No. 20-1459

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUSTIN EUGENE TAYLOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's efforts to defend the court of appeals' decision, which refused to recognize the frequent and violent federal crime of attempted Hobbs Act robbery as a "crime of violence" under 18 U.S.C. 924(c)(3), simply highlight the decision's flaws. To support the Fourth Circuit's counterintuitive conclusion, respondent is forced to marry an expansive conception of attempt liability to a restrictive reading of Section 924(c)(3)(A). But each of the two pillars of that argument runs counter to decades of precedent and practice. Respondent's imagined category of trivial attempted Hobbs Act robberies that do not entail "attempted use" or "threatened use" of force simply does not exist. This Court should restore the clear application of Section 924(c)(3)(A) to attempted Hobbs Act robbery and reverse the decision below.

A. The Specific Intent And Substantial Step Required For Attempted Hobbs Act Robbery Necessarily Entail The Use, Attempted Use, Or Threatened Use Of Force

Respondent does not dispute that completed Hobbs Act robbery is a "crime of violence" under Section 924(c)(3)(A), which encompasses all federal felonies that involve "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); see Gov't Br. 14-18; cf. Resp. Br. 24-25. And just as 18 U.S.C. 1951(a) prescribes the same criminal liability for both completed and attempted robberies, Section 924(c)(3)(A) prescribes the same criminal liability for both completed and attempted robberies facilitated by a firearm. In contending otherwise, respondent relies—both explicitly and implicitly—on the incorrect premise that even benign preparatory activities would suffice for conviction of attempted Hobbs Act robbery. That premise, if accepted, would dramatically expand criminal liability for all attempt crimes far beyond what this Court, or the lower courts, have recognized and expose a vast range of activity to potential federal prosecution. The longstanding requirements of federal attempt law foreclose that result.

1. Well-established attempt-law principles substantially restrict the scope of activity that can constitute attempted Hobbs Act robbery. See, *e.g.*, *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-107 (2007). As a threshold matter, an individual cannot be convicted of an attempt offense unless he has the specific intent to complete the crime. See *ibid.* That specific-intent requirement is powerful. This Court has held, for example, that firing shots in the direction of a doorway through which U.S. Marshals were attempting to enter

was insufficient to establish specific intent to kill one of the Marshals. See *Braxton* v. *United States*, 500 U.S. 344, 350-351 & n.* (1991). For Hobbs Act robbery, like many other federal offenses, the specific-intent requirement makes the mens rea for attempt more demanding than the mens rea for the completed crime. While completed Hobbs Act robbery requires only a "mens rea element of general intent—or knowledge—as to the actus reus of the offense," *United States* v. *García-Ortiz*, 904 F.3d 102, 108 (1st Cir. 2018) (citations omitted), cert. denied, 139 S. Ct. 1208 (2019), attempted Hobbs Act robbery requires "a specific intent to commit the unlawful act," *Braxton*, 500 U.S. at 351 n.*; see, *e.g.*, *United States* v. *Dominguez*, 954 F.3d 1251, 1255, 1260 (9th Cir. 2020), petition for cert. pending, No. 20-1000 (filed Jan. 21, 2021).

The specific-intent requirement is not only a stringent limitation on its own, but also informs the second necessary element for an attempt—that the specific intent be "accompanied by significant conduct," often called a "substantial step." *Resendiz-Ponce*, 549 U.S. at 107. That substantial step must "strongly corroborat[e] * * * the actor's criminal purpose." Model Penal Code, Pt. I, § 5.01(2) (1985). A substantial step cannot consist of "mere preparation," *Swift & Co.* v. *United States*, 196 U.S. 375, 402 (1905); instead, the defendant "must perform objectively culpable and unequivocal acts toward accomplishing the crime," *United States* v. *St. Hubert*, 909 F.3d 335, 351 (11th Cir. 2018), cert. denied, 139 S. Ct. 1394 (2019), and 140 S. Ct. 1727 (2020). "Generally, a defendant takes a substantial step when his actions 'make[] it reasonably clear that had [the defendant] not been interrupted or made a mistake . . . [he] would have completed the crime.'" *United States* v.

Muratovic, 719 F.3d 809, 815 (7th Cir. 2013) (citation omitted; brackets in original).

2. Respondent downplays both requirements. He entirely disregards the specific-intent requirement, and he defines a "substantial step" as merely an "overt act," Br. 11 (citation omitted), omitting the criteria that would transform a simple overt act into an "'overt act' that constitutes a 'substantial step' toward completing the offense." *Resendiz-Ponce*, 549 U.S. at 107 (citation omitted).

Respondent's suggestions of what might amount to a "substantial step" that could support an attempt conviction would, if endorsed, result in an unprecedented expansion of the substantive scope of federal criminal law. Respondent suggests, for example (Br. 17), that a person commits attempted robbery merely by "reconnoitering a convenience store with an intent to threaten the clerk there—even if the person abandons his plan before arriving at the store." But the Model Penal Code, the only source he cites, describes attempt case law as combining "reconnoitering" with "other factors," such as "possession of weapons or equipment, confederates, or additional activities." 2 Model Penal Code and Commentaries, Pt. I, § 5.01 cmt. 6(b)(iii), at 335-336 (1985) (footnotes omitted). And it is unclear how the government would prove specific intent in a case involving a would-be robber's early and voluntary abandonment of his plans.

Respondent's other efforts to minimize the substantial-step requirement reflect a similarly unfounded approach to the requirements for an attempt. He claims, for example, that the government's opening brief classifies "casing a store *or* buying weapons" as "substantial steps" that could each support an attempt conviction.

Resp. Br. 25 (emphasis added) (citing Gov't Br. 36). But the government's opening brief stated that "cas[ing] the store that [the defendant] intends to rob, discuss[ing] plans with a co-conspirator, *and* buy[ing] weapons to complete the job"—all together—could support attempt liability. Gov't Br. 36 (emphasis added; internal quotation marks omitted); compare, *e.g.*, Resp. Br. 12 (citing *United States* v. *McFadden*, 739 F.2d 149, 152 (4th Cir.), cert. denied, 469 U.S. 920 (1984)), with *McFadden*, 739 F.2d at 152 (attempt liability for defendants who "discussed their plans to rob the banks, * * * reconnoitered the banks in question, * * * assembled the weapons and disguises necessary for use in the robbery[,] * * * proceeded to the area of the bank with a vehicle and a driver to be used in the get away," and had recently completed multiple similar bank robberies).

3. Respondent additionally overlooks a critical element of Hobbs Act robbery itself—namely, its preservation of the common-law requirement to overcome the victim's resistance. See Gov't Br. 33. Because Hobbs Act robbery requires the taking of property "against [the victim's] will," 18 U.S.C. 1951(b)(1), a conviction for the completed crime requires proof that the defendant used enough actual or threatened force to obtain what he wanted from his victim. In a completed robbery, the robber's success in obtaining property can satisfy that requirement. See, *e.g.*, *Stokeling* v. *United States*, 139 S. Ct. 544, 553 (2019) ("Overcoming a victim's resistance was *per se* violence against the victim, even if it ultimately caused minimal pain or injury."). A conviction for attempted Hobbs Act robbery, in turn, requires proof beyond a reasonable doubt of actions that strongly corroborate the defendant's specific intent to

overcome his victim's will through actual or threatened violence. The defendant's actions must therefore be intimidating and evocative enough for the government to satisfy that burden even though he failed to obtain any property.

As a result, merely reconnoitering a store or drafting a threatening note (see Pet. App. 10a) would not, by themselves, meet the government's burden of proof. Such cases cannot exist in law, and they do not exist in practice. Although this Court applies a legal, elements-based categorical approach to classifying a statutory offense as a "crime of violence" under Section 924(c)(3)(A), see, *e.g.*, *Stokeling*, 139 S. Ct. at 554-555, the Court has tethered that approach to reality by requiring more than the application of "legal imagination." *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A defendant must show "a realistic probability, not a theoretical possibility," that a criminal law "would apply" to circumstances beyond Section 924(c)(3)(A)'s scope. *Ibid.* (citation omitted).

Respondent asserts (Br. 40-41) that such a real-world connection is unnecessary if "the explicit language of an offense establishes that its scope exceeds the relevant definition." But respondent's restrictive view of the realistic-probability principle conflicts with *Moncrieffe* v. *Holder*, which applied the principle even where—unlike here—a crime's express definition technically covered the marginal case at issue (prosecution for possession of antique firearms). See 569 U.S. at 206. And even if respondent's characterization of the principle were correct, no "explicit language" supports his overbroad characterization of attempt liability under

the Hobbs Act. The analysis of attempt liability required in this case is instead akin to the analysis of generalized accomplice liability to which this Court first applied the realistic-probability principle. See *Duenas-Alvarez*, 549 U.S. at 190-193 (considering whether California aiding-and-abetting liability would permit conviction for non-generic burglary). And that is how the only court of appeals to have expressly addressed the realistic-probability principle in the context of attempted Hobbs Act robbery has applied it. See *United States* v. *McCoy*, 995 F.3d 32, 56-57 (2d Cir. 2021), petition for cert. pending, No. 21-447 (filed Sept. 15, 2021).

The realistic-probability principle forecloses respondent's argument here. The Fourth Circuit failed to identify a single real attempted Hobbs Act robbery that did not involve "the use, attempted use, or threatened use" of force. 18 U.S.C. 924(c)(3)(A). Respondent does no better; he proffers only two putative examples, see Resp. Br. 45, each of which could be described as involving "the use, attempted use, or threatened use" of force. In *United States* v. *Licht*, No. 18-cr-60248 (S.D. Fla. Jan. 31, 2019), a defendant who had previously robbed banks by threatening tellers with a (possibly unloaded) gun donned a ski mask, armed himself with a (possibly unloaded) gun and pepper spray, and tried to enter other banks—but so alarmed the tellers that they signaled a police emergency or refused to open the doors. See 18-cr-60248 D. Ct. Doc. 29, at ¶¶ 1-5, 9 (S.D. Fla. Dec. 4, 2018). And in *United States* v. *Williams*, 531 Fed. Appx. 270 (3d Cir. 2013), federal agents intercepted an armed corrupt police officer who was on his

way to steal gambling proceeds by conducting an unjustified show-of-force traffic stop. *Id.* at 271.[*]

Williams might more accurately have been prosecuted as attempted Hobbs Act extortion, see 18 U.S.C. 1951(b)(2) (defining "extortion" as "the obtaining of property from another, with his consent, * * * under color of official right"), rather than attempted Hobbs Act robbery. But any error in the theory of prosecution would not support respondent's comprehensive redefinition of federal attempt law and of attempted Hobbs Act robbery in particular. In applying the realistic-probability inquiry to inform the scope of a *state* crime, a federal court might conceivably defer to a small number of prosecutions as reflective of how the State construes its law. But in applying the principle to inform the scope of a *federal* crime, this Court—not any inference that might be drawn from materials concerning an individual prosecution or lower-court decision—is the final expositor of federal criminal law, see, *e.g.*, *Tafflin* v. *Levitt*, 493 U.S. 455, 465 (1990). And this Court has made clear that attempt liability ends well short of where respondent would stretch it.

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[*] Respondent's five amici together provide only one other example of a putatively benign attempted robbery, *United States* v. *Simms*, No. 20-cr-80083 (S.D. Fla. June 3, 2021) (cited at Br. of Nat'l Ass'n of Fed. Defenders 19-20), and their reliance on that case is similarly mistaken. In *Simms*, a defendant who had used direct force in a past armed robbery with a similar profile displayed what appeared to be a long gun while circling a store, which closed before he could rob it. 20-cr-80083 D. Ct. Doc. 49, at ¶¶ 12, 18 (S.D. Fla. May 24, 2021). That conduct is readily described as the attempted or threatened use of force.

B. Respondent's Narrow Reading Of Section 924(c)(3)(A) Is Unsound

Respondent's effort to excise attempted Hobbs Act robbery as a "crime of violence" under Section 924(c)(3) relies not only on an excessively broad conception of "attempt[ed]" robbery, 18 U.S.C. 1951(a), but also an unduly narrow definition of "attempted use" and "threatened use" of force, 18 U.S.C. 924(c)(3)(A). That error is independently fatal to his position.

1. As the government's opening brief explains, Section 924(c)(3)(A) contains three mutually supportive and overlapping terms—"the use," "attempted use," and "threatened use" of force—that cover the waterfront of substantial efforts to instrumentalize physical force, whether or not those efforts come to fruition. See Gov't Br. 18-19; cf., *e.g., Brnovich* v. *Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2357 (2021) (Kagan, J., dissenting) (observing that an "overlapping list" of items can "make[] clear" that "every kind" is included). Respondent's divide-and-conquer interpretive strategy, under which the phrases are so "distinct," Resp. Br. 20, and so narrow, that Section 924(c)(3)(A) implausibly fails to reach attempted robbery, misses the meaning imparted by the "full body of [the] text" by "'los[ing] sight of the forest for the trees.'" Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 356 (2012) (citation omitted); see, *e.g., Helvering* v. *Gregory*, 69 F.2d 809, 810-811 (2d Cir. 1934) (L. Hand, J.) ("[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes."), aff'd, 293 U.S. 465 (1935). Respondent then compounds that mistake with a crabbed construction of each of the provision's phrases.

Respondent does not contend that the language of Section 924(c)(3)(A) compels his interpretation. Indeed, he does not expressly dispute that the statutory text could include attempted Hobbs Act robbery. Instead, respondent simply argues that context requires a narrower reading of certain words. See, *e.g.*, Resp. Br. 13-14, 21-22, 24-25. But the context points directly the opposite way. In applying the provision's language, "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004). That term's "ordinary meaning" thus "informs [the language's] construction." *Borden* v. *United States*, 141 S. Ct. 1817, 1830 (2021) (plurality opinion). And respondent cannot dispute that attempted robberies fit naturally within the ordinary meaning of "crime[s] of violence."

That context makes it particularly inappropriate for respondent to simultaneously construe the concept of an "attempt" broadly for purposes of "attempts" to commit Hobbs Act robbery, 18 U.S.C. 1951(a), but narrowly for purposes of "attempted use" of force under Section 924(c)(3)(A). As this Court illustrated in *James* v. *United States*, 550 U.S. 192 (2007), overruled on other grounds by *Johnson* v. *United States*, 576 U.S. 591 (2015), the most natural understanding of the latter phrase is that it signals the "express inclusion of attempt offenses." *Id.* at 198; see *ibid.* (noting that the elements clause "specif[ies] exactly what types of offenses—*including attempt offenses*—are covered by its language") (emphasis added). Just as Congress "interweave[s] prohibitions on attempted crimes within the statutes defining the underlying substantive offenses" themselves, *United States* v. *Walker*, 990 F.3d 316, 329 (3d Cir. 2021), petition for cert. pending, No.

21-102 (filed July 22, 2021), Congress included attempt crimes involving the inchoate invocation of force in Section 924(c)(3)(A).

2. Respondent has offered no clear alternative interpretation of "attempted use" in Section 924(c)(3)(A). To the extent that respondent might limit the provision's application to crimes whose defining statutes list attempted use of force as an element explicitly, while excluding crimes whose conduct necessarily entails the same thing implicitly, see Resp. Br. 31, few federal felonies would appear to qualify. See Resp. C.A. Reply Br. 16-17 (pointing to two such federal crimes and unspecified "assimilated state offenses"); see, *e.g.*, 18 U.S.C. 111(b) (criminalizing assault of a federal officer by using "a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component)"). That list would not include, for example, attempted murder. See, *e.g.*, 18 U.S.C. 1113.

Alternatively, to the extent that respondent might embrace the court of appeals' limitation to attempts to commit crimes whose completed form requires the direct use of force, he invites a legal anomaly. Federal attempt law applies to those crimes, like attempted murder, in the same way that it does to attempted Hobbs Act robbery. If specific intent and a substantial step toward murdering someone necessarily entail the "attempted use" of force, irrespective of how nonviolent the attempt itself is, then it is difficult to see why specific intent and a substantial step toward robbing someone would not do likewise. The very same nonviolent prefatory conduct—*e.g.*, getting armed, surveilling a target, and arriving on the scene—could equally

support liability for either attempted murder or attempted robbery by force or threat. And the conduct can equally be described as the "attempted use" of force—*i.e.*, an attempt to "employ[]" force as an "instrument," *Voisine* v. *United States*, 136 S. Ct. 2272, 2278-2279 & n.3 (2016) (citations omitted)—irrespective of whether force would be used as the instrument for a killing or to overcome someone's will. See Gov't Br. 20-21.

In each case, the defendant is attempting to "use" force in the well-recognized sense of making it "an operative factor" that is "calculated to bring about a change in the circumstances of the predicate offense." *Bailey* v. *United States*, 516 U.S. 137, 143, 148 (1995). Respondent, like the Fourth Circuit, resists that commonsense understanding by theorizing that Section 924(c)(3)(A)'s separate mention of "threatened use" of force constricts "attempted use" of force solely to attempted *direct* application. See Resp. Br. 14-15. But neither respondent nor the Fourth Circuit has identified any dictionary definition of "use" that compels such an inference. See *Voisine*, 136 S. Ct. 2278 & n.3 (citing a broader definition, and quoting *Bailey*'s definition of "use" to interpret elements clause); cf. Resp. Br. 21 (criticizing government for relying on *Bailey* in interpreting "use"). And the more natural inference is that the additional phrase expands, rather than contracts, Section 924(c)(3)(A).

The three conjoined phrases "the use," "attempted use," and "threatened use" are not hermetically sealed from one another, such that each is constricted to some narrow and exclusive range of conduct. Instead, they supply Section 924(c)(3)(A)'s breadth, reinforcing one another and substantially overlapping. See Gov't Br.

19. Throwing an object at someone, but missing, could equally be described as "the use" or "attempted use" of force, as a matter of both plain English and the legal meaning of "attempt." Similarly, pressing a gun or gun-like object against a victim's back to make him kneel could be described as "the use" of force (applying pressure to a victim's body) or "threatened use" of force (threatening further harm). See Resp. Br. 15-16 (describing such a case).

None of the three phrases is surplusage (see Resp. Br. 16), because various forms of criminal conduct fit best under only one. See, *e.g.*, *Horn & Hardart Co.* v. *National R.R. Passenger Corp.*, 793 F.2d 356, 360 (D.C. Cir. 1986) (partial "overlap" of contractual terms "cannot properly be equated with the unhappy condition of 'surplusage'"). The fatal shooting of respondent's victim Martin Silvester, for example, is best described as a direct, consummated "use" of force. And obtaining money by calmly delivering a threatening note to a store cashier is best described as a "threatened use" of force. But many actions could readily fall within more than one phrase, see Gov't Br. 19—and any course of conduct substantial enough to support a conviction for attempted robbery will involve more than one single, indivisible action.

3. By reaching "the use," "attempted use," *and* "threatened use" of force, Section 924(c)(3)(A) eliminates the need for fine metaphysical distinctions concerning how force might be employed during a federal felony and covers the "category of violent, active crimes" that necessarily entail substantial efforts to instrumentalize force, *Stokeling*, 139 S. Ct. at 553 (citation omitted). But even if a more balkanized interpretation were warranted, the "threatened use" of force

would itself cover marginal cases of attempted Hobbs Act robbery, as the government's opening brief explains. See Br. 21-25.

Respondent is able to argue otherwise only by casting aside any ordinary or legal definition of "threat" that does not suit his purpose. Respondent asserts that the "prevailing" definition of "'threat'" in "the criminal law" is a "'communicated intent to inflict harm or loss on another or on another's property.'" Br. 16-17 (citation omitted). But the same dictionary definition on which he relies also lists the very similar concept of "[a]n indication of an approaching menace." *Black's Law Dictionary* 1783 (11th ed. 2019)); see also *Black's Law Dictionary* 1327 (5th ed. 1979) (similarly listing a "menace; especially, any menace of such a nature and extent as to unsettle the mind of the person on whom it operates"). While respondent makes much of a supposed distinction between those definitions, he cites no source distinguishing between them or establishing that the word "threat" is limited, in criminal law, to the narrowest reading of the first definition listed in *Black's Law Dictionary*. See Resp. Br. 16-17, 22-27.

In any event, even under his preferred definition, respondent cannot meaningfully support his proffered narrow reading. He cannot, and does not, dispute that even under that definition, a "threat" need not be subjectively intended, communicated to the potential object of the threatened harm, or expressed in words rather than communicated through action. See, *e.g.*, *Elonis* v. *United States*, 575 U.S. 723, 733 (2015); *Virginia* v. *Black*, 538 U.S. 343, 360 (2003); *Griffin* v. *United States*, 336 U.S. 704, 709-710 (1949) (considering, in a criminal trial, the admissibility of "uncommunicated threats"); Gov't Br. 23-24. Given those undisputed points, a course

of conduct substantial enough to amount to attempted Hobbs Act robbery would constitute the "threatened use" of force, because it would at least involve conduct that an objective observer would identify as threatening.

As respondent notes (Br. 24), to actually *complete* the offense of Hobbs Act robbery, a threat would need to be communicated to the robbery victim (who may or may not himself be the object of the threat). But respondent errs in trying (*ibid.*) to inject such a communication-to-the-robbery-victim requirement into Section 924(c)(3)(A). The language that he emphasizes in the Hobbs Act—which requires taking property "from the person or in the presence of another," 18 U.S.C. 1951(b)(1)—does not appear in Section 924(c)(3)(A). Instead, Section 924(c)(3)(A) requires only that the threatened force be "against the person or property of another." 18 U.S.C. 924(c)(3)(A). That language addresses the content of the threat, not its communication. And the existence of a threat to a person or property is an objective fact whether or not it is communicated to anyone in particular. See Gov't Br. 24-25; see also *Elonis*, 575 U.S. at 732-733.

Respondent contends (Br. 23) that the government interprets "threatened use" too passively, to encompass "a state of readiness to use force with no communication to anyone." See Br. 27 (stating that the government would extend "'threat' to unexpressed intentions to do harm"). But that would be true only if the government embraced respondent's improperly expansive view of attempt law. Under the correct standards for criminal attempt liability, see pp. 2-6, *supra*, a would-be Hobbs Act robber must (at least) take *actions* that objectively

manifest his determination to obtain property by overcoming his victim's will. And when a defendant takes such a "substantial step," his conduct necessarily "conveys the notion of an intent to inflict harm" as it "would be understood by a reasonable person." *Elonis*, 575 U.S. at 732, 737.

Contrary to respondent's suggestion (Br. 25-26), this Court's recent decision in *Elonis* v. *United States* fully supports that understanding of a threat. In *Elonis*, this Court considered whether a statute criminalizing certain "'communication[s] containing * * * threat[s]'" required that the defendant "be aware of the threatening nature" of his communications, *in addition to* requiring that "a reasonable person would regard" the communications as threatening. 575 U.S. at 726 (citation omitted). Far from "reject[ing]" that reasonable-person standard, Resp. Br. 25 (emphasis omitted), *Elonis* reinforced it by emphasizing that dictionary definitions of "threat" are framed in terms of "what the statement conveys," 575 U.S. at 733. And the mens rea requirement that *Elonis* inferred in the federal threat statute at issue there is inapposite here, where the objectively threatening conduct must reflect a deliberate design to complete a Hobbs Act robbery.

Finally, respondent errs in suggesting (Br. 23, 33) that adherence to the ordinary understanding of "threatened use" in Section 924(c)(3)(A) would reproduce the unconstitutional "residual clause," which defined crimes of violence by "requir[ing] courts 'to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk.'" *United States* v. *Davis*, 139 S. Ct. 2319, 2326 (2019) (citation omitted). Application of the "threatened

use" component of Section 924(c)(3)(A) looks to the "minimum conduct criminalized" by a statute's elements, *Moncrieffe*, 569 U.S. at 191, not a hypothetical "ordinary case" of the crime. And it looks to what those elements require the perpetrator to have actually done, and whether those actions objectively threaten force, not to the "imprecise qualitative standard" of "substantial risk." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1215 (2018) (citations and internal quotation marks omitted) (plurality opinion); see 18 U.S.C. 924(c)(3)(B).

The definition of "threatened use" in Section 924(c)(3)(A) is thus considerably more concrete and considerably less comprehensive than Section 924(c)(3)(B), failing to cover numerous crimes that the residual-clause inquiry would have captured. See, *e.g.*, 18 U.S.C. 1201(a) (kidnapping); 18 U.S.C. 1591(a) (child sex trafficking); 18 U.S.C. 2339A, 2339B (material support of terrorism); see also, *e.g.*, *James*, 550 U.S. at 195 (attempted burglary). The statutes defining those crimes do not center on force the way that the Hobbs Act does. Undoubtedly, Section 924(c)(3)(B)'s residual clause would cover attempted Hobbs Act robbery, were that clause capable of constitutional application. Cf. *Borden*, 141 S. Ct. at 1834-1837 (Thomas, J., concurring in the judgment). But the same could be said of most, if not all, Section 924(c)(3)(A) offenses, and this Court has never viewed that overlap as a reason for declining to give Section 924(c)(3)(A) its own proper scope, which includes attempted Hobbs Act robbery.

4. The history of Section 924(c)(3)(A) underscores that Congress designed it to encompass paradigmatically violent crimes like attempted Hobbs Act robbery. See Gov't Br. 25-26. That design has been effectuated

by decades of prosecutions and the consistent interpretation of the United States Sentencing Commission. See *id.* at 26.

Respondent notes that draft versions of the original Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, Tit. II, ch. XVIII, 98 Stat. 2185, which specified "robbery or burglary" as the predicate offenses that could trigger an ACCA sentencing enhancement, explicitly referenced attempt liability, whereas the enacted version of the ACCA did not. Resp. Br. 35 (citation omitted). But respondent has not cited, and the government has not located, the explanation for a House subcommittee's deletion of that language, which had appeared in both House and Senate drafts. The subcommittee did not identify as "pertinent" any of the changed language outlining the predicate offenses, H.R. Rep. No. 1073, 98th Cong., 2d Sess. 4 (1984), and the subcommittee's minutes reflect that it was "attempt[ing] to parallel pretty much what the Senate has drafted," *Transcript of Proceedings, Subcomm. on Crime of the House Comm. on the Judiciary, Markup on H.R. 1627*, 98th Cong., 2d Sess. 9 (Sept. 13, 1984) (on file with the NARA Center for Legislative Archives). In any event, when Congress decided to "expand the number of qualifying offenses" two years later, *Stokeling*, 139 S. Ct. at 551, it enacted an elements clause that mirrors Section 924(c)(3)(A) and *does* expressly include attempts.

Respondent also takes issue (Br. 36-39) with a Senate report describing the elements clause as covering such crimes as "a threatened or attempted simple assault or battery on another person." S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (footnotes omitted). But while the report's discussion is not unambiguous,

and certain of the mentioned offenses might in fact be excluded for other reasons, the discussion nevertheless reflects what a plain reading of the text indicates—that the enacted language "include[s] attempt offenses," *James*, 550 U.S. at 198. Furthermore, even if respondent's interpretation were the right one, it would provide no support for his position that Congress excluded the commonplace violent offense of attempted robbery, or any other attempts to commit violent crimes, from the definitions of a "crime of violence" or "violent felony."

5. Finally, respondent's resort to the rule of lenity is misplaced. See Resp. Br. 47-50. For nearly 50 years, this Court has explained that "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 172-173 (2014) (citation omitted); see *Shular* v. *United States*, 140 S. Ct. 779, 789 (2020) (Kavanaugh, J., concurring); *Huddleston* v. *United States*, 415 U.S. 814, 830-831 (1974). This case presents no such circumstance.

Respondent nevertheless tries to invoke the rule of lenity by urging (Br. 48-49) the Court to water down its well-established limits. But the Court's longstanding and careful formulation, to which innumerable judicial decisions have adhered, ensures that judges respect "the product of the legislative process" and refrain from applying a substantive canon that could alter a statute's meaning unless the statute is truly and irremediably ambiguous. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 124 (2010); see *id.* at 128-133 (collecting sources and summarizing the longstanding principle that "saying that ambiguity

justified the application of lenity did not mean that a court had recourse to the rule whenever a narrower interpretation was plausible").

In any event, because the language, context, history, and design of Section 924(c)(3)(A) all weigh against the excision of attempted Hobbs Act robbery, no true ambiguity exists here, grievous or otherwise. Furthermore, neither of the dual purposes served by the rule of lenity—"fair warning of the boundaries of criminal conduct" and ensuring "that legislatures, not courts, define criminal liability," *Crandon* v. *United States*, 494 U.S. 152, 158 (1990)—would be advanced by adopting respondent's position. A Section 924(c) defendant cannot complain that he lacked "fair warning" of the penalty for his attempted crime with a firearm, when that penalty is the same as the one for the completed offense that he specifically intended and endeavored to commit. And acknowledging Congress's longstanding and consistent efforts to treat robbery offenses as crimes of violence ensures that the "legislature[], not courts, define[s] criminal liability," *ibid.*, under Section 924(c)(3)(A).

C. The Implications Of Respondent's Position Are Untenable

Ultimately, respondent would foreclose Section 924(c)(3) prosecutions for real and violent criminal conduct. That includes not only the killing of Martin Silvester during respondent's own attempted Hobbs Act robbery, but also numerous other attempted Hobbs Act robberies suffused with obvious violence. See Gov't Br. 28-32. Although "applying the categorical approach" has been known to result in occasional case-specific "absurdity," *Quarles* v. *United States*, 139 S. Ct. 1872, 1880

(2019) (Thomas, J., concurring), that perverse across-the-board rule cannot be correct.

Respondent does not dispute that excising attempted robbery from the elements clause could have significant implications even beyond Section 924(c) prosecutions. He does not distinguish attempted Hobbs Act robbery from state or common-law attempted robbery crimes, suggesting that the many defendants (past and present) whose ACCA classification is based on an attempted robbery could be affected by this case. Similarly, 18 U.S.C. 16(a) employs language that mirrors Section 924(c)(3)(A)'s in defining "crime of violence" for many other provisions in the federal code, including provisions penalizing the use of minors to commit violent crimes, 18 U.S.C. 25, prohibiting the possession of body armor by violent felons, 18 U.S.C. 931, and providing mandatory restitution to crime victims for such expenses as medical care or lost wages, 18 U.S.C. 3663A. Excluding attempted robbery from those provisions' reference to a "crime of violence" would defy common sense just as much as excluding it from Section 924(c)'s.

None of those consequences are warranted by the statutory text, context, or the categorical approach. "The elected lawmakers wanted to categorically include attempt crimes" like attempted Hobbs Act robbery in Section 924(c)(3)(A), "and they said so plainly." *Walker*, 990 F.3d at 330. This Court should restore the law that they enacted by reversing the decision below.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

NOVEMBER 2021