No. 18-373

In the Supreme Court of the United States

FLOYD ROSE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on review for plain error, petitioner's admission that he forced an individual to withdraw money from a national bank's automated teller machine was sufficient to establish that he committed a robbery that "in any way or degree obstruct[ed], delay[ed], or affect[ed] commerce," in violation of the Hobbs Act, 18 U.S.C. 1951(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 891 F.3d 82.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2018. On August 13, 2018, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including September 27, 2018. The petition for a writ of certiorari was filed on September 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of New York, petitioner was convicted of robbery in violation of the Hobbs Act, 18 U.S.C. 1951. Pet. App. 11a. The court sentenced petitioner to 60 months of imprisonment, to be followed by

three years of supervised release. *Id.* at 12a-13a. The court of appeals affirmed. *Id.* at 1a-10a.

1. On January 8, 2015, petitioner and an accomplice, James Arberry, approached a woman (Victim 1) at a bus stop in Bronx County, New York. Presentence Investigation Report (PSR) ¶ 12; see Gov't C.A. Br. 5. Arberry pretended to be a taxi driver and convinced Victim 1 to get into a car with him and petitioner. PSR ¶ 12. Arberry then drove to a Citibank branch, where he and petitioner forced Victim 1 to withdraw $1000 from an automated teller machine (ATM). *Ibid.* Arberry and petitioner released Victim 1 only after she gave the money to petitioner. *Ibid.*

On June 10, 2015, petitioner and Arberry approached a man (Victim 2) outside a train station in Manhattan. PSR ¶ 10(b)-(c); see Pet. App. 3a. Petitioner and Arberry convinced Victim 2 to walk with them on the pretense of finding a church where petitioner could make a charitable donation. PSR ¶ 10(b)-(c). Along the way, Arberry pressed a "hard object" against Victim 2's back, told him that he was being robbed, and threatened to "hurt" Victim 2 if he did not cooperate. PSR ¶ 10(d). Arberry directed Victim 2 to a Citibank branch and ordered him to withdraw money from an ATM. PSR ¶ 10(f). Victim 2 withdrew $900, which he handed over to petitioner. PSR ¶ 10(f)-(g). Petitioner and Arberry then forced Victim 2 to walk with them to a subway station before releasing him. PSR ¶ 10(g)-(h).

On July 10, 2015, petitioner and an unidentified accomplice accosted a woman (Victim 3) on a street in Manhattan. Pet. App. 36a-37a; see Gov't C.A. Br. 5. Petitioner and his accomplice forced Victim 3 to withdraw approximately $2993 from a Bank of America ATM and

from a currency-exchange business and to hand the money over to petitioner. Gov't C.A. Br. 5.

2. A federal grand jury charged petitioner with three counts of bank robbery, in violation of 18 U.S.C. 2113(a) and (e), and conspiracy to commit robbery in violation of the Hobbs Act, 18 U.S.C. 1951. Pet. App. 35a-37a. The Hobbs Act prohibits "in any way or degree obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce, by robbery." 18 U.S.C. 1951(a). The government later filed a superseding information charging petitioner with a single count of substantive Hobbs Act robbery, arising out of the June 10, 2015, robbery involving Victim 2. Pet. App. 30a. Petitioner pleaded guilty to that offense. *Id.* at 3a.

Before accepting petitioner's plea, the district court conducted a "thorough" colloquy to ensure that the plea was knowing and voluntary. Pet. App. 3a (citation omitted). Among other things, petitioner was advised that his plea would necessarily encompass admissions that "interstate commerce o[r] an item moving in interstate commerce was delayed, obstructed, or affected" as a result of his offense, 6/24/16 Plea Hr'g Tr. (Plea Tr.) 9, and that the government could establish that "the withdrawal from the ATM machine was from a bank that does business in interstate commerce," *id.* at 13. Petitioner acknowledged that he violated the Hobbs Act, including its commerce element, by "t[aking] a person's property by force and m[aking] them withdraw money from an ATM machine." *Ibid.* Petitioner also entered into a plea agreement in which he acknowledged that he owed $1900 in restitution to Citibank, which was the amount Citibank lost as a result of the robberies on January 8 and June 10, 2015. Plea Agreement 2; see PSR

¶¶ 12-13. Based on those admissions, the district court accepted petitioner's guilty plea. Pet. App. 3a-4a; see Plea Tr. 14.

About six weeks later, petitioner sent a *pro se* letter to the district court in which he sought permission to withdraw his plea. Pet. App. 4a; see *id.* at 27a-29a. Petitioner contended that he "didn't rob anyone," *id.* at 27a, and that his attorney had "coerced him into pleading guilty," *id.* at 4a. Petitioner did not, however, dispute that forcing a victim to withdraw money from a national bank's ATM satisfies the Hobbs Act's commerce element.

Following an evidentiary hearing, the district court denied petitioner's request to withdraw his guilty plea. Pet. App. 18a-26a. The court determined that petitioner had knowingly and voluntarily pleaded guilty and that his attorney had effectively represented him. *Id.* at 22a-25a. The court emphasized that petitioner had been advised of all of the elements of Hobbs Act robbery during his plea colloquy and that he had specifically admitted that his conduct satisfied those elements. *Id.* at 19a.

The district court sentenced petitioner to 60 months of imprisonment. Pet. App. 12a.

3. The court of appeals affirmed. Pet. App. 1a-10a. Petitioner contended, for the first time on appeal, that he was "legally innocent" of Hobbs Act robbery because his offense involved taking money from an individual, which he contended did not involve even the "de minimis impact on interstate commerce" required by the Hobbs Act. Pet. C.A. Br. 9; see *id.* at 10-13. Petitioner further argued that, in light of his asserted legal innocence, the district court had erred in declining to allow him to withdraw his plea. *Id.* at 17.

The court of appeals noted that, because petitioner had not preserved his claim in the district court, appellate review was limited to plain error. Pet. App. 5a-6a. The court determined that petitioner could not satisfy that standard because "the district court committed no error, let alone an error that was plain and affected [petitioner's] substantial rights." *Id.* at 6a. The court explained that petitioner and his accomplice had not simply "rob[bed] [a] victim of property on his person," *id.* at 8a, but had "instead targeted the funds held in the victim's account at Citibank," which "were the property of Citibank at the time that [petitioner] initiated the robbery," *ibid.* The court accordingly recognized that, "although the victim withdrew the funds from an ATM and physically handed them" to petitioner, "the target of the robbery remained * * * Citibank," a "business engaged in interstate commerce." *Ibid.* (citation and internal quotation marks omitted). Indeed, the court noted that petitioner had "admitted as much in his plea agreement by consenting to pay restitution of the stolen money *directly to Citibank*, not to the [individual] victim." *Ibid.*

The court of appeals accepted that the Fifth Circuit had reached a different conclusion in *United States* v. *Burton*, 425 F.3d 1008 (2005), but it "decline[d] to follow" that decision. Pet. App. 9a. The court noted that *Burton* had principally held that forcing a victim to withdraw money from an ATM did not constitute bank robbery, in violation of 18 U.S.C. 2113(a), and had then extended that holding to reverse a conviction for Hobbs Act robbery "summarily [and] without discussion." Pet. App. 9a. The court observed, however, that the "key question" under the bank robbery statute is whether money was taken from "'the care, custody, control, management, or possession of' a bank," *ibid* (quoting

18 U.S.C. 2113(a)), rather than the different question under the Hobbs Act whether the offense as a whole had at least "a *de minimis* effect on interstate commerce," *ibid.* In light of the evidence that petitioner's offense was directed at Citibank and caused losses to Citibank, the court determined that petitioner had failed to establish that the district court plainly erred in finding a sufficient factual basis to support his conviction for Hobbs Act robbery. *Id.* at 9a-10a.

ARGUMENT

Petitioner contends (Pet. 9-22) that his conviction for robbery in violation of the Hobbs Act is invalid because his offense conduct—forcing an individual to withdraw money from a national bank's ATM—did not "in any way or degree" affect interstate commerce, 18 U.S.C. 1951(a). That contention does not warrant review. Petitioner did not preserve his claim in the district court, and appellate review is therefore limited to plain error. The court of appeals' determination that petitioner failed to demonstrate reversible plain error is correct, and any conflict with the Fifth Circuit's decision in *United States* v. *Burton*, 425 F.3d 1008 (2005), is shallow and of limited significance in light of this Court's subsequent decision in *Taylor* v. *United States*, 136 S. Ct. 2074 (2016). In any event, this case would be a poor vehicle in which to consider the question presented because petitioner's unconditional guilty plea forecloses any challenge by him to the evidentiary basis for his Hobbs Act conviction. The petition for a writ of certiorari should be denied.

1. Petitioner acknowledges (Pet. 22) that he "did not make th[e] argument in the district court" that he now raises in his petition and that it was therefore appropriate for the court of appeals to review his claim for plain

error. On plain-error review, petitioner has the burden to establish (i) error that (ii) was "clear or obvious, rather than subject to reasonable dispute," (iii) "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and (iv) "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (citations omitted); see *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1904-1905 (2018); *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81-82 (2004). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett*, 556 U.S. at 135 (quoting *Dominguez Benitez*, 542 U.S. at 83 n.9). The court of appeals correctly determined that petitioner failed to show an entitlement to plain-error relief, Pet. App. 5a-6a, and that determination does not warrant this Court's review.

a. The Hobbs Act prohibits committing (or attempting or conspiring to commit) a robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). The Act defines "commerce" broadly to include, among other things, "all * * * commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). That language "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); see *Taylor*, 136 S. Ct. at 2079 (explaining that "[t]he language of the Hobbs Act is unmistakably broad," reaching "any obstruction, delay, or other effect on commerce, even if small"); *United States* v. *Culbert*, 435 U.S. 371, 373

(1978) (observing that the words of the Hobbs Act "do not lend themselves to restrictive interpretation").

In *Taylor*, the Court considered whether evidence that the defendant had "target[ed] drug dealers" as his robbery victims was sufficient to satisfy the commerce element of Section 1951(a), even if "the drug dealers he targeted might [have] deal[t] in only locally grown marijuana." 136 S. Ct. at 2078. The Court explained that the Hobbs Act extends to all robberies that affect any of the "categories of activity that Congress may regulate under its commerce power." *Id.* at 2079. The statute thus encompasses robberies affecting "the use of the channels of interstate commerce" or those affecting "the instrumentalities of interstate commerce, or persons or things in interstate commerce," as well as robberies "th[at] substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal." *Ibid.* (citation and internal quotation marks omitted). And because "the market for marijuana, including its intrastate aspects is 'commerce over which the United States has jurisdiction,'" the Court explained, "[i]t therefore follows as a simple matter of logic that a robber who affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction." *Id.* at 2080 (quoting 18 U.S.C. 1951(b)(3)).

The principles articulated in *Taylor* squarely resolve this case. Petitioner forced Victim 2 to engage in a commercial transaction—the withdrawal of money from a national bank's ATM—and then immediately stole the proceeds of that transaction. The funds in the victim's account, which he was forced to withdraw and which were the target of the robbery, were funds in which "the

bank, too, had property rights." *Shaw* v. *United States*, 137 S. Ct. 462, 466 (2016); see *ibid.* ("When a customer deposits funds, the bank ordinarily becomes the owner of the funds."). Thus, as petitioner acknowledged in the district court, the money he stole came from Citibank, and the resulting losses were absorbed by Citibank. See Plea Tr. 13; Plea Agreement 2. The economic activity that petitioner initiated (an ATM withdrawal) and the entity whose funds were depleted as a consequence (Citibank) both were subjects that "Congress may regulate under its commerce power." *Taylor*, 136 S. Ct. at 2079; see 12 U.S.C. Ch. 2 (National Banks). His offense thus affected "the use of the channels of interstate commerce," as well as "the instrumentalities of interstate commerce," *Taylor*, 136 S. Ct. at 2079 (citation omitted), and his robbery therefore "in any way or degree" affected "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(a) and (b)(3).

Petitioner argues (Pet. 16) that *Taylor* does not control here because the circumstances of this case involve "robbery of an individual, as opposed to a business." Given the bank's own property interest in the money that was targeted, see *Shaw*, 137 S. Ct. at 466, that is not an accurate description of his crime. In any event, *Taylor* interpreted the breadth of the Hobbs Act's commerce element by reference to the Court's prior holding in *Gonzalez* v. *Raich*, 545 U.S. 1 (2005), where the Court upheld Congress's power to regulate individuals' "possessing, obtaining, or manufacturing cannabis for their *personal* medical use" within a single State. *Id.* at 7 (emphasis added). "Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce," the Court explained in

Taylor, "it follows that Congress may also regulate intrastate drug *theft*." 136 S. Ct. at 2077; see *id.* at 2080 ("It therefore follows as a simple matter of logic" that robbery of a drug dealer "affect[s] commerce over which the United States has jurisdiction."). The same principle applies here. Because Congress's Commerce Clause power reaches the use of national banks' ATMs, a robbery in which the victim is forced to withdraw money from such an ATM "affects commerce" as the Hobbs Act defines that term. 18 U.S.C. 1951(a).

Contrary to petitioner's contention, the court of appeals did not hold that the Hobbs Act applies in every case in which "an individual" is robbed of "his own money." Pet. 1 (emphasis omitted). Petitioner here did not simply take whatever cash his victim happened to have in his wallet. Rather, in rejecting petitioner's challenge to the sufficiency of the evidence, the court emphasized that petitioner, by forcing his victim to travel to and withdraw funds from an ATM, had "targeted the funds held in the victim's account at Citibank," which "were the property of Citibank at the time that [petitioner] initiated the robbery." Pet. App. 8a; see *ibid.* ("[T]he target of the robbery" was "Citibank."). The court also noted petitioner's admission, "by consenting to pay restitution of the stolen money *directly to Citibank*," that Citibank bore the economic consequences of his crime. *Ibid.* Those features of this robbery distinguish it from other robberies in which the perpetrator merely takes "money previously withdrawn from a bank." Pet. 17.

Petitioner also identifies no reason to interpret the Commerce Clause or the Hobbs Act to exempt from federal regulation robberies that are structured so as to ensure that property taken from an interstate business

passes through the hands of an unwilling intermediary on its way to the defendant. Consider, for example, a robbery scheme in which a defendant forces individual victims to use their personal credit cards to buy him merchandise from interstate retailers, resulting in substantial losses to the retailers and the credit card companies. Under petitioner's interpretation, that crime would not affect "commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3), as long as the defendant forced the individual victims to momentarily take possession of the merchandise before the robbery was completed. Likewise, robberies of the sort at issue here would, under petitioner's interpretation, affect commerce only if the defendant himself took the money directly from the ATM; forcing a victim to take possession of the money before handing it over to the defendant—even for an instant—would insulate the defendant from federal jurisdiction. But the effect on interstate commerce is the same in both circumstances.

b. As petitioner acknowledges (Pet. 11), the court below—in accord with other courts of appeals—has recognized that the Hobbs Act does not generally apply to robberies that target an individual's personal property, because any effect on commerce that might result from such offenses would be too attenuated to support federal jurisdiction. See, *e.g.*, *United States* v. *Perrotta*, 313 F.3d 33, 36 (2d Cir. 2002) (citing cases). But the courts of appeals have determined that robberies of individuals *do* violate the Hobbs Act where "the link between the robbery and interstate commerce is more direct," including where defendants use individuals as unwilling intermediaries to "target[] the assets of a commercial enterprise. *United States* v. *Powell*, 693 F.3d 398, 403-404 (3d Cir. 2012) (citing cases), cert. denied,

568 U.S. 1111 (2013); see *Perrotta*, 313 F.3d at 37-38 (same). And they have specifically done so where, as here, the defendant forces an individual to engage in a commercial transaction using an instrumentality of interstate commerce in order to acquire the property that the defendant intends to steal. See, *e.g.*, *United States* v. *McCarter*, 406 F.3d 460, 462 (7th Cir. 2005) (forcing an individual to withdraw money from an ATM violates the Hobbs Act because "Congress's commerce power, exerted to the full in the Hobbs Act, * * * includes the power to forbid criminally motivated interstate transactions"), abrogated on other grounds, *United States* v. *Parker*, 508 F.3d 434 (7th Cir. 2007).

Consistent with *Taylor*, therefore, all the courts of appeals with criminal jurisdiction have upheld Hobbs Act convictions where the assets of a commercial enterprise were the target of a robbery and where the robbery depleted those assets, even if the depletion was minimal. See *United States* v. *Ossai*, 485 F.3d 25, 31 (1st Cir.) (robbery targeting donut shop), cert. denied, 552 U.S. 919 (2007); *United States* v. *Elias*, 285 F.3d 183, 187-189 (2d Cir.) (grocery store), cert. denied, 537 U.S. 988 (2002); *Powell*, 693 F.3d at 402-406 (3d Cir.) (business owners' homes); *United States* v. *Tillery*, 702 F.3d 170, 174-175 (4th Cir. 2012) (dry cleaner), cert. denied, 569 U.S. 985 (2013); *United States* v. *Robinson*, 119 F.3d 1205, 1212-1215 (5th Cir. 1997) (check-cashing stores), cert. denied, 522 U.S. 1139 (1998); *United States* v. *Smith*, 182 F.3d 452, 454, 456-457 (6th Cir. 1999) (grocery and party stores), cert. denied, 530 U.S. 1206 (2000); *United States* v. *Wrobel*, 841 F.3d 450, 455-456 (7th Cir. 2016) (diamond merchant); *United States* v. *Dobbs*, 449 F.3d 904, 911-912 (8th Cir. 2006) ("'mom and pop' convenience store"), cert. denied, 549 U.S. 1233 (2007); *United*

States v. *Nelson*, 137 F.3d 1094, 1102 (9th Cir.) (jewelry store), cert. denied, 525 U.S. 901 (1998); *United States* v. *Curtis*, 344 F.3d 1057, 1070-1071 (10th Cir. 2003) (convenience stores and restaurants), cert. denied, 540 U.S. 1157 (2004); *United States* v. *Guerra*, 164 F.3d 1358, 1360-1361 (11th Cir. 1999) (gas station); *United States* v. *Harrington*, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (restaurant).

In alleging a circuit conflict, petitioner relies (Pet. 1-2, 14-15) on the Fifth Circuit's decision in *Burton*, *supra*. In *Burton*, the court of appeals focused on interpreting the federal bank robbery statute, 18 U.S.C. 2113(a), which it read to require that money must be in the "the care, custody, control, management, or possession" of a bank at the time it is stolen. 425 F.3d at 1010 (quoting 18 U.S.C. 2113(a)). The court determined that forcing an individual to withdraw money from an ATM and then stealing the money from that individual does not qualify as bank robbery because, in that scenario, the robbery takes place after the money has been removed from the bank's custody. See *ibid.* ("We only consider 'the care, custody, control, management, or possession' at the time of the transfer to Burton."); *id.* at 1010-1012. Following its discussion of Section 2113(a), the court then stated, without elaboration, that the defendant's conviction for Hobbs Act robbery "fail[ed]" for the same reasons, *id.* at 1012, a conclusion that the parties had not disputed, *ibid.*

Burton does not create any conflict warranting this Court's review. As the court of appeals in this case noted, the "key question[s]" posed by the Hobbs Act and the bank robbery statute are different: The Hobbs Act is concerned with whether the offense had at least "a *de minimis* effect on interstate commerce," Pet.

App. 9a, whereas the bank robbery statute concerns whether money was taken from "the care, custody, control, management, or possession" of a bank. 18 U.S.C. 2113(a). *Burton*'s conclusory view, on an issue that was not disputed in that case, that those distinct inquiries are the same was reached without analysis or adversary presentation. Given the chance to squarely address the meaning of "affects commerce" under the Hobbs Act in light of this Court's intervening decision in *Taylor*, the Fifth Circuit might well reach a different result. Notably, petitioner identifies no post-*Taylor* decision in which a court of appeals has adopted the cramped interpretation of Hobbs Act robbery that he advocates here. Cf. *United States* v. *Davis*, 711 Fed. Appx. 605, 609-610 (11th Cir. 2017) (upholding conviction for robbery under Hobbs Act where "[e]ach count [of the indictment] charged that Davis either conspired to take or took currency and other property 'from the person and in the presence of persons employed by, and persons patronizing,' a business"), cert. denied, 138 S. Ct. 1548 (2018).

In any event, even if *Burton* had squarely addressed the issue here (it did not), and further, had continuing vitality as to the meaning of "affects commerce" under Section 1951 in light of *Taylor*, it would not conflict directly with the holding in this case, given the plain-error posture here. To establish that an error was "clear or obvious," *Puckett*, 556 U.S. at 135, a defendant must show that the error was "so 'plain'" under governing law that a court would be "derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982); see *Henderson* v. *United States*, 568 U.S. 266, 278 (2013) (explaining that "lower court decisions that are questionable but not *plainly* wrong (at time of trial or

at time of appeal) fall outside the * * * scope" of the plain-error rule). Petitioner cites no decision from this Court or the Second Circuit that would have plainly required a holding—contrary to petitioner's admissions in connection with his guilty plea—that forcing an individual to withdraw money from an ATM does not "affect[] commerce" within the meaning of the Hobbs Act. 18 U.S.C. 1951(a). Indeed, prior to the ruling below, at least one other circuit had already determined that forcing an individual to withdraw money from an ATM violates the Hobbs Act. *McCarter*, 406 F.3d at 462.

2. This case would, moreover, not be a suitable vehicle for considering the question presented because petitioner entered an unconditional guilty plea in which he agreed to the sufficiency of the facts whose sufficiency he now contests.

a. At his plea colloquy, petitioner was advised that his plea would necessarily encompass an admission that "interstate commerce o[r] an item moving in interstate commerce was delayed, obstructed, or affected" as a result of his offense. Plea Tr. 9 He acknowledged that, if necessary, the government could establish that "the withdrawal from the ATM machine was from a bank that does business in interstate commerce," satisfying the Hobbs Act's commerce element. *Id.* at 13. Petitioner further acknowledged that he violated the Hobbs Act when he used "force" to "ma[k]e [Victim 2] withdraw money from an ATM machine," *ibid.*, and also admitted that Citibank lost $1900 as a result of his robberies, Plea Agreement 2. Based on those admissions, the district court accepted petitioner's guilty plea. Pet. App. 3a-4a; see Plea Tr. 14.

Petitioner's guilty plea forecloses his argument here. A defendant who is correctly advised of the elements of

a criminal offense, and enters an unconditional plea of guilty to that offense, necessarily admits that his conduct satisfied those elements. See *Brady* v. *United States*, 397 U.S. 742, 748 (1970) ("[T]he plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial."). An unconditional guilty plea therefore forecloses any argument by the defendant that is inconsistent with the premise that he committed the crime, or that the government would be able to provide sufficient evidence of the crime at trial. See *United States* v. *Broce*, 488 U.S. 563, 570-571 (1989). Having admitted that he committed all of the elements of the offense charged in the indictment, petitioner has accordingly relinquished any argument that his conduct did not satisfy those elements. See *Class* v. *United States*, 138 S. Ct. 798, 805 (2018) ("[A] valid guilty plea relinquishes any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty.'") (quoting *Broce*, 488 U.S. at 573-574).

Although the government did not address this argument in its court of appeals brief, focusing instead on petitioner's inability to demonstrate plain error, Gov't C.A. Br. 18-24, that failure does not preclude this Court from considering the issue. Unlike a case in which the government effects a "deliberate waiver" of a litigation defense, *Wood* v. *Milyard*, 566 U.S. 463, 466 (2012), the government here merely did not invoke a threshold bar to appellate relief, without any indication that the government affirmatively intended to relinquish it. Under those circumstances, the bar remains an alternative basis for affirming a judgment in the government's favor. *Id.* at 472-473; see *Day* v. *McDonough*, 547 U.S. 198, 211 (2006) (court may consider a threshold procedural bar

not pressed by the government where "nothing in the record suggests that the [government] 'strategically' withheld the defense or chose to relinquish it"); cf. *United States* v. *New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("[A] prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted."). The availability of that alternative basis for affirming the court of appeals' judgment refutes petitioner's assertion (Pet. 21) that this case would be a "clean vehicle" for addressing the question presented.

b. Petitioner's guilty plea would make this an unsuitable vehicle in another respect as well. Because petitioner pleaded guilty unconditionally, the government did not have occasion to offer evidence regarding the effect of petitioner's crime on interstate commerce. For instance, had it been necessary to do so, the government might have offered evidence from Citibank about the effects of the robbery on its finances—including its apparent policy of reimbursing ATM robbery victims—as well as evidence regarding the movement of currency made necessary by the depletion of cash in its ATM machine. Or the government might have sought to offer testimony from petitioner's accomplice, James Arberry, regarding their practice of targeting particular victims or particular ATMs. See PSR 26 (observing that Arberry pleaded guilty and was sentenced before petitioner). Because of petitioner's guilty plea, no such evidence related to the commerce element was offered. Thus, contrary to petitioner's assertion (Pet. 4), "[t]he underlying facts" of this case are not "straightforward and undisputed," but instead have been sharply curtailed by his own choice to waive trial. Cf. *Taylor*, 136 S. Ct. at 2078 (defendant "challenged the sufficiency

of the evidence to prove the commerce element of the Hobbs Act" following his conviction at trial).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2018