No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEON ECKFORD,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the realistic probability test first set forth in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), applies when comparing a federal predicate statute to a generic federal crime, as the Ninth Circuit currently holds, or whether it only applies when comparing a state predicate statute to a generic federal crime, as this Court held in *United States v. Taylor*, 142 S. Ct. 2015 (2022), and at least seven other circuits hold?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leon Eckford respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 77 F.4th 1228 (9th Cir. 2023). *See* Appendix ("App.").

JURISDICTION

Petitioner was convicted of violating of 18 U.S.C. §§ 1951 and 924(c)(1)(A), in the United States District Court for the Central District of California. The United States Court of Appeals for the Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291 and affirmed the judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(c)

18 U.S.C. § 1951

Section 924(c) of the United States Code provides in relevant part:

> Any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in

addition to the punishment provided for such crime of violence or drug trafficking crime—

. . .

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.

Section 1951 of the United States Code prohibits Hobbs Act Robbery and provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned no more than twenty years, or both.

(b) As used in this section—(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, of fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

INTRODUCTION

This Petition concerns the "by-now-familiar" yet often hard-to-apply categorial approach. *See Borden v. United States*, 141 S. Ct. 1817, 1822 (2021); *United States v. Taylor*, 142 S. Ct. 2015, 2032 (2022) (Thomas, J., dissenting) (calling the categorical approach "difficult to administer"). In *Taylor*, the Court clarified that when applying the categorical approach to compare a state prior conviction to a generic federal crime's definition, there are "federalism concern[s]" in play so it is appropriate for a federal court to consult state caselaw to see how the state statute is actually applied. 142 S. Ct. at 2025. But when applying the categorical approach to compare a federal prior conviction statute to a generic federal crime's definition, "no such federalism concern is in play." *Id.* Because the question is "whether the elements of one federal law align with those prescribed in another," the federal reviewing court can review the federal predicate statute's terms and interpret its reach. *See id.* There is no need to require defendants to show a "realistic probability," *see Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), that the federal statute would be applied to conduct that falls outside the federal generic definition. *See Taylor*, 142 S. Ct. at 2024-26.

And yet, while the majority of the circuits have heeded this Court's explanation that the "realistic probability" test doesn't apply in the context of comparing a federal predicate's elements to a federal generic crime's elements, *see id.*, the Ninth Circuit has not. It continues to require defendants to point to a case in which a federal statute was applied in the overbroad way they argue. The Court did so in Petitioner's own case, and in others, after *Taylor* clarified that this was not required.

In light of this inconsistent application of the realistic-probability test among the circuits, the Court should grant the Petition on this important question affecting thousands of criminal and immigration cases that turn on the correct application of the categorical approach.

STATEMENT OF THE CASE

1. Petitioner participated in two jewelry store robberies. In the first robbery, Petitioner and three other men robbed a Ben Bridge jewelry store. Petitioner was present while two of the men smashed glass display cases filled with Rolex watches and he then helped remove 14 watches before fleeing the store. In the second robbery, Petitioner and four other men robbed a Rolex boutique. Petitioner was again present when another man struck the boutique's security guard with a handgun, pointed the handgun at the security guard, and ordered him to the ground. Petitioner then helped smash the glass display cases filled with Rolex watches, and he and others took 133 watches before fleeing the store.

2. Based on his participation in these robberies, Petitioner was charged with several offenses, including aiding and abetting Hobbs Act robbery, 18 U.S.C. §§ 2, 1951, and aiding and abetting the use of a gun during a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii). He pleaded guilty to these counts, noting during his change of plea hearing that he wished to preserve the issue of whether his robbery conviction qualified as a crime of violence, and proceeded to sentencing.

The district court acknowledged that Petitioner was "what we call the grabber in this robbery," so his "role in the robberies was not as aggravated as the other co-conspirators." He didn't assault anyone, nor possess or carry "the dangerous weapon." Nevertheless, under § 924(c) Petitioner's participation mandated a seven-year sentence consecutive to the Hobbs Act robbery sentence because the district court found that Petitioner's conviction for aiding and abetting Hobbs Act robbery qualified

as a "crime of violence" under § 924(c). Accordingly, the district court imposed a 48-month sentence for the robbery conviction, and a consecutive 84-month sentence for the § 924(c) conviction, for a total of 132 months (or eleven years) in custody.

3. On appeal, Petitioner argued that aiding and abetting Hobbs Act robbery did not qualify as a § 924(c) predicate crime of violence mandating a consecutive seven-year sentence. A § 924(c) crime of violence is a felony that has an element of "use, attempted use, or threatened use of force," *see* § 924(c)(3)(A), but Hobbs Act robbery didn't necessarily require any type of force. Instead, it could be committed by future threats to intangible economic interests, which did not entail the use of violent physical force against a person like a crime of violence required. *See Johnson v. United States*, 559 U.S. 133, 140 (2010).

The Ninth Circuit disagreed. Applying the categorical approach, it reasoned that the least serious way to commit Hobbs Act robbery required at least an implicit threat to use violent physical force because it could be committed by placing a victim in fear of bodily injury. *See* App. at 9.

It had already held as much in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) ("*Dominguez I*"), *vacated*, 142 S. Ct. 2857 (2022). In that case, the defendant raised the same argument as Petitioner—that future threats to intangible economic interests did not require any violent physical force, so Hobbs Act robbery didn't qualify as a § 924(c) crime of violence. 954 F.3d 1260. But the Ninth Circuit refused to consider this argument. "We need not analyze whether the same would be true if the target were 'intangible economic interests,' because Dominguez fails to

point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *See id.* It relied on this Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). There, the Court held that when applying the categorical approach to determine the reach of a state statute, a defendant could not rely on "legal imagination" to show the state statue falls outside the generic definition of a crime in a federal statute. *See id.* at 822. Demonstrating that a state statute was broader than the generic definition required "a realistic probability, not a theoretical possibility" that the state would apply its statute to conduct outside the generic definition. *Id.* Applying this "realistic probability" test from *Duenas-Alvarez*, the Ninth Circuit in *Dominguez I* concluded that the defendant had failed to point to cases in which courts had applied Hobbs Act robbery to non-violent conduct in the way he had argued, so he could not show that the Hobbs Act robbery statute was broader than § 924(c)'s crime of violence definition. 954 F.3d at 1260-61.

Arguing that *Dominguez I*'s reasoning no longer applied, Petitioner disputed that *Duenas-Alvarez* applied in his case. He pointed out that in *Taylor*, this Court had explicitly rejected the government's attempt to rely on the *Duenas-Alvarez* realistic-probability test to argue the defendant needed show how the statute was usually prosecuted in order to demonstrate that it didn't fit the generic definition of a crime. 142 S. Ct. at 2024. The Court rejected the government's argument because *Duenas-Alvarez* didn't apply to the defendant's circumstances. *Id.* at 2025. Most importantly, there were no federalism concerns at play because the Court was

analyzing "only whether the elements of one federal law align with those prescribed in another." *Id.* In these circumstances, the categorical approach did not "mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to present proof about the government's own prosecutorial habits." *Id.*

Relying on *Taylor*'s distinction between analyzing state statutes and federal statutes under the categorical approach, Petitioner argued that the Ninth Circuit's reasoning in *Dominguez I*—applying *Duenas-Alvarez*'s realistic-probability test to analyze the reach of the federal Hobbs Act robbery statute—was incompatible with *Taylor*. *See* App. at 11. But while the Ninth Circuit acknowledged *Taylor*'s explanation that the *Duenas-Alvarez* realistic-probability test only applied when comparing a statute statute's elements to the elements of a generic federal crime, it still embraced the reasoning of *Dominguez I*. App. at 12. It "would still find that *Dominguez I*'s citation to the realistic-probability test does not render its analysis of completed Hobbs Act robbery clearly irreconcilable with *Taylor*." *Id.*

This was because in *Dominguez I* the court had "cited *Duenas-Alvarez* to emphasize that there was no 'realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." App. at 13 (citing *Dominguez I*, 954 F.3d at 1260). Finding that reasoning still applied, the court reasoned that Petitioner's argument about "hypothetical" future threats to intangible property did not demonstrate that Hobbs Act robbery was broader than the generic crime of violence definition in § 924(c) because the

government would not undertake a Hobbs Act robbery prosecution for the threats to intangible property that Petitioner posited. App. at 14-15. Accordingly, the Ninth Circuit affirmed Petitioner's § 924(c) conviction and its mandatory seven-year consecutive sentence. App. at 18.

REASONS FOR GRANTING THE PETITION

I. The Circuits are not uniformly applying the realistic-probability test this Court established in *Duenas-Alvarez*.

As this Court well knows, the categorical approach governs how a court analyzes the elements of a predicate statute to determine whether its elements match the elements of a generic offense listed in a federal immigration or criminal statute. *See*, *e.g.*, *Taylor v. United States*, 495 U.S. 575, 588 (1990); *see also Borden*, 141 S. Ct. at 1822 (explaining that the categorical approach's focus is "on whether the elements of the statute of conviction meet the federal standard"). In general, under the categorical approach when the elements of the predicate statute do not match those of the federal generic crime, the predicate crime cannot be used to trigger any consequences listed in the federal statute. *See Borden*, 141 S. Ct. at 1822.

And as the Court also knows, when applying the categorical approach, the focus is on the least culpable of the acts criminalized by the predicate statute. *See id.* If any of those criminalized acts do not meet the standard required by the federal statute's elements, "the statute of conviction does not categorically match the federal statute," and cannot serve as a predicate conviction. *See id.*

In the criminal context, defendants arguing that their predicate convictions don't satisfy the generic definition of a crime listed in a federal statute point to cases demonstrating that the statute was applied in a way that does not satisfy the generic federal definition. *See*, e.g., *Stokeling v. United States*, 139 S. Ct. 544, 555 (2019) (surveying Florida robbery prosecutions to determine whether Florida requires same degree of "force" necessary for an ACCA robbery predicate). And sometimes defendants argue that their predicate convictions don't satisfy the federal generic crime's definitions by arguing that the language in the predicate statute simply allows for prosecutions that don't satisfy the federal generic crime. *See*, *e.g.*, *Taylor*, 142 S. Ct. at 2020 (comparing elements of predicate statute of conviction to the elements of federal statute, and determining that the mismatch "is enough to resolve this case").

Years ago, in *Duenas-Alvarez*, the Court explained that when a defendant argues that his statute of conviction does not qualify as a predicate conviction, he cannot make his point by relying on "the application of legal imagination to a state statute's language." 549 U.S. at 822. Instead, showing that the state statute of conviction "creates a crime outside the generic definition of a listed crime in a federal statute" requires a different showing. *See id.* "It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* To make that showing, the Court explained, a defendant could show that the statute was applied in an overbroad way

in his own case, or he can point to "other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

Many lower courts relied on this realistic-probability test for years when applying the categorical approach, *See, e.g.*, *Lopez-Aguilar v. Barr*, 921 F.3d 898, 903-04 (9th Cir. 2019) (analyzing whether Oregon robbery statute criminalized "theft by deception," which would not qualify as generic theft, and holding that there was no categorical match because "there is no realistic probability that Oregon would prosecute such conduct under the statute."); *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc) (analyzing whether state felon-in-possession statute was a categorical match with federal felon-in-possession statute, and holding that defendant needed to point to a Texas case where someone was prosecuted in a manner that did not match elements of federal offense).

Last term, the Court clarified that the *Duenas-Alvarez* realistic-probability test only applies in specific circumstances. In *Taylor*, the defendant argued that his attempted Hobbs Act robbery conviction was not a categorical match for the federal generic offense of a "crime of violence," which required using, attempting to use, or threatening to use force. *See* 142 S. Ct. at 2023-24. The government didn't look to the elements of Hobbs Act robbery for a categorical analysis, *id.* at 2024, and instead "fault[ed] Mr. Taylor for failing to identify a single case in which it has prosecuted someone for attempted Hobbs Act robbery without proving a communicated threat." *Id.* at 2024.

But the Court rejected the government's attempts to fault the defendant. Not only did it point out the "oddity of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits," and the "practical challenges such a burden would present in a world where" most defendants plead and not all cases make it onto Lexis or Westlaw. *See id.* at 2024. But the Court also explained that *Duenas-Alvarez*'s realistic-probability test didn't even apply to the defendant's case in the first place.

This was because in *Duenas-Alvarez*, the "immigration statute at issue … required a federal court to make a judgment about the meaning of a state statute," whereas in *Taylor*, "no such federalism concern [was] in play." *See id.* at 2025. Further, "in *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped;" the only question was whether "the state courts *also* applied the statute in a special (nongeneric) manner." *Id.* (cleaned up). By contrast, in *Taylor* there was no overlap between the two statutes because the Hobbs Act robbery statute did not require proof of any of the elements required by § 924(c). *See id.*

The Court explained that Congress did not condition the long prison sentences in § 924(c) on mandating "an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to present proof about the government's own prosecutorial habits." *See id.* Instead, reviewing courts had a much more straightforward job: to look at the elements of the underlying crime and ask whether they matched the elements of the generic federal offense. *See id.*

Since *Taylor*'s explanation of the proper application of *Duenas-Alvarez*'s realistic-probability test, most of the circuits have recognized that the test doesn't apply when comparing a federal predicate statute to a federal generic crime's definition. For instance, recently the Fifth Circuit distinguished between state and federal predicate statutes. *See United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023). It stated that in *Taylor* the Court only "compared two *federal* statutes and analyzed whether the elements of one aligned with the elements of the other." *Id.* *Taylor* didn't affect "how to compare a state statute of conviction with a federal enhancement," the court held. *See id.* Similarly, the Eighth Circuit also explicitly acknowledged that, after *Taylor*, *Duenas-Alvarez*'s reasonable-probability test applies only when comparing a state statute's elements to a generic federal crime, but does *not* apply when comparing a predicate federal statute's elements. *See United States v. Bragg*, 44 F.4th 1067, 1076 (8th Cir. 2022) (holding that *Taylor* did not overrule circuit precedent applying the reasonable-probability test when determining whether state statutes were a categorical match to a federal statute).

After *Taylor*, other circuits, too, have similarly limited the application of the reasonable-probability test to the context of comparing state predicate statutes to generic federal crimes. *See*, *e.g.*, *United States v. Redd*, --- F.4th ----, 2023 WL 6887335 (4th Cir. Oct. 19, 2023) (holding that realistic-probability test applies when defendant argues a state statute falls outside of ACCA's generic definition of a violent felony, if the state statute's language does not plainly cover the conduct defendant alleges); *United States v. Williams*, 80 F.4th 85, 100 n.11 (1st Cir. 2023) (relying on

Duenas-Alvarez to note that in the context of arguing that a state statute is broader than the generic crime, a defendant must point to a case in which the statute was applied in the overbroad manner); *United States v. Jenkins*, 68 F.4th 148, 154-55 (3d Cir. 2023) (acknowledging that *Duenas-Alvarez* realistic-probability test would apply to defendant's argument that state statute was broader than federal crime if elements of state statute matched federal crime); *United States v. Turner*, 47 F.4th 509, 522-23 (7th Cir. 2022) (relying on *Duenas-Alvarez* to find that defendant arguing state statute is broader than ACCA's generic crime definition must show it is actually possible to violate the state statute in the way he argues); *United States v. Paulk*, 46 F.4th 399 (6th Cir. 2022) (applying realistic-probability test to defendant's argument that his predicate state statute could be violated without any mens rea, in contrast to generic federal crime).

The Ninth Circuit, however, even after *Taylor*, continues to apply *Duenas-Alvarez*'s realistic-probability test to federal predicate statutes. Even though there are no federalism concerns present because the court is determining whether a federal statute matches a federal generic crime, the Ninth Circuit continues to enforce the realistic-probability requirement. In Petitioner's own case, the court relied on reasoning in prior circuit caselaw that "there was no 'realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest.'" App. at 13 (citing *Dominguez I*, 954 F.3d at 1260). Though Petitioner argued that *Duenas-Alvarez* didn't apply, and that *Taylor* had overruled *Duenas-Alvarez* in the context of analyzing federal predicate statutes, the

Ninth Circuit disagreed. *Id.* (stating that "*Taylor* did not overrule *Duenas-Alvarez"* and that prior caselaw relying on realistic-probability test to analyze federal statute was not irreconcilable with *Taylor*'s analysis). While it noted there was "some appeal" to Petitioner's argument that the federal statute's plain terms established that it didn't require the use of physical force, the court didn't believe Hobbs Act robbery would be prosecuted in the way Petitioner proffered. *Id.* at 14-15 (disagreeing that Petitioner's "hypothetical" would be prosecuted under Hobbs Act robbery statute). In other words, Petitioner hadn't cited a case in which Hobbs Act robbery was prosecuted in the overbroad manner he argued, so the court ignored his "hypothetical" argument about the statute's reach.

Similarly, in *United States v. Linehan*, the question was whether a federal statute punishing transporting an explosive device had a use-of-force element required by the federal crime of solicitation to commit a crime of violence. *See* 56 F.4th 693, 698-99 (9th Cir. 2022). After analyzing the elements of the transportation offense, the Ninth Circuit applied *Duenas-Alvarez* to the defendant's argument that the predicate transportation offense could be completed without the attempted use of force required for a federal crime of violence. *Id.* at 704. It concluded that "'legal imagination' cannot carry the day," and faulted the defendant for presenting "obscure hypotheticals" rather than pointing to an actual case. *Id.*

In another circuit that doesn't apply *Duenas-Alvarez* to federal predicate statutes, Petitioner's case and *Linehan* would have likely had a different outcome. The courts of appeals would not have relied on the realistic-probability test to analyze

Petitioner's claim, and instead compared the elements of Hobbs Act robbery to the elements of a generic crime of violence.

Defendants in the Ninth Circuit will have their cases decided—and sometimes face substantial additional time in custody as a result—because they could not satisfy the burden to "present empirical evidence about the government's own prosecutorial habits." *See Taylor*, 142 S. Ct. at 2024. In other circuits, however, a defendant can rely on the federal statute's plain terms and argue that they don't match the generic federal crime's elements.

The inconsistency with which the lower courts are applying *Duenas-Alvarez*'s realistic-probability test, in the wake of *Taylor*'s explanation that it only applies when comparing state predicate crimes to a generic federal crime, is an important issue this Court should address by granting the Petition. Whether an immigrant is deported because of a prior conviction, or whether a defendant faces a lengthy mandatory-minimum sentence because of a prior conviction, should not turn on his circuit of prosecution. The uniform application of the categorial approach is an important question, with serious consequences, that affects thousands of people in the court system and across the circuits. The Court should ensure it is applied uniformly.

II. This case presents an ideal vehicle to resolve the issue since the issue is preserved and would affect the outcome in Petitioner's case.

Petitioner's case presents an ideal vehicle to address the inconsistent application of the *Duenas-Alvarez* realistic-probability test. The issue was preserved

and ruled on by the Ninth Circuit, with the court explicitly disagreeing with Petitioner's argument that the test didn't apply in his case. App. at 12-14. The court relied on circuit caselaw applying the realistic-probability test to Hobbs Act robbery, and found that caselaw still binding after *Taylor* and dispositive in Petitioner's case. App. at 13-15.

Additionally, correctly applying *Taylor*'s holding in Petitioner's case, to bar application of the realistic-probability test, would result in a different outcome. As other circuits have acknowledged, by its plain terms the Hobbs Act robbery statute "criminalizes a threat of 'injury, immediate or future, to [one's] person or property." *See United States v. O'Connor*, 874 F.3d 1147, 1154, 1158 (10th Cir. 2017). And under the Hobbs Act, "property" is "not limited to tangible things, but includes intangible assets," like the right to conduct a lawful business and solicit customers. *See United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999), *abrogated on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003). Because placing someone in fear of future injury to an intangible economic interest does not require the use, attempted use, or threatened use of a §924(c) crime of violence, the plain terms of §1951(b)(1) establish that the elements of Hobbs Act robbery don't match the elements of a §924(c) crime of violence. "That ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise." *See Taylor*, 142 S. Ct. at 2025.

CONCLUSION

While some circuits correctly apply the realistic-probability test in *Duenas-Alvarez* only when there are federalism concerns present because the question is whether a state statute matches the generic federal definition, the Ninth Circuit does not. In Petitioner's own case and others the Ninth Circuit has applied the test to federal predicate statutes, in contravention to *Taylor*.

This Court should grant the writ to address this important question of federal law and ensure that the realistic-probability test is uniformly applied.

Date: October 31, 2023

Respectfully submitted,

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