No. 22-7872

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

CARMELITA BARELA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The government candidly acknowledges in its brief that Ms. Barela's robbery prosecution for coughing and saying (to no one in particular) she had COVID while gathering items from Walgreens and exiting without paying, exposing her to a fifteen-year sentence in federal prison, is an "unusual" use of the Hobbs Act. In fact, for that reason, the government assures the Court that such a prosecution is unlikely to be repeated, thereby making this case an unsuitable vehicle for resolving lower courts' confusion over the reach of the Hobbs Act beyond force involving physical injury to a particular person or group, or threats or attempts thereof.

There are two glaring flaws in this logic. First, it ignores the fact that this is a test case; yes, it is unprecedented, but its affirmance opens the door to similar prosecutions in the future. We live in unusual times, in which the federal government apparently hopes to secure ever-greater authority to deal with public health, environmental, and other diffuse harms through creative expansions of criminal law. Thus, Ms. Barela's case might be more accurately described as a canary in the coalmine. Second, although Ms. Barela's particular prosecution might be unprecedented, the lower-court misinterpretations of the Hobbs Act's reach that made her prosecution possible are not new and are in urgent need of clarification.

In turn, the government's attempts to portray the lower courts as unified and correct on the issues of direct versus indirect force and intentional versus reckless use of force are unpersuasive. On the first point, the government argues that the

Castleman[1] dictum describing indirect threat of exposure to an infection as a "use of force" is applicable to the ACCA's "violent force" requirement, that lower courts are in agreement on this, and that nothing in this Court's *Stokeling* opinion[2] states that "force" must instead be "direct." Yet one of the government's own cited cases acknowledges a circuit split on *Castleman*'s application to the ACCA and other contexts requiring "violent force."

The government also insists there is no conflict because Ms. Barela was not charged under the ACCA. But of course, that is not the issue. As the government acknowledges, courts uniformly have held that Hobbs Act robbery is a violent felony and a crime of violence ["VF/COV"] for purposes of the 18 U.S.C. § 924(c), the ACCA and other sentencing enhancements. If the use of force in this case is not "violent force" for those purposes, those holdings must be revisited. Additionally, although *Stokeling* does not explicitly address direct versus indirect force, the point is that this Court requires that Hobbs Act robbery involve actual or threatened violence toward a person – a victim – rather than a diffuse potential exposure of unspecified persons to possible injury.

As to the Hobbs Act *mens rea* conflict, the government acknowledges that *Borden*[3] and other lower courts require the Hobbs Act's threatened, attempted or actual use of force to be intentional, but insists the Ninth Circuit's instruction here complied with that requirement by requiring the jury to find Ms. Barela was "aware of the act" she was performing, and thus that the threat was "intentional." But as

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[1] *United States v. Castleman*, 572 U.S. 157 (2014).
[2] *Stokeling v. United States*, 586 U.S. ___, 139 S. Ct. 544 (2019).
[3] *Borden v. United States*, 593 U.S. ___,141 S. Ct. 1817 (2021).

most law students know from reading this Court's much-cited opinion in *Elonis*,[4] telling jurors the threat or act must be "intentional" is not the same as telling them the defendant must intend for their acts or words to be threatening, *i.e.*, to put fear in the victim. Tellingly, the government does not cite *Elonis* in its brief and makes no other attempt to explain why the instruction here required proof of intent rather than merely recklessness.

Because the Ninth Circuit's decision below is in direct conflict with *Borden*, because *Castleman*'s dictum is in tension with *Stokeling* and lower courts disagree as to how that dictum should apply to the "violent force" requirement, and because Ms. Barela's case portends a troubling expansion of federal criminal law in the modern era, this Court should grant the petition.

ARGUMENT

The government has not meaningfully rebutted either of the petition's reasons for granting certiorari. First, circuits are split on whether the violent force required for a VF/COV can be indirect, with some courts relying on dictum in *Castleman*, a non-VF/COV, non-robbery case, to conclude it can be. But that dictum conflicts with *Stokeling*'s requirements for common-law robbery, including Hobbs Act robbery. Second, this case conflicts with *Borden*, and creates a circuit split, by failing to require at least a knowing threat to at least knowingly use force, beyond mere recklessness. This case, because of and not in spite of its unusual facts, suggests the

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[4] *Elonis v. United States*, 575 U.S. 723 (2015); *accord Counterman v. Colorado*, 600 U.S. 66, 74 (2023) ("Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat").

need for this Court to resolve the open and disputed question of whether a less-than-knowing threat to use indirect force can sustain a conviction for Hobbs Act robbery and other purported VF/COVs.

I. Although circuits are split on whether *Castleman*'s indirect-force dictum applies to VF/COV, *Stokeling*'s violent-force requirement for common-law robberies precludes it

There is no dispute that the challenged jury instruction in this case relied on the "the common-law concept of 'force'" from *Castleman*. Opp. at 8 (quoting *Castleman*, 572 US. at 170; internal quotation marks omitted); *see also id.* p.6-7 (discussing *Castleman* as the source of Court's approval for indirect use of force in common-law context). Yet *Castleman*'s statement about indirect force being sufficient in the common-law-force context was dictum; the case did not involve battery by poisoning or threatening to infect with a disease. Nor did *Castleman* address robbery or the meaning of "force" applicable to VF/COVs.

Although the government claims to find no "authority suggesting that common-law robbery offenses carried an alternative understanding of force" to *Castleman*'s dictum, Opp. at 8, there is ample such authority in this Court's multiple cases holding that the "violent force" required for VF/COVs is not the same as common-law force at issue in *Castleman*. *Castleman*, 572 U.S. at 163; *Borden*, 141 S. Ct. at 1833-34; *Stokeling*, 139 S. Ct. at 553; *Johnson v. United States*, 559 U.S. 133, 140-42 (2010). These cases make plain that *Castleman* common-law force, sufficient for common-law misdemeanor battery, is "different in kind from the violent force

necessary to overcome resistance by a victim" that common-law robbery requires. *Stokeling*, 139 S. Ct. at 553.[5]

The government's efforts to downplay the circuit disagreement about application of *Castleman*'s indirect-force dictum to VF/COVs, Opp. at 11-12, are unpersuasive. For example, the government attempts to distinguish *United States v. Harris,* 68 F.4th 140, 148 (3d Cir. 2023), and *United States v. Mayo*, 901 F.3d 218, 229 n.15 (3d Cir. 2018), as involving omission or inaction instead of indirect force.[6] But by *Castleman*'s logic, omissions such as "the act of employing" deprivation of food or necessary medication "knowingly as a device to cause harm" are just as much a use of indirect force as poisoning or infecting with a disease. 572 U.S. at 170-71. In fact, the government argued in *Harris* that "starving a child to death" would be a violent felony based on *Castleman*. 68 F.4th at 148. Indeed, the very case cited by the government for the proposition that indirect force is sufficient for the ACCA itself notes a circuit split on this issue. *United States v. Chapman,* 866 F.3d 129, 133 n.4 (3d Cir. 2017).

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[5] Thus, the reason *Castleman*'s dictum has no bearing on the Hobbs Act is not that its reasoning "depended on any consideration unique to § 921(a)(33)(A) [misdemeanor battery]," but that it relates to common-law force and not to the term of art "violent force" or crimes of violence as used in the ACCA.

[6] The Second Circuit en banc majority in *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021), disagreed with the Third Circuit's holdings, in *Harris* and *Mayo*, that the possibility that a crime could be committed by omission precluded it from qualifying as a VF/COV. *Compare Scott*, 990 F.3d at 125, *with Harris*, 68 F.4d at 146-48 (reaffirming *Mayo*). *See also Whyte v. Lynch*, 807 F.3d 463, 470-71 (1st Cir. 2015) (noting that *Castleman* did not address the VF/COV context and that not all uses of physical force under 921(a) will be violent force for ACCA or other purposes).

On the merits, the government does not dispute that common-law robbery did not include exposure to illness. Nor does it identify any other case involving a robbery committed by an indirect use of force, such as infection with a disease. Opp. at 8-9. Instead, relying on *Castleman*, the cases the government cites discuss the possibility only hypothetically – and skeptically. *See United States v. Hill*, 890 F.3d 51, 58-59 (2d Cir. 2018) (rejecting as unrealistic hypothetical Hobbs Act robbery committed by threat to poison or withhold medication); *United States v. Burns-Johnson*, 864 F.3d 313, 318 (4th Cir. 2017) ("[a]ssuming, without deciding, that statutory armed robbery realistically might encompass robbery by poison"); *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016) ("[I]t will be the rare bank robber who commits that offense with poison....").

Nor does the government meaningfully dispute that *Stokeling* requires that violent force be direct. This Court held in *Stokeling* that the physical force required for robbery must be sufficient to "overcome" "resistance by the victim," "a violent act directed against" the victim, and "necessarily involves a physical confrontation and struggle." 139 S. Ct. at 549, 551, 553. Here, Ms. Barela did not even attempt or threaten to use the type of common-law-robbery force discussed in *Stokeling*; at most, there was an implied general threat of exposure to a virus. In contrast, "threats to hit someone," in the government's example, Opp. at 11, like the examples in *Stokeling*, implicate (1) the prospect of immediate physical harm; (2) to a specific victim; (3) in close physical proximity; (4) with a clear and clearly expressed intent to injure.

II. The jury instruction allowing conviction based on a reckless threat of exposure to disease conflicts with *Borden* and other circuits

A. The jury instructions did not require a knowing threat

The conflict between this case and others is not, as the government describes it, related to whether Hobbs Act robbery "requires a showing that the defendant acted deliberately" in performing the acts she took that turned out to be threatening. Opp. at 14. Rather, the conflict is that Ms. Barela's jury was not required to find that she intended to place, or knew she was placing, a particular person or persons in fear of bodily injury.

A person can be "aware of the act" they commit without intending that it be taken by a person as a threat of violent force. This was the situation in *Elonis*: Elonis clearly was aware of the words he wrote on social media; his argument was that he was not aware of how the intended recipient would take them and did not intend them as a threat. 575 U.S. at 731. Here, the jury instructions and the testimony allowed the jury to find Ms. Barela guilty based on having recklessly or negligently placed a Walgreens employee in fear, rather requiring it to determine whether Ms. Barela knowingly or intentionally intended that a particular person or persons be placed in fear of harm.

B. The Ninth Circuit's decision upholding the Hobbs Act robbery conviction without proof of a knowing or intentional threat to infect with a disease conflicts with *Borden* and circuit opinions

The government fails to distinguish the cases discussed in the petition, Pet. at 2-16, holding that other threat-based offenses do not satisfy *Borden* if they do not require the jury to find that the defendant knowingly or intentionally threatened

violent force. Opp. at 15 n.3. It characterizes *United States v. Frazier*, for example, as holding that a state intimidation statute is not a COV because it "'did not require that the defendant knowingly or intentionally targeted the person of another with the force or threatened force.'" Opp. at 15 n.3 (quoting *Frazier*, 48 F.4th 884, 885-87 (8th Cir. 2022); cleaned up). The instructions here likewise did not require the jury to determine whether Ms. Barela "knowingly or intentionally targeted the person of another with the force or threatened force."

The government characterizes another case, *United States v. White*, 58 F.4th 889 (6th Cir. 2023), as precluding Ohio robbery from being a VF because the element of "'displaying, brandishing, indicating possession or, of using a deadly weapon'" was a strict liability. Opp. at 15 n.3 (quoting *White*, 58 F.4th at 896-97). As discussed in the petition, Pet. at 2-13, that case held that the weapon element conveyed an implied threat to inflict physical harm. But "it does not follow that the implied threat is necessarily accomplished with a mens rea greater than recklessness." *White*, 58 F.4th at 896. The same is true of the implied threat in this case.

The government does not dispute that "robbery offenses involving threats can be committed with only a mens rea of recklessness." Opp. at 15. The jury instructions here required nothing more. The Ninth Circuit's decision in this case thus conflicts with *Borden*, as well as the cases cited in the petition and acknowledged by the government, Opp. at 15 n.3, holding that threat-based offenses that may be premised on a mens rea of less than knowledge cannot qualify as VF/COVs.

C. This case squarely presents important, recurring and confounding issues about the scope of the Hobbs Act and VF/COVs

In just the four months since Ms. Barela filed her petition, numerous published circuit opinions grappled with the complexities of applying *Borden* and this Court's other VF/COV cases, particularly to threat-based offenses. *See, e.g., United States v. Barlow*, ___ F.4th ___, 2023 WL 6543811 (9th Cir. Oct. 4, 2023); *id.* at *12 (Bea, J., dissenting); *United States v. Williams*, 80 F.4th 85, 92-93 (1st Cir. 2023); *United States v. Henderson*, 80 F.4th 207, 212-15 (3d Cir. 2023); *United States v. Campbell*, 77 F.4th 424, 428-29 (6th Cir. 2023); *United States v. Stanford*, 75 F.4th 309, 319-20 (3d Cir. 2023); *see also United States v. Kepler*, 74 F.4th 1292, 1302-11 (10th Cir. 2023) (applying *Borden* to federal second-degree murder); *United States v. Lung'aho*, 72 F.4th 845 (8th Cir. 2023) (applying *Borden* to arson statute).

The Third Circuit's recent analysis in finding a Pennsylvania robbery offense a Guidelines COV highlights a particularly stark contrast with this case. *Henderson*, 80 F.4th at 214-15. That offense qualified as a COV because it required proof that the defendant (1) "threaten[ed] to use physical force" and (2) the threat was intentional or knowing. *Id.* at 212. To reach this conclusion, the Third Circuit analyzed the two means of committing robbery under the statute and held that (1) "intentionally" putting the victim in fear of immediate serious bodily injury explicitly includes an intent requirement because, without it, "conduct that 'puts another in fear' could cover reckless actions," *id.* at 215 n.8; and (2) in "'threaten[ing] another with" serious bodily injury that type of injury need not require an explicit intent requirement because it inherently "conveys an intentional act." *Id.* at 215.

Specifically, "'threatens another' addresses a specific type of act, namely a communication that conveys an intent to harm." *Id.* at 215 n.8. Because this language requires the threat to be directed toward another person with the intent of causing the victim to fear serious bodily injury, it implicitly and necessarily reaches only knowing or intentional conduct. *Id.* at 215; *see also, e.g.*, *United States v. Belcher*, 40 F.4th 430, 431-32 (6th Cir. 2022) (Tennessee robbery statute's requirement that defendant commit the theft by putting a person in "fear of bodily injury and of present personal peril from violence *offered* or impending" requires intent to threaten force). In reaching this conclusion, the Third Circuit also "acknowledged that the word 'threat' alone has been viewed as an actual reus and does not carry its own implicit mens rea." *Henderson*, 80 F.4th at 214 n.7 (internal quotation marks omitted; citing, *i.a.*, *Counterman*, 143 S. Ct. at 2117-18).

Here, by contrast, the jury was instructed to determine whether Ms. Barela took "personal property from the person or in the presence of another against their will by means of . . . threatened . . . fear of injury . . . to their person." ER-141. The operative language here – "by means of threatened fear of injury" – did not even require that the defendant make the threat, let alone that the defendant did so at least knowingly. With this instruction, a jury could find a defendant guilty of Hobbs Act robbery for shoplifting while employees were distracted by an angry dog, for example, or perhaps even simply because the shoplifter was a loud, large Black person.

Other circuits recently have, correctly, construed this Court's cases to exclude offenses that would encompass similar scenarios from qualifying as VF/COVs. The

First Circuit held, for example, that a "'threatened use' of force . . . means '[a] communicated intent to inflict physical or other harm on [a] person' as opposed to simply 'an abstract risk to community peace and order.'" *Williams*, 80 F.4th at 92 (quoting *United States v. Taylor*, 142 S. Ct. 2015, 2022-23 (2022) (as modified in *Williams*)). *Taylor* precludes defining "threatened use of physical force" as "a thing that might well cause harm." *Id.*

The government's urging this Court to deny this case any importance because it was based on "a threat made to infect victims with a communicable disease for which there then existed no vaccination and during a period the locality had issue a stay-at-home order," Opp. at 17, actually highlights the diffuse and environmental nature of the threat in her case. The "threatened fear of injury" that the Walgreens manager testified about could have come from her general fear of COVID and all its unknowns as "a thing that might well cause harm," *Williams*, 80 F.4th at 92, rather than any intentional or knowing threat from Ms. Barela. The jury instructions failed to eliminate this possibility.

The question this case presents is not, as the government claims to construe it, whether the Ninth Circuit properly construed the Hobbs Act or courts properly have held that Hobbs Act robbery is a crime of violence. Opp. at 16. It is, fundamentally, whether *any* offense can qualify as a VF/COV if the necessary use or attempted or threatened use of "violent force" is no more than an implicit threat to recklessly risk transmission of a disease. Pet. at i. In the categorical-analysis context, factually unusual fringe cases such as this one clarify the boundaries. The determination whether an offense qualifies as a VF/COV "doesn't ask whether the crime is

sometimes or even *usually* associated with communicated threats of force (or, for that matter, with the actual or attempted use of force). It is whether the government must prove, as an *element* of its case the use, attempted use, or threatened use of force." *Taylor*, 142 S. Ct. at 2024 (emphases in original). Thus, if the government is to continue to rely on Hobbs Act robbery offenses as VF/COVs, Ms. Barela's conviction under that statute must satisfy the requirements this Court has established for VF/COVs.

Yes, this case is factually unusual, but we live in unusual times, and allowing the Ninth Circuit's decision to stand will open the floodgates. Humankind has had diseases for all time, and common-law robbery for centuries; the absence of similar prosecutions shows this type of case was not meant to be common-law robbery. But that does not mean it will not be treated as such in the future, after this case, or that disease, pollution, addiction, poverty, or failure to follow public health directives will not be construed as violence. Just because harm is becoming more diffuse does not mean that this Court must endorse the expansion of federal criminal law and sentencing. *See generally* Eric Biber, *Law in the Anthropocene Epoch*, 106 Geo. L.J. 1 (2017) (explaining that traditional criminal law principles such as mens rea are expanding and adapting to meet governments' desire to regulate against diffuse environmental harms through criminal law).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Dated: October 24, 2023

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