No. 24-6312

In the
Supreme Court of the United States

Tisheem Rich,

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Lower courts are flouting *United States v. Taylor*, 596 U.S. 845 (2022), by refusing, as here, to consider hypothetical robberies that violate the plain text of the Hobbs Act yet entail no "use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). Such hypotheticals illustrate why Hobbs Act robbery is not a "crime of violence" and thus does not permit the added punishment § 924(c) compels for such offenses.

Prior to *Taylor*, arguing that a crime was not 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 statute 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, what § 924(c) demands. And a "hypothetical" can "illustrate" why the answer is no. *Id.* at 851.

As the Second Circuit recognized, Petitioner has identified "hypothetical Hobbs Act robberies that do not involve the use, attempted use, or threatened use of physical force." Pet. App. 5a. Yet it decided it was "bound by rulings of prior

panels," *id.*, even though no such panel has ever addressed – let alone rejected – Rich's arguments. The Circuit thus affirmed his § 924(c) conviction and 7-year prison sentence without considering whether they are lawful.

Likewise, judges across the nation continue daily to treat Hobbs Act robbery as a § 924(c) predicate. "As the government points out," such "'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.*, which may not "run concurrently with any other term of imprisonment." § 924(c)(1)(D)(ii). Thus, scores of people are subjected to years of extra prison time on the view that Hobbs Act robbery is a § 924(c) "crime of violence."

But that view is soundly mistaken. The text of the Hobbs Act makes plain robbery can be committed by threatening either self-harm or defamatory injury to property, neither of which involves any actual, attempted or threatened use of physical force against other people or property. And, very notably, the government does not show otherwise; it opposes certiorari based on the lack of a circuit split.

The lack of a split is the product, however, of the circuits' stubborn refusal to consider nonviolent robbery hypotheticals. They've simply tuned out. This Court's intervention is thus needed to remedy their misreading of the Hobbs Act. Now's the time to answer the oft-posed, hugely consequential "question left open after *Taylor*." *United States v. Stoney*, 62 F.4th 108, 113 (3d Cir. 2023).

ARGUMENT

I. Hobbs Act Robbery is Not a § 924(c) "Crime of Violence"

Rich, incorporating by reference the lengthier petition in *Barrett v. United States*, No. 24-5774, has identified two ways Hobbs Act robbery can be committed without any "use, attempted use, or threatened use of physical force against the person or property of another." § 924(c)(3)(A).

First, a person can commit Hobbs Act robbery by threatening self-harm. The Act defines "robbery" as including a taking from a person "by means of actual or threatened force . . . to . . . a relative or . . . anyone in his company." § 1951(b)(1). Thus, when someone is a person's "relative" or "in his company" and takes from him by threatening to harm himself, that's "robbery." Picture "a man putting a gun to his own head and demanding 'cash, or I'll pull the trigger,' from his cousin." Pet. 10. That involves no actual, attempted or threatened force "against the person or property of another." § 924(c)(3)(A).

The government's response to this is poor. It says the Act's language that reaches threatened harm to a robbery victim's "'relative or member of his family or [] anyone in his company'" is "most naturally read to refer to relatives and people in the company of the victim that are not the robber himself." BIO 9 (quoting § 1951(b)(1)). But the government cites no textual or other support for that view, which the plain language of the Act refutes.

The Act says "robbery" can be committed by threatening the victim's "relative" or "anyone in his company." And those words mean what they say. "The

language of the Hobbs Act is unmistakably broad," *Taylor v. United States*, 579 U.S. 301, 305 (2016), and its "words do not lend themselves to restrictive interpretation." *United States v. Culbert*, 435 U.S. 371, 373 (1978). "Congress intended to make criminal all conduct within the reach of the statutory language," *id.* at 380, and the conduct above is clearly within that reach. "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).

Further, the government doesn't explain why Congress would punish a robbery affecting interstate commerce when the robber threatens the victim, but not when the robber threatens himself. Though committed differently, both robberies disrupt commerce; and that disruption is what Congress outlawed in the Hobbs Act. *See also, e.g., Stirone v. United States*, 361 U.S. 212, 215 (1960) (The "Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'") (quoting § 1951(a)).

Because Hobbs Act robbery can be committed by threatening to harm oneself, it is not a § 924(c) predicate.

Second, "Hobbs Act robbery can be committed by putting the victim in fear of future economic injury to his business." Pet. 10. The Act defines "robbery" as including a taking from a person accomplished through "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. Yet conjuring such fear requires no "use, attempted use, or threatened use of physical force against" anyone or anything. § 924(c)(3)(A). Rather, as Barrett hypothesized, a person can rob a restaurateur by threatening to "'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)." *Barrett*, No. 24-5774, Pet. 25.

The government's response to this is also weak. It claims the "Hobbs Act would classify such conduct as the separate crime of 'extortion,' rather than 'robbery.'" BIO 9. Yet 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 an "overlap between [] two clauses [that] is substantial . . . is not uncommon in criminal statutes." *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014). There is no hermetic seal separating Hobbs Act robbery from extortion.

The D.C. Circuit – the only one that *hasn't* held Hobbs Act robbery fits within § 924(c)(3)(A) – recently agreed. Rejecting the claim that "robbery and extortion were distinct crimes at common law, and Congress imported this 'old soil' [] into the

Hobbs Act," *United States v. Burwell*, 122 F.4th 984, 992 (D.C. Cir. 2024), the court explained how robbery and extortion overlapped: "robbery could be induced by threats of something other than violence. As Blackstone explained, 'extorting money or [any] other thing of value by means of a charge of sodomy may be robbery.'" *Id.* at 992-93 (citation omitted). Robbery also "encompass[ed] [other] threats because they would 'so injure a person,'" such as accusing him of a different "infamous crime." *Id.* at 993 (citations omitted). "The upshot of the common law is that some non-violent extortionate threats rose to the level of robbery." *Id.* And these "common law principles" were "brought into the Hobbs Act," *id.* at 994, and then expanded upon. *See also, e.g., United States v. Pena*, 161 F. Supp. 3d 268, 280 (S.D.N.Y. 2016) ("Hobbs Act robbery is modeled on common law robbery.").

For example, obtaining money by threatening "future" "injury" to "property" – "Give me the cash, or I'll flood the internet with claims your food made me sick" – is "robbery," § 1951(b)(1), even though "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.* Indeed, even if the threat above "describes classic extortion," it "also satisfies the basic elements of Hobbs Act robbery, which is our inquiry under the categorical approach." *O'Connor*, 874 F.3d at 1153.

For either of the reasons above or both, Hobbs Act robbery is not a § 924(c) "crime of violence."

Unable to show otherwise, the government invokes *Stokeling v. United States*, 586 U.S. 73 (2019). But *Stokeling* says nothing about the Hobbs Act. The case concerned Florida robbery, which "requires 'resistance by the victim that is overcome by the physical force of the offender.'" *Id.* at 86 (quoting *Robinson v. State*, 692 So.2d 883, 886 (Fla. 1997)). Yet Hobbs Act robbery, as shown, can be committed without "overcom[ing] a victim's physical resistance"— and without any "physical confrontation and struggle" at all. *Id.* at 83.

The Court did say "the 'force' required for common-law robbery would be sufficient . . . under the [] elements clause" at § 924(e)(2)(B)(i), *id.* at 80, which almost mirrors § 924(c)(3)(A). And "Hobbs Act robbery is modeled on common law robbery." *Pena*, 161 F. Supp. 3d at 280. But it's not true that the "elements of Hobbs Act robbery track the elements of common-law robbery." BIO 8.

Though "modeled on common law robbery," *Pena*, 161 F. Supp. 3d at 280, Hobbs Act robbery goes well beyond it. The common law generally "confine[d] robbery to the use or threat of force before, or simultaneous to, the assertion of dominion over property." *United States v. Jones*, 878 F.3d 10, 18 (2d Cir. 2017) (citations omitted). A "taking was merely larceny unless [it] involved "violence,'" *Stokeling*, 586 U.S. at 77 (quoting 2 J. Bishop, *Criminal Law* § 1156, p. 860 (J. Zane & C. Zollman eds., 9th ed. 1923)), which "was 'committed if sufficient force [was] exerted to overcome the resistance.'" *Id.* at 78 (quoting Bishop at 861). There was an "exception" – "'extortion of money by threatening to smirch a fair reputation [wa]s so atrocious a wrong that it [wa]s generally regarded as robbery,'" Bishop at

867 (citation omitted) – but robbery normally "require[d] either actual violence inflicted on the person robbed, or such demonstrations or threats as under the circumstances create[d] in him a reasonable apprehension of bodily injury." *Id.* at 864. Thus, the "common law offense [of] robbery" usually required that "the victim be moved by fear of violence when he parts with his money or property." *United States v. Loc. 807 of Int'l Brotherhood of Teamsters*, 315 U.S. 521, 533 (1942).

The Hobbs Act expanded this definition to include takings accomplished by threatening "injury" in the "future" to the victim's "property," § 1951(b)(1), such as threatening to defame his business, or by threatening "injury" to his "relative" or "anyone in his company," *id.*, who may be the robber himself. "The traditional concept of robbery is closely related to physical violence . . . '*against a robbery victim*.' But the Hobbs Act's definition of robbery does not follow the traditional concept." *Lynch*, 268 F. Supp. 3d at 1106 (emphasis in *Lynch*; quoting *Johnson v. United States*, 559 U.S. 133, 139 (2010)). Indeed, just as "Congress has unquestionably *expanded* the common-law definition of extortion to include acts by private individuals" as stated "in the Hobbs Act," *Evans v. United States*, 504 U.S. 255, 261 (1992) (emphasis in original), Congress in that Act also expanded the common-law definition of robbery.

The government considers it "implausible that Congress would have intended to exclude Hobbs Act robbery from Section 924(c)(3)." BIO 9. Agreed: Hobbs Act robbery "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." §

924(c)(3)(B). But "§ 924(c)(3)(B) is unconstitutionally vague." *United States v. Davis*, 588 U.S. 445, 470 (2019).

To be a "crime of violence," a felony now must 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). Attempted Hobbs Act robbery does not qualify, as the Court explained with its "Adam" hypothetical in *Taylor*. And completed robbery does not qualify either, as Rich has shown with his hypotheticals. The Circuit acknowledged these "hypothetical Hobbs Act robberies that do not involve the use, attempted use, or threatened use of physical force," but ruled against Rich anyway. Pet. App. 5a. This flouting of *Taylor* – and its instruction to do the "straightforward job" of "[l]ook[ing] at the elements of the underlying crime," 596 U.S. at 860 – warrants review.

II. This Case is an Ideal Vehicle to Decide This Issue

The government cites the appeal waiver in Petitioner's plea agreement (which the Circuit did not enforce), and his having to show plain error to prevail, as reasons to deny the writ. Neither is persuasive.

A court's "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Consequently, "lack of federal jurisdiction cannot be . . . overcome by an agreement of the parties." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). "While the parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which

does not present an actual 'case or controversy.'" *Sosna v. Iowa*, 419 U.S. 393, 398 (1975) (citation omitted). *See also, e.g., Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation."); *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) ("[P]arties by consent cannot confer on federal courts subject-matter jurisdiction."); *United States v. Griffin*, 303 U.S. 226, 229 (1938) ("[L]ack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties.").

A court has no jurisdiction to convict a person under § 924(c) absent commission of a "crime of violence or drug trafficking crime." § 924(c)(1)(A). Rich was not charged with a drug trafficking crime; and the crimes of violence alleged to support his § 924(c) count were conspiracy to commit Hobbs Act robbery and completed robbery. *See* 2d Cir. 21-3104, Docket Entry 46 at 15. But "conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)." *United States v. Barrett*, 102 F.4th 60, 69 (2d Cir. 2024), *cert. granted on another question*, 2025 WL 663692 (U.S. Mar. 3, 2025). And, as shown, completed Hobbs Act robbery is not a "crime of violence" either. The district court therefore lacked jurisdiction to convict Rich under § 924(c), and that lack of jurisdiction "cannot be . . . overcome by an agreement of the parties." *Maurer*, 293 U.S. at 244.

Rich's plea agreement is therefore no obstacle to this Court's review. *See also*

Taylor, 596 U.S. at 860 (holding attempted Hobbs Act robbery is not a § 924(c) "crime of violence" despite the fact that "Taylor pleaded guilty to using a firearm during an attempted Hobbs Act robbery, which he conceded was a 'crime of violence' under 18 U.S.C. § 924(c)(3)") (Thomas, J., dissenting).

Rich's having to show plain error to prevail is also no reason to deny review: *Taylor* itself confirms that. Rather than being a direct appeal, as Rich's case is, "Taylor filed a federal habeas petition" challenging his § 924(c) conviction. 596 U.S. at 849. The government noted, because the case was a habeas proceeding, Taylor had to show more than plain error: "A defendant seeking relief under [28 U.S.C.] § 2255 bears the burden of establishing a constitutional violation. Collateral review 'is an extraordinary remedy' that 'will not be allowed to do service for an appeal.'" *Taylor*, 4th Cir. 19-7616, Brief of the United States, 2020 WL 2501177, at *21 (quoting *Bousley v. United States*, 523 U.S. 614, 621 (1998)). "By not raising his constitutional attack on count seven before his conviction became final, the defendant procedurally defaulted it." *Id*. at *23. Taylor thus also had to "establish (1) that he is actually innocent or (2) cause for the default and prejudice resulting." *Id*. (internal punctuation and citations omitted).

None of this hindered a ruling in Taylor's favor. As this Court explained, even in cases more procedurally complex than Rich's, where defendants must show more to prevail, answering the "crime of violence" question is a "straightforward job: Look at the elements of the underlying crime and ask whether they require the government to prove the use, attempted use, or threatened use of force." *Taylor*,

596 U.S. at 860. "Following that direction in this case, the Fourth Circuit correctly recognized that, to convict a defendant of attempted Hobbs Act robbery, the government does not have to prove any of those things." *Id*. As shown, the same is true of completed Hobbs Act robbery.

And, *Taylor* aside, it was plainly erroneous to convict Rich under § 924(c). As detailed, the "'error'" of deeming Hobbs Act robbery a § 924(c) predicate is "'clear.'" *Rosales-Mireles v. United States*, 585 U.S. 129, 134 (2018) (citation omitted). And it obviously "'affected the defendant's substantial rights,'" *id*. (citation omitted), to subject him to a conviction – and 7-year sentence, consecutive to the robbery term – the district court had no jurisdiction to enter. Finally, to let that conviction stand, and let Rich wrongfully languish in prison for those 7 years, would "'seriously affect[] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 135 (citation omitted). After all, "'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors" that "require individuals to linger longer in federal prison than the law demands?'" *Id*. at 141 (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (Gorsuch, J.)).

In sum, the "crime of violence" question was decided in the court below and is outcome-determinative: the Circuit concluded Petitioner is subject to a conviction (and 7-year consecutive prison term) that may not be entered if Hobbs Act robbery is not a § 924(c) predicate. And, as shown, it is not. This case is thus an ideal vehicle to decide this recurring and very weighty question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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