No. 20-1459

IN THE
Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
JUSTIN EUGENE TAYLOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMM IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and boasts a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL and its members have an important interest in ensuring that the government does not ignore the Supreme Court's recent instructions to sentencing courts on how to determine what constitutes a "crime of violence" and, instead, attempt to resuscitate now-defunct methods of sentencing that subject individuals to mandatory minimum sentences.

Amicus FAMM, previously known as "Families Against Mandatory Minimums," is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational criminal justice pol-

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[1]Pursuant to Supreme Court Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amici and their counsel made any monetary contribution toward the preparation and submission of this brief. Both of the parties have consented to the filing of this brief, and undersigned amici have transmitted those consents to the Clerk of the Court in the course of filing this brief.

icies and to challenge inflexible and excessive penalties required by mandatory and extreme sentencing laws. Founded in 1991, FAMM currently has more than 75,000 members around the country. By mobilizing currently and formerly incarcerated people and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected amicus filings in important cases.

FAMM submits this brief cognizant of the toll mandatory minimums, including those contained in 18 U.S.C. § 924(c)(3), exact on its members in prison, their loved ones, and our communities. In light of the grave harm these sentences wreak, FAMM is keenly interested in ensuring they be used sparingly and only to the extent Congress intended. In the event there is any ambiguity in congressional intent with respect to the requirements of any sentencing law, the rule of lenity resolves it in favor of the defendant.

SUMMARY OF ARGUMENT

In its opening brief, the government makes a startling proposal that the Court resuscitate the now-defunct "ordinary case" analysis that was used only when applying the categorical approach to the unconstitutional residual clause. Anything less, the government contends, would require an exercise of "legal imagination," Br. U.S. 13, as opposed to a purportedly more concrete examination of "realistic probabilit[ies]," Br. U.S. 37, "actual litigated case[s]," Br. U.S. 35, "archetypical conduct," Br. U.S. 19, and "real-world examples," Br. U.S. 12. But the government's admonition about "legal imagination" is taken from cases that

have no bearing on this one. It also ignores the holding in *Descamps* v. *United States*, 570 U.S. 254, 261 (2013) in which the Court held, once again, that a proper analysis focuses on "elements, not facts." See also *United States* v. *Davis*, 139 S. Ct. 2319 (2019) (same). If *Descamps*, *Davis*, and other opinions taking the same approach are to have any authority, and if there is to be any distinction between the elements clause and the unconstitutional residual clause, this recrudescence of ordinary case analysis warrants rejection.

Even if the Court finds that attempted Hobbs Act robbery does not unambiguously fall outside the scope of 18 U.S.C. § 924(c), the Court should apply the rule of lenity because "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333. That is especially true where, as here, mandatory minimum penalties are imposed under statutes that have vexed courts and litigants for nearly two decades.

ARGUMENT

I. THE GOVERNMENT ATTEMPTS TO FLOUT THIS COURT'S HOLDING IN *DAVIS* AND REVIVE THE UNCONSTITUTIONAL RESIDUAL CLAUSE.

Amici write to address the government's flawed argument that lower courts, when analyzing elements clauses, should ignore supposedly unlikely factual scenarios. Following this Court's ruling in *Davis*, which struck down § 924(c)'s residual clause as void for vagueness, the categorical approach to the elements clause provides the only way for a crime to constitute a "crime of violence" under § 924(c)(3). A categorical approach requires examining whether the elements of a crime *necessarily*—that is, *always*—entail physical force. That approach cannot be squared with ignoring

scenarios in which the elements of a crime could be satisfied without physical force.

Rather than directly contend with the fact that the elements of attempted Hobbs Act robbery do not necessarily require physical force, the government tries to appeal to the likelihood of such a scenario. See Br. U.S. 36. This argument misapplies the law and skirts *Davis* by attempting to use the ordinary case analysis when applying the categorical approach to the elements clause. The Court should reject the government's backdoor attempt to reanimate the unconstitutional residual clause and uphold the Fourth Circuit's ruling.

A. The categorical approach applied to § 924(c)'s elements clause looks solely to what proof a statute of conviction necessitates.

Both parties agree that the touchstone for § 924(c)'s elements clause is the categorical approach. That approach involves straightforward statutory interpretation. It requires courts "to look only to the fact of conviction and the statutory definition of the prior offense" to determine if it is a valid predicate. *Taylor* v. *United States*, 495 U.S. 575, 602 (1990). When applied to an elements clause, the approach asks "whether [a] conviction *necessarily* 'had, as an element,'" one of the options specified in the relevant elements clause. *United States* v. *Castleman*, 572 U.S. 157, 168 (2014) (emphasis added); see also *Borden* v. *United States*, 141 S. Ct. 1817, 1820–22 (2021) (plurality opinion). Here, those options are "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).

The inquiry thus centers on a potential predicate "offense's elements, not the facts of the case" at hand—or, for that matter, any other instance of the predicate

offense. *Shular* v. *United States*, 140 S. Ct. 779, 784 (2020). "If any—even the least culpable—of the acts criminalized do not entail th[e] kind of force" specified in the elements clause, "the statute of conviction does not categorically match the" clause, and the offense of conviction does not qualify as a valid predicate. *Borden*, 141 S. Ct. at 1822 (plurality opinion); see also *Johnson* v. *United States*, 559 U.S. 133, 137 (2010) ("[N]othing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts.").

Contrast the categorical approach to the elements clause with the same approach to § 924(c)'s now-defunct residual clause. An offense qualified as a valid predicate under the residual clause if it was a felony and, "by its nature, involve[d] 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). Applying the categorical approach to this clause in turn yielded what this Court called an "ordinary case" analysis. See *James* v. *United States*, 550 U.S. 192, 208 (2007), *overruled by Johnson* v. *United States*, 576 U.S. 591 (2015). "[J]udges had to disregard how the defendant actually committed [the] crime. Instead, they 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 2326 (cleaned up); see also *Johnson*, 576 U.S. at 596 (noting the analysis "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury" (citation omitted)).

"Ordinary case" analysis in cases like this one, however, proved unworkable. It came to an end when the Court held in *Davis* that § 924(c)'s residual clause was void for vagueness. See 139 S. Ct. at 2336. The Court reasoned 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.* at 2326; see also *Johnson,* 576 U.S. at 600–04 (invalidating the residual clause of the Armed Career Criminal Act (ACCA) on similar grounds). Section 924(c)(3)'s elements clause, therefore, now provides the only criteria for an offense to qualify as a "crime of violence."

B. The government's "legal imagination" aspersion has no place in applying the categorical approach to § 924(c)'s elements clause.

The government concedes that the categorical approach applied to the elements clause "focus[es] on the minimum conduct criminalized by a statute." Br. U.S. 36 (citation omitted). But the concession comes with a catch. Citing *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), and *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013), the government asserts that analyzing potential predicate offenses under the elements clause "'is not an invitation to apply "legal imagination,"' but instead requires 'a realistic probability, not a theoretical possibility,' that the statute 'would apply to conduct that falls outside' the relevant category of offenses." Br. U.S. 36–37 (cleaned up). Under this view, there is a threshold "probability" below which potential factual scenarios do not count for determining whether an offense "necessarily involves the defendant's 'use, attempted use, or threatened use of physical force.'" *Borden*, 141 S. Ct. at 1822 (plurality opinion); see also *Castleman*, 572 U.S. at 168.

But both *Duenas-Alvarez* and *Moncrieffe* (which quotes *Duenas-Alvarez*) arose in different contexts than the one here. Neither of those cases applied the categorical approach to a federal crime as a potential predicate offense. They instead applied it to: (1) whether a state criminal offense; (2) necessarily falls within a "generic" offense under federal law; (3) sufficient to result in immigration law consequences.

In *Duenas-Alvarez*, the issue was "whether the term 'theft offense'"—a term the Court considered in the "generic" sense—"includes the crime of 'aiding and abetting' a theft offense." 549 U.S. at 185. And in *Moncrieffe*, in determining whether a conviction under state law "qualifie[d] as an 'aggravated felony' under" immigration law, the Court considered "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." 569 U.S. at 190 (citation omitted). In both cases, the Court looked to state court interpretations of the statutes at issue for definitive constructions—an exercise unnecessary where the potential predicate is a federal crime. This Court has thus never incorporated the "realistic probability" and "legal imagination" language into: (1) an elements clause analysis; (2) of a federal criminal offense; (3) resulting in a mandatory minimum sentence.

More fundamentally, however, the government's condemnation of "legal imagination" is no more than a negative label for the logical reasoning that the categorical approach to the elements clause demands. The government, in invoking *Duenas-Alvarez* and *Moncrieffe*, asks this Court in essence to require a criminal defendant to adduce the facts from his or her case or from other cases. See *Duenas-Alvarez*, 549 U.S. at 193 ("[H]e must at least point to his own case or other cases in which the state courts in fact did apply

the statute in the special (nongeneric) manner for which he argues.").

The government's proposal does not square with the categorical approach's instruction to consider only what an offense "*necessarily* involves," *Borden*, 141 S. Ct. at 1822 (plurality opinion) (emphasis added), and "to disregard how the defendant actually committed his crime," or any other defendant for that matter, *Davis*, 139 S. Ct. at 2326. That would invite judges to "reconstruct," perhaps "long after the original conviction, the conduct underlying" not just this defendant's conviction but also an indefinite number of others. *Johnson*, 576 U.S. at 604. The Court rejected that notion as "impracticab[le]" in the past and should do so now as well. *Id.*

C. The government's argument by anecdote bears a fatal resemblance to "ordinary case" analysis.

Faithful application of the categorical approach to § 924(c)'s elements clause can yield only one conclusion: Attempted Hobbs Act robbery is not categorically a "crime of violence." As the Fourth Circuit reasoned below, because Hobbs Act robbery can be completed by threats alone, attempted Hobbs Act robbery can be completed with mere attempted threats, and attempted threats do not necessarily require proof of either "the use, attempted use, or threatened use of physical force." See *United States* v. *Taylor*, 979 F.3d 203, 208 (4th Cir. 2020).

Rather than deal head-on with non-violent attempted-threat robbery, however, the government's argument resurrects "ordinary case" analysis under the residual clause by disguising it as a true elements-clause analysis. This evasion of controlling precedent cannot succeed.

The government's argument contains two of the distinctive features of "ordinary case" analysis, which illustrate the government's attempt to revive the now-defunct residual clause: (1) the idealization of an offense and (2) risk analysis. See*, e.g.*, *Johnson,* 576 U.S. at 604. ("The residual clause . . . requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime.").

First, the government claims that "much *archetypical conduct* in either completed or attempted robbery—e.g., rushing into a convenience store armed to the teeth, or discharging a gun into the air—could easily be described as involving any or all of 'the use,' 'attempted use,' or 'threatened use' of force." Br. U.S. 19 (emphasis added). It argues that the Fourth Circuit's analysis of "pure 'attempted threat' cases" should be rejected because "the court of appeals failed to identify *any actual litigated case* fitting that description. And given the requirements of Hobbs Act robbery and attempt liability, the pure 'attempted threat' cases envisioned by the Fourth Circuit are *implausible* at best." *Id.* at 35 (emphasis added). It also marches out a litany of "real-world examples," *id.* at 28, and various hypotheticals to show how attempted robbery *could* include the use of force. *Id.* at 12.

When courts idealized the "ordinary case" of an offense under the residual clause, they might have considered "archetypal conduct." They might have considered the frequencies of the different ways the offense has been and might be committed. But when applying the categorical approach to the elements clause, these considerations are "neither here nor there." *Borden*, 141 S. Ct. at 1832 (plurality opinion). Elements-clause analysis requires considering solely whether a conviction *necessarily* entails "the use, attempted use, or threatened use of physical force." Again, "[i]f any—

even the least culpable" or, *amici* posit, even the least likely—"of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically" constitute a valid predicate. *Id.* at 1822. Logical reasoning and attention to statutory text are not improper exercises of "legal imagination" and are certainly preferable to the government's suggestion that courts allow "cherry picking" instead.

Second, the government argues that "attempts to commit certain felonies are often *more* violent than the completed felonies." Br. U.S. 27. A court might have considered how "often" an offense was more or less violent when performing risk analysis under the residual clause. But again, that clause is dead, and the government's assertion is no answer to whether a conviction for an offense *necessarily* entails "the use, attempted use, or threatened use of physical force."

The Court should not tolerate this attempt to skirt the consequences of *Davis*. If *Davis* is to have any consequence, and if there is to be any distinction between the elements clause and the now-defunct residual clause, it must reject the government's arguments. The Court expressly acknowledged Congress's power to amend the residual clause to address its vagueness flaw or mandate something other than the categorical approach. See *Davis*, 139 S. Ct. at 2336 (stating that "[o]f course, too, Congress always remains free to adopt a" new approach by amending the statute). In the meantime, the government here repackages and proffers a residual-clause analysis like a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," frightening defendants with the threat of mandatory minimum sentences. *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398

(1993) (Scalia, J., concurring). Its resurrection conveniently permits the government to depict for sentencing courts what is "archetypal," "real-world" and "realistically probable." Legal imagination indeed.

II. THE RULE OF LENITY REQUIRES HOLDING THAT ATTEMPTED HOBBS ACT ROBBERY IS NOT A "CRIME OF VIOLENCE"

The lack of daylight between the government's argument and "ordinary case" analysis under the now-defunct residual clause is reason enough to reject its position—to say nothing of the reasons that the respondent and other amici offer. Regardless of the merits of those arguments, it is at minimum ambiguous whether "crime of violence" encompasses attempted Hobbs Act robbery, or, indeed, the attempt to commit any object offense that may be completed by threats alone. Certainly this case, if any, is an instance where the rule of lenity should apply, given that the competing analytical approaches here are far from the understanding of a lay person. Both lenity's plain directive and its underlying purposes require that the Court reject the government's argument.

A. Section 924 is at best ambiguous about what constitutes a valid predicate offense.

The rule of lenity applies where there are "ambiguities about the breadth of a criminal statute." *Davis*, 139 S. Ct. at 2333.[2] Here, each of the elements clause's

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[2]Occasionally, this Court has required a criminal statute to possess "grievous ambiguity" before the rule of lenity applies. *Shular*, 140 S. Ct. at 788 (Kavanaugh, J., concurring). This idea is a deeply flawed and recent judicial creation. While the ambiguity standard for the rule of lenity dates back centuries, the idea of "grievous ambiguity" arose in *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (quoting from *Huddleston* v. *United States*,

three components suffers from ambiguity. The government first argues that "the phrase 'use of physical force . . . '" includes "inchoate or indirect uses, as well as direct applications, of physical force." Br. U.S. 20 (citations omitted). The respondent replies that "use" entails only "the actual deployment of force," whereas the other two components of the clause cover inchoate and communicated intents to use force. Br. Resp. 20. The government then contends that "threatened use of force" means an "objective manifestation" that "conveys the notion of an intent to inflict harm," including the requisite substantial step in any attempt charge. Br. U.S. 11, 23 (citation omitted). The respondent answers that "threatened" means something else: "a *communicated* intent to inflict harm.'" Br. Resp. 22 (emphasis added). Finally, the government posits that "attempted use" "includes all attempts to commit crimes otherwise covered by the elements clause." Br. U.S. 21. The respondent in turn notes that the statute speaks not of "attempts to commit a crime of violence" but of the "*attempted use* . . . of physical force." Br. Resp. 28 (quoting 18 U.S.C. § 924(c)(3)(A)).

At best, attempted Hobbs Act robbery falls short of "conduct clearly covered" by the elements clause. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997); see also *Toussie* v. *United States*, 397 U.S. 112, 122 (1970) ("[I]t is appropriate, before we choose the harsher alternative, to require that Congress should have spoken

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415 U.S. 814, 831 (1974)). Justice Scalia cautioned that, without careful application, the rule of lenity could transform from a "presupposition of our law" to "a historical curiosity." *Holloway* v. *United States*, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting). If the rule of lenity does not apply in a case like this one—where attempts to construe and apply the statutory phrase "violent felony" have so vexed the courts, the Bar and scholars—then it really has been relegated to the status of an "historical curiosity." *Shular*, 140 S. Ct. at 786 (Kavanaugh, J., concurring).

in language that is clear and definite." (citation omitted)). Straightforward application of the rule of lenity therefore requires concluding that the offense is categorically not a "crime of violence."

B. The rule of lenity's purposes apply with force here.

Lenity is founded on two rationales: "'the tenderness of the law for the rights of individuals' to fair notice of the law" and "the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Davis*, 139 S. Ct. at 2333 (quoting *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820)); see also *Lanier*, 520 U.S. at 265–66, n.5.

Each is implicated here. The government's expansive interpretation of § 924(c)(3)'s elements clause does not give fair notice to would-be defendants of the law's limits. It would permit the government to tack on an extra charge for an attempt to commit a "crime of violence," even where the attempt itself does not strictly involve, as the text of the statute demands, "the use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(c)(3)(A).

That outcome is unfaithful to the idea of notice. "[F]air warning," after all, "should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931).

Nor does the government's proffered interpretation respect the separation-of-powers principle undergirding the rule of lenity. When this Court held just two years ago in *Davis* that § 924(c)(3)'s residual clause was unconstitutionally vague, it observed that Congress could revise the statute in any number of ways—

but the Court was resolute that it "is not in the business of writing new statutes" itself. 139 S. Ct. at 2336; see also *United States* v. *Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (Gorsuch, J.) ("Congress is free . . . to amend § 924(c)(1)(A) . . . [b]ut unless and until it does, we will not relegate men and women to prison . . . because they did something that might—or might not—have amounted to a violation of the law as enacted."). Congress has yet to act.

C. Application of lenity is particularly important for mandatory minimum sentences.

The Court has consistently cautioned against adopting expansive interpretations of criminal statutes carrying significant mandatory minimum sentences, like § 924(c). *See Davis*, 139 S. Ct. at 2323–24; *Begay* v. *United States*, 553 U.S. 137, 146–47 (2008), *abrogated by Johnson* v. *United States*, 576 U.S. 591 (2015); see also *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) ("[The rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."). And caution is warranted here: § 924(c)'s "crime of violence" offense carries with it a minimum sentence ranging from five years to as much as thirty years, depending on the type of firearm used, the degree of its involvement, and the existence of prior convictions. See 18 U.S.C. § 924(c)(1).

The mandatory minimum context presents a toxic combination of high cost and less-than-artfully drafted statutes. Mandatory minimum sentencing statutes often use "sweeping and imprecise language" that "set[s] up a host of vexing constitutional and statutory interpretation questions for the court." Rachel E. Barkow, *Categorical Mistakes*, 133 Harv. L. Rev. 200, 202

(2019). Besides the residual clauses found unconstitutionally vague in *Davis* and *Johnson* described above, this Court has described as "unclear" a different portion of § 924(c) that imposed a 30-year mandatory minimum sentence for possessing a machinegun while committing certain crimes. *United States* v. *O'Brien*, 560 U.S. 218, 227, 229 (2010). In *United States* v. *Granderson*, the Court found another mandatory minimum provision did not "appear[] … to have received Congress' careful attention." 511 U.S. 39, 42 (1994). The rule of lenity, "as a sort of 'junior version of the vagueness doctrine,'" *Lanier*, 520 U.S. at 266 (quoting H. Packer, The Limits of the Criminal Sanction at 95), is a useful tool for ensuring the Court does not enforce Congress's linguistic errors on a presumptively free people.

Further, mandatory minimum provisions often are said to reflect (at least in theory) the moral judgment of the community that particular conduct deserves harsher punishment. In our system of government, that judgment is reserved to the legislature. The rule of lenity ensures that criminal sentences actually reflect legislative judgment, rather than guesswork by the courts about what the legislature meant. See *Granderson*, 511 U.S. at 69 (Kennedy, J., concurring in the judgment) ("[B]ecause criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity, and set the punishments therefor.") (quoting *Bass*, 404 U.S. at 348) (citation omitted); *United States* v. *R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment) (describing one of "the rule of lenity's . . . purpose[s]" as "assuring that the society, through its representatives, has genuinely called for the punishment to be meted out"); *United States* v.

Wiltberger, 18 U.S. 76, 95 (1820) (explaining that "[t]he rule that penal laws are to be construed strictly" is founded not merely on "tenderness of the law for the rights of individuals" but also on the "plain principle that the power of punishment is vested in the legislative, not in the judicial department"). Any criminal statute presents these concerns, but mandatory minimum provisions make them particularly weighty.

Unlike other criminal laws, mandatory minimums are exceptions to the principle that courts should "impose a sentence sufficient, but not greater than necessary," to accomplish the goals of criminal punishment after considering "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). A mandatory minimum is a congressional directive to subordinate justice in individual cases to a perceived need for greater deterrence or incapacitation generally. Congress may choose to make that tradeoff (within constitutional bounds), but the courts should ensure that Congress has actually made that choice before imposing needlessly harsh punishments. Cf. *Busic* v. *United States*, 446 U.S. 398, 409 (1980) (interpreting a sentencing enhancement; rejecting the "assumption that . . . Congress' sole objective was to increase the penalties . . . to the maximum extent possible").

The adverse consequences of erroneously expanding mandatory sentencing beyond the limits of the statutory language affect more than just individual defendants. Such errors strike at the foundations of the sentencing system by undermining "sentencing proportionality—a key element of sentencing fairness." *Harris* v. *United States*, 536 U.S. 545, 571 (2002) (Breyer, J., concurring in part and concurring in the judgment), *overruled by Alleyne* v. *United States*, 570 U.S. 99 (2013). As the Sentencing Commission—quoted with

approval by this Court—has explained: "'The 'cliffs' that result from mandatory minimums compromise proportionality, a fundamental premise for just punishment, and a primary goal of the Sentencing Reform Act.'" *Neal* v. *United States*, 516 U.S. 284, 292 (1996) (quoting United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 26 (Aug. 1991)).

By contrast, the costs of erroneously construing a mandatory minimum provision too narrowly are relatively low, both for individual cases and for the criminal justice system as a whole. In cases that fall outside the scope of a mandatory minimum, but that nevertheless feature aggravating circumstances similar to those that moved Congress to impose the minimum, a sentencing judge still has discretion (guided by § 3553(a) and the sentencing guidelines) to impose a more severe sentence. As Justice Breyer explained in *United States* v. *Dean*, "an interpretive error on the side of leniency[] still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence . . . is not legislatively *required*." 556 U.S. 568, 584 (2009) (Breyer, J., dissenting).

Moreover, "an error that excludes (erroneously) a set of instances Congress meant to include . . . could lead the Sentencing Commission to focus on those cases . . . [and] make available to Congress a body of evidence and analysis that will help it reconsider the statute." *Id.* at 585. Those who bring actions under the criminal laws (the executive branch) have far greater access to those who create them (the legislative branch) than do those who defend against such actions (potential criminal defendants). In light of this practical reality, the rule of lenity "places the weight of inertia upon the

party that can best induce Congress to speak more clearly." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

The penalties that people like Justin Eugene Taylor face are "serious[]" and reflect "the moral condemnation of the community." *Bass*, 404 U.S. at 348. Lenity demands that the Court select a harsher interpretation of § 924(c) only if Congress has spoken "plainly and unmistakably." *Id.* (citation omitted). This principle "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Id* (citation omitted). Here, Congress has not. Due process demands "language that the common world will understand." *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27 (Holmes, J.)). If the rule of lenity, a "venerable" canon of statutory construction, *R.L.C.*, 503 U.S. at 305 (plurality opinion), is ever to protect laypeople from the leviathan of the law, it is in this case. The Court should therefore hold that attempted Hobbs Act robbery is not a "crime of violence."

CONCLUSION

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

Respectfully submitted,

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