No. 20-1459

In the Supreme Court of the United States

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 of Neal Goldfarb
as *Amicus Curiae*
in Support of Respondent

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Interest of Amicus[1]

Amicus Neal Goldfarb is an attorney with an interest and expertise in linguistics and lexicography, and in applying the insights and methodologies of those fields to legal interpretation. That knowledge gives *amicus* a perspective on the linguistic and lexicographic issues raised in this case, and enables him to discuss those issues in more depth than is typical of the briefs submitted to the is Court.

Amicus has previously filed several amicus briefs in this Court drawing on linguistics. Links to most of those briefs are available at the link at the bottom of the page.[2] His most recent brief, in *New York Rifle & Pistol Ass'n v. Bruen*, No. 20-843, is available on the Court's docket.[3]

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1. All parties have consented in writing to the filing of this brief. No part of this brief was authored by any party's counsel. Nobody other than amicus contributed any money intended to fund the brief's preparation or submission.

   This brief follows two typographic conventions generally followed in linguistics:

   (a) *Italics* signal that a word or phrase is being used to refer to itself as an expression. E.g. "The word *language* has eight letters."

   (b) 'Single quotation marks' are used to enclose statements of the meaning of a word or phrase. E.g., "*Closed* means 'not open.'"

2. https://lawnlinguistics.com/briefs/.

3. https://tinyurl.com/GoldfarbAmicusBruen.

Introduction and Summary of Argument

This Court has held that the meaning of statutory text should remain constant across the range of cases in which the text is applied, and therefore that statutes should not be interpreted in such a way that they mean one thing in some cases and something different in other cases. *Clark v. Martinez*, 543 U.S. 371 (2005); *see also United States v. Santos*, 553 U.S. 507, 522-24 (plurality opinion) (2008); *id.* at 532 (Alito, J., dissenting, joined by three Justices). This case is unusual in that the government's proposed interpretation of *threat* and *threaten* would, if adopted by the Court, violate that principle.

In the context of criminal law, *threat* and *threaten* have a well established meaning. A threat is understood to be a particular kind of communicative act, by which *amicus* means a threat is understood to be an action by which the actor seeks to communicate something to somebody, and *threaten* is understood to denote the making of a threat, and therefore as a type of communicative act.

These points may seem painfully obvious, but the position advocated by government makes it necessary to start with the basics. The government proposes that *threat* and *threaten* be interpreted as denoting conduct as to which the actor has no communicative intent. It is therefore necessary to be explicit about what would ordinarily go without saying, which in this case means establishing that in the context of criminal law, threats are understood to be communicative acts.

In order to make that showing, *amicus* surveys some of the different ways in which criminal law treats threats as communicative acts. In some threat statutes, the communicative nature of the prohibited conduct is clear on the face of the text. And while that is not true of all statutes that prohibit threats, the caselaw fills the gap by invoking dictionary entries defining *threat* and *threaten* in terms that are clearly communicative.

The brief then turns to the details of the government's argument, in order to make it clear that the government does in fact argue in favor of interpreting threat and threaten in a way that has nothing to do with communication. Specifically, *amicus* discusses the language the government uses in its effort to show that it is possible to commit Hobbs Act robbery-by-threat without making a threat in any communicative sense. He also shows that the dictionary definition the government relies on pertains to a sense of threat that has no communicative component.

Amicus then discusses the Hobbs Act, which does not does not prohibit the mere act of making a threat, but focuses instead on the use of threats as a means of coercion. That is important because an uncommunicated threat can't possibly have any coercive effect.

Having separately discussed the government's noncommunicative interpretation and the ways in criminal statutes and caselaw treat threats as communicative acts, amicus compares the two senses in order to show that they differ from one another very substantially. And that comparison sets the stage for a return to the point made at the beginning of this part

of the brief: accepting the government's interpretation would result in *threat* and *threaten* having different meanings in different cases.

As amicus explains, that would be something that this Court has held to be inappropriate. Even if there might be some basis on which the Court might make an exception to the general rule, no such basis exists here. And on top of that, accepting the government's interpretation would open the door to a host of bad consequences.

For all of the foregoing reasons, the government's interpretation should be rejected.

Argument

A. In the context of criminal law, *threat* and *threaten* denote communicative acts.

1. Although it might seem like belaboring the obvious to say this, the acts that the criminal law classifies as threats, are communicative acts—acts whose purpose is to communicate something to another person.

In some statutes criminalizing threats, the communicative nature of the prohibited conduct is made clear in the text. For example, 18 U.S.C. § 871 (the statute at issue in *Watts v. United States*, 394 U.S. 705 (1960)) prohibits the mailing of "any letter, paper, writing, print, missive, or document containing any threat" against the President or other specified officials. Similarly, 18 U.S.C. § 875 (the statute at issue in *Elonis v. United States*, 575 U.S. 723 (2015)), prohibits transmitting in interstate commerce "any threat…to injure the person of another." And the Uniform Code of Mili-

tary Justice prohibits "wrongfully communicat[ing] a threat to the injure the person, property, or reputation of another[.]"[4]

Other statutes define the prohibited conduct by using the verb *threaten*, without specifying the kind of conduct that the verb denotes. For example, 18 U.S.C. § 115(a)(1) makes it illegal to "threaten[] to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under [section 1114 of this title]" if the threat is made with a specified *mens rea*.

The threats prosecuted under statutes such as those that have been discussed typically, if not invariably, take the form of spoken or written statements.[5] These are prototypical communicative acts—or at least they are if the statement is made or otherwise transmitted to someone to someone other than the speaker or writer.[6]

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4. 10 U.S.C. § 915(a), Art. 115.

5. *See, e.g.*, *Elonis v. United States*, *supra*; *United States v. Veliz*, 800 F.3d 63 (2d Cir. 2015); *United States v. Heinemann*, 767 F.3d 960 (10th Cir. 2014); *United States v. White*, 670 F.3d 498 (4th Cir. 2012); *United States v. England*, 507 F.3d 581 (7th Cir. 2007); *United States v. Stewart*, 420 F.3d 1007 (9th Cir. 2005); *United States v. Martin*, 163 1212 (10th Cir. 1998); *United States v. Stevenson*, 126 F.3d 662 (5th Cir. 1997).

6. With regard to the qualification, see the discussion of *Porter v. Ascension Paris School Board*, 393 F.3d 608 (5th Cir. 2004) at page 9, below.

Courts have treated such actions accordingly; for example, by relying on one or more of the following dictionary entries defining *threat* or *threaten* as denoting communicative acts:

- "A communicated intent to inflict harm or loss on another or on another's property[.]" *Black's Law Dictionary* (6th ed. 1990, 8th ed. 2004 & 10th ed. 2014).[7]
- "[A]n expression of an intention to inflict evil, injury, or damage on another usu. as retribution or punishment for something done or left undone[.]" *Webster's Third New International Dictionary* (1981 [1961] & 2002 [1961]).[8]
- "*Law*, specif., an expression of an intention to inflict loss or harm on another by illegal means." *Web-*

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7. *Quoted in Doggart v. United States*, 906 F.3d 506, 510.(6th Cir. 2018) (citing 10th ed.; interpreting 18 U.S.C. § 875(c)); *United States v. Jongewaard*, 567 F.3d 336, 340 (8th Cir. 2009) (citing 8th ed.); *England*, 507 F.3d at 589 (citing 6th ed.; interpreting 18 U.S.C. § 1512(a)(2)(A)); *and United States v. Reynolds*, 381 F.3d 404, 406 (5th Cir. 2004) (citing 8th ed.; interpreting 18 U.S.C. § 2332a).

8. *Quoted in Jongewaard*, 567 F.3d at 340; *England*, 507 F.3d at 589; *and United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990), *overruled in nonpertinent part*, *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1066 (9th Cir. 2002), *as stated in United States v. Hanna*, 293 F.3d 1080, 1088 n.5 (9th Cir. 2002).

ster's New International Dictionary (2d ed. 1942 [1934]).[9]

- "[T]o declare (usually conditionally) one's intention of inflicting injury upon" a person. 11 *Oxford English Dictionary* 353 (1st ed. 1933).[10]

Similarly, in *Elonis*, Justice Alito interpreted *threat* to denote a communicative act, stating that it can "fairly be defined as a statement that is reasonably interpreted as 'an expression of an intention to inflict evil, injury, or damage on another[]'" (citing *Webster's Third*).[11] The government's brief in *Elonis* interpreted *threat* that way, too:

> A "threat" is defined as "an expression of an intention to inflict loss or harm on another by illegal means," *Webster's New International Dictionary* 2633 (2d ed. 1958), or "[a] communicated intent to inflict harm or loss on another," Pet. Br. 23 (quoting *Black's Law Dictionary* 1519 (8th ed. 2004)).[12]

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9. *Quoted in Doggart*, 906 F.3d at 510 (mistakenly substituting "unconditionally" for "conditionally").

10. *Id.*

11. 575 U.S. at 743–44 (2015) (Alito, J., concurring in part and dissenting in part).

12. Brief for the United States at 24, *Elonis v. United States*, *supra* (No. 13-983).

Of particular relevance here, courts have reached the same conclusion in interpreting ACCA,[13] and also under sentencing-related provisions that have consequences in cases where either the offense of conviction or a defendant's prior conviction "has as an element the…threatened use of [for example,] physical force against the person or property of another[.]"[14]

Moreover, the conception of threats as being communicative acts is inherent in the "true threat" doctrine under the First Amendment, which exists precisely because threats are deemed to be communicative, *see Virginia v. Black*, 538 U.S. 343, 359-60 (2003); *Watts*, 394 U.S. at 707-08.

2. It is true that under some statutes, the making of a threat is illegal even if the threat is not received by (or even sent to) the person targeted by the threat. *See* Gov't Br. 24-25 and cases cited. But as Respondent points out, in each case cited by the government the threat had been communicated to somebody, even if not the intended target. Resp. Br. 26-27. And at least one case has held that it is not a crime to write

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13. *United States v. Schaffer*, 818 F.3d 796, 798 (8th Cir. 2016); *United States v. Parnell*, 818 F.3d 974, 980-81 (9th Cir. 2016); *United States v. King*, 979 F.2d 801, 803 (10th Cir. 1992). *See also Austin v. United States*, 280 F. Supp. 2d.367, 575-77 (S.D.N.Y. 2017).

14. *United States v. Ovalle-Chun*, 815 F.3d 222, 224-27 (5th Cir. 2016) (U.S.S.G. § 2L1.2 cmt. n.1(B)(iii) (Nov. 1, 2014)); *United States v. Damaso-Mendoza*, 653 F.3d 1245, 1249 n.1 (10th Cir. 2001) (18 U.S.C. § 16); *United States v. White*, 258 F.3d 374 (5th Cir. 2001) (18 U.S.C. § 921(a)(33)(A)).

threatening language on a piece of paper if the writer does not communicate the threat to someone else by intentionally letting them see the document.[15]

But the general rule that a threat need not be communicated to the target in order to be illegal doesn't apply to robbery-by-threat under the Hobbs Act, which does not criminalize the making of threats *simpliciter*. Rather, it criminalizes threats of force or violence when they are made for the purpose of "unlawful[ly] taking or obtaining…personal property from the person or in the presence of another, against his will[,]" 18 U.S.C. § 1951(b)(1).

Threats meeting that description are coercive in nature: the threat cannot have the desired effect unless it is to be communicated to the person in possession or control of the money or property that the robber is after, whether that person is a pedestrian being held up for their wallet or a store clerk or bank teller having access to the register or cash drawer. If no threat is communicated to the intended victim (and assuming no force is actually used), the victim will feel free to disregard the would-be robber's demand.[16]

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15. *Porter v. Ascension Paris School Board*, 393 F.3d 608, 616-17, 617-18 (5th Cir. 2004)

16. *See, e.g.,* Hallie Liberto, *Threats, Warnings, and Assertions*, in *The Oxford Handbook of Assertion* 201, 201-02 (Sanford C. Goldberg ed. 2020). The author discusses the fact that some residents of Monterrey, Mexico never answer their phones, for fear that if they do, the caller will turn out to be a drug-cartel member "offering," in exchange for money, to "protect" them from having their house burned down. "The drug cartel has

As previously noted, the threat can be either verbal or nonverbal. If it is verbal, it can be explicit ("Give me the money or I will shoot you") or implied ("I have a gun. Give me the money"), but either way, the communicative nature of the act will be indisputable.

In the case of nonverbal conduct, however, there may be room for doubt as to whether the conduct was intended to communicate anything. But the conclusion that nonverbal acts can amount to threats *if they are intended to be communicative* is well established. The Commentary on the Model Penal Code's robbery provision makes that clear. The Code's analogue of the "threatened use of force" is "[i] threatens another with or [ii] purposely puts him in fear of immediate serious bodily injury," with phrase [i] applying to what *amicus* refers to here as verbal threats and phrase [ii] referring to what he calls nonverbal threats.[17] The Commentary explains that the latter phrase was intended to cover "menacing or other implied threat sought to be communicated to the victim by the actor's conduct[,]" and that it "would thus apply to cases where the actor brandishes a weapon or otherwise displays the ability

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no incentive to burn down their house until the threat is uttered and received (or expected to be received—as in a case where the drug cartel member leaves a message on an answering machine)." *Id.*

In the event of a robbery, of course, not answering the phone isn't an option.

17. Model Penal Code ("MPC") § 222.1(1)(B) & cmt. 3(b) (Am. L. Inst. 1980) (bracketed numbering added).

and the intention to use force if his wishes are not honored."[18]

B. The government's argument relies on senses of *threat* and *threaten* that are inappropriate in the present context.

1. The government's premise is that a defendant can be found to have threatened to use force despite never having communicated an intention to use force.

Although the government does not frame its argument in terms having to do with the presence or absence of a communicative act conveying a threat, its argument depends on the premise that a defendant can be found to have threatened to use force without ever having communicated any intention to use force.

In arguing that a "threatened use of force" would be inherent in any conduct amounting to attempted robbery-by-threat, the government goes on at length to characterize what that conduct would entail, but at no point does it discuss the would-be perpetrator's conduct in terms having anything to do with communication. Instead, it resorts to a series of generalities and circumlocutions:

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18. MPC § 222.1, cmt. 3(b). *Cf. United States v. Brown*, 947 F.3d 503 (8th Cir. 2020) ("The only purpose in brandishing a weapon is to induce fear by the threat of potentially fatal violence."); *United States v. Olivares*, 833 F.3d 450 (5th Cir. 2016) (witnesses identified defendant as "the person who brandished a weapon *in order to threaten them*") (emphasis added).

- "Conduct substantial enough to satisfy [the] requirements [of attempted Hobbs Act robbery] at least 'threaten[s]' the use of force, as it 'conveys the notion of an intent to inflict harm' as it 'would be understood by a reasonable person.'[19]
- "[In order to support a conviction of attempted Hobbs Act robbery, a defendant's conduct in furtherance of the planned robbery] must be significant enough that the jury…finds that the step establishes *a course of action* that is, at least, objectively threatening."[20]
- "[C]onviction for attempted Hobbs Act robbery requires the jury to find that the defendant engaged in a course of action that was sufficiently certain, if unchecked, to culminate in taking property through physical harm or the threat of it….Anyone observing a course of action that has progressed to such a point would naturally describe it as involving at least 'threatened use' of force."[21]
- "The objective manifestation of a defendant's determination to rob someone is itself a threat of force in the ordinary sense—*i.e.*, an action that 'conveys the notion of an intent to inflict harm[.]'"[22]

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19. Gov't Br. 11 (emphasis added) (quoting *Elonis*, 575 U.S. at 731, 737.

20. Gov't Br. 22 (emphasis added).

21. Gov't Br. 22 (emphasis added).

22. Gov't Br. 23 (citing *Elonis*, *supra*, 575 U.S. at 731).

- "A reasonable person would surely interpret the actions of would-be robbers who, say, acquire guns, ammunition, and zip ties and are arrested en route to their target, as a threat to the physical well-being of innocent people."[23]
- "[A] defendant who attempts a Hobbs Act robbery in which the plan is to take property by threat of force *specifically designs* his conduct to be objectively perceived as threatening. As a result, any defendant who is far enough along in that conduct to have taken a substantial step toward its completion has engaged in at least 'threatened use' of force."[24]

In each of these passages, the government posits a situation in which an omniscient observer could infer that if the defendant went through with their plans, there would be a risk of violence. But the question whether such an inference would be justified is irrelevant, because the inference would be based on what the government refers to the defendant's "conduct," "actions," and "course of action," and on the "objective manifestation of [his] determination to rob someone" (whatever that might be), and not on any statement, note, or other action by the defendant that was intended as a communication.

Further indication that the government relies on noncommunicative senses of *threat* and *threaten* is provided by its citation to *Black's Law Dictionary*,

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23. Gov't Br. 23 (citation omitted).

24. Gov't Br. 24 (emphasis in the original).

which it offers for the proposition that "a 'threat' may be embodied in 'a declaration, express or implied, of an intent to inflict loss or pain on another' or instead take the form of '[a]n indication of an approaching menace'[.]"[25] Whereas the first of those definitions relates to the communicative sense of *threat*, the second relates to a noncommunicative sense.

That is clear from the phrase that *Black*'s provides as an example illustrating the use of *threat* in the sense to which the definition relates. That phrase, which the government does not quote, is "the threat of bankruptcy[.]"[26] When this phrase considered in the context of the definition it exemplifies (to repeat: "the threat of bankruptcy"), it can only be interpreted as meaning 'the risk that the company will file bankruptcy,' not 'the company's statement that it would have to file for bankruptcy (if some contingency did or did not occur).' Indeed, the latter interpretation would do nothing to advance the government's argument.

Thus, the government's reliance on the "approaching menace" definition tends to confirm that its argument interprets *threat* in a noncommunicative sense.

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25. Govt. Brief 16 (quoting *Black's Law Dictionary* 1783 (11th ed. 2019)).

26. *Black's Law Dictionary* 1783 (11th ed. 2019).

2. The senses of threat *and* threaten *on which the government relies differ materially from those in which the words are used in statutes criminalizing threats.*

The government's proposed interpretation of *threat* and *threaten* exploits the fact that those words, like many others, can be used in ways that differ from one another but are nevertheless related.[27] The government relies on a sense of *threat* and *threaten* that is expressed when those words are used in certain kinds of contexts, but those contexts differ in important ways from the contexts provided by criminal statutes that prohibit threats. And here as in many cases, a difference in context results in a difference in meaning. Those differences must therefore be taken into account in deciding this case. *Deal v. United States*, 508 U.S. 129, 132 (1993) (noting the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").[28]

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27. The technical term for that phenomenon is *polysemy*, and it is to be distinguished from the phenomenon of *homonymy*, in which two separate words are spelled and pronounced the same, as in *bank* ('financial institution') and *bank* ('land beside a river'). *E.g.*, Alan Cruse, *Meaning in Language: An Introduction to Semantics and Pragmatics* 107 (2d ed. 2004).

28. *Cf.* Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. Rev. 1359, 1378-83 (2018) (drawing on work in corpus linguistics and

As shown by the discussion above of the government's reliance on *Black's Law Dictionary*, the examples that are included in definitions provide information about the kinds of contexts in which each of the various senses appear. In order to further inform the Court as to the kinds of contexts in which the "approaching menace" sense of threat is found, *amicus* sets out below the relevant definitions of *threat* and *threaten*, with the accompanying examples, from dictionaries published both before and after ACCA's enactment in 1984:

- *Merriam-Webster's Third New International Dictionary* (1993 [1961]):

  threat—"something that by its very nature or relation to another threatens the welfare of the latter <the crumbling cliff was a constant threat to the village below> <economic depressions constitute a major threat to party hegemony >"

  threaten—"4a: to give signs of the approach of (something evil or unpleasant) **:** indicate as impending **:** portend <the sky threatens storm>" b**:** to hang over as a threat **:** menace <famine threatens the city>

- *Random House Dictionary of the English Language* 1478 (Unabridged ed. 1967):

  threat—an indication or warning of probable trouble, or of being at risk for something terrible: *The threat of a storm was in the air.*

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corpus-based lexicography in discussing some of the ways in which word meaning is context-dependent).

threaten— to be a menace or source of danger to: *Sickness threatened her peace of mind*. to give an ominous indication of: *The clouds threaten rain*.

- *New Oxford American Dictionary* 1757 (2d ed. 2005) (grammatical information omitted):

  threat—a person or thing likely to cause damage or danger. *'hurricane damage poses a major threat to many coastal communities'* ■ The possibility of trouble, danger, or ruin. *'the company faces the threat of bankruptcy*[.]*'*

  threaten—cause (someone or something) to be vulnerable or at risk; endanger. '*a broken finger threatened his career*' '*one of four hospitals threatened with closure'* ■ (of a situation or weather conditions) seem likely to produce an unpleasant or unwelcome result. '*the dispute threatened to spread to other cities*' '*the air was raw and threatened rain'* ■ (of something undesirable) seem likely to occur. 'unless war threatened, national politics remained the focus of attention'

As is true of the example from *Black*'s ("the threat of bankruptcy"), none of the threats in the examples above constitutes a communicative act. Indeed, none of them represents any kind of act on the part of a human being.

However, one of the definitions of *threat* in the online version of the *New Oxford American Dictionary* ("NOAD") covers humans: "a person or thing likely to cause damage or danger."[29] And although there is no

29. https://www.lexico.com/en/definition/threat?locale=en.

corresponding example sentence in the hard-copy version of the dictionary, additional examples, based on corpus data, are available online.[30] Among them are the following:

- "The men, who cannot be named for legal reasons, have been described as a serious threat to national security."
- "Normally calm and measured people will go red at the mention of his name and tell you that he is a dangerous threat to liberty."
- "Unless he was posing a genuine threat to our security, it would be illegal to attack."
- "The home secretary says those who are to be held under house arrest represent a serious threat to national security."

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30. *Id.* (under sense 2, click on "+More example sentences").

The online version of NOAD includes a perplexing definition that does not appear in the printed edition and that calls for some explanation:

> *Law* A menace of bodily harm, such as may restrain a person's freedom of action.

The body of law that is referred to is apparently the law of England, in which *menace* is used as meaning 'threat.' *See Oxford English Dictionary*, *menace n.*, sense 1.a. (3rd ed. 2001, rev. 2021), available at www.oed.com. The inclusion of this definition in NOAD is presumably due to the fact that NOAD is based on the *Oxford Dictionary of English*, a single-volume British dictionary that is separate from the multivolume *Oxford English Dictionary*.

Like the examples that were previously quoted, none of the immediately preceding examples uses *threat* in a communicative sense. But because the threat is imputed to a person, these examples are the ones that most closely exemplify the sense of *threat* and *threaten* on which the government's argument is based. It will therefore be useful to take a closer look at these uses and others like them, in order to more particularly explain both how these uses are similar to how the government uses *threat* and *threaten,* and how both sets of uses differ from the use of those words in the Hobbs Act, ACCA, and the other provisions discussed above on pages ___.

First, not only does the threat referred to in each example constitute a communicative act, it does not constitute a discrete act at all. Rather, it can be characterized as a perceived risk or danger of harm that might materialize at some point in the future, with the perception of the risk or danger arising from one's knowledge or beliefs about the propensities and past conduct of the person in question.

Corresponding to that difference in meaning is a difference in the grammatical contexts in which *threat* is used. Whereas a person who threatens someone (in the communicative sense) or threatens to do something (in that same sense) can be said to have "made a threat," it would be odd to use that phrase in talking about threats of the kind referred to in the examples above. And it is not necessarily true of someone who makes a threat (in the communicative sense) that he or she "*is* a threat," "*poses* a threat," "*represents* a threat," or is appropriately "*described as* a threat,"

because not everyone who makes a threat is able to carry it out.

Moreover, these differences are not trivial or superficial. Rather, they are examples of the way that the meaning of a word *in* a particular context is often affected *by* the context.[31] Thus, when *threat* appears in the phrase "pose a threat," its meaning differs from what it means when it is part of the phrase "make a threat."

Amicus has looked for examples of *pose* (or *present*) *a threat* being used in federal or state statutes with respect to individuals (as opposed to actions, circumstances, and so forth). He has found only a few, but all of them had two things in common: (1) the phrase *pose a threat* is more or less synonymous with *pose a risk* and *pose a danger*, and (2) the judgment that someone poses or presents a threat is predictive in nature.[32] For example:

- 6 U.S.C. § 1170(a)(1) (security background checks of individuals in railroad transportation):

  "The term 'security background check' means reviewing [certain databases] for the purpose of identifying individuals who may pose a threat to transportation security or national security, or of terrorism[.]"

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31. *See A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, *supra*, 2017 BYU L. Rev. at 1378-83.

32. These points are also true of the use of *pose* (or *present*) *a threat* in nonlegal contexts.

- 8 U.S.C. § 1735(a) (restriction on issuance of visas to nonimmigrants from countries that are state sponsors of international terrorism):

  "Nonimmigrant visas may not be issued to an alien from such a country unless it is determined "that such alien does not pose a threat to the safety or national security of the United States."

- Ala. Code 1975 15-16-43: (involuntary commitment of defendant found not guilty by reason of insanity):

  Involuntary commitment is required upon a finding "that the defendant is mentally ill and as a consequence of such mental illness poses a real and present threat of substantial harm to himself or to others[.]" *See id*. §§ 15-16-41 & 15-16-42.

- Del. Code § 5005(a)(3) (involuntary hospitalization upon psychiatrist's certification):

  Involuntary commitment is authorized upon certification by a psychiatrist that, *inter alia*, "[a]s a result of the person's apparent mental condition, the person poses a present threat, based upon manifest indications, of being dangerous to self or dangerous to others."

- N.M. Rules Ann., Rule 5-602.2.B(2) (proceedings after a finding of incompetency):

  "The terms dangerous and dangerousness mean that, if released, the defendant presents a serious threat of inflicting great bodily harm on another of violating [certain statutory provisions.]"

In cases in which this Court has used the phrase *pose* (or *present*) *a threat*, the phrase has meant essentially the same thing as it does in the statutes above:

- "[O]n the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety[.]" *Terry v. Ohio*, 392 U.S. 1, 28 (1968).
- "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).
- "The [Bail Reform] Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *United States v. Salerno*, 481 US 733, 739 (1987).
- "[The proper application of the Fourth Amendment reasonableness standard for using force in making an arrest] requires careful attention to the facts and circumstances of each particular case, including …whether the suspect poses an immediate threat to the safety of the officers or others[.]" *Graham v. Connor*, 490 US 386, 396 (1989).

Each of the commonalities referred to above serves to distinguish these uses from the use of *threat* and

threaten to denote communicative acts. While *pose a threat* means much the same thing as *pose a risk* and *pose a danger*, the communicative sense of *threat* doesn't mean 'risk' or 'danger' and that sense of *to threaten* doesn't mean *to risk* or *to endanger*. And while the determination whether someone has threatened to use force has to do with their actions in the past, the determination whether they pose a threat of violence calls for a prediction about what they might do in the future.

Related to the latter point is the fact that the two interpretations differ in the implications they hold for cases in which the defendant did not intend to carry out the threat, would have been unable to carry it out, or both. Under the law as it currently stands, a defendant who has made a threat that he does not intend to carry out and has no ability to carry it out can nevertheless be convicted.[33] But despite having *made* a threat, such a defendant would not *pose* a threat. Under the government's interpretation, therefore, he would *not* be guilty. As *amicus* has said, the differences between the two interpretations are neither trivial nor superficial.

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33. *See, e.g.*, *Virginia v. Black*, 538 U.S. at 359-60; *United States v. Left Hand Bull*, 901 F.3d 647, 649 (8th Cir. 1990); *United States v. Glover*, 846 F.3d 339, 344 (6th Cir. 1988); *United States v. Parr*, 545 F.3d 491, 498 (7th Cir. 2008),

3. The government's interpretation is at best out of step with the existing caselaw, and is in conflict with decisions by several of the Circuits.

Although this Court is of course not bound by decisions by the courts of appeals, it is worth pointing out the extent to which the government's argument is at odds with the existing case law.

Amicus has already cited cases from six of the Circuits interpreting *threat* and *threaten* as denoting communicative acts.[34] Those decisions are inconsistent with any suggestion that engaging in conduct that is noncommunicative but poses a threat of violence (or a risk or danger of it) amounts to "the threatened use of force." The government has cited no cases to the contrary, and *amicus* is unaware of any, despite having done fairly extensive research regarding the issue.

Moreover, several of the cases *amicus* has cited have rejected that idea, and they have done so in contexts in which conduct satisfying the elements of the predicate offense in question would necessarily pose a threat of the use of force (or in one of the cases, of the use of a deadly weapon).

Two of the cases had to do with armed robbery: the Tenth Circuit held that conspiracy to commit armed robbery is not a qualifying offense under ACCA,[35] and the Fifth Circuit held that the actual commission of an armed robbery is not a qualifying offense, where the

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34. *See* cases cited in footnotes 13 & 14, *supra*.

35. *United States v. King*, 979 F.2d at 803.

offense was defined by state law as simply committing a robbery while in possession of a weapon.[36]

The Fifth and Seventh Circuits have both dealt with statutes criminalizing the act of pointing a firearm at someone;[37] the issue in the Seventh Circuit case was whether the crime fell within the scope of ACCA,[38] and in the Fifth Circuit case the issue was whether the statute qualified as a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A), which includes within that category crimes that "[have], as an element,…the threatened use of a deadly weapon[.]"[39] In each case the court held that it would be possible for a firearm to be pointed at someone in circumstances in which it is clear to those present that no threat was intended. As a result that the statutes were held not include as an element the threatened use of physical

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36. *United States v. Parnell*, 818 F.3d at 978, 980-81.

37. *Portee v. United States*, 941 F.3d 263 (7th Cir. 2018); *United States v. White*, 258 F.3d 374 (5th Cir. 2001).

38. *Portee*, 941 F.3d at 265-66; *see* Ind. Code § 35-47-4-3 (as in effect in October 1999).

39. *White*, 258 F.3d at 381; *see* Tex. Penal Code § 22.05 (as in effect August 1, 1994). The statute prohibited "[recklessly engaging] in conduct that places another in imminent danger of serious bodily injury," and it specifies that "[r]ecklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded."

force (in the Seventh Circuit case) or of a deadly weapon (in the Fifth Circuit case).[40]

In each of these four cases, the court recognized that conduct sufficient to violate the underlying statute would pose a threat of the use of force (in the cases decided under ACCA)[41] or of a deadly weapon (in the case decided under 18 U.S.C. § 921(a)(33)(A)).[42] Nevertheless, the statutes at issue were held not to be crimes of violence under ACCA or a misdemeanor crime of domestic violence under § 921(a)(33)(A), as the case may be. In *Parnell*, *King*, and *White*, the court concluded that the threats constituting crimes of violence are *communicative* threats.[43] And while the decision in *Portee* didn't use comparable language, the court's holding is hard to explain on any other basis.[44]

With all of this being said, *amicus* has come across cases in which statutes were found to have the threatened use of force as an element even though, in amicus's opinion, the prohibited conduct would not

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40. *Portee*, 941 F.3d at 267-69; *White*, 259 F.3d at 381-84. In the situations posited in each the decision hypothetical, pointing the gun would presumably be a communicative act, but one performed with the intent to amuse rather than threaten.

41. *King*, 979 F.2d at 803; *Parnell*, 818 F.3d at 980; *White*, 258 F.3d at 383-384.

42. *White*, 258 F.3d at 383-84.

43. *King*, 979 F.2d at 803; *Parnell*, 818 F.3d at 980; *White*, 258 F.3d at 384.

44. *White*, 258 F.3d at 383-84.

necessarily involve a communicative act.[45] Although the results in some of these cases can be seen as consistent with the government's argument, that provides only weak support for the government's position.

In none of the cases in question did the court say that a defendant could be found guilty of making a threat based solely on noncommunicative conduct. Rather, the court took an overly broad view of the kinds of action that can appropriately found to be communicative. To the extent that these cases reached the wrong result, therefore, the flaw in these decisions' reasoning was not in the legal rule they invoked but in their application of that rule to the predicate statutes.

C. The government's interpretation is radically inappropriate, because it would result in the meaning of the words in statutes changing from one case to the next.

The government's interpretation presents a challenge to the principle that the meaning of a word or phrase as used in a particular provision should remain stable across all cases in which the statute is applied, The government does not contend that its interpretation should replace the established interpretation of *threat* and *threaten* as denoting communicative acts. Therefore, although it does not address the issue, its position must be that ACCA should be interpreted in two different ways, with one interpretation being ap-

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45. *E.g.*, *United States v. Harden*, 866 F.3d 768, 769-70, 771-72 (7th Cir. 2017); *United States v. Cortez-Arias*, 403 F.3d 1111, 1115, 1116 (9th Cir. 2005).

plied in some cases and the other being applied in other cases. However, this Court has decisively rejected such an approach to statutory interpretation.

Even if there might be circumstances warranting interpretation-in-the-alternative, no such circumstances are present here. There is no principled reason to allowing *threat* and *threaten* to have different meanings in different cases. And there are powerful reasons not to do so.

1. The principle that a statute's interpretation should be uniform across all cases was articulated by this Court in *Clark v. Martinez*, 543 U.S. 371 (2005). That case involved a provision authorizing detention of aliens who fell into any of three different categories, 8 U.S.C. § 1231(a)(6). In a previous case relating to the second of three categories, the Court had interpreted the statute not to authorize indefinite detention. *Zadvydas v. Davis*, 533 U.S. 678 (2001). At issue in *Clark* was whether that interpretation applied as well to cases arising under the first category. The argument against doing so was based on the fact that the first category covered aliens who had never been lawfully admitted to the United States, while the second category covered aliens who had been admitted but were subject to removal. It was argued that the considerations that had motivated the earlier decisions applied to aliens who had already been admitted (those in category 2) did not apply to aliens who had not yet been admitted (those in category 1).

The Court held that because the text did not draw any distinction based on admission status, the same interpretation had to be applied in both categories of

cases. *Clark*, 543 U.S. at 377-84. The Court rejected the suggestion that the previous interpretation should be limited to the category that raised the concerns that the interpretation was based on; "the lowest common denominator, as it were, must govern." *Id.* at 380 (cleaned up). Accepting that argument, the Court said, "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382.

In a subsequent case, decided several years after *Clark*, eight of the Court's Justices reiterated the conclusion that the statutory text should be interpreted in the same way in all cases to which it applies. The case was *United States v. Santos*, 553 U.S. 507 (2008), in which the Court was divided 4-1-4 as to the merits. The deciding vote was provided by Justice Stevens, who argued that having two concurrent interpretations is permissible in at least some circumstances. 553 U.S. at 524-28 (Stevens, J., concurring in the judgment). But all eight of the remaining Justices disagreed with that view. *Id.* at 522-24 (plurality opinion); *id.* at 532 (Alito, J., dissenting, joined by three Justices).

2. The government has not asked the Court to revisit the question whether the meaning of a statute can vary from one case to the next. But even if the Court were open to that possibility, this case would present a bad vehicle for addressing the issue. Assuming there exist circumstances in which deviating from *Clark* might be appropriate, no such circumstances are present here. On the contrary, there are powerful reasons not to do so.

First, there is no principled reason to allow competing interpretations of *threat* and *threaten* to exist side-by-side. There exist no considerations such as those raised by the dissents in *Clark*, 542 U.S. at 392-401 (Thomas, J., dissenting), and *Santos* 553 U.S. at 524-28 (Stevens, J., dissenting), that could reasonably be regard as justifying allowing multiple interpretations.

Second, accepting the government's interpretation would open Pandora's box. One of the first problems likely to arise would be that of determining what kinds of cases the government's interpretation might apply to. But before dealing with that issue, it would be necessary to decide *how to go about* deciding the issue. Would the issue arise only with respect to ACCA? Or maybe all statutes that include phrases such as *threatened use of force?* All statutes that are asserted to be qualifying offenses under ACCA and similar statutes? All criminal statutes that include the words *threat* or *threaten*? (And if so, why only criminal statutes?)

And regardless of how issues such as those were ultimately resolved (after who-knows-how-many trips to this Court), there would remain the need in every relevant context to decide the underlying question of which interpretation should apply. That would raise a whole new set of questions, such as what factors would be relevant and what the decisional criteria would be.

The final problem *amicus* can currently foresee as resulting if the government's interpretation were accepted is one he has already referred to (pg. 23, *supra*): the inconsistency in the outcomes that would result

from the different interpretations in at least one identifiable category of cases.

In short, there are very good reasons to abide by the principle that the meaning of statutory text should remain constant across all cases in which it might apply.

Conclusion

The government's proposed interpretation of *threat* and *threaten* should be rejected.

Respectfully submitted,

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