No. _____

In the

Supreme Court of the United States

_____

Mark Allen Hayden,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

Whether *Floyd v. State*, __ S.W.3d___, 2024 WL 4757855 (Tex. Crim. App. November 13, 2024) – issued by the Texas Court of Criminal Appeals after the decision below -- demonstrates that Petitioner's prior statute of conviction cannot be divided for the purposes of the categorical approach, and hence demonstrates a reasonable probability of relief if the court below were given a chance to reconsider in light of that intervening authority?

Whether 18 U.S.C. §922(g)(1) comports with the Second Amendment, and whether this Court should hold the instant Petitition pending resolution of the circuit split presented by *Range v. Garland*, ___ F.4th___, 2024 WL 5199447 (3rd Cir. Dec. 23, 2024)(en banc), and *United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024)?

PARTIES TO THE PROCEEDING

Petitioner is Mark Allen Hayden, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Allen Hayden, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the court of appeals is reported at *United States v. Hayden,* No. 24-10132, 2024 WL 4501063 (5th Cir. October 16, 2024)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on October 16, 2024. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT GUIDELINE, STATUTES AND CONSTITUTIONAL PROVISION

Federal Sentencing Guideline 4B1.2 reads in relevant part:

> (a) Crime of Violence.--The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
>
> ***
>
> (e)(3) Robbery.--"Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his

custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.

Texas Penal Code §29.02(a) provides:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Section 922(g) of Title 18 reads in relevant part:

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year …

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The Second Amendment to the United States Constitution provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

On August 17, 2022, Lubbock police followed a car dealership's hidden tracker to find its stolen car. *See* (Record in the Court of Appeals, at 26-27). They found Petitioner Mark Allen Hayden running toward the car and arrested him. *See* (Record in the Court of Appeals, at 26-27). They also found a gun on his person and small quantities of drugs in the car. *See* (Record in the Court of Appeals, at 26-27). Because the gun once crossed state lines and Petitioner had prior felony convictions, he pleaded guilty to a violation of 18 U.S.C. §922(g)(1). *See* (Record in the Court of Appeals, at 25-28).

A Presentence Report (PSR) noted one prior conviction that received criminal history points, a 2001 Texas robbery conviction. *See* (Record in the Court of Appeals, at 129-130). No party introduced any judicial records arising from this conviction such as an indictment, jury instruction, or judgment. Nonetheless, the PSR treated this conviction as a "crime of violence" under USSG §4B1.2, and therefore enhanced Petitioner's base offense level under the Federal Sentencing Guidelines from 14 to 20 pursuant to USSG §2K2.1(a). *See* (Record in the Court of Appeals, at 124-125). It applied no adjustment for possessing the firearm in connection with another felony under USSG §2K2.1(b)(6). The PSR thus found a Guideline range of 27-33 months imprisonment, the product of a final offense level of 17 and a criminal history category II. *See* (Record in the Court of Appeals, at 141).

The government objected to the absence of this four-level adjustment for possessing a firearm in connection with another offense. *See* (Record in the Court of Appeals, at 145-169). The defendant personally conceded its applicability, stating that he wished to take responsibility for the conduct he undertook with the firearm. *See* (Record in the Court of Appeals, at 89). The district court thus added four levels to the final offense level and applied a Guideline range of 41-51 months imprisonment, the product of a level 21 and a criminal history category II. *See* (Record in the Court of Appeals, at 89-90). After hearing both sides, it imposed a sentence of 72 months. *See* (Record in the Court of Appeals, at 102). Explaining the sentence, it expounded on the facts of the offense and Petitioner's extensive criminal history. *See* (Record in the Court of Appeals, at 97-102). The court said that it would have imposed the same sentence even if the Guidelines were different. *See* (Record in the Court of Appeals, at 102). It made the same claim in the Statement of Reasons. *See* (Record in the Court of Appeals, at 181).

B. Appellate Proceedings

Petitioner appealed, pressing two claims. First, he contended that the district court plainly erred in classifying his prior Texas robbery conviction as a "crime of violence" in light of USSG §4B1.2(e)(3), added to the Guideline by a November 1, 2023, Amendment. *See* Initial Brief in *United States v. Hayden*, No. 24-10132, 2024 WL 2060781, at *5 (5th Cir. Filed April 29, 2024)("Initial Brief")(citing USSG Appx C., Amdmt 822 (Nov. 1, 2023)). That provision provides a new definition of "robbery," one of the offenses enumerated by the Guideline as a "crime of violence." USSG

§4B1.2(e)(3). Specifically, the new definition requires the defendant to take property "by means of" various kinds of force and violence. *Id.* Petitioner contended that the Texas robbery statute reached beyond this new definition because it required only that the defendant cause or threaten injury "in the course" of a theft. Initial Brief, at *6; Tex. Penal Code §29.02(a). Indeed, he noted that the statute could even be violated by using force after discarding stolen property. *See* Initial Brief, at *6 (citing *Smith v. State*, 2013 WL 476820, at *3 (Tex. App. Houston [14th Dist.] Feb. 7 2013)(unpublished); *Morgan v. State*, 703 S.W.2d 339, 341 (Tex. App. 1985); *Ulloa v. State*, 570 S.W.2d 954 (Tex.Cr.App. 1978); *White v. State*, 671 S.W.2d 40, 42 (Tex. Crim. App. 1984)). That scenario, he contended, could hardly be described as obtaining property "by means of" force and violence. *See id.*

The government ultimately supplemented the record on appeal with documents reflecting Petitioner's prior robbery conviction, which documents showed that it arose from Tex. Penal Code §29.02(a)(2), threatening injury during the course of a theft. *See* Appellee's Unopposed Motion to Supplement the Record on Appeal and for an Extension of Time to File Appellee's Brief in *United States v. Hayden*, No. 24-10132, 2024 WL 2060781, at *5 (5th Cir. Filed May 23, 2024). Petitioner conceded that existing Fifth Circuit law permitted the sentencing court to divide the Texas robbery statute into two distinct offenses – robbery-by-injury and robbery-by-threat. *See* Reply Brief in *United States v. Hayden*, No. 24-10132, 2024 WL 3903992, at *1 (5th Cir. Filed August 13, 2024)("Reply Brief"). And he recognized that the court below had found robbery-by-threat to have as an element the threatened use of physical

force against the person of another, and hence to constitute a "crime of violence" under USSG §4B1.2(a)(1). *See* Reply Brief, at *1.

However, he noted the pendency of *Floyd v. State*, __ S.W.3d___, 2024 WL 4757855 (Tex. Crim. App. November 13, 2024), in the Texas Court of Criminal Appeals, a case that would address whether Texas robbery defendants enjoy a right of jury unanimity on the question of whether they committed that offense by injury or threat. *See* Initial Brief, at *4. He argued that if the defendant lost in *Floyd*, the Texas robbery statute would become indivisible under Fifth Circuit precedent. *See id.* at *4-5 (citing *United States v. Howell*, 838 F.3d 489, 497-498 (5th Cir. 2016) (citing *Mathis v. United States*, 579 U.S. 500 (2016)), *abrogated on other grounds by Borden v. United States*, 593 U.S. 420 (2021)). This would mean, he argued, that the entire statute would fall outside the definition of a "crime of violence" if the robbery-by-injury provision included conduct not amounting to a crime of violence. *See id.* And, he noted, the court below had already said that robbery-by-injury lacks the use, attempted use, or threatened use of physical force against the person of another as an element. *See id.* at *11 (citing *Garrett*, 24 F.4th at 488-89 (arguable dicta); *United States v. Wheeler*, No. 19-11022, 2022 WL 17729412, at *1-2 (5th Cir. Dec. 16, 2022)(unpublished); *United States v. Jackson*, 30 F.4th 269, 274-75 (5th Cir. 2022); *United States v. Ybarra*, No. 20-10520, 2021 WL 3276471, at *1 (5th Cir. July 30, 2021)(unpublished)). Accordingly, he argued that if the defendant lost in *Floyd*, the judgment could no longer be affirmed on the grounds that his prior offense had the use or threatened use of force as an element under §4B1.2(a)(2). *See id.* at *11-13.

Petitioner also raised a Second Amendment argument, contending that he had a Second Amendment right to possess arms, and that a criminal conviction could not lie for the exercise of that right. *See id.* at **7, 30-35. He conceded that this claim could also be reviewed only for plain error. *See id.* at *30.

The court of appeals opted not to wait for the Texas Court of Criminal Appeals in *Floyd*, and it affirmed on October 16, 2024. *See* [Appx. A]; *United States v. Hayden,* No. 24-10132, 2024 WL 4501063 (5th Cir. October 16, 2024)(unpublished). Addressing the Guideline issue, it held:

> Hayden's base offense level was enhanced because his 2001 conviction for Texas robbery was classified as a crime of violence for the purposes of § 2K2.1(a)(4)(A).
>
> The state indictment indicates that Hayden was convicted of robbery-by-threat, which satisfies the relevant definition. *See United States v. Garrett*, 24 F.4th 485, 491 (5th Cir. 2022). Hayden has not shown any error, let alone a clear or obvious one.

Hayden, No. 24-10132, 2024 WL 4501063, at *1. *Garrett*, the case it cited as dispositive, held the Texas robbery statute divisible into its injury and threat alternatives, and then further held that Texas robbery-by-threat possesses the threatened use of force as an element. *See Garrett*, 24 F.4th at 491. It also applied plain error review to the Second Amendment claim and found that any error could not be deemed clear or obvious. *See id.* (citing *United States v. Jones*, 88 F.4th 571, 573–74 (5th Cir. 2023)).

28 days later, the Texas Court of Criminal Appeals decided *Floyd*, holding that Texas defendants have no right to a unanimous jury on the question of whether they committed a robbery by threat or injury. *See Floyd,* 2024 WL 4757855, at *1.

REASONS FOR GRANTING THE PETITION

I. The court below would likely grant relief if given the opportunity to reconsider its decision in light of *Floyd v. State*, __ S.W.3d___, 2024 WL 4757855 (Tex. Crim. App. November 13, 2024).

Federal Sentencing Guideline 2K2.1(a) provides a base offense level of 20, rather than 14, when the defendant has been previously convicted of a felony "crime of violence." USSG §2K2.1(a)(4)(A). That Guideline uses the definition of "crime of violence" found at USSG §4B1.2. *See* USSG §2K2.1, comment. (n.1). That definition reads as follows:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that–
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

USSG §4B1.2(a).

Thus, an offense may be a "crime of violence" under §4B1.2 because it either: a) has force (including attempted and threatened force) as an element (the "force clause" or the "elements clause"), or b) is one of the "enumerated offenses," among them "robbery." In determining whether a prior offense qualifies as a "crime of violence," the court below examines the match between its elements and the definition found in §4B1.2. *See United States v. Stoker*, 706 F.3d 643, 648, n.4 (5th Cir. 2013); *see also Shepard v. United States*, 544 U.S. 13, 20–26 (2005). If the prior

statute of conviction criminalizes conduct outside the definition found in §4B1.2, it will find the offense non-qualifying. *See United States v. Houston*, 364 F.3d 243, 246 (5th Cir. 2004)("If an indictment is silent as to the offender's actual conduct, we must proceed under the assumption that his conduct constituted the least culpable act satisfying the count of conviction"); *see also Borden v. United States*, 593 U.S. 420, 424 (2021)(plurality op.)("If any—even the least culpable—of the acts criminalized do not entail that kind of force, the statute of conviction does not categorically match the federal standard, and so cannot serve as an ACCA predicate.").

The court below permits the sentencing judge to utilize certain judicial records of conclusive significance – indictments, judicial confessions, jury instructions, and the judgment – to narrow the defendant's prior statute of conviction to a single offense housed therein. *See United States v. Stoker*, 706 F.3d 643, 648, n.4 (5th Cir. 2013); *Shepard v. United States*, 544 U.S. 13, 20–26 (2005). However, a prior statute of conviction is not divisible in this way unless it contains distinct offenses – it may not be divided into distinct manners and means of committing the same offense. *See United States v. Howell*, 838 F.3d 489, 497-498 (5th Cir. 2016)(citing *Mathis v. United States*, 579 U.S. 500 (2016)), *abrogated on other grounds by* Borden, supra.

Petitioner has been previously convicted of a robbery under Texas law, and he received an enhanced base offense level on that basis. Texas robbery may be committed by causing injury to another recklessly. *See* Tex. Penal Code §29.02(a)(1). The reckless infliction of bodily injury lacks the use, attempted use, or threatened use of physical force against the person of another. *See Borden*, 593 U.S. at 423. The court

below has therefore repeatedly said that Texas simple robbery-by-injury lacks such force as an element. *See United States v. Garrett*, 24 F.4th 485, 488–89 (5th Cir. 2022)("If the statute is indivisible and thus only states one crime, Garrett's conviction does not qualify under *Borden* as an ACCA violent felony because robbery can be committed recklessly.")(arguable *dicta*); *United States v. Wheeler*, No. 19-11022, 2022 WL 17729412, at *1–2 (5th Cir. Dec. 16, 2022)(unpublished)("At the time Wheeler committed the underlying offense, he had four previous convictions for aggravated robbery with a deadly weapon in violation of the Texas robbery statute…. Wheeler begins by asserting that convictions under the Texas robbery statute are not categorically violent felonies—and we agree with that."); *United States v. Jackson*, 30 F.4th 269, 274–75 (5th Cir. 2022)("Jackson points out that one predicate for Texas aggravated robbery—robbery-by-injury, allows conviction based on mere recklessness. It follows under the categorical approach, he contends, that no Texas aggravated robbery conviction is a violent felony. Normally Jackson might have a point; courts usually look at the elements of the entire statute to determine if all iterations of the crime have the required force element. But when a statute is divisible into multiple crimes…"); *United States v. Ybarra*, No. 20-10520, 2021 WL 3276471, at *1 (5th Cir. July 30, 2021)(While *Borden* does not affect paragraph (a)(2) of that section, the record makes clear that Ybarra was convicted under paragraph (a)(1). That provision criminalizes the reckless use of force, so it does not satisfy ACCA's elements clause after *Borden*.").

But Texas robbery can also be committed by threatening another with injury; for this form of the offense, the statute lists only intent and knowledge as culpable mental states. *See* Tex. Penal Code §29.02(a)(2). The court below has held that this form of the offense has the threatened use of force as an element. *See Garrett*, 24 F.4th 491 ("Robbery-by-threat is a violent felony because intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death plainly constitutes the 'threatened use of physical force' under the ACCA"). Further, it has held that the Texas robbery statute in fact houses two distinct offense – robbery-by-injury and robbery-by-threat – for the purposes of applying criminal history enhancements like the one at bar. *See id.* at 490 ("Although state appellate court decisions are not unanimous, we conclude, as we have said, that lower court cases considered as a whole are supportive of the notion that simple robbery is divisible into separate crimes"). That is, it has held that the Texas robbery statute divisible, so that a defendant convicted under the robbery-by-threat alternative of the offense may not avail himself or herself of the possibility of conviction for committing a robbery by reckless injury in order to show the statute's overbreadth. *See id.*

In the present case, the government eventually introduced documents showing that Petitioner had been convicted on a theory of robbery-by-threat. *See* [Appx. A]; *United States v. Hayden*, No. 24-10132, 2024 WL 4501063, at *1 (5th Cir. Oct. 16, 2024)(unpublished)("The state indictment indicates that Hayden was convicted of robbery-by-threat, which satisfies the relevant definition."). And the court of appeals held that the Texas robbery statute satisfied §4B1.2's definition of a "crime of

violence," citing *Garrett*, *supra*, a case that applied ACCA's force/elements clause (identical to the one at bar) to Texas robbery-by-threat. *See Hayden*, 2024 WL 4501063, at *1. The court below thus upheld the sentence on the theory that: 1) Petitioner's statute of conviction could be narrowed to robbery-by-threat, and 2) that this statutory alternative satisfies the force/elements clause.

After the decision below (and after the deadline for rehearing, *see* Fed. R. App. P. 40(d)(1)), the Texas Court of Criminal Appeals – the Texas court of last resort in criminal matters – issued *Floyd v. State*, __ S.W.3d___, 2024 WL 4757855 (Tex. Crim. App. November 13, 2024). *Floyd* holds that a Texas aggravated[1] robbery defendant charged has no right to a unanimous verdict as to whether he or she committed the offense by injury or threat. *See Floyd*, 2024 WL 4757855, at *1 ("…in order to convict someone of aggravated robbery, does the jury have to unanimously agree on whether the person committed injury-robbery or threat-robbery? No. We hold that the commission of the different variations of aggravated robbery constitute a different manner and means of committing the single offense of aggravated robbery."). That is, the jury must unanimously find only that the defendant violated the statute in at least one of these two ways, but it need not agree about which one. *See id.* at *5 ("The jury charge instructed the jury to find Appellant guilty if it found either that he had threatened or placed Diane Porter in fear of imminent bodily injury or death or had caused bodily injury to her. This charge did not deprive Appellant of his constitutional

[1] Texas aggravated robbery, Tex. Penal Code §29.03, requires the commission of robbery under Tex. Penal Code §29.02. *Floyd* relied on the structure of the simple robbery statute to reach its conclusion, and accordingly eliminates any right of jury unanimity on the threat/injury question for simple robbery defendants as well. *See Floyd,* 2024 WL 4757855, at **4-5.

right to a unanimous verdict."). So under *Floyd*, if six jurors think that the defendant committed robbery-by-injury (but not by threat), and six jurors think that the defendant committed robbery-by-threat (by not by injury), the defendant will be convicted.

Mathis makes clear enough that this renders the Texas robbery statute indivisible as between its injury and threat prongs. *See Mathis*, 579 U.S. at 517-518 ("This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question: The listed premises in Iowa's burglary law, the State Supreme Court held, are 'alternative method[s]' of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle.")(quoting and citing *State v. Duncan*, 312 N.W.2d 519 (Iowa 1981)). But Fifth Circuit law makes this point exquisitely clear in multiple panel opinions and a still-controlling *en banc* opinion. See *United States v. Herrold*, 883 F.3d 517, 526 (5th Cir. 2018)(*en banc*)("If state court decisions dictate that a jury need not unanimously agree on the applicable alternative of the statute, the statute is indivisible and its alternative terms specify different means of committing a single offense."), *vacated and remanded by* 139 S.Ct. 2712 (2019), *different results reached on remand, reinstated in relevant part by* 943 F.3d 173 (5th Cir. 2019)(en banc)("Finally, because neither *Quarles* nor *Stitt* calls into question our holding that the Texas burglary statute is indivisible, we reinstate that section (Part II) of our en banc decision."); *United States v. Howell*, 838 F.3d 489, 497 (5th Cir. 2016)("The test to distinguish means from elements is whether a jury must

agree."); *Garrett*, 24 F.4th at 489 ("We have previously held that if a statute only sets out alternative means of committing a crime, such that the jury need not agree which of the various possible means was actually employed in committing the crime, then the statute states only one crime and consequently is indivisible.").

In the Fifth Circuit, a jury unanimity opinion like *Floyd*, issued by the highest state court, is simply the gold standard for determining a statute's divisibility. *See Herrold*, 883 F.3d at 526 ("Under *Mathis*, when state law does not require jury unanimity between statutory alternatives, the alternatives cannot be divisible."). Such an opinion overrides any contrary state authority that bears on the question of whether a statute houses one or more offenses, including cases about lesser included offenses, cases about the notice required in the indictment, or cases that use the term "elements" off-handedly in discussing the nature of an offense. *See id.* at 522-526 (citing *Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1975), *Devaughan v. State*, 749 S.W.2d 62 (Tex. Crim. App. 1988), and *Martinez v. State*, 269 S.W.3rd 777 (Tex. App. – Austin 2008), and concluding that *Martinez* controlled over *Day* and *Devaughn* for the purposes of divisibility because only *Martinez* involved jury unanimity).

Further, in cases where the state court has authoritatively answered the jury unanimity question, the Fifth Circuit has disavowed any freelance statutory interpretation to determine whether the defendant's prior offense statute contains one or many distinct offenses – it will defer to the state court on this matter of state law. *See id.* at 527 ("We are bound to examine how a state treats its own statute using the materials that the Court said speak with sufficient certainty on the matter. For

this reason, we decline to hold that these structural statutory features are sufficient to resolve the question of divisibility when they point in the opposite direction of sources that the *Mathis* Court *did* say were relevant—state decisions on the subject of jury unanimity.")(emphasis in original).

Accordingly, the Texas robbery statute is now inarguably indivisible. And because its robbery-by-injury prong can be violated recklessly, Fifth Circuit law now inescapably demands the conclusion that no portion of the Texas robbery statute now has as an element the use, attempted use, or threatened use of physical force against the person of another. This directly and plainly contradicts the rationale of the decision below.

This Court should therefore vacate the judgment below and remand. It has explained:

> [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). These intervening events:

> may include a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.

Lawrence, 516 U.S. at 166–67 (internal citations omitted)(citing *Conner v. Simler*, 367 U.S. 486, (1961); *Schmidt v. Espy*, 513 U.S. 801 (1994); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Louisiana v. Hays*, 512 U.S. 1230 (1994); *NLRB v. Federal Motor Truck Co.*, 325 U.S. 838 (1945); *Wells v. United States*, 511 U.S. 1050 (1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971)).

As this passage notes, an intervening State Supreme Court decision providing the critical rule of decision for the case will justify a GVR order, even if the Petition comes from a federal circuit rather than a state supreme court. *See Conner v. Simler*, 367 U.S. 486 (1961). *Floyd* destroys the rationale for the decision below, and it provides the controlling decision. *Mathis* refers explicitly to an opinion like *Floyd* as the conclusive resolution of the divisibility question. *See Mathis*, 579 U.S. at 517-518. The Fifth Circuit has likewise recognized that state court decisions – of which *Floyd* is now the most authoritative – are authoritative in the divisibility context, foreclosing any independent analysis of the relevant statute performed by a federal court. *See id*. at 522-527. This is merely a simple and straightforward application of the principle that state courts are the ultimate arbiters of state law, both generally, *see Bell v. Maryland*, 378 U.S. 226, 237 (1964), and in the context of criminal history enhancements, *see James v. United States*, 550 U.S. 192, 213, (2007), *overruled on other grounds by Johnson v. United States,* 576 U.S. 591 (2015).

It is true that an offense may be a crime of violence under §4B1.2 even if it does not have force as an element, if it corresponds to an offense enumerated in the Guideline. *See* USSG §4B1.2 (a)(2). "Robbery" is among these enumerated offenses, and the court below has held that Texas robbery corresponds to the generic, enumerated form of the offense. *See United States v. Santiesteban-Hernandez*, 469 F.3d 376, 381 (5th Cir. 2006); *United States v. Adair*, 16 F.4th 469, 471 (5th Cir. 2021). However, those decisions preceded a 2023 amendment to the Guideline providing a new definition of the offense of "robbery." *See* USSG §.4B1.2(e)(3); USSG Appx. C, Amdmt 822 (November 1, 2023).

Under the new definition:

> "Robbery" is the unlawful **taking or obtaining** of personal property from the person or in the presence of another, against his will, **by means of** actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.

USSG §4B1.2(e)(3)(emphasis added).

As the emphasized portion shows, this definition of robbery plainly requires that the defendant acquire property by means of force or threats. Because the phrase "by means of" says how a defendant must acquire the property, it requires some causal connection between assaultive conduct and the taking; the mere co-occurrence of assaultive conduct and "the course of" of a theft would not suffice. *See Commonwealth v. Jones*, 283 N.E.2d 840, 843 (Mass. 1986) (citing Anderson, *Wharton's Criminal Law & Procedure*, § 559; 46 Am. Jur., Robbery, § 19;

Commonwealth v. Novicki, 87 N.E. 2d 1, 5 (Mass. 1941); Hale, P. C. (1847 ed.) 534; 77 C. J. S., *Robbery*, §§ 11-14)(common law robbery, which refers to theft "by" force or intimidation, required "a causal connection between the defendant's use of violence or intimidation and his acquisition of the victim's property."); *accord* La Fave, *Substantive Criminal Law*, §20.3(d), p.187 ("There must be a causal connection between the defendant's threat of harm and his acquisition of the victim's property– that is the threat must induce the victim to part with his property."); *see also* BLACK'S LAW DICTIONARY (11th Ed. 2019)("Means: … 2. Something that helps to attain an end; an instrument; a cause.").

This is confirmed by the final sentence of the Guideline definition, which states that "force" refers to "force that is sufficient to overcome a victim's resistance." Under this definition, then, the force used in robbery and the theft must relate to each other in a particular way: the force must be deployed to overcome a victim's resistance to the acquisition (or, perhaps, retention) of property. It cannot simply occur close in time to the theft.

The Texas offense plainly does not require a causal connection between the defendant's assaultive conduct and his or her acquisition of the property. Rather, it requires only that a person commit the assaultive conduct "**in the course of** committing theft … and with intent to obtain or maintain control of the property…" Tex. Penal Code §29.02 (emphasis added). "The phrase 'in the course of committing theft' is defined by Section 29.01 of the Penal Code to mean 'conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt

or commission of theft.'" *Sorrells v. State*, 343 S.W.3d 152, 155–56 (Tex. Crim. App. 2011). Notably, Texas courts have repeatedly upheld robbery convictions where the defendant threatened or inflicted injury on another **after discarding** stolen property. *See Smith v. State*, 2013 WL 476820, at *3 (Tex. App. Houston [14th Dist.] Feb. 7 2013)(unpublished); *Morgan v. State*, 703 S.W.2d 339, 341 (Tex. App. 1985); *Ulloa v. State*, 570 S.W.2d 954 (Tex.Cr.App.1978); *White v. State*, 671 S.W.2d 40, 42 (Tex. Crim. App. 1984). In no natural sense of the language could this conduct be described as obtaining property "by means of actual or threatened force."

Accordingly, the existence of a possible alternative means to label the prior robbery offense a "crime of violence" does not defeat Petitioner's showing of a reasonable probability of a different result on remand. Nor does his burden as a plain error defendant to show that the error affected the defendant's substantial rights and the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Olano*, 507 U.S. 725, 732 (1993). In the ordinary case, a Guideline error will satisfy this test. *See Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016); *Rosales-Mireles v. United States*, 585 U.S. 129, 139-140 (2018).

Here, the district court said:

> although I believe the guideline calculations announced today were correct, to the extent they were incorrectly calculated, I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the 3553(a) factors. The history here, the recidivism here are just too great, and this, in any event, is a nonguideline upward variance sentence.

(Record in the Court of Appeals, at 102). It reiterated this disclaimer in the Statement of Reasons, *see* (Record in the Court of Appeals, at 181), as it does in very nearly all

of its cases. Nonetheless, the court of appeals neither relied on nor even cited this statement in support of its decision to affirm. *See* [Appx. A]; *United States v. Hayden,* No. 24-10132, 2024 WL 4501063 (5th Cir. October 16, 2024)(unpublished).

Still sometimes such disclaimers defeat a claim for relief, in spite of Guideline error. *See United States v. Richardson*, 676 F.3d 491, 511 (5th Cir. 2012); *United States v. Redmond*, 965 F.3d 416, 420-421 (5th Cir. 2020); *United States v. Garcia*, 647 Fed. Appx. 408, 410 (5th Cir. 2016)(unpublished); *United States v. Thomas*, 793 Fed. Appx. 346, 347 (5th Cir. 2020)(unpublished); *United States. v. Rico*, 864 F.3d 381, 386-387 (5th Cir. 2017); *United States v. Reyna-Aragon*, 992 F.3d 381, 387-389 (5th Cir. 2021); *United States v. Castro-Alfonso*, 841 F.3d 292, 297–99 (5th Cir. 2016); *United States v. Kinzy*, 2023 WL 4763336, at *14 (5th Cir. 2023)(unpublished).

But in cases where the district court has not considered the range ultimately vindicated on appeal, *see United States v. Rico*, 864 F.3d 381, 386 (5th Cir. 2017), "it is not enough for the district court to say the same sentence would have been imposed but for the error." *United States v. Tanksley*, 848 F.3d 347, 353 (5th Cir. 2017), *supplemented* 854 F.3d 284 (5th Cir. 2017)(citing *United States v. Bazemor*e, 608 Fed. Appx. 207, 216 (5th Cir. 2015)(unpublished); *accord United States v. Redmond*, 965 F.3d 416, 421 (5th Cir. 2020). Thus, the court below will sometimes remand for resentencing in spite of a district court's statement that the sentence would have been the same under different Guidelines. *See United States v. Walters*, No. 22-50774, 2024 WL 512555, at *2 (5th Cir. Feb. 9, 2024)(unpublished); *United States v. Taylor*, 2022 WL 2752602, at *2 (5th Cir. 2022)(unpublished); *United States v. Martinez-Romero*,

817 F.3d 917 (5th Cir. 2016); *United States v. Rico-Mejia*, 859 F.3d 318, 323-325 (5th Cir. 2017), *abrogated on other grounds by United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. 2018), *abrogated by Borden, supra*; *Tanksley*, 848 F.3d at 353; *United States v. Cardenas*, 598 Fed. Appx 264, 269 (5th Cir. 2015) (unpublished); *United States v. Vasquez-Tovar*, 420 F. Appx 383, 384 (5th Cir. 2011) (unpublished); *United States v. Leal-Rax*, 594 Fed. Appx 844 (5th Cir. 2014) (unpublished), *abrogated on other grounds by United States v. Reyes-Contreras, abrogated in turn by Borden, supra*; *Bazemore*, 608 Fed. Appx at 216.

Here, there is special reason to think that the court's Guideline disclaimer does not overcome the usual effect of Guideline error on the case's outcome. First, there is the context in which the court made its statement. The parties had offered the court only one possible change in the Guideline range: the addition, or not, of a four-level adjustment for possessing a firearm in connection with another felony. *See* (Record in the Court of Appeals, at 87-89, 145-177). This changed the Guideline range from 27-33 months imprisonment, *see* (Record in the Court of Appeals, at 141), to 41-51 months imprisonment, *see* (Record in the Court of Appeals, at 177). In this context, the court may be understood to say that it would have imposed 72 months imprisonment even if it had resolved differently the sole Guideline issue in the case.

It is linguistically possible to read the statement in a different way: as a claim that the sentence would have been 72 months under any Guideline recommendation at all, whether 0-6 months or 180 months. But this is not the best or most favored reading, for a variety of reasons. It would not comport with this Court's empirical

observations about the usual effect of the Guidelines on the sentence. *See Molina-Martinez*, 578 U.S. at 192-193. As between a narrow interpretation of the court's statement emerging from its particular procedural posture and an extreme claim as to the total irrelevance of the Guidelines, the former is more plausible. Further, the broad any-Guidelines-at-all interpretation of the district court's disclaimer would raise serious questions about its compliance with 18 U.S.C. §3553(a)(4), which requires consideration of the Guidelines in fashioning a sentence. Finally, the court knows how to say that it would have imposed the same sentence even if the Guidelines were literally anything at all when it wishes to do. Imposing the statutory maximum in *United States v. Billups*, 2022 WL 287552 (5th Cir. 2022)(unpublished), in response to much more extreme conduct, it said:

> So even if the guideline sentence were, you know, one to three days in prison, I would impose a life sentence, because that's the only reasonable sentence available here to me given the calculus that I've discussed previously.

Initial Brief in *United States v. Billups*, No. 20-11263, 2021 WL 1851733, at *4 (5th Cir. Filed May 5, 2021)(emphasis removed). The disclaimer in this case lacks this kind of specificity.

Second, the magnitude of the error tends to show an effect on substantial rights. The district court believed the Guidelines to be 41-51 months imprisonment. *See* (Record in the Court of Appeals, at 88-89). Had it withheld a six-level enhancement to the base offense level, the range would have been just 21-27 months imprisonment, the product of an offense level of 15 and a criminal history category of II. *See* (Record in the Court of Appeals, at 141); USSG Ch. 5A. A variance to the 72-

month sentence actually imposed would have required it nearly to triple the high end (multiply by 2.67) of the true range, and to add nearly four years (45 months). The court thought it was imposing a variance of just 21 months, and just 139%.

Third, the same disclaimer found in the Statement of Reasons has appeared in innumerable cases coming from the same judge. *See* Initial Brief in *United States v. Wheeler*, No. 21-11182, at 20 (5th Cir. Filed March 8, 2022)(reflecting that the same judge said in case of within-Guideline sentence, "I believe the guideline calculations announced today were correct, but even if they were incorrectly calculated, I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the 3553(a) factors."); Appellee's Brief in *United States v. Gonzalez*, No. 21-10631, at 28-29 (5th Cir. Filed January 11, 2022)(government arguing as to 365 month high-end of the Guideline sentence that "proof of harmlessness is clear and unambiguous—the district court stated that, even if it was incorrect in its guidelines calculation, it 'would have imposed the same sentence without regard to that range, and [it] would have done so for the same reasons, in light of the 3553(a) factors.'"); Appellee's Brief in *United States v. Seabourne*, No. 21-11043, at 18 (arguing as to 125-month sentence at the high end of the range that the Guideline error was harmless because the district court said "'[even if the guidelines were incorrectly calculated, I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the [Section] 3553 factors. So even assuming I had sustained each of the defendant's objections . . . I would have upwardly varied to 125 months.'"); Initial

Brief in *United States v. Gollihugh*, No. 21-11132, at 10 (5th Cir. Filed March 3, 2022)(quoting the same district court to say with regard to an upward variance that "I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons."); Initial Brief *in United States v. Salas*, No. 21-11066 (5th Cir. Filed February 15, 2022)(stating in case involving 20-year within-Guideline sentence "[t]he court then stated that even if the guideline calculations it adopted were wrong, it would impose the same sentence based on the § 3553(a) factors and the court's determination that 'a sentence below 20 years is just – would be insufficient and unreasonable.'"); Initial Brief in *United States v. Fyke*, No. 21-11284 (5th Cir. Filed April 11, 2022)(noting as to a statutory maximum sentence at the high end of the Guideline range that the same "district court explained that it 'would have imposed the same sentence' and 'would have done so for the same reasons, in light of the 3553(a) factors,' even if it had not considered the correct advisory range."); Appellee's Brief *in United States v. Santos*, 21-10381, at 29 (5th Cir. Cir. Filed October 29, 2021)(arguing that any Guideline error as to within-Guideline 192-month sentence imposed by same court would be harmless because the court said "I believe the guideline calculations announced today were correct, but to the extent they were incorrectly calculated, I inform the parties that I would have imposed the same sentence without regard to that range, and I would have done so for the same reasons, in light of the 3553(a) factors as I have explained them."); Initial Brief in *United States v. Rodriguez-Huitron*, No. 21-10082, 2021 WL 1933697, at *2 (5th Cir. Filed May 4, 2021)(noting that same district court had "disclaimed any impact of the

Guidelines on the sentence imposed, but did not disclaim the impact of the statutory range" when imposing a 57 month sentence).

This history tends to show that the court's final words have operated more as "a talisman to insulate sentences that otherwise ought to be revisited by all participants: opposing counsel, the parties, and sentencing judges," *Kinzy*, 2023 WL 4763336, at *14, than a considered judgment as to the likely sentence under different Guidelines.

An intervening authority -- *Floyd* -- shows that the reasoning of the court below in affirming the sentence would not be accurate today. Whatever other obstacles may persist, they are not insuperable. It is at least reasonably probable that the court below will reach a different conclusion given the chance to consider to *Floyd*. This Court should give it a chance to do so.

II. This Court should decide the constitutionality of 18 U.S.C. §922(g)(1) under the Second Amendment. It should hold the instant Petition pending resolution of any merits cases presenting that issue.

The Second Amendment guarantees "the right of the people to keep and bear arms." Yet 18 U.S.C. §922(g)(1) denies that right, on pain of 15 years imprisonment, to anyone previously convicted of a crime punishable by a year or more. In spite of this facial conflict between the statute and the text of the constitution, the courts of appeals uniformly rejected Second Amendment challenges to the statute for many years. *See United States v. Moore*, 666 F.3d 313, 316-317 (4th Cir. 2012) (collecting cases). This changed, however, following *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111 (2022). *Bruen* held that where the text of Second

Amendment plainly covers regulated conduct, the government may defend that regulation only by showing that it comports with the nation's historical tradition of gun regulation. *See Bruen*, 142 S. Ct. at 2129-2130. It may no longer defend the regulation by showing that the regulation achieves an important or even compelling state interest. *See id*. at 2127-2128.

In *United States v. Rahimi*, 144 S.Ct. 1889 (June 21, 2024), this Court held that 18 U.S.C. §922(g)(8) comports with the Second Amendment. That statute makes it a crime to possess a firearm during the limited time that one:

> is subject to a court order that … restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and … includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or ….by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury…

18 U.S.C. §922(g)(8).

Upholding this statute, this Court emphasized its limited holding, which was "only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 144 S.Ct. at 1903. That rationale plainly leaves ample space to challenge 18 U.S.C. §922(g)(1). Section (g)(1) imposes a permanent, not a temporary, firearm disability. And that disability can arise from all manner of criminal convictions that do not involve a judicial finding of future physical dangerousness.

Such a challenge could well be resolved against constitutionality of §922(g)(1). "Though recognizing the hazard of trying to prove a negative, one can with a good degree of confidence say that bans on convicts possessing firearms were un-known before World War I." C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?,* 32 Harv. J. L. & Pub. Pol'y 695, 708 (2009); *see also* Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009)("The Founding generation had no laws . . . denying the right to people convicted of crimes.").; Carlton F.W. Larson, *Four Exceptions in Search of A Theory:* District of Columbia v. Heller *and Judicial* Ipse Dixit, 60 Hastings L. J. 1371, 1376 (2009) ("…state laws prohibiting felons from possessing firearms or denying firearms licenses to felons date from the early part of the twentieth century.").

The government asked this Court to grant *certiorari* in a wide range of cases presenting the constitutionality of §922(g)(1). *See* Supplemental Brief for the Federal Parties in Nos. 23-374, *Garland v. Range*; 23-683, *Vincent v. Garland*; 23-6170, *Jackson v. United States*; 23-6602, *Cunningham v. United States*, and 23-6842, *Doss v. United States*, at p.4, n.1 (June 24, 2024)(collecting 12 such cases)(hereafter "Supplemental Federal Parties), *available at* https://www.supremecourt.gov/DocketPDF/23/23-374/315629/20240624205559866_23-374%20Supp%20Brief.pdf, *last visited July 25, 2024.* All of those Petitions were granted, and the cases remanded in light of *Rahimi*, *supra*. *See Garland v. Range*, No. 23-374, 2024 WL 3259661 (July 2, 2024); *Vincent v. Garland*; No. 23-6170, 2024 WL 3259668 (July 2, 2024); *Jackson v. United States*, No.

23-6170, 2024 WL 3259675 (July 2, 2024); *Cunningham v. United States*, No. 23-6602, 2024 WL 3259687 (July 2, 2024); *Doss v. United States*, No. 23-6842, 2024 WL 3259684 (July 2, 2024). Notably, this Court remanded both those cases that resulted in a finding of §922(g)(1)'s unconstitutionality (like *Range*), and those that found it constitutional (the remainder). This demonstrates that *Rahimi* does not clearly resolve the constitutional status of the statute – were that so, it would be unnecessary to remand those cases in which the arms-bearer lost in the court of appeals. This Court should grant *certiorari* to decide this momentous issue, and, if it does so in another case, should hold the instant Petition pending the outcome. *See Stutson v. United States*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting)("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided.").

Upon remand, the *en banc* Third Circuit has found that 18 U.S.C. §922(g)(1) violates the Second Amendment as applied to the Plaintiff on that case, *Rahimi* notwithstanding. *See Range v. Garland*, ___ F.4th___, 2024 WL 5199447 (3rd Cir. Dec. 23, 2024)(*en banc*). This creates a clear circuit split as to whether §922(g)(1) can ever violate the Second Amendment. *Compare United States v. Jackson*, 110 F.4th 1120, 1129 (8th Cir. 2024). A Petition for Certiorari on the issue can be reasonably anticipated. Although it will probably pertain to the viability of as-applied rather than facial challenges to the statute, any resolution of the issue will certainly shed considerable light on both manner of claims.

This Court should therefore hold the instant case pending the resolution of any merits case granted to address the Constitutionality, facial or as-applied, of §922(g)(1). It should do so notwithstanding the failure of preservation in the district court, which may ultimately occasion review for plain error. *See United States v. Olano*, 507 U.S. 725, 732 (1993). For one, an error may become "plain" any time while the case remains on direct appeal. *See Henderson v. United States*, 568 U.S. 266 (2013). Further, procedural obstacles to reversal – such as the consequences of non-preservation – should be decided in the first instance by the court of appeals. *See Henry v. Rock Hill*, 376 U.S. 776, 777 (1964)(GVR "has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent"); *Torres- Valencia v. United States*, 464 U.S. 44 (1983)(GVR utilized over government's objection where error was conceded; government's harmless error argument should be presented to the court of appeals in the first instance); *Florida v. Burr*, 496 U.S. 914, 916-919 (1990)(Stevens, J., dissenting)(speaking approvingly of a prior GVR in the same case, wherein the Court remanded the case for reconsideration in light of a new precedent, although the claim recognized by the new precedent had not been presented below); *State Farm Mutual Auto Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (remanding for reconsideration in light of new authority that party lacked opportunity to raise because it supervened the opinion of the court of appeals).

Petitioner challenged the facial constitutionality of 18 U.S.C. §922(g)(1) in the court of appeals. This Court should not terminate his direct appeal if that issue is to be settled shortly.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 14th day of January, 2025.

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