No. 20-1459

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

JUSTIN EUGENE TAYLOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR AMICUS CURIAE JOHN PANGELINAN IN SUPPORT OF RESPONDENT JUSTIN TAYLOR

JOSEPH E. HOREY
BANES HOREY BERMAN & MILLER, LLC
200 Marianas Business Plaza, Susupe, Saipan
Commonwealth of the Northern Mariana Islands
PO Box 501969, Saipan MP 96950
Telephone: (670) 234-5684
Fax: (670) 234-5683
E-mail: jhorey@pacificlawyers.law

Counsel of Record for Amicus Curiae John Pangelinan

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICUS[1]

Amicus John Pangelinan has completed his sentence in federal prison for Hobbs Act robbery attempt (and/or conspiracy), but remains incarcerated there due to the Ninth Circuit's view that Hobbs Act robbery attempt is a "crime of violence" justifying an additional sentence. *See generally Pangelinan v. United States*, 2020 WL 1858403 (D.N.M.I. 2020). His appeal, contending that it is not, is stayed pending the outcome of this case.[2]

SUMMARY OF ARGUMENT

Hobbs Act robbery attempt is not a "crime of violence" under 18 U.S.C. § 924(c)(1)(A), because, as explained further herein, it can be committed by attempted robbery by threat, and various other similar ways, which do not entail physical force, and because, in any event, it does not have as an element the actual, attempted or threatened use of force.

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[1] Written consent to the filing of this *amicus* brief has been provided by counsel of record for each party.

No counsel for any party authored this brief in whole or in part. No party, counsel for any party, or any other person, other than the *amicus curiae* or his counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] *See United States v. Pangelinan*, No. 20-15783, Dkt. 29 (9th Cir. July 14, 2021) ("Submission of this case is deferred pending the decision of the United States Supreme Court in *United States v. Taylor*, No. 20-1459.").

ARGUMENT

I. Introduction

If one uses, or even carries, a firearm while committing a "crime of violence," an additional term of up to ten years in prison is authorized by statute.[3] The issue now before the Court is whether attempted robbery, in violation of the Hobbs Act,[4] falls within the statutory definition of a "crime of violence" for these purposes.[5] This issue has taken on a new importance since a broad definition of the term – subparagraph (B) of the statute defining it – was struck down as unconstitutionally vague in *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319 (2019), leaving only the narrower subparagraph (A).[6]

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[3] 18 U.S.C. § 924(c)(1)(A) ("[A]ny person who, during and in relation to any *crime of violence* . . . 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* . . . be sentenced to a term of imprisonment") (emphasis added).

[4] 18 U.S.C. § 1951(a) ("Whoever . . . obstructs, delays, or affects commerce . . . by robbery . . . *or attempts or conspires so to do* . . . shall be fined under this title or imprisoned not more than twenty years, or both.") (emphasis added).

[5] For the remaining statutory definition, post-*Davis*, *see* 18 U.S.C. § 924(c)(3)(A) ("[T]he term 'crime of violence' means an 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*[.]") (emphasis added).

[6] For the former second part of the statutory definition, as it existed pre-*Davis*, *see* 18 U.S.C. § 924(c)(3)(B) ("[T]he term 'crime of violence' means an offense that is a felony and . . . that by its nature, involves a substantial risk that physical force against the

Before *Davis*, there had been little cause for concern whether Hobbs Act robbery attempt fell within the narrower definition in subparagraph (A), because it had pretty clearly fallen within the broad definition of subparagraph (B), and thus within the term "crime of violence" as used elsewhere in the statute. Now, however, post-*Davis*, the narrower definition in subparagraph (A) is the only operative definition of the term. The question whether Hobbs Act robbery attempt falls within that definition is therefore now entirely determinative of whether such an attempt constitute a "crime of violence."

The question has split the circuit courts, panels within the circuit courts, and the district courts. *Amicus* writes separately to draw the Court's attention to those post-*Davis* cases on the correct side of the split. In addition to the Fourth Circuit in this case, dissenting judges in the Ninth and Eleventh Circuits, as well as several district courts, have found that Hobbs Act robbery attempt is *not* a statutory "crime of violence" as now defined in subparagraph (A). For example, Judge Ramona Mangloña, of the District Court for the Northern Mariana Islands, would have held that Hobbs Act robbery attempt was *not* a "crime of violence" as defined in subsection (A), but was constrained to hold the contrary by the binding authority of the Ninth Circuit's decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), issued just shortly beforehand, over a cogent dissent by

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person or property of another may be used in the course of committing the offense.").

Judge Jacqueline Nguyen.[7] The *Dominguez* court followed the Seventh Circuit in *United States v. Ingram*, 947 F.3d 1021 (7th Cir. 2020), and the Eleventh Circuit in *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018), the latter of which had reached its result over another cogent dissent by Judge Jill Pryor, joined by Judges Wilson and Martin.[8] Numerous other district courts that have considered the issue have also reached concluded that Hobbs Act robbery attempt is not a "crime of violence."[9]

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[7] *See Pangelinan v. United States*, 2020 WL 1858403 (D.N.M.I. 2020). *See also Dominguez*, *supra*, 954 F.3d at 1262 (Nguyen, J., dissenting in part).

[8] *See United States v. St. Hubert*, 918 F.3d 1174, 1211 (11th Cir. 2019) (Pryor, J., dissenting from denial of rehearing *en banc*).

[9] *See*, *e.g.*, *United States v. Culbert*, 2020 WL 1849692 at *1 (E.D.N.Y. 2020) ("The narrow question put to the Court is whether *attempted* Hobbs Act robbery is . . . a crime of violence. It is not.") (emphasis in original); *United States v. Cheese*, 2020 WL 705217 at *4 (E.D.N.Y. 2020) (under *Davis*, "inchoate crimes – such as [Hobbs Act] conspiracy or attempt – cannot be crimes of violence under the Elements Clause because they do not require as an *element* of the offense the use, attempted use, or threatened used of force"); *Lofton v. United States*, 2020 WL 362348 at *9 (W.D.N.Y. 2020) ("Because attempted Hobbs Act robbery does not categorically entail the use, threatened use, or attempted use of force, [it] is not a crime of a violence under § 924(c)(3)(A)[.]"); *United States v. Tucker*, 2020 WL 93951 at *6 (E.D.N.Y. 2020) ("[G]iven the broad spectrum of attempt liability, the elements of attempt to commit [Hobbs Act] robbery could clearly be met without any use, attempted use, or threatened use of violence.") (internal quotation marks omitted); *FNU LNU v. United States*, 2020 WL 5237798 at *7 (S.D.N.Y. 2020) ("[T]he Court finds that attempted Hobbs Act robbery . . . is not a 'crime of violence' within the meaning of the Elements Clause."); *United States v. Halliday*, 511 F. Supp. 3d 205, 207 (D. Conn. 2021) ("[M]y conclusion is that

In this case for the first time, a circuit court majority has also reached the same conclusion. *See United States v. Taylor*, 979 F.3d 203, 208 (4th Cir. 2020). The conclusion is correct and should be upheld. This Court should adopt the reasoning of the Fourth Circuit in this case, as well as the dissenting opinions of Judge Nguyen in *Dominguez* and Judge Pryor in *St. Hubert*, Judge Mangloña in Amicus' case, and the other district courts that have so concluded.

II. Hobbs Act Robbery Attempt Can Be Committed by Attempted Robbery by Threat, Which Is Not a Crime of Violence.

The reason that the courts and judges finding attempted Hobbs Act robbery not to be a "crime of violence" have the better of the argument boils down to one thing – the *categorical approach*, which must be used in resolving the question of whether any given offense is a "crime of violence." *See*, *e.g.*, *Davis*, *supra*, 139 S. Ct. at 2328 ("[T]he statutory text [of § 924(c)(3)] commands the categorical approach").

The categorical approach to the question of whether Hobbs Act robbery attempt, as defined by 18 U.S.C. § 1951(a), constitutes a "crime of violence," as defined by 18 U.S.C. § 924(c)(3)(A), requires a perfect

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an attempted Hobbs Act robbery is not a federal crime of violence."); *Starks v. United States*, 516 F. Supp. 3d 762, 773–74 (M.D. Tenn. 2021) ("[T]he Court has studied the matter and concludes . . . that attempted Hobbs Act robbery is not categorically a crime of violence.").

congruence between the two offenses, such that all acts susceptible to prosecution as Hobbs Act robbery attempt will necessarily also fall within the statutory definition of a "crime of violence." The offenses do not line up with this kind of perfect congruence, because, for an attempt crime to be a "crime of violence," it must have, as an element, the "attempted use . . . of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).[10] Such force is not a necessary element of Hobbs Act robbery attempt. That offense can be committed without attempting to use such force.

This is true, for one reason, because the Hobbes Act defines "robbery" expansively as follows:

> 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.

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[10] "Physical force" has been construed in an analogous statute as meaning force that is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (construing 18 U.S.C. § 924(e)(2)(B) ("the use, attempted use, or threatened use of physical force against the person of another")).

18 U.S.C. § 1951(b)(1). Based on this statutory language, Hobbs Act robbery attempt can be committed in at least twenty-three different ways:

1. attempt to use actual force
2. attempt to use threatened force
3. attempt to use violence
4. attempt to use fear of immediate injury to the victim's person
5. attempt to use fear of future injury to the victim's person
6. attempt to use fear of immediate injury to the victim's property
7. attempt to use fear of future injury to the victim's property
8. attempt to use fear of immediate injury to property in the victim's custody
9. attempt to use fear of future injury to property in the victim's custody
10. attempt to use fear of immediate injury to property in the victim's possession
11. attempt to use fear of future injury to property in the victim's possession
12. attempt to use fear of immediate injury to the person of the victim's relative
13. attempt to use fear of future injury to the person of the victim's relative

14. attempt to use fear of immediate injury to the property of the victim's relative

15. attempt to use fear of future injury to the property of the victim's relative

16. attempt to use fear of immediate injury to the person of a member of the victim's family

17. attempt to use fear of future injury to the person of a member of the victim's family

18. attempt to use fear of immediate injury to the property of a member of the victim's family

19. attempt to use fear of future injury to the property of a member of the victim's family

20. attempt to use fear of immediate injury to the person of anyone in the victim's company at the time

21. attempt to use fear of future injury to the person of anyone in the victim's company at the time

22. attempt to use fear of immediate injury to the property of anyone in the victim's company at the time

23. attempt to use fear of future injury to the property of anyone in the victim's company at the time

See id. Even if "actual force" is considered synonymous with "violence," and "a relative" is considered synonymous with "a member of his family," that still leaves eighteen different ways in which to commit the offense. Of these, only Method No. 1 ("attempt to use actual

force") and its synonym Method No. 3 ("attempt to use violence") would necessarily constitute the "attempted use . . . of physical force against the person or property of another," and thus could support calling Hobbs Act robbery attempt a "crime of violence."

Method No. 2 ("attempt to use threatened force") would not. A crime requiring the "*attempted* use of physical force" is listed as a "crime of violence," as is, separately, a crime requiring the "*threatened* use of physical force,"[11] but a crime that can be committed by only "*attempted threatened* use of physical force" is not. Thus, a defendant who has the intent to obtain property by making a threat, and takes a substantial step toward making that threat, but does not actually make it, could properly be convicted of Hobbs Act robbery attempt, but would not have committed a "crime of violence."[12]

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[11] *See* 18 U.S.C. § 924(c)(3)(A) ("[T]he term 'crime of violence' means an 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[.]"). (emphasis added).

[12] The "threatened use of physical force" is not an element of Hobbs Act robbery *attempt*, it is an element of Hobbs Act robbery itself. *See* 18 U.S.C. § 1951(b)(1) (" '[R]obbery' means the unlawful taking or obtaining of personal property . . . by means of actual or threatened force. . . ."). Alternatively, it could be considered a Hobbs Act violation in its own right, distinct from either robbery or robbery attempt. *See id*. at § 1951(a) ("affects commerce . . . by robbery . . . *or* attempts . . . so to do, *or* . . . threatens physical violence to any person or property in furtherance of a plan . . . to do [so]") (emphasis added). Either way, attempt and threat are distinct in the statutory structure.

The same is true of a defendant who intended to obtain property by any of the methods listed as No. 4 though No. 23 above. All of these can be committed by creating in the victim a "fear of injury" to someone or something – including things quite remote from the victim himself, such as the "property of a relative." Furthermore, the statutory structure requires that this fear be created otherwise than by making a threat, since the various "fear of injury" methods are listed in the statute separately from, and in addition to, the use of "threatened force" (Method No. 2). Since "threatened force" is thus already separately covered, the "fear of injury" must be created in some other way, such as, for example, by cultivating a menacing appearance.[13] Indeed, none of these methods even require the defendant himself to create the fear of injury in the victim, only to exploit it to his own ends. *See* 18 U.S.C. § 1951(b)(1) ("by means of . . . fear of injury").

The result is that there are multiple ways to commit Hobbs Act robbery attempt, only two of which would qualify as a crime of violence (or only one, depending on how one counts Methods Nos. 1 and 3). And even if some of these may seem far-fetched (*e.g.*, attempting to exploit the victim's fear of future injury to his relative's property), it takes little legal imagination to conceive of a robbery by threat – "your money or your life," said by one without the means to follow through, or with the means but without the

[13] Even if doing so could be considered an implicit "threat," an attempt to do so would not support a "crime of violence" for the reasons stated in the preceding paragraph.

intent. An *attempted* robbery by threat is no more far-fetched that that. *See*, *e.g.*, *Pangelinan*, *supra*, 2020 WL 1858403 at *7 ("The man had only a fake bomb. While he hoped the ruse would scare the bank teller, it was only that – a ruse.") (*citing United States v. Still*, 850 F.2d 607 (9th Cir. 1988)); *id*. at *8 ("[C]ase law is replete with examples of Hobbs Act robbery convictions involving only fake weapons.") (*citing United States v. Cordero*, 166 F.3d 334 (4th Cir. 1998) (defendant robbed store using toy pistol); *United States v. Aponte*, 2019 WL 3302378 (E.D.N.Y. 2019) (defendant robbed cab drivers with fake gun)).

III. Hobbs Act Robbery Attempt Does Not Have as an Element the Actual, Attempted or Threatened Use of Force.

Hobbs Act robbery attempt is not a "crime of violence" for the further reason that, even when committed with violent intent, it still does not have as an element the actual, attempted or threatened use of force. The elements of intent are culpable intent and a substantial step toward commission of the offense. *See*, *e.g.*, *United States v. Resendiz-Ponce*, 549 U.S. 102, 111 (2007) (Scalia, J., dissenting) ("As the Court acknowledges, it is . . . well established that 'attempt' contains two substantive elements: the *intent* to commit the underlying crime, and the undertaking of *some action* toward commission of that crime") (emphasis in original); *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980) ("A conviction for attempt requires proof of culpable intent and conduct constituting a substantial

step toward commission of the crime that strongly corroborates that intent."). Those opinions rejecting attempted robbery as a "crime of violence" are based on the recognition of the fact that, whatever the defendant's intent may be, the "substantial step" comprising the second element of the attempt need not be violent. *See*, *e.g.*, *Cheese*, *supra*, 2020 WL 705217 at *3 ("Because a defendant who takes a substantial step in furtherance of Hobbs Act robbery can do so without the use, threatened use, or attempted use of force, attempted Hobbs Act robbery cannot be a crime of violence under the categorical analysis."). The situation was aptly described by Judge Pryor in her *St. Hubert* dissent as follows:

> We can easily imagine that a person may engage in an overt act [amounting to an attempt] – in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block from the bank, and approaching the bank's door before being thwarted – without having used, attempted to use, or threatened to use force. Would this would-be robber have *intended* to use, attempt to use, or threaten to use force? Sure. Would he necessarily have attempted to use force? No. So an individual's conduct may satisfy all the elements of an attempt to commit an elements-clause offense without anything more than intent to use elements-clause force and some act (in furtherance of the intended offense) that does not involve the use, attempted use, or threatened use of such force.

St. Hubert, *supra*, 918 F.3d at 1212 (Pryor, J., dissenting) (emphasis in original). Again, the prospect of such convictions is perfectly realistic. The case law abounds with examples of prosecutions for, and convictions of, Hobbs Act robbery attempt, as well as attempted bank robbery (prohibited by 18 U.S.C. § 2113), where the evidence showed violent intent, but not yet any kind of violent action. *See*, *e.g.*, *United States v. Wrobel*, 841 F.3d 450, 453-55 (7th Cir. 2016) (Hobbs Act robbery attempt: defendants rented a van and drove cross-country from Chicago to New Jersey for a planned New York robbery, bringing such gear as hooded sweatshirts, a black hat, gloves, and a pry bar); *United States v. Paris*, 578 Fed. Appx. 146, 147-48 (3rd Cir. 2014) (Hobbs Act robbery attempt: defendant "enter[ed] a store in a disguise with [his] hand near a gun"); *United States v. Muratovic*, 719 F.3d 809, 816 (7th Cir. 2013) (Hobbs Act robbery attempt: defendants had "conducted surveillance on the truck [they planned to rob], procured two handguns . . . even filled up gas cans for use while following the truck on the highway [and] had arrived at the origination point for the robbery on the day set"); *United States v. Gonzalez*, 441 Fed. Appx. 31, 36 (2nd Cir. 2011) (Hobbs Act robbery attempt: defendant had "scope[d] out the area" and "already put on latex gloves"); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990) (bank robbery attempt: defendant was "walking toward the bank, wearing a ski mask, and carrying gloves, pillowcases,

and a concealed, loaded gun");[14] *United States v. Jackson*, 560 F.2d 112, 116 (2nd Cir. 1977) (bank robbery attempt: defendants "drove to the bank with loaded weapons[; c]ardboard was placed over the license, and the bank was entered and reconnoitered"); *United States v. Stallworth*, 543 F.2d 1038, 1041 (2nd Cir. 1976) (bank robbery attempt: defendants had "reconnoitered the bank . . . armed themselves[,] stole[n] ski masks and surgical gloves [and] moved ominously toward the bank").

CONCLUSION

The issue of whether Hobbs Act attempted robbery is a "crime of violence" is clearly in an ongoing state of development in the courts. Since the decision in *Davis* brought it to the fore, the issue has been, and continues to be, extensively litigated. Judge Pryor's dissent in *St. Hubert* has persuaded several district courts that attempted Hobbs Act robbery is not a categorical "crime of violence." *See*, *e.g.*, *Tucker*, *supra*, 2020 WL 93951 at *6 ("[T]his Court concurs with Judge Pryor and two other judges of the 11th Circuit. . . ."); *Lofton*, *supra*, 2020 WL 362348 at *5 ("Like the district court in *Tucker*, this Court finds Judge Pryor's critique of *St.*

[14] The court in *Moore* explicitly stated that attempted robbery "does not require the actual use of force, violence or intimidation." *Moore*, *supra*, 921 F.2d at 209 (noting that, in *Snell*, *supra*, 627 F.2d at 187-88, an attempted bank robbery conviction was "upheld despite no evidence of actual force, violence or intimidation").

Hubert II to be compelling."); *Cheese*, *supra*, 2020 WL 705217 at *3 (quoting and adopting Judge Pryor's reasoning); *FNU LNU*, *supra*, 2020 WL 5237798 at *5 ("This Court finds the Pryor Dissent's reasoning persuasive") Judge Nguyen of the Ninth Circuit was also persuaded by Judge Pryor, *see Dominguez*, *supra*, 954 F.3d at 1266-67, and Judge Nguyen's dissent is now winning converts of its own, including Judge Mangloña in Amicus' own case. *See Pangelinan*, *supra*, 2020 WL 1858403 at *7 ("Judge Nguyen made an excellent argument for why an attempt to commit a crime of violence need not also fee within the elements clause."); *id*. at *8 ("Consequently, this Court agrees with Judge Nguyen that attempted Hobbs Act robbery can be committed without the attempted use or threatened use of violent force.").

Two clear schools of thought have emerged on the subject, but the better rule is that enunciated by Judge Pryor, Judge Nguyen, Judge Mangloña, by a growing number of district courts, and by the Fourth Circuit in this case – that Hobbs Act robbery is *not* a "crime of violence." This is the better rule for the simple reason that it follows the categorical approach, while the rival approach adopted by such cases as *Dominguez* and *St. Hubert* does not. *See Dominguez*, *supra*, 954 F.3d at 1264 (Nguyen, J., dissenting) ("Nowhere in its opinion does the majority apply the categorical approach to attempted Hobbs Act robbery."); *FNU LNU*, *supra*, 2020 WL 5237798 at *5 ("[T]he Eleventh Circuit's opinion in *St. Hubert II* . . . fails to conduct the thorough categorical analysis that is mandated by the

Supreme Court in *Johnson* and *Davis*."). Once the categorical approach is applied, it becomes clear that the required congruence of offenses is lacking, and that Hobbs Act robbery attempt is not a "crime of violence."[15]

Because the categorical approach leads inevitably to the conclusion that Hobbs Act robbery attempt is not a "crime of violence" as defined by statute, the Court should affirm the judgment of the Fourth Circuit in this case.

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[15] The circuit court cases holding that it *is* a "crime of violence" – *Dominguez*, *Ingram* and *St. Hubert*, now joined by *United States v. Walker*, 990 F.3d 316, 323 *ff*. (3rd Cir. 2021) – ultimately rely on *United States v. Hill*, 877 F.3d 717, 719 (7th Cir. 2017), for the rule that an attempt to commit a "crime of violence" is also a "crime of violence" if it "requires proof of intent to commit all elements of the completed crime." *See Dominguez*, *supra*, 954 F.3d at 1251; *Ingram*, *supra*, 947 F.3d at 1026; *St. Hubert*, *supra*, 909 F.3d at 352; *Walker*, 990 F.3d at 327 (all citing *Hill*). This rule is unsound. A given crime's status as a "crime of violence" depends upon its elements, and intent is only one of the elements of attempt. As shown above, the second element, a substantial step towards commission, need not involve either the actual or attempted use of physical force.

Respectfully submitted this twenty-ninth day of October, 2021.

JOSEPH E. HOREY
BANES HOREY BERMAN & MILLER, LLC
200 Marianas Business Plaza, Susupe, Saipan
Commonwealth of the Northern Mariana Islands
PO Box 501969, Saipan MP 96950
Telephone: (670) 234-5684
Fax: (670) 234-5683
E-mail: jhorey@pacificlawyers.law

Counsel of Record for Amicus Curiae
John Pangelinan