No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JACINTO ALVAREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Does the "attempted use of force" clause in the crime of violence definition at 18 U.S.C. § 16(a) require an "intent" to use force against another?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Jacinto Alvarez and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Alvarez,* U.S. District Court for the Southern District of California, Order issued January 13, 2020.
- *United States v. Alvarez*, No. 20-50068, U.S. Court of Appeals for the Ninth Circuit. Published opinion issued February 16, 2023.
- *United States v. Alvarez*, No. 20-50068, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for panel rehearing and rehearing en banc. April 18, 2023.

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APP. NO.	DOCUMENT
A.	*United States v. Alvarez*, U.S. Court of Appeals for the Ninth Circuit. Opinion, filed February 16, 2023
B.	*United States v. Alvarez*, U.S. Court of Appeals for the Ninth Circuit. Order denying the petition for rehearing and petition for rehearing en banc, filed April 18, 2023

IN THE SUPREME COURT OF THE UNITED STATES

JACINTO ALVAREZ,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jacinto Alvarez respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on April 18, 2023.

INTRODUCTION

The "crime of violence" definition at 18 U.S.C. § 16(a) reaches offenses that have as an element the "use, attempted use, or threatened use of physical force." Recently, this Court clarified that the "attempted use of force" clause in this definition is not satisfied by crimes that do not "actually harm anyone or even threaten harm"—for instance, a person who writes a robbery note but never delivers it. *United States v. Taylor*, 142 S. Ct. 2015, 2020–21 (2022) (quotations omitted). But while *Taylor* clarified the actus reus component of the "attempted use of force" clause, it did not define the mens rea necessary to satisfy it.

Though *Taylor* did not define the mens rea of the "attempted use of force" clause, most circuit courts have. Of these circuits, all but one holds—consistent with common law and the generic federal definition of 'attempt'—that this clause requires an "intent" to use force against another. The sole exception is the Ninth Circuit, which held in Petitioner's case that a state conviction for attempted assault committed with a mens rea of "knowledge" categorically falls within the definition of the "attempted use of force." The Ninth Circuit arrived at this decision by refusing to consider common law or the generic federal definition of attempt—both of which require intent.

The Ninth Circuit's radical holding and methodology upends decades of precedent. It also creates confusion and division on one of the most frequently-arising definitions in criminal law. This Court should grant certiorari to bring the Ninth Circuit's definition of the "attempted use of force" clause into alignment with other circuits. But at a minimum, this Court should grant, vacate, and remand this case for the Ninth Circuit to apply *Taylor*'s actus reus holding in the first instance and determine whether the state crime at issue required a substantial step of actual or threatened force.

OPINION BELOW

A three-judge panel of the Ninth Circuit affirmed Mr. Alvarez's conviction in a published opinion. *See United States v. Alvarez*, 60 F.4th 554 (9th Cir. 2023) (attached here as Appendix A). Mr. Alvarez then petitioned for panel rehearing and rehearing en banc. On April 18, 2023, the panel denied Mr. Alvarez's petition for

panel rehearing, and the full court declined to hear the matter en banc (attached here as Appendix B).

JURISDICTION

On February 16, 2023, the Ninth Circuit denied Mr. Alvarez's appeal and affirmed his conviction. *See* Appendix A. Mr. Alvarez then filed a petition for panel rehearing and rehearing en banc, which the Ninth Circuit denied on April 18, 2023. *See* Appendix B. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

Mr. Alvarez is a citizen of Mexico who lived in the U.S for a decade. During this time, he married a U.S. citizen and settled in Ohio. One night, Mr. Alvarez got into a fight with his wife after he became intoxicated at a local barbecue. When the police attempted to restrain him, he resisted and was subsequently charged with a violation of Ohio Revised Code § 2903.13(A). This statute provides that "[n]o person shall knowingly cause *or attempt to cause* physical harm" to another. Ohio Revised Code § 2903.13(A) (emphasis added). Mr. Alvarez was convicted of this offense and received a sentence of 18 months.

Soon after Mr. Alvarez completed his sentence, the Department of Homeland Security (DHS) placed him in administrative removal proceedings under 8 U.S.C. § 1228(b). Under this provision, a noncitizen who has been convicted of an aggravated felony and is not a lawful permanent resident may be deported without seeing an immigration judge. The DHS alleged that Mr. Alvarez's Ohio assault conviction was an aggravated felony "crime of violence," as defined by 18 U.S.C.

§ 16(a). The DHS thus summarily deported Mr. Alvarez to Mexico under this provision.

After Jacinto Alvarez was deported to Mexico, his wife remained in Ohio for health reasons. But when she suddenly stopped answering her phone, Mr. Alvarez grew worried. He unlawfully crossed the border from Mexico and was quickly apprehended. In a jail cell, Mr. Alvarez heard the tragic news that his wife had been murdered by her grandson. Nevertheless, the government prosecuted him for illegal reentry after a prior removal under 8 U.S.C. § 1326.

During his prosecution, Mr. Alvarez filed a motion to dismiss his indictment on the basis that his prior administrative order of removal was invalid. He argued that his Ohio conviction did not satisfy the "attempted use of force" definition in § 16(a) and thus could not be an aggravated felony "crime of violence." Specifically, he pointed out that federal criminal law defines 'attempt' to require an intentional or purposeful act, combined with a substantial step. By contrast, Ohio employs a unique statutory definition of 'attempt' that includes conduct committed either "purposely *or knowingly*," Ohio Revised Code § 2923.02(A) (emphasis added). And a person acts "knowingly" in Ohio when they are aware that their conduct will "*probably* cause a certain result or will *probably* be of a certain nature." Ohio Revised Code § 2901.22(B) (emphases added).

The district court denied the motion with little analysis. Mr. Alvarez then appealed his conviction to the Ninth Circuit. On appeal, he renewed his argument that this conviction was not categorically an aggravated felony. Again, he argued

that Ohio 'attempt' offenses committed with mere knowledge could not satisfy the "attempted use of force" definition in § 16(a), which requires a substantial step taken with the *intent* to use force against another.

In a published opinion, the Ninth Circuit disagreed. The court acknowledged that "common law attempt requires specific intent." Pet. App. 13a. But to interpret the phrase "attempted use of force," the court refused to apply either common law or the "generic federal definition of attempt," claiming that to do so would be "critical error." Pet. App. 9–13a. The Ninth Circuit did not deny that § 16(a) defines the term "crime of violence" for purposes of federal criminal law and that federal courts unanimously hold that federal 'attempt' requires intent. Nor did the Ninth Circuit point to any textual anomalies or legislative history indicating that Congress intended to define 'attempt' in § 16(a) differently than it does everywhere else in federal law. Instead, the Ninth Circuit took the default stance that the common law and the generic federal definition simply did not apply. Pet. App. 12a.

Having unshackled itself from common law and the generic federal definition, the Ninth Circuit then relied on its own precedent to hold that "'knowledge' is a sufficient mens rea under the crime of violence definition in § 16(a)." Pet. App. 12a. But the precedent it cited involved the "use" or "threatened use" of force clauses—not the "attempted use" of force clause. Pet. App. 13a (citing *United States v. Werle*, 877 F.3d 879, 882 (9th Cir. 2017) (per curiam); *Amaya v. Garland*, 15 F.4th 976, 983 (9th Cir. 2021); *United States v. Melchor-Meceno*, 620 F.3d 1180, 1186 (9th Cir. 2010)). The Ninth Circuit also cited this Court's decision in *Borden v. United States*,

141 S. Ct. 1817 (2021), Pet. App. 12a—even though *Borden* considered only the "use of force" definition. *See Borden*, 141 S. Ct. at 1825 ("We must decide whether . . . an offense requiring the '*use of physical force* against the person of another' [ ] includes offenses criminalizing reckless conduct.") (plurality op.). In fact, *Borden* expressly declined to consider the "attempted use of force" definition, stating that "[w]e have no occasion to address" inchoate offenses such as 'attempt' where "heightened culpability has been thought to merit special attention." 141 S. Ct. at 1823 n.3 (quotations omitted).

In a footnote, the Ninth Circuit also contended that "even on the mistaken view that 'attempted uses' of force require a higher mens rea," the result would be the same. Pet. App. 15a. This was so, it claimed, because a person who knows that force "will be used" to harm another necessarily intends to harm another. Pet. App. 15a (quotations omitted). But the Ninth Circuit ignored that Ohio attempted assault does not require a person to know that force "*will* be used" to cause physical harm—only that it would "*probably* cause physical harm." Ohio Rev. Code § 2901.22(B) (emphasis added). Nevertheless, the Ninth Circuit concluded that Ohio attempted assault categorically satisfied the "attempted use of force" definition and affirmed his conviction.

Mr. Alvarez filed a petition for panel and en banc rehearing. The three-judge panel denied Mr. Alvarez's petition for panel rehearing, and the full court declined to hear the matter en banc. Pet. App. 25a. This petition follows.

REASONS FOR GRANTING THE PETITION

I.

The Ninth Circuit—unlike every other circuit that has considered the issue—erroneously holds that the "attempted use of force" does not require a mens rea of intent.

"[A]s used in the law for centuries, [attempt] encompasses both the overt act and *intent* elements." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (emphasis added). Black's Law Dictionary defines "attempt" as "[a]n overt act that is done with the *intent* to commit a crime but that falls short of completing the crime." Black's Law Dictionary (11th ed. 2019) (emphasis added); *see also* 2 Wayne R. LaFave, Substantive Criminal Law § 11.3(a) (3d ed. 2021) ("The mental state required for the crime of attempt, as it is customarily stated in the cases, is an intent to commit some other crime."); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* § 3.A.7, at 637 (3d ed. 1982) ("[A]n attempt to commit any crime requires a specific intent to commit that particular offense."). As one authority explained, "[e]very attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is the *essence* of the attempt[.]" John Salmond, *Jurisprudence* 387 (Glanville L. Williams ed., 10th ed. 1947) (emphasis added).

"It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (quoting *Neder v. United States*, 527 U.S. 1, 23 (1999)). The Court has repeatedly applied this "settled

principle" to interpret terms and phrases in the "crime of violence" context. *See, e.g.,* S*tokeling v. United States,* 139 S. Ct. 544, 551 (2019) (applying common-law definition of robbery to the term "force" in the ACCA "violent felony" definition at 18 U.S.C. 924(e)(2)(B)(i)); *United States v. Castleman*, 572 U.S. 157, 162 (2014) (applying common-law definition to the "misdemeanor crime of violence" definition in 18 U.S.C. 921(a)(33)(A)). Even when this Court ultimately concludes that a common law meaning "does not fit" a particular crime-of-violence definition, it still begins the analysis by "recogniz[ing] the general rule that a common-law term of art should be given its established common-law meaning." *Johnson v. United States*, 559 U.S. 133, 139 (2010).

But here, the Ninth Circuit refused at the outset to even consider common law or the generic federal definition of attempt. Pet. App. 13a ("Alvarez contends that knowledge is not sufficient for 'attempted use' because common law attempt requires specific intent. We disagree."). Yet it pointed to no "indication" that Congress sought to avoid "the well-settled meaning" of 'attempt' when it drafted § 16(a). *Sekhar*, 570 U.S. at 732. The Ninth Circuit never explained why Congress would silently choose to use one scienter for the "attempted use of force" definition in § 16(a) and a different scienter for every other attempt crime in the federal criminal code. And though it claimed its own "precedent" supported this conclusion, Pet. App. 12–13a, it relied on case law that analyzed the "use" or "threatened use" of force definitions, where knowledge *is* a sufficient mens rea. *See Borden*, 141 S. Ct. at 1826.

No other circuit court has ever taken this approach. To interpret the identically-worded "attempted use of force" clause at 18 U.S.C. § 924(c)(3)(A), the Second Circuit echoed the argument that "absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *United States v. McCoy*, 995 F.3d 32, 55 (2d Cir. 2021), *judgment vacated by Taylor*, 142 S. Ct. 2015 (2022) (quotations omitted). The Second Circuit thus concluded that "when Congress used 'attempted use' in § 924(c) without providing a different definition for the phrase, it adopted the concept of 'attempt' existing under federal law." *Id.*

Similarly, the Seventh Circuit held in a case under the Armed Career Criminal Act at 18 U.S.C. § 924(e)(2)(B)(i) that the "attempted use of force" definition is met "[w]hen the intent element of the attempt offense includes intent to commit violence against the person of another." *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017). Likewise, the Third Circuit held in a § 924(c) case that "we read the phrase [attempted use of force] to capture attempt offenses" because attempt is a "term of art in criminal law" that requires the individual to have "intended to commit the completed offense." *United States v. Walker*, 990 F.3d 316, 328–29 (3d Cir. 2021), *judgment vacated by Taylor*. The Fifth and Eleventh Circuits have reached similar conclusions. *See United States v. Calderon-Pena*, 383 F.3d 254, 260–61 (5th Cir. 2004) (en banc) ("Our precedents have properly recognized that the 'attempted use of physical force' requires at least that the perpetrator harbor an intent to use physical force against the victim's person."), *overruled on other grounds*; *Hylor v. United States*, 896 F.3d 1219, 1223 (11th Cir. 2018) (same as to 18

U.S.C. § 924(e)(2)(B)(ii); *United States v. White*, 258 F.3d 374, 384 (5th Cir. 2001) (same as to 18 U.S.C. § 922(g)(9)). These decisions draw from—and align with—the uncontroversial principle taught to every first-year law student: that attempt offenses require a mens rea of intent.[1]

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[1] *See, e.g., United States v. Perez-Rodriguez,* 13 F.4th 1, 13 (1st Cir. 2021) ("To prove an attempt, the government must establish both a specific intent to commit the substantive offense and a substantial step toward its commission."); *United States v. Castillo*, 36 F.4th 431, 442 (2d Cir. 2022) ("This generic definition of attempt requires proof that the defendant "had the intent to commit the crime."); *Singh v. Gonzales*, 432 F.3d 533, 539 (3d Cir. 2006) ("It is well-established that attempt cannot be established without a mental state of specific intent."); *United States v. Dozier*, 848 F.3d 180, 186 (4th Cir. 2017) ("Our precedent defines generic attempt as requiring (1) culpable intent to commit the crime charged and (2) a substantial step towards the completion of the crime[.]"); *United States v. Howard*, 766 F.3d 414, 419 (5th Cir. 2014) ("This test has two elements: (1) the specific intent to commit the underlying crime, mens rea, and (2) conduct which constitutes a "substantial step" toward the commission of the crime, actus reus."); *United States v. Grant*, 15 F.4th 452, 458 (6th Cir. 2021) ("To prove an attempt offense generally, the government must prove that the defendant acted with a specific intent to commit the crime."); *United States v. Calloway*, 116 F.3d 1129, 1135–36 (6th Cir. 1997) ("The general rule, however, is that attempt crimes require proof of a specific intent to complete the acts constituting the substantive offense."); *United States v. Cote*, 504 F.3d 682, 687–88 (7th Cir. 2007) ("For an attempt conviction, the Government was required to prove that Mr. Coté acted with the specific intent to commit the underlying crime and that he took a substantial step towards completion of the offense."); *United States v. Matthews*, 25 F.4th 601, 603–04 (8th Cir. 2022) ("All attempts, regardless of the mental state of the underlying crime, are themselves specific-intent crimes."); *United States v. Isabella*, 918 F.3d 816, 831 (10th Cir. 2019) ("To prove an attempt, the government must show (1) specific intent to commit the crime, and (2) a substantial step towards completion of the crime."); *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) ("To sustain a conviction for the crime of attempt, the government need only prove (1) that the defendant had the specific intent to engage in the criminal conduct for which he is charged and (2) that he took a substantial step toward commission of the offense."); *United States v. Bryant*, 420 F.2d 1327, 1333 n.10 (D.C. Cir. 1969) ("Generally, in cases of attempt or assault with intent to commit a substantive crime, the required

But here, when defining the "attempted use of force," the Ninth Circuit inexplicably carved out an exception to the well-established definition of 'attempt.' It did so despite the absence of any indication that Congress meant to assign § 16(a) a different scienter than every other federal attempt crime. This holding not only departs from the bedrock rule that attempt requires intent, it ignores the "settled principle" that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses" unless it otherwise indicates. *Sekhar*, 570 U.S. at 732. As this Court recently reminded the Ninth Circuit, "when Congress 'borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.'" *United States v. Hansen*, __ S. Ct. __, No. 22-179, 2023 WL 4138994, at *7 (U.S. June 23, 2023). Because the Ninth Circuit's definition of "attempted use of force" is wildly out of step with other courts of appeals, common law, and every other federal attempt crime, this Court should grant certiorari to swiftly bring it back into substantive and methodological compliance.

II.

This case presents a recurring and important constitutional issue.

The ubiquitous phrase "use, attempted use, or threatened use of physical force" appears in numerous places throughout the federal criminal code and the U.S. Sentencing Guidelines. It adds a minimum mandatory five-year consecutive

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specific intent is simply 'an intent to commit a specific crime,' 1 Wharton's Criminal Law § 73 (12th ed. 1967).").

sentence onto a firearm offense. *See* 18 U.S.C. § 924(c). It transforms a federal firearm offense into a discretionary life sentence. *See* 18 U.S.C. § 924(e)(2)(B)(ii). It adds a mandatory life sentence onto a variety of federal crimes. *See* 18 U.S.C. § 3559(c)(1). It raises the statutory maximum for illegal reentry offenses to twenty years. 8 U.S.C. § 1326(b)(2). It triggers mandatory restitution. *See* 18 U.S.C. § 3663A(c)(1)(A)(i). It dramatically raises a person's Sentencing Guidelines range, particularly in the context of the unlawful possession of a firearm. *See* U.S.S.G. § 4B1.2(a)(1); U.S.S.G § 2K2.1(a). Simply put, there is no phrase in federal criminal law more likely to trigger a higher sentence than the "use, attempted use, or threatened use of physical force."

Federal dockets reflect this. Many of the statutes and Guidelines incorporating this phrase apply it to prior state convictions, requiring frequent comparisons with the elements of various state crimes. A Westlaw search indicates that in the last ten years alone, this phrase has appeared in over two thousand written decisions. Judges have orally applied it in tens of thousands more. Thus, it is not an exaggeration to say that courts use the phrase "use, attempted use, or threatened use of physical force" to determine sentences on a daily basis. If the Court allows the nation's largest circuit to apply an incorrect interpretation of this phrase, there is no telling how many people will receive legally erroneous sentences.

III.

Mr. Alvarez's case provides an excellent vehicle to resolve this issue.

Mr. Alvarez's case is an ideal vehicle for resolving the question of the requisite mens rea for the "attempted use of force" clause. First, Mr. Alvarez raised and preserved this issue at every level—in a pretrial motion to the district court, on appeal to the Ninth Circuit, and in a petition for panel and en banc rehearing to the Ninth Circuit. Second, the parties and the Ninth Circuit all agreed that Ohio attempt includes conduct committed either "purposely *or knowingly*." Ohio Revised Code § 2923.02(A) (emphasis added). Third, the Ninth Circuit's only basis for denying Mr. Alvarez's motion to dismiss the indictment was its conclusion that his Ohio conviction was an aggravated felony "crime of violence" under 8 U.S.C. § 1101(a)(43)(F), which cross-references the "crime of violence" definition in § 16(a). Thus, this case turns squarely on the pure legal question of whether the "attempted use of force" definition in § 16(a) requires a mens rea of intent.

Though the Ninth Circuit asserted a fallback theory to its primary holding, this theory cannot withstand even a cursory analysis. In a footnote, the Ninth Circuit stated that even if common law attempt *did* require intent, no practical difference exists between knowledge and intent anyway. Pet. App. 15a. Relying (again) on its own authority, rather than anything from common law or this Court, the Ninth Circuit noted that when a statute requires knowledge that force "will be used" against another, a person who "acts with such knowledge" engages in conduct that would still "categorically qualify as an attempted use of force." Pet. App. 15a

(citing *United States v. Linehan*, 56 F.4th 693 (9th Cir. 2022)) (quotations omitted). In other words, the Ninth Circuit theorized that anyone who *knows* force will be used and acts anyway must have also had the *intent* to use it.

This inferential leap ignores the Court's distinction between purpose and knowledge in the context of "inchoate crimes" such as attempt. *Borden*, 141 S. Ct. at 1823 n.3. In such contexts, "'heightened culpability has been thought to merit special attention.'" *Id.* (quoting *United States v. Bailey*, 444 U.S. 394, 405 (1980)). Nothing opened the door for the Ninth Circuit to spontaneously abolish this Court's precedent distinguishing purpose and knowledge in the context of attempt offenses.

But even if the Ninth Circuit *could* abolish this precedent, it would not matter for purposes of Ohio attempted assault. The Ninth Circuit surmised that a person who acts knowing that force "will be used" against another categorically engages in the "attempted use of force." Pet. App. 15a. But Ohio attempted assault does not require certainty that force "*will* be used"—only that it will "*probably*" be used. *See* Ohio Rev. Code § 2901.22(B) (defining "knowingly" as awareness that "the person's conduct will *probably* cause a certain result or will *probably* be of a certain nature") (emphases added). State cases agree, holding that attempted assault requires only knowledge that one's conduct "*could* result in physical harm," *State v. Thompson*, 2016 WL 3570469, at *9 (Ohio Ct. App. 2016), or would "*probably* cause harm," *In re M.H.*, 169 N.E.3d 971, 982 (Ohio Ct. App. 2021) (emphases added). In other words, even assuming the Ninth Circuit *could* abolish the distinction between purpose and knowledge, Ohio attempted assault does not rise to the level of

knowledge necessary to equate it with intent under the Ninth Circuit's own test. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (holding that federal courts are "bound by" state law when determining the elements of a state crime under the categorical approach). Thus, the Ninth Circuit's erroneous fallback theory does not affect this petition's suitability for review.

IV.

Alternatively, the Court should grant, vacate, and remand this case for the Ninth Circuit to apply *Taylor* in the first instance.

At a minimum, this Court should grant certiorari, vacate the opinion, and remand to the Ninth Circuit for further consideration in light of *Taylor*, 142 S. Ct. 2015. As noted, *Taylor* clarified that the actus reus for the "attempted use of force" clause is not satisfied by crimes that do not "actually harm anyone or even threaten harm." 142 S. Ct. at 2020–21. Prior to *Taylor*, the Ninth Circuit was on the wrong side of the circuit split, holding that attempted Hobbs Act robbery categorically involved the "attempted use of force." *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), *cert. granted, judgment vacated,* 213 L. Ed. 2d 1082, 142 S. Ct. 2857 (2022). Because briefing in this case was nearly completed by the time *Taylor* issued, the Ninth Circuit never considered whether Ohio attempted assault—like Hobbs Act robbery—could encompass a substantial step that did not involve the actual or threatened use of harm to another. At the very least, then, this Court should remand for the Ninth Circuit to apply *Taylor* in the first instance to the actus reus of the state crime at issue here.

CONCLUSION

For these reasons, this Court should grant Mr. Alvarez's petition for a writ of certiorari to determine the scienter necessary for a federal attempt crime. But at a minimum, this Court should grant certiorari, vacate the decision, and remand this case with instructions for the Ninth Circuit to apply this Court's decision in *Taylor* to Ohio attempted assault.

Respectfully submitted,

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