No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MALLORY NEHEMIAH BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 2113(a) provides that a person commits bank robbery if they take property from a bank by force and violence, intimidation, or extortion. Extortion can be completed without using violence. Is the federal bank robbery statute indivisible, such that bank robbery is categorically not a crime of violence?

PARTIES TO THE PROCEEDING

Petitioner Mallory Nehemiah Brown and respondent United States of America were the only parties to the proceeding in the United States Court of Appeals for the Ninth Circuit.

RELATED PROCEEDINGS

United States v. Brown, No. 9:24-cr-00049-DLC-1, U.S. District Court for the District of Montana. Judgment entered Sept. 3, 2025; amended judgment entered Sept. 16, 2025.

United States v. Brown, No. 25-5757, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 23, 2026; rehearing en banc denied July 30, 2026.

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INTRODUCTION

The courts of appeals are split 5 to 1 on whether federal bank robbery, 18 U.S.C. § 2113(a), is a single, indivisible offense that can be committed by extortion. The answer determines whether bank robbery is a crime of violence. The First, Second, Third, Ninth, and Eleventh Circuits hold that § 2113(a) is divisible and that bank robbery is a crime of violence. The D.C. Circuit, in a detailed analysis of the statute's text, structure, and history, holds the opposite. *United States v. Burwell*, 122 F.4th 984, 986 (D.C. Cir. 2024). The majority view traces to *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018) (per curiam), which resolved the question in two sentences, conducted no divisibility analysis, and relied on two earlier Ninth Circuit cases that did not address divisibility. The First, Second, Third, and Eleventh Circuits followed, each citing *Watson*.

That line of authority reached Mr. Brown, who has a prior § 2113(a) conviction and pleaded guilty to being a felon in possession of a firearm. Applying *Watson*, the district court held that his prior conviction was a crime of violence. Doing so raised his guideline range from 51–63 months to 92–115 months. The Ninth Circuit affirmed and denied rehearing en banc.

Mr. Brown asks the Court to resolve the circuit split. This case is an ideal vehicle. It arises on direct appeal, Mr. Brown preserved the issue at every stage, the answer determines his guideline range, and his prior conviction rests on § 2113(a) alone, and not on the aggravated offenses in subsections (d) and (e) that complicated earlier petitions.

The petition should be granted.

OPINIONS BELOW

The Ninth Circuit's memorandum disposition (App. 3a–5a) is unpublished. *United States v. Brown*, No. 25-5757, 2026 WL 1802852 (9th Cir. June 23, 2026). The district court's oral ruling on Mr. Brown's crime-of-violence objection (App. 8a–9a) and the order denying rehearing en banc (App. 15a) are unreported.

JURISDICTION

The Ninth Circuit entered judgment on June 23, 2026. App. 3a. Mr. Brown timely petitioned for rehearing en banc on July 7, 2026, App. 17a, and the Ninth Circuit denied the petition on July 30, 2026, App. 15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Federal bank robbery is defined as:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
> …
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a).

The Sentencing Guidelines set a base offense level of 20 for a firearms offense if "the defendant committed any part of the instant offense subsequent to sustaining one

felony conviction of either a crime of violence or a controlled substance offense." U.S.S.G. § 2K2.1(a)(4)(A) (2024). For a prohibited person without such a conviction, the base offense level is 14. *Id.* § 2K2.1(a)(6)(A). Section 2K2.1 adopts the definition of "crime of violence" in § 4B1.2(a), *id.* § 2K2.1 cmt. n.1, which provides:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a) (2024).

STATEMENT OF THE CASE

A. The district court applies *Watson* and nearly doubles Mr. Brown's guideline range.

Mr. Brown pleaded guilty to possessing a firearm as a prohibited person, in violation of 18 U.S.C. § 922(g)(1). Mr. Brown has a 2004 federal conviction for bank robbery under 18 U.S.C. § 2113(a). At sentencing, Mr. Brown objected to treating that conviction as a crime of violence, arguing under *Burwell* that § 2113(a) is indivisible and that his base offense level should have been 14 under U.S.S.G. § 2K2.1(a)(6)(A). D. Ct. Doc. 49, at 2–3. The district court overruled the objection as foreclosed by *Watson* and noted that Mr. Brown had preserved it for appeal. App. 8a–9a. The court then set the base offense level at 20 under § 2K2.1(a)(4)(A). App. 10a. That six-level difference raised Mr. Brown's guideline range from 51–63 months to 92–115 months. App. 11a. The court imposed 115 months, "at the

high end of the guidelines." App. 12a.

B. The Ninth Circuit affirms and denies rehearing en banc.

On appeal, Mr. Brown argued that *Watson* should be revisited because it conducted no divisibility analysis and relied on two cases, *Jennings* and *Eaton*, that did not address divisibility. C.A. Opening Br. 6–10.

After oral argument, the panel affirmed in an unpublished memorandum, explaining that *Watson* forecloses Mr. Brown's argument and noting that he raised it "only to preserve it for possible en banc consideration." App. 5a. Mr. Brown timely petitioned for rehearing en banc. App. 17a. The Ninth Circuit denied the petition. App. 15a.

C. Basis for Federal Jurisdiction in the District Court

The district court had jurisdiction under 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are irreconcilably divided on whether § 2113(a) is divisible.

An ever-developing circuit split has emerged since the D.C. Circuit issued its opinion in *Burwell*. The Ninth Circuit's opinion in *Watson* has influenced every other circuit court in holding that § 2113(a) is divisible.

A. *The Ninth Circuit summarily concludes that § 2113(a) is divisible.*

In *Watson*, the Ninth Circuit disposed of the divisibility question in two sentences: § 2113(a) "does not contain one indivisible offense. Instead, it contains at least two separate offenses, bank robbery and bank extortion." 881 F.3d at 786. The

court cited *United States v. Jennings*, 439 F.3d 604, 612 (9th Cir. 2006), *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir. 1991), and a model jury instruction to support its conclusion. *Id.* But *Jennings* and *Eaton* "neither conducted a divisibility analysis nor addressed in any way whether force and violence, intimidation, and extortion are alternative means or elements." *Burwell*, 122 F.4th at 995–96. *Watson*'s conclusion nonetheless spread quickly.

B. *The First and Second Circuits follow Watson.*

In 2019, the Second Circuit relied on *Watson* to hold that § 2113(a) is divisible. *United States v. Evans*, 924 F.3d 21, 28 (2d Cir. 2019). The next year, the First Circuit reached the same conclusion, relying in part on both *Watson* and *Evans*. *King v. United States*, 965 F.3d 60, 67–69 (1st Cir. 2020).

C. *The D.C. Circuit conducts a full divisibility analysis and holds the statute indivisible.*

In December 2024, the D.C. Circuit decided *Burwell*. Applying *Mathis v. United States*, 579 U.S. 500 (2016), the court examined the statute's text, structure, punctuation, history, and common-law roots and held that "§ 2113(a) is indivisible as to extortion." *Burwell*, 122 F.4th at 986; *see id.* at 989–96. Because extortion "can be accomplished using a threat of something other than violence, such as a threat of economic loss or a threat to reveal compromising information," federal bank robbery is not a crime of violence. *Id.* at 986–87, 989. The D.C. Circuit then denied the government's petition for rehearing en banc. *United States v. Burwell*, No. 16-3009, 2025 WL 1182116, at *1 (D.C. Cir. Apr. 22, 2025) (per curiam).

The Eleventh and Third Circuits have since held that § 2113(a) is divisible, each citing *Watson*, and the Third Circuit expressly disagreed with *Burwell*. *United States v. Armstrong*, 122 F.4th 1278, 1285–87 (11th Cir. 2024), *cert. denied*, No. 25-5063 (Nov. 17, 2025); *United States v. Vines*, 134 F.4th 730, 734 (3d Cir. 2025), *cert. denied*, No. 25-106 (Nov. 17, 2025). *Watson* appears to have set off a cascading effect on circuit courts around the country.

The split is entrenched.

II. The question is recurring and this case is the best vehicle to resolve it.

A. *Four petitions in the past year show the question is not going away.*

Since July 2025, four petitions have asked this Court to decide § 2113(a)'s divisibility: *Henderson v. United States*, No. 25-13 (11th Cir.); *Armstrong v. United States*, No. 25-5063 (11th Cir.); *Vines v. United States*, No. 25-106 (3d Cir.); and *Morelock v. United States*, No. 25-6079 (11th Cir.). The Court denied *Henderson*, *Armstrong*, and *Vines* on November 17, 2025, and *Morelock* on March 9, 2026.

There is no reason to let the question percolate further. Courts on both sides of the split have declined to revisit it en banc: the D.C. Circuit in *Burwell*, and the Ninth Circuit here. App. 15a. Only this Court can resolve the conflict.

B. *Mr. Brown's case is the cleanest vehicle to address the question.*

Each earlier petition suffered from a procedural or substantive obstacle to reaching the divisibility question. Mr. Brown's does not.

Henderson's case presented the issue in a successive § 2255 motion, and the predicate offense was assaulting and killing a person during an attempted bank

robbery under § 2113(a), (d), and (e). The government argued that the aggravated offense was a crime of violence regardless of § 2113(a)'s divisibility, making the question "academic." Br. for the United States in Opp. 21–23, *Henderson*, No. 25-13.

Armstrong arose under 18 U.S.C. § 924(c), with completed and attempted § 2113(a) robberies as predicates. Unfortunately for Mr. Armstrong, his petition for a writ of certiorari was submitted after the deadline had passed. The government urged denial on that ground alone. Br. for the United States in Opp. 10–11, *Armstrong*, No. 25-5063.

Vines, like *Henderson*, was a collateral attack under § 2255. The predicate was attempted armed bank robbery under § 2113(d), and the government argued that every circuit treats that aggravated offense as a crime of violence, so the result would be the same anywhere. Br. for the United States in Opp. 7, 10–13, *Vines*, No. 25-106.

Finally, *Morelock* suffers from the same substantive warts as *Henderson* and *Vines*. In a § 922(g)(1) prosecution, Mr. Morelock's prior predicate felony was for §§ 2113(a), (d), and (e). The government argued this felony was a crime of violence regardless of whether § 2113(a) is divisible. Br. for the United States in Opp. 18–20, *Morelock*, No. 25-6079.

Mr. Brown's case has none of these problems. It arises on direct appeal. He preserved the issue at sentencing, D. Ct. Doc. 49, at 2–3; App. 8a–9a, on appeal, App. 5a, and in his petition for rehearing en banc, App. 17a. His prior conviction rests on § 2113(a) alone, with no subsection (d) or (e) element. In Mr. Brown's case,

the answer is outcome-determinative. If § 2113(a) is indivisible, his guideline range falls from 92–115 months to 51–63 months.

III. The Ninth Circuit's ruling is incorrect.

A. *Under Mathis, § 2113(a) is indivisible.*

A statute is indivisible when it sets out a single set of elements to define a single crime. It is divisible when it lists elements in the alternative and thereby defines multiple crimes. *Mathis*, 579 U.S. at 504–05. Determining divisibility is a question of statutory construction. "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal citations and quotations omitted).

Here, the statute's text, punctuation and structure all point to indivisibility. The first paragraph of § 2113(a) lists three ways of committing the offense, "by force and violence," "by intimidation," and "by extortion." The statute lists these means in a single sentence, separated by commas rather than semicolons. *Burwell*, 122 F.4th at 990. When Congress meant to create a separate bank crime, it did so expressly: bank burglary appears in a separate paragraph of § 2113(a), and bank larceny and receipt of stolen bank property appear in separate subsections. 18 U.S.C. § 2113(a)–(c); *Burwell*, 122 F.4th at 990. Congress did not set extortion apart in either way.

The penalty structure points the same way. "If statutory alternatives carry different punishments, then . . . they must be elements." *Mathis*, 579 U.S. at 518.

Section 2113(a) carries a single 20-year maximum however the offense is committed. Though not dispositive, a uniform penalty "provides meaningful evidence that the provision may be indivisible." *Burwell*, 122 F.4th at 990.

The statutory history confirms the point. Section 2113(a) did not mention extortion until 1986, when Congress added it in an amendment titled "Addition of Extortion to Bank Robbery Offense." Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 68, 100 Stat. 3592, 3616. That title "suggests that Congress intended to 'add' extortion to the extant offense of bank robbery, rather than to create a new separate and distinct bank extortion offense." *Burwell*, 122 F.4th at 991 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)).

The House Report accompanying the amendment shows that Congress was clarifying, not creating, an offense. Courts had been "divided over the question whether [§ 2113(a)] proscribe[d] extortionate conduct," and the Report concluded that "[t]here is no gap in federal law." *Id.* (quoting H.R. Rep. No. 99-797, at 32 (1986)). As the *Burwell* court explained, "even before the 1986 amendment, extortion, just like 'force and violence' and 'intimidation,' was simply another means of committing the same crime," and Congress "inserted 'obtain by extortion' to 'expressly' cover what the statute always did." *Id.* at 991–92.

B. *Because the statute is indivisible and extortion requires no force, § 2113(a) is not categorically a crime of violence.*

Extortion can be committed without using or threatening physical force. It "can be accomplished using a threat of something other than violence, such as a

threat of economic loss or a threat to reveal compromising information." *Burwell*, 122 F.4th at 989. The government has conceded as much. *Id.* (noting the parties' agreement that bank robbery by extortion "does not necessarily involve the use or threatened use of force"). A scammer could obtain a bank's money by threatening to expose a bank president's affair unless he wires the bank's funds to the scammer. A hacker who discovers a bank officer's embezzlement could demand a share of the stolen funds in exchange for silence.

Each example satisfies § 2113(a), and none requires force. Because the least culpable means of committing the offense involves no use or threat of physical force, § 2113(a) is not categorically a crime of violence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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