No. 22-86

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The question presented is whether a person who forces a bank customer to withdraw the customer's money from an ATM in order to take the money from the customer violates 18 U.S.C. § 2113(a), the federal bank-robbery statute. The government does not dispute that the circuits are intractably divided over that important question of federal criminal law.

Rather, the government's main argument is that this case is a poor vehicle to resolve that conflict because the decision below arose from the district court's dismissal of the bank-robbery count rather than from a conviction. To the contrary, this case presents an ideal vehicle to resolve the circuit conflict. The courts below decided this case on an undisputed factual record to which the government acquiesced, so the petition squarely presents a pure legal question that is not subject to further factual development. That posture affords the Court a perfect vehicle to resolve the circuit conflict over that legal issue, which is why the Court routinely grants petitions in a similar procedural posture.

The Court's review is especially warranted because the decision below is wrong. The government's defense of the judgment rests on a reading of the bank-robbery statute wholly unmoored from its text, and this Court should reject it.

The petition should be granted and the decision below reversed.

ARGUMENT

A. This Case Provides An Ideal Vehicle To Resolve The Undisputed Circuit Conflict Over An Important Question Of Federal Criminal Law

1. The government does not dispute that courts of appeals have divided over the question presented. Pet. 11-14. As the decision below explained, "[t]he Fifth and Seventh Circuits have both addressed [the question presented,] and they have reached opposite conclusions." Pet. App. 9a. The court below "side[d] with the Seventh Circuit," *id.* at 12a, while "reject[ing]" and "disagree[ing] with the Fifth Circuit's contrary approach," *id.* at 13a-14a. The government characterizes the split as "shallow," Opp. 6, but it is deep enough—no prospect exists that these courts will alter their respective positions, which means that the scope of an important federal criminal statute will continue to turn on the happenstance of geography absent this Court's intervention. That result is intolerable, which is why this Court routinely grants certiorari to resolve similarly "shallow" conflicts, including in criminal cases.[1]

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[1] Recent two-to-one splits include *Reed v. Goertz*, No. 21-442; *Bittner v. United States*, No. 21-1195; *Shoop v. Twyford*, 142 S. Ct. 2037 (2022); *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020); *Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018); *Koons v. United States*, 138 S. Ct. 1783 (2018); *United States v. Bryant*, 579 U.S. 140 (2016); and *Simmons v. Himmelreich*, 578 U.S. 621 (2016). Recent one-to-one splits include *Nance v. Ward*, No. 21-439; *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941 (2022); *Yellen v. Confederated Tribes of the*

2. The government's main reason for the Court to leave this certworthy conflict unresolved turns on its claim that this case is a poor vehicle. In truth, however, this petition presents the Court with an ideal vehicle—indeed, the cleanest vehicle it is likely to see—through which to resolve the circuit split.

The government does not dispute that resolution of the question presented would be outcome determinative: if the Court were to reject the decision below in favor of the Fifth Circuit's position, all agree that the bank-robbery count (and the associated Section 924(c) count) would be dismissed. Pet. 17. But the government nevertheless contends that the Court should deny review because the case "is currently in an interlocutory posture" subject to further factual development. Opp. 6.

The government's argument is erroneous because the facts here are entirely undisputed and not subject to further factual development on the question presented. Courts in the Tenth Circuit normally do not consider motions to dismiss criminal counts based on facts outside the indictment. Pet. App. 5a. But an exception applies when, among other things, "the operative facts are undisputed" and the "government fails to object to the district court's consideration of those undisputed facts." *Id.* (quoting *United States v. Pope*, 613 F.3d 1255, 1260 (10th Cir. 2010)). Here, both courts below found it appropriate

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Chehalis Rsrv., 141 S. Ct. 2434 (2021); *Babb v. Wilkie*, 140 S. Ct. 1168 (2020); *CITGO Asphalt Refin. Co. v. Frescati Shipping Co.*, 140 S. Ct. 1081 (2020); and *Dahda v. United States*, 138 S. Ct. 1491 (2018).

to consider petitioner's motion to dismiss because "all operative facts outside the indictment were undisputed." Pet. App. 6a. The government acquiesced in that conclusion in its briefing below, and its opposition here does not dispute it.

This case is thus an ideal vehicle—it presents the purely legal question at issue cleanly on an undisputed factual record. It is, of course, true that the Court normally avoids reviewing interlocutory questions when further factual development could affect how the question presented in the petition is analyzed. *See, e.g.*, *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari). But because the facts are undisputed on the question presented, no risk exists of that happening here.

Indeed, the government's main argument is that the Court should avoid review not because of any further factual development that could alter analysis of the question presented, but rather because petitioner could prevail below on a different ground that does *not* implicate the question presented. Opp. 7.[2]

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[2] The government does attempt one example of further fact development that could affect the question presented—it says that maybe, the evidence will show that petitioner attempted to "snatch[] the cash directly from the ATM tray" rather than taking it from the bank customer, in which case the question presented would not be implicated. Opp. 8. But the government refutes its suggestion in the next breath—this is an attempt case, and no evidence exists that that petitioner intended to take cash directly from an ATM tray. *Id.* The government suggests that the fact that this is an attempt case might itself make the case a poor vehicle, *id.*, but that is wrong. An attempt charge does not change the *legal standard* for what

But that is no reason to deny certiorari. To the contrary, the Court routinely grants review in civil cases in a materially identical posture—*viz.*, where the district court grants a dispositive motion based on undisputed facts and the court of appeals reverses. The petitioners in such cases could win on some other ground not presented in the petition for certiorari, but that has never posed an impediment to this Court's review.[3] To be sure, this posture is less common in criminal cases, but that is simply because dismissal of criminal counts on undisputed facts is "uncommon." Pet. App. 5a. But when this Court has been confronted with formally "interlocutory" criminal cases that nevertheless cleanly present a legal question otherwise worthy of certiorari, it has not hesitated to grant review. *See, e.g.*, *Bates v. United States*, 522 U.S. 23 (1997); *Solorio v. United States*, 483 U.S. 435 (1987); *Oliver v. United States*, 466 U.S. 170 (1984).

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is required to commit the substantive offense. A person is guilty of attempt when he takes "a substantial step in a course of conduct planned to culminate in his commission of a crime." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (citation and internal quotation marks omitted). And under the government's view—upheld by the court below—petitioner can be convicted of bank robbery on the undisputed facts because he intended to force a bank customer to withdraw funds from an ATM and then to take the funds. The government does not dispute that the case would come out the same way in the Seventh Circuit but not in Fifth, so the circuit conflict is squarely presented.

[3] *See, e.g., Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1787 (2022); *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1258 (2022); *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021); *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168 (2021).

That is certainly the case here. Not only are the courts of appeals intractably divided on the question presented, but that question is undoubtedly important—the federal bank-robbery statute carries the potential for 25 years in prison, Pet. 19, and it is beyond dispute that the possibility of such severe punishment should not turn on the circuit in which an indictment is issued. The government questions whether the fact pattern giving rise to the question presented—*i.e.*, a bank customer being forced to withdraw money from an ATM—arises frequently, but the petition showed that ATM robberies are quite common. Pet. 15-16. The government suggests that not all ATM robberies necessarily involve forced customer withdrawals, as opposed to, for example, assaults on ATM technicians. Opp. 14. But while ATM robberies may take various forms, even the government does not dispute that forcing a customer to make withdrawals is a common form of ATM robbery. The consequence of that conduct—and years in prison—should not turn on whether the conduct occurred in Dallas or Albuquerque.

The government also suggests that if the question presented arises frequently, the Court will have many opportunities to resolve it in the future. That, too, is wrong, because the vast majority of cases charging federal bank robbery resolve with a guilty plea: nearly 90% in the 12-month period ending in March 2022,[4] and nearly 95% the previous year.[5]

[4] Table D-4—U.S. District Courts–Criminal Federal Judicial Caseload Statistics (March 31, 2022), https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2022/03/31.

These figures reflect the pressure on defendants to plead guilty when facing the high potential sentence authorized under Section 2113(a).

Thus, while federal bank-robbery charges are quite common, nearly all such cases result in guilty pleas that preclude federal appellate consideration of the question presented. And federal prosecutors can exact such guilty pleas—at least in the Seventh and Tenth Circuits—for conduct that is not federal bank robbery in the Fifth Circuit.

This case is different, of course, because the district court at the outset dismissed the federal bank-robbery count as a matter of law on the undisputed factual record. That makes this case an especially *good* vehicle through which to resolve the circuit conflict. After all, it is unlikely that the Court will soon be confronted with the opportunity to consider this important legal question on such a clean, undisputed factual record, which makes it all the more important that the Court grant review now rather than allow the acknowledged circuit conflict to persist.

B. The Decision Below Is Incorrect

The federal bank-robbery statute applies when a defendant "takes" "from the person or presence of another," "by force and violence, or by intimidation," money that "belong[s] to," or is "in the care, custody, control, management, or possession of, any bank[.]"

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[5] Table D-4—U.S. District Courts–Criminal Federal Judicial Caseload Statistics (March 31, 2021), https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2021/03/31.

18 U.S.C. § 2113(a). As the petition explained, Pet. 19-27, that rule is not satisfied when a defendant takes money from a bank customer after forcing the customer to withdraw the money from an ATM. That is because the money that the defendant "takes" from the bank customer is not "in the care, custody, control, management, or possession, of [a] bank," but rather in the care, custody, control, management, or possession *of the customer*.

The government's main contrary argument is that because it is bank robbery "to take money from an ATM directly," Opp. 9, it likewise must be bank robbery to threaten a customer into withdrawing money from the bank and then taking the money from the customer, Opp. 9-10. But that argument fails under the plain terms of the statute. Money in an ATM is in the bank's possession, so when a defendant takes money from an ATM directly, he "takes" money that is "in the custody, control, … or possession" of the bank. But the money is no longer in the bank's possession once the bank customer has withdrawn it. So when a defendant takes money from that customer after the customer has withdrawn the money from an ATM, he "takes" money that is "in the custody, control, … or possession" not of the bank but of the customer. That distinction makes all the difference under Section 2113(a).

The government's principal answer violates the statutory text. According to the government, "[w]hen a defendant threatens a bank customer into approaching an ATM and typing in the customer's PIN number, the defendant is exercising control over the funds in the ATM." Opp. 10. But how this sup-

posed control counts as the "taking" of money under Section 2113(a) remains unexplained. The government cites nothing to support that nontextual suggestion. Whatever control a defendant exercises over the customer, the defendant never exercises control over the funds—"takes" them, in the words of the statute—until the funds are no longer in the bank's possession. The federal bank-robbery statute applies only to the act of taking bank funds, but here the act of taking happens only after the bank no longer possesses or controls them.

The government attempts to solve this fundamental defect in its theory by asserting that, under *Shaw v. United States*, 137 S. Ct. 462 (2016), the funds are still the bank's funds even after the customer has withdrawn them. But *Shaw* does not say that, and neither *Shaw* nor any other case supports the government's argument. The defendant in *Shaw* was convicted of bank fraud after "obtain[ing] the identifying numbers of a Bank of America account belonging to a bank customer" and "us[ing] those numbers (and other related information) to transfer funds from [the customer's] account to other accounts at other institutions," from which he eventually obtained the money. *Id.* at 466. The defendant argued that his conduct targeted only "'a bank *customer's* property, not 'a bank's *own* property.'" *Id.* (emphasis in original). Rejecting that argument, this Court explained that "the bank, too, had property rights in [the customer's] bank account," because the bank becomes the owner, or "like a bailee," of a customer's deposited funds. *Id.*

None of that suggests that funds that have *left* the bank's custody because of a customer's withdrawal remain bank funds—after all, a bank cannot plausibly be considered a "bailee" of funds after the funds have been withdrawn. The whole point of the offense conduct here is to take money *after the customer has withdrawn it*. That is a state crime, not federal bank robbery.

Banks grant their customers "access to and the right to control" the money they withdraw from their accounts. *People v. Mullins*, 19 Cal. App. 5th 594, 602 (2018); *cf. United States v. Burton*, 425 F.3d 1008, 1011 (5th Cir. 2005) ("It is absurd to think that a bank teller could enter a customer's vehicle to assert 'management' of the property within the vehicle."). If the government were right, then it would be federal bank fraud under *Shaw* if the fraudster deceives his victim into withdrawing money from an ATM in order to give it to the fraudster. That would be a massive expansion of federal liability. Nothing in *Shaw* suggests that the federal bank fraud statute reaches that far. And neither *Shaw* nor any other case the government cites suggests that the bank retains ownership or control over funds after they are withdrawn by a customer authorized to withdraw them. When a defendant takes those funds by force after they have been withdrawn, he is taking the customer's money, not the bank's.

Finally, the government asserts that "Petitioner does not appear to dispute that forcing or intimidating a bystander to withdraw funds from someone else's account would qualify as a violation of Section 2113(a)." Opp. 11. That is true, but the distinction

between the government's hypothetical and the undisputed facts here demonstrates the government's basic error.

When someone withdraws funds from *someone else's account—i.e.*, when that person withdraws funds without authorization—the bank retains title to those funds. That is because money taken through criminal means "remains the property of the owner, at least as respects the finder." 53A Am. Jur. 2d Money § 23; *see, e.g.*, *Eisenberg v. Grand Bank for Savings, FSB*, 70 F. App'x 765, 769 (5th Cir. 2003) ("Mississippi case law is clear that a thief does not obtain title to stolen property."); *Matter of Okedokun*, 968 F.3d 378, 390 (5th Cir. 2020) (same under Texas law); *In re 1973 John Deere 4030 Tractor*, 816 P.2d 1126, 1133 (Okla. 1991) (Oklahoma law); *Superior Iron Works & Supply Co. v. McMillan*, 235 Ark. 207, 210 (1962) (Arkansas law). So in the bystander hypothetical, the defendant's act of robbery "takes" the bank's funds because the withdrawal itself was unauthorized, so the bank retained title to the funds even after withdrawal.

In this case, in contrast, the bank customer was not forced to withdraw *someone else's* money, which he would have no authorization to do. The customer was instead forced to withdraw *his own money*, which he *did* have authorization to do. The money became his and not the bank's once it was withdrawn, and remained his and not the bank's when the defendant took it. That ends the matter under Section 2113(a), which applies only when the defendant "takes" money in the "custody," "control," or "possession" of the bank.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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