No. 24-____

In the
Supreme Court of the United States

Dwayne Barrett,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Double Jeopardy Clause permits two sentences for an act that violates 18 U.S.C. § 924(c) and § 924(j), a question that divides seven circuits but about which the Solicitor General and Petitioner agree.

II. Whether "Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A), a question left open after" *United States v. Taylor*, 596 U.S. 845 (2022). *United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 102 F.4th 60 and appears at Petitioner's Appendix ("Pet. App.") 1a-70a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231; the Second Circuit did under 28 U.S.C. § 1291; and this Court does under § 1254(1).

RELEVANT PROVISIONS

"No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. V.

18 U.S.C. § 924(c)(1)(A) is violated if someone, "during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or [], in furtherance of any such crime, possesses a firearm."

18 U.S.C. § 924(j) is violated if someone, "in the course of a violation of subsection (c), causes the death of a person through the use of a firearm."

A "'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." 18 U.S.C. § 924(c)(3)(A).

Hobbs Act robbery is "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." 18 U.S.C. § 1951(b)(1).

INTRODUCTION

The "government's longstanding position has been that a defendant may not be sentenced to cumulative punishments for Section 924(c) and (j) offenses arising out of the same conduct." *Lora v. United States*, No. 22-49, Brief for the United States, 2023 WL 2186455, at *24. Five circuits agree that such double punishment violates the Double Jeopardy Clause. *See United States v. Garcia-Ortiz*, 657 F.3d 25, 28 (1st Cir. 2011); *United States v. Ortiz-Orellana*, 90 F.4th 689, 705 (4th Cir. 2024); *United States v. Gonzales*, 841 F.3d 339, 355-58 (5th Cir. 2016); *United States v. Wilson*, 579 F. App'x 338, 348 (6th Cir. 2014); *United States v. Cervantes*, 2021 WL 2666684, at *7 (9th Cir. 2021).

The Second Circuit disagrees: "§ 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments." Pet. App. 52a. The Eleventh Circuit is also "unpersuaded by the argument of the United States that the imposition of sentences under both section 924(c) and section 924(j) would violate the Double Jeopardy Clause." *United States v. Julian*, 633 F.3d 1250, 1256 (11th Cir. 2011).

The Court should resolve the split over this oft-posed and important question, the answer to which can mean two prison terms – one of "15 years" plus a consecutive one of "30 years" – rather than one sentence of "not more than 15 years." *Lora v. United States*, 599 U.S. 453, 459-60 (2023).

The Court should also answer the "question left open after *Taylor*," which is whether "Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)."

United States v. Stoney, 62 F.4th 108, 113 (3d Cir. 2023). *Taylor* resolved a "5-1" circuit split over whether "attempted Hobbs Act robbery is a crime of violence." Reply Brief for the Petitioner, 2021 WL 2385535, at *5-6. "The answer matters," the Court said, as it can mean "years or decades of further imprisonment." *United States v. Taylor*, 596 U.S. 845, 848 (2022). Likewise, labeling Hobbs Act robbery a § 924(c) "crime of violence" mandated an extra "ten years" behind bars for Petitioner and advised "life imprisonment" under the Sentencing Guidelines, which his "sentence of 50 years" effectively constitutes. Pet. App. 12a-13a.

But this Court clarified in *Taylor* that deciding whether a crime is a § 924(c) predicate is a "straightforward job: Look at the elements." 596 U.S. at 860. And the elements of Hobbs Act robbery are such that it can be committed by threatening (1) harm to oneself or (2) nonphysical injury to property, neither of which entails "the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). Notably, the Second Circuit did not disagree: it said it was "bound by" a case that "never considered" these points, Pet. App. 38a, and then it refused to consider them en banc. *Id.* at 71a.

The Government has all but conceded Petitioner's first point is correct, s*ee infra* at 23-24, yet the circuits refuse to address it. And various judges have agreed with the second point, *see infra* at 25-26, but circuits have disagreed by deeming robbery and extortion mutually exclusive— something the Hobbs Act does not do.

The Court should settle this. If not, it should hold this petition for the forthcoming "crime of violence" ruling in *Delligatti v. United States*, No. 23-825.

STATEMENT OF THE CASE

1. Petitioner Dwayne Barrett was the driver for a robbery crew. On December 12, 2011, when he wasn't present, a co-defendant fatally shot a man for throwing a bag of cash out the window of a moving vehicle. *See* Pet. App. 6a.

For this, a jury convicted Barrett of: aiding a Hobbs Act robbery, by driving the co-defendant to the scene, in violation of 18 U.S.C. § 1951; aiding the use of a gun during that robbery, a "crime of violence," in violation of § 924(c); and aiding the use of a gun used to kill during a "crime of violence," in violation of § 924(j). The District Court (Sullivan, J.) sentenced Barrett to 90 years in prison, but that sentence was vacated after an appeal to this Court. *See* Pet. App. 10a-11a.

At resentencing, where Barrett's § 924(j) conviction meant his suggested sentence was life imprisonment, *see* U.S.S.G. §§ 1B1.2(a); 2A1.1; Appendix A, the judge imposed a sentence of 50 years, which included 20 years for the Hobbs Act robbery and a consecutive 25 years for the § 924(j) conviction. *See* 2d Cir. 21-1379, Docket Entry 70 at 268. The judge did not impose a sentence for the § 924(c) conviction, as that and the one under § 924(j) "merged into one sentence because one's a lesser included of the other." *Id.* at 220. *See also id.* at 275 (Amended Judgment reflecting no sentence imposed for the § 924(c) conviction).

2. While Barrett's appeal of that new judgment was pending, this Court decided *Lora*. The Court overruled all the cases that held "§ 924(c)(1)(D)(ii)'s bar on concurrent sentences governs § 924(j) sentences" and that "a § 924(j) conviction is [] subject to the mandatory minimum sentences specified in § 924(c)." 599 U.S. at

456. In fact, "subsection (j) neither incorporates subsection (c)'s penalties nor triggers the consecutive-sentence mandate." *Id*. at 462.

Barrett thus filed a supplemental brief, explaining why the District Court had misunderstood § 924(j)'s penalties. *See* 2d Cir. 21-1379, Docket Entry 127.

3. Also while his appeal was pending, this Court decided *Taylor*. Reversing all but one of the circuits that had weighed in, it held attempted Hobbs Act robbery is not a "crime of violence" under § 924(c). It also clarified the proper methodology for determining if a crime "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). Previously, arguing a crime wasn't a § 924(c) predicate required the defendant to show a "'realistic probability'" the "'statute at issue could be applied to conduct that does not constitute a crime of violence' by establishing that 'courts [have] in fact appl[ied] the statute in the manner for which he argues.'" *United States v. Nikolla*, 950 F.3d 51, 53-54 (2d Cir. 2020) (citation omitted).

But *Taylor* ended the "realistic probability" test in § 924(c) cases. That test had developed in the context of federal courts having to "make a judgment about the meaning of a state statute," yet "no such federalism concern is in play here. The statute before us [§ 924(c)] asks only whether the elements of one federal law align with those prescribed in another." 596 U.S. at 859. *See also* § 924(c)(1)(A) (limiting § 924(c) predicates to crimes "for which [a] person may be prosecuted in a court of the United States"). Section 924(c) does not "mandate an empirical inquiry into how crimes are usually committed, let alone impose a burden on the defendant to

present proof about the government's own prosecutorial habits. Congress tasked the courts with a much more straightforward job: Look at the elements of the underlying crime." *Taylor*, 596 U.S. at 860.

"The only relevant question is whether the federal felony at issue always requires the government to prove," *id.* at 850, the "use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). And a "hypothetical" can "illustrate" why the answer is no. *Taylor*, 596 U.S. at 851. *See also, e.g., United States v. McDaniel*, 85 F.4th 176, 186 n.13 (4th Cir. 2023) (*Taylor* "clarified that . . . the 'realistic probability' test only applies when a federal court is interpreting state law.").

Barrett thus filed another supplemental brief, setting out two reasons why the elements of Hobbs Act robbery don't require what § 924(c)(3)(A) demands. He also provided hypotheticals. *See* 2d Cir. 21-1379, Docket Entry 111.

4. The Second Circuit (per Raggi, J.), agreed the District Court's misunderstanding of § 924(j)'s penalties required resentencing. But it reversed the ruling that the § 924(c) and § 924(j) counts "'merged into one sentence.'" Pet. App. 49a (quoting District Court). "As construed in *Lora*, § 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments." *Id.* at 52a. "Accordingly, on remand, the district court should sentence Barrett on each of these two counts of conviction." *Id.*

As to whether Hobbs Act robbery is a § 924(c) predicate, the Second Circuit acknowledged Barrett presented "two hypotheticals" showing "Hobbs Act robbery,

like attempted Hobbs Act robbery, can be committed without 'the use, attempted use, or threatened use of physical force against the person or property of another.'" *Id*. at 36a (quoting § 924(c)(3)(A)). But while Barrett's appeal was pending, the circuit decided *United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023) (per curiam).

McCoy held Hobbs Act robbery is a § 924(c) predicate: "unlike in *Taylor*, Defendants here have presented no hypothetical case in which a Hobbs Act robbery could be committed without the use, attempted use, or threatened use of force against another person or his property." *Id*. at 74.

Barrett argued *McCoy* shouldn't control, as he – unlike those defendants – had indeed identified hypothetical robberies not fitting within § 924(c)(3)(A). But the circuit concluded it was "bound by *McCoy*" even though "the court there never considered the hypothetical Hobbs Act robberies he posits." Pet. App. 38a.

5. Barrett sought en banc review: *McCoy* "didn't analyze [the "crime of violence"] question as required by the Supreme Court's decision in *United States v. Taylor*." 2d Cir. 21-1379, Docket Entry 161-1 at 1. *McCoy* "neither identified the elements of Hobbs Act robbery nor examined whether they invariably require proof of what § 924(c)(3)(A) demands." *Id*. It thus "didn't address [this] question as the Supreme Court requires— and [] consequently got the wrong answer." *Id*. at 2.

As for the panel's *Lora* ruling, *Lora* "says nothing about whether a defendant may be sentenced under both § 924(c) and § 924(j) for the same conduct." *Id*. at 3. "And to the extent this question surfaced, the government sided with Barrett." *Id*.

The Second Circuit denied en banc review without dissent. Pet. App. 71a.

REASONS FOR GRANTING THE PETITION

I. The Double Jeopardy Question Merits an Answer

The Second Circuit's ruling that the Double Jeopardy Clause permits sentences under both § 924(c) and § 924(j) for the same act is "in conflict with" rulings of other "United States court[s] of appeals on the same important matter." Sup. Ct. R. 10(a). This circuit split will only deepen absent review, and the jurisdictions in the minority allow what the Solicitor General and five circuits consider unconstitutional double punishment. The Court should resolve this dispute by holding "'a defendant may be punished for *either* a Section 924(c) offense *or* a Section 924(j) offense, *but not both*.'" *Lora*, 599 U.S. at 461 (emphasis in *Lora*; quoting Brief for the United States).

A. The Circuits Are Split

In *United States v. Garcia-Ortiz*, 657 F.3d 25 (1st Cir. 2011), the First Circuit held that imposing two sentences for § 924(c) and § 924(j) convictions stemming from the same conduct "transgressed the Double Jeopardy Clause." *Id.* at 27. A "conviction under section 924(j) necessarily includes a finding that the defendant violated section 924(c). The only meaningful difference is that section 924(j) requires proof of one additional fact: the death. Accordingly, section 924(c) is a lesser included offense of section 924(j). The government now concedes as much, and the case law amply supports this concession." *Id.* at 28 (citations omitted). "Congress could have authorized cumulative punishments for convictions under sections 924(c) and 924(j) had it chosen to do so. But the plain language of section 924(j) indicates no such desire." *Id.* (citation omitted).

The Fourth Circuit agrees. Section "924(c) is a lesser-included offense of § 924(j). The Government has not suggested that Congress intended to authorize cumulative punishments for convictions under these two statutes. And we can find no evidence of such congressional intent." *United States v. Palacios*, 982 F.3d 920, 924-25 (4th Cir. 2020) (citations omitted). Thus, "the Double Jeopardy Clause prohibits imposition of cumulative punishments for § 924(c) and § 924(j) convictions based on the same conduct." *Id.* at 925. *See also United States v. Ortiz-Orellana*, 90 F.4th 689, 705 (4th Cir. 2024) (same).

The Fifth Circuit also agrees. It reversed a judge who held (like the Second Circuit here) that "section 924(c) and section 924(j) are 'distinct offenses, which Congress intended to punish in separate and consecutive fashions.'" *United States v. Gonzales*, 841 F.3d 339, 355 (5th Cir. 2016). "Every element of section 924(c) is also an element of section 924(j)," the court noted; "therefore, a person who violates section 924(j) necessarily violates section 924(c). As such, section 924(j) amounts to the 'same offense' as section 924(c) for purposes of the Double Jeopardy Clause." *Id.* at 356. "We recognize, though, that . . . 'a legislature [may] specifically authorize[] cumulative punishment under two statutes.'" *Id.* (citation omitted). But we "do not see an intent by Congress to impose cumulative punishment under both subsections for the same conduct." *Id.* at 357. "We thus follow the majority view in the courts of appeal (and the government's view) that there is insufficient indication that Congress intended sentences to be imposed under both subsection 924(j) and the lesser included offense of subsection 924(c)." *Id.* at 358.

The Sixth Circuit agrees too. "Every element of § 924(c) is also an element of § 924(j). Thus, § 924(c) is a lesser-included offense of § 924(j)— which means that, for purposes of the Double Jeopardy Clause, § 924(c) counts as the 'same offense' as § 924(j). Moreover, there is no indication that Congress authorized multiple punishments." *United States v. Wilson*, 579 F. App'x 338, 348 (6th Cir. 2014).

The Ninth Circuit agrees as well. "Because § 924(c) is a lesser-included offense of § 924(j), and because both counts here were based on the same underlying murder [], convictions and sentences on both counts violate 'the aspect of the Double Jeopardy Clause that protects against multiple punishments.'" *United States v. Cervantes*, 2021 WL 2666684, at *7 (9th Cir. 2021) (quoting *United States v. Kuzma*, 967 F.3d 959, 977 (9th Cir. 2020)).

The Second Circuit disagrees with all the courts above: "§ 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments." Pet. App. 52a. The circuit acknowledged "Barrett's § 924(c) crime is [] a lesser-included offense of his § 924(j) crime," *id.* at 54a, but decided that "Congress intended to authorize cumulative sentences for a defendant convicted on related § 924(c) and § 924(j) counts of conviction." *Id.* at 61a.

The Second Circuit noted the split on this: "for some time, courts, including our own, . . . concluded that cumulative § 924(c) and § 924(j) sentences were not authorized." *Id.* at 56a & n.29 (citing cases). *See also id.* at 58a n.31 ("After *Lora*, the Fourth Circuit reiterated its *Palacios* holding that cumulative punishments under § 924(c) and § 924(j) violate double jeopardy.") (citing *Ortiz-Orellana*).

The Eleventh Circuit agrees with the Second Circuit. "Our interpretation of section 924(j) does not prevent a district court from imposing a sentence under section 924(c) that must run consecutive to a separate sentence imposed under section 924(j)." *United States v. Julian*, 633 F.3d 1250, 1256 (11th Cir. 2011). "We are unpersuaded by the argument of the United States that the imposition of sentences under both section 924(c) and section 924(j) would violate the Double Jeopardy Clause of the Fifth Amendment." *Id.*

Though the § 924(c) and § 924(j) charges in *Julian* were in the same rather than separate counts, *see id.* at 1252, the Government has explained that *Julian*'s double jeopardy "discussion was not dicta," as "it related directly to the panel's holding that §§ 924(c) and 924(j) create separate offenses, and was necessary to dispense with the appellee's express argument in that case that the Double Jeopardy Clause barred this interpretation." *United States v. Campo* (11th Cir.), Brief for the United States, 2016 WL 1295538, at *51-*52. *Julian* "rejected the idea that 'the imposition of sentences under both section 924(c) and section 924(j) would violate the Double Jeopardy Clause.'" *Id.* at *51 (quoting *Julian*, 633 F.3d at 1256).

And dicta or not, the Eleventh Circuit has cited *Julian* in "affirm[ing] [the] imposition of separate sentences" for § 924(c) and § 924(j) counts stemming from the same conduct. *United States v. Campo*, 840 F.3d 1249, 1268 (11th Cir. 2016).

In sum, the circuits are split over this important question of statutory and constitutional interpretation. And though the Second Circuit could have lessened the split its panel ruling exacerbated, it refused to go en banc. Pet. App. 71a.

B. The Government Agrees with Petitioner

The "Double Jeopardy Clause," the Solicitor General noted in *Lora*, precludes "'multiple punishments for the same offense.'" Brief for the United States, 2023 WL 2186455, at *22 (citation omitted). "[T]wo offenses are presumptively 'distinct' (and thus not the 'same') if and only if 'each statute requires proof of an additional fact which the other does not.'" *Id*. (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "The legislature may 'specifically authorize[] cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" [offense] under *Blockburger*.' But the absence of a distinction under *Blockburger* creates a 'presumption' that Congress intended only one conviction and one punishment." *Id*. at *22-*23 (brackets in brief; citations omitted).

"That presumption applies with full force here, because Sections 924(c) and (j) do not have distinct elements. Section 924(j) 'requires proof of a fact' – a firearm-related death – 'which [Section 924(c)] does not.' But Section 924(c) does not require proof of any element that Section 924(j) does not also require." *Id*. at *23 (brackets in brief; quoting *Blockburger*, 284 U.S. at 304). And "Congress has not authorized separate convictions and punishments based on Sections 924(c) and (j) for a single homicide." *Id*. Accordingly, "the government's longstanding position has been that a defendant may not be sentenced to cumulative punishments for Section 924(c) and (j) offenses arising out of the same conduct." *Id*. at *24. Indeed, the claim that "Congress intended 'that a defendant could be convicted and sentenced under (c) and (j) at the same time' . . . is insupportable." *Id*. at *25-*26 (citation omitted).

C. The Government Is Right, and the Second Circuit Is Wrong

When "'two statutory provisions proscribe the "same offense,"'" courts may not "impose two punishments for that offense." *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (quoting *Whalen v. United States*, 445 U.S. 684, 692 (1980)). The only exception is if "Congress clearly indicates that it intended to allow courts to impose them." *Id.* at 303. Congress didn't do so here.

The Court effectively decided this question in *Whalen*, where it explained that "rape and the killing of a person in the course of rape in the District of Columbia are separate statutory offenses for which punishments are separately provided. Neither statute, however, indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode." 445 U.S. at 690. Thus, "Congress did not authorize consecutive sentences . . . , since it is plainly not the case that 'each provision requires proof of a fact which the other does not.' A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." *Id.* at 693-94 (quoting *Blockburger*, 284 U.S. at 304). And a directive to impose two punishments "nowhere clearly appears." *Id.* at 695.

Likewise, armed robbery and fatally shooting a person in the course of such robbery are "separate statutory offenses for which punishments are separately provided" under § 924(c) and § 924(j). *Id.* at 690. "Neither statute, however, indicates whether Congress authorized consecutive sentences where both statutes have been offended in a single criminal episode." *Id.* Thus, "Congress did not

authorize consecutive sentences . . . , since it is plainly not the case that 'each provision requires proof of a fact which the other does not.' A conviction for killing in the course of [armed robbery] cannot be had without proving all the elements of [armed robbery]." *Id*. at 693-94 (quoting *Blockburger*, 284 U.S. at 304). And a directive to impose two punishments "nowhere clearly appears." *Id*. at 695.

The Second Circuit's opinion ignores *Whalen*. "As construed in *Lora*," it asserts instead, "§ 924(c)(1) and § 924(j) crimes are separate offenses for which Congress has clearly authorized cumulative punishments." Pet. App. 52a.

Nothing in *Lora* supports that. Lora was convicted of violating § 924(j) but not § 924(c), *see* 599 U.S. at 455, so the Court wasn't presented with the question whether two sentences are constitutional. And it declined to speculate: citing the Government's opinion that a "'defendant may be punished for *either* a Section 924(c) offense *or* a Section 924(j) offense, *but not both*,'" *id*. at 461 (emphasis in *Lora*; citation omitted), the Court took "no position on the Government's view." *Id*. Obviously, the Court did not hold (or imply) two sentences may be imposed.

Per the Second Circuit, however, "Congress intended to authorize cumulative sentences for a defendant convicted on related § 924(c) and § 924(j) counts of conviction." Pet. App. 61a. The court cited two clauses of § 924(c) in support of its claim: "Congress authorized – indeed, mandated – that sentences imposed under [§ 924(c)] (1) cannot be less than prescribed minimums, *see* 18 U.S.C. § 924(c)(1)(A), and (2) must run consecutively to any other sentences imposed on a defendant, *see id*. § 924(c)(1)(D)(ii)." Pet. App. 55a.

Yet all § 924(c)(1)(A) says is a § 924(c) sentence must be a certain "minimum" (depending on the facts of the case) and "in addition to the punishment provided for [the underlying] crime of violence or drug trafficking crime." As the Government explained in *Lora*, this simply "makes clear that a violation of Section 924(c) is not the same offense for punishment purposes as the predicate [violent or drug] crime, even though *Blockburger* would presumptively classify it as such." Brief for the United States, 2023 WL 2186455, at *26. The Fifth Circuit agrees: § 924(c)(1)(A) "says nothing [] about a section 924(c) sentence running consecutively to a sentence for a section 924(j) conviction." *Gonzales*, 841 F.3d at 357.

Nor does § 924(c)(1)(D)(ii). It says "no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment." It thus applies only if a § 924(c) sentence is "imposed on a person." But that just begs the question: *May* a § 924(c) sentence be "imposed on a person" sentenced under § 924(j) for the same conduct? The clause doesn't say.

And that silence is deafening compared to § 924(c)(1)(A), which directs that a person who commits a crime of violence or drug trafficking crime with a gun "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime[,] be sentenced" under § 924(c). But § 924(c)(1)(D)(ii), in contrast, does not say a person who commits a crime of violence or drug trafficking crime with a gun and kills someone with that gun "shall, in addition to the punishment provided for such killing, be sentenced" under § 924(c). And "'where Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

The Fifth Circuit thus finds § 924(c)(1)(D)(ii) an exceptionally "weak[] basis from which to discern legislative intent to impose multiple punishments," as it, unlike § 924(c)(1)(A), is not a "statutory command[]" to do that. *Gonzales*, 841 F.3d at 357. "If a defendant receives a sentence under subsection (j)," moreover, "he does *not* receive a sentence 'imposed . . . under [subsection (c)].'" *Lora*, 599 U.S. at 461 (emphasis and brackets in *Lora*; quoting § 924(c)(1)(D)(ii)). And this "aligns with" the "Government's view" that a "'defendant may be punished for *either* a Section 924(c) offense *or* a Section 924(j) offense, *but not both*.'" *Id*. (emphasis in *Lora*).[1]

In sum, the Government considers the Second Circuit's view "insupportable" for good reason. *Lora*, Brief for the United States, 2023 WL 2186455, at *26. Nothing "clearly indicates," *Rutledge*, 517 U.S. at 303, a person may be sentenced under § 924(c) and § 924(j) for the same conduct. The Double Jeopardy Clause thus precludes such double punishment.

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[1] The Second Circuit also invoked *United States v. Gonzales*, 520 U.S. 1 (1997), but that case posed a different question: whether a § 924(c) sentence may "run concurrently with a state-imposed sentence." *Id*. at 2. The Court said no, citing what is now § 924(c)(1)(D)(ii). It emphasized that it was "hesitant to reach beyond the facts of this case to decide a question that is not squarely presented." *Id*. at 11.

It reiterated, moreover, that a judge "could not (for double jeopardy reasons) sentence a person to two consecutive federal prison terms for a single violation of a federal criminal statute, such as § 924(c)." *Id*. at 9. This favors Petitioner, as "section 924(j) amounts to the 'same offense' as section 924(c) for purposes of the Double Jeopardy Clause," *Gonzales*, 841 F.3d at 356, and when "'two statutory provisions proscribe the "same offense,"'" courts may not "impose two punishments." *Rutledge*, 517 U.S. at 297 (quoting *Whalen*, 445 U.S. at 692). The only exception is if "Congress clearly indicates" otherwise, *id*. at 303, which it didn't do here.

II. The "Crime of Violence" Question Merits an Answer

Whether Hobbs Act robbery is a § 924(c) "crime of violence" is "an important question of federal law that has not been, but should be, settled by this Court," especially as lower courts have decided it "in a way that conflicts with relevant decisions of this Court" and accordingly gotten the wrong answer. Sup. Ct. R. 10(c).

A. This Question Is Recurring and Immensely Consequential, But the Circuits Have Refused to Address It Correctly

"As the government points out," Hobbs Act "'robbery frequently serv[es] as a predicate offense for § 924(c) counts.'" *United States v. Thomas*, 2019 WL 1590101, at *2 (D.D.C. 2019) (citation omitted). And 2,864 people were sentenced for violating § 924(c) in the last fiscal year. *See* https://www.ussc.gov/research/quick-facts/section-924c-firearms. The average sentence was 145 months, *id.,* reflecting § 924(c)'s mandate that a consecutive term of at least 5, 7, 10, 25 or 30 years – or life imprisonment – be imposed. *See* § 924(c)(1).

The issue here is at least as weighty as the one in *Taylor*, which asked: "Does attempted Hobbs Act robbery qualify as a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A)? The answer matters because a person convicted of attempted Hobbs Act robbery alone normally faces up to 20 years in prison. But if that offense qualifies as a 'crime of violence' under § 924(c)(3)(A), the same individual may face a second felony conviction and years or decades of further imprisonment." 596 U.S. at 848. Strike the word "attempted" from this passage, and that describes this case. And as *Taylor* held as to attempted Hobbs Act robbery, completed robbery is not a "crime of violence" under § 924(c).

Taylor clarified that deciding whether an offense is a § 924(c) predicate is a "straightforward job: Look at the elements." *Id.* at 860. "The only relevant question is whether the federal felony at issue always requires the government to prove," *id.* at 850, the "use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A). And a "hypothetical" can "illustrate" why the answer is no. *Taylor*, 596 U.S. at 851.

The Second Circuit acknowledged Petitioner presented "two hypotheticals" illustrating how "Hobbs Act robbery, like attempted Hobbs Act robbery, can be committed without 'the use, attempted use, or threatened use of physical force against the person or property of another.'" Pet. App. 36a (quoting § 924(c)(3)(A)). But it concluded it was "bound by *McCoy*" even though "the court there never considered the hypothetical Hobbs Act robberies he posits." *Id.* at 38a.

Worse than not considering his hypotheticals, *McCoy* did not analyze this question as *Taylor* requires: it did not "[l]ook at the elements" of Hobbs Act robbery, 596 U.S. at 860, or discuss whether they "always require[] the government to prove" what § 924(c)(3)(A) demands. *Id.* at 850. Rather, *McCoy* just said the defendants "presented no hypothetical case in which a Hobbs Act robbery could be committed without the use, attempted use, or threatened use of force against another person or his property." 58 F.4th at 74. So the court ruled against them, deferring to the Second Circuit's "settled understanding that completed Hobbs Act robberies are categorically crimes of violence pursuant to section 924(c)(3)(A). *See, e.g., United States v. Hill*, 890 F.3d 51, 56-60 (2d Cir. 2018)." *McCoy*, 58 F.4th at 74.

But *Hill*'s reason for rejecting an argument that Hobbs Act robbery can be committed "without the use of physical force" was that Hill relied on "hypotheticals, not actual cases," and therefore "failed to show any realistic probability that a perpetrator could effect such a robbery in the manner he posits." 890 F.3d at 57 n.9. *Taylor* later made clear, however, the "realistic probability" test doesn't apply here: a "hypothetical" can suffice to show a crime is not a § 924(c) predicate. 596 U.S. at 851. *See also McDaniel*, 85 F.4th at 186 n.13 (*Taylor* "clarified that . . . the 'realistic probability' test only applies when a federal court is interpreting state law.").

Thus, to summarize the circuit's ruling against Petitioner, it's based on a case (*McCoy*) that never considered his arguments, didn't perform the analysis *Taylor* requires, and deferred to a ruling (*Hill*) that employed the "realistic probability" test this Court jettisoned in *Taylor*.

That's no way to run a railroad, and the Second Circuit is not alone. In another post-*Taylor* challenge to a § 924(c) count premised on Hobbs Act robbery, the First Circuit also refused to identify robbery's elements or discuss whether they invariably require what § 924(c)(3)(A) demands. It just said the challenge was "inconsistent with this court's precedent. *See United States v. Garcia-Ortiz*, 904 F.3d 102 (1st Cir. 2018)." *Diaz-Rodriguez v. United States*, 2023 WL 5355224, at *1 (1st Cir. 2023). But *Garcia-Ortiz* was based, like *Hill*, on the defendant's citing "no actual convictions for Hobbs Act robbery matching or approximating his theorized [nonviolent] scenario" and consequently showing no "'realistic probability' that courts would apply the law to find an offense in such a scenario." 904 F.3d at 107.

The Sixth Circuit also believes "*Taylor* did not disturb our caselaw that completed Hobbs Act robbery qualifies as a crime of violence," citing "*United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017)." *Varner v. United States*, 2024 WL 2830657, at *2 (6th Cir. 2024). Yet *Gooch* held, like the cases above, "a hypothetical nonviolent violation of the statute, without evidence of actual application of the statute to such conduct, is insufficient to show a 'realistic probability' that Hobbs Act robbery could encompass nonviolent conduct." 850 F.3d at 292.

The other circuits have also made clear they're not interested in reconsidering this question as *Taylor* now requires. As the Tenth Circuit has said: "Not only have we held that 'Hobbs Act robbery is a crime of violence under the elements clause,' but we have also rejected an attempt to get around that holding by raising new arguments against it." *United States v. Crocker*, 2023 WL 4247255, at *3 (10th Cir. 2023) (citation omitted). The Second Circuit did exactly that here, saying it was "bound by *McCoy* to reject Barrett's argument that substantive Hobbs Act robbery is not a categorical crime of violence" even though *McCoy* "never considered the hypothetical Hobbs Act robberies he posits." Pet. App. 38a. The circuit then refused to consider his arguments en banc. *Id*. at 71a. *See also, e.g., United States v. Stallings*, 2022 WL 521723, at *1 (4th Cir. 2022) (The argument that "Hobbs Act robbery does not qualify as a proper predicate for [a] § 924(c) charge . . . is foreclosed by binding precedent."); *United States v. Hill*, 63 F.4th 335, 363 (5th Cir. 2023) ("Our precedents establish that Hobbs Act robbery is a crime of violence."); *United States v. Worthen*, 60 F.4th 1066, 1068-69 (7th Cir. 2023) ("We

have determined many times that" Hobbs Act robbery "'requires using or threatening force" against the person or property of another. . . . We follow the course here."); *Wade v. United States*, 2023 WL 3592112, at *1 (9th Cir. 2023) (The "claim that Hobbs Act robbery does not qualify as a crime of violence under the elements clause of 18 U.S.C. § 924(c) is foreclosed by this court's precedent."); *United States v. Wiley*, 78 F.4th 1355, 1363-64 (11th Cir. 2023) ("Hobbs Act robbery itself qualifies as a crime of violence under § 924(c)"; the contrary "argument is foreclosed by our precedent.").

As the circuits will not budge, it falls to this Court to correctly answer the "question left open after *Taylor*." *Stoney*, 62 F.4th at 113.

B. Hobbs Act Robbery Is Not a "Crime of Violence"

Deciding whether a crime is a § 924(c) predicate is a "straightforward job: Look at the elements." *Taylor*, 596 U.S. at 860. The only question is "whether the 'least culpable' conduct that could satisfy the offense elements in a hypothetical case would 'necessarily involve[]' the 'use, attempted use, or threatened use of physical force against the person or property of another.'" *Delligatti v. United States*, No. 23-825, Brief for the United States, 2024 WL 4374209, at *6 (citations omitted).

1. Hobbs Act Robbery Can Be Committed by Threatening Harm to Oneself

The Hobbs Act, at 18 U.S.C. § 1951(b)(1), defines robbery as

> 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.

Robbery is thus committed when there's a taking from a person "by means of actual or threatened force . . . to . . . a relative or member of his family." *Id.* So when someone takes from a relative by threatening harm to himself, that's robbery.

Picture a man confronting his cousin, who's just leaving her restaurant with the day's proceeds. The man puts a gun to his own head: "Give me the cash, or I'll pull the trigger." She complies. That's robbery, yet there's no actual, attempted or threatened force "against the person or property of another." § 924(c)(3)(A).

The Government has said this "is simply not robbery." 2d Cir. 21-1379, Docket Entry 113 at 14. But it tracks robbery's definition: the man succeeds in "obtaining" the cash "from the person" of his cousin "by means of . . . threatened force . . . to . . . a relative." § 1951(b)(1). In passing the "Hobbs Act," moreover, "Congress intended to make criminal all conduct within the reach of the statutory language." *United States v. Culbert*, 435 U.S. 371, 380 (1978). "The language of the Hobbs Act is unmistakably broad," *Taylor v. United States*, 579 U.S. 301, 305 (2016), and the conduct above is plainly "within [its] reach." *Culbert*, 435 U.S. at 380.

The Government has claimed "relative" means one "other than the robber." 2d Cir. 21-1379, Docket Entry 113 at 16. But the Act doesn't say that. It says robbery can be committed by threatening the victim's "relative." § 1951(b)(1). And "relative" means "relative." The Act's "words do not lend themselves to restrictive interpretation." *Culbert*, 435 U.S. at 373. "Hobbs Act robbery reaches" threats to the victim's relative "because the statute specifically says so. We cannot ignore the

statutory text and construct a narrower statute than the plain language supports." *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017) (citation omitted).

Indeed, the Hobbs Act says obtaining property by threatening force against "*anyone* in [the victim's] company" is robbery. § 1951(b)(1) (emphasis added). So picture the robbery above, but this time the restaurateur's employee threatens self-harm as the two leave the restaurant together. Different hypothetical, same result: robbery can be committed without any actual, attempted or threatened force "against the person or property of another." § 924(c)(3)(A).

The Government has, in fact, all but conceded this point. Besides robbers, the Hobbs Act punishes someone who "commits or threatens physical violence to *any person* or property in furtherance of a plan" to violate the Act. § 1951(a) (emphasis added). Before *Taylor*, the Second Circuit held this offense "qualifies categorically as a 'crime of violence.'" *Nikolla*, 950 F.3d at 52. Nikolla disagreed, saying a threat to "any person" included a "threat of violence to the defendant himself," but he did "not cite to any case that applied the Hobbs Act in this way." *Id*. at 54. He thus failed the "realistic probability" test. *Id*. at 53.

Yet now that *Taylor* has discarded that test in § 924(c) cases, telling courts to simply "[l]ook at the elements" of the federal crime at issue, 596 U.S. at 860, the "Government agrees that violation of this provision does not constitute a crime of violence in light of *Taylor*." 2d Cir. 21-1379, Docket Entry 113 at 17. That's because, given the "any person" language, the Hobbs Act can "be plausibly read to criminalize the use or threat of violence against oneself . . . , which lays outside of

the boundaries of the conduct recognized by the elements clause of § 924(c)." *Seale v. United States*, 2022 WL 18024217, at *3 (D.N.J. 2022).

And just as "any person" might be the defendant himself, so too might a robbery victim's "relative" or "anyone in h[er] company" be the defendant himself. But threatening to harm oneself is no threat "against . . . another." § 924(c)(3)(A). Thus, neither the "violence to any person" crime nor robbery is a "crime of violence."

Finally, the Government has said threatening to harm oneself "more closely resembles extortion." 2d Cir. 21-1379, Docket Entry 113 at 15 n.8. If true, however, that is "beside the point. The Federal Criminal Code is replete with provisions that criminalize overlapping conduct." *Pasquantino v. United States*, 544 U.S. 349, 358 n.4 (2005). Even if the scenarios above "describe[] classic extortion . . . such conduct also satisfies the basic elements of Hobbs Act robbery," *O'Connor*, 874 F.3d at 1153, as the cash is obtained from the restaurateur "by means of . . . threatened force . . . to . . . a relative or . . . anyone in h[er] company." § 1951(b)(1).

Because Hobbs Act robbery can be committed by threatening to harm oneself, it does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A).

2. Hobbs Act Robbery Can Be Committed by Threatening Nonphysical Injury to Property

Hobbs Act robbery can also be committed by putting someone in "fear of injury, immediate or future, to his . . . property." § 1951(b)(1). And the "'cases interpreting the Hobbs Act have repeatedly stressed that the element of "fear" required by the Act can be satisfied by putting the victim in fear of economic loss.'"

United States v. Capo, 817 F.2d 947, 951 (2d Cir. 1987) (en banc; citation omitted). The model jury instructions on Hobbs Act robbery therefore say: "Fear exists if a victim experiences anxiety, concern, or worry over . . . business loss." 3 Leonard B. Sand et al., *Modern Federal Jury Instructions*, Instr. 50-6.

So picture the restaurateur again, but this time her cousin or employee says: "Give me the cash, or I'll flood the internet with claims your food made me sick." This creates a "fear of injury" in the "future" to the victim's "property," § 1951(b)(1), without the "use, attempted use, or threatened use of physical force." § 924(c)(3)(A). As this hypothetical illustrates, the "plain language of the statute provides that a Hobbs Act robbery can be accomplished by causing a victim to have 'fear of injury' to property" – loss of business for the restaurant – "without any force whatsoever." *Haynes v. United States*, 237 F. Supp. 3d 816, 826 (C.D. Ill. 2017).

The judge in *Haynes* was required to rule against the defendant, however, citing a case "in which the Seventh Circuit squarely held that a Hobbs Act robbery qualifies as a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A)." *Id*. at 827.

Likewise, a judge in the Second Circuit has considered this argument, in the context of a "threat to injure 'intangible' property (*e.g.*, shares of stock)," and said it "seems possible to commit Hobbs Act robbery without simultaneously committing a 'crime of violence' pursuant to section 924(c)." *United States v. Tejada*, 2024 WL 3302491, at *6 (E.D.N.Y. 2024). *See also United States v. Loc. 560 of Int'l Bhd. of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985) (The circuits are "unanimous" that the Hobbs Act applies to "intangible, as well as tangible, property."). But the judge was

"bound by controlling Second Circuit precedent." *Tejada*, 2024 WL 3302491, at *4.

The judge in *United States v. Chea*, 2019 WL 5061085 (N.D. Cal. 2019), held "Hobbs Act robbery is not categorically a crime of violence under the elements clause of § 924(c)(3), because the offense can be committed by causing fear of future injury to property, which does not require 'physical force.'" *Id*. at *1. "Where the property in question is intangible, it can be injured without the use of any physical contact at all." *Id*. at *8. "If Congress had intended 'fear of injury' to mean 'fear of violence or violent force,' it could have said so expressly. It did not." *Id*. at *9.

The Ninth Circuit abrogated this ruling in a later case, but only because that defendant "fail[ed] to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *United States v. Dominguez*, 954 F.3d 1251, 1260 (9th Cir. 2020).

After *Taylor*, the Ninth Circuit acknowledged the "realistic probability test [i]s not implicated" when "comparing two federal statutes." *United States v. Eckford*, 77 F.4th 1228, 1235 (9th Cir. 2023). But it said, quoting a First Circuit case, that a "threat to injure intangible property . . . 'sounds to us like Hobbs Act *extortion*'" rather than robbery. *Id*. (quoting *García-Ortiz*, 904 F.3d at 107; emphasis in *García-Ortiz*).

Yet neither circuit recognized the U.S. Code is "replete with provisions that criminalize overlapping conduct." *Pasquantino*, 544 U.S. at 358 n.4. "'Robbery' reaches the act of taking property by threatening future injury to [] property" even though, "[t]raditionally, that degree of attenuation is characteristic of extortion."

United States v. Lynch, 268 F. Supp. 3d 1099, 1106 (D. Mont. 2017). This reflects the "overlap between the Hobbs Act's definitions of traditionally violent robbery and traditionally non-violent or less-violent extortion." *Id.* The Act's crimes are not mutually exclusive: even if obtaining business proceeds by threatening to disparage the business "describes classic extortion . . . such conduct also satisfies the basic elements of Hobbs Act robbery," *O'Connor*, 874 F.3d at 1153, as the proceeds are obtained "by means of . . . fear of injury . . . to . . . property." § 1951(b)(1). "We cannot ignore the statutory text and construct a narrower statute than the plain language supports." *O'Connor*, 874 F.3d at 1154.

"The language of the Hobbs Act is unmistakably broad," *Taylor*, 579 U.S. at 305, and defies "restrictive interpretation." *Culbert*, 435 U.S. at 373. "The plain text of the Hobbs Act robbery definition makes clear that it will apply to force or threats against property," *United States v. Chappelle*, 41 F.4th 102, 109 (2d Cir. 2022), and "fear of injury . . . to . . . property" is "broad enough to encompass instances of the loss of economic value rather than only a physical destruction." *Haynes*, 237 F. Supp. 3d at 826. One may therefore "commit Hobbs Act robbery without simultaneously committing a 'crime of violence,'" *Tejada*, 2024 WL 3302491, at *6, as "causing fear of future injury to property [] does not require 'physical force.'" *Chea*, 2019 WL 5061085, at *1.

In sum, for either of the reasons above or both, Hobbs Act robbery "does not require proof of *any* of the elements § 924(c)(3)(A) demands. That ends the inquiry." *Taylor*, 596 U.S. at 859 (emphasis in original).

III. This Case Is an Ideal Vehicle for Answering These Questions

The double jeopardy and "crime of violence" questions were cleanly presented and squarely decided in the court below, and each is outcome-determinative: the Second Circuit concluded Petitioner must receive prison terms he cannot receive if this Court rules for him.

Holding that "Double Jeopardy Does Not Bar Separate Sentences" for an act that violates § 924(c) and § 924(j), the circuit ordered Petitioner's judge to "sentence [him] on each of these two counts of conviction." Pet. App. 52a. He therefore stands to receive one prison term under § 924(j), and then a consecutive one under § 924(c). Per the Solicitor General and five circuits, however, such double punishment for "the same offence" is unconstitutional. U.S. Const., Amend. V.

Petitioner was also convicted of Hobbs Act robbery and "faces up to 20 years in prison" for that. *Taylor*, 596 U.S. at 848. "But if that offense qualifies as a 'crime of violence' under § 924(c)(3)(A)," *id.*, as the Second Circuit held it does, he must receive a consecutive prison term of at least "ten years." Pet. App. 12a. By detailing why Hobbs Act robbery is not § 924(c) predicate, however, he has shown "Congress has not authorized courts to convict and sentence him to a decade of further imprisonment under § 924(c)(3)(A)." *Taylor*, 596 U.S. at 852.

This case is an ideal vehicle for determining the lawfulness of these additional punishments.

IV. If Nothing Else, This Petition Should Be Held for *Delligatti*

The Court will decide this Term if a crime that "can be committed by failing to take action" is a "crime of violence" under § 924(c). *Delligatti v. United States*,

No. 23-825, Petition for a Writ of Certiorari, 2024 WL 382517, at *i. In doing so, the Court will provide further guidance on how to decide "crime of violence" questions and potentially grounds for judges to reassess the "crime of violence" question here.

As the Solicitor General said in a similar situation, "although this Court's decision in [*United States v.*] *Rahimi* may not definitively resolve the question presented here, it is likely to shed substantial light on the proper analysis of that question. Under the Court's usual practice, such overlap justifies holding the petition for a writ of certiorari pending the resolution of *Rahimi*." *Garland v. Range*, No. 23-374, Reply Brief for the Petitioners, 2023 WL 7276461, at *9.

The Court did indeed hold that petition for *Rahimi*, which it then granted, even though the petition did not pose the precise question presented in *Rahimi*. *See Garland v. Range*, 144 S. Ct. 2706 (2024). This reflects that the "Court often 'GVRs' a case – that is, grants the petition for a writ of certiorari, vacates the decision below, and remands for reconsideration by the lower court – when we believe that the lower court should give further thought to its decision in light of an opinion of this Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision." *Flowers v. Mississippi*, 136 S. Ct. 2157, 2157 (2016) (Alito, J., dissenting).

Thus, if nothing else, the Court should hold this petition for *Delligatti* and then grant it, vacate the Second Circuit's judgment and remand the case for further consideration. *See also, e.g., Jackson v. United States*, 144 S. Ct. 2710 (2024) (GVR in light of *Rahimi*); *Vincent v. Garland*, 144 S. Ct. 2708 (2024) (same).

CONCLUSION

The petition for a writ of certiorari should be granted. Failing that, the petition should be held for the opinion in *Delligatti v. United States*, No. 23-825.

Respectfully submitted,

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