No. 20-1459

In The Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

JUSTIN EUGENE TAYLOR,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether attempted Hobbs Act robbery, which may be completed through an attempted threat alone, *see* 18 U.S.C. § 1951(a), falls outside the definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(A).

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-12a) is reported at 979 F.3d 203. The district court's opinion (Pet. App. 13a-23a) is unpublished but is available at 2019 WL 4018340.

JURISDICTION

The court of appeals entered its judgment on October 14, 2020. Pet. App. 1a. The court denied the government's petition for rehearing on December 11, 2020. *Id.* at 24a. The government filed its petition for a writ of certiorari on April 14, 2021, and this Court granted certiorari on July 2, 2021. 141 S. Ct. 2882 (Mem.). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 18 U.S.C. §§ 16, 924, and 1951 are reprinted in an appendix to this brief.

STATEMENT

A. Legal Framework

1. The definition of "crime of violence"

Section 924(c) makes it a crime to use or carry a firearm during and in relation to, or to possess a firearm in furtherance of, *inter alia*, a "crime of violence" that can be prosecuted in federal court. 18 U.S.C. § 924(c)(1)(A). The offense carries a mandatory minimum of five years for a basic offense, seven years where the firearm is brandished, ten years where it is discharged, and in all cases a maximum of life. *Id.* § 924(c)(1)(A)(i)-(iii). Section 924(c) sentences must run consecutively to any other sentence. *Id.* § 924(c)(1)(D)(ii); *United States v. Gonzalez*, 520 U.S. 1 (1997).

Section 924(c)(3)(A) defines a "crime of violence" to mean an offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." That definition—known as the "elements" clause—is identical to the definition of "crime of violence" in 18 U.S.C. § 16(a), with the additional limitation that the offense must be a felony. *See id.* § 924(c)(3).

When enacted, Congress paired the elements clause with a "residual" clause. *See id.* § 924(c)(3)(B). That clause was designed to cover offenses that "carrie[d] a substantial risk of" violence sufficient to justify labeling them "crimes of violence," even though they lacked an element bringing them within the scope

of Section 924(c)(3)(A). *See* S. Rep. No. 225, 98th Cong. 1st Sess. 307, 313 n.9 (1983).

In *United States v. Davis*, 139 S. Ct. 2319 (2019), this Court invalidated the residual clause as unconstitutionally vague. Section 924(c)'s residual clause required judges to estimate "the degree of risk posed by a crime's imagined 'ordinary case.'" *Id.* at 2326. If the degree of risk was high, the offense was a "crime of violence" within the meaning of Section 924(c). But this approach "provide[d] no reliable way to determine which offenses qualify as crimes of violence and thus [wa]s unconstitutionally vague." *Id.* at 2324.

Accordingly, the elements clause now stands on its own. Whether an offense constitutes a "crime of violence" turns on the elements of the crime, not on the degree of risk of violence posed in the ordinary case.

2. The categorical approach

In determining whether a crime satisfies the elements clause, a court applies the "categorical approach." *See*, *e.g.*, *United States v. Simms*, 914 F.3d 229, 234 (4th Cir. 2019) (citing *Leocal v. Ashcroft*, 543 U.S. 1, 7-10 (2004), which interpreted 18 U.S.C. § 16(a)). The categorical approach requires a court to assess the *elements* of the offense rather than the *conduct* underlying the conviction. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (discussing the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)). After determining the elements necessary to sustain a conviction, the court presumes that the conviction "rested upon nothing more than the least of the acts criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (internal quotation marks and brackets omitted); *see also Johnson v. United States*,

559 U.S. 133, 137 (2010) (same, under ACCA's elements clause). An offense does not qualify as a predicate unless "the *least* serious conduct it covers falls within the elements clause." *Borden v. United States*, 141 S. Ct. 1817, 1832 (2021) (plurality opinion); *see also Pereida v. Wilkinson*, 141 S. Ct. 754, 763 (2021) (categorical approach considers whether the "minimum conduct" necessary to violate the statute fits within the relevant category).

Thus, if the minimum conduct that violates a criminal statute does not categorically satisfy the definition of a crime of violence, then that offense cannot be classified as a crime of violence. Put concretely, this means that all of the means of violating a statute must require proof of use, attempted use, or threatened use of force; if one means of violating the statute does not require such proof, then the statute is not a Section 924(c) predicate. *See Moncrieffe*, 569 U.S. at 191-92; *Borden*, 141 S. Ct. at 1832 (plurality opinion).

B. The Current Controversy

1. In February 2009, respondent Justin Eugene Taylor was charged with, among other offenses, conspiracy to commit Hobbs Act robbery (Count Five) and attempted Hobbs Act robbery (Count Six), both in violation of 18 U.S.C. § 1951. C.A. App. 11-14. Mr. Taylor was also charged with using and carrying a firearm during and in relation to a "crime of violence" in violation of 18 U.S.C. § 924(c) (Count Seven). Count Seven listed the conspiracy alleged in Count Five and the attempted robbery alleged in Count Six as predicate offenses. *Id.*

Mr. Taylor pleaded guilty to the Hobbs Act conspiracy and Section 924(c) counts. C.A. App. 15-31. As part of his plea agreement, Mr. Taylor waived his right to challenge on appeal his convictions and any sentence within the applicable statutory range. *Id.* at 35. Neither the plea agreement nor the plea colloquy identified the predicate for the Section 924(c) count. *Id.* at 15-31, 32-47. The government agreed to dismiss the remaining charges. Pet. App. 3a. The court sentenced Mr. Taylor to 240 and 120 months' imprisonment for the conspiracy and Section 924(c) convictions, respectively, to be served consecutively, for a total of 360 months. *Id.*

Mr. Taylor appealed his sentence, arguing that the district court had miscalculated his Sentencing Guidelines range. The Fourth Circuit dismissed his appeal as barred by the appellate waiver in his plea agreement, *id.*, and this Court denied review, *see Taylor v. United States*, 564 U.S. 1029 (2011). Mr. Taylor then filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, which the district court denied. Pet. App. 3a.

2. In 2016, Mr. Taylor sought leave from the Fourth Circuit to file a second Section 2255 motion in light of this Court's decisions in *Johnson v. United States*, 576 U.S. 591 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). *Johnson* held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii)—which provided for a sentence enhancement when the offense categorically presented a serious potential risk of physical injury to another—is unconstitutionally vague. 576 U.S. at 604-06. As a result, courts could not constitutionally enhance a defendant's sentence based on predicate

offenses that qualify as violent crimes only under the residual clause. *See id.* And *Welch* held that *Johnson* applies retroactively on collateral review. 136 S. Ct. at 1265. Mr. Taylor argued that the residual clause in Section 924(c) is materially identical to the residual clause invalidated in *Johnson* and, therefore, his conviction under Section 924(c) was unconstitutional. C.A. App. 65-72. The Fourth Circuit granted Mr. Taylor permission to file his second Section 2255 petition. *Id.* at 59-60.

This Court then extended *Johnson*'s holding to Section 924(c) in *Davis*. 139 S. Ct. at 2324. As a result of *Davis*, courts cannot rely on the residual clause to support a conviction under Section 924(c). *Id.* For Mr. Taylor, *Davis* meant that his conviction for conspiracy to commit Hobbs Act robbery could no longer serve as a predicate offense for Section 924(c); such a conspiracy had previously qualified as a "crime of violence" under Section 924(c) only by virtue of its now-invalid residual clause. *Id.* at 2325, 2336; *see* Pet. App. 21a.

Nevertheless, the district court denied Mr. Taylor's second Section 2255 petition. Pet. App. 13a-23a. It held that attempted Hobbs Act robbery—one of the predicate offenses that could theoretically support Mr. Taylor's conviction under Section 924(c)—qualified as a crime of violence because it satisfied that statute's still-valid elements clause *Id.* at 22a; *see* 18 U.S.C. § 924(c)(3)(A) (covering offenses that have "as an element the use, attempted use, or threatened use of physical force against the person or property of another"). The court believed that attempted Hobbs Act robbery "invariably requires the actual,

attempted, or threatened use of physical force." Pet. App. 21a.

3. Mr. Taylor appealed, and the court of appeals granted a certificate of appealability on two questions: First, whether a Section 924(c) conviction must be vacated if the indictment charged multiple predicates, one of which is invalid; and second, whether attempted Hobbs Act robbery categorically qualifies as a predicate crime of violence. C.A. App. 157. The court of appeals vacated Mr. Taylor's Section 924(c) conviction based on its decision on the second issue, declined to reach the first issue, and remanded to the district court for resentencing. Pet. App. 2a n.1, 12a.

The court noted that the parties agreed that Hobbs Act conspiracy (one of the two offenses alleged) "no longer qualifies as a valid § 924(c) predicate." *Id.* at 1a. The court next determined that the other predicate offense—attempted Hobbs Act robbery—also fails to qualify under the categorical approach. *Id.* at 6a. The court explained that "when [an] offense may be committed without the use, attempted use, or threatened use of physical force[,] the offense is not 'categorically' a 'crime of violence.'" *Id.* Under a "straightforward application of the categorical approach," it continued, "attempted Hobbs Act robbery" does not qualify as a crime of violence because that offense "does not invariably require the use, attempted use, or threatened use of physical force." *Id.* at 8a.

The court of appeals explained that the government can obtain a conviction for attempted Hobbs Act robbery by proving that a defendant intended to commit robbery by threatening to use physical force and took a substantial nonviolent step

toward making that threat. *Id.* In that scenario, the court reasoned, the elements of attempted Hobbs Act robbery would be satisfied, but the text of Section 924(c)(3)(A) would not, because the defendant did not use, attempt to use, or threaten to use physical force, but merely *attempted to threaten* to use physical force. *Id.* "The plain text of § 924(c)(3)(A) does not cover such conduct." *Id.*

The court of appeals found the government's "dire warning[s]" about the scope of its holding misplaced. The decision, the court explained, would not extend to the many attempt offenses (such as murder) that can be completed only through actual, not threatened, use of physical force. *Id.* at 11a. But where, as here, a defendant could be convicted for attempting the offense based solely on an attempted threat, "an attempt to commit that crime falls outside the purview of the [elements] clause." *Id.* at 10a-11a.

SUMMARY OF ARGUMENT

This case involves a mismatch between the elements of an offense and the requirements to classify that offense as a "crime of violence." The government prosecuted Mr. Taylor for using or carrying a firearm in connection with a crime of violence, relying on an attempted Hobbs Act robbery offense as a predicate crime. The problem for the government is that an offense qualifies as a "crime of violence" only if it has as an element the use, attempted use, or threatened use of force against the person or property of another, and attempted Hobbs Act robbery does not.

I. Attempted Hobbs Act robbery can be committed by attempting to threaten a person to surrender property, which does not necessarily entail the use, attempted use, or threatened use of force. Attempt

liability requires only the intent to commit a robbery, coupled with a substantial step towards it. The substantial step need not be violent. Nor need it entail an actual threat, *i.e.*, a communicated intent to do harm. The minimum conduct necessary to prove attempted Hobbs Act robbery, then, does not satisfy any of the bases listed in Section 924(c)'s elements clause.

The government tries to force attempted Hobbs Act robbery into the text of the elements clause, but that is trying to fit a square peg into a round hole. Attempted threats do not constitute the actual use of force. Nor do they constitute actual threats of force. (The government counterintuitively argues both.) And the elements clause does not codify a rule that any attempt to commit a crime of violence is itself a crime of violence.

The text of Section 924(c)'s elements clause should be the end of this case. But the government resorts to arguing that Hobbs Act attempts are often violent, so Congress must have wanted to cover them. This argument is a repackaged version of residual-clause analysis, which this Court condemned as unconstitutionally vague. The government's page-after-page recitation of violent attempted Hobbs Act robberies is beside the point. Under the elements clause, what matters is the elements, not actual conduct in supposed "ordinary cases."

II. Although legislative history cannot (as the government suggests) expand the reach of a criminal statute, here, the legislative history of Section 924(c)(3)(A) does not support the government's position. Nothing in it shows a desire to cover *all* attempted robberies. To the contrary, Congress

rejected language that would have done that when it enacted the original ACCA.

III. The government next argues that, even if the text of the Hobbs Act does cover *attempted threats* that have no actual, attempted, or threatened use of force (and as discussed, it does), attempted Hobbs Act robbery is nonetheless a crime of violence because prosecutions under that theory are a product of "legal imagination." That claim is wrong, legally and factually. When a statute's clear text includes a means of committing the offense that is outside the elements clause, that is the end of the analysis; the text itself provides a "realistic probability" of prosecution. In any event, the government does prosecute attempted threats where no force or threatened force is proved or provable.

IV. Finally, if text, structure, and history do not unambiguously refute the government's position, the rule of lenity does. At the very least, Section 924(c) is ambiguous about whether it covers attempted Hobbs Act robbery. Faced with an ambiguous statute, this Court should adhere to its traditional refusal to make clear for the government what Congress did not.

ARGUMENT

ATTEMPTED HOBBS ACT ROBBERY IS NOT A "CRIME OF VIOLENCE" UNDER 18 U.S.C. § 924(C)(3)(A)

A straightforward application of the categorical approach establishes that attempted Hobbs Act robbery is not a "crime of violence" under Section 924(c)(3)(A). Because an individual may commit attempted Hobbs Act robbery through attempted threats—without engaging in "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 crime does not *necessarily* have any of the elements listed in Section 924(c)(3)(A). Neither the government's efforts to alter the meaning of those terms nor its improper resort to ordinary-case analysis changes that conclusion.

I. ATTEMPTED HOBBS ACT ROBBERY DOES NOT REQUIRE THE GOVERNMENT TO PROVE THE USE, ATTEMPTED USE, OR THREATENED USE OF PHYSICAL FORCE

A. Attempted Hobbs Act Robbery Can Be Proved By Attempted Threats Alone

"The Hobbs Act makes it a crime to affect commerce, or to attempt to do so, by robbery." *Taylor v. United States*, 136 S. Ct. 2074, 2077 (2016) (citing 18 U.S.C. § 1951(a)). Robbery means an "unlawful taking" from a person "by means of actual *or threatened force*, or violence, or fear of injury." 18 U.S.C. § 1951(b)(1) (emphasis added). And while "[t]here is no general federal attempt statute," *United States v. Hite*, 769 F.3d 1154, 1162 (D.C. Cir. 2014) (internal quotation marks omitted), the Hobbs Act itself explicitly proscribes attempts, 18 U.S.C. § 1951(a).

The text of the Hobbs Act makes clear that attempted robbery can be completed by attempted *threats* of force; the defendant need not actually make threats, engage in force, or attempt to use force. First, to establish an attempted Hobbs Act robbery offense, the government must prove only that a defendant (i) had the intent to commit Hobbs Act robbery, and (ii) engaged in an "overt act," that is, a "substantial step" towards its commission. *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (describing

general standards for attempt liability). As the government itself concedes, a "substantial step" "need not be violent in and of itself." U.S. Br. 22. Courts widely agree, recognizing that nonviolent conduct such as "reconnoitering the place contemplated for the commission of the crime" or "possess[ing] materials to be employed in the commission of the crime" can constitute substantial steps. *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984); *see also, e.g.*, Model Penal Code and Commentaries, Part I § 5.01(2) (1985) (listing multiple examples of nonviolent acts that qualify as "substantial steps").

Second, because Hobbs Act robbery can be completed through *threatened* force alone, attempted Hobbs Act robbery can be accomplished through an *attempt to threaten* force. The threat need not be expressed in order to complete the attempt. *See* Model Penal Code and Commentaries, Part II § 222.1, at 115 (1980) (robbery) ("Where the threats are not actually communicated, a prosecution for attempt may still be appropriate if the purpose to engage in the offending conduct can be shown together with a substantial step towards its commission.").

Accordingly, the minimum conduct that the government must prove to show that a defendant committed attempted Hobbs Act robbery is that the defendant (i) intended to threaten force to take property from the victim, and (ii) took a nonviolent, substantial step toward the goal of making that threat. No more is required. The government need not prove the use of physical force, an attempt to use physical force, or a threat to use physical force.

B. Because A Hobbs Act Attempt Can Be Proved By Attempted Threats Alone, It Is Not Categorically A Crime Of Violence

Section 924(c) defines "crime of violence" to mean the "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3). As just discussed, an attempted threat can be established based on a nonviolent substantial step towards the completed offense of threatening force, coupled with the intent to complete the offense. That conduct—the minimum required to prove a violation—satisfies none of the criteria for qualifying an offense as a crime of violence under the elements clause.

1. The attempt to threaten need not involve the actual "use" of force. When interpreting statutory language, this Court "must give words their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (citation omitted). The most natural understanding of the "use" of physical force is the *application* of force—striking, shaking, grabbing, shooting, stabbing, or other violent means of taking hold of a person.

Standard definitions and this Court's cases confirm that understanding. "Dictionaries consistently define the noun 'use' to mean the 'act of employing' something." *Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016) (citing multiple dictionaries). "Force" is defined to mean "[p]ower, violence, or pressure directed against a person or thing." Black's Law Dictionary (11th ed. 2019); *see also* Collins Dictionary of the English Language (1985) ("1. strength or energy; might; power; *the force of the blow* … 2. exertion or the use of exertion against a person or

thing that resists."); 1 Funk & Wagnalls Standard Desk Dictionary (1979) ("1. [p]ower or energy; strength … 2. [p]ower exerted on any resisting person or thing"); *Johnson v. United States*, 559 U.S. 133, 138-39 (2010) (collecting similar definitions).

Consistent with those definitions, this Court has understood the phrase "use of force" to refer to an *application* of force—including in construing language identical to Section 924(c)(3)(A). In *Leocal*, this Court confirmed that the "use" of force in Section 924(c)(3)(A) carries that ordinary meaning, requiring that force "actually be applied." 543 U.S. at 11 (interpreting 18 U.S.C. § 16(a)'s identical elements clause). And in *Voisine*—which interpreted "use of force" language in 18 U.S.C. § 922(g)(9)[1]—this Court described that requirement as covering the "*application* of … force." 136 S. Ct. at 2277 (emphasis added); *accord Borden v. United States*, 141 S. Ct. 1817, 1825 (2021) (plurality opinion).

The examples the Court gave in *Voisine* reinforce that point. The Court noted that "throw[ing] a plate in anger against the wall" with knowledge of a "substantial risk" that "a shard from the plate would ricochet and injure" a victim and "slam[ming] [a] door shut" in a manner that was at minimum "quite likely" to "catch [a victim's] fingers in the jamb" would both qualify as uses of force. 136 S. Ct. at 2279. In each

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[1] Section 922(g)(9) covers misdemeanor crimes of domestic violence, does not require the use of force to be "against a person or property," and requires a lesser degree of force than Section 924(c)(3)(A). *See United States v. Castleman*, 572 U.S. 157, 163-69 (2014). None of those distinctions undercuts the Court's understanding that the "use of force" means the *application* of force.

example, physical force is actually exercised, not merely referenced by someone intending to use it or warning of its possible deployment.

Applying that settled construction here, a person may attempt a Hobbs Act robbery by threat without ever actually using force. That is because, as explained above, an individual can commit that attempt crime by (i) having an intent to commit Hobbs Act robbery by threat and (ii) taking a non-violent step toward communicating that threat. *See supra* I.A. Attempted Hobbs Act robbery thus does not categorically entail a "use of force" within the meaning of Section 924(c)(3)(A).

2. Similarly, an attempted threat under the Hobbs Act is not categorically an "attempted use" of force within the meaning of Section 924(c). An attempt to commit Hobbs Act robbery by threat can be proved with an attempt to threaten *simpliciter*, with no proof of any intent to follow through on the threat to deploy force. *See Virginia v. Black*, 538 U.S. 343, 359-60 (2003) ("The speaker need not actually intend to carry out the threat."); *cf. Holloway v. United States*, 526 U.S. 1, 11 (1999) (explaining, in the context of 18 U.S.C. § 2119, that "an empty threat, or intimidating bluff" would satisfy the element of "by force and violence or by intimidation," but that, standing alone, it would not be enough to satisfy conditional intent to cause death or serious bodily harm); *id.* at 11 n.13 (noting judicial holdings that "a threat to harm does not in itself constitute an intent to harm or kill"); *United States v. Bailey*, 819 F.3d 92, 97 (4th Cir. 2016) (defendant placed a "cold and hard" object against driver's neck, but no evidence established possession of a weapon or an "actual threat to inflict harm," so

evidence proved only an "empty threat or an intimidating bluff"); Argument Tr. 65, *Borden v. United States*, No. 19-5410 (Nov. 3, 2020) (counsel for the government: "[T]hreatening doesn't actually require intent to use force. A simple bluff would suffice in those circumstances."). An attempt to *threaten* force, therefore, need not entail any intent to *use* force. Consequently, an attempted threat of force does not categorically qualify under Section 924(c)(3)(A)'s coverage of "an attempted use … of physical force."

Any other view of Section 1951 would render part of the Hobbs Act superfluous. Hobbs Act robbery can be committed "by means of actual *or* threatened force." 18 U.S.C. § 1951(b)(1) (emphasis added). Understanding an attempted Hobbs Act robbery to necessarily entail an "attempted use of force" would leave no daylight between the attempted, *actual* use of force and the attempted, *threatened* use of force. And that would flout basic principles of statutory interpretation, which require this Court to "give effect to every word of a statute wherever possible." *Leocal*, 543 U.S. at 12; *see*, *e.g.*, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019). Under the anti-surplusage canon, no term "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012). Accordingly, attempted threats constitute an independent means of committing attempted Hobbs Act robbery—one that does not entail the attempted use of force.

3. Finally, an attempted threat does not necessarily, implicitly, or actually involve a "threatened use of force." In the criminal law, the

prevailing definition of "threat" is "[a] communicated intent to inflict harm or loss on another or on another's property"; in other words, "a declaration, express or implied, of an intent to inflict loss or pain on another <a kidnapper's threats of violence>." *Threat*, Black's Law Dictionary (11th ed. 2019); *see Threat*, Black's Law Dictionary (5th ed. 1979) (setting forth a materially identical definition of "threat" shortly before the Comprehensive Crime Control Act of 1984 limited Section 924(c) to "crimes of violence," *see* Pub. L. No. 98-473, tit. II, 98 Stat. 1976, 2136, 2138-39 (1984)); *see also Black*, 538 U.S. at 359. Because a threat entails a communication of intent, a "threatened use of force" necessarily entails a communicated intent to use force.

But an *attempted* threat need not entail any such communication. Rather, as explained above, it requires only (i) an intent to threaten and (ii) some substantial step toward executing the threat. Although a substantial step *could* entail communication, it need not. For example, it could entail simply "reconnoitering the place contemplated for the commission of the crime." Model Penal Code and Commentaries, Part I § 5.01(2) (1985). A person may, therefore, attempt to commit Hobbs Act robbery by threats by reconnoitering a convenience store with an intent to threaten the clerk there—even if the person abandons his plan before arriving at the store. That action does not entail any "threatened use of force" within the meaning of Section 924(c). As a result, an attempt to commit Hobbs Act robbery by threat does not necessarily entail a threatened use of force.

The commentaries to the Model Penal Code confirm the point, explaining that one can *attempt* to threaten force without actually threatening force. Discussing what constitutes a "threat of serious bodily injury," the commentaries explain that "there will be cases, appropriately reached by a charge of attempted robbery, where the actor does not actually harm anyone *or even threaten harm*." Model Penal Code and Commentaries, Part II § 222.1, 114-15 (1980) (emphasis added). "If, for example, the defendant is apprehended before he reaches his robbery victim and thus before he has actually engaged in threatening conduct, proof of his purpose to engage in such conduct will justify a conviction of attempted robbery if the standards … [of attempt] are met." *Id.* That analysis corroborates the natural understanding that, while a threatened use of force entails a *communicated* expression of an intent to use force, an attempted threat offense does not.

* * *

Because Section 1951 authorizes prosecution for attempted Hobbs Act robbery where the defendant intends to threaten but has not conveyed a serious expression of an intent to do harm or used or attempted to use force, an attempt prosecution based on the "minimum conduct," *Pereida v. Wilkinson*, 141 S. Ct. 754, 763 (2021), covered by the Hobbs Act does not satisfy the definition of a crime of violence.

C. The Government's Textual Arguments Are Wrong

The government offers three textual responses to this argument. First, the government argues that to threaten force *is* to use force, such that an attempted threat itself constitutes an attempted use of force.

U.S. Br. 20-21.[2] Second, the government argues that an attempted threat of force is itself a "threatened use" of force. *Id.* at 21-25. Third, the government contends that the statute's reference to "attempted use" of force sweeps in "all attempts to commit crimes that involve physical force." *Id.* at 19-20. The first two arguments are novel; the third reflects the government's central argument in the lower courts. None is persuasive.

1. The government's contention that a defendant who attempts to threaten force has attempted to "use" force rests on a misapprehension of the meaning of the "use" of force in Section 924(c)(3)(A).

As explained above, "'[u]se' requires active employment," such that a perpetrator must "actively employ[] physical force against another person" or their property to come within the ambit of the statute. *Leocal*, 543 U.S. at 9 (internal citation omitted). A reference to using force in the future, as in a threat, cannot amount to "active" employment of physical force under Section 924(c)(3)(A). If anything, such references to force are akin to the use of "emotional force"—a category that this Court has explicitly distinguished from "physical force," which is "exerted by and through concrete bodies." *Johnson*, 559 U.S. at 138. Absent such physical "exert[ion]," there cannot be "use." Rather, "the phrase 'use of physical force' … means the 'volitional' or 'active' employment of force." *Borden*, 141 S. Ct. at 1825 (plurality opinion)

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[2] This argument abandons the position the government took in the court of appeals, where it stated that "actual use," "attempted use," and "threatened use" are "independent criteria." U.S. Br. 11, *United States v. Taylor*, No. 19-7616 (4th Cir. May 5, 2020).

(interpreting analogous language in 18 U.S.C. § 924(e)(2)(B)(i)) (internal citation omitted).

The "tripartite structure" (U.S. Br. 18) of Section 924(c)(3)(A) confirms that the government's equation of the threatened use of force with the actual use of force is incorrect. The statute separately identifies elements that cover the actual deployment of force ("use"), an inchoate use of force ("attempted use"), and conveying an intent to use force ("threatened use"). The three types of offense elements are distinct. True, a single course of conduct might involve more than one: a robber may hand a threatening note to a convenience store clerk, grab for cash in her till, and strike her if she resists. But the government's approach to the text (threatened use = actual use) would render the specific coverage of "the threatened use" of force superfluous, contrary to basic principles of statutory construction.[3]

In asserting the implausible contrary conclusion—that any *threat* to apply force to overcome the victim's will is a *use* of force—the government cites not a single case under any statute criminalizing threats that characterizes a threat as a "use" of force. Instead, the government draws on its intuition that a "[a] normal speaker of English could" say that a person has engaged in the "use" of force when he points a gun at a victim and demands cash. U.S. Br. 20. The government supports its appeal to intuition with this

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[3] The government's interpretation would likewise create redundancy in countless robbery statutes, which routinely include actual and threatened uses of force as separate means of committing the offense. *See, e.g.*, N.Y. Penal Law § 160.00; Wash. Rev. Code § 9A.56.190.

Court's conclusion that a person "uses … a firearm" in connection with a crime by "making a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense," *id.* at 20-21 (citing *Bailey v. United States*, 516 U.S. 137, 142-43, 148 (1995)).

These efforts ignore this Court's instruction to "construe language in its context," "[p]articularly when interpreting a statute that features as elastic a word as 'use.'" *Leocal*, 543 U.S. at 9; *see*, *e.g.*, *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks omitted). The context here is the "use of force" in a statute describing offense elements found in violent crimes. The use of force in this context describes the *application* of force—not an allusion to its possible future use. What it means to "use" an inanimate object such as a firearm in the statutory context of Section 924(c)(1)(A) differs from what it means to "use" a "force exerted by and through concrete bodies" "against the person [or property] of another." *Johnson*, 559 U.S. at 138-39. A firearm can be "used" to threaten (which would satisfy Section 924(c)(1)(A) as construed in *Bailey*). But to employ a firearm in the "use … of physical force against another"—the context here—requires conduct such as shooting or pistol-whipping the victim. As *Leocal* recognized, in this context, force can be "used" (or "employed") only when it is "actually … applied." 543 U.S. at 11.

The government's examples, *see* U.S. Br. 20, prove the point. Deploying a gunboat to send a message to a

country's leaders is not the same thing as shelling the beach, even if the threat to use force accomplishes the desired aim. Similarly, a person might "use" a gun to rob a person of his wallet by threatening to discharge the weapon. But the person has not "used" physical force against that individual. The threat itself accomplished the person's goal and thus prevented any need to use force.

2. The government alternatively argues that a defendant who is apprehended before he communicates a threat to anyone has nonetheless "threatened" the use of force. *See* U.S. Br. 24-25; Pet. 13. That contention misunderstands the meaning of "threatened" in this context. As explained, a "threat" in criminal law means a "communicated intent to inflict physical or other harm on any person or on property." *See supra* I.B.3. Statutory context makes clear that this is the sense of threat in the phrase "threatened use of force" in Section 924(c)(3)(A). This provision describes typical elements of violent crimes, and its use of the "transplanted" term threat "brings the old soil with it." *United States v. Davis*, 139 S. Ct. 2319, 2331 (2019) (internal quotation marks omitted).

a. The government cites no cases embodying its understanding of "threatened." Instead it turns to the *secondary* definition of threat—"[a]n indication of an approaching menace." *Threat*, Black's Law Dictionary (11th ed. 2019) (second definition); *see* U.S. Br. 16. As applied by the government, that version of the term "threat" connotes the risk that force may be used in the future, rather than any actual communication of an intent to use force. That definition may describe the "menace" in a pirate ship sailing towards its quarry, but it is a misfit for Section 924(c)(3)(A).

Because "a word is known by the company it keeps," *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961), "threatened use" must be read alongside its companions "use" and "attempted use," each of which connotes *actions* with respect to force. *See Leocal*, 543 U.S. at 9 ("[U]se requires active employment." (internal citation omitted)); *Resendiz-Ponce*, 549 U.S. at 106-07 (attempt offenses require an "overt act"). The government's reading would pair the active actions of using and attempting to use force with something entirely different: a "threatened use of force" that denotes a state of readiness to use force with no communication to anyone. That anomaly not only runs contrary to principles of *noscitur a sociis*, *see Jarecki*, 367 U.S. at 307, but also collapses a "threatened use of force" into an "attempted use of force."

Further undermining the government's theory is that, under its reading, the now-defunct residual clause would have had little purpose. That clause previously captured "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(c)(3)(B). The government's version of "threatened force" performs an identical function to the residual clause by embracing conduct that could be "objectively perceived as threatening" by some hypothetical observer precisely because of the potential risk that force would be used. U.S. Br. 24. The government may not "stretch the bounds of the [elements] clause to compensate for the now-invalid residual clause." *United States v. Middleton*, 883 F.3d 485, 492-93 (4th Cir. 2018). By recasting "threatened force" under its secondary definition—thereby transforming a provision meant to capture a communicated

intent to use force into a provision about the probabilities of what events may follow from certain conduct—the government would do just that. *See infra* I.D.

b. Considering the meaning of "threatened" in Hobbs Act robbery underscores the misfit between the government's definition of threatened (*i.e.*, "a course of action" that an "ordinary observer" might later interpret as an objective "threat to the physical well-being of innocent people," U.S. Br. 22-23, 36) and the understanding of threat in the criminal law. The statute defines robbery to mean 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." 18 U.S.C. § 1951(b)(1) (emphasis added). As used in the Hobbs Act, "threatened force" means a communicated threat, because property cannot be taken or obtained by means of threatened force absent such communication. This Court "normally presume[s] that the same language in related statutes carries a consistent meaning." *Davis*, 139 S. Ct. at 2329. And the government concedes that the meaning of "threat" in the Hobbs Act corresponds to the meaning of the same term in Section 924(c)(3)(A). *See* Pet. 10-11 (contending that Section 1951 *"tracks precisely* the 'use' and 'threatened use' components of Section 924(c)(3)(A)" (emphasis added)); *see also* U.S. Br. 16 (equating the Hobbs Act's reference to "threatened force … or fear of injury" to a "threatened use" of force under Section 924(c)(3)(A)). The Hobbs Act's use of the term "threat" in the typical criminal-law sense of a communicated intent to inflict harm thus reinforces that in Section 924(c)(3)(A), a

threatened use of force involves the communication of the threat.

c. The government seeks to erase the distinction between "attempted threats" and "completed threats" by relying on this Court's decision in *Elonis v. United States*, 575 U.S. 723 (2015), but that effort fails. *See* U.S. Br. 11, 16, 23. As support for the notion that a threat need not be communicated to be completed, the government splices together language from the opinion's recitation of the *defendant*'s description of dictionary definitions of "threat" (that a threat "conveys the notion of an intent to inflict harm"), with language that the Court ultimately *rejected* as the basis for the defendant's conviction because it constituted an impermissible negligence standard—that a statement "would be understood by a reasonable person" to convey harm. U.S. Br. 11 (quoting *Elonis*, 575 U.S. at 732, 737); *id.* at 16 (same), *id.* at 23 (same).

By stitching together these disparate statements from *Elonis*—none of which represents this Court's holding in the case—the government casts that decision as recognizing "threats" that are not communicated to anyone, but instead involve only actions that, had they been perceived by a hypothetical observer, would be interpreted as threatening. *See* U.S. Br. 36 (characterizing substantial steps in an attempted robbery—such as casing a store or buying weapons—to "constitute a 'threatened use of physical force' … *from the perspective of an ordinary observer*") (emphasis added and internal citation omitted). *Elonis* does not stand for that proposition. On the contrary, *Elonis* never contemplated a threat that was observed solely by a hypothetical reasonable person. All of the dictionary definitions of "threat" considered

in *Elonis* reflected solely the *primary* definition of "threats" as communicated expressions of an intent to inflict harm. *See* 575 U.S. at 732-33 (citing dictionaries). And all the threats at issue in *Elonis* were in fact communicated to real-world recipients through social media posts. *See id.* at 727-31. The government accordingly cannot rely on *Elonis* for its contention that a hypothetical reasonable observer's interpretation of steps towards an incomplete robbery can be used to satisfy an element of "threatened use of physical force" under Section 924(c)(3)(A).

d. The government likewise derives no support from its citations to cases in which conduct was prosecuted as a "threat" even when the threatening message did not reach its intended victim. *See* U.S. Br. 24-25 (citing cases). Even assuming that a "threat" under Section 924(c)(3)(A) need not reach its *intended* victim—a proposition that is far from certain, given the textual differences between many of the broad threat statutes at issue in the government's cases and Section 924(c)(3)(A)—these cases still do not support the government's view, because each involved a threatening statement made *to someone*, even if that individual was not the intended victim of the threatened harm. *See United States v. England,* 507 F.3d 581, 584-85, 589 (7th Cir. 2007) (defendant made threats against one family member to another family member, satisfying the "require[ment] that *someone*—not necessarily the intended victim—perceive" an "expression" of "an intent to inflict injury on another"); *United States v. Spring*, 305 F.3d 276, 280, 281 n.1 (4th Cir. 2002) (defendant told multiple fellow inmates he wanted to kill probation officer, and question of whether defendant actually intended to carry out his

threats was not raised); *United States v. Martin*, 163 F.3d 1212, 1213 (10th Cir. 1998) (defendant "threatened to unload six bullets into [a police officer's] brain" in conversation with an informant, with the court considering "the key point" to be "whether the defendant intentionally communicated the threat"); *United States v. Kosma*, 951 F.2d 549, 550 (3d Cir. 1991) (defendant "mailed a series of written communications"); *United States v. Smith*, 1991 WL 36269, at *2 (7th Cir. 1991) (tbl.) (defendant communicated threat against a judge to an FBI employee, violating a statute that "punishes threats … regardless of the person or agency to whom the threat is conveyed"). Because each of these cases involves an *actually communicated* threat, none supports the government's extension of "threat" to unexpressed intentions to do harm that take on a "threatening" valance only through the eyes of a purely hypothetical observer.

At bottom, the government has no support for collapsing "attempted threats" into the "threatened use of force." Its current position—that the meaning of "threat" turns on what "[a]nyone" would say about a course of conduct (U.S. Br. 22)—would mean that a person threatens to use force when he drives toward a store alone, intending to utter a bluff to obtain money from a cashier. The threat would be only in the defendant's mind. But if the would-be robber abandoned his attempt and later revealed to another person what he had been intending to do, a hypothetical observer could describe the conduct as a "threatened use of force." The words of a criminal statute cannot be stretched that far.

3. The government's third textual argument—that the words "attempted use" in the elements clause necessarily reach "all attempts to commit crimes that involve physical force," U.S. Br. 20, 32—fares no better. The government contends that the "attempted use" language is one example of "Congress's general practice of 'interweav[ing] prohibitions on attempted crimes within the statutes defining the underlying substantive offenses.'" *Id.* at 20 (quoting *United States v. Walker*, 990 F.3d 316, 329 (3d Cir. 2021)). Yet that reading overlooks that the elements clause encompasses crimes that have "as an element the use, *attempted use*, or threatened use of physical force against the person or property of another," full stop. The clause does not reach all attempts to commit a crime of violence. Congress could easily have written the law to do so: "For purposes of this subsection, the term 'crime of violence' means an offense that is a felony and (i) has as an element the use or threatened use of physical force against the person or property of another, *or* (ii) is an attempt to commit an offense that has such an element." Had Congress intended to "interweave" a comprehensive prohibition on attempts into the elements clause, it would have opted for such a construction, rather than nestling the word "attempted" in the middle of the statute's list of qualifying elements.

The government does not argue that "attempted" modifies both "use" and "threatened use" in Section 924(c)(3)(A). Nor could it. The statute separates "attempted use" from "threatened use" with a comma and the word "or"; and the adjective "attempted" appears in the middle of a three-part list. The modifier "attempted" therefore does not carry over beyond

"use." This Court has recognized that statutory meaning can turn on "grammatical structure," including the placement of a comma. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *see also* Bryan A. Garner, Garner's Dictionary of Legal Usage 730 (3d ed. 2011) ("The fallacies underlying" the notion that "punctuation is not a part of the statute" are "too obvious to require extensive explanation.").

D. The Government's Strained Interpretation Of The Elements Clause Effectively Revives The Defunct Residual Clause

The government's reading of the elements clause as a broad net that would catch all Hobbs Act attempts (U.S. Br. 18-25) exposes a more basic flaw that pervades its position: under the government's reading, elements-clause analysis would incorporate the same sort of analysis that formerly characterized the invalidated residual clause. The Court should reject the government's effort to resuscitate the residual clause.

1. Congress enacted the residual clause precisely because it wanted to "provide[] a home for many crimes regardless of whether they included an element of violent 'physical force.'" *Stokeling v. United States*, 139 S. Ct. 544, 562 (2019) (Sotomayor, J., dissenting). As noted, the residual clause thus defined "crime of violence" offenses as those "that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B). To determine whether an offense qualified as a crime of violence under the residual clause, judges were "required to imagine the idealized 'ordinary case' of the defendant's crime and then guess

whether a 'serious potential risk of physical injury to another' would attend its commission." *Davis*, 139 S. Ct. at 2325-26 (quoting *Johnson v. United States*, 576 U.S. 591, 596-97 (2015)).

In *Davis*, this Court invalidated the residual clause, holding that this sort of ordinary-case analysis "provide[d] no reliable way to determine which offense qualify as crimes of violence." *Id.* at 2324; *accord Johnson*, 576 U.S. at 598 (ordinary-case analysis required by ACCA's residual clause caused "more unpredictability and arbitrariness" for specifying unlawful conduct than the Constitution allows); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018) (ordinary-case analysis required by residual clause of 18 U.S.C. § 16 was unconstitutionally vague because it required courts "to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk" (internal quotation marks omitted)).

2. The government attempts to revive that rejected mode of analysis here, this time under Section 924(c)'s elements clause. By pointing to a series of cases that it regards as exemplifying "many" Hobbs Act attempts, the government employs reasoning that once would have justified treating an offense as a crime of violence under the residual clause. U.S. Br. 27-32. For instance, the government invokes the "likelihood of a violent physical confrontation" in attempted Hobbs Act robberies, *id.* at 28, and asserts that "[w]ould-be robbers routinely provoke forceful resistance from other citizens," *id.* at 29. But this asks this Court to do precisely what it has repudiated: to "imagine the idealized 'ordinary case' of the

defendant's crime." *Davis*, 139 S. Ct. at 2326. The government's approach thus runs counter to *Davis*, *Johnson*, and *Dimaya*, which all "teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *Id.*

One indication of the government's resort to residual-clause-style analysis is its aversion to referring to "elements," instead preferring to discuss what an offense might "involve." *See, e.g.*, U.S. Br. 10-11, 15-16, 19-22, 24-25, 28, 30, 34-35. For example, the government argues that Congress must have meant to "reach[] all attempts to commit crimes that *involve* physical force." *Id.* at 20 (emphasis added). This imprecise use of the term "involve"—in the context of the government's brief, to denote not what a crime *necessarily* entails (*i.e.*, an element of the crime), but instead what the crime *typically* looks like—betrays the government's continued reliance on inapplicable residual-clause-style analysis.

This Court has repeatedly confirmed that pointing to violent commissions of an offense on particular occasions "has no purchase" under the categorical approach. *Borden*, 141 S. Ct. at 1832 (plurality opinion). Under that approach, "the existence of such cases is neither here nor there," because "[a]n offense does not qualify … unless the least serious conduct it covers falls within the elements clause." *Id.*; *accord Pereida*, 141 S. Ct. at 763 (proper analysis considers "the minimum conduct required to secure a conviction"); *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) ("[W]e must presume that the conviction rested upon nothing more than the least of the acts

criminalized" (alterations and internal quotation marks omitted)).

Section 924(c)(3)(A) does not cover attempts based on the conduct "routinely" or "often" seen in predicate violations. U.S. Br. 27, 29. Rather, it covers any felony that "has as an *element* the … *attempted use* … *of physical force* against the person or property of another." An element of a crime is one of "[t]he constituent parts," such as "the actus reus, mens rea, and causation," that the prosecution must prove to sustain a conviction. *Elements of Crime*, Black's Law Dictionary (11th ed. 2019). And the elements of attempted Hobbs Act robbery can be proved through attempted threats, which fall outside the elements described in Section 924(c)(3)(A)'s definition of "crime of violence." It does not matter that "[m]any defendants" do something violent that the government need not prove to secure an attempted Hobbs Act robbery conviction. U.S. Br. 29. Covering such crimes was the *raison d'être* of the residual clause, which looked to the "nature" of particular crimes (18 U.S.C. § 924(c)(3)(B)) as courts pictured them.

3. This Court's invalidation of the residual clause is no reason to expand the construction of the elements clause—or to abandon the proper application of the categorical approach. As Justice Thomas has observed, the invalidation of ACCA's residual clause in *Johnson* "left prosecutors and courts in a bind. … The workaround was to read the elements clause broadly. But the text of that clause cannot bear such a broad

reading." *Borden*, 141 S. Ct. at 1834-35 (Thomas, J., concurring in the judgment).[4]

Of course, Congress is free to enact a constitutionally sound substitute for the residual clause, or to amend the elements clause to expand its reach. If it desires to expand the elements clause to cover the attempted threatened use of force, it could easily say so. *See supra* I.C.3. But it is not the judicial function to rewrite or reinterpret a criminal statute to compensate for previously invalidated provisions as a means of accommodating the government's interest in covering crimes it believes Congress wanted to reach. *Cf. Davis*, 139 S. Ct. at 2327 (rejecting government's "new 'case-specific'" interpretation of the residual clause). That is particularly true when doing so would revive the vagueness quagmire that doomed the residual clause.

II. THE LEGISLATIVE HISTORY OF SECTION 924(C)(3)(A) DOES NOT SUPPORT THE GOVERNMENT'S POSITION

Given the clarity of the statutory text, there is no need to consider legislative history. *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019). Even if the text were ambiguous, legislative history cannot be used to expand the reach of a criminal statute. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) ("Even were the statutory language … ambiguous, longstanding principles of lenity …

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[4] While the government argues that attempted robbery crimes would qualify under the residual clause as interpreted by Justice Thomas in *Borden*, *see* U.S. Br. 27-28 (citing 141 S. Ct. at 1834-35 (Thomas, J., concurring in the judgment)), it does not actually argue that this Court should overrule its prior cases holding that the residual clause is constitutionally invalid.

preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."); *Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.").

In any event, legislative history is of no help to the government. The government asserts that "[t]he elements clause's inclusion of attempted Hobbs Act robbery is … the product of deliberate congressional design." U.S. Br. 25. But that position does not follow from the government's premises. The government reasons that (i) the elements clause must include common-law robbery because robbery is the quintessential crime of violence and was an enumerated offense in the original version of ACCA; (ii) when ACCA was amended to include an elements clause, it was intended to expand the reach of the original ACCA; and (iii) a Senate report described the uniform definition of "crime of violence" from which Section 924(c)(3)(A) evolved as including "threatened or attempted simple assault or battery on another person." U.S. Br. 17-18, 25-26. None of these contentions supports construing Section 924(c)(3)(A) more broadly than its words permit.

A. The Evolution Of The Language In ACCA Does Not Establish That Attempted Hobbs Act Robberies Are Covered By Section 924(c)(3)(A)

The evolution of ACCA does not support the notion that attempted threats are covered by Section 924(c)(3)(A) notwithstanding that the text of the

statute excludes them. Assuming that the elements clauses in ACCA and Section 924(c)(3)(A) reach substantive crimes with the elements of common-law robbery, *see Stokeling v. United States*, 139 S. Ct. 544, 551 (2019), the same cannot be said for all forms of *attempted* robbery.

On the contrary, Congress rejected proposed language for the original ACCA that would have embraced all attempted robbery offenses. The Senate version of that original statute—Senate Bill 52—contained such language. *See* S. 52, 98th Cong., 2d Sess., § 2 (1984) (providing enhanced penalties for using a firearm by persons with two prior convictions for "any robbery or burglary offense, or a conspiracy or attempt to commit such an offense"). But the House did not adopt a parallel version of Senate Bill 52. Instead, the House adopted House Resolution 6248, which borrowed some language from Senate Bill 52 but did not include inchoate crimes. House Resolution 6248 applied only to "robbery or burglary, or both." H.R. 6248, 98th Cong., 2d Sess. § 2 (1984). The Senate adopted the House version on October 4, 1984, and that version became the original ACCA. *See* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185 (1984). Congress's rejection of the Senate language and omission of attempted robbery from the final version of the original ACCA indicates that in 1984, it did not intend attempted robberies to qualify as predicate felonies.

When ACCA was expanded in 1986, it did not reintroduce language that would have captured all inchoate offenses in the manner contemplated by Senate Bill 52. Instead, the elements clause in the amended ACCA encompasses offenses that have "as an

element the use, attempted use, or threatened use of physical force against the person of another," Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-40 (1986), rather than offenses that have "as an element the use or threatened use of physical force against the person of another, *or a conspiracy or attempt to commit such an offense*."

Thus, the expansion of ACCA in 1986 does not resolve which types of attempted robbery now fall within its ambit or the ambit of the similarly phrased Section 924(c)(3)(A). That question is instead resolved by the text of the statute, which makes clear that attempted Hobbs Act robbery cannot qualify as a "crime of violence."

B. The Legislative History Of Section 924(c)(3)(A) Does Not Show A Congressional Design To Include Attempted Hobbs Act Robbery Within The Elements Clause

The government relies on the brief discussion of what became Section 924(c)(3)(A) in a 1983 Senate report, together with Senator Specter's quotation of that report at a House Judiciary Committee hearing, to argue that Congress intended the statute to cover attempt crimes, including "attempted assault." U.S. Br. 25-26 (first citing S. Rep. No. 225, 98th Cong., 1st Sess. (1983); then citing *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 47 (1986)). But the Senate report does not support the government's argument.

The 1983 Senate report gives two examples of "crimes of violence": simple assault, which it refers to

as "threatened or attempted simple assault" (then codified at 18 U.S.C. § 113(e), now codified at § 113(a)(5)) and battery (then codified at 18 U.S.C. § 113(d), now codified at § 113(a)(4)). Contrary to the government's contention (U.S. Br. 26), the report's use of "threatened or attempted" language does *not* refer to inchoate offenses, but rather to the two means of committing simple assault: "'by either a willful *attempt* to inflict injury upon the person of another, or by a *threat* to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.'" *United States v. Dupree*, 544 F.2d 1050, 1051-52 (9th Cir. 1976); *accord, e.g.*, *United States v. Hathaway*, 318 F.3d 1001, 1008 (10th Cir. 2003). Indeed, given the absence of a general federal attempt statute, no such crime as attempted simple assault exists under the former Section 113(e)—much less threatened simple assault. Far from invoking the nonexistent crime of inchoate simple assault, the Senate report's language instead precisely tracks the two means of committing completed simple assault. The reference to simple assault thus says nothing about an *attempted threat* qualifying as a crime of violence, since simple assault, unlike attempted Hobbs Act robbery, cannot be accomplished by attempted threat.

The government's reliance on the 1983 Senate report faces another obstacle. Treating that report's reference to simple assaults and battery as a definitive interpretation of the elements clause would mean that *Johnson* (2010) and *Borden* were both wrongly decided and that much of the reasoning of *Stokeling* was meaningless. Simple assault under the former Section

113(e) can be completed with offensive touching, *see, e.g.*, *United States v. Diamond*, 463 F. App'x 608, 609 (9th Cir. 2011); *United States v. Delis*, 558 F.3d 177, 178 (2d Cir. 2009), thus running counter to this Court's determination in *Johnson* that the force required under ACCA's elements clause is "*violent* force … capable of causing physical pain or injury," 559 U.S. 133, 140 (2010). For the same reason, if the 1983 Senate report controlled the meaning of the elements clause, it would render unnecessary the pains *Stokeling* took to distinguish the degree of force required to commit robbery from that required to commit common-law battery. *See* 139 S. Ct. at 552-53. And because battery under Section 113 can be committed recklessly, *see United States v. Loera*, 923 F.2d 725, 728 (9th Cir. 1991), the 1983 Senate report's reference to battery cannot be reconciled with *Borden*'s exclusion of offenses requiring only the *mens rea* of recklessness from the scope of the ACCA elements clause, *see* 141 S. Ct. 1817, 1834 (2021) (plurality opinion); *id.* at 1835 (Thomas, J., concurring in the judgment).

Unsurprisingly, courts have routinely resisted the government's attempts to rely on this language in the 1983 Senate report to broaden the definition of a "crime of violence." *See, e.g.*, *Popal v. Gonzalez*, 416 F.3d 249, 254 n.5 (3d Cir. 2005) (rejecting government's reliance on the report's reference to simple assault to argue that Section 16(a)'s crime-of-violence definition encompasses simple assault committed recklessly); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1128-29 (9th Cir. 2006) (adopting *Popal*'s reasoning); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003) (rejecting the government's

"attempts to avoid the clear language of § 16(a)" by relying on the report's reference to simple assault); *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015) (adopting *Chrzanoski*'s reasoning "debunk[ing]" an "over-reading" of this language from the report). This Court should do the same. Here, too, the government cannot rely on the 1983 Senate report to distort the meaning of Section 924(c)(3)(A) beyond its text to cover attempted Hobbs Act robbery.[5]

III. "ATTEMPTED THREAT" CASES THAT DO NOT SATISFY THE ELEMENTS CLAUSE ARE NOT THE PRODUCT OF LEGAL IMAGINATION

The government faults the Fourth Circuit—and by extension, respondent—for failing to identify an "actual litigated case" (U.S. Br. 35) in which the government prosecuted someone for attempted Hobbs Act robbery based on an unconsummated threat. But the government's claim that respondent cannot identify any such case is both legally irrelevant and factually wrong.

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[5] The government also relies (U.S. Br. 26) on the approach adopted by the U.S. Sentencing Commission in the Sentencing Guidelines. *See* U.S.S.G. Manual § 4B1.2 cmt. n.1. But the Commission cannot modify Acts of Congress, and the inaction of Congress on the Guidelines (let alone on commentary, which need not be submitted to Congress at all) does not make law. Beyond that, the Guidelines commentary also treats conspiracies as crimes of violence, *id.*, and the government has not disputed that conspiracies do not so qualify under the elements clause, Pet. App. 1a, 4a.

A. The Text Of A Statute Can Itself Establish A "Realistic Probability" Of Its Application To Conduct Encompassed By That Text

Identifying litigated cases is not necessary where, as here, the text of the statute and black-letter law make clear that it is broader than the elements clause.

1. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), an individual based his claim that a state law was overbroad on something other than statutory language—there, the prospect that a state court would apply an aspect of the aiding and abetting doctrine in an unusually broad manner. The Court held that, in that circumstance, he must show 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" by identifying "cases in which the state courts" have actually applied state law in a non-generic manner. *Id.* at 193. Mere application of "legal imagination to [the] … statute's language" would not do. *Id.*

Here, no legal imagination is necessary: The text of the Hobbs Act and black-letter law on attempt liability make clear that attempted Hobbs Act robbery can be prosecuted where a defendant merely attempts to threaten force, *see supra* I.A, a point the government conspicuously does not contest. Where no real dispute exists about whether attempted Hobbs Act robbery covers such conduct, the only question is whether that crime "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). If it does not, "the categorical analysis is complete; there is no categorical match." *Gordon v. Barr*, 965 F.3d 252, 260 (4th Cir. 2020). Put differently, where the explicit

language of an offense establishes that its scope exceeds the relevant definition, there is no need to hypothesize about whether a statute would be interpreted to reach conduct that falls outside of the defined category—the statute itself establishes the "realistic probability" that it is facially overbroad.

2. This Court's other categorical approach cases confirm the point.

The only other elements-clause case in which this Court has so much as mentioned a "realistic probability" analysis is *Moncrieffe v. Holder*, 569 U.S. 184 (2013). There, without reference to any realistic probability approach, the Court held that because a Georgia controlled substances statute was, on its face, broader than the federal statute, it did not constitute an aggravated felony. *Id.* at 194-95. Only later, responding to the government's argument that application of the categorical approach would "frustrate the enforcement of other aggravated felony provisions," did the Court invoke *Duenas-Alvarez*. *Id.* at 205. One such provision, Section 1101(a)(43)(C) of the Immigration and Nationality Act, refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U.S.C. § 921(a)(3), and the government worried that "a conviction under any state firearms law that lacks [an antique firearms] exception" would fail the categorical inquiry, 569 U.S. at 205.

Without analyzing any particular state's statutory language, the Court mentioned *Duenas-Alvarez* and suggested that "[t]o defeat the categorical comparison … a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases

involving antique firearms." 569 U.S. at 205-06. This meant that if the state statute did not, standing alone, reveal that it criminalizes antique firearms, the noncitizen would be required to show a realistic probability that the statute would be interpreted to allow prosecution for an antique firearm. *See* 18 U.S.C. § 921(a)(16) (defining "antique firearm" to mean firearms manufactured before 1898, or "muzzle loading" rifles, shotguns, or pistols designed to use black powder).

In different categorical approach contexts, this Court's decisions establish that where "the elements of [the defendant's] crime of conviction … cover a greater swath of conduct than the elements of the relevant [generic] offense," that disparity "resolves th[e] case." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (comparing elements of Iowa burglary to the elements of the relevant ACCA offense, generic burglary). In such circumstances, no occasion exists to look beyond the plain-text comparison. *See id.* (holding that state statute was overbroad based solely on textual comparison); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (same; petitioner "needs no more to prevail"); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988-90 (2015) (same); *Descamps v. United States*, 570 U.S. 254, 264-65 (2013) (same).

Mellouli is particularly instructive. There, this Court considered whether a conviction under a Kansas statute was categorically a conviction "relating to a controlled substance (as defined in [federal law])." 135 S. Ct. at 1984. The state statute expressly encompassed several non-federally-controlled substances, but the government argued that the state statute was not actually broader than the generic offense because

the petitioner could identify "no Kansas paraphernalia prosecutions involving non-federally-controlled substances." U.S. Br. 39-40 n.6, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (No. 13-1034). This Court was unmoved. Because the language of the state law "was not confined to federally controlled substances," the plain text of the law was broader than its generic counterpart. 135 S. Ct. at 1988. The categorical approach did not allow the government to shift the burden to the defendant to identify a particular case where a state prosecutor had actually charged broader conduct given that the statute of conviction explicitly covered the conduct.

3. The weight of authority in the courts of appeals is consistent with this approach, declining to require a showing of "actual cases" where, as here, the statute of conviction is facially broader than the federal statute to which it is being compared. *See, e.g.*, *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017); *Hylton v. Sessions,* 897 F.3d 57, 65 & n.4 (2d Cir. 2018); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009); *United States v. Aparicio-Soria*, 740 F.3d 152, 157-58 (4th Cir. 2014) (en banc); *United States v. Havis*, 907 F.3d 439, 446 (6th Cir. 2018); *Gonzalez v. Wilkinson*, 990 F.3d 654, 660-61 (8th Cir. 2021); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020) (en banc); *United States v. Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017); *Ramos v. United States AG*, 709 F.3d 1066, 1071-72 (11th Cir. 2013).

The contrary approach that the government supports has prompted "nearly unanimous disagreement," for good reason: the requirement to point to actual cases has no basis "when the statutory language itself, rather than the application of legal imagination

to that language, created the realistic probability that a state would apply the statute to conduct beyond the generic definition." *Hylton,* 897 F.3d at 65 (internal quotation marks omitted). If the rule were as the government has it, "'realistic probability' [would] mean[] that petitioners must prove through specific convictions that unambiguous laws really mean what they say." *Gonzalez*, 990 F.3d at 660-61. Of course, "a good rule of thumb for reading [statutes] is that what they say and what they mean are one and the same." *Mathis*, 136 S. Ct. at 2254.

Even members of the one circuit that has consistently applied the outlier approach have expressed doubts about its own precedent. Alone among the circuits, "the Fifth Circuit creates 'no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face,'" *Alexis v. Barr*, 960 F.3d 722, 727 (5th Cir. 2020) (citing *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017)). But in *Alexis*, Judge Graves issued a concurrence *to his own majority opinion*, explaining that while the panel was bound by Fifth Circuit precedent, he believed that "the realistic probability test and 'actual case' requirement are simply illogical and unfair" in this context. *Id.* at 731 (Graves, J., concurring).

B. The Government Prosecutes Pure Attempted Threat Cases

Not only is the realistic probability of prosecution satisfied by the explicit text of the Hobbs Act, *see Hylton*, 897 F.3d at 63, but the government's argument is also wrong on the facts because no "legal imagination," *Duenas-Alvarez*, 549 U.S. at 193, is required to envision these cases—they already exist.

For example, in *United States v. Williams*, the defendant was charged with attempted Hobbs Act robbery based on his plan to communicate an intent to seize property against an undercover officer's will, and the substantial, but non-violent, steps he took toward doing so. *See* Gov't Trial Mem. 7-8, *United States v. Williams*, No. 10-cr-427-HB-6 (E.D. Pa. Feb. 22, 2011) (ECF No. 230). But he ultimately just sat in his car and did not execute the plan. *Id.* at 8. Nevertheless, the government charged him; the jury convicted him; the district court denied a motion for acquittal; and the Third Circuit affirmed on appeal. *See United States v. Williams*, 531 F. App'x 270 (3d Cir. 2013).

Similarly, in *United States v. Licht*, the defendant was charged with two counts of completed bank robbery and two counts of attempted bank robbery in violation of 18 U.S.C. § 2113(a).[6] *See* Information, *United States v. Licht*, No. 18-cr-60248-BB (S.D. Fla. Sept. 13, 2018) (ECF No. 17). During the completed robberies, he brought an unloaded gun into the bank and used it to threaten bank tellers and obtain money. Stipulated Factual Proffer ¶ 9, *United States v. Licht*, No. 18-cr-60248-BB (S.D. Fla. Dec. 4, 2018) (ECF No. 29). During the attempted robberies, he could not enter the bank at all (in one instance) or fled immediately upon entering the lobby (in the other instance). *Id.* ¶¶ 3, 4. Accordingly, in the attempted robberies, he did not attempt to use force; he did not

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[6] Although *Licht* concerns bank robbery, "every violation of [the federal bank robbery act] would also establish a Hobbs Act violation." *United States v. Holloway*, 309 F.3d 649, 652 (9th Cir. 2002). The government itself included *Licht* in its list of federal defendants who were convicted under both Section 924(c) and a federal robbery statute. See Pet. 21; BIO 10 n.2; U.S. Br. 38.

threaten to use force; and he certainly did not use force.

C. The Violence In Some Attempted Robbery Prosecutions Is Irrelevant Under The Categorical Approach

With little to work with in the text or structure of the relevant statutory provisions, the government describes numerous attempted Hobbs Act prosecutions involving violent conduct, purportedly to illustrate why this Court should ground the categorical approach in "reality." U.S. Br. 37; *see id. at* 28-32. But as explained, the categorical approach turns on *elements*, not prosecutions. *See supra* II.A.2.[7]

The government's concerns reduce to a policy argument, asserting that affirming the judgment below "would inevitably exclude many serious violent criminals" from Section 924(c)(3)(A). U.S. Br. 39. But "[i]t is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair." *Pereida v. Wilkinson*, 141 S. Ct. 754, 766-67 (2021). That is the province of Congress, *see supra* I.D.3, and the government's appeal to practical consequences cannot override the text of the relevant law. *See Davis*, 139 S. Ct. at 2335 ("What's the point of all this talk of 'bad' consequences

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[7] For the same reason, the government's suggestion that this Court should look beyond the elements of the predicate offense to consider that Section 924(c) offenses involve firearms (U.S. Br. 27) is fundamentally inconsistent with elements-clause categorical analysis. *See United States v. Davis*, 139 S. Ct. 2319, 2331 (2019) (rejecting circumstance-specific interpretation of Section 924(c)(3)(A)).

if not to suggest that judges should be tempted into reading the law to satisfy their policy goals?").

In any event, the government's concerns about consequences are "considerably overblown." *Id.* at 2335. "[W]hen a defendant's § 924(c) conviction is invalidated" or a prosecution unavailable, the defendant still may often be convicted of the underlying federal crime of violence—here, Hobbs Act robbery, carrying a twenty-year maximum sentence—and "the district court may increase the sentences for any remaining counts if such an increase is warranted." *Id.* at 2336 (internal quotation marks omitted). There is no reason to distort categorical-approach doctrine or engage in judicial policymaking to address the problem the government identifies because that problem does not exist.

IV. THE RULE OF LENITY DICTATES THAT THE GOVERNMENT'S POSITION FAILS

A. As described above, attempted Hobbs Act robbery can be committed by means of attempted threats alone. *See supra* I.A. And the text and statutory structure of Section 924 establish that "the use, attempted use, or threatened use of physical force," 18 U.S.C. § 924(c)(3)(A), does not cover attempted threats. *See supra* I.B. But if, after applying traditional tools of statutory interpretation, the Court concludes that it is "left with an ambiguous statute," *Shular v. United States*, 140 S. Ct. 779, 787 (2020) (internal quotation marks omitted), the rule of lenity dictates that it adopt the more lenient interpretation.

The rule of lenity teaches "that ambiguities about the breadth of a criminal statute should be resolved in

the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *see Jones v. United States*, 529 U.S. 848, 858 (2000) (similar); *Liparota v. United States*, 471 U.S. 419, 427 (1985) (similar). That is just as true of "sentencing provisions" as "criminal statutes" defining underlying crimes. *Taylor v. United States*, 495 U.S. 575, 596 (1990).

This Court has sometimes required a criminal statute to have "ambiguity" and other times required it to have "grievous ambiguity" before finding that the rule of lenity comes into play. *Shular*, 140 S. Ct. at 788 (Kavanaugh, J., concurring). But while the rule of lenity itself dates back centuries, *see United States v. Wiltberger*, 18 U.S. 76, 95, 105-06 (1820), the notion that lenity applies only in cases of "grievous ambiguity" appeared only when *Chapman v. United States*, 500 U.S. 453, 463 (1991), quoted *Huddleston v. United States*, 415 U.S. 814, 831 (1974), for that proposition. But *Huddleston* merely stated that the Court "perceive[d] no grievous ambiguity or uncertainty in" a particular statute, 415 U.S. at 831, without suggesting that "grievous ambiguity" was a threshold requirement for lenity.

Of the two, the ambiguity standard is more consistent with the rule's origins and purpose. Lenity is meant to protect citizens from punishment that is not "clearly prescribed" and to provide Congress with the proper incentive to clarify the law while preventing courts from inventing it "in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion of Scalia, J.). It also "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. Moreover, because ambiguity is only rarely "grievous," the

"grievous ambiguity" standard threatens to "reduce" the rule of lenity from a "presupposition of our law" to "a historical curiosity." *Holloway v. United States*, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting). In short, the ambiguity standard furthers the aims of the rule of lenity by advancing democratic accountability, preserving separation of powers, and protecting the due process principle of fair warning.

B. Here, at the very least, the government's expansive reading of Section 924 is not unambiguously correct—and when all the tools of statutory construction fail to resolve genuine ambiguity about whether Congress has demanded a serious mandatory consecutive prison term, that ambiguity can fairly be categorized as "grievous."

The government argues that attempted threats are "uses of force" by abandoning the universal understanding that the use of force requires the application of force. It says that an attempted threat *is* a "threatened use of force"—inexplicably interpreting "threatened" according to its secondary definition of "approaching menace," rather than its primary and contextually appropriate definition of a communicated intent to do harm, thus departing from ordinary criminal-law standards. It treats the statutory structure of Section 924(c)(3)(A) as an amalgam of concepts to cover the "waterfront" of uses of forces to obtain property (U.S. Br. 18), thus glossing over limitations inherent in the words Congress used. It improperly relies on legislative history to expand the scope of a criminal law. And it resorts to an "ordinary case" approach that is foreign to elements-clause analysis. None of those arguments supports the government's strained reading of the statutes at issue.

But at the very least, the rule of lenity dictates that doubts about the government's position require its rejection.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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STATUTORY PROVISIONS INVOLVED

18 U.S. Code § 16 - Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or prop-erty of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S. Code § 924 – Penalties [excerpted in relevant part]

* * * * *

(c)

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, 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—

(i) be sentenced to a term of imprisonment of not less than 5 years;

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

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S. Code § 1951 - Interference with commerce by threats or violence

(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 not 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, or 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.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.