No. 20-

IN THE

Supreme Court of the United States

MONICO DOMINGUEZ,

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether attempted robbery under the Hobbs Act, 18 U.S.C. § 1951, qualifies as a "crime of violence," meaning that it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," *id.* § 924(c)(3)(A).

RELATED PROCEEDINGS

1. United States District Court (N.D. Cal.):

A. *United States* v. *Dominguez* et al., No. 3:12-cr-00834-EMC-1 (May 14, 2014) (criminal judgment against Monico Dominguez).

B. *United States* v. *Dominguez* et al., No. 3:12-cr-00834-EMC-2 (Aug. 7, 2013) (criminal judgment against Juan Dominguez).

C. *United States* v. *Dominguez* et al., No. 3:12-cv-00834-EMC-3 (proceedings against Shawn Geernaert).

D. *United States* v. *Dominguez* et al., No. 3:12-cv-00834-EMC-4 (Oct. 5, 2016) (criminal judgment against Juan Partida).

2. United States Court of Appeals (9th Cir.):

A. *United States* v. *Dominguez*, No. 14-10268 (judgment on appeal on Apr. 7, 2020; order denying rehearing on Aug. 24, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Monico Dominguez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1a-31a) is published at 954 F.3d 1251 (9th Cir. 2020). The district court's judgment (App. 33a-47a) is unpublished.

JURISDICTION

The Ninth Circuit entered judgment on April 7, 2020, and denied a timely rehearing petition on August 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 18 U.S.C. §§ 924(c) and 1951 are reproduced in the appendix.

INTRODUCTION

The Hobbs Act, 18 U.S.C. § 1951, prohibits actual or attempted robbery or extortion affecting interstate or foreign commerce. This case involves an acknowledged circuit conflict over whether attempted Hobbs Act robbery categorically constitutes a "crime of violence" for purposes of enhanced sentencing under 18 U.S.C. § 924(c)—and more generally whether any attempt to commit a "crime of violence" is itself necessarily a "crime of violence."

In its decision here, the Ninth Circuit followed the Seventh and Eleventh Circuits in holding that attempted Hobbs Act robbery is a "crime of violence" as defined by 18 U.S.C. § 924(c)(3)(A) simply because a *completed* Hobbs Act robbery is such a crime. Subsequently, the Fourth Circuit expressly disagreed with those circuits, holding that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the categorical approach." *United States* v. *Taylor*, 979 F.3d 203, 208 (4th Cir. 2020), *reh'g en banc denied*, No. 19-7616 (4th Cir. Dec. 11, 2020). That holding is correct, and this Court should grant review in order to resolve the circuit conflict and adopt the Fourth Circuit's position.

Determining whether an offense is a crime of violence under § 924(c)(3)(A) requires application of the categorical approach, meaning that the offense must require as an element that the jury necessarily find (or the defendant necessarily admit) the use, attempted use, or threatened use of force. Attempted Hobbs Act

robbery has two elements: (1) the intent to commit a robbery that affects interstate commerce; and (2) a substantial step toward the completion of that goal. The first element obviously need not involve the use, attempted use, or threatened use of force. Intent, by definition, is not an act at all; it exists only in a person's mind. And as the Ninth Circuit correctly acknowledged below, the "substantial step" element likewise need not involve the use, attempted use, or threatened use of force. App. 6a. Thus, attempted Hobbs Act robbery is not categorically a crime of violence.

Like the Seventh and Eleventh Circuits before it, the Ninth Circuit reached a contrary conclusion by focusing not on the elements of *attempted* Hobbs Act robbery (the crime of conviction), but on the elements of a *completed* Hobbs Act robbery. And it applied a principle found nowhere in the statute or this Court's precedent, that any attempt to commit a crime of violence necessarily involves an attempt to use "physical force." In particular, the Ninth Circuit reasoned that "to be guilty of attempt, a defendant must intend to commit every element of the completed crime," and "[a]n attempt to commit a crime should therefore be treated as an attempt to commit every element of that crime." App. 19a. That conflates intent with attempt. For purposes of attempted Hobbs Act robbery, one can *intend* to use force without ever actually *attempting* to use force. But only the latter comes within the definition of "crime of violence" under § 924(c)(3)(A).

Review here is warranted not only because of the conflict regarding the treatment of attempted Hobbs Act robbery, but also because of the implications of the question presented for other attempt and conspiracy crimes. Courts have, for example, applied the same reasoning that the Ninth Circuit employed here to hold

that attempted carjacking and attempted bank robbery are crimes of violence. Moreover, 18 U.S.C. § 924(e) as well as some immigration laws similarly rely on the categorical approach in defining whether an offense qualifies as a "crime of violence" for other purposes.

In short, this case presents an opportunity to reconcile the inconsistent treatment of attempted Hobbs Act robbery under § 924(c)(3)(A) and to guide courts in applying the categorical approach to attempt offenses and other inchoate offenses more generally.

STATEMENT

A. Attempted Hobbs Act Robbery

The Hobbs Act creates criminal liability for any person "who[] in any way … obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery … or attempts or conspires to do so." 18 U.S.C. § 1951(a). As used in the Act, "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, or fear of injury, immediate or future, to his person or property." *Id.* § 1951(b)(1). And under federal law, criminal-attempt liability requires the intent to commit the completed offense together with "an overt act qualifying as a substantial step toward completion of [that] goal." *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-107 (2007).

Attempted Hobbs Act robbery thus has two elements: (1) the intent to commit such robbery and (2) a substantial step toward the completion of that robbery. App. 5a, 19a-20a. As the Ninth Circuit recognized here, however, the second element need not involve the use

of force. It could instead include (for example) proceeding toward the target with a weapon, *see* App. 5a; *accord United States* v. *Moore*, 921 F.2d 207, 209 (9th Cir. 1990), or gathering weapons and lying in wait for the target, *see United States* v. *Muratovic*, 719 F.3d 809, 816 (7th Cir. 2013); *United States* v. *Chapdelaine*, 989 F.2d 28, 30-31, 33 (1st Cir. 1993).

B. Enhanced Sentences Under 18 U.S.C. § 924(c)

As this Court has explained, 18 U.S.C. § 924(c) "threatens long prison sentences for anyone who uses a firearm in connection with certain other federal crimes." *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). In relevant part, it imposes a mandatory minimum five-year prison sentence, in addition to any sentence already imposed for the underlying crime, for any person who uses, carries, or possesses a firearm in furtherance of a "crime of violence." 18 U.S.C. § 924(c)(1)(A)(i). Repeat violations of § 924(c) carry a minimum term of 25 years in prison. *Id.* § 924(c)(1)(C)(i).

A "crime of violence" for purposes of § 924(c) is any "offense that is a felony and … has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). That definition is sometimes referred to as the use-of-force clause or the elements clause. "[P]hysical force" is "force capable of causing physical pain or injury." *Stokeling* v. *United States*, 139 S. Ct. 544, 553-555 (2019) (quotation marks omitted).[1]

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[1] The so-called residual clause of § 924(c)(3) provides that an offense is a crime of violence if (1) it is a felony and (2) "by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of

Sentencing courts determine whether an offense constitutes a crime of violence using the "categorical approach." *Davis*, 139 S. Ct. at 2329. Under that approach, courts "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [a crime of violence], while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Id.* (quotation marks omitted). Consequently, an offense qualifies as a crime of violence only if, in light of the statutory elements of the offense, the use, attempted use, or threatened use of physical force "was necessarily found [by the jury] or admitted" by the defendant. *Id.* at 2249.

C. Proceedings Below

Petitioner Monico Dominguez was convicted (as relevant here) of two offenses: (1) attempted robbery in violation of the Hobbs Act, and (2) possession of a firearm in furtherance of that robbery, which the prosecution charged as a crime of violence under 18 U.S.C. § 924(c)(3)(A). App. 6a-7a. The prosecution argued at trial that Mr. Dominguez and a friend planned to rob an armored car, and that on the day of the planned robbery, they drove toward the warehouse where the car was parked, armed with a revolver. App. 4a. According to the prosecution, however, Mr. Dominguez called off the plan after being alerted to unusual law-

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committing the offense." 18 U.S.C. § 924(c)(3)(B). But because this Court has held the residual clause unconstitutionally vague, *see Davis*, 139 S. Ct. at 2336, the use-of-force clause of is the only way that an offense can qualify as a crime of violence under § 924(c).

enforcement activity in the area. App. 4a-5a. Mr. Dominguez was arrested the following day. App. 5a.

After trial, Mr. Dominguez was sentenced to 25 years for possession of a firearm in furtherance of a "crime of violence," the mandatory minimum because it was his second such conviction. App. 7a. That sentence is "to be served consecutively to all other sentences imposed," which totaled seven years and one day. *Id.*[2]

The Ninth Circuit affirmed in a published opinion. As relevant here, the court held, over a dissent, that Mr. Dominguez's 25-year sentence was proper because *attempted* Hobbs Act robbery is a "crime of violence" for purposes of § 924(c)(3)(A). App. 18a-20a. The majority acknowledged that the categorical approach must be used to determine whether attempted Hobbs Act robbery is a crime of violence. App. 13a. But it held that such attempted robbery is a crime of violence simply "[b]ecause *completed* Hobbs Act robbery is a crime of violence under § 924," and "when a substantive offense would be a crime of violence … an attempt to commit that offense is also a crime of violence." App. 18a (emphasis added). "In order to be guilty of attempt," the court reasoned, "a defendant must intend to commit every element of the completed crime. An attempt to commit a crime should therefore be treated as an attempt to commit every element of that crime." App. 19a (citation omitted). Accordingly, the majority concluded, "[w]hen the intent element of the attempt offense includes intent to commit violence[,] … it makes sense to say that the attempt crime itself includes

[2] Mr. Dominguez was sentenced to seven years for a separate conviction under § 924(c). App. 7a.

violence as an element." App. 19a (quotation marks omitted).

The panel majority brushed aside Mr. Dominguez's argument that attempted Hobbs Act robbery is not categorically a "crime of violence" because it can be committed without the use, attempted use, or threatened use of physical force. App. 19a-20a. Mr. Dominguez had explained that neither of the offense's elements—the specific intent to commit a Hobbs Act robbery and taking a substantial step toward actually committing the robbery—necessarily involves the use, attempted use, or threatened use of physical force, such that the offense does not categorically meet the statutory definition of a "crime of violence." Appellant's C.A. Supplemental Brief in Light of *United States* v. *Davis* ("Appellant's C.A. Supp. Br.") 6-7. The panel majority agreed that the "substantial step" element need not be "a violent act or even a crime." App. 6a. But, it said, a "criminal who specifically intends to use violence, and then takes a substantial step toward that use, has, by definition, attempted a violent crime, albeit an uncompleted one." App. 20a. Moreover, the court stated that "adopting Dominguez's approach in this case would be plainly inconsistent with" circuit precedent holding that "'attempts to commit crimes of violence, enumerated or not, [are] themselves crimes of violence.'" *Id.* (quoting *Arellano Hernandez* v. *Lynch*, 831 F.3d 1127, 1132 (9th Cir. 2016)). The panel majority noted that its views accorded with those of the Seventh and Eleventh Circuits and that there was (at that time) no contrary circuit decision. App. 18a-19a (citing, among others, *United States* v. *Ingram*, 947 F.3d 1021 (7th Cir.), *cert. denied*, 141 S. Ct. 323 (2020), and *United States* v. *St. Hubert*, 909 F.3d 335, 351 (11th Cir. 2018)).

Judge Nguyen dissented in relevant part, explaining that attempted Hobbs Act robbery is not categorically a crime of violence because it can be committed without using, attempting to use, or threatening to use physical force. App. 22a-31a. For example, she noted, a person can take the requisite "substantial step" in furtherance of committing a Hobbs Act robbery by "plan[ning] a robbery, buy[ing] the necessary gear, and driv[ing] toward the target, but return[ing] home after seeing police in the vicinity," App. 24a. (Indeed, these were precisely the "substantial steps" the panel majority said Mr. Dominguez had taken. App. 10a-11a.) Because none of those acts involves the use, attempted use, or threatened use of force, Judge Nguyen reasoned, "attempted Hobbs Act robbery does not qualify as a crime of violence under the elements clause." App. 25a. Judge Nguyen also explained that the panel majority erred by "conflat[ing] *attempt* and *intent*": Although attempt requires that the defendant "intend" to commit every element of the crime, it "doesn't follow" that a defendant guilty of attempt actually "attempted to commit every element of the underlying crime." *Id.* In effect, Judge Nguyen stated, the majority's analysis "casts aside the categorical approach" by failing "to compare the *acts* proscribed by an underlying crime to the violent *acts* enumerated in § 924(c)(3)(A)." App. 27a.

D. The Circuit Conflict

The Fourth Circuit subsequently issued a decision expressly disagreeing with the Ninth Circuit's decision in this case. In *Taylor*, a unanimous panel of the Fourth Circuit held that attempted Hobbs Act robbery was not categorically a crime of violence, concluding that "a straightforward application of the categorical

approach to attempted Hobbs Act robbery yields a different result" from that reached by the Seventh, Ninth, and Eleventh Circuits. 979 F.3d at 208. Those circuits were wrong, the Fourth Circuit explained, because they applied "a rule of their own creation," rather than "the categorical approach—as directed by the Supreme Court." *Id.*

REASONS FOR GRANTING THE PETITION

The courts of appeals have expressly disagreed over whether attempted Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A). The Seventh, Ninth, and Eleventh Circuits hold that it is—not because any of its elements involves the use, attempted use, or threatened use of physical force but merely because the elements of the distinct offense of *completed* Hobbs Act robbery do. The Fourth Circuit, by contrast, has concluded that attempted Hobbs Act robbery is not a crime of violence under a "straightforward application of the categorical approach" because it "does not invariably require the use, attempted use, or threatened use of physical force." *Taylor*, 979 F.3d at 208. And that conclusion is correct; the other circuits have misapplied the categorical approach, undermining the consistency it was designed to create. This conflict, moreover, creates vast sentencing disparities across circuits, making a defendant's prison time depend greatly on the fortuity of geography. Finally, the flawed reasoning of the Seventh, Ninth, and Eleventh Circuits extends beyond just attempted Hobbs Act robbery, affecting numerous cases—in both the criminal and immigration contexts—that turn on whether other attempt offenses are also crimes of violence. The petition should be granted.

I. THE CIRCUITS ARE AVOWEDLY CONFLICTED OVER WHETHER ATTEMPTED HOBBS ACT ROBBERY IS A CRIME OF VIOLENCE

A. In *United States* v. *St. Hubert*, the Eleventh Circuit held that Hobbs Act robbery is a crime of violence because a person cannot be convicted of it without proof of at least the threatened use of physical force (namely, an unlawful taking by means of fear of injury). 909 F.3d at 349-350. It then held that attempted Hobbs Act robbery is also categorically a "crime of violence" because the statutory definition of that term "expressly includes 'attempted use' of force." *Id.* at 351 (emphasis omitted). The court relied on a Seventh Circuit decision holding that attempted murder is a crime of violence under § 924(e) because "[w]hen a substantive offense would be a violent felony under § 924(e) and similar statutes, an attempt to commit that offense also is a violent felony," *Hill* v. *United States*, 877 F.3d 717, 719 (7th Cir. 2017), cited in *St. Hubert*, 909 F.3d at 352. The Eleventh Circuit recognized that the substantial step required for an attempted robbery conviction can fall short of "actual or threatened force," but it reasoned—based on the principle articulated in *Hill*—that "the robber [nonetheless] has attempted to use actual or threatened force because he has attempted to commit a crime that would be violent if completed." 909 F.3d at 353.

The Eleventh Circuit denied rehearing en banc in *St. Hubert* over a dissent by Judge Jill Pryor. She explained that "only by converting *intent* … into *attempt*" can one "infer[] from the fact of a conviction for an attempt crime that the person attempted to commit every element of the substantive offense." *United States* v. *St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019). Judge Pryor further explained that the panel's reason-

ing was inconsistent with the categorical approach, because the panel held that "an individual's conduct may satisfy all the elements of an attempt to commit" a crime of violence "without anything more than intent to use … force and some act (in furtherance of the intended offense) that does not involve the use, attempted use, or threatened use of such force." *Id.*

The Seventh Circuit reached the same result regarding attempted Hobbs Act robbery in *United States* v. *Ingram*. Like the Eleventh Circuit in *St. Hubert*, the Seventh Circuit relied on its prior decision in *Hill* because "§ 924(e) and § 924(c) use almost identical language." 947 F.3d at 1026. The Seventh Circuit thus reasoned that because (1) completed "Hobbs Act robbery constitutes a crime of violence" and (2) "the attempt offense 'requires proof of intent to commit all elements of the completed crime,'" attempted Hobbs Act robbery is categorically a crime of violence. *Id.* at 1025-1026 (quoting *Hill*, 877 F.3d at 719).

The Ninth Circuit followed suit in its published opinion in this case. As explained, the panel majority's reasoning amounted to the logical syllogism that because *completed* Hobbs Act robbery is a crime of violence, *attempted* Hobbs Act robbery must be as well, even though the sole *actus reus* elements of the attempt crime—a "substantial step" toward completion of the robbery—need not itself be "a violent act or even a crime." App. 6a, 18a.

B. After the decision below, the Fourth Circuit rejected the other circuits' views, declaring that "a straightforward application of the categorical approach … yields a different result." *Taylor*, 979 F.3d at 208. The Fourth Circuit explained that "unlike substantive Hobbs Act robbery, attempted Hobbs Act robbery

does not invariably require the use, attempted use, or threatened use of physical force." *Id.* Rather, a conviction for attempted Hobbs Act robbery could be based on proof of only "(1) the defendant['s] specific[] intent[] to commit robbery by means of a threat to use physical force; and (2) [that] the defendant took a substantial step corroborating that intent." *Id.* And that "substantial step need not be violent." *Id.* It could instead entail "proceed[ing] to the area" of the intended robbery after "plan[ning]," "reconnoiter[ing]," and "assembl[ing] weapons and disguises." *Id.* A defendant who takes steps like those, the court stated, has "satisfie[d] the elements of attempted Hobbs Act robbery" but "has not used, attempted to use, or threatened to use physical force." *Id.*

Responding to the other circuits' analysis, the Fourth Circuit explained that the fact that *completed* Hobbs Act robbery necessarily entails the use, attempted use, or threatened use of physical force does not mean that every *attempt* at Hobbs Act robbery involves an attempt to use force. For example, attempts can instead involve an attempt to threaten force, "[b]ut an attempt to threaten force does not constitute an attempt to use force." *Taylor*, 979 F.3d at 209.

The government petitioned for rehearing en banc in *Taylor*, admitting that the circuits were in conflict on the question presented. Petition for Rehearing En Banc 12, *United States* v. *Taylor*, No. 19-7616 (4th Cir. Nov. 30, 2020). The Fourth Circuit denied rehearing on December 11, 2020.

II. THE NINTH CIRCUIT'S DECISION IS WRONG

The decision below misapplies the categorical approach by focusing not on the actual elements of

attempted Hobbs Act robbery—which the Ninth Circuit conceded do not require the use, attempted use, or threatened use of physical force—but on the distinct elements of *completed* Hobbs Act robbery. In so doing, the Ninth Circuit mistakenly equated intent with attempt, holding that a person who intends to commit a crime of violence and takes a substantial step toward the realization of that intent must necessarily have attempted to perform all the elements of the completed offense, including using force. That is a leap without logic.

A. A straightforward application of the categorical approach makes clear that attempted Hobbs Act robbery is not a crime of violence. Under that approach, courts determine whether the statutory definition of the offense requires the jury to find or the defendant to admit the use, attempted use, or threatened use of force. *Supra* p. 6. Applied to attempt offenses, that means courts must look not at the elements of the completed offense, but at the distinct elements of the attempt offense itself. This Court made that clear in *James* v. *United States*, 550 U.S. 192 (2007), *overruled on other grounds*, *Johnson* v. *United States*, 576 U.S. 591 (2015). There, the Court held that the "pivotal question" in determining whether an attempted burglary conviction was a crime of violence under § 924(e) was "whether overt conduct" required for an attempted burglary conviction "is 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 202-203 (quoting § 924(e)(2)(B)(ii)). Likewise here, the "pivotal question" is whether either element of attempted Hobbs Act robbery—(1) intent to affect commerce by taking property by means of actual or threatened force, violence, or fear of injury or (2) a substantial step toward the completion of the intended

robbery—necessarily requires the use, attempted use, or threatened use of force.

Neither one does. Intent is merely a mental state; it requires no act at all. And as for the requisite substantial step, a conviction for attempted Hobbs Act robbery can be supported by nothing more than "surveillance of the object of a crime and the assemblage of the necessary instruments." *United States* v. *Prichard*, 781 F.2d 179, 182 (10th Cir. 1986). For example, substantial steps could include a defendant's surveillance of the target location and then proceeding toward that location with a mask, a toy gun, or a note falsely claiming to have a gun—harmless tools intended to make an empty threat to use force. *See, e.g.*, *United States* v. *Korte*, 918 F.3d 750, 752-753 (9th Cir. 2019) (upholding convictions for robbery by "force and violence[] or by intimidation" of one defendant who demanded money while wearing a mask and another who did so with a toy gun); *United States* v. *Murphy*, 306 F.3d 1087, 1089 (11th Cir. 2002) (per curiam) (upholding conviction for robbery by "threat of death" of an unarmed defendant who passed a note stating "I have a gun"); *United States* v. *Perry*, 991 F.2d 304, 307-308, 310-311 (6th Cir. 1993) (upholding conviction for robbery by intimidation of a defendant who carried a wooden gun).

These cases show that attempted robbery can be committed by merely *attempting to threaten* to use force. Such conduct does not fall within the definition of "crime of violence" under § 924(c)(3)(A). A defendant who "takes a nonviolent substantial step toward threatening to use physical force … has not used, attempted to use, or threatened to use physical force." *Taylor*, 979 F.3d at 208. Therefore, because the crime of attempted Hobbs Act robbery does not necessarily

require the use, attempted use, or threatened use of force, it is not categorically a crime of violence.

B. The Ninth Circuit reached a contrary conclusion through illogical leaps that do not comport with the categorical approach. Its reasoning (and that of the Eleventh and Seventh Circuits) is wrong for two related reasons.

First, the decision below (as Judge Nguyen's partial dissent explained) "conflates *attempt* and *intent*." App. 25a. The Ninth Circuit panel majority reasoned that because an attempt conviction requires proof of a defendant's "inten[t] to commit every element of the completed crime," an attempt to commit robbery should be treated not as reflecting the *intent* to commit robbery, but "as an attempt to commit every element of that crime." App. 19a. The court's equating of intent and attempt is unsupported and incorrect. "*Intending* to commit each element of a crime involving the use of force simply is not the same as *attempting* to commit each element of that crime." *St. Hubert*, 918 F.3d at 1212 (J. Pryor, J., dissenting from denial of rehearing en banc). Thinking about using force, or planning or wanting to use it, takes place in one's mind, whereas actually attempting to use force requires an action. The latter satisfies § 924(c)(3)(A)—which includes "attempted use"—but the former does not.

Second, the Ninth Circuit incorrectly equated attempting to use force, which satisfies § 924(c)(3)(A), with "attempt[ing] a violent crime," which does not necessarily satisfy that provision. The majority reasoned that a "criminal who specifically intends to use violence, and then takes a substantial step toward that use, has, by definition, attempted a violent crime, albeit an uncompleted one." App. 20a. True or not, that is

irrelevant because § 924(c)(3)(A) is not triggered by attempting a "violent crime," but rather by the attempt to use "physical force." And because a completed Hobbs Act robbery—like many "crimes of violence"—can be committed without the actual use of force, such as through the attempted or threatened use of force, an attempt to commit Hobbs Act robbery does not necessarily require an attempt to use force. Consequently, *attempted* Hobbs Act robbery need not involve the use, attempted use, or threatened use of force. It therefore is not categorically a crime of violence.[3]

In sum, the Ninth Circuit's rule that any attempt to commit a crime of violence is always itself a crime of violence is inconsistent with the categorical approach because it looks not to the elements of the attempt offense actually committed (here, attempted Hobbs Act robbery), but to the distinct elements of the completed offense, which are irrelevant. Neither § 924(c)(3)(A) nor this Court's precedent teaches that an attempt to commit a crime of violence necessarily entails an attempt to commit each element of that crime.

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[3] Of course, the analysis for other attempt crimes may be different. If a given crime can be committed *only* through the actual use of force—that is, if the attempted or threatened use of force is not an alternative means of committing the crime—it may well be that an attempt to commit that crime necessarily involves the use, attempted use, or threatened use of force. *See Taylor*, 979 F.3d at 209; *Hill*, 877 F.3d at 719-720. But that is not true of Hobbs Act robbery.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT, WITH CONSEQUENCES FAR BEYOND ATTEMPTED HOBBS ACT ROBBERY

A. The circuit conflict over the question presented will result in unfair and disparate treatment of countless defendants based simply on the jurisdiction in which they are sentenced. Specifically, defendants in the Seventh, Ninth, and Eleventh Circuits could be sentenced to prison terms that are years longer—or decades in the case of enhancements that apply based on the use of certain kinds of firearms or successive convictions, 18 U.S.C. §§ 924(c)(1)(B)(ii), 924(c)(1)(C)—than their similarly situated counterparts in the Fourth Circuit. District courts in other circuits, moreover, are reaching similarly inconsistent results. *Compare, e.g.*, *Wallace* v. *United States*, 458 F. Supp. 3d 830, 837 (M.D. Tenn. 2020), *and Crowder* v. *United States*, 2019 WL 6170417, at *2 (S.D.N.Y. Nov. 20, 2019) (each holding that attempted Hobbs Act robbery is a crime of violence), *with, e.g.*, *United States* v. *Culbert*, 453 F. Supp. 3d 595, 598-601 (E.D.N.Y. 2020), *and Lofton* v. *United States*, 2020 WL 362348, at *5-9 (W.D.N.Y. Jan. 22, 2020) (each holding the opposite). The sentencing disparities thus go beyond even the four circuits that have squarely addressed the issue.

B. The Ninth Circuit's flawed reasoning affects sentencing decisions beyond attempted Hobbs Act robbery. Indeed, the implications of the majority's broad assumption that an "attempt to commit a crime should … be treated as an attempt to commit every element of that crime," App. 19a, sweep far beyond the context of this case.

First, the Ninth Circuit's reasoning could affect the question whether other inchoate crimes that "can be

accomplished merely through the threatened use of force," *Taylor*, 979 F.3d at 209, are crimes of violence under § 924(c)(3)(A). For example, several circuits have employed the same rationale as the Ninth Circuit to conclude that other attempt offenses are crimes of violence under § 924(c)(3)(A). *United States* v. *Armour*, 840 F.3d 904, 907-909 & n.3 (7th Cir. 2016) (attempted bank robbery); *Ovalles* v. *United States*, 905 F.3d 1300, 1304-1307 (11th Cir. 2018) (per curiam) (attempted carjacking), *abrogated on other grounds by United States* v. *Davis*, 139 S. Ct. 2319 (2019); *United States* v. *Rinker*, 746 F. App'x 769, 772 (10th Cir. 2018) (attempted bank robbery).

Second, the Ninth Circuit's reasoning could require treating conspiracy offenses as crimes of violence, even though they typically are not. Conspiracy to commit Hobbs Act robbery requires proof of an agreement to commit Hobbs Act robbery, the defendant's knowledge of the conspiratorial goal, and that the defendant knowingly and voluntarily participated in furthering that goal. *Brown* v. *United States*, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam). Thus, like the attempt offense, the conspiracy offense includes no element that necessarily entails the use, attempted use, or threatened use of physical force. *See, e.g.*, *United States* v. *Santos*, 449 F.3d 93, 103, 105 (2d Cir. 2006) (affirming conviction for conspiracy to commit Hobbs Act robbery based on evidence of the defendant's "plan to steal … drugs at knife-point" and "dr[iving] … in the direction" of the target). Accordingly, the vast majority of lower courts to have considered the issue have held—much like the Fourth Circuit did with respect to attempted Hobbs Act robbery—that conspiracy to commit Hobbs Act robbery is *not* a crime of violence under § 924(c)(3)(A). *See Brown*, 942 F.3d at 1075-1076 (citing cases); *accord*

Velleff v. *United States*, 307 F. Supp. 3d 891, 895 (N.D. Ill. 2018); *United States* v. *Baires-Reyes*, 191 F. Supp. 3d 1046, 1049-1050 (N.D. Cal. 2016). The panel majority's reasoning in this case is in significant tension with that conclusion.

Third, this case has implications beyond § 924(c)(3)(A) because other criminal statutes likewise call for the categorical approach to determine whether a prior conviction is a "crime of violence" or a "violent felony," as do the immigration laws. For example, the Armed Career Criminal Act, 18 U.S.C. § 924(e), and the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(a), each use a test nearly identical to that for § 924(c) to determine what constitutes a crime of violence for purposes of punishing repeat offenders and, as to the INA, rendering noncitizens removable. *See, e.g.*, *Taylor*, 979 F.3d at 206 n.6 ("Because the definition of 'crime of violence' in § 924(c)(3)(A) is almost identical to the definition of 'violent felony' in ACCA our decisions interpreting one definition are persuasive as to the meaning of the other." (quotation marks and brackets omitted)); *Hill*, 877 F.3d at 719 ("When a substantive offense would be a violent felony under § 924(e) *and similar statutes*, an attempt to commit that offense also is a violent felony." (emphasis added)). Indeed, the Ninth Circuit itself has expressly said that "[t]o determine whether a conviction under [a state criminal statute] is for a crime of violence" with immigration consequences, it applies "the categorical approach from" this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990). *Flores-Vega* v. *Barr*, 932 F.3d 878, 882 (9th Cir. 2019).

In short, resolving the circuit conflict over the question presented would allow this Court to provide a

much needed course correction regarding how to determine when attempt and other inchoate offenses qualify as crimes of violence under multiple federal criminal and immigration statutes that collectively govern an enormous number of cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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