reconsider its approach after *Taylor*. But given the Tenth Circuit's persistent unwillingness to take this issue seriously, and given the inevitability that this issue will return to this Court post-*Taylor*, principles of judicial economy favor granting certiorari now.

III. Completed Hobbs Act robbery can be accomplished by threats of future harm to intangible property.

On the merits, the government argues that Hobbs Act robbery is not meaningfully different from common law robbery, which this court concluded was the "'quintessential' example of a crime that requires the use of threatened use of physical force." (Resp. 13 (quoting *Stokeling v. United* States, 139 S.Ct. 544, 551 (2019)).) However, to make this argument, the government ignores the very aspect of the Hobbs Act that gives it its breadth: the possibility that it can be committed by threat of future harm to property.

To be sure, parts of the Hobbs Act "track" the common law definition of a taking by "force or violence," but that is not the end of the analysis. The Hobbs Act also states that it can be committed by causing "fear of injury, immediate *or future*,

to his person *or property*." 18 U.S.C. § 1951(b)(1) (emphasis added). The Eleventh Circuit, for example, has acknowledged that Hobbs Act robbery is broader than common law robbery and *Stokeling* because "[i]t includes not only the use of force against a person, but also the use of force against property." *United States v. Eason*, 953 F.3d 1184, 1192 (11th Cir. 2020). In fact, "[b]y its terms, the Hobbs Act robbery statute may be violated by [threatening to injure] a person's property, even when that property is not physically proximate to the robbery victim." *Id.* at 1193.

Although *Eason* discussed a threat to forcibly harm property, it did not consider whether § 1951 requires the harm to be caused by violent physical force in every case. On this point, a plain reading of the disjunctive list in § 1951 makes clear that a threat to injure property can be made without threatening violent force. "Fear of injury" is redundant and superfluous if it is limited to injuries caused by "actual or threatened force, or violence." *Cf. United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019) (holding that witness tampering statute could not be used as a § 924(c) predicate because property can be injured without the use of violent force). The fact that "injury" is presented as an alternative to actual or threatened force or violence means that the type of injury contemplated by the Hobbs Act is not limited to injuries caused by violent force and reaches threats of non-forcible, economic harm as well.

This breadth is confirmed by the way that courts have defined property in the Hobbs Act over the years, reaching "money and other tangible and intangible things

of value," as the court instructed the jury in this case. (App. A54.) The government ignores the fact that courts have been defining Hobbs Act robbery in this way for many years. (Pet. 16-17 (citing cases).)

The government argues only that the broad definition that includes "intangible property" is used only in extortion cases (Resp. 13-14). Aside from being incorrect (as manifest by the many robbery cases that use this definition), the government doesn't explain why this observation matters. The government has never offered any sound reason why the term "property" should mean different things in the same statute. Indeed, as discussed above, the Fourth Circuit seems to have concluded that the term "property" means the same thing across all of Title 18. *See Mathis*, 932 F.3d at 266.

The government further tries to argue that a taking predicated on a threat to harm a stock option would not be robbery because it is accomplished with the victim's "grudging consent." (Resp. 15 (quoting *Ocasio v. United States*, 136 S.Ct. 1423, 1435 (2016).) However, this argument is inconsistent with the plain text of § 1951(b)(1), which explicitly includes a taking based on the threat of *future* harm to property.

The reality is that Congress passed a sweeping statute in the Hobbs Act that was designed to reach a broad swath of conduct. The labels Congress gave—robbery and extortion—mean nothing under the categorical approach. The only question is the reach of the statute under its plain terms. Here, the statute is unambiguous

that Hobbs Act *robbery* reaches taking property without the victim's consent based on threats of future harm to intangible property. That a victim's non-consent in one case might arguably be characterized as grudging consent in another does not alter the fact that, as written, § 1951(b)(1) can be based on threats of future harm to intangible property.

A key data point for confirming the breadth of Hobbs Act robbery is found in the pattern jury instructions discussed on Mr. Maumau's petition. (Pet. 14-16.) The government argues that "[p]attern instructions are instructive—but not binding—within the circuits in which they are issued," so we cannot rely on them as an authoritative statement of the elements of Hobbs Act robbery. (Resp. 16.) The problem with this argument is that it ignores the well-established precedent that pattern jury instructions are one of the principal sources for determining a crime's elements under the categorical approach. (Pet. 14 (citing cases).) And the fact that the pattern instruction was actually used—in this case and many others—gives it a legal status far beyond a mere suggestion.

The question is not whether "any court of appeals would in fact affirm a Hobbs Act robbery conviction premised on threats to harm intangible property (or even that a district court would allow one)." (Resp. 16.) This question just repackages the "realistic probability" test that this Court rejected in *Taylor*. Rather, the question is what are *the elements* of Hobbs Act robbery—how far do they reach?

and do they include conduct that can be accomplished without the use of force? To answer this question, caselaw tells us to look at pattern jury instructions.

In this case, however, it is not merely the Tenth Circuit's failure to "expressly examin[e] the pattern jury instructions" that injected error into the opinion below. (*See* Resp. 16.) Rather, the glaring defect of the decision below is found in the Tenth Circuit's unwillingness to confront the reality that the district court *in this case* used the pattern instructions that *the Tenth Circuit* promulgated to define the elements of Hobbs Act robbery. Mr. Maumau does not argue that he is entitled to relief because the elements of Hobbs Act robbery *maybe* reach intangible property if we twist extortion cases to apply to him. No, Mr. Maumau argues that he is entitled to relief because the judge in his case, relying on guidance from the Tenth Circuit, said that's what the law is. The government completely ignores this fact. As described to the jury Mr. Maumau's crime falls outside the force clause of § 924(c), and he is entitled to relief from that conviction under *Davis* and *Taylor*.

In short, under the plain language of the statute, a defendant can commit "robbery" by threatening to cause future harm to property. 18 U.S.C. § 1951(b)(1). Courts have long defined "property" to include "intangible" property, and this is true even in robbery trials over many years and many jurisdictions. Thus, a defendant can be convicted of "robbery" when he takes property from another without his consent by threatening to cause future harm to intangible property—an act that that can be accomplished without the use of violent physical force.

CONCLUSION

For these reasons, the court should grant the writ.

Mr. Maumau was convicted of the same crime as his codefendant Eric Kamahele, who the government has agreed is entitled to GVR. For both defendants, the jury was told to convict if it found that they "*attempted to obtain* property from another." (App. A55-56 (emphasis added).)

Additionally, Mr. Maumau was convicted of a crime that could be accomplished by threatening future harm to intangible property, which does not require the use of physical force. Though united in their conclusion, the circuits' diverse rationales cannot be sustained after *Taylor*. And the need for Supreme Court review is particularly acute here, where the Tenth Circuit has failed to analyze the scope of Hobbs Act robbery as a § 924(c) predicate.

Respectfully submitted,

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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 Reply in Support of Petition for Writ of Certiorari was 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
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950 Pennsylvania Ave, N.W.
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It is further attested that the envelope was deposited with the United States Parcel Service on December 12, 2022, and all parties required to be served have been served.

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AFFIDAVIT OF MAILING

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