No. 16-15357

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MARCUS KALANI WATSON
&
ROGUSSIA EDDIE ALLEN DANIELSON
Defendants-Appellants.

On Appeal from the United States District Court for the District of Hawaii
Honorable Derrick K. Watson, United States District Judge
U.S. D.C. Nos. 1:15-cv-00313-DKW, 1:15-cr-00360-DKW, 1:14-cr-00751-DKW

AMICI BRIEF OF
THE NINTH CIRCUIT FEDERAL PUBLIC AND COMMUNITY DEFENDERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

In Support of Defendants-Appellants and
Urging Reversal of the Underlying Judgment

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae, the Ninth Circuit Federal Public and Community Defenders (listed in the Appendix) represent indigent criminal defendants and appellants in federal courts pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, and 18 U.S.C. § 3599, as well as indigent criminal defendants seeking to set aside their convictions under 28 U.S.C. § 2255. As the institutional defenders for indigent defendants, the Federal Public Defenders have a unique interest and particular expertise and interest in the subject matter of this litigation. The issues presented and their broader implications are of great importance to our work and the welfare of our clients.

Amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year

in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amici and their members represent thousands of individuals in federal court each year, including many who were previously charged with or who currently face convictions under § 924(c). *Amici* have particular expertise and interest in the issues presented in this case.

Amici are contemporaneously filing a motion for leave to file this brief.

STATEMENT AS TO FRAP 29(c)(5)

No party's counsel authored this brief, either in whole or in part. No party, their counsel, or any other person contributed money that was intended to fund preparing or submitting this brief.

I. ARGUMENT

A. The residual clause of 18 U.S.C. § 924(c)(3)(B) is void for vagueness.

The Supreme Court held in *Johnson* that the Armed Career Criminal Act's ("ACCA") residual clause (18 U.S.C. § 924(e)(2)(B)(ii)), is unconstitutionally void for vagueness "in all its applications." *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). It follows that the residual clause in § 924(c)(3)(B) is also void. Both clauses require the same unmanageable and indeterminable analysis that compelled the *Johnson* Court to overrule its previous precedents and strike down the residual clause.

The *Johnson* Court identified "[t]wo features" of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." *Id.* First, it "leaves grave uncertainty about how to estimate the risk posed by a crime." *Id.* That is, it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime[.]" *Id.* Second, the clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. "Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 2560.

Johnson applies equally to § 924(c)'s residual clause, because the two clauses are materially indistinguishable in the two features *Johnson* identified.

This Court has already so held in relation to another residual clause, 18 U.S.C. § 16(b), whose language and mode of analysis is identical to § 924(c)(3)(B).

1. *Dimaya* guides the result here, because § 16(b) and § 924(c)(3)(B) are identical.

This Court in *Dimaya v. Lynch*, 803 F.3d 1110, 1114-15 (9th Cir. 2015), recognized in § 16(b) the "same combination of indeterminate inquiries" that *Johnson* disapproved, and therefore concluded that § 16(b) had the "same constitutional defects." Those defects were the use of the "ordinary case" analysis and the need for a court to determine a threshold level of "risk" involved in that judge-imagined ordinary case. *Id.* ("Importantly, both [§ 16(b)] and ACCA's residual clause are subject to the same mode of analysis."). *Johnson* thus "dictate[d] that § 16(b) be held void for vagueness." *Id.* at 1115.

The same should apply to § 924(c)(3)(B)'s identical clause, which requires the identical "ordinary case" and risk analysis as § 16(b): Like § 16(b), the categorical rule applies to determining whether a predicate offense is a "crime of violence." *United States v. Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995). Like § 16(b), the "crime of violence" inquiry is a question of law "obviating the need for fact finding by the jury." *Id.*; *United States v. Mendez*, 992 F.2d 1488, 1490 (9th Cir. 1993). And like § 16(b), that legal analysis results in the same indeterminable two-part inquiry. Courts must first "decid[e] what kind of conduct the 'ordinary case' of a crime involves" and then try to match it with a threshold

for "how much risk it takes" to qualify as a crime of violence. *See Dimaya*, 803 F.3d at 1115 (quoting *Johnson*, 135 S. Ct. at 2557-58); *e.g.*, *United States v. Chandler*, 743 F.3d 648, 653-54 (9th Cir. 2014) (relying on a § 924(c)(3)(B) case in conducting the ordinary case analysis), *vacated and remanded in light of Johnson by* 619 F. App'x 641.

Because the analysis of § 924(c)(3)(B) requires the same "wide-ranging inquiry" as the residual clauses of ACCA and § 16(b), it too fails. *See Johnson*, 135 S. Ct. at 2557.

2. The contrary holdings of the Second, Sixth, and Eighth Circuits are inconsistent with *Johnson*, *Welch*, and *Dimaya*.

Decisions purporting to save § 924(c)(3)(B) from invalidation by *Johnson* suffer from two fundamental flaws. First, they overlook the core holding of *Johnson* in favor of nitpicking the clause's slight textual differences from ACCA, and second, they fail to recognize the role of the categorical rule in interpreting § 924(c)(3)(B).

a. The textual differences between ACCA and § 924(c) do not solve the core vagueness problems *Johnson* identified.

The core reasoning underlying *Johnson* was not the particular language ACCA used to describe "risk," but rather the indeterminacy of assessing the risk posed by a judge-imagined "ordinary" crime. *See Johnson*, 135 S. Ct. at 2558; *Dimaya*, 803 F.3d at 1117 (concluding that the "fundamental reason" underpinning

Johnson's holding "was the residual clause's 'application of the 'serious potential risk' standard to an idealized ordinary case of the crime'") (quoting *Johnson*, 135 S. Ct. at 2561); *accord Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016) (finding § 16(b) unconstitutionally vague because *Johnson*'s "core holding" was to invalidate ACCA's "application of an imprecise risk-based standard to a hypothetical ordinary case of the crime"); *United States v. Vivas-Ceja*, 808 F.3d 719, 722 (7th Cir. 2015) (invalidating § 16(b) because "the [ACCA] residual clause's two-step categorical approach is also found in § 16(b)"). Even the government in *Johnson* conceded that the "ordinary case" analysis and "risk" assessment common to ACCA, § 16(b) and § 924(c)(3)(B) made the three "equally susceptible" to vagueness challenges—notwithstanding their slightly different language. *See* Supplemental Brief for Respondent at 22-23, *Johnson*, 135 S. Ct. 2551 (No. 13-7170), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/13-7120_resp_US_supp.authcheckdam.pdf.

Nonetheless, the Second and Sixth Circuits have relied on a few supposedly clarifying textual differences between ACCA and § 924(c) to hold the latter constitutional. *See United States v. Hill*, __ F.3d __, 2016 WL 4120667, at *8-*9 (2d Cir. Aug. 3, 2016); *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016). These cases are plainly inconsistent with *Dimaya*. *See Hill*, 2016 WL 4120667, at

*10 ("[W]e find [*Dimaya*] unpersuasive . . . ."); *Taylor*, 814 F.3d at 379 (disagreeing explicitly with *Dimaya*).

Taylor and *Hill*'s reasoning was rejected in *Dimaya* and should be rejected in interpreting the identical language at issue here. As *Dimaya* instructs, the textual differences provide little, if any, further clarity. *See* 803 F.3d at 1117-19. And even assuming that any of the differences give courts more guidance, that extra clarity still does not solve the core vagueness defects that condemned ACCA's clause. *Id.* at 1120 ("Although the government can point to a couple of minor distinctions between the text of [ACCA's] residual clause and that of [§ 16(b)], none undermines the applicability of *Johnson* 's fundamental holding to this case."); *accord Golicov v. Lynch*, __ F.3d __, No. 16-9530, slip op. at 16-17 (10th Cir. Sept. 19, 2016) ("[N]either [ACCA nor § 16(b)'s "risk" language] offers courts meaningful guidance to assess the risk posed by the hypothetical offense."); *United States v. Gonzalzez-Longoria*, __ F.3d __, 2016 WL 4169127, at *11 (5th Cir. Aug. 5, 2016) (en banc) (Jolly, J., dissenting) ("[A]ny distinction between the two statutes is not salient enough to constitutionally matter."); *Shuti*, 828 F.3d 440 ("[A] marginally narrower abstraction is an abstraction all the same."); *Vivas-Ceja*, 808 F.3d at 723 (concluding that the government had "overread[]" *Johnson*'s discussion of ACCA's text, and those textual features were not "one of the 'two

features' that combined to make the clause unconstitutionally vague") (citing *Johnson*, 135 S. Ct. at 2557).

If *Dimaya* and other courts' repudiation of these textual arguments were not enough, the Supreme Court has also weighed in since *Johnson* to discredit them. In *Welch*, the Court pinpointed *Johnson*'s main holding: the "vagueness of the residual clause rest[ed] in large part on its operation under the categorical approach." *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016). The Court then reiterated that it was not the specific language of ACCA that made it unconstitutional, but rather the indeterminate inquiry inherent in the ordinary case analysis. *See id.* ("The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense. . . . [T]he 'indeterminacy of the wide-ranging inquiry' made the residual clause more unpredictable and arbitrary in its application than the Constitution allows.").

b. *Prickett* is inconsistent with *Johnson*'s call to maintain the categorical rule despite its constitutional repercussions.

The Eighth Circuit in *United States v. Prickett*, __ F.3d __, 2016 WL 4010515, at *1 (8th Cir. July 27, 2016) has taken a different approach by reimagining decades of precedent to now assert that "§ 924(c)(3)(B)'s residual clause operates on 'real-world facts'" for which courts may consider the "real-

world conduct" of the defendant before it. In addition to being aberrant as a matter of precedent, that position is ill-advised and in conflict with *Johnson*.[1]

Indeed, for years before *Prickett*, the Eighth Circuit applied the categorical rule to § 924(c)(3)(B). *See, e.g.*, *United States v. Moore*, 38 F.3d 977, 981 (8th Cir. 1994) ("Applying the categorical approach, we agree with the conclusion of the Ninth Circuit that involuntary manslaughter as defined by § 1112 is a crime of violence under 18 U.S.C. § 924(c)(3)(B)."). That categorical rule relies on the "statutory definitions . . . and *not* [] the particular facts underlying th[e] conviction[]." *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (internal quotation marks omitted) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

Whatever the current state of the law in the Eighth Circuit, the categorical rule applies to § 924(c)(3)(B) in the Ninth Circuit. *Amparo*, 68 F.3d at 1124; *Mendez*, 992 F.2d at 1490; *United States v. Springfield*, 829 F.2d 860, 862-63 (9th Cir. 1987). This Court has repeatedly considered and repeatedly reaffirmed the

[1] In dicta, the Sixth Circuit has come to a similar conclusion, flawed for the same reasons. *See Shuti*, 828 F.3d 440 (surmising that the "crime of violence" analysis under § 924(c) involves not the categorical rule but rather "the actual conduct in the [individual] case") (quoting *United States v. Checora*, 2015 WL 9305672, at *9 (D. Utah Dec. 21, 2015)). The persuasive value of this dictum is suspect—both in the Sixth Circuit and elsewhere—because the Sixth Circuit applied the opposite reasoning in another recent case. *See Taylor*, 814 F.3d at 378 (acknowledging that "ACCA['s] residual clause, like § 924(c)(3)(B), requires the application of a categorical approach, which requires courts to look at the ordinary case of the predicate crime").

rule's application in this context. *United States v. Piccolo*, 441 F.3d 1084, 1086-87 (9th Cir. 2006) ("We considered the possibility of using a case-by-case approach when reviewing [a predicate] crime of conviction [under § 924(c)(3)(B)] but declined to do so . . . ."); *Amparo*, 68 F.3d at 1125 (rejecting argument that § 924(c) is different than other residual clauses because the predicate crime of violence is "tried concurrently with the predicate offense"). That conclusion is consistent with the text of § 924(c)(3)(B), *United States v. Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993) ("[T]he language 'by its nature' relates to the *intrinsic* nature of the crime, not to the facts of each individual commission of the offense.") (citation omitted), as well as its legislative history, *Amparo*, 68 F.3d at 1225 ("The legislative history to section 924(c) indicates that Congress intended a categorical approach to the 'crime of violence' language in subsection (3)(B).").

Further, the categorical rule achieves the right result as a matter of policy and fairness. It advances this Court's "general commitment to deciding rules of law on categorical grounds." *Piccolo*, 441 F.3d at 1087. It offers predictability to defendants and the counsel advising them about whether their convictions will "count" under § 924(c). *Cf. Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (discussing the importance of "informed consideration" during the plea-bargaining process). It avoids "practical difficulties" such as where a defendant pleads guilty to a predicate crime and "insufficient facts [are] available" to assess its level of

violence, if any, or where sufficient facts exist but cause "mini-trials" in cases that would otherwise resolve via plea. *See Piccolo*, 441 F.3d at 1087 n.5 (citing *Taylor*, 495 U.S. at 601). It also prevents the "unfair[ness]" of sustaining a § 924(c) conviction where "the facts indicated a violent felony but the defendant had pleaded guilty to a lesser, non-violent charge." *Id.* (citing *Taylor*, 495 U.S. at 601). Based on similar reasons, the Supreme Court has repeatedly emphasized the importance of the categorical rule. *See Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016); *Descamps*, 133 S. Ct. at 2287-88; *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1689-90 (2013). *Prickett* did not engage with these justifications.

More importantly, *Prickett*'s rejection of the categorical rule in order to save § 924(c)'s residual clause is squarely at odds with *Johnson*. *Johnson* repudiated the "ordinary case" approach, which instructed judges to imagine the ordinary commission of a given crime. 135 S. Ct. at 2561. *Johnson* explicitly did not abandon the categorical rule itself, which "focus[es] on the elements, rather than the facts, of a crime." *See id.*; *Descamps*, 133 S. Ct. at 2285. The rule's day of reckoning could have come in *Johnson*. The case presented the Court the opportunity to abandon the categorical rule to save the residual clause. *Johnson*, 135 S. Ct. at 2578-79 (Alito, J., dissenting). Along those lines, the Court could have held that the residual clause allowed courts to determine if the individual

offender's conduct presented "a serious potential risk of physical injury," thus obviating the need for the problematic "ordinary case" analysis.

But the Court refused, *id.* at 2561-62 (majority opinion), despite the pull of precedent upholding the clause's constitutionality, *id.* at 2563, and the principle of constitutional avoidance, *see Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) ("The doctrine of constitutional avoidance requires that 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Rust v. Sullivan*, 500 U.S. 173, 190 (1991)).

In this Circuit, § 924(c)(3)(B) unequivocally calls for a categorical approach. As *Johnson* instructs, this approach in the context of the "ordinary case" analysis dooms § 924(c)(3)(B), just as it did ACCA and § 16(b).

c. The lack of "repeated failures" to define § 924(c)'s residual clause is an artifact with no constitutional significance.

Two courts have noted that Supreme Court caselaw does not show "repeated failures to craft a principled and objective standard" for the § 924(c) residual clause, in apparent contrast to ACCA. *See Taylor*, 814 F.3d at 378; *Hill*, 2016 WL 4120667, at *10. But this observation does not bear on § 924(c)(3)(B)'s constitutionality, because *Johnson*'s holding did not hinge on the Court's repeated attempts to address ACCA.

The government urged this exact point in relation to § 16(b), but the *Dimaya* court swiftly disposed of it. *See* 803 F.3d at 1119. The court reasoned, "[w]e can discern very little regarding the merits of an issue from the composition of the Supreme Court's docket" and the lack of caselaw "does not indicate that [the Supreme Court] believes [§ 16(b)] to be any more capable of consistent application [than ACCA]." *Id.* The court also noted that the dearth of § 16(b) cases was explainable by factors irrelevant to the clause's constitutionality. *Id.*

This Court should come to the same conclusion here: the lack of § 924(c) cases on the Supreme Court's docket does not bear on its constitutionality. *Johnson*'s discussion of prior ACCA cases "served to 'confirm its hopeless indeterminacy,'" but "was not a necessary condition to the Court's vagueness determination." *Vivas-Ceja*, 808 F.3d at 723 (quoting *Johnson*, 135 S. Ct. at 2258). Even the Sixth Circuit now also agrees, despite its contrary reasoning in *Taylor*. *See Shuti*, 828 F.3d 440 ("[T]he government['s argument] mistakes a correlation for causation; conflicting judicial interpretations only provide *ex post* 'evidence of vagueness.'") (quoting *Johnson*, 135 F.3d at 2258).

Moreover, the lack of § 924(c) opinions is an explainable artifact of the legal landscape: § 924(c) "crimes of violence" rely on federal-law predicates, while ACCA (and § 16(b) for that matter) can involve both federal and state law crimes.

In short, there are simply more ACCA predicates to argue about, so it is unsurprising that more of those arguments have made it to the Supreme Court.

3. In considering § 924(c), vagueness concerns are at their peak.

The vagueness concerns identified in *Johnson* are especially pronounced when evaluating the residual clause of § 924(c), even more than § 16(b), because of the power this statute entrusts to a single actor. Since the statute's enactment in 1968, its prescribed punishments for using, carrying or possessing a firearm during a crime of violence have become increasingly harsh. Originally, a conviction carried one year of mandatory imprisonment on top of the sentence imposed on the predicate crime of violence. *United States v. Ezell*, 417 F. Supp. 2d 667, 673 (E.D. Penn. 2006) (discussing the statute's history). The "second or subsequent" offense carried two years. *Id.* Congress gradually ratcheted up these penalties more than five-fold. *See id.* at 674. Today, using, carrying, or possessing some kinds of firearms—in the very first instance—mandates a term of thirty years in prison. 18 U.S.C. § 924(c)(1)(B). A second instance condemns a person to life imprisonment. *Id.* § 924(c)(1)(C)(ii). *See also* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2192 (Apr. 2016) (positing that the only area of agreement on "gun control" in a politically polarized Congress is criminal consequences for illegal gun owners, which results in overly punitive penalties for firearms offenses).

These increasingly heavy punishments coincided with a series of Supreme Court cases that shrunk the judicial role in interpreting § 924(c) and sentencing defendants thereunder. Among the more salient points, the Court decided that § 924(c)'s higher penalties (at least 25 years or at least life, *see* 18 U.S.C. § 924(c)(1)(C)) kick in automatically in multi-count § 924(c) indictments, even if all counts occurred on the same day and even if the defendant had never been previously punished for possessing a firearm. *Deal v. United States*, 508 U.S. 129, 133 (1993); *id.* at 138 (Stevens, J., dissenting). The Court requires these terms of imprisonment to run consecutively to each other and to any other term. *United States v. Gonzales*, 520 U.S. 1, 8 (1993). A court has no discretion to moderate the resulting sentence, even on non-§ 924(c) counts. *See United States v. Roberson*, 474 F.3d 432, 437 (7th Cir. 2007) (holding that a sentencing judge may not consider the severity of a § 924(c) mandatory minimum term in sentencing a defendant on a predicate crime of violence). The only way these harsh penalties are not automatic and mandatory is, of course, if the prosecutor so decides. *See United States v. Wipf*, 620 F.3d 1168, 1171 (9th Cir. 2010).

In this context, the twin objectives of the vagueness doctrine are most readily apparent: the law deposits almost all control of defendants' sentences in the prosecutor, raising especially strong concerns about arbitrary enforcement and notice to defendants about the consequences of their actions. *See Johnson*, 135 S.

Ct. 2556; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("Vague laws offend several important values[, such as preventing] arbitrary and discriminatory application."). In particular, a prosecutor can use § 924(c) to threaten a defendant, who may have little or no criminal history and strong mitigating factors, with decades or lifetimes of punishment. Of course, many statutes offer prosecutors this opportunity by way of high maximum penalties. But unlike many of those statutes, § 924(c) provides credibility to the threat of such draconian punishments, because a sentencing judge is powerless to moderate that sentence in any way.

Concerns about how prosecutors use § 924(c) are not merely theoretical. Prosecutors' discretion in this context works a well-documented injustice on defendants. *See, e.g.*, Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 30, 78 (Oct. 2013) (reporting that "prosecutors file mandatory minimums twice as often against black men as comparable white men" and "the non-drug mandatory minimum that was most common and the most responsible for driving sentencing disparities was the enhancement for crimes involving firearms, found in 18 U.S.C. § 924(c)"); *id.* at 2 ("[A]fter controlling for [various offense and offender characteristics], there remains a black-white sentence-length gap of about 10%. . . . [B]etween half and the entire gap can be explained by the

prosecutor's initial charging decision—specifically, the decision to bring a charge carrying a 'mandatory minimum.'").

The slice of control courts retain over § 924(c) is the legal determination of whether an offense comprises a predicate "crime of violence" on which a prosecutor may base the charge. As it now stands, the residual clause of § 924(c) leads to sometimes "unconscionable" punishments for persons deemed violent criminals on the basis of crimes that were not actually violent. *See United States v. Ballard*, 599 F. Supp. 2d 539, 543 (S.D.N.Y. 2009). Namely, although the "ordinary" instance of a crime may involve violence, the clause also sometimes punishes persons who committed none. *See Begay v. United States*, 553 U.S. 137, 141 (2008) (citing *James v. United States*, 550 U.S. 192, 208-09 (2007), for the proposition that a crime could fall under the residual clause, "even if on *some* occasions it can be committed in a way that poses no serious risk of physical harm"); *Dimaya*, 803 F.3d at 1116 n.7 (noting that the "ordinary" burglary was deemed violent, but statistics show that in reality only about seven percent involved violence). Invalidating § 924(c)(3)(B) would eliminate the possibility of categorically imposing § 924(c) liability on these non-violent offenders.

B. Armed bank robbery is not categorically a "crime of violence" under § 924(c)(3)(A).

Shorn of its unconstitutional residual clause, § 924(c) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened

use of physical force against the person or property of another."[2] 18 U.S.C. § 924(c)(3)(A). This clause is not intended to punish non-violent offenders, because before concluding than an offense qualifies as a "crime of violence," a court must find that every person who commits the offense "necessarily" used, attempted to use, or threatened to use violent physical force. *United States v. Werle*, 815 F.3d 614, 621 (9th Cir. 2016); *see United States v. Benally*, __ F.3d __, 2016 WL 4073316, at *4 (9th Cir. Aug. 1, 2016).

As applied here, this categorical rule dictates that armed bank robbery under 18 U.S.C. § 2113(a), (d) is not a "crime of violence," because the range of conduct it criminalizes encompasses non-violent means.

1. The elements of § 2113(a), (d)

The analysis begins by examining the elements of the predicate offense. *Descamps*, 133 S. Ct. at 2285. The Court then determines whether "the least of the acts criminalized" under those elements necessarily involves the use, attempted use, or threatened use of physical force. *Werle*, 815 F.3d at 623 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015)).

Bank robbery under § 2113(a), (d) is not a crime of violence, because none of the elements require violent force or threats. The elements are:

(1) The defendant took, or attempted to take, money belonging to, or in the custody, care, or possession of, a bank, credit union, or saving and loan

[2] This language is known as the "force clause" or "elements clause."

association;
(2) The money was taken "by force and violence," or "by intimidation," or "by extortion";
(3) The deposits of the institution were federally insured; and
(4) In committing or attempting to commit the offense, the defendant assaulted any person, or put in jeopardy the life of any person, by the use of a dangerous weapon or device.

18 U.S.C. § 2113(a), (d);[3] *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000).

Wright's recitation of the elements of this offense entirely left out the "by extortion" language of the statute. *See* 215 F.3d at 1028. The defendant in that case apparently did not argue that "by extortion" was a way of committing the offense. Regardless, *Mathis*, 136 S. Ct. 2243, has abrogated *Wright*'s interpretation of the elements.

Mathis held that the listing of different factual means of committing a single element makes that element indivisible—that is, a court cannot inquire how the defendant committed the offense and rather must consider the least culpable conduct that can satisfy that element as a whole. *Id.* at 2249, 2255. *Mathis*

[3] The full text of subsection (a) ¶ 1 reads:

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

Subsection (d) adds the final element of "assault[ing] any person, or put[ting] in jeopardy the life of any person by the use of a dangerous weapon or device[.]" *Wright*, 215 F.3d at 1028.

contrasted elements (i.e., "the things the prosecution must prove to sustain a conviction") with factual means (i.e., "circumstances or events having no legal effect or consequences"). *Id.* at 2248 (internal quotation marks, alterations, and citations omitted). Alternative elements "define multiple crimes[,]" while alternative factual means are "alternative methods of committing [a] single crime." *Id.* at 2249-50.

Here, the statutory language demonstrates that "by force and violence," "by intimidation," and "by extortion" are three "means" of committing the single crime of bank robbery.

To begin, the statute provides a single penalty for bank robbery that does not depend on whether the defendant used "force and violence," "intimidation," or "extortion." *See* 18 U.S.C. § 2113(a) (stating that takings committed by force and violence, by intimidation, and by extortion are punishable by a "fine[] under this title or imprison[ment] not more than twenty years, or both"). Thus, the terms do not create "two different offenses, one more serious than the other." *Mathis*, 136 S. Ct. at 2249; *id.* at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."). Instead, they each define an equally serious way of the committing the offense.

The text also indicates that these three are simply ways of completing an element. *See id.* at 2250 (describing "means" as different ways of "fulfilling an

element"). That is, "by force and violence," "by intimidation," and "by extortion" are each methods of wrongfully obtaining bank monies.

The history of this section confirms that bank robbery is a single offense that can be accomplished "by force and violence," "by intimidation," or "by extortion." Prior to 1986, § 2113(a) included only obtaining money "by force and violence" or "by intimidation." *See United States v. Holloway*, 309 F.3d 649, 651 (9th Cir. 2002); *United States v. Selfa*, 918 F.2d 749, 750 n.1 (9th Cir. 1990) (interpreting the pre-1986 statute). A circuit split ensued over whether the provision covered wrongful takings in which the perpetrator was not physically inside the bank. H.R. Rep. No. 99-797 sec. 51 & n.16 (1986) (collecting cases). Most circuits held that it did cover such "extortionate" takings. *Id.*

Agreeing with those circuits, the amendment added language to clarify that "extortion" was a prohibited means of extracting money from a bank. *Id.* ("Extortionate conduct is prosecutable [] under the bank robbery provision . . . ."). This history shows that Congress did not intend to create a new offense by adding "by extortion" to the statute, but did so instead to clarify that such conduct was included within bank robbery. *See* Fed. Crim. Jury Instr. 7th Cir. (2012) (advising in the instruction for "Bank Robbery—Elements," that "[§ 2113(a)] includes a means of violation for whoever 'obtains or attempts to obtain by extortion.' If a defendant is charged with this means of violating the statute, the instruction should

be adapted accordingly"); *United States v. Askari*, 140 F.3d 536, 548 (3d Cir. 1998) (en banc) ("If there is no taking by extortion, actual or threatened force, violence, or intimidation, there can be no valid conviction for bank robbery under 18 U.S.C. § 2113(a)."), *opinion vacated on other grounds*, 159 F.3d 774.

The amendment also shows that "by extortion" is not a stand-alone element, because a jury need not determine unanimously whether the taking was "by extortion" or by some other means. *Mathis*, 136 S. Ct. at 2256. That is, a person wrongfully obtains bank monies (i) by force and violence inside the bank, (ii) by intimidation inside the bank, or (iii) by extortion from outside the bank. H.R. Rep. No. 99-797 sec. 51 (giving as an example of "extortionate conduct" the situation where "a perpetrator who, from a place outside the bank, threatens the family of a bank official in order to cause the bank official to remove money from the bank and deliver it to a specified location"). A person could make a demand for money while standing in front of a bank teller, or a person could call the bank teller and make the same demand; a jury need not unanimously decide which happened in order to convict, because the person's location is merely a factual circumstance. *Cf. Mathis*, 136 S. Ct. at 2250 ("Each of the terms serves as an alternative method of committing the single crime of burglary, so that a jury need not agree on which of the locations was actually involved.") (internal quotation marks, citations, and alteration omitted); *United States v. Dixon*, 805 F.3d 1193, 1198 (9th Cir. 2015)

("[T]he jury can return a guilty verdict even if some jurors believe the defendant took property from the victim's person and other jurors believe the defendant took the property from the victim's immediate presence[] [or if] some jurors believe the defendant used force and others believe the defendant used fear.").[4]

Because "by extortion" is a factual means of wrongfully obtaining bank monies, it should be included in the second element of this offense. Turning next examine to the least of the acts criminalized, neither this second element nor any other element requires the force or violence inherent in a "crime of violence."

[4] *Mathis* contemplated that in some circumstances, a statute of conviction and its caselaw will be insufficient to determine whether the terms are alternative "means" or "elements." 136 S. Ct. at 2256-57. As a last resort, *Mathis* allows courts to look at charging documents or jury instructions in the particular case. *Id.* n.7. Here, the Court need not venture into records of conviction in each individual case, because the foregoing statutory language and history make clear that this statute defines a single crime with three factual means. Moreover, looking at the charging documents and jury instructions in each individual case would be less reliable and less consistent than the caselaw and history of § 2113. Namely, looking at individual documents undermines the "general commitment to deciding rules of law on categorical grounds." *Piccolo*, 441 F.3d at 1087. It also puts too much emphasis on the fortuities in an individual case. For instance, as Justices Breyer and Ginsburg pointed out, a charging document or jury instruction may include only one of the means, rather than enumerating all means available in the statute. *Mathis*, 136 S. Ct. at 2260-61 (Breyer, J., dissenting). This situation may occur—simply as a matter of practicality, efficiency, or clarity—if, for instance, the evidence in the case related only to one of the means and not others. *See id.* (discussing situation in which a person is accused of burglarizing a house, not a boat). Indeed, courts do not require charging documents or jury instructions to include every factual way a person can commit a given offense, so such documents cannot give a reliable answer the way that caselaw and statutory history can.

2. The least of the acts criminalized by the second element is extortion by non-violent means.

A single element—the second element—contains the word "force." But as explained above, that element may be completed in two other ways: "by intimidation" and "by extortion." The least culpable way of completing the second element appears to be "by extortion," which is accomplished with "wrongful use of actual or threatened force, violence, or fear." *Askari*, 140 F.3d at 548.

Notably, wrongful "fear" need not involve fear of physical force. *United States v. Valdez*, 158 F.3d 1140, 1143 n.4 (10th Cir. 1998) (observing that "an individual may be able to commit a bank robbery under the language of 18 U.S.C. § 2113(a) 'by extortion' without the threat of violence"). Indeed, extortion can be committed by putting another person in fear of financial or reputational loss. *See Bouveng v. NYG Capital LLC*, 2016 WL 1312139, at *30 (S.D.N.Y. Mar. 31, 2016) (extortion by threatening to initiate lawsuit); *Azzara v. United States*, 2011 WL 5025010, at *3 (S.D.N.Y. Oct. 20, 2011) (extortion by threatening to give sexually explicit videotapes to employer).[5]

[5] These cases concerned convictions for Hobbs Act extortion, not § 2113(a), but Congress intended the two to cover this same activity. *See Holloway*, 309 F.3d at 651; H.R. Rep. No. 99-797 sec. 51 ("Extortionate conduct is prosecutable either under the bank robbery provision or the Hobbs Act . . . ."). Indeed, Hobbs Act extortion involves "force, violence, or fear"—the same language used to define "by extortion" in § 2113(a). *See Askari*, 140 F.3d at 548 n.16. Hobbs Act extortion can also be committed "under color of official right," but that aspect was not at issue in *Bouveng* or *Azzara*.

Extortion can also be committed by holding a bank employee's family member for ransom without using or threatening force. *See United States v. Carpenter*, 611 F.2d 113, 114 (5th Cir. 1980). As the Supreme Court recognized recently, holding a person for ransom need not involve any violence whatsoever. *Torres v. Lynch*, 136 S. Ct. 1619, 1629 (2016) ("The 'crime of violence' provision [of 18 U.S.C. § 16] would not pick up demanding a ransom for kidnapping."). *See also Delgado-Hernandez v. Holder*, 697 F.3d 1127, 1130 (9th Cir. 2012) (concluding that a statute prohibiting kidnapping "forcibly, or by any other means of instilling fear" does require use, attempted use, or threatened use of force). The second element of armed bank robbery is therefore not "an element [necessarily involving] the use, attempted use, or threatened use of physical force[.]" 18 U.S.C. § 924(c)(3)(A); *Werle*, 815 F.3d at 621.

3. Even disregarding the "by extortion" language of the second element, the least conduct criminalized is unintended "intimidation."

An offense involving less than intentional use or threatened use of force is not a crime of violence. *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) ("[T]he use of force must be intentional, not just reckless or negligent.") (citation omitted). In *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1126 (9th Cir. 2006), an en banc panel emphasized that accidental conduct is not enough. The court defined "accidental" as "not having occurred as the result of anyone's

purposeful act." *Id.* at 1129-30 (quotation marks and alteration omitted; emphasis added).

Bank robbery "by intimidation" does not meet this standard because it does not require purposeful intimidation. Instead, it requires "knowledge" with respect to the taking of property by intimidation; that is, knowledge of the circumstance that were objectively intimidating. *Carter v. United States*, 530 U.S. 255, 268 (2000).

But knowledge sufficient for § 2113 is different from and lesser than the "purposeful[ness]" required of a crime of violence. *See Fernandez-Ruiz*, 466 F.3d at 1130 (defining "purposeful" as "done with a specific purpose in mind; deliberate") (internal quotation marks omitted); *cf. Voisine v. United States*, 136 S. Ct. 2272, 2278 (2016) (contrasting the *mens rea* of "knowingly" with "intentionally," which the Court defined as "to have that result as a conscious object") (internal quotation marks omitted).

In fact, having "knowledge" of the circumstances is consistent with a mental state no higher than negligence. As the Supreme Court recently explained,

> Criminal negligence standards often incorporate "the circumstances known" to a defendant. . . . Courts then ask, however, whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. That is precisely the Government's position here: Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

Elonis v. United States, 135 S. Ct. 2001, 2011 (2015) (internal citations omitted).

United States v. Ketchum, 550 F.3d 363 (4th Cir. 2008), illustrates the significance of the gap between knowing of objective circumstances and intending to threaten someone. The *Ketchum* defendant handed a bank teller a note that read, "These people are making me do this." *Id.* at 365. He also told the teller, "They are forcing me and have a gun. Please don't tell the cops. I must have at least $500." *Id.* Once the teller gave him the money and returned the note, the defendant left the bank without further incident. *Id.*

The court found these facts sufficient to convict, in part because "by intimidation" in § 2113(a) "is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, *whether or not the defendant actually intended the intimidation*." *Id.* at 367 (citation and quotation marks omitted; emphasis added). The defendant in *Ketchum* knew what he was saying; but whether or not he actually intended to threaten the teller with violence was "irrelevant." *United States v. Foppe*, 993 F.2d 1444, 1451 (9th Cir. 1993) ("Whether [the defendant] specifically intended to intimidate [the teller] is irrelevant."); *see United States v. Kelley*, 412 F.3d 1240, 1244 (11th Cir. 2005) ("[A] defendant can be convicted under section 2113(a) even if he did not intend for an act to be intimidating.").

Defendants like Ketchum demonstrate that there is a realistic probability that

this statute applies to persons who do not intentionally threaten or use violent force. *See Dixon*, 805 F.3d at 1198. Categorically labeling this offense as a crime of violence in the absence of such intent violates the "bedrock principle" of *Leocal v. Ashcroft*, 543 U.S. 1 (2004): "an offense must involve the intentional use of force against the person or property," and otherwise, it is not a crime of violence. *Fernandez-Ruiz*, 466 F.3d at 1131. Thus, the second element of bank robbery—whether "by intimidation" or "by extortion"—does not satisfy § 924(c)(3)(A).

4. The fourth element, putting life in jeopardy by way of a dangerous device, requires only a risk of force and no actual or threatened force.

Turning to the final element of this offense, it does not on its face include any reference to force or violence. It refers instead to "assault[ing] any person, or put[ting] in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d).

Courts have construed that language so broadly that it encompasses situations where danger is posed by something other than the device or the person armed with it. In particular, danger posed by police and guards can meet this element. For instance, in *United States v. Martinez-Jimenez*, 864 F.2d 664, 667 (9th Cir. 1989), the court found this element satisfied by a defendant's "'extremely light' toy gun" that he "held [] downward by his side" at all times. The court reasoned that lives were in jeopardy because the presence of the toy "creat[ed] a

likelihood that the reasonable response of police and guards will include the use of deadly force. The increased chance of an armed response creates a greater risk to the physical security of victims, bystanders, and even the perpetrators." *Id.*

Although the "risk" of harm embodied in this element was sufficient to trigger the residual clause, it is not sufficient for the force clause. *Cf. United States v. Parnell*, 818 F.3d 974, 980 (9th Cir. 2016) ("There is a material difference between the presence of a weapon, which produces a *risk* of violent force, and the actual or threatened use of such force. Only the latter falls within ACCA's force clause. Offenses presenting only a risk of violence fall within ACCA's residual clause, [which is now void].").

Because none of the elements of armed bank robbery require the use, attempted use, or threatened use of force, the Court should hold that this offense is not categorically a crime of violence.

5. This Court should recognize the Supreme Court's abrogation of *Wright*.

Sixteen years ago, this Court held that § 2113(a), (d) was a crime of violence. *See Wright*, 215 F.3d at 1028. Since then, the Supreme Court's elaboration of the categorical rule has abrogated *Wright*'s meager analysis on that topic. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc) ("[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-

judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.").

In particular, as discussed above, *Mathis* abrogated *Wright*'s unexplained exclusion of "by extortion" as a means of committing the offense. *Supra* Part I.B.1.

Wright's reasoning also failed to comply with the Supreme Court's directive to consider the least acts criminalized in assessing the elements of an offense. *See Mellouli*, 135 S. Ct. at 1986 (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1384-85 (2013)). Certainly, the *Wright* court did no such thing. It simply recited the elements and concluded that "[a]rmed bank robbery qualifies as a crime of violence because one of the elements of the offense is taking 'by force and violence, or by intimidation.'" *Wright*, 215 F.3d at 1028. It is time for this Court to revisit *Wright* and conclude that this offense is not categorically a crime of violence.

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II. CONCLUSION

For the foregoing reasons, amici urge reversal of the district court's judgment in this case.

Dated: September 19, 2016

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE
FOR CASE NO. 16-10117

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B), because it contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii). The brief has been prepared in proportionally spaced typeface 14-point Times New Roman type style in compliance with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

Dated: September 19, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 19, 2016

/s/ Sonia Boyal

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