No. 22-____

IN THE
Supreme Court of the United States

CHARLES CHAVEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal bank-robbery statute prohibits taking (or attempting to take) "from the person or presence of another … any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." 18 U.S.C. § 2113(a). The question presented is:

Whether a person violates this provision by forcing a bank customer to withdraw the customer's money from an ATM in order to take the money from the customer.

PARTIES TO THE PROCEEDING

Petitioner in this Court and appellee in the court of appeals is Charles Chavez.

Respondent in this Court and appellant in the court of appeals is the United States of America.

DIRECTLY RELATED PROCEEDINGS

United States District Court

United States of America v. Charles Chavez, No. 1:19-cr-01818-MV (D.N.M.) (motion to dismiss granted and opinion issued May 19, 2020)

United States Court of Appeals

United States of America v. Charles Chavez, No. 20-2083 (10th Cir.) (judgment reversed and opinion issued March 29, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Chavez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 29 F.4th 1223 and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-16a. The opinion of the district court is reported at 460 F. Supp. 3d 1225 and reprinted at Pet. App. 17a-28a.

JURISDICTION

The court of appeals entered its judgment on March 29, 2022. Pet. App. 1a. On June 14, 2022, Justice Gorsuch granted petitioner's application to extend the time to file a petition for a writ of certiorari until July 27, 2022. *See* No. 21A818. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The federal bank-robbery statute, 18 U.S.C. § 2113(a), provides in relevant part that:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association … [s]hall be fined under this title or imprisoned not more than twenty years, or both.

INTRODUCTION

Congress enacted the federal bank-robbery statute in 1934 based on its determination that states were unable to respond to the increased volume of robberies directed against banks, especially through organized crime. That statute's text thus focuses explicitly on persons who take money belonging to a bank: it prohibits "tak[ing], from the person or presence of another, … money … belonging to, or in the care, custody, control, management, or possession of, any bank." 18 U.S.C. § 2113(a).

In this case, the government does not allege that petitioner Charles Chavez robbed a bank or attempted to rob a bank. Instead, the government alleges that he attempted to force a person who has a bank account to withdraw money from an ATM. The question presented here—whether that conduct can support a conviction under the federal bank-robbery statute—has divided the circuits. The Fifth Circuit has held that this conduct does not constitute bank robbery because the statute reaches only the taking of money that is in the possession of a *bank*, not in the possession of a bank *customer*. In contrast, the Seventh Circuit has held that this conduct can count as bank robbery even though the defendant's conduct was not directed at a bank but at a bank customer. And in the decision below, the Tenth Circuit at length considered the reasoning of these two decisions and ultimately adopted the Seventh Circuit's holding while expressly rejecting the Fifth Circuit's.

This Court's review is required to resolve the circuit conflict and thus restore a uniform interpretation to a federal criminal statute carrying a penalty of up to 20 years of imprisonment. The question presented has substantial importance to the administration of federal criminal law, and it implicates an oft-recurring fact pattern reflected in numerous reported decisions and statistics. This case provides the Court with an ideal vehicle through which to resolve the conflict over the question presented—the question arises cleanly in the context of clear allegations, and its resolution is practically important to this prosecution.

Review is especially warranted because the decision below is incorrect. The statutory text focuses on the prohibited act of "tak[ing]" money "from the person or presence of another." 18 U.S.C. § 2113(a). And it asks whether the money that is taken "belong[s] to" or is "in the care, custody, control, management, or possession of, any bank." *Id.* The paradigmatic example of a violation would be a person walking into a bank and holding up a teller, and the teller turning over money from the bank's vault. In that scenario, the bank would unquestionably possess the money at the time the defendant took it from "the person or presence of another." In contrast, in this case, petitioner allegedly attempted to force a bank customer—*i.e.*, a person who holds money in a bank account—to withdraw money from an ATM in order to "take[]" the money "from the person or presence" of the customer. In that scenario, the defendant takes money that is in the possession of the *customer*—not the bank. Such an act could be punished as robbery of the customer under state law, but it is not robbery of the bank under federal law. In holding otherwise, the court below (like the Seventh Circuit before it) disregarded the unambiguous statutory language. And even if that language were ambiguous, the statutory history and rule of lenity would compel rejection of the Tenth Circuit's interpretation.

The petition should be granted.

STATEMENT

A. Legal Background

Until 1934, robbery "directed against … banks w[as] punishable only under state law." *Jerome v.*

United States, 318 U.S. 101, 102 (1943). But "[b]y 1934[,] great concern had been expressed over interstate operations by gangsters against banks—activities with which local authorities were frequently unable to cope." *Id.* (citing H.R. Rep. No. 73-1461, at 2 (1934)). Congress thus enacted the federal bank-robbery statute to punish "those who rob, burglarize, or steal from" the "institutions in which [the federal government] is interested." H.R. Rep. No. 73-1461, at 2. The statute's caption announces its purpose as "provid[ing] punishment for certain offenses committed against banks." Pub. L. No. 73-235, 48 Stat. 783 (1934).

The provision of the Act at issue here has retained its focus on protecting banks since 1934. True to its title, the text focuses on violent means of taking, or attempting to take, "from the person or presence of another," property or money "belonging to, or in the care, custody, control, management, or possession of any bank." 18 U.S.C. § 2113(a). Section 2113(a) subjects violators to up to 20 years of imprisonment, while § 2113(d) provides for an enhanced punishment of up to 25 years of imprisonment for those who, in violating subsection (a), "assault[] any person, or put[] in jeopardy the life of any person by the use of a dangerous weapon or device." And bank robbery is frequently charged as the predicate for the offense of using, carrying, or possessing a firearm in connection with a crime of violence, which carries severe mandatory minimum penalties and can support a sentence up to life imprisonment. *See* 18 U.S.C. § 924(c).

B. Factual and Procedural Background

1. While this case arises on a motion to dismiss petitioner's indictment, petitioner and the government agree on the following operative facts. Pet. App. 2a (Tenth Circuit noting that "[t]he following facts are undisputed at this stage"); *id.* at 20a (district court stating that "[t]he recitation of the operative facts in [petitioner's] motion is essentially the same as in the government's response").

Petitioner, while armed with a rifle, approached the passenger side of an occupied vehicle parked at a Wells Fargo ATM in Albuquerque, New Mexico. *Id.* at 2a. The ATM was not located on the premises of a Wells Fargo bank branch. *Id.* Petitioner demanded money from the vehicle's two occupants, but they did not have cash. *Id.* Petitioner then demanded that they insert their bank card into the ATM and make a withdrawal. *Id.* The occupants claimed that they could not do so because they had just deposited a check, which had not yet cleared, and they had no other funds in their account. *Id.*

At that point, a law-enforcement officer arrived at the scene. *Id.* at 2a-3a. Petitioner then asked the vehicle occupants for cigarettes and left. *Id.* at 3a. Law-enforcement officers later arrested him. *Id.*

2. Petitioner was indicted on six counts, two of which relate to the incident at the Wells Fargo ATM. *Id.* Count 5 charged Petitioner with attempted bank robbery with a dangerous weapon—*i.e.*, "by force, violence, and intimidation, … attempt[ing] to take from the person and presence of another a sum of U.S. currency belonging to and in the care, custody, control,

management and possession of Wells Fargo Bank, … and in committing such offense, … assault[ing] and put[ting] in jeopardy the life of another person by use of a dangerous weapon," in violation of 18 U.S.C. § 2113(a) and (d). *Id.*; *see also id.* at 31a. Count 6 charged petitioner with "knowingly us[ing], carr[ying], and brandish[ing] a firearm, during and in relation to … attempted bank robbery with a dangerous weapon, as charged in Count 5 …, and in furtherance of such crime, possess[ing] and brandish[ing] said firearm," in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *Id.* 3a; *see also id.* at 31a.

In addition to these two counts, the government charged petitioner with four counts relating to two alleged carjackings that took place separate from—though on the same night as—the incident at the Wells Fargo ATM. *See id.* at 29a-30a. Specifically, the government charged petitioner with two counts of taking a motor vehicle that had been involved in interstate commerce by force, violence, and intimidation, in violation of 18 U.S.C. § 2119; and two counts of possessing and brandishing a firearm during and in relation to the alleged carjackings, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *Id.*

3. Petitioner moved to dismiss Counts 5 and 6—the counts relating to the incident at the Wells Fargo ATM. As to Count 5, petitioner argued that the acts alleged by the government fell outside the bank-robbery statute's scope. Pet. App. 3a. And because Count 6 rested on the flawed premise that petitioner had committed attempted bank robbery under Count 5,

petitioner argued that Count 6 had to be dismissed as well. *Id.*[1]

The district court granted petitioner's motion to dismiss, holding that "as a matter of law, [petitioner's] actions did not violate the federal bank robbery statute." *Id.* at 27a. The district court observed that the Fifth and Seventh Circuits had "reached opposite conclusions" about whether a person may violate the bank-robbery statute by forcing a bank customer to withdraw the customer's money from an ATM in order to take the money from the customer. *Id.* at 23a. The district court "agree[d] with the Fifth Circuit's" conclusion that in these circumstances "the money [is] not in 'the care, custody, control, management, or possession' of the bank at the relevant time, which [is] the time of the transfer of the money from the victim to the defendant." *Id.* at 24a (quoting *United States v. Burton*, 425 F.3d 1008, 1010 (5th Cir. 2005)). "This interpretation," the court explained, "comports with the plain language of the statute, which prohibits taking the property or money 'from the person or presence of another.'" *Id.* at 25a (quoting 18 U.S.C. § 2113(a)). And the court rejected the government's argument that the Fifth Circuit in *Burton* did "not properly consider the forcible and coercive nature of the [ATM] withdrawal," reasoning that "*Burton* concluded that despite the coerced nature of the withdrawal, the funds were no longer in the custody of the

[1] The parties agree that if Count 5 must be dismissed, Count 6 must also be dismissed. Pet. App. 4a.

bank at the time of the transfer to the defendant." *Id.* at 27a.

4. After the district court's decision granting petitioner's motion to dismiss counts 5 and 6, the grand jury returned a superseding indictment. *See* Dist. Ct. Dkt. 36. The superseding indictment contained the same four carjacking-related counts, removed the two dismissed bank-robbery-related counts, and added two new counts. *Id.* The two new counts charged petitioner with: (1) "unlawfully attempt[ing] to obstruct, delay and affect commerce, and the movement of articles and commodities in such commerce, namely currency in the possession of Wells Fargo Bank, by robbery and attempt to commit robbery," in violation of 18 U.S.C. § 1951(a); and (2) possessing and brandishing a firearm "during and in relation to" petitioner's "attempted interference with commerce by threats or violence," in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *See* Dist. Ct. Dkt. 36, at 2-3.

Following of the return of this superseding indictment, the government filed a notice of appeal of the district court's decision dismissing the attempted bank-robbery charge and follow-on 18 U.S.C. § 924(c)(1)(A)(ii) charge. *See* Dist. Ct. Dkt. 38. The government's briefing in the Tenth Circuit did not mention the superseding indictment and argued that the district court erred in granting petitioner's motion to dismiss. *See* Appellant's Opening Brief, *United States v. Chavez*, No. 20-2083, 2020 WL 5544441 (10th Cir. Sept. 14, 2020); Appellant's Reply Br., No. 20-2083, *United States v. Chavez*, 2020 WL 7177005 (10th Cir. Dec. 4, 2020). The district court vacated

petitioner's jury-selection and trial dates pending resolution of the government's appeal, and no further district court proceedings have occurred during the appeal. *See* Dist. Ct. Dkt. 45.

5. The Tenth Circuit reversed. Like the district court, the Tenth Circuit acknowledged that the Fifth and Seventh Circuits "have reached opposite conclusions" on the question presented. Pet. App. 9a. But unlike the district court, the Tenth Circuit "side[d] with the Seventh Circuit and h[e]ld that directly forcing a bank customer to withdraw money from an ATM qualifies as federal bank robbery in violation of 18 U.S.C. § 2113(a) because the funds belonged to the bank at the time of the coerced withdrawal." *Id.* at 12a-13a.

The Tenth Circuit "agree[d] with the Seventh Circuit that money in an ATM is 'obviously' bank money." *Id.* at 13a (quoting *United States v. McCarter*, 406 F.3d 460, 462 (7th Cir. 2005)). And it "also agree[d] with the Seventh Circuit," without independent analysis, "that when '[a] robber forces [a] bank customer to withdraw … money, the customer becomes the unwilling agent of the robber, and the bank is robbed.'" *Id.* (quoting *McCarter*, 406 F.3d at 463). The Tenth Circuit recognized that the circuits are split on the issue, but it "reject[ed] the Fifth Circuit's position that the ownership of the money is not measured until the defendant physically places his hands on it, without regard to how the defendant acquired it." *Id.* at 13a-14a. Accordingly, the Tenth Circuit "conclude[d] that, had [petitioner] completed the course of conduct he attempted, he would have committed federal bank robbery under 18 U.S.C. § 2113," meaning that Counts 5

and 6 "should not have been dismissed before trial." *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

The courts of appeals are openly and intractably divided over the question presented: whether a person may commit federal bank robbery by forcing (or attempting to force) a bank customer to withdraw the customer's money from an ATM in order to take the money from the customer. This Court should resolve the conflict now to ensure the uniform interpretation of a frequently invoked federal criminal statute carrying significant penalties. This petition—which cleanly presents this purely legal question—provides the Court with an ideal opportunity to resolve the circuit conflict. And the decision below is wrong: it is irreconcilable with the unambiguous statutory language and history. The petition should be granted.

A. The Courts Of Appeals Are Openly Divided Over The Scope Of The Federal Bank-Robbery Statute

The circuits are openly and intractably divided over the scope of the federal bank-robbery statute. The court below recognized the conflict, and it expressly disagreed with the Fifth Circuit's text-based interpretation, while adopting the Seventh Circuit's overbroad reading. Only this Court can resolve that disparate construction of an important federal criminal law.

1. The Fifth Circuit has held that a person does not commit bank robbery when he forces a bank customer to withdraw the customer's money from an ATM in order to take the money from the customer.

In *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005), the defendant ordered a woman to "get into her car and he drove them to a … [bank]," where the woman "withdrew $150 and gave it to" the defendant under duress. *Id.* at 1009. The Fifth Circuit held that the defendant had not committed bank robbery because the money withdrawn from the ATM was "not in the 'care, custody, control, management, or possession' of the bank … at the time of the transfer to [the defendant]." *Id.* at 1010. Rather, the bank customer "had the money and gave it to [the defendant] in her vehicle—not in the bank." *Id.* at 1011. The evidence, therefore, could "only support[] a finding that [the defendant] robbed [the customer]," as opposed to the bank. *Id.* at 1010. The Fifth Circuit noted that most "[c]ases finding that property was within the 'care, custody, control, management or possession' of a bank have done so when the property was *inside* the bank" when the defendant took it. *Id.* at 1011 (citing cases). Where the force is exerted against the customer in order to take the customer's money from her, the Fifth Circuit explained, the bank-robbery statute does not apply. *Id.* at 1010-11.

2. In contrast, in *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005), the court adopted a broad, atextual reading of the bank-robbery statute. There, the defendant accosted a woman in a parking garage, entered the backseat of her car, and forced her to drive to an ATM at gunpoint, before the crime was interrupted. *Id.* at 462. The Seventh Circuit held that the defendant had committed attempted bank robbery by trying to force the victim to withdraw her money from an ATM in order to take that money from

her once she withdrew it. *Id.* The court acknowledged that "[i]f the depositor is robbed of the money he has just withdrawn after he leaves the bank, that is not a bank robbery." *Id.* at 463. But, the court reasoned, if the defendant "forces the bank's customer to withdraw the money," that "is robbing the bank rather than robbing just the customer" because "the customer becomes the unwilling agent of the robber." *Id.*; *see also United States v. Durham*, 645 F.3d 883, 893 (7th Cir. 2011) (reiterating this rule).

3. In this case, the Tenth Circuit recognized that "[t]he Fifth and Seventh Circuits have both addressed [the question presented,] and they have reached opposite conclusions." Pet. App. 9a. *Burton* was decided after *McCarter*, and after considering the Seventh Circuit's reasoning at length, the Fifth Circuit "decline[d] the Government's invitation to follow … *McCarter*," finding the Seventh Circuit's holding "unpersua[sive]." 425 F.3d at 1011. Here, the court of appeals set out in detail the Fifth and Seventh Circuits' reasoning. The court then "side[d] with the Seventh Circuit and h[e]ld that directly forcing a bank customer to withdraw money from an ATM qualifies as federal bank robbery in violation of 18 U.S.C. § 2113(a) because the funds belonged to the bank at the time of the coerced withdrawal." Pet. App. 12a-13a. The court noted that it "reject[ed]" and "disagree[d] with the Fifth Circuit's contrary approach." *Id.* at 13a-14a.

The Seventh and Tenth Circuits have thus squarely held that a person may commit bank robbery by forcing a bank customer to withdraw the customer's money from an ATM in order to take the

money from the customer. Conversely, the Fifth Circuit has held that a person *cannot* commit bank robbery in these circumstances. So if petitioner's case had arisen in the Fifth Circuit, his attempted bank-robbery charge (and the § 924(c)(1)(A)(ii) charge predicated on it) would have been dismissed. The Court should grant certiorari to resolve this division of authority over the scope of a federal criminal statute that subjects violators to up to 20 years of imprisonment (plus routinely charged sentencing enhancements).

B. The Scope Of The Bank-Robbery Statute Is Important And Merits Resolution Here

1. The conflict over the scope of a federal criminal statute that carries a potential prison term of 20 years is intolerable, and it requires this Court's intervention. The Court has repeatedly granted certiorari in similar circumstances, and it should likewise grant the petition here. *See, e.g.*, *Ruan v. United States*, 142 S. Ct. 2370 (2022); *United States v. Taylor*, 142 S. Ct. 2015 (2022); *Wooden v. United States*, 142 S. Ct. 1063 (2022); *Borden v. United States*, 141 S. Ct. 1817 (2021); *Van Buren v. United States*, 141 S. Ct. 1648 (2021); *see also Bittner v. United States*, No. 21-1195, *cert. granted* (June 21, 2022) (granting review where the government acquiesced in a case involving a one-to-one circuit split on "a fairly straightforward and discrete question of statutory construction" on a tax-penalty issue (*see* Respondent's Br. 19 (May 17, 2022)).

The fact pattern charged in this case—a defendant forcing (or attempting to force) a bank customer to withdraw money from an ATM—arises frequently.

The reported case law demonstrates that individuals frequently attempt to rob customers at ATMs. *See, e.g.*, *United States v. Rose*, 891 F.3d 82, 84 (2d Cir. 2018); *United States v. Durham*, 645 F.3d 883, 893 (7th Cir. 2011); *United States v. McCarter*, 406 F.3d 460, 461-62 (7th Cir. 2005); *United States v. Burton*, 425 F.3d 1008, 1009 (5th Cir. 2005); *United States v. Moore*, 402 F. App'x 778, 779 (4th Cir. 2010); *United States v. Smith*, 670 F. Supp. 2d 1316, 1320-21 (M.D. Fla. 2009); *United States v. Davis*, 2014 WL 12899089, at *1 (W.D. Tenn. Apr. 21, 2014); *People v. Mullins*, 19 Cal. App. 5th 594, 599-600 (Cal. Ct. App. 2018). And FBI statistics show that in 2020, the federal government charged 1,500 bank robberies under 18 U.S.C. § 2113(a), 229 of which appear to have occurred at ATMs.[2]

Evidence also suggests that ATM robberies are becoming more and more prevalent. The number of ATM robberies charged by the federal government in 2020 (229) increased significantly from 2019 (31) and 2018 (74).[3] And the ATM Industry Association has

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[2] *See* Federal Bureau of Investigation, *Bank Crime Statistics 2020*, https://www.fbi.gov/file-repository/bank-crime-statistics-2020.pdf/view.

[3] *See* Federal Bureau of Investigation, *Bank Crime Statistics 2019*, https://www.fbi.gov/file-repository/bank-crime-statistics-2019.pdf/view; Federal Bureau of Investigation, *Bank Crime Statistics 2018*, https://www.fbi.gov/file-repository/bank-crime-statistics-2018.pdf/view.

found that the number of ATM crimes increased 148% from 2019 to 2020.[4]

ATM robberies are particularly prevalent in certain jurisdictions. For instance, Los Angeles has recently seen a spike in ATM crimes.[5] The Texas Bankers Association states that "Houston and Southeast Texas have been recognized … as hotbeds for ATM crime."[6] And the same appears to be true of certain parts of Florida.[7]

Prosecutors, defense attorneys, courts, and individuals require clarity about whether the oft-recurring conduct at issue in this case constitutes a federal crime. Only this Court can provide the requisite definitive answer.

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[4] *See* Jim Sams, *As Criminals Innovate, ATM Thefts Becoming a Growing Source of Insurer Loss*, Claims J. (Feb. 5, 2021), https://www.claimsjournal.com/news/national/2021/02/05/301871.htm#.

[5] *See* Ethan Ward, *Crime at ATM Machines Spikes During COVID*, Crosstown (Nov. 18, 2020), https://xtown.la/2020/11/18/rise-atm-crime-covid/.

[6] Texas Bankers Assoc., *ATM Crime Task Force Report* at 2 (Nov. 2020), https://www.claimsjournal.com/app/uploads/2021/02/ATM-Crime-Task-Force-Report-NOV-2020-FINAL.pdf32.pdf

[7] *See* McNelly Torres, *Banks Fail to Protect Consumers From ATM Crime, FCIR Investigation Finds*, Fla. Ctr. for Investigative Reporting (Nov. 20, 2013), https://fcir.org/2013/11/20/banks-fail-to-follow-laws-meant-to-protect-consumers-from-atm-crime-fcir-investigation-finds/.

2. Review of the question presented is warranted in this case. The operative facts alleged by the government "are undisputed at this stage," Pet. App. 2a, and the case presents a pure question of law. The question was fully litigated below, yielding published district court and court of appeals opinions. The question presented is also outcome determinative of petitioner's bank-robbery and follow-on § 924(c)(1)(A)(ii) charge: if his interpretation of the bank-robbery statute is correct, then those charges must be dismissed.[8]

Following the district court's decision, the grand jury returned a superseding indictment replacing the dismissed attempted bank-robbery count and § 924(c)(1)(A)(ii) count with a count of attempted Hobbs Act robbery, 18 U.S.C. § 1951(a), and a new § 924(c)(1)(A)(ii) count predicated on the alleged attempted Hobbs Act robbery. *See* Dist. Ct. Dkt. 36; *supra* at 9.[9] But that superseding indictment by no

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[8] Petitioner's § 924(c)(1)(A)(ii) charge predicated on his attempted bank-robbery charge may be invalid in any event in light of this Court's decision in *United States v. Taylor*, 142 S. Ct. 2015 (2022), which held that attempted Hobbs Act robbery, 18 U.S.C. § 1951(a), is not a "crime of violence" under § 924(c)'s elements clause. *Taylor*, 142 S. Ct. at 2021. Before *Taylor*, however, some circuits had held that attempted bank robbery does satisfy § 924(c)'s elements clause. *See Collier v. United States*, 989 F.3d 212, 221 (2d Cir. 2021). And the government's brief in *Taylor* argued that attempted bank robbery qualifies under § 924(c), even if attempted Hobbs Act robbery does not. U.S. Br., *United States v. Taylor*, No. 20-1459, 2021 WL 4121414, at *34 n.* (Sept. 7, 2021).

[9] The new § 924(c)(1)(A)(ii) count in the superseding indictment was returned before this Court's decision in *Taylor*, but is

means signals the government's intention to drop the bank-robbery counts despite the Tenth Circuit's decision. To the contrary, the government filed its notice of appeal after the grand jury issued the superseding indictment, and it has continued to prosecute the appeal despite having brought the additional Hobbs Act charge. If the validity of the bank-robbery counts were unimportant to the government in this case, it would have had no reason pursue an appeal that would delay district court proceedings and lead to a ruling affecting prosecutions in multiple states. The government's appeal attests to the broad legal significance of the scope of the bank-robbery statute on these facts.

If the Tenth Circuit's decision were allowed to stand, the bank-robbery counts in the original indictment would automatically come back into existence. *See United States v. Walker*, 363 F.3d 711, 715 (8th Cir. 2004) ("a superseding indictment does not in effect dismiss the original indictment and … both indictments can co-exist" (citing cases)); *accord United States v. Bowen*, 946 F.2d 734, 736 (10th Cir. 1991). In turn, those reinstated counts would expose petitioner to at least an additional 32 years of imprisonment: up to 25 years for the attempted bank-robbery charge, *see* 18 U.S.C. § 2113(a) (20 years for generic attempted bank robbery); *id.* § 2113(d) (5-year enhancement for "assault[ing] any person, or put[ting] in jeopardy the life of any person by the use of a dangerous weapon"), plus a mandatory minimum 7-year

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now unsustainable in light of that decision. *See* 142 S. Ct. at 2021.

enhancement for allegedly brandishing a firearm during and in relation to the attempted bank robbery, *see id.* § 924(c)(1)(A)(ii). Leaving aside the § 924(c) counts, the 25-year sentence for attempted bank robbery is the most severe potential penalty of any of the counts the government has charged in this case. *Compare* 18 U.S.C. § 1951(a) (potential 20-year sentence); *id.* § 2119(a)(1) (potential 15-year sentence).

This potential for a severe sentence explains why the government has fought on appeal to retain the bank-robbery and associated § 924(c) count. Reinstating those counts would not only allow the government to obtain a longer sentence upon conviction, but also to impose substantial pressure on petitioner to plead guilty in advance of trial. A reversal of the decision below, in contrast, would deprive the government of that ability. Granting the petition would thus allow the Court to resolve the circuit conflict in a case where the Court's conclusion would have a substantial practical impact on petitioner's prosecution.

C. The Decision Below Is Incorrect

Reinforcing the need for this Court's review, the decision below is incorrect. It departs from the text-based approach to construing federal criminal laws that this Court has time and again demanded, and instead relies on a judicially invented unwilling-agent theory that Congress did not enact and that lacks legal foundation.

To sustain a bank-robbery charge, the statutory text requires that the bank have possession or control of the funds at the time the defendant takes the funds

from the person or presence of another. That requirement is not satisfied where a defendant forces (or attempts to force) a bank customer to withdraw the customer's money from an ATM in order to take the money *from the customer*. The statutory history confirms this plain-text reading. And even if there were ambiguity, the rule of lenity would require the Court to adopt petitioner's more limited view of the statute's scope.

1. a. As this Court has repeatedly instructed, "[s]tatutory interpretation … begins with the text." *Ross v. Blake*, 578 U.S. 632, 638 (2016). Nowhere is that principle more important than in the interpretation of federal criminal law, where the separation of powers dictates that "[o]nly the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 139 S. Ct. 2319, 2325-26 (2019) (quoting *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)). The bank-robbery statute prohibits "tak[ing], from the person or presence of another, … money … belonging to, or in the care, custody, control, management, or possession of, any bank." 18 U.S.C. § 2113(a). The text makes the prohibited act the "taking" of money "from the person or presence of another." And it requires that the money taken "belong[] to" or be in the "care, custody, control, management, or possession of any bank." When that care-or-custody-of-the-bank requirement is satisfied, the government may charge bank robbery; when not, the statute is not violated.

The paradigmatic charge of bank robbery exists when a defendant holds up a bank teller "*inside* the bank," and the teller turns over money from the

bank's vault. *United States v. Burton*, 425 F.3d 1008, 1011 (5th Cir. 2005); *see also, e.g.*, *Chapman v. United States,* 346 F.2d 383, 387 (9th Cir. 1965) (defendant stole bank property from bank employee's desk). The statute also applies when a defendant extorts a bank employee to pay him the bank's money (even outside of bank premises), or when a defendant robs a bank agent transporting the bank's money. *See, e.g.*, *United States v. Beck*, 511 F.2d 997, 999, 1003 (6th Cir. 1975) (defendant extorted bank manager to go to a parking lot and give him a bag of money from the bank's vault); *United States v. Jakalski*, 237 F.2d 503, 506 (7th Cir. 1956) (defendant robbed "an armored car service employed by the bank" transporting the bank's money); *see also United States v. Van*, 814 F.2d 1004, 1006-08 (5th Cir. 1987) (providing similar typology of bank-robbery cases under § 2113(a)). In all of these circumstances, at the time the defendant "takes" the money "from the person or presence of another," the money "belong[s] to" or is "in the care, custody, control, management, or possession of [a] bank."

In contrast, the bank-robbery statute does not apply when a defendant forces a bank customer to withdraw the customer's money from an ATM in order to take the money from the customer's person. In those circumstances, the defendant never "takes" money "belonging to, or in the care, custody, control, management, or possession of [a] bank." 18 U.S.C. § 2113(a). The money that the defendant takes *had been* in the bank's custody. But when the defendant "takes" or attempts to take the money "from the person or presence of another," the money is "in the care, custody,

control, management, or possession of" the *customer*—not the bank. *Id.* The reason is straightforward: once the customer withdraws his money, the bank no longer has possession or control of that money; the customer does. *See Burton*, 425 F.3d at 1010-11 (following victim's withdrawal, "the bank did not have 'care, custody, control, management, or possession' of property in [the victim's] vehicle"). Accordingly, while a defendant in these circumstances may potentially face prosecution under state law for robbing the customer, he cannot face prosecution under federal law for robbing the bank.

The contrary reading adopted by the Tenth Circuit below (following the Seventh Circuit) is untethered to the statutory text. The court of appeals "h[e]ld that directly forcing a bank customer to withdraw money from an ATM qualifies as federal bank robbery in violation of 18 U.S.C. § 2113(a) because the funds belonged to the bank at the time of the coerced withdrawal." Pet. App. 12a-13a. But the statute's application does not turn on who possesses or controls the funds "at the time of the coerced withdrawal"; it turns on who possesses or controls the funds when the defendant "takes" them "from the person or presence of another." 18 U.S.C. § 2113(a). And where a defendant coerces a bank customer to withdraw money from an ATM in order to take that money from the customer, the customer—not the bank—possesses the money when the defendant takes it.

b. The Tenth Circuit also reasoned that "when 'a robber forces a bank's customer to withdraw money, the customer becomes the unwilling agent of the robber, and the bank is robbed.'" Pet. App. 13a (quoting

United States v. McCarter, 406 F.3d 460, 463 (7th Cir. 2005)) (alterations omitted). *McCarter* invented this unwilling-agent theory, but *McCarter*'s only support for it was *Embrey v. Hershberger*, 131 F.3d 739 (8th Cir. 1997) (en banc), which did not refer to unwilling agents and involved the robbery of a bank employee, not a bank customer. *Id.* at 739. The Seventh Circuit thus appears to have pulled this unwilling-agent theory from thin air. It is unsurprising, then, that the theory lacks any textual or legal foundation.

To start, the unwilling-agent theory has no textual basis. The bank-robbery statute does not refer to it. Rather, the statute turns on who "possess[es]" or "control[s]" the money when the defendant "takes" it "from the person or presence of another," 18 U.S.C. § 2113(a)—it applies only when the victim is "any bank," and does not apply when the victim is the bank's customer.

The unwilling-agent theory also has no common-law basis that might inform the interpretation of the bank-robbery statute. "It is well-established at common law that an individual is criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime." *Morrisey v. State*, 620 A.2d 207, 211 (Del. 1993); *see State v. Thomas*, 619 S.W.2d 513, 514 (Tenn. 1981). Thus, at common law, "[w]here A by threats coerces B to engage in criminal conduct, A is guilty of the crime in question." Wayne R. LaFave, *Criminal Law*, Ch. 9.7(e), at 659 (6th ed. 2017); *see id.* Ch. 13.1(a), at 879 ("[I]f *A*, with intent to bring about *B*'s death, causes *C* (a child) to take *B*'s life, *A* is guilty of intent-to-kill

murder"); *id.* Ch. 19.3(b), at 1228 n.91 ("one can commit a crime through an innocent agent, as where Fagin forces Oliver Twist, who is too young to be guilty of crime or has the defense of coercion thereto, to steal for him"). The same is true if A induces an "innocent agent" to commit an element of an offense, even if the agent's conduct would not itself satisfy all of an offense's requirements. *Id.* Ch. 19.3(b), at 1228 (discussing commission of the "asportation element in larceny" through an "innocent agent").

The Seventh and Tenth Circuits' unwilling-agent theory deviates from this common-law rule. The common-law rule applies where a defendant coerces another "to engage in *criminal conduct*," *Id.* Ch. 9.7(e), at 659 (emphasis added), or to carry out an element of a criminal offense, *id.* Ch. 19.3(b), at 1228. The unwilling-agent theory, in contrast, applies where a defendant coerces another to engage in *perfectly lawful conduct* that is not an element of bank robbery—withdrawing money from an ATM. *See* 18 U.S.C. § 2113(a) (requiring that the "tak[ing]" be "from the person or presence of another"). Of course, if a defendant were to coerce another person to hold up a bank teller, the defendant would be guilty of bank robbery. But that is not what happened here or in *McCarter*. The alleged crime—the taking of property from the person or presence of another—occurred *after* the lawful withdrawal of money from the bank.

Nor does any other principle of federal law support the unwilling-agent theory. As a general rule of federal criminal law, 18 U.S.C. § 2(b) provides that "[w]hoever willfully causes an act to be done which if

directly performed by him or another would be an offense against the United States, is punishable as a principal." This provision codified *United States v. Giles*, 300 U.S. 41 (1937), which held that a defendant violated a federal law by causing "an innocent intermediary" to "make" a "false entry" in a bank record. *Id.* at 48-49; *see* 18 U.S.C. § 2 Prior Law & Revision Notes (provision "removes all doubt that one who … causes the commission of an indispensable element of the offense by an innocent agent or instrumentality is guilty as a principal"). Courts have therefore consistently held that this provision "was designed to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent." *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983) (citing cases).[10] The unwilling-agent theory strays from § 2(b) for the same reason it strays from the common law: Whereas § 2(b) holds a defendant liable for "caus[ing] an intermediary to commit a criminal *act*" or an "indispensable element" of an offense, the unwilling-agent theory holds a defendant liable for causing an intermediary to perform the lawful act of withdrawing funds from an ATM.[11]

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[10] *See also, e.g.*, *United States v. Ubaldo*, 859 F.3d 690, 702 (9th Cir. 2017); *United States v. Dodd*, 43 F.3d 759, 763 (1st Cir. 1995); *United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966).

[11] The Model Penal Code accords with the common law and § 2(b), and thus similarly provides no support for the unwilling-agent theory. *See* Model Penal Code § 2.06(2)(a) (liability where a defendant "act[s] with the kind of culpability that is sufficient for the commission of the offense [and] he causes an innocent or

Finally, the unwilling-agent theory lacks a coherent limiting principle and would sweep in cases far afield from what could reasonably be viewed as *bank* robbery. In *United States v. Van*, 814 F.2d 1004 (5th Cir. 1987), for instance, the defendants held the victim's daughter hostage and called the victim to "instruct[] [her] to withdraw … money from her account at [a] bank," "drive to a 7-Eleven store," and then turn over the money in the store parking lot. *Id.* at 1005. The Fifth Circuit reversed the defendants' bank-robbery convictions because the money "did not 'belong to' a bank and it was not 'in the care, custody, control, management or possession of a bank' at the time that [the victim] transferred the money to [the defendants]." *Id.* at 1007. But under the logic of the Seventh and Tenth Circuits, the conduct in *Van* would qualify as bank robbery because the victim was the defendants' "unwilling agent" when she withdrew her money from the ATM. Pet. App. 13a. Thus, those circuits' rules lead to the untenable result that a defendant may violate the *bank*-robbery statute by coercing "a bank *customer* [to] withdr[a]w her own funds from a bank and deliver[] them to [the defendant] approximately nine miles from the bank." *Van*, 814 F.2d at 1008 (emphasis added).

The Tenth Circuit tried to distinguish *Van* on the ground that petitioner's "control over the accountholders in this case would have been much more immediate than the control exercised in *Van*." Pet.

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irresponsible person to engage in *such conduct*" (emphasis added)).

App. 14a-15a. But that purported distinction only underscores the vagueness and unworkability of the judicially invented unwilling-agent theory. A case-by-case assessment of whether "[t]he control exercised by the [defendant] sufficed to render the [victim his] agent during the bank withdrawal," *id.* at 15a, produces unpredictable results and line-drawing exercises that have no foundation in the statute. In contrast, the statutory text gives courts, prosecutors, and juries a clear line, by limiting the scope of liability to robbery of banks, not robbery of bank customers.

2. The statutory history confirms the natural reading of the text. Before 1934, robbery "directed against … banks [was] punishable only under state law." *Jerome v. United States*, 318 U.S. 101, 102 (1943). By 1934, however, "great concern had been expressed over interstate operations by gangsters against banks—activities with which local authorities were frequently unable to cope." *Id.* And "in response to that concern," the Attorney General "recommended legislation embracing certain new federal offenses," including federal bank robbery. *Id.* The Attorney General's recommendation to Congress (quoted in the House Report) saw "no logical reason why the Federal Government should not protect the institutions in which it is interested from robbery by force or violence" and explained that the proposed bank-robbery legislation appropriately "provides punishment for those who rob, burglarize, or steal from such institutions, or attempt to do so." H.R. Rep. No. 73-1461, at 2.

Congress acted on the Attorney General's recommendation and passed the bank-robbery statute at issue here. That statute declared its original purpose as "provid[ing] punishment for certain offenses committed *against banks*." Pub. L. No. 73-235, 48 Stat. 783 (1934) (emphasis added). As the Fifth Circuit has recognized, the statutory history shows that the bank-robbery statute "was intended to punish those who commit criminal acts directed *at a bank*, not at a bank's customer." *Van*, 814 F.2d at 1008 (emphasis added). And as explained above, that purpose is reflected in the statutory text, which focuses on whether the relevant funds were in the "care, custody, control, management, or possession of, *any bank*." 18 U.S.C. § 2113(a) (emphasis added).

Extending the bank-robbery statute to the act of forcing a bank customer into withdrawing funds from an ATM, in order to rob the customer of her funds, would expand the statute well beyond what the enacting Congress envisioned. Congress sought to protect *banks* "organized or operating under [the] laws of the United States," Pub. L. No. 73-235—the "institutions" in which the federal government had an "interest[]," H.R. Rep. No. 73-1461, at 2—not to protect bank *customers*. And Congress would have seen no need to create a federal crime punishing robbery of private individuals with bank accounts, since (unlike with actual bank robbery) nothing suggests that state and local authorities needed federal intervention to prosecute such run-of-the-mill crimes. "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States v. Bass*, 404 U.S. 336, 349 (1971). And

no textual or historical basis supports the conclusion that Congress deviated from that traditional rule here. To the contrary, all relevant evidence suggests that Congress strictly targeted robberies directed at banks themselves—the institutions in which the federal government has a distinct "interest[]" in "protect[ing]." H.R. Rep. No. 73-1461, at 2.

3. Finally, insofar as "text, structure, and history fail to establish that the Government's position is unambiguously correct," the Court must "apply the rule of lenity and resolve the ambiguity in [petitioner's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see Davis*, 139 S. Ct. at 2333 ("[A]mbiguities about the breadth of a criminal statute should be resolved in the defendant's favor."); *see also Wooden v. United States*, 142 S. Ct. 1063, 1082-86 (2022) (Gorsuch, J., concurring in the judgment) (tracing the origins and proper scope of the rule of lenity). Here, the bank-robbery statute does not unambiguously apply to a defendant who coerces a bank customer to withdraw the customer's money from an ATM in order to take the money from the customer; quite the contrary is the case. A defendant in petitioner's shoes would therefore lack fair notice that his conduct violated a federal statute carrying a potential 20-year prison sentence, and allowing prosecutors to expand the reach of the statute subverts Congress's role of defining federal crimes. Thus, at the very least, the rule of lenity mandates adopting petitioner's more limited construction.

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This Court's review is necessary to resolve a long-recognized and intractable circuit conflict over an important question of federal law, and to enforce the Court's repeated admonitions to enforce unambiguous statutory text when construing the federal criminal code. And review would not only resolve the circuit conflict over the question presented, but it would also have practical importance to the parties here and similarly situated defendants. That case-specific importance of the question presented renders this petition an especially good vehicle through which to resolve the recognized circuit conflict. This Court should therefore grant review now and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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