

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)
 Petitioner,)
 v.) No. 20-1459
JUSTIN EUGENE TAYLOR,)
 Respondent.)
- - - - -

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UNITED STATES,)
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 Petitioner,)
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 JUSTIN EUGENE TAYLOR,)
)
 Respondent.)

Tuesday, December 7, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

REBECCA TAIBLESON, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 20-1495, United
5 States versus Taylor.

6 Ms. Taibleson.

7 ORAL ARGUMENT OF REBECCA TAIBLESON

8 ON BEHALF OF THE PETITIONER

9 MS. TAIBLESON: Mr. Chief Justice, and
10 may it please the Court:

11 In Section 924(c), Congress sought to
12 punish some of the most dangerous federal
13 criminals, felons who use guns during crimes of
14 violence. That includes Respondent. Indeed, it
15 is undisputed that had Respondent or his coactor
16 remembered to take Martin Sylvester's money
17 after fatally shooting him, they would have
18 completed their Hobbs Act robbery and thereby
19 committed a crime of violence. That oversight
20 does not determine the application of
21 Section 924(c).

22 The overlapping and elastic phrases of
23 the elements clause, "use, attempted use, and
24 threatened use of force," cover the category of
25 force crimes, completed and attempted, of which

1 robbery is the quintessential example. Those
2 words reach attempted Hobbs Act robbery in two
3 independent, mutually reinforcing ways.

4 First, as every court of appeals to
5 consider the question other than the Fourth
6 Circuit has determined, the "attempted use"
7 language captures attempts to commit force
8 crimes, crimes that, if completed, would also
9 satisfy the elements clause.

10 Second, as to attempted Hobbs Act
11 robbery specifically, its elements, substantial
12 step and specific intent, necessarily entail the
13 use, attempted use, or at least threatened use
14 of force that is required by the law of attempt,
15 and it is borne out by the universe of real
16 cases.

17 The possible interpretations of the
18 elements clause that could favor Respondent --
19 there are two -- are each unsound: either
20 reducing the "attempted use" phrase to a near
21 nullity or drawing an incoherent distinction
22 between different attempt crimes that can be
23 equally violent, like attempted murder and
24 attempted robbery.

25 And to make his theory work,

1 Respondent would dramatically expand attempt
2 liability. If reconnoitering a store is an
3 attempted robbery today, then Googling a fraud
4 scheme is attempted wire fraud tomorrow.

5 That is not the law. This Court
6 should reverse the decision below.

7 JUSTICE THOMAS: If we don't agree
8 with your reading, applying the categorical
9 approach in this case, consistent with our
10 jurisprudence, would it change your case if we
11 could abandon the categorical approach?

12 MS. TAIBLESON: Of course. Of course,
13 Your Honor, it -- it would.

14 JUSTICE THOMAS: Is there a way to
15 apply a conduct-based approach to the elements
16 clause?

17 MS. TAIBLESON: The government has not
18 asked for that in this case. We would be happy,
19 of course, to brief it should the Court request
20 further briefing on that question. It is true
21 that the judicial sort of chorus of complaints
22 about the categorical approach has been growing
23 ever louder, but -- but we have not asked for
24 that here in light of this Court's recent
25 decision in Davis.

1 JUSTICE THOMAS: Well, one final
2 question. I know we have to apply our
3 jurisprudence, including the categorical --
4 categorical approach. That's what you have to
5 argue. But what did this Respondent actually do
6 here?

7 MS. TAIBLESON: Mr. Taylor
8 participated in an attempted Hobbs Act robbery
9 in which his coactor shot to death the victim,
10 Martin Sylvester. That is the crime at issue
11 here.

12 JUSTICE THOMAS: Well, it just seems
13 that if you look at the actual facts and you
14 consider your argument, there's a bit of a look
15 -- "through the looking glass" feel to this
16 case.

17 MS. TAIBLESON: I couldn't agree more,
18 Justice Thomas. It's almost like angels dancing
19 on the head of a pin here, particularly when you
20 consider the fact that no one -- not the Fourth
21 Circuit, not any litigant -- has identified any
22 real attempted Hobbs Act robbery cases that
23 don't involve the use, attempted use, or
24 threatened use of force.

25 This is all really turning on the sort

1 of legal imagination of the Fourth Circuit, and
2 that is what this Court has said the categorical
3 approach should not do.

4 I think, you know, there is room --

5 JUSTICE SOTOMAYOR: I'm sorry. How
6 about the --

7 MS. TAIBLESON: -- in the cat- --

8 JUSTICE SOTOMAYOR: -- how about the
9 Williams case?

10 MS. TAIBLESON: The Williams --

11 JUSTICE SOTOMAYOR: There was an
12 actual conviction.

13 MS. TAIBLESON: The Williams case is
14 an actual conviction, but it is not, Your Honor,
15 an attempted threat case. If there's a problem
16 with the Williams case, as the government's
17 brief concedes there might be, it's because an
18 -- it's an attempted extortion case in which the
19 plan --

20 JUSTICE SOTOMAYOR: But that's not the
21 way it was charged, and that's not the way it
22 was convicted.

23 MS. TAIBLESON: But, Your Honor, even
24 taking the way it was charged is not an example
25 of the type of case imagined by the Fourth

1 Circuit, which is a purely non-threatening
2 attempted threat.

3 JUSTICE SOTOMAYOR: There's a very
4 fine line between extortion and -- and threat.
5 I mean, almost nonexistent. That's why they
6 charged it the way they did in Williams.

7 In any way -- at any rate, that
8 concept of plausibility is -- I believe that all
9 of our cases that have applied it have done so
10 with respect to ambiguous state statutes. Why
11 should we ply -- apply that presumption or that
12 way of reading things to a federal statute?
13 We're the ones who read it and say what it is.

14 MS. TAIBLESON: Absolutely, Your
15 Honor. I think the underlying principle
16 reflected in Duenas-Alvarez is that the
17 categorical approach should not turn on legal
18 imagination but, rather, on the real world. And
19 I -- I see no reason why that principle --

20 JUSTICE SOTOMAYOR: So are you --

21 MS. TAIBLESON: -- would not apply --

22 JUSTICE SOTOMAYOR: -- tell me if you
23 have -- are you saying that the following
24 categories of cases you would not prosecute?
25 Someone is going to attempt or intend to

1 threaten an undercover agent, gets to the spot,
2 sits there, has a gun, will only use it if the
3 verbal conversation turns sour, but then stops
4 and doesn't do anything.

5 You're going to forgo threatening that
6 person --

7 MS. TAIBLESON: Well, Your Honor, I --

8 JUSTICE SOTOMAYOR: -- charging that
9 person?

10 MS. TAIBLESON: -- I suppose, if I'm
11 understanding correctly, the hypothetical is a
12 potential attempt to threaten a federal
13 official, which is a different statute with
14 different elements.

15 JUSTICE SOTOMAYOR: No, he's going to
16 attempt to threaten him to take what drugs the
17 undercover is purporting to sell.

18 MS. TAIBLESON: If -- if the -- if the
19 would-be robber reaches the point of being on
20 the crime scene with the gun and is intercepted
21 or sort of foiled by something beyond his
22 control --

23 JUSTICE SOTOMAYOR: No, he just -- he
24 gets there. You see him go there. You don't
25 know exactly why he ran off, but he ran off.

1 You're not going to prosecute him?

2 MS. TAIBLESON: I think, if I'm
3 understanding, voluntary abandonment can
4 foreclose a finding of attempt liability. And
5 so, if there's a voluntary abandonment --

6 JUSTICE SOTOMAYOR: That's a defense.

7 MS. TAIBLESON: Well --

8 JUSTICE SOTOMAYOR: Are you going to
9 charge him or not?

10 MS. TAIBLESON: It -- it -- it's not
11 uniformly viewed as a defense. In fact, the
12 federal courts view it as evidence that would
13 undermine --

14 JUSTICE SOTOMAYOR: Are you going to
15 charge him or not if --

16 MS. TAIBLESON: If --

17 JUSTICE SOTOMAYOR: -- in those places
18 where voluntary abandonment is a defense?

19 MS. TAIBLESON: I'm not aware of a
20 place in the United States, a federal court
21 where voluntary abandonment is a -- is a
22 recognized affirmative defense, but, if his
23 substantial step reflects his specific intention
24 to go through with that robbery, then, yes, it
25 is an attempted Hobbs Act robbery.

1 JUSTICE SOTOMAYOR: Okay.

2 JUSTICE BARRETT: Ms. Taibleson, is it
3 your position on this, you know, legal
4 imagination of the Fourth Circuit, is your
5 position that you actually have to be able to
6 point to a case where there's been an actual
7 prosecution? You don't say that in your opening
8 brief, but I think your reply brief is a little
9 bit less clear, so I'm just wondering. Do you
10 think that the defendant has to come up with a
11 case that actually involved the kind of facts
12 that the Fourth Circuit posited?

13 MS. TAIBLESON: I think it would --
14 pointing to a specific case is certainly helpful
15 and relevant evidence, and that's what the Court
16 looked to in Moncrieffe and Duenas-Alvarez, the
17 two times that the Court has applied that
18 principle. It looked to actual cases to see if
19 those cases sort of, you know, bear out the
20 defendants' posited interpretation of the
21 criminal law.

22 Now I'm certainly not saying that you
23 need a case that's precisely on all fours with,
24 you know, what the Fourth Circuit imagined, but
25 what's really telling here is the utter absence

1 of any cases. This crime has been charged, I
2 mean, we're talking about thousands of
3 prosecutions, and we're looking at zero
4 examples.

5 Instead, what has happened is the
6 Fourth Circuit has excised from Section 924(c) a
7 core violent federal crime based on the
8 imaginary supposition that someone might commit
9 it with a purely non-threatening attempted
10 threat and yet somehow still come to the
11 attention of law enforcement and be prosecuted.

12 And I would submit that that's not the
13 way we do statutory interpretation in any
14 context. I mean, I think we always interpret
15 federal statutes with a modicum of common sense
16 and assuming that we sort of live in the world
17 that we live in, which is what Congress, you
18 know, presumes when it writes these laws.

19 We don't need to pretend that we live
20 in, you know, the movie Minority Report in which
21 the government can prosecute pre-crime and
22 thought crime and, you know, benign private
23 preparatory steps. That's not how Congress
24 writes laws, and that's not how we interpret
25 them, even under the categorical approach.

1 JUSTICE ALITO: Can I just clarify?

2 CHIEF JUSTICE ROBERTS: I'm not --

3 JUSTICE ALITO: Go ahead, Chief.

4 CHIEF JUSTICE ROBERTS: I was just
5 going to say I'm not sure who the "we" is that
6 you're talking about. But, I mean, how would we
7 give any boundary line between the imagination
8 that you're saying shouldn't be applied under
9 the categorical approach and -- and exactly what
10 we -- the theory of the approach is?

11 MS. TAIBLESON: If I'm understanding
12 correctly, Your Honor, I -- I think real cases
13 are exactly what this Court looked to in
14 Duenas-Alvarez and Moncrieffe. I -- I -- I
15 suppose I don't have -- you know, it doesn't
16 have to be a certain number of real cases, but,
17 you know, some evidence that this crime in the
18 real world as courts have interpreted the legal
19 doctrine does, you know, manifest in the way
20 envisioned by the defendant.

21 And, here, you know, this Court need
22 not articulate how many cases one needs to cross
23 that line because we're talking about zero.

24 JUSTICE KAVANAUGH: What if there were
25 a few cases, outlier cases, unusual cases? What

1 -- what then? How -- how -- I guess I'm asking,
2 how should we articulate the Moncrieffe
3 principle to capture what you think is the right
4 rule here, the common-sense rule?

5 MS. TAIBLESON: Well, I think Your
6 Honor's question points to the one conceptual
7 difference between this case and Duenas-Alvarez,
8 which is that, here, we're talking about federal
9 law, the federal law of attempt as applied to
10 the federal Hobbs Act statute.

11 And so, ultimately, this Court is the
12 final expositor of that law, and this Court has
13 the final say as to how the standards for
14 attempt liability play out when applied to the
15 Hobbs Act.

16 And so, to the extent there were,
17 although unidentified, you know, a crime -- some
18 crimes in which the record seems to suggest
19 something that would go beyond what this Court
20 views as appropriate attempt liability, it is
21 within this Court's power to say: Well, no,
22 actually, the law of attempt does not stretch
23 that far.

24 Now I don't think there are such
25 cases, but it is -- you know, that is a feature

1 that differentiates this from Duenas-Alvarez.

2 JUSTICE ALITO: Well, can a -- to
3 clarify your answers to Justice Sotomayor and to
4 Justice Kavanaugh, is it a violation of the
5 Hobbs Act if a person attempts to threaten but
6 does not actually threaten? Is that an
7 attempted violation of the Hobbs Act?

8 MS. TAIBLESON: I don't think there is
9 such a thing as a non-threatening attempt to
10 threaten under the Hobbs Act, if that makes
11 sense. So whatever --

12 JUSTICE ALITO: I'm not sure I
13 understood that. Now can you attempt -- is --
14 do you -- must you actually -- must the person
15 actually make a threat, or is it sufficient --
16 and -- and a threat doesn't -- I mean, I -- I
17 think a person may threaten without having
18 either the intention or the ability to use
19 force. That's a different question.

20 But is it a violation of the Hobbs Act
21 to attempt to threaten?

22 MS. TAIBLESON: Not unless the conduct
23 reaches the point of actually threatening the
24 use of force. Otherwise, it will not meet the
25 standards of substantial step liability as

1 applied to the elements --

2 JUSTICE ALITO: All right. So that's
3 a --

4 MS. TAIBLESON: -- of the Hobbs Act.

5 JUSTICE ALITO: -- that's a Hobbs Act
6 question. That's not an -- an Armed Career
7 Criminal Act question, correct?

8 MS. TAIBLESON: Correct.

9 JUSTICE ALITO: And that's what we
10 have to tackle first, what -- what is the
11 meaning of an attempted Hobbs Act violation.

12 MS. TAIBLESON: Correct. I think --
13 the -- the -- the government thinks there are
14 two ways to approach this case textually, and
15 they're mutually sort of reinforcing. The first
16 is, as every court of appeals, other than the
17 Fourth Circuit, has said, the attempted use
18 phrase in the elements clause could simply reach
19 all attempts to commit force crimes.

20 The second is, as Your Honor posits,
21 to focus on the elements of attempted Hobbs Act
22 robbery, substantial step and specific intent,
23 and analyze whether they, under the law of
24 attempt, always entail the use, attempted use,
25 or threatened use.

1 JUSTICE BREYER: So can we -- should
2 we take that as a concession by the government
3 that there is no such thing as an attempted use
4 -- an attempted threat of force? If that's --

5 MS. TAIBLESON: I don't think we need
6 to answer --

7 JUSTICE BREYER: -- if that's the
8 government's position, maybe we could just say
9 that and -- and say, okay, it doesn't exist.
10 There we are.

11 MS. TAIBLESON: You know --

12 JUSTICE BREYER: And can we or not? I
13 don't know. You may know.

14 MS. TAIBLESON: Justice Breyer, I
15 don't think we need to answer in the abstract
16 whether there is ever such a thing as an
17 attempted threat --

18 JUSTICE BREYER: I'm not asking in the
19 concrete. I mean, I probably am being overly
20 imaginative, but my -- my -- my -- my experience
21 suggests that there are quite a few cases where
22 people might go into a bank, you know, and
23 they're going to rob it and they use a wooden
24 gun or they use something that looks like a gun
25 or they have something in their pocket that

1 looks like, okay, so somebody goes and does --
2 goes to enormous effort to get the right shape
3 and the right kind, but it's made out of wood,
4 you know, and he walks into the bank.

5 And just as he's about to present it
6 to the teller and say give me your money or your
7 life or something, before he did it, a policeman
8 walks by, or the teller turns the other way, and
9 before the teller turns back, the policeman
10 walks by. Good-bye. End to that.

11 Now that doesn't seem to me to be
12 comic book. I mean, it could happen and in
13 which case he's attempted to threaten force but
14 failed.

15 MS. TAIBLESON: I think, Your Honor,
16 he has threatened the use of force within the
17 meaning of Section 924.

18 JUSTICE BREYER: He's actually
19 threatened it. He hasn't gotten it out of his
20 pocket. Nobody knows it's there except for him.
21 Who did he threaten?

22 MS. TAIBLESON: Oh. So to the extent
23 -- I mean, Your Honor, whatever he has done by
24 hypothesis has been threatening enough to garner
25 an emergency police presence.

1 JUSTICE BREYER: No, no. All he did
2 was walk into the bank. He spent one month
3 writing to Amazon to find the exact shape of the
4 gun, though it was made out of wood, and he puts
5 it in his pocket and everything's set. And he
6 walks into the bank, and just as he's about to
7 pull out the gun, because he's now right first
8 in the queue, in walks a policeman, or the
9 teller turns the other way, and so forget it.

10 Now my -- is that -- is that -- he --
11 he was attempting to use force, to threaten
12 force -- to threaten force. I don't know.
13 That's why I pose it as a question. Sometimes I
14 pose as questions things I actually don't know
15 the answer to.

16 MS. TAIBLESON: I think, Your Honor,
17 under your question, the police officer,
18 whatever -- whatever he has done is --

19 JUSTICE BREYER: The police officer
20 hasn't seen anything, by the way. All he sees
21 is a man in a blue suit standing there.

22 MS. TAIBLESON: Well, I think, in that
23 circumstance then, we're back in sort of
24 Minority Report land, where the police officer
25 can read the thoughts of the man --

1 JUSTICE KAGAN: No, no, no.

2 MS. TAIBLESON: -- in the blue suit
3 standing --

4 JUSTICE KAGAN: I mean, suppose --
5 suppose that, you know, the guy goes in, and
6 maybe he has a fake gun, maybe he just has a
7 note saying "I have a gun, give me your money or
8 I shoot," but he doesn't have a real gun, and
9 some confederate of his calls the police
10 department and says he's going to go rob a bank.
11 And so the police department gets on its, you
12 know, horse and -- and -- and apprehends him
13 actually before he even goes into the bank.

14 Are you saying that there's no crime
15 here?

16 MS. TAIBLESON: Your Honor, I think
17 there -- there may be a crime there, depending
18 --

19 JUSTICE KAGAN: Of course, there's a
20 crime here.

21 MS. TAIBLESON: -- on the details. I
22 -- I think your -- your question --

23 JUSTICE KAGAN: There's an attempt
24 crime, right? It's an attempted threat?

25 MS. TAIBLESON: If his conduct is

1 substantial enough that it strongly corroborates
2 his specific intent not only to threaten, it's
3 not a threaten simpliciter statute, but to get
4 all the way to the point of confronting the
5 store clerk, overcoming her will, and taking
6 property, then, yes, it is an attempted Hobbs
7 Act robbery.

8 JUSTICE KAGAN: Well --

9 JUSTICE ALITO: But he makes it.

10 MS. TAIBLESON: But I think the --

11 JUSTICE ALITO: I mean, that's a
12 situation where there's an actual threat.

13 MS. TAIBLESON: There is indeed.

14 JUSTICE ALITO: All right.

15 MS. TAIBLESON: I mean, it certainly
16 does not strain the text of 924(c) --

17 JUSTICE ALITO: But that's not the --
18 I mean, that's not the question. I know this
19 may be the stuff of criminal law classes in law
20 school as opposed to the real world, but is
21 there such a thing as threatening an attempt --
22 can you threaten to attempt -- I mean, no, can
23 you attempt to threaten?

24 JUSTICE KAGAN: Attempt to threaten.

25 JUSTICE ALITO: Can you attempt to

1 threaten?

2 MS. TAIBLESON: Well --

3 JUSTICE KAGAN: I thought my case was
4 an attempt to threaten. It's an attempt, but he
5 never actually threatened anything. But he's
6 going to threaten. He tried to threaten. He
7 was apprehended before he threatened.

8 JUSTICE BARRETT: Can I clarify?

9 JUSTICE KAGAN: So it's -- it's the
10 same question. Is there an attempted threat?

11 JUSTICE BARRETT: Because do you think
12 it has to be communicated? Maybe that's what
13 you're telling Justice Kagan, that the teller
14 doesn't have to hear it? It doesn't have to be
15 communicated? I took that to be your argument
16 in the brief.

17 MS. TAIBLESON: The teller certainly
18 does not have to hear it. And there's no
19 dispute, right, that the victim -- the threat
20 does not need to be relayed to the victim. The
21 threat can be actions, not words.

22 JUSTICE BREYER: So what we're really
23 --

24 MS. TAIBLESON: The threat need not be
25 --

1 JUSTICE BREYER: -- it's with a fake
2 gun, the gun is made out of marshmallows, you
3 know, and it's in his pocket, and it just looks
4 like a gun, and he gets up close, but he doesn't
5 take the gun out and he doesn't do anything
6 else, and the reason is because the teller
7 turned the other way at the last minute. Now --
8 or because the policeman walked by at the last
9 minute. You're saying that's not an attempt at
10 a threat?

11 MS. TAIBLESON: I think the man --

12 JUSTICE BREYER: I don't know. I
13 don't know. It's a -- why isn't it?

14 MS. TAIBLESON: I -- I think, Justice
15 Breyer, a man walking into a bank with a bunch
16 of marshmallows in his pocket --

17 JUSTICE BREYER: Well --

18 MS. TAIBLESON: -- shaped like a gun
19 and that's all --

20 JUSTICE BREYER: -- I'm slightly sorry
21 I used that example.

22 MS. TAIBLESON: -- has not committed
23 an attempted robbery.

24 JUSTICE KAGAN: I -- I think, Ms.
25 Taibleson, that the -- the question here really

1 is, are you going to sort of say, well, we're
2 the government, we're here to tell you that we
3 are not -- never going to charge an attempted
4 threat?

5 MS. TAIBLESON: We are never going to
6 charge -- there is no such thing as an attempted
7 Hobbs Act robbery in which the overt actions in
8 the world, to Justice Barrett's questions, the
9 outward manifestations of his conduct, the
10 things that we can see, that a jury can see, are
11 not at least threatening the use of force,
12 because the law of attempt, as applied to the
13 Hobbs Act, requires that we get to that point in
14 order to prove the defendant's specific
15 intention to overcome his victim's will and take
16 her property.

17 CHIEF JUSTICE ROBERTS: So --

18 JUSTICE SOTOMAYOR: Counsel --

19 CHIEF JUSTICE ROBERTS: -- it's a
20 conspiracy. He's talked with three other
21 people, one of whom may be an undercover
22 officer, and says, I'm going to go in and I'm
23 going to -- you know, I'm going to shoot this
24 person or I'm going to threaten harm, I'm never
25 going to shoot them because then I'll get extra

1 time in prison if I'm caught.

2 But we know that he's going to attempt
3 that because he's told the other conspirators.
4 Why -- what's wrong with that? There can
5 certainly be an attempt to threaten somebody.

6 MS. TAIBLESON: I -- I think --

7 CHIEF JUSTICE ROBERTS: They -- or one
8 of the -- the undercover agents stops him before
9 he can do any harm.

10 MS. TAIBLESON: Mr. Chief Justice, we
11 do not think a conspiracy is reached by the
12 elements clause for two reasons.

13 CHIEF JUSTICE ROBERTS: Okay. But I'm
14 not saying -- it doesn't have to be charged as a
15 conspiracy. It could be charged as an attempt
16 by him to threaten the other people. That's
17 just the evidence to support the notion that he
18 was going to attempt.

19 MS. TAIBLESON: It sounds like the
20 hypothetical you described is a conspiracy and
21 is not an attempt. The overt action required
22 for a conspiracy is not nearly to the same
23 degree -- is not as -- as aggravated as the
24 substantial step required for an attempt.

25 And a conspiracy does not satisfy the

1 definition of Section 924(c)(3)(A).

2 CHIEF JUSTICE ROBERTS: What would you
3 call it if somebody met with a group and says,
4 I'm going to go rob that bank? They don't have
5 to agree; they just -- they just know it. Then
6 he gets a gun and he -- and he gets a note that
7 says, you know, give me all your money, and he
8 goes in, but because somebody has alerted the
9 police, before he can do it, he's arrested.

10 MS. TAIBLESON: I think it's --

11 CHIEF JUSTICE ROBERTS: I would say
12 he's arrested for attempting to threaten
13 somebody.

14 MS. TAIBLESON: If he gets close
15 enough to the point of consummating the robbery,
16 then the actions that he must have committed to
17 get to that point will threaten the use of
18 force, and, yes, he has committed --

19 CHIEF JUSTICE ROBERTS: Okay. So the
20 question -- you know, then we just do the usual
21 legal analysis. If -- if he gets to the
22 counter, does that count? If he gets to the
23 door, does that count? Is that really what it
24 turns on?

25 MS. TAIBLESON: Well, of course, Your

1 Honor, criminal liability often turns on those
2 small details. And -- and, you know --

3 JUSTICE KAGAN: But there must be --

4 MS. TAIBLESON: -- many of Your
5 Honor's questions --

6 JUSTICE KAGAN: -- some realm of
7 cases, Ms. Taibleson, where you're not going to
8 be able to say that the threat was actually
9 made, but you're going to want to have the
10 option in your pocket of charging somebody with
11 an attempt at a threat, unless you're willing to
12 give all that away.

13 MS. TAIBLESON: I'm not sure that in
14 the abstract a pure attempted threat is
15 something that exists. One clue to this is 18
16 U.S.C. 1512(a), a witness-tampering statute that
17 criminalizes the witness tampering through the
18 "use or threat of force, or attempts to do so."
19 So that sounds like it would capture attempted
20 use and attempted threats, as well as use and
21 threats.

22 But then the penalty provision only
23 provides penalties for uses of force, attempted
24 uses of force, and threatened uses of force,
25 which reflects, I think, the common-sense and

1 textual intuition that there's no such thing as
2 an attempted threat in the abstract that does
3 not itself attempt the use of force or threaten
4 the use of force.

5 JUSTICE GORSUCH: I think that's --

6 JUSTICE BREYER: Well, all you have to
7 do to think of examples is -- is just think of a
8 case where the person is threatening force,
9 okay? He wraps his head in a towel, that's
10 Simms, and he walks in front of a shop, a Boost
11 shop, whatever it was, with something that looks
12 likes a long gun, and then he notices that the
13 lights are out and nobody's there, so he turns
14 around and goes home, okay?

15 Now you say, well, that's threatening
16 force. So all I have to do to do the other is I
17 just transform that long gun into a wooden gun.
18 All right? Everything else is exactly the same.
19 So all we have to do to create the attempted
20 threat of force, you see, is take a case in
21 which there's an actual attempt to use force and
22 change the mechanism so it won't really use the
23 force but just appear to.

24 Now that's all that we've been doing.
25 And if you want to say the government says it

1 will never charge and it is not -- we do not
2 charge attempts to use force and we will not
3 because the statute doesn't cover it and that is
4 our view in the Department of Justice, well,
5 okay, I will certainly listen to that.

6 MS. TAIBLESON: Two responses.

7 First, I think I am saying that, but
8 let me respond more substantively. The
9 defendant, in an attempted robbery, Justice
10 Breyer, is specifically intending a
11 confrontation with a victim whose response is,
12 by definition, impossible for him to predict.

13 So even in just a simple threat case
14 the victim might simply hold on to the property
15 for a second longer, and the defendant -- and
16 the robber has to yank it out of her hand.
17 Stokeling teaches us that is force, not to
18 mention the fact that she might actually resist.

19 So this idea of a robber who ex ante
20 has irrevocably disavowed any idea that there
21 will ever be any direct physical contact during
22 a robbery that satisfies force under Stokeling,
23 it is a fiction. It is a -- it's a -- it's a
24 thought experiment. And it would be very
25 strange to excise a core violent crime from the

1 elements clause based on that thought experiment

2 --

3 JUSTICE GORSUCH: Counsel --

4 MS. TAIBLESON: -- when every --

5 JUSTICE ALITO: Ms. Taibleson, I --

6 MS. TAIBLESON: -- actual instance --

7 JUSTICE ALITO: No, go ahead.

8 JUSTICE GORSUCH: Go ahead.

9 JUSTICE ALITO: I mean, I really think
10 you have to answer the question whether there
11 can be a conviction for attempted Hobbs Act
12 robbery where the defendant attempts to threaten
13 but does not actually get to the point of doing
14 whatever it takes to make an actual threat. I
15 really think you have to answer that question.

16 If -- you know, if the answer is no,
17 then you win this case. If the answer is yes,
18 then I think you've got to fall back on your
19 argument, this exists in theory, but it's not a
20 case that exists in the real world in any
21 substantial numbers or maybe at all, and the
22 application of the Armed Career Criminal action
23 turn on that. I -- I really think you have to
24 answer that.

25 MS. TAIBLESON: Justice Alito, I want

1 to give you as precise an answer as I possibly
2 can. I think the answer to your question is no
3 because any case that we prosecute --

4 JUSTICE KAGAN: Sorry. No what?

5 MS. TAIBLESON: No, we do not
6 prosecute a pure attempted threat case because
7 any case that reaches the level of being an
8 attempted Hobbs Act robbery must -- the conduct
9 must threaten the use of force.

10 And so -- and so, you know, there --
11 there is -- I suppose, you know -- if I may
12 continue, Mr. Chief Justice?

13 CHIEF JUSTICE ROBERTS: Sure.

14 MS. TAIBLESON: You could describe
15 that, I suppose, as an attempted threat, which
16 the Fourth Circuit did. It's sort of a pithy
17 formulation. But, in practice, no, we do not
18 prosecute and we cannot prosecute a pure
19 attempted threat case that does not rise to the
20 level of a threat.

21 JUSTICE GORSUCH: Well, can --

22 CHIEF JUSTICE ROBERTS: Sure.

23 JUSTICE GORSUCH: I'll do it my turn.
24 That's fine.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything?

2 JUSTICE THOMAS: Yes. Ms. Taibleson,
3 the -- I think the argument has pointed out
4 exactly what my problem is. Could you just
5 briefly tell us what the Respondent was indicted
6 for in this case and convicted of?

7 MS. TAIBLESON: Yes. The Respondent's
8 indictment had numerous charges, Your Honor,
9 numerous drug trafficking charges attached to
10 Section 924(c) violations, as well as conspiracy
11 to commit Hobbs Act robbery, attempt to
12 commit --

13 JUSTICE THOMAS: No, I mean the
14 underlying facts. I'm just --

15 MS. TAIBLESON: Oh, of course.
16 Respondent in this case, Your Honor, was a drug
17 dealer in the Richmond area who planned with one
18 of his coactors to conduct a sham drug deal in
19 which they intended to actually steal the drug
20 money from their, you know, putative customer.

21 They armed themselves, went to the
22 scene. Respondent's coactor attempted to take
23 the money from the customer, and a struggle
24 ensued. Respondent's coactor shot the victim,
25 Martin Sylvester, fatally. And then Respondent

1 drove them away from the scene of the crime.
2 They fled. They forgot in a panic to actually
3 take the victim's money.

4 And I think that point highlights a
5 key distinction here between completed robbery
6 and attempted robbery. Completed robbery,
7 Stokeling teaches, is the quintessential
8 elements clause offense. The distinction
9 between completed and attempted robbery is that
10 the property is not taken. It's not that force
11 is absent.

12 So that if force is absent, it's no
13 kind of robbery at all. It's larceny or a theft
14 or burglary. So the distinction between
15 completed and attempted robbery is not a
16 distinction that the elements clause cares
17 about, which really highlights how deeply
18 implausible it is that Congress would have
19 written the elements clause to capture robbery,
20 included attempt liability, but accidentally
21 missed attempted robbery.

22 JUSTICE THOMAS: Thank you. I just
23 wanted to assure myself that there was no
24 marshmallow gun involved.

25 (Laughter.)

1 MS. TAIBLESON: No, sir.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 Justice Alito, anything further?

6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: Counsel, I -- I
8 always have to put these cases in context. This
9 is a enhancement case, correct? This defendant
10 has been convicted of the attempted Hobbs Act
11 robbery?

12 MS. TAIBLESON: He actually, because
13 of the nature of the plea agreement, I believe
14 he pled to conspiracy, and he was sentenced to
15 the maximum amount on that charge, in addition
16 to the --

17 JUSTICE SOTOMAYOR: How -- what was
18 that maximum?

19 MS. TAIBLESON: I believe it's a
20 20-year. And then --

21 JUSTICE SOTOMAYOR: And -- and, in
22 fact, it's -- your brief sounds like, if we do
23 this, we're going to let out all these horrible
24 criminals. But most of them are facing very
25 substantial sentences like this man.

1 And if we invalidate this enhancement,
2 the Court could look at -- will resentence and
3 look at the mix of sentences and could even give
4 the same sentence just using different
5 rationale, correct?

6 MS. TAIBLESON: Two responses, Your
7 Honor.

8 First, defendants can plead only to
9 the 924(c) violation. So sometimes, no, they
10 will not have a separate conviction on which to
11 rely.

12 Second, the logic of Respondent's
13 argument would apply not only to Hobbs Act
14 robbery but to all attempted state robberies,
15 potentially to attempted rape, which is
16 classically defined as a crime involving force
17 or threat to overcome the victim's will. The
18 logic would also apply to attempted murder
19 because --

20 JUSTICE SOTOMAYOR: This has nothing
21 -- this is just on the enhancement. This has
22 nothing to do with the prosecution for these
23 things. It just has to do with the enhancement.

24 MS. TAIBLESON: Well, Section 924(c)
25 is a separate crime, Your Honor, unlike ACCA, so

1 Section 924(c) separately criminalizes --

2 JUSTICE SOTOMAYOR: And the only thing
3 at issue here is the threatened use of threat,
4 the attempted use of threat?

5 MS. TAIBLESON: Well, the only thing
6 at issue in this case is attempted Hobbs Act
7 robbery. But the logic of this decision would
8 naturally lend itself -- naturally apply to many
9 other predicate offenses.

10 JUSTICE SOTOMAYOR: All right. Thank
11 you, counsel.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?
13 Justice Gorsuch?

14 JUSTICE GORSUCH: Counsel, I -- I --
15 I'd just like to return to where Justice Alito
16 left off just so I understand.

17 I had not read the government's brief
18 or heard through most of this argument a
19 submission that the government is unable to
20 prosecute somebody for Hobbs Act robbery based
21 on an attempted threat that failed.

22 I'm still, frankly, at -- at the end
23 of this argument not clear about the
24 government's representations on that score.
25 What I had understood the government to argue is

1 that that's just not a real-world case, or there
2 are very few of them, and that the usual case,
3 the generic case, involves more than that, and,
4 golly, look at this particular set of facts and
5 how terrible it is.

6 I'll be honest. My reaction to that
7 argument is, boy, that sounds like the residual
8 clause all over again to me.

9 What do you -- what do you want to say
10 in response to that?

11 MS. TAIBLESON: Two responses.

12 First, Your Honor, we're arguing both.
13 We're arguing it's not a real case and also,
14 that is, it's not a real case in large part
15 because it is foreclosed by the law of attempt,
16 so we cannot prosecute it.

17 Second --

18 JUSTICE GORSUCH: Where -- where is
19 that -- where is the argument that it's just not
20 ever possible as opposed to we as a matter of
21 prosecutorial discretion or it's just unlikely
22 or it's just fanciful? Where is it -- where is
23 it written that the government cannot bring such
24 a claim?

25 MS. TAIBLESON: It's a combination of

1 the requirements of attempt liability.

2 JUSTICE GORSUCH: I don't see it in
3 your brief, counsel.

4 MS. TAIBLESON: It's the requirements
5 of attempt liability.

6 JUSTICE GORSUCH: Is it in your brief?

7 MS. TAIBLESON: I -- I thought so,
8 Justice Gorsuch. But, if it was -- if you
9 didn't -- I apologize if it was unclear.

10 So attempt liability requires a -- you
11 know, a substantial step that's big enough --

12 JUSTICE GORSUCH: I understand the
13 substantial step argument. I do get that. But
14 that gets back to marshmallows and -- and wooden
15 guns and what's enough to be a substantial step.

16 Besides that argument, do you have
17 anything else you want to say?

18 MS. TAIBLESON: Yes. We do have one
19 other textual argument, which is the argument
20 advanced by every other court of appeals, which
21 is that the attempted use language captures
22 attempted force crimes.

23 But I also want to answer Your Honor's
24 question about the residual clause, which I
25 think is an important one. The analysis here

1 differs from the residual clause analysis in two
2 ways, and then there's an example that really
3 helps to make this plain.

4 First, there is no need or recourse to
5 identify a typical or ordinary attempted Hobbs
6 Act robbery. Instead, we're looking at the
7 elements required by law.

8 Second, there is no risk analysis that
9 is divorced from the elements of the crime. So,
10 on that, if you look at James at 204 to 209, you
11 can see a great example of how the residual
12 clause analysis differs from this case.

13 JUSTICE GORSUCH: Yeah, let me just
14 stop you there and say I find all that pretty
15 unpersuasive because, to the extent you're
16 arguing that the defendant failed to cite a
17 real-world case or this isn't our practice or
18 we're not likely to do this, that strikes me as
19 just really arguing the residual clause all over
20 again, and I would have thought the government
21 would be prepared to move on past that by now.

22 MS. TAIBLESON: We disagree. We think
23 that there is --

24 JUSTICE GORSUCH: I -- I -- I -- I --
25 that's more in the nature of just a thought for

1 you to take home and think about. Thank you.

2 MS. TAIBLESON: Thank you, Justice
3 Gorsuch.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 JUSTICE KAVANAUGH: I have a few
7 questions. I haven't really moved on past
8 Davis, but I will for purposes of this argument.

9 So I -- I understood you to say we
10 will not and cannot prosecute an attempted
11 threat. We do not, cannot, and will not
12 prosecute an attempted threat. Is that fair?

13 MS. TAIBLESON: That's fair. And --

14 JUSTICE KAVANAUGH: And if we -- sorry
15 to interrupt. And if we write that in the
16 opinion, then it'll be written down.

17 MS. TAIBLESON: Yes, Your Honor. And
18 just like when I answered Justice Alito, I want
19 to be as honest and precise as I can.

20 What I mean is that we cannot
21 prosecute conduct that does not at least arise
22 to the threatened use of force, so it -- nothing
23 that could be purely described as an attempted
24 threat as the Fourth Circuit envisioned it.

25 Certainly, there can be threatening

1 conduct that is displayed to someone other than
2 the ultimate victim. There's no dispute that
3 that's still a threatened use of force. And so
4 we can prosecute crimes that don't, you know,
5 ultimately get to the point of that
6 confrontation with the victim, yes, but the
7 conduct must still threaten the use of force.

8 JUSTICE KAVANAUGH: And then I
9 understood your alternative argument, but I want
10 to make sure this is correct, to be even if you
11 could theoretically do it, what you're saying we
12 cannot and will not do, but even if we
13 theoretically could do it, that's a 1-in-10,000
14 possibility, and Moncrieffe and Duenas-Alvarez
15 say that's not something we should, therefore,
16 throw out the other 9,999 attempted robbery
17 cases, correct?

18 MS. TAIBLESON: That is correct, Your
19 Honor. And if I could add, I think, you know,
20 the existence of these potential hypothetical
21 extreme margin cases of attempted Hobbs Act
22 robbery are not only -- not only are we
23 cautioned against relying on them by
24 Duenas-Alvarez, but the fact that the extreme
25 margin example of attempted Hobbs Act robbery is

1 also at the extreme margins of the elements
2 clause actually reflects the congruence between
3 those two statutes.

4 It's not a reason to throw the baby
5 out with the bath water. It's what we would
6 expect to find in two statutes that both turn on
7 the concept of force.

8 JUSTICE KAVANAUGH: Then, last, a
9 question on the sentencing provisions. Congress
10 obviously did this and imposed this because
11 there's a huge problem with violent crime
12 committed with firearms and thought that the
13 sentences were not sufficient to protect the
14 public. I mean --

15 MS. TAIBLESON: That's correct, Your
16 Honor. These are some of the most violent
17 federal felony prosecutions that we have that we
18 are defending here, like Respondent's own case.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: I just want to be
23 clear about what you're conceding. So you're
24 saying, you know, you've -- Justice Alito is
25 right, I think the government has to answer

1 whether there's such a thing as an attempt to
2 threaten to use force.

3 You're saying that if someone is in
4 the parking lot of a convenience store that
5 they've cased out, has in their pocket a note
6 that is going to -- will pass to the cashier
7 saying your money or your life, and also has a
8 loaded gun on them, gets out of the car and
9 starts walking towards the convenience store,
10 and then is intercepted because maybe, as the
11 Chief had posited, he's confided his plans to a
12 confederate and so there's a way to prove
13 intent, you're saying that the government could
14 not prosecute that as an attempt to threaten?

15 MS. TAIBLESON: No, Justice Barrett.
16 The presence of a loaded gun there is a key
17 piece of evidence. A man intending to rob a
18 bank walk -- or a store, walking up to the store
19 with a loaded gun does threaten the use of
20 force, even though he hasn't --

21 JUSTICE BARRETT: Well, a threat has
22 to be communicated, right?

23 MS. TAIBLESON: It does. And it --
24 well, it has to be not communicated in the sense
25 of sort of reduced to words exchanged with the

1 victim. It does not. It has to be actions or
2 words that convey the intention to inflict harm.
3 That's the definition of threat that this Court
4 quoted in *Elonis*, and that's the definition
5 relevant here.

6 JUSTICE BARRETT: So, if I disagree
7 with you about that definition of threat, if I
8 think that a threat has to be something that the
9 other person hears, you know, that's actually
10 communicated to the -- the potential victim,
11 then you lose?

12 MS. TAIBLESON: Well, under that one
13 -- then -- then you would not accept our -- one
14 of our arguments, yes, but I -- I would caution
15 against that interpretation of threat.

16 There's no -- the -- the -- the case
17 law on the word "threat" is really uniform. It
18 need not be conveyed directly to the recipient,
19 to the intended recipient, of the threat.
20 That's clear under *Elonis*. There are numerous
21 federal statutes that refer to threats that are
22 not ultimately communicated to the victim.
23 That's clear under the case law on true threats.

24 So I -- I don't think that there's
25 actually much dispute between us here as to that

1 feature of the word "threat."

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Just to follow up on
5 both of these, I mean, it seems to me that what
6 you're doing is you're sort of disclaiming
7 something with one hand and then taking it back
8 with the other. You're saying, oh, we won't
9 prosecute attempted threats, but then you're
10 saying that everything that -- all these
11 hypotheticals that sort of sound like attempted
12 threats to the people who are making -- who are
13 posing the hypotheticals, that you can just
14 prosecute those as threats in themselves and
15 that you don't disclaim the ability to do that.

16 But I think what you're hearing is
17 that there are some threats that just haven't
18 been consummated to the degree that they are
19 threats. And the question is, you know, if you
20 -- if you accept that idea that there are some
21 threats that just haven't been made yet, but
22 they're trying to make them, are you just going
23 to leave those alone?

24 MS. TAIBLESON: Justice Kagan, let me
25 try a different answer because I -- I hear that

1 you're unsatisfied. There is no crime that has
2 as an element an attempted threat, right?
3 That's just a sort of reformulation of some of
4 the words here.

5 The elements of attempted Hobbs Act
6 robbery are a substantial step and specific
7 intent. And so what I -- what I am doing and I
8 think what Your Honor is hearing is I am
9 sometimes reformulating my answer in the
10 language of substantial step and specific
11 intent, which is what the government has to
12 prove, and that is the criterion for our federal
13 prosecutions under law.

14 And -- and so, to the extent that's
15 what I'm doing, I'm simply filtering the
16 question through the prism of the actual law.
17 There's -- the Fourth Circuit did, you know,
18 say, oh, there's not an attempted threat in the
19 elements clause. But there's no crime with an
20 element of attempted threat. So that's simply
21 sort of not the correct, you know, filter of
22 analysis here.

23 CHIEF JUSTICE ROBERTS: Anyone else?

24 Thank you, counsel.

25 MS. TAIBLESON: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Dreeben.

2 ORAL ARGUMENT OF MICHAEL R. DREEBEN

3 ON BEHALF OF THE RESPONDENT

4 MR. DREEBEN: Thank you, Mr. Chief

5 Justice, and may it please the Court:

6 An attempt to commit Hobbs Act robbery
7 is not a crime of violence under the elements
8 clause. Under the categorical approach, what
9 matters is the minimum conduct prohibited.

10 Here, that is attempted threats
11 robberies, and those robberies do not require
12 the use, attempted use, or actual threatened use
13 of physical force. An example proves the point,
14 and my example is similar in form to Justice
15 Kagan's, Justice Breyer's, and Justice
16 Barrett's.

17 The defendant drives to a convenience
18 store with a note and an unloaded gun. In
19 previous note-only robberies, he never used
20 force. Because of unrelated police activity, he
21 never enters the store, but he's stopped on the
22 way home and confess -- confesses to a
23 threats-only robbery.

24 That conduct establishes an attempt to
25 commit robbery by threat. It involves a

1 substantial step, and the intent is established
2 by the facts in his own confession. It is
3 punishable by 20 years, which is what Respondent
4 received in this case for his attempted and
5 conspiracy to commit Hobbs Act robbery.

6 What it does not show is an attempt to
7 use force, the actual use of force, or a threat
8 to use force. To get around that reality, the
9 government distorts the meaning of "use of
10 force" and "threatened use of force" and adopts
11 a very unorthodox meaning of "attempt
12 liability." It argues that attempted threats
13 are attempted uses of force, positing a meaning
14 of "use of force" that contradicts this Court's
15 cases.

16 It argues that the robber on the way
17 to the target has already threatened force,
18 adopting a definition of "threatened" that is
19 foreign to criminal law, appears in no case, and
20 has never been used before.

21 The government's position does not
22 correspond to what is left of the definition of
23 crime of violence. It expected the elements
24 clause to do all the work, but Congress did not.
25 It enacted the residual clause to capture cases

1 just like this. The residual clause is gone,
2 but its demise does not expand the elements
3 clause.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Mr. Dreeben, one
6 minor question. In your many years of
7 experience, have you ever seen someone charged
8 with attempted threat as you --

9 MR. DREEBEN: The way --

10 JUSTICE THOMAS: -- as you posit, for
11 example, similar to your hypothetical?

12 MR. DREEBEN: So, Justice Thomas, two
13 answers on that.

14 The government's typical approach to
15 charging is to use the entire language of the
16 statute. So the Hobbs Act would be charged in
17 haec verba. And it includes threats. It
18 includes taking by force.

19 JUSTICE THOMAS: No, I mean -- I
20 understand that. But have you -- in the
21 underlying facts, have you ever seen -- even if
22 it's covered by Hobbs Act, have you ever seen
23 this specific set of facts charged as a crime?

24 MR. DREEBEN: It's actually fairly
25 frequent, Justice Thomas, because many robbers

1 do not intend to use force. They go to banks
2 and convenience stores and other low-hanging
3 fruit that -- for targets for money. And many
4 of them --

5 JUSTICE THOMAS: No, I mean
6 specifically attempted threat.

7 MR. DREEBEN: Sometimes the government
8 cannot prove anything more. It is much easier
9 to prove that somebody with a gun in their
10 pocket who goes to a convenience store is
11 attempting to threaten than it is to prove that
12 they attempted to use force. And the government
13 never has to prove more than the attempted
14 threats to get a -- a conviction.

15 And defendants can't offer up a
16 defense, I only intended to threaten, never
17 wanted to hurt a fly. That's not a defense to
18 the crime. It's a confession.

19 And so the reported cases are fairly
20 thin on facts that clearly demonstrate only an
21 intent to threaten and not an intent to use
22 force, but the body of cases that the government
23 prosecute typically will involve cases where we
24 don't have to show, the government can say, that
25 he intended to actually use force. Even if it's

1 a sham, even if he went in just intending as a
2 bluff threat, he's still guilty because the
3 threat of force triggers many of the concerns
4 that the criminal law has.

5 It instills fear. It can lead to
6 violence spontaneously. So we punish threats
7 for that reason. And they have to be true
8 threats that are communicated, I think, as
9 several members of the Court have articulated
10 today.

11 The government posits a meaning of
12 "threats" and "threatened" in the Hobbs Act
13 that, as far as I'm aware, has never appeared in
14 any case, any government brief, any submission,
15 or any logical application of the meaning of
16 this statute, Section 924(c)(3)(A).

17 And there's a reason for that. When
18 Congress drafted these elements clauses, it
19 wanted to capture particular kinds of crimes
20 that had particular elements. So --

21 JUSTICE ALITO: Well, I don't know
22 whether you finished answering Justice Thomas,
23 but, if you have, I want to jump in because I
24 think you're confusing two separate things.

25 You're confusing the question whether

1 a Hobbs Act defendant must actually intend to
2 use force. And the answer to that is no, it's
3 enough if he threatens to use force. It's not
4 -- doesn't matter whether he has the capability
5 of using force. If it's a fake gun, it's
6 nevertheless a threat.

7 That's not the -- that's not the
8 question that we were discussing with
9 Ms. Taibleson. It's whether someone can be
10 prosecuted under the Hobbs Act for attempting to
11 threaten without actually threatening.

12 MR. DREEBEN: Yes.

13 JUSTICE ALITO: That's a separate
14 question --

15 MR. DREEBEN: Yes.

16 JUSTICE ALITO: -- is it not? Yes.

17 MR. DREEBEN: It is a separate
18 question, but, Justice Alito, I -- I -- I think
19 all of the hypotheticals that were propounded by
20 the Court satisfy the attempt --

21 JUSTICE ALITO: No, I understand. I
22 -- I -- I --

23 MR. DREEBEN: -- to threaten test.

24 JUSTICE ALITO: -- I understand that.
25 They go to that separate question, not --

1 MR. DREEBEN: Correct.

2 JUSTICE ALITO: -- what I think you
3 were discussing, which is the actual intent to
4 use force. So this is the question that I have
5 with respect to that. Assuming for the sake of
6 argument that that would fall within the Hobbs
7 Act, since the Hobbs Act was enacted, are there
8 -- is there any reported case involving a
9 conviction based on that theory?

10 MR. DREEBEN: So we pointed to several
11 cases in our brief, and the NAFD amicus brief
12 points to others. But I think what I need --

13 JUSTICE ALITO: Well, what's the best
14 one?

15 MR. DREEBEN: Well, the Williams case
16 that Justice Sotomayor mentioned and the Licht
17 case that are both in our brief involve people
18 that are essentially doing the kind of activity
19 that the hypotheticals posit. And the
20 government absolutely prosecutes those cases.

21 JUSTICE ALITO: All right. Well, and
22 let me expand it. I don't know when -- when did
23 robbery emerge as a hot -- as a common law
24 crime? I don't know, hundreds of years ago.

25 Can you point to a body of robbery

1 cases -- and this is essentially what's involved
2 here, robbery -- involving a threat, an attempt
3 to threaten, people who were convicted of
4 robbery where they didn't actually threaten, but
5 they attempted to threaten?

6 MR. DREEBEN: So, Justice Alito,
7 almost every one of the attempt cases -- and
8 there are many, and most are not reported
9 because there's no issue to appeal -- involve
10 the interdiction of crime oftentimes because the
11 suspect is under surveillance, as in one of the
12 cases that's mentioned in the briefs, and the
13 police don't want the person to actually get
14 inside the store with what looks like a gun, so
15 they take him down outside.

16 It's an attempt because a substantial
17 step has been taken. Notwithstanding what the
18 government said, a substantial step in all the
19 reported cases and in the Model Penal Code
20 involves activity that is strongly corroborative
21 of the intent to commit a crime.

22 So you have cases, lots of them, where
23 people are on their way to the target, they've
24 equipped themselves with either a real or a fake
25 gun, they have the note in their pocket, and

1 they're -- they're taken down before they get
2 there.

3 JUSTICE ALITO: No, I -- I understand
4 the theory. I'm just asking, are there reported
5 cases involving prosecutions based on this
6 theory where there was no actual threat, there
7 was simply --

8 MR. DREEBEN: Yes.

9 JUSTICE ALITO: -- an attempt to
10 threaten?

11 MR. DREEBEN: Yes. I think almost all
12 --

13 JUSTICE ALITO: And where -- where are
14 they?

15 MR. DREEBEN: Well, I -- I mentioned
16 the two that were cited in our brief.

17 JUSTICE ALITO: Williams and what?
18 Okay. Williams is a non-precedential Third
19 Circuit opinion. All right. It's the Third
20 Circuit, so wow, you know.

21 MR. DREEBEN: I would have thought --

22 JUSTICE ALITO: It has a special place
23 in my heart.

24 MR. DREEBEN: -- that would stand in
25 special credit.

1 JUSTICE ALITO: But what do you have
2 beyond that? In the hundreds and hundreds of
3 years of robbery prosecutions, do you have any
4 body of --

5 MR. DREEBEN: I guess I don't
6 understand the question, Justice Alito, for two
7 reasons. One is the question of what the Hobbs
8 Act prohibits is a question of federal law. The
9 government said that today. So it is up to this
10 Court to decide what the scope of the Hobbs Act
11 is. Once it's identified its elements and how
12 the crime can be committed, it lays it up
13 against the elements clause of 924(c)(3)(A) and
14 it asks, is there a categorical match?

15 I think, also, more to the point of
16 your question, there are a -- a large body of
17 prosecutions that never generate any law because
18 there is no dispute that, if the facts establish
19 the substantial step and the intent to commit
20 the completed crime, and the crime has, as a
21 means of committing it, threatened use of force,
22 the defendant is guilty and the defendant is not
23 going to go to trial or set up a pointless legal
24 context to say all I did was attempt to
25 threaten.

1 JUSTICE KAGAN: So -- so just --

2 JUSTICE GORSUCH: Mr. -- sorry,
3 please.

4 JUSTICE KAGAN: I mean, just to
5 explain what you're saying a -- a little bit
6 further, Justice Alito is saying, I don't see
7 the cases. You're seeing -- you -- you said as
8 a first matter you don't need to see the cases,
9 but then, as a second matter, you wouldn't see
10 the cases, but there are a ton of these cases.

11 So I guess I would like explained a
12 little bit more why we don't see the cases.
13 And, you know, I guess there are two questions
14 here, like why are you so sure that there are a
15 ton of cases and, if you are so sure of that,
16 why don't we see them reported in -- in the U.S.
17 reports?

18 MR. DREEBEN: So, Justice Kagan, there
19 is no reason why you ever would see them. What
20 the government needs to do is show that the
21 person intended to commit a robbery. Many
22 people who go into stores -- and this is
23 anecdotal, but you can look at it on Google, you
24 can look at it from the vantage point of the
25 NAJD, which represents multitudes of defendants

1 whose cases never make it up on appeal -- there
2 are people who go into stores. They want money.
3 They don't want to hurt anybody. They often
4 will use guns, either loaded, inoperable, or
5 fake, as a means of communicating the threat so
6 that they get the money.

7 When the government arrests and
8 prosecutes them, it doesn't have to peer in
9 their mind and say: Did they intend to use
10 force? It is enough that the facts show that
11 they intended to threaten force.

12 JUSTICE ALITO: That's a different
13 question. That's what I was talking about
14 before. Must you intend to use force or have
15 the capability of using it? No. No. That's
16 clear.

17 MR. DREEBEN: Correct.

18 JUSTICE ALITO: Okay. I understand
19 that. The question is, are there cases where
20 all that the defendant has done is attempted to
21 threaten?

22 MR. DREEBEN: I think in --

23 JUSTICE ALITO: That's the question.
24 And, I mean, if you were rep -- if somebody --
25 you had a client and did -- and that client did

1 nothing but attempt to threaten, didn't actually
2 threaten, wouldn't you argue this doesn't
3 constitute an attempt under -- under the Hobbs
4 Act or under the common law of robbery?

5 If you had nothing else, yes, you'd
6 make that argument, and then there would be
7 reported cases. I'm not arguing that this isn't
8 a theoretical -- you know, this isn't a
9 theoretical possibility. Maybe it is. Maybe it
10 isn't. This is a separate question. Is this
11 something that comes up in the real world and
12 not just in a law school criminal law class?

13 MR. DREEBEN: Well, the reason that --

14 JUSTICE ALITO: Maybe that's
15 irrelevant, but I just would like to know the
16 answer to it.

17 MR. DREEBEN: Well, and I think the
18 answer to it, Justice Alito, is that the
19 government's conception today of what a
20 substantial step is is not the conception that's
21 reflected in the decisions of the circuits or
22 the charging practices or litigating behavior of
23 the government.

24 So a defendant who did all the things
25 that these hypotheticals reflect has attempted

1 to commit a crime, and oftentimes the only
2 intent you can prove or the easiest intent to
3 prove is that the defendant intended to
4 threaten.

5 So do defendants appeal and bring
6 futile arguments that really there's no such
7 thing as an attempt to threaten? I don't know
8 why they would do that because the Hobbs Act is
9 incredibly clear that it -- it prohibits
10 robbery, as did the common law, by means of use
11 of force or by means of fear.

12 It's enough if the robber is
13 successful in threatening and gets the property.
14 And so, when the person goes to the store, all
15 of these cases that come up on appeal are
16 sustained by the government if the evidence
17 shows or the defendant admits an intent to
18 threaten. It does not have to be proved, and he
19 does not have to admit that he intended to use
20 force.

21 I agree that they're distinct, Justice
22 Alito, but the reason why these cases aren't
23 challenged is it is not a legal defense to say,
24 I didn't intend to use force.

25 JUSTICE GORSUCH: Mr. -- Mr. Dreeben,

1 I'd like to pick your brain in a different
2 direction if I might. It's good to see you.

3 MR. DREEBEN: Thank you, Your Honor.

4 JUSTICE GORSUCH: The government this
5 morning seems to be disclaiming what I would
6 have thought a natural reading of the statute
7 would suggest, that you can attempt to threaten
8 and that that would violate the Hobbs Act.

9 I -- I -- I confess I didn't quite see
10 that in the briefs. Perhaps I missed it. I --
11 I'd like you to comment on, in any event, what
12 you think we should make of the government's
13 concession or disclaiming of power under a plain
14 language of the statute that it would otherwise
15 apparently have, what -- what -- what weight we
16 should give that, number one.

17 Number two, it seems to me that what
18 they're trying to do is, as Justice Kagan
19 pointed out, at least in the discussion today is
20 to move a lot of that, those prosecutions that
21 would otherwise fall under that, into a broader
22 and more capacious understanding of threats, and
23 I'd like you to comment on that too.

24 MR. DREEBEN: So, as to the first
25 question, Justice Gorsuch, I think the Court

1 should give respectful attention to the
2 government's reading of criminal statutes, but
3 it is ultimately for this Court to say what the
4 Hobbs Act means.

5 I don't think this is a close question
6 on the meaning of the Hobbs Act, and I'm not
7 sure my friends are disavowing the language of
8 the Hobbs Act that permits prosecutions for
9 attempts and permits prosecutions for robberies
10 by threat. You put the two of them together,
11 and I'm fairly confident that Ms. Taibleson
12 would say, yes, that statute means what it says,
13 you can prosecute attempted robberies by
14 threats.

15 If the government is disavowing that,
16 I think this Court should exercise its power to
17 construe federal law and to read the statute as
18 it's written.

19 As to the -- the second question, the
20 meaning of threats, here is where I think the
21 government's argument is both out of sync with
22 the rest of criminal law and holds the potential
23 to do some considerable damage in expanding
24 liability in ways where it has never gone.

25 The meaning of "threat" in criminal

1 law is fairly well established. It's a
2 communicated expression of an intent to do harm.

3 Justice Thomas's separate opinion in
4 *Elonis* used that definition. Justice Alito's
5 definition was fairly similar, adding in "to a
6 reasonable person" would appear as a serious
7 expression. And the Court quoted without
8 disagreement dictionary definitions that were
9 proffered by both the defendant and the
10 government.

11 They all involve the essential thing
12 here of communication. What the government has
13 said is that "threatened" apparently alone in
14 Section 924(c)(3)(A), although I think its
15 rationale would extend to all the elements
16 clauses, means something other than a
17 communicated intent.

18 The government is shifting over to a
19 definition of "intent" that we use in the real
20 world sometimes, like the threat of bankruptcy.
21 It's a risk that may materialize, but it is not
22 the definition of "threatened" that you would
23 expect to see in a statute that's trying to
24 describe real-world criminal offenses involving
25 threats. Those all involve communication.

1 JUSTICE GORSUCH: I -- I -- as -- as I
2 understood the government, they would -- they
3 would say, well, it has to be communicated to
4 someone, but not necessarily the victims. What
5 -- what's your thought on that?

6 MR. DREEBEN: Agree, it does, but it
7 has to be communicated. And what the government
8 is doing is saying the guy on the way to the
9 store, who actually wants to be rather secretive
10 and doesn't want people to know that he's on his
11 way to a store to rob it, has somehow
12 communicated to an omniscient objective
13 observer, aware of all the facts, conduct that
14 is threatening. And --

15 JUSTICE GORSUCH: I -- I'm sorry to
16 interrupt, but just to -- just to finish this up
17 and then I'll be done. I think the government
18 would respond: Well, we had an informant who
19 alerted a police officer, and, surely, the
20 police officer would have felt threatened.

21 MR. DREEBEN: I think, if you add in
22 the informant to whom information was
23 communicated, you get into some nice questions
24 about whether co-conspirators speaking with each
25 other could generate the kind of communication

1 that we think of as a threat.

2 But the government's position is not
3 that. The government's position is anyone just
4 driving on their way, if they are a threat
5 because they intend to go in with a gun, that is
6 threatened. It's a non-communicative use of
7 threat. It's not the one that is found in the
8 criminal law.

9 JUSTICE GORSUCH: Thank you.

10 JUSTICE KAVANAUGH: On Justice
11 Gorsuch's first question about the government's
12 representation, I take you to be saying that we
13 should upend hundreds, if not thousands, of
14 convictions against violent criminals who
15 committed violent crimes with firearms because
16 we shouldn't accept the government's
17 representation that it cannot, will not, and
18 does not prosecute attempted threats. And I'm
19 trying to figure out how that makes any sense.

20 MR. DREEBEN: Well, Justice Kavanaugh,
21 they can say what they will do, although, in my
22 experience, representations at the podium here
23 do not radiate back to the 93 U.S. --

24 JUSTICE KAVANAUGH: So -- so we
25 shouldn't believe them? We shouldn't believe

1 this will be communicated? That's the basis for
2 throwing out thousands of convictions?

3 MR. DREEBEN: No. I -- I think that
4 the reason why the Court should accept the
5 Fourth Circuit's reading and our position is
6 that it is legally correct. And the Court
7 should decide for itself what the Hobbs Act
8 means and what attempt liability entails and
9 then apply the elements clause.

10 And, Justice Kavanaugh, if I could
11 respond, I think, to the underlying impulse, the
12 concern that this is upending congressional
13 intent. When Congress originally enacted all
14 the definitions of a crime of violence, here, in
15 ACCA, in Section 16, it paired the elements
16 clause with a broad residual clause, and it did
17 that for a reason.

18 It knew that not all the crimes and
19 the conduct that it wanted to reach would be
20 comprehended by solely looking at elements under
21 a formal categorical approach, which is what
22 this Court has always used.

23 When this Court invalidated the
24 residual clause, first in Johnson, then in
25 Dimaya, finally in Davis, it took away that

1 backstop. But, as Justice Thomas said in his
2 recent opinion -- separate opinion, I believe,
3 in Borden, it doesn't change the scope of the
4 elements clause, which is --

5 JUSTICE KAVANAUGH: Well, that's -- I
6 agree with that. But I think there's a mistaken
7 impression that you're creating there -- I don't
8 -- you're not intending it -- but which is, if
9 it's covered by the residual clause, the old
10 residual clause, then it couldn't have also been
11 covered by the elements clause. And I think
12 that's a misreading, I think, of how the two
13 clauses fit together.

14 MR. DREEBEN: Oh, I --

15 JUSTICE KAVANAUGH: I think there was
16 overlap between the two clauses.

17 MR. DREEBEN: Yeah. No, I agree -- I
18 agree with that. And there are a handful of
19 cases where you see courts applying both to the
20 same crime. It is fairly notable that the
21 government has totally given up on conspiracy as
22 a predicate crime that satisfies the elements
23 clause, even though, as I understood Ms.
24 Taibleson's argument, I don't see why the
25 government couldn't argue that when a lot of

1 conspirators get together and agree to commit a
2 crime, that's a threatened use of violence right
3 then and there.

4 But the government doesn't go that
5 far. It's abandoned conspiracy. And the -- the
6 ultimate reading of the elements clause remains
7 something that the Court should do under its own
8 power. Even before the residual clause was
9 gone, the government was prosecuting cases like
10 this, but it did it by saying attempted
11 robberies fit within the residual clause on
12 several occasions.

13 JUSTICE KAVANAUGH: Well, that was
14 just very easy, right? So it was easy to fit it
15 under the residual clause. Once that's gone,
16 then it's a tougher question. That's why we're
17 here. But I don't think that means just because
18 they used to charge them under the easy
19 approach, they couldn't have also charged them
20 under the elements clause. I mean, I think
21 we're agreeing on that.

22 MR. DREEBEN: We do. And I -- I -- I
23 think it's important to look at the language of
24 the elements clause. That's typically the way
25 the Court has tried to match up the elements of

1 an offense with the elements clause.

2 The government said here today
3 something that I don't really think it said very
4 clearly in its brief, which is that the
5 "attempted use" part of the definition of the
6 crime of violence somehow carries over and
7 captures all attempt crimes, all attempts that
8 could be prosecuted under underlying statutes.

9 That isn't the way that Congress
10 worded the "crime of violence" definition. It's
11 "use, attempted use, or threatened use of
12 physical force against another." The
13 "attempted" piece modifies "use." It doesn't
14 modify "threatened."

15 And Congress had ample models before
16 it and could amend the statute tomorrow if it
17 wanted to capture all attempts to commit crimes
18 of violence. S. 52, which was the original
19 progenitor of the Armed Career Criminal Act,
20 covered robbery and burglary and attempts and
21 conspiracies to commit those offenses.

22 That would have been a perfectly
23 natural way to pick up all attempts. The
24 Sentencing Guidelines do it that way. The three
25 strikes provision does it that way. And it --

1 it could easily be mapped onto the language
2 here, but that's not what Congress wrote.

3 JUSTICE KAVANAUGH: Can I ask a
4 different question, which is suppose that there
5 is a theoretical possibility and that we don't
6 accept the government's representation and that
7 there are the couple of cases or few cases that
8 you reference. I think their other argument
9 rests on Moncrieffe and Duenas-Alvarez, that we
10 shouldn't do what -- what you're suggesting
11 based on just a few outlier cases. Just want
12 you to respond to that argument.

13 MR. DREEBEN: So, Justice Kavanaugh,
14 if I could unpack this a little bit because I --
15 I essentially agree with what Justice Sotomayor
16 said. Those were cases involving state crimes
17 that had certain ambiguities. And what the
18 Court was essentially saying was you, the
19 defendant, have come up with a very unorthodox
20 application of a very typical offense, aiding
21 and abetting, and you're extending it far beyond
22 where other courts do. We're not California,
23 the Court could say. We need to know whether
24 California construes its law that way, and to
25 prove it to us, show us some cases where there

1 are prosecutions like that.

2 The Court has not extended that
3 approach when the language on its face is clear.
4 The government cites Moncrieffe, but I'm a
5 little puzzled by that citation because the
6 holding of Moncrieffe was a Georgia controlled
7 substances act was not categorically a match for
8 a federal drug definition because the Georgia
9 statute didn't have an exception for social
10 sharing of marijuana without remuneration. The
11 federal law did.

12 And the -- the Court did not look to
13 see whether there were any cases in which
14 Georgia actually had prosecuted social sharing
15 of marijuana. It went with the plain language.

16 So, here, you have both elements. You
17 have a federal statute that it's up to this
18 Court to construe, and its plain language covers
19 attempted threats, and you have the fact that
20 the language is clear.

21 JUSTICE KAVANAUGH: Well, the analogy
22 to California, though, I think, doesn't that fit
23 this case as well? I guess I'm not
24 understanding the federal/state. When the
25 government says actually we do not and -- and

1 will not extend the statute that far, isn't that
2 the same as saying, well, we don't have any
3 evidence that California would extend it that
4 far? I mean, it --

5 MR. DREEBEN: Well, I --

6 JUSTICE KAVANAUGH: -- seems similar.

7 MR. DREEBEN: -- I think it's quite
8 different because the question for the Court in
9 Duenas-Alvarez was, what does California law
10 mean? When the Court asks the question what
11 does federal law mean, it doesn't need the
12 government to tell it what federal law means.
13 It says what federal law means because this
14 Court is the ultimate expositor of federal law,
15 and it does that by looking clearly at the
16 statute.

17 And the other distinction of
18 Duenas-Alvarez was the defendant offered
19 something that the Court thought was rather
20 implausible, that aiding and abetting in
21 California reached the circumstance of you
22 shared a drink with a young person and then
23 later on the young person went out and drove and
24 caused an accident.

25 JUSTICE KAVANAUGH: And --

1 MR. DREEBEN: The -- the Court didn't
2 buy that that was a natural aiding-and-abetting
3 violation, and it said show me.

4 JUSTICE KAVANAUGH: If we accept the
5 government's representation and agree with it,
6 so we are now saying that as a matter of federal
7 law, do you lose then?

8 MR. DREEBEN: Yes. I think, if you --
9 if you were to say that there is no such thing
10 as attempted threats under the Hobbs Act, that
11 is not -- you know, that's not consistent with
12 our theory. But I -- I do not understand how
13 the government could say that attempted threats
14 are not a violation of the Hobbs Act for the
15 reasons that we've already discussed.

16 The Hobbs Act has multiple means of
17 committing robbery: force, fear, threatened use
18 of violence. And the distinction between using
19 force and threatening force is embedded in
20 robbery statutes across the country.

21 So all you need to do is tie to that
22 the -- the attempt liability standards. And the
23 only way the government gets out of that, I
24 think, as members of the courts have pointed
25 out, is by adopting very eccentric definitions

1 of "threat" that do not involve communication
2 and very eccentric definitions of "use of force"
3 which do not involve the application of force.

4 This Court in Leocal and again in
5 Voisine said use of force against the person of
6 another involves the application of force. You
7 can't back it up and say that the threat of
8 force is itself the use of force.

9 So I think the -- the problem for the
10 government's case here is that the categorical
11 approach focuses on elements. It's not about
12 real-world cases. It's about what the statutes
13 mean. It focuses on the minimum conduct
14 required to violate the underlying statute and
15 then comparing it to the elements clause and
16 then asking, is there a match? And, here, there
17 is not a match, and it's for that reason why
18 this case falls outside the elements clause.

19 And if I could make one more comment
20 in response to some of the questions that
21 Justice Thomas was asking, the government here
22 charged seven different counts of -- it charged
23 several counts that involve drug trafficking and
24 use of a firearm during and in relation to a
25 drug trafficking offense.

1 Had it accepted a guilty plea to
2 those, it could have had its 924(c). The fact
3 that it decided to go with the attempted or
4 conspiracy to commit a Hobbs Act robbery as the
5 predicate offense for 924(c) and still got a
6 20-year sentence on the underlying Hobbs Act
7 offense is no reason for this Court to depart
8 from the categorical approach, to interpret the
9 elements analysis as anything but based on
10 elements, or to distort the meaning of federal
11 criminal law in ways that will have broad and
12 unpredictable ramifications for threat statutes,
13 attempt liability, and a host of other
14 applications.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Dreeben. This discussion actually reminded me
17 of a scene in a Woody Allen movie -- I -- I
18 don't remember which one it was, but you might
19 -- where the robber walks into the bank, hands a
20 note to the teller, and the teller reads it and
21 says: Give me the money, I have a gun. And --
22 and the robber says: No, it's gun, I have a
23 gun. And she says: No, that's definitely a
24 "B," and -- and -- and then goes and asks the
25 teller next to her, is this a "B" or a -- and so

1 that's a "B". And I think the guy just leaves.

2 I mean, which -- how do you analyze that?

3 MR. DREEBEN: So that -- that would
4 actually be a substantive violation of the Hobbs
5 Act if Take the Money and Run --

6 CHIEF JUSTICE ROBERTS: Is that what
7 it was?

8 MR. DREEBEN: -- could -- could --
9 yes, it would, because that would have been a
10 threatened use of force. Now it probably would
11 be an attempt if he walked out without the
12 money, and that -- but that would be -- you
13 know, if he made the threat and got money, it
14 would be a crime. If he makes the threat and he
15 doesn't get money because they can't read the
16 note, it could be prosecuted as an attempt.

17 But not all Hobbs Act attempts involve
18 the actual communication of the threat.

19 CHIEF JUSTICE ROBERTS: But --

20 MR. DREEBEN: I think that's our
21 central point.

22 CHIEF JUSTICE ROBERTS: -- but it --
23 it's an attempted threat --

24 MR. DREEBEN: Correct.

25 CHIEF JUSTICE ROBERTS: -- not a real

1 threat.

2 MR. DREEBEN: Well, it's an attempted
3 Hobbs Act robbery by means of threat. He made
4 what he thought was a threat. He communicated
5 something that was an intention, could be
6 understood as a threat of harm. It wasn't
7 understood by the teller, but you don't have to
8 have success in order to have criminal
9 liability. You know, an attempt that fails is
10 still prosecutable as an attempt, so, yes, I
11 think it would be covered.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas?

14 JUSTICE THOMAS: Thank you, Mr. Chief
15 Justice.

16 Mr. Dreeben, you said that the
17 categorical approach -- categorical approach was
18 not about the real world, and that is actually
19 part of my problem, that much of our discussion
20 here was not about this case, the facts in this
21 case.

22 If we -- how would your case change or
23 the analysis in your case change if the
24 categorical approach did not exist? I know
25 there are some complications because this is the

1 elements clause and not the residual clause, but
2 how would it change?

3 MR. DREEBEN: Well, then the
4 government would need to show in a
5 circumstance-specific way that a crime involved
6 the use, threatened use, or actual use of force.
7 And this case would probably come out the other
8 way.

9 The reason why I think the government
10 has never challenged or even argued that the
11 elements clause doesn't involve a
12 non-categorical approach is because of the word
13 "elements" --

14 JUSTICE THOMAS: Yeah.

15 MR. DREEBEN: -- and because of a
16 sequence of decisions of this Court going back
17 to Leocal and extending on and on that say that
18 it does focus not on real-world facts.

19 The Court said that very clearly most
20 recently in United States versus Davis. It said
21 it earlier in Mathis, and I think Mathis is
22 perhaps a good answer to some of the concerns
23 that have been raised. There, you have an Iowa
24 burglary statute that covers not only dwellings
25 but also vehicles. And vehicles are not part of

1 generic burglary. The object has to be a house.

2 And so the Court said in Mathis: None
3 of those burglaries under Iowa law count because
4 the -- the statute is overbroad. Now I suspect
5 that there are very few burglaries prosecuted
6 and convicted in Iowa that involve boats as
7 their target. Most of them, if not all of them,
8 are going to involve houses and buildings. And
9 yet the categorical approach is intentionally
10 overbroad.

11 And Congress had no reason to worry
12 about that when it passed the elements clause
13 because the residual clause was the backstop.
14 That is the source of the reason why the Court
15 has concerns today about whether the elements
16 clause is not broad enough.

17 JUSTICE THOMAS: You said that when
18 you were on the other side too, didn't you?

19 (Laughter.)

20 MR. DREEBEN: I would have made the
21 arguments that I thought the United States
22 should make.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer?

1 Justice Alito?

2 JUSTICE ALITO: Yeah, Mr. Dreeben,
3 it's always good to hear you argue.

4 I would have thought when you left the
5 Solicitor General's office you would never want
6 to have anything more to do with an Armed Career
7 Criminal Act case, but maybe it's more congenial
8 on the other side in these cases.

9 MR. DREEBEN: Well, this case is --
10 this case is actually under 924(c), and I think
11 another notable thing that the Court should just
12 have in mind on the scope of these statutes is
13 that the Hobbs Act itself prohibits robbery
14 through the threat of force against persons or
15 property.

16 The Armed Career Criminal Act
17 enhancement does not include under the elements
18 clause threats against property. So already the
19 Hobbs Act has fallen out of ACCA, and the nation
20 and criminal justice seem to have survived just
21 fine.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: I'm a bit confused
25 and possibly because of the government, and so

1 I'm going to ask you to clarify it if you can
2 for me. What is it that you think the
3 government thinks is the unusual situation, the
4 one that they wouldn't charge?

5 MR. DREEBEN: So, as I understand the
6 government's position, the government sees the
7 substantial step requirement as so rigorous that
8 any defendant who could be charged with an
9 attempted Hobbs Act robbery has already reached
10 the point of engaging in the threatened use of
11 force and that the two flaws that I think exist
12 in that argument are that, first, the
13 substantial step can be far more capacious than
14 what I think the government has been telling us
15 today. And if you look around the circuits at
16 case law, you find plenty of cases that are a
17 little bit more generous to the government than
18 what they seem to be saying today.

19 And the second piece of the
20 government's argument, and it's indispensable,
21 is that if it hasn't reached that point, then
22 you don't have the threatened use of force at
23 all. And I'm sure Ms. Taibleson will --

24 JUSTICE SOTOMAYOR: So am I right
25 that --

1 MR. DREEBEN: -- correct me if I'm
2 wrong.

3 JUSTICE SOTOMAYOR: She will. But I
4 thought it was that she's saying someone doesn't
5 intend to have a gun, doesn't have a gun, they
6 just have a note that says, I'm threatening --
7 I'm going to threaten you, but I really don't
8 have anything to carry it through on me or
9 whatever. If they catch them at the door of the
10 bank, they're not going to charge them?

11 MR. DREEBEN: I'm pretty sure that
12 that is not the government's intent.

13 JUSTICE SOTOMAYOR: I -- I -- I -- I
14 think the government would say I'm going to
15 charge them, but --

16 MR. DREEBEN: Well, the government
17 frequently does charge people like that because
18 it's safer to take them down before they get
19 inside if --

20 JUSTICE SOTOMAYOR: Exactly. So --

21 MR. DREEBEN: -- they're under
22 surveillance. But I think what Ms. Taibleson
23 would say, just to be fair to what the
24 government's argument is, is that already is a
25 threatened use of force, even if nothing has

1 been communicated. And this is where we part --

2 JUSTICE SOTOMAYOR: And -- and nothing
3 done other than the planning --

4 MR. DREEBEN: Correct.

5 JUSTICE SOTOMAYOR: -- writing the
6 note --

7 MR. DREEBEN: Correct.

8 JUSTICE SOTOMAYOR: -- casing the
9 bank, going to the bank, opening the door,
10 that's enough for them?

11 MR. DREEBEN: I think I'll --

12 JUSTICE SOTOMAYOR: That's a threat,
13 to threaten?

14 MR. DREEBEN: -- have to leave it for
15 Ms. Taibleson to draw that line, but, you know,
16 this is, in part, answers to some of the
17 questions that Justice Kavanaugh was asking.

18 If the Court did reject the
19 government's unusual version of threatened use
20 of force that doesn't involve any communication,
21 then they are putting themselves out of the box
22 for prosecuting those kinds of interdictions,
23 and I think that that is something that would
24 have high costs prospectively in law
25 enforcement.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: Yeah. So along the
4 same lines, and just thinking about what this
5 set of cases are that are the attempted threats
6 or the attempted robbery by threat, and Justice
7 Kavanaugh referred to them as a few or a couple
8 of cases, and that might be with respect to
9 reported cases, but what I take you to be
10 saying, and I just want to make sure that I
11 understand this, is that every time somebody is
12 apprehended in the parking lot, before he gets
13 to the cashier, before he gets to the teller,
14 right, and the government apprehends that person
15 and then negotiates a plea with that person,
16 because that's what happens in most of these
17 cases, that the government is relying on the
18 fact that it doesn't have to show an attempt to
19 actually use force, that all it has to show, and
20 the culprit knows this and the government knows
21 this, all it has to show is an attempt to
22 threaten force because of the fake gun or the
23 note in the pocket or anything else that might
24 convey such an intent and that it's irrelevant
25 whether the person -- whether the person intends

1 to use force. The government knows it doesn't
2 need to show that, and so too the culprit
3 doesn't need to show that. And the chances for
4 a plea are, you know, increased.

5 So we might have a few reported cases,
6 but in all cases where the government apprehends
7 somebody -- am I -- am I wrong about this?

8 MR. DREEBEN: You are --

9 JUSTICE KAGAN: In all cases where the
10 government apprehends somebody before they
11 actually get to the point of the teller or the
12 cashier, the government is relying and the
13 government gets what it wants because it only
14 needs to show an attempted threat?

15 MR. DREEBEN: One hundred percent
16 correct. And I think backing up that insight is
17 that showing intent to threaten is very easy on
18 these facts. Showing intent to actually use
19 force can be quite difficult. The government
20 doesn't need to show that to get a conviction.
21 And so there's no reason why the facts are ever
22 developed that would differentiate between those
23 two intents.

24 And one real-world fact that backs up
25 that a lot of robbers probably don't intend to

1 use force is that in 80 percent of the sentenced
2 Hobbs Act robbery cases, which involve both
3 attempts and completed offenses, under the
4 Sentencing Guidelines, the defendants do not get
5 an enhancement for causing bodily injury, which
6 suggests that in four out of five robberies, no
7 one gets hurt.

8 And that accords with the -- the
9 reality that a lot of robbers have the intent to
10 threaten. They do not necessarily have the
11 intent to use force.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?

14 Justice Barrett?

15 Thank you, counsel.

16 Rebuttal, Ms. Taibleson.

17 REBUTTAL ARGUMENT OF REBECCA TAIBLESON
18 ON BEHALF OF THE PETITIONER

19 MS. TAIBLESON: Thank you, Mr. Chief
20 Justice. I have three points to make.

21 First, to help to clarify some of the
22 confusion, I think it's important to
23 differentiate here the words "threat" and
24 "force" appear in both the Hobbs Act and in
25 Section 924(c)(3)(A). Those words, standing

1 alone, have the same meaning in both statutes,
2 actions or words that objectively manifest or
3 convey the intention to inflict harm.

4 Now the Hobbs Act, in defining
5 "robbery," also adds other elements to the
6 crime, right? So you can see this in the text.
7 It has to be, you know, from the person or in
8 the presence of another to -- against his will
9 and to take property. That means that a Hobbs
10 Act robbery sort of adds those extra
11 requirements on top of the basic definition of
12 "threat."

13 924(c)(3)(A), of course, does not. It
14 simply refers to a threatened use of force by
15 itself. And that makes sense because
16 924(c)(3)(A) is -- that language does not create
17 the actus reus of any new crime. Instead, it is
18 written to cover a category of other crimes.
19 That category includes completed Hobbs Act
20 robbery, which will have a threat that meets all
21 those other definitions' requirements too, but
22 also crimes that do not have all those other
23 requirements met, such as sometimes attempted
24 Hobbs Act robbery.

25 So, to be clear about the government's

1 position here, as a matter of law and as a
2 matter of sort of practice and the laws of
3 physics, we cannot prosecute what we're calling
4 attempted threat cases under the Hobbs Act for
5 actions that do not at least threaten the use of
6 force as that phrase is used in 924(c)(3)(A).

7 That is what I mean to say, and to the
8 extent I created confusion on that, I'm sorry.

9 Second, as to the records reflecting
10 prosecutions for non-threatening conduct, first,
11 contrary to my friend, there is every incentive
12 for a defendant to argue that he did not commit
13 a substantial step sufficient to constitute an
14 attempted Hobbs Act robbery.

15 At the very least, there is always an
16 incentive at sentencing for a defendant to make
17 a record of the -- but -- of the fact that his
18 crime involved only benign preparatory steps and
19 that he never under any circumstances would even
20 have yanked property from his victim's hand had
21 she resisted for a moment.

22 That is -- is clear in the records of
23 actual criminal convictions. And not even the
24 brief filed by the Federal Defenders cites such
25 a case despite the fact that they represent

1 these clients.

2 As to Moncrieffe -- as to Moncrieffe
3 on this point, my friend ignores the critical
4 section of Moncrieffe that applied the
5 Duenas-Alvarez principle to evaluate a state
6 statute that did, unlike the Hobbs Act here,
7 have a facial mismatch with the relevant generic
8 federal statute.

9 So the state statute posited was a
10 firearms statute that lacked an exception for
11 antique guns, and it was being compared to a
12 federal statute that had an exception for
13 antique guns. And Moncrieffe applied the
14 Duenas-Alvarez principle in noting that there
15 would not be a categorical mismatch if, in fact,
16 there were no actual state prosecutions under
17 that firearms offense for crimes involving
18 antique guns.

19 Third, I want to briefly touch on the
20 potential interpretations of Section
21 924(c)(3)(A) that could actually support
22 Respondent here. There are two, and they are
23 both unsound.

24 First, Respondent could interpret the
25 phrase "attempted use of force" as applying only

1 when the listed statutory elements of the crime
2 include the unsuccessful application of direct
3 physical force, like shooting and missing or
4 trying to shoot and having your gun jam.

5 That would reach a -- almost a null
6 set of crimes. Respondent identified two in
7 Fourth Circuit briefing, but the language of
8 those two statutes -- and it's one subsection of
9 an aggravated assault statute and one subsection
10 of a witness-tampering statute -- that language
11 was not in effect in the 1980s when the elements
12 clause was drafted.

13 So we're talking about a null set.
14 That cannot be right. This Court has repeatedly
15 declined to interpret categorical language that
16 reaches a category of crimes to reach nothing.

17 Second, the Fourth Circuit's approach,
18 a slightly broader reading, recognized that the
19 phrase "attempted use" is a sort of term of art
20 that captures some attempt crimes, like
21 attempted murder, even if the substantial step
22 does not reach the point of swinging and missing
23 or shooting and missing. But it limited the
24 phrase to exclude attempts to commit crimes that
25 can be completed with a threat of force.

1 The problem is there's no crime that
2 has as an element the attempted threat.
3 Instead, the elements that we have to look at
4 under the categorical approach are substantial
5 step and specific intent.

6 And when we compare the substantial
7 step that could support an attempted murder
8 conviction to the substantial step that could
9 support an attempted robbery conviction, we see
10 that they can be equally violent.

11 So a hired hitman, sitting outside the
12 victim's house with a gun -- if I could just
13 finish my sentence, Your Honor. Thank you.
14 Sitting outside the victim's house with a gun,
15 compared to an armed robber about to enter the
16 store with a gun. That conduct must rise and
17 fall together categorically.

18 If there are no further questions,
19 Your Honor.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 11:27 a.m., the case
23 was submitted.)

24

25

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