No. 18-989

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARVIN LEWIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 907 F.3d 891.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 8a-12a.

STATEMENT

Following a jury trial in the United States District Court for Western District of Texas, respondent was convicted on one count of conspiring to interfere with commerce by threats of violence (Hobbs Act conspiracy), in violation of 18 U.S.C. 1951; 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1); one count of engaging in monetary transactions in criminally derived property, in violation of 18 U.S.C. 1957; seven counts of interfering with commerce by threats of robbery, in violation of 18 U.S.C. 1951 and 2; three counts of possessing, using, and carrying (and brandishing) a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2; and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g) and 2. App., *infra*, 2a-3a & n.1. The district court sentenced respondent to 924 months of imprisonment, to be followed by three years of supervised release. Judgment 4-5. The court of appeals vacated the Section 924(c) conviction predicated on Hobbs Act conspiracy and remanded for resentencing. App., *infra*, 6a-7a.

1. Respondent and Brandon Grubbs committed a series of armed robberies in Austin and Houston, Texas, from November 2014 to November 2015, targeting jewelry stores and other merchants selling diamonds and luxury watches. See App., *infra*, 2a; Gov't C.A. Br. 4-14. Respondent was also implicated in a similar armed robbery of a jewelry store in Strongsville, Ohio, in June 2015. *Id.* at 14-15. Grubbs pleaded guilty and testified against him at trial. *Id.* at 4-5.

The robberies largely followed a similar pattern. Respondent would identify the store to rob; coach Grubbs on what to say, or which jewelry or other items to take, in the store; drive Grubbs to and from the robbery; and

supply Grubbs with a firearm (or, in other cases, an imitation firearm) for the robbery. See Gov't C.A. Br. 4-14. On January 7, 2015, for example, respondent picked up Grubbs and told Grubbs that he (respondent) had another "lick" set up—*i.e.*, that he had identified another robbery target. *Id.* at 8. Respondent drove Grubbs to Exotic Diamonds, a jewelry store in Houston, Texas, and gave Grubbs a working firearm to use in the robbery. *Id.* at 8-9. Respondent told Grubbs that the store had a guard. *Id.* at 9. Grubbs entered the store while respondent waited outside. *Ibid.* Inside, Grubbs pointed the firearm at the guard—a police officer—to disarm him, while other employees fled to the back of the store. *Ibid.* Grubbs then broke a glass case, grabbed jewelry, and fled the store. *Ibid.* Respondent picked him up in a car nearby. *Ibid.*

Respondent and Grubbs committed four robberies at gunpoint and attempted several more. See Gov't C.A. Br. 8-10, 11-12. In the Ohio robbery—which was committed by a masked man at gunpoint, but which the evidence tied to respondent in other ways—respondent stole more than half a million dollars in diamonds. See *id.* at 14-15, 50 & n.15.

2. A federal grand jury in the Western District of Texas indicted respondent on 27 counts, including one count of Hobbs Act conspiracy, in violation of 18 U.S.C. 1951, and four counts of possessing, using, and carrying (and brandishing) a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. Second Superseding Indictment 4, 12-14.

Section 924(c) makes it a crime to "use[] or carr[y]" a firearm "during and in relation to," or to "possess[]" a firearm "in furtherance of," any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A).

The statute contains its own specific definition of "crime of violence," which is applicable only "[f]or purposes of this subsection," 18 U.S.C. 924(c)(3), and which has two subparagraphs, (A) and (B). Section 924(c)(3)(A) specifies that the term "crime of violence" includes any "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). Section 924(c)(3)(B) specifies that the term "crime of violence" also includes any "offense that is a felony * * * that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3)(B). The indictment alleged that the "crime of violence" for one of respondent's Section 924(c) counts was Hobbs Act conspiracy. Second Superseding Indictment 12 (Count 23).

The jury found respondent guilty on 25 counts, including Hobbs Act conspiracy, the Section 924(c) count predicated on Hobbs Act conspiracy, and two other Section 924(c) counts. App., *infra*, 2a-3a & n.1.[*] For two of the Section 924(c) convictions, the jury made special findings that the firearm was brandished. Special Verdict Form 24-25; see 18 U.S.C. 924(c)(1)(A)(ii) (enhanced penalties for brandishing). The district court imposed a statutory minimum 84-month term of imprisonment for the first Section 924(c) conviction and consecutive statutory minimum 300-month terms for the second and third Section 924(c) convictions. App., *infra*, 3a; Judgment 4; see 18 U.S.C. 924(c)(1)(C)(i) (enhanced

[*] The jury in fact found respondent guilty on four Section 924(c) charges, but the district court dismissed one of them after trial at the government's request. App., *infra*, 3a & n.1.

sentence for "second or subsequent" Section 924(c) conviction); *Deal* v. *United States*, 508 U.S. 129, 132-137 (1993). On the remaining counts, the court imposed statutory maximum sentences—to run concurrently with each other and, as required by 18 U.S.C. 924(c)(1)(D)(ii), consecutively to the sentences for the Section 924(c) offenses—for a total sentence of 924 months, to be followed by three years of supervised release. App., *infra*, 3a & n.2; Judgment 4-5.

3. The court of appeals vacated respondent's Section 924(c) conviction predicated on Hobbs Act conspiracy, vacated his sentence, and remanded for resentencing. App., *infra*, 1a-7a. In doing so, the court relied on its prior decision in *United States* v. *Davis*, 903 F.3d 483 (5th Cir. 2018) (per curiam), cert. granted, No. 18-431 (Jan. 4, 2019), which was decided while respondent's appeal was pending. App., *infra*, 2a.

In *Davis*, the Fifth Circuit reasoned that a Hobbs Act conspiracy does not qualify as a "crime of violence" under the definition of that term in Section 924(c)(3)(A) because "the conspiracy offense does not necessarily require proof that a defendant used, attempted to use, or threatened to use force." 903 F.3d at 485. The court then held that the alternative definition of "crime of violence" in Section 924(c)(3)(B) cannot support a Section 924(c) conviction predicated on Hobbs Act conspiracy because that definition "is unconstitutionally vague" in light of this Court's decisions in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), and *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). *Davis*, 903 F.3d at 486.

In the decision below, the court of appeals concluded that "[t]he reasoning in *Davis* mandates" the vacatur of respondent's Section 924(c) conviction based on a

Hobbs Act conspiracy, "even under plain error review." App., *infra*, 6a.

REASON FOR GRANTING THE PETITION

The decision below rested on the Fifth Circuit's prior holding in *United States* v. *Davis*, 903 F.3d 483 (2018) (per curiam), that the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. App., *infra*, 5a-7a. On January 4, 2019, this Court granted the government's petition for a writ of certiorari in *Davis* (No. 18-431) to review the constitutionality of Section 924(c)(3)(B). This Court should accordingly hold this petition pending its final decision in *Davis* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Davis*, No. 18-431, and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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JANUARY 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50526

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARVIN LEWIS, DEFENDANT-APPELLANT

Filed: Nov. 1, 2018

Appeals from the United States District Court
for the Western District of Texas

Before: HIGGINBOTHAM, SMITH, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Lewis was indicted for crimes related to a series of robberies. On appeal, Lewis raises three issues. First, he asserts that we should vacate his conviction and sentence on count 23 of the indictment—possession, use, and carrying a firearm during and in relation to a crime of violence: brandishing, in violation of 18 U.S.C. §§ 2 and 924(c) (2012)—because conspiracy to commit a Hobbs Act robbery, the predicate offense, is not a crime of violence ("COV"). Second, Lewis maintains that the district court erred by including the four-level § 3B1.1(a) enhancement in his sentencing guidelines calculation. Third, Lewis contends that the sentence was procedurally and substantially unreasonable.

At oral argument, both parties agreed that under *United States v. Davis*, 903 F.3d 483, 484-86 (5th Cir. 2018), *petition for cert. filed* (Oct. 3, 2018) (No. 18-431), Lewis's conviction of conspiracy to commit Hobbs Act robbery (count 1) cannot serve as the underlying COV predicate for his initial § 924(c) conviction (count 23). Accordingly, we vacate the conviction on count 23. Furthermore, because that conviction affected the sentences for the other § 924(c) convictions (counts 25 and 26), "the proper remedy . . . is to vacate the entire sentence and remand for resentencing." *United States v. Aguirre*, 926 F.2d 409, 410 (5th Cir. 1991).

I.

Lewis and his co-defendant, Brandon Grubbs, participated in a series of jewelry store robberies in Austin and Houston, Texas, between November 2014 and November 2015. Lewis was involved in a robbery in Strongsville, Ohio, in June 2015. After his arrest in November 2015, Grubbs reached a plea agreement to testify against Lewis at trial.

Lewis was charged in a second superseding indictment with twenty-seven counts, including conspiracy to interfere with commerce by threats or violence, in violation of 18 U.S.C. § 1951 (count 1); money laundering, in violation of 18 U.S.C. § 1956 (counts 2-14); spending proceeds, in violation of 18 U.S.C. § 1957 (count 15); interference with commerce by threats or violence, in violation of 18 U.S.C. §§ 2 and 1951 (counts 16-22); possession, use, and carrying a firearm during and in relation to a crime of violence: brandishing, in violation of 18 U.S.C. §§ 2 and 924(c) (counts 23-26); and felon in possession of a firearm, in violation of 18 U.S.C. §§ 2 and 922(g) (count 27). Lewis was later convicted on

25 of 27 counts and acquitted on two of the money laundering counts (counts 2 and 3).

The court granted the government's motion to dismiss count 24 for reasons unrelated to this appeal.[1] On the counts that did not require a mandatory minimum (counts 1, 4-22, and 27; collectively the "non-§ 924(c) counts"), the court determined that the advisory guidelines yielded 360 months to life. Limited by the statutory maximums, however, the court imposed a sentence of 240 months on counts 1, 4-14, and 16-22 and 120 months on counts 15 and 27.[2] The court determined that the sentences on those counts should be served concurrently. The court then sentenced Lewis to an 84-month mandatory minimum on count 23, *see* 18 U.S.C. § 924(c)(1)(A)(ii), a 300-month mandatory minimum on count 25, *see id.* § 924(c)(1)(C)(i), and a 300-month mandatory minimum on count 26. *See id.* The sentences on counts 23, 25, and 26 (collectively the "§ 924(c) counts") were to be served consecutively to one another and to the sentences on the non-§ 924(c) counts, as required by statute. *See id.* § 924(c)(1)(D)(ii).

II.

Lewis contends that his conviction and sentence on count 23—knowingly using, carrying, or brandishing a firearm to interfere with commerce by robbery, in violation of 18 U.S.C. §§ 2 and 924(c)—should be vacated

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[1] Count 24 related to the "possession, use, and carrying a firearm during and in relation to a crime of violence: brandishing," in violation of 18 U.S.C. §§ 2 and 924(c).

[2] The statutory maximum for counts 1, 4-14, and 16-22 was 240 months, and the statutory maximum for counts 15 and 27 was 120 months.

because the predicate offense, conspiracy to commit a Hobbs Act robbery, is not a COV. "Whether a particular offense is a [COV] is a question of law for the court to resolve." *United States v. Buck*, 847 F.3d 267, 274 (5th Cir.) (citation omitted), *cert. denied*, 138 S. Ct. 149 (2017). Because Lewis failed to raise this in the district court, we review it for plain error. *See United States v. Suarez*, 879 F.3d 626, 630 (5th Cir. 2018) (citation omitted). "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." FED. R. CRIM. P. 52(b).

Plain-error review proceeds in four steps. First, "there must be an error or defect . . . [a] 'deviation from a legal rule' [] that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quoting *United States v. Olano*, 507 U.S. 725, 732-33 (1993)). Second, the error must be plain; that is, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Id.* Third, "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings.'" *Id.* (quoting *Olano*, 507 U.S. at 734). Fourth, "if the above three prongs are satisfied, [we have] the *discretion* to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Olano*, 507 U.S. at 736).

III.

Section § 1951 (which codified the Hobbs Act) provides, in relevant part, that "[w]hoever . . . obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or *conspires* so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything" is liable under the statute.[3] Relatedly, § 924(c) punishes "any person who, during and in relation to any crime of violence . . . uses or carries a firearm." 18 U.S.C. § 924(c)(1)(A). As defined in § 924(c)(3), a COV is

> an offense that is a felony and [] (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[4]

At oral argument, the government conceded, "[I]t is true in this case that *Davis* is presently binding precedent on this court, and that the [§] 924(c) count . . . count 23, which is linked to Lewis's conspiracy to commit Hobbs Act robbery, which was count 1, must be

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[3] 18 U.S.C. § 1951 (emphasis added). Lewis was also charged per § 2, which makes one who aids or abets "an offense against the United States" liable as a principal. 18 U.S.C. § 2.

[4] 18 U.S.C. § 924(c)(3). Section 924(c)(3)(A) is commonly referred to as the "elements clause" and § 924(c)(3)(B) as the "residual clause." *See*, *e.g.*, *United States v. Eshetu*, 898 F.3d 36, 38 n.2 (D.C. Cir. 2018); *Buck*, 847 F.3d at 274.

vacated. . . . " Consequently, both sides agree that in the wake of *Davis*, the conviction for conspiracy to commit Hobbs Act robbery (count 1) may not serve as the COV predicate for the § 924(c) conviction (count 23).

"[C]onspiracy to commit an offense is merely an agreement to commit an offense." *Davis*, 903 F.3d at 485 (citing *United States v. Gore*, 636 F.3d 728, 731 (5th Cir. 2011)). Consequently, conspiracy to commit Hobbs Act robbery fails to satisfy the requirements of § 924(c)(3)(A)'s elements clause because it "does not necessarily require proof that a defendant used, attempted to use, or threatened to use force." *Id.* Further, the "residual clause" of § 924(c)(3)(B) "is unconstitutionally vague" under the categorical approach. *Id.* at 486. Accordingly, in *Davis* we vacated the convictions of knowingly using, carrying, or brandishing a firearm to aid and abet conspiracy to interfere with commerce by robbery because the conspiracy charge did not qualify as a COV predicate under either clause of § 924(c)(3).

The reasoning in *Davis* mandates a similar result here, even under plain error review. The error was clear and affected Lewis's substantial rights.[5] Further, it seriously affected the fairness, integrity, and public reputation of judicial proceedings because Lewis's sentence was enhanced by an additional twenty-five years by the error. Failure to remedy the mistake would be manifestly unfair.

We vacate the conviction (and the sentenced imposed) on count 23 for knowingly using, carrying, or

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[5] *See Puckett*, 556 U.S. at 135; *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1911 (2018).

brandishing a firearm to interfere with commerce by robbery. Additionally, given that the sentencing enhancements applied to Lewis's subsequent § 924(c) convictions (counts 25 and 26) were predicated on his initial § 924(c) conviction (count 23), the sentence was improperly enhanced under § 924(c)(1)(A)(ii) and (C)(i). Therefore, we VACATE the entire sentence and REMAND for resentencing.

Nothing in this opinion should be taken to cast doubt on the district court's initial application of the § 3B1.1(a) sentencing enhancement or on the procedural or substantive reasonableness of the sentences imposed on the non-§ 924(c) counts (1, 4-22, and 27). Although 18 U.S.C. § 3553 "as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing,"[6] district courts have long possessed the authority "to exercise broad discretion in imposing a sentence within a statutory range."[7] We leave it to the district court to decide the appropriate sentence on remand.

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[6] *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting 18 U.S.C. § 3553(a)).

[7] *United States v. Booker*, 543 U.S. 220, 233 (2005) (citation omitted); *see also Dean v. United States*, 137 S. Ct. 1170, 1175 (2017) (citation omitted).

APPENDIX B

1. Amend. V of the U.S. Const. provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 924(c) provides:

Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with

any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dan-

gerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

3. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means 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.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.