No. 25-106

In the
Supreme Court of the United States

RONALD DEWITT VINES

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case indisputably implicates multiple circuit splits. Indeed, the Government concedes—like the court below—that the circuits "disagree[]" on whether § 2113(a) is divisible. BIO.8; *see* Pet.App.6a. And while the Government suggests that there is no split on "whether 'attempted federal bank robbery is a crime of violence,'" BIO.9, the lower court rightly recognized that is not true. The "circuits are divided" on this issue as well, and only this Court can restore uniformity in the law. Pet.App.8a.

These openly acknowledged circuit splits provide reason enough to grant review. And the Government does not dispute that this case presents a clean vehicle for resolving the question presented. Nor does it seriously contest the significance of the issue, which has led to § 924(c) convictions and harsh mandatory minimums for some defendants, but not others, based on nothing more than geographic happenstance. Not only that, but by twisting the statutory text to water down the crime-of-violence inquiry, the decision below (and the circuits it followed) have ratcheted up the burden of proof for the predicate offense. That in turn makes it *more* difficult to secure convictions for attempted bank robbery. The Government does not dispute that important consequence either.

Instead, the Government spends the bulk of its opposition arguing that the decision below is correct. But those merits arguments all fail, and they provide no basis to deny review at any rate. There will be time enough to consider the competing merits' arguments later. The key point for now is that some circuits have sided with the Government, while others have agreed

with Petitioner. That disagreement has resulted in three deeply entrenched circuit splits, and this Court should grant certiorari to settle the doctrinal disarray.

ARGUMENT

I. The Government Cannot Refute the Circuit Splits Acknowledged Below.

Faced with multiple acknowledged circuit splits, the Government struggles to downplay them. But its efforts to do so fall flat.

A. *First*, the Government admits that the D.C. Circuit has squarely "[d]epart[ed] from" its sister circuits by holding that § 2113(a) is divisible. BIO.7; *see United States v. Burwell*, 122 F.4th 984 (D.C. Cir. 2024). The decision below recognized that direct conflict of authority as well. Pet.App.6a.

The Government nevertheless says that this open "disagreement" is "recent and shallow." BIO.8. But the disagreement has no real chance of going away. The Government filed an en banc petition in *Burwell* asking the court to join its sister circuits, but to no avail. *See United States v. Burwell*, 2025 WL 1182116, at *1 (D.C. Cir. Apr. 22, 2025). The D.C. Circuit has thus shown that it stands by *Burwell*, and the circuit conflict will persist absent this Court's intervention.

The Government next submits that the "practical significance of *Burwell* remains unclear." BIO.8. But the fact that three cert petitions are already pending in *Burwell*'s wake shows the importance and recurring nature of the issue. *See* BIO.7 n.* (citing other petitions). The substantive consequences of *Burwell* are also hardly a mystery. Adopting *Burwell*'s divisibility analysis will defeat every § 924(c)

conviction premised on a § 2113(a) charge. *See Burwell*, 122 F.4th at 997. And because courts have incorporated "the elements of attempted bank robbery under § 2113(a)" to define the elements necessary to convict under § 2113(d), Pet.App.7a, *Burwell* has significant implications for § 2113(d) charges as well.

These are not obscure crimes either. The Government admits that it "frequently prosecutes Section 924(c) offenses" connected to "attempted federal bank robberies." Pet. for Writ of Cert. at 20, *United States v. Taylor*, No. 20-1459 (U.S. Apr. 14, 2021). The availability of those charges and their attendant mandatory minimums should not turn on geography alone. This Court should close the divide.

B. *Second*, the Government suggests there is no split as to "whether 'attempted federal bank robbery is a crime of violence.'" BIO.9. That is simply false. The Panel recognized that its "sister circuits are divided" on this issue too, with at least three circuits staking out positions on each side of the split. Pet.App.8 (collecting cases). In fact, even the Government has recently conceded—several times—that "the courts of appeals have disagreed over" how § 924(c) "applies to attempts'" under the federal bank robbery statute. Gov't Br., *Hill v. United States*, 2025 WL 1769100, at *23 (6th Cir. June 20, 2025); *see also, e.g.*, Gov't Br., *United States v. Straite*, 2025 WL 830982, at *9 (4th Cir. Mar. 10, 2025) ("circuits have split"); Gov't Br., *United States v. Morelock*, 2023 WL 3735595, at *54 (11th Cir. May 25, 2023) ("circuits are divided").

The Government's about-face is puzzling. The Fourth, Sixth, and Ninth Circuits have squarely held

that "force and violence or intimidation" need not "accompany [an] attempt to take property from the custody or possession of the bank." *United States v. McFadden*, 739 F.2d 149, 151 (4th Cir. 1984); *see United States v. Wesley,* 417 F.3d 612, 618 (6th Cir. 2005); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990). That directly conflicts with the decision below and the views of several other circuits. Pet.12-13. The Government eventually admits that this conflict of authority exists. BIO.9. Yet it strains to distinguish that conflict as concerning the proof needed to "sustain a conviction" for the predicate offense, rather than to secure an accompanying § 924(c) conviction under the categorical approach. *Id.*

That is an empty distinction. After all, the "only relevant question" under the categorical approach is whether the predicate offense "*always* requires the government to prove" the "use, attempted use, or threatened use of force." *United States v. Taylor*, 596 U.S. 845, 850 (2022) (emphasis added). The Fourth, Sixth, and Ninth Circuits hold that the government need not always (or ever) offer such proof. Pet.10-12. It necessarily follows that attempted bank robbery "does not satisfy the elements clause" in those circuits. *United States v. Hogue*, 2023 WL 5973111, at *1 (9th Cir. Sept. 14, 2023). To hold otherwise would render the bank robbery statute "a chameleon," with "its meaning subject to change depending on the presence or absence" of an accompanying § 924(c) charge. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). There is "little to recommend [that] novel interpretive approach." *Id.* And the Government offers none.

Nor can the Government escape review by now "tak[ing] the position" that attempted bank robbery "requires proof of force and violence or intimidation." BIO.10. The executive branch disavowing its previous position does not alter the meaning of the statute Congress enacted, let alone close the doctrinal divide.

And the executive's shift only highlights why review is desperately needed now. Under that approach, prosecutors cannot secure attempt convictions without allowing dangerous situations to unfold. In *McFadden*, for instance, officers would have had to standby until the would-be armed robbers actually applied "force and violence or intimidation," rather than apprehend the perpetrators just outside when they arrived with sawed-off shotguns ready to rob the bank. *See* 739 F.2d at 151. Allowing that twisted conception of attempt crimes to persist will require that lives "be endangered before an arrest [can] be made for an attempted robbery of the bank by use of force and violence or intimidation." *Id.*

That is thankfully not the law in the Fourth, Sixth, and Ninth Circuits. But it is in the Third, Fifth, Seventh, and Eleventh Circuits. Pet.12-13. And it might be in the Second Circuit, depending on which of two conflicting panel precedents is followed. *See* Pet.13-14.

Only this Court can bring clarity to this chaotic area of the law. And the Government's apparent belief that the entrenched circuit conflict will sort itself out in *Taylor*'s wake is meritless. *See* BIO.10. If anything, *Taylor* supports the position adopted by the Fourth, Sixth, and Ninth Circuits by holding that "attempted Hobbs Act robbery does not qualify as a crime of

violence." 596 U.S. at 852; *see* Pet.25-26. Those three circuits have no reason to distance themselves from *Taylor* and abandon their precedent to instead hold that the similar crime of attempted bank robbery *does* require proof of violence. They will thus remain in conflict with the contrary decisions of other circuits, including those issued post-*Taylor*. *See* Pet.App.12a; *United States v. Armstrong*, 122 F.4th 1278, 1289 (11th Cir. 2024); *Collier v. United States*, 989 F.3d 212, 221 (2d Cir. 2021); *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008); *United States v. Bellew*, 369 F.3d 450, 454 (5th Cir. 2004). Simply put, there is no reason for this deep division of authority to percolate any longer.

C. *Third*, the Government cannot seriously dispute that some circuits have required proof of force or violence to support a § 2113(d) conviction, while others have not. *See* Pet.14-16. So the Government tries to minimize this split by observing that some of the decisions are "unpublished." BIO.11. That is no reason to deny review here. Unpublished appellate decisions have significant lingering effects on the law. They serve as persuasive authority for district courts. And their presence on the books influences the calculus for criminal defendants trying to discern which charges are lawfully on the table when deciding whether to plead guilty. The "unpublished" designations here should thus carry little or "no weight" in this Court's "decision to review [this] case." *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987).

That is particularly true in these circumstances, where the proper reading is straightforward, *see infra* at 11-12, and the Petition raises two *additional* circuit

splits that undeniably exist. The third split just provides "extra icing on a cake already frosted." *Cf. Van Buren v. United States*, 593 U.S. 374, 394 (2021) (citation omitted). That is, this case provides a clean and unique opportunity for the Court to clear up all three splits at once.

II. The Government's Efforts to Defend the Decision Below Are Unavailing.

Unable to wash away the circuit splits, the Government devotes most of its brief to defending the lower court's fractured decision. Whatever the merits of those arguments, though, they cannot diminish the need for review. The conflict among the circuits will remain unless this Court intervenes.

In all events, the decision below is on the wrong side of all three circuit splits. And the Government does nothing to salvage that erroneous decision.

A. It starts by trying to paint *Burwell*'s divisibility analysis as "mistaken," arguing that "the D.C. Circuit failed to give effect to the differing terms 'take' and 'obtain.'" BIO.8. That is incorrect. As *Burwell* explained, "the plain text of § 2113(a)'s first paragraph criminalizes *how* someone unlawfully comes into possession of bank property—either by taking or attempting to take by force, violence, or intimidation; or by obtaining, or attempting to obtain bank property by extortion." 122 F.4th at 991. There is also no reason to think that Congress placing these two verbs in a single paragraph was meant to signify different offenses, rather than "alternative means" to commit the same offense. *Id.* On the contrary, "[l]egislatures frequently enumerate alternative means of committing a crime without intending to define

separate elements or separate crimes." *Mathis v. United States*, 579 U.S. 500, 506 (2016) (citation omitted). And § 2113(a)'s syntax, structure, and statutory history all point to that being the case here. *See* Pet.17-19. So too does its singular punishment. *See Mathis*, 579 U.S. at 518. The Government barely addresses these indicators of statutory meaning.

Drifting further from the text, the Government invokes the supposed "common-law roots from which Section 2113(a) is drawn." BIO.8. But its common-law argument teeters on two propositions. The "[f]irst is the strength of the common law difference between robbery and extortion," and the "second is the assumption that Congress wanted any such differences carried" into § 2113(a) when it amended the statute in 1986. *Burwell*, 122 F.4th at 992. Neither proposition holds.

As to the first, the "upshot of the common law is that some non-violent extortionate threats rose to the level of robbery." *Id.* at 993. By the mid-nineteenth century, "extort[ing] money under threat of charging the prosecutor with an unnatural crime," or extortion by "similar means," had "in many cases been holden to be robbery." 2 Francis Wharton, *A Treatise on Criminal Law* 352 (7th ed. 1874). That common-law rule then evolved "by statute" in some jurisdictions to include threats to refer the target to prosecutors for "other crime[s]." Robert Desty, *A Compendium of American Criminal Law* 502 (1882); *see, e.g.*, *United States v. Nardello*, 393 U.S. 286, 294 (1969) (citing Kansas law that classified certain extortionate measures as robbery). The "scope of robbery" thus "grew" over time to encompass the taking or obtaining

of property from another through various forms of non-violent extortion. 3 Wayne R. Lafave, *Substantive Criminal Law* § 20.3 n.1 (3d ed. 2025) (citation omitted).

In any event, nothing indicates that Congress meant to import two separate common-law offenses into § 2113(a)'s first paragraph. "The canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law." *Carter v. United States*, 530 U.S. 255, 264 (2000). But the term "robbery" appears nowhere in the statute's operative language. As to "extortion," Congress included that language in 1986 to clarify a circuit split and make clear that § 2113(a) proscribed extortionate conduct all along—as part of a single bank robbery offense. Pet.18-19. In doing so, Congress also "depart[ed] from the common law's application of greater punishment for robbery than extortion" by "maintain[ing] the same maximum penalty for bank robbery committed by force and violence, intimidation, or extortion." *Burwell*, 122 F.4th at 993.

All this shows that § 2113(a)'s first paragraph encapsulates a single, indivisible offense. And it is undisputed that this offense is not a crime of violence if the statute is indivisible. Pet.19.

B. Even if the "completed" offense were divisible, the resulting "attempt" offense still would not be a crime of violence. *See Taylor*, 596 U.S. at 850-51. The Government's lone response is that "the phrase 'by force and violence, or by intimidation' modifies both 'takes' and 'attempts to take.'" BIO.8 (quoting 18 U.S.C. § 2113(a)). But the Government never explains

how to square its argument with the text or statutory context.

The Government's construction is also awkward. Read naturally, the adverbial "force" phrase the Government relies upon modifies the word "takes" that immediately follows it. 18 U.S.C. § 2113(a). The same cannot be said for the "attempts to take" language that comes further downstream. This language is separated from the purported modifier by intervening text and then "set aside by commas." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). That grammatical structure demonstrates that the attempt phrase "stands independent" from the earlier 'force' language that modifies 'takes.' *Id.*

The "classical elements of an attempt" lend further support to that conclusion. *McFadden*, 739 F.2d at 152 (citation omitted). They do not require the use of force. Rather, an "attempt" under § 2113(a) "requires only that the defendant *intended* to use force, violence or intimidation and made a *substantial step* toward consummating the robbery." *Moore*, 921 F.2d at 209 (emphasis added).

That is not a crime of violence. "[A]n intention is just that, no more." *Taylor*, 596 U.S. at 851. "And whatever a substantial step requires, it does not require the government to prove that the defendant used, attempted to use, or even threatened to use force against another person or his property." *Id.*

The Government tellingly held this understanding for decades. And its recent interpretive flip-flop only underscores the need for review.

C. The Government fares no better in trying to defend the lower court's interpretation of § 2113(d). As

the Petition explained, § 2113(d) adopts the common-law understanding of "attempt." Pet.21-22. The Government does not dispute that. Nor does it dispute that this common-law understanding—which requires only an intent to commit the crime and a substantial step toward that end—lacks any requirement of force or violence. *See* Pet.22; Pet.App.13a.

Instead, the Government suggests that § 2113(d)'s "attempt" clause is "not applicable to Section 2113(a)" predicates. BIO.11. Yet that argument contradicts the statute's plain text. The attempt clause applies—by its terms—to "any offense defined *in subsections (a)* and (b) of this section." 18 U.S.C. § 2113(d) (emphasis added). Thus, the Government's construction "must be rejected, for it reads" that unambiguous language right "out of the statute." *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 719 (2018); *see* Pet.App.20a (Roth, J., dissenting) (noting how this position "rewrites the text").

The Government's final rejoinder similarly ignores plain meaning. It admits that the phrase "any person" naturally "include[s] the defendant himself"—and is therefore broader than the "person . . . of another" language used in § 924(c). BIO.12. Still, the Government tries to brush aside that linguistic distinction because "a person cannot assault himself." *Id.* Even if that is right, it would only go to show the limits on the scope of what constitutes an "assault." It would not change the meaning of "any person." And the disjunctive text of the statute applies to a defendant that either "assaults any person, *or* puts in jeopardy the life of any person." 18 U.S.C. § 2113(d) (emphasis added).

Accordingly, a straightforward application of § 2113(d)'s text shows that a defendant can put his own life "in jeopardy" when attempting to rob a bank. *Id.*; *see* Pet.23-24. That is enough to convict for the attempt under § 2113(d). But because such an attempt does not "always" involve the use of "'physical force against the person or property *of another*,'" Congress "has not authorized courts to convict and sentence" Petitioner to seven years of "further imprisonment under § 924(c)(3)(A)." *Taylor*, 596 U.S. at 850, 852, 856 (emphasis added) (quoting 18 U.S.C. § 924(c)(3)(A)).

* * *

In short, this case is a prime candidate for review. It implicates three interlocking circuit splits—two of them openly acknowledged. And it provides the Court with an ideal vehicle to settle all three divides at once.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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