No. 22-86

In the Supreme Court of the United States

CHARLES CHAVEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
ROSS B. GOLDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioner was properly indicted for "attempt[ing] to take, from the person or presence of another * * * money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank," in violation of 18 U.S.C. 2113(a), for using a rifle to threaten bank customers to withdraw funds for him from a bank's automated teller machine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 22-86

CHARLES CHAVEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 29 F.4th 1223. The opinion and order of the district court (Pet. 17a-28a) is reported at 460 F. Supp. 3d 1225.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2022. On June 14, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including July 27, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the United States District Court for the District of New Mexico indicted petitioner for, *inter alia*, attempted bank robbery, in violation of 18

U.S.C. 2113(a) and (d), and using, carrying, and brandishing a firearm during and in relation to the attempted bank robbery, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. 29a-31a. The district court granted petitioner's pretrial motion to dismiss those two counts. *Id.* at 17a-28a. A grand jury then returned a superseding indictment that did not include an attempted bank-robbery count. See Superseding Indictment 1-3. The court of appeals reversed the district court's dismissal of the two counts of the original indictment and remanded for further proceedings. Pet. App. 1a-16a.

1. After using a rifle to commit two carjackings, petitioner, still carrying the rifle, approached an occupied car parked at a Wells Fargo automated teller machine (ATM) in Albuquerque, New Mexico. See Gov't C.A. Br. 1-2; Pet. App. 2a.[1] Petitioner demanded money from the two occupants of the vehicle. Pet. App. 2a. When they responded that they had no cash, petitioner "demanded that they put a bank card into the ATM and make a withdrawal." *Ibid.*

The bank customers claimed that they had been using the ATM to deposit a check that had not yet cleared and would not otherwise be able to withdraw funds. Pet. App. 2a. A law enforcement officer then arrived on the scene. *Id.* at 2a-3a. Petitioner "change[d] course," asked the occupants for cigarettes, and left. *Id.* at 3a.

---

[1] This case comes to the Court after a pretrial dismissal of some counts and is based on facts outside the indictment. Petitioner moved to dismiss the indictment based on "the facts alleged in the discovery provided by the government" to petitioner, C.A. App. 11, and the factual narrative here is based on those facts.

2. A grand jury in the United States District Court for the District of New Mexico indicted petitioner on two counts of carjacking with intent to cause death and serious bodily injury, in violation of 18 U.S.C. 2119; two counts of using, carrying, and brandishing a firearm during and in relation to the carjackings, in violation of 18 U.S.C. 924(c)(1)(A)(ii); one count of attempted bank robbery through the use of a dangerous weapon, in violation of 18 U.S.C. 2113(a) and (d); and one count of using, carrying, and brandishing a firearm during and in relation to the attempted armed robbery, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Indictment; see Pet. App. 3a, 29a-31a.

Petitioner moved to dismiss the attempted-bank-robbery count, and the associated firearm count, on the theory that his conduct did not constitute attempted bank robbery under 18 U.S.C. 2113(a). Pet. App. 3a. Section 2113(a) applies where a person "by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another * * * any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association." 18 U.S.C. 2113(a).

The district court granted petitioner's motion to dismiss. Pet. App. 17a-28a. In its view, "the relevant time" for assessing the applicability of the statute is "the time of the transfer of the money from the victim to the defendant," and that at the time that the physical transfer to petitioner would have occurred had the robbery been completed, the money would no longer have been in the care, custody, or control of a bank. *Id.* at 25a; see *id.* at 17a-28a.

A grand jury in the United States District Court for the District of New Mexico subsequently returned a superseding indictment that omitted the bank-robbery-related charges. See Superseding Indictment 1-3. The superseding indictment included new charges that petitioner attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and used, carried, and brandished a firearm in connection with the attempted Hobbs Act robbery, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Superseding Indictment 2-3.[2]

3. The government appealed the district court's dismissal of the attempted-bank-robbery and associated firearm charges alleged in the original indictment. The court of appeals reversed and remanded for further proceedings. Pet. App. 1a-16a.

At the outset, the court of appeals observed that "pretrial dismissals based on facts outside the indictment and bearing on the general issue of guilt are uncommon," but deemed the district court's consideration of petitioner's motion here to be procedurally proper. Pet. App. 5a (citation and internal quotation marks omitted); see *id.* at 5a-6a. The court of appeals determined, however, that the motion to dismiss had lacked merit. See *id.* at 6a-16a.

The court of appeals focused on the scope of the completed bank-robbery offense defined in Section 2113(a), because the charge of attempted bank robbery would be invalid only if the conduct that petitioner attempted would itself not have been covered. See Pet. App. 6a-7a. The court "assume[d] without deciding that legal impossibility is a defense to attempt in this

---

[2] In light of this Court's decision in *United States* v. *Taylor*, 142 S. Ct. 2015 (2022), the government intends to move to dismiss that firearm count.

circuit." *Id.* at 9a. And it explained, based on the text of the statute, that "directly forcing a bank customer to withdraw money from an ATM qualifies as federal bank robbery in violation of 18 U.S.C. § 2113(a)" because "the funds belonged to the bank at the time of the coerced withdrawal." *Id.* at 12a-13a.

The court of appeals observed that "money in an ATM is 'obviously' bank money," and that "tak[ing] money from an ATM directly" would "be taking a bank's money with the statute's contemplation." Pet. App. 13a (quoting *United States* v. *McCarter*, 406 F.3d 460, 462 (7th Cir. 2005), overruled on other grounds by *United States* v. *Parker*, 508 F.3d 434 (7th Cir. 2007)). It also expressed agreement with the Seventh Circuit and other courts that "if [petitioner] had succeeded in compelling the accountholders to withdraw money from the ATM, he would have stolen money from the bank through the accountholders, who were his 'unwilling agents.'" *Ibid.* (quoting *McCarter*, 406 F.3d at 463) (brackets omitted). And it "assum[ed] without deciding that the person-or-presence requirement would be met" in such a case. *Id.* at 12a n.1.

The court of appeals declined to adopt the Fifth Circuit's view that "the ownership of the money" under Section 2113(a) "is not measured until the defendant physically places his hands on it." Pet. App. 13a-14a. The court explained that focusing on the moment in time that the defendant physically obtains the money is inconsistent with the statutory text, which "plainly calls for evaluating the money's status at the time of its 'tak[ing],'" rather than at the time the money physically changes hands. *Id.* at 14a (quoting 18 U.S.C. 2113(a)). And it noted that such an approach would "produce absurd results." *Ibid.*

Judge Ebel concurred. Pet. App. 16a. He agreed with the majority that a defendant who forces a bank customer to make an ATM withdrawal takes funds that are "in the care, custody, control, management, or possession of, [the] bank." *Ibid.* (quoting 18 U.S.C. 2113(a)) (brackets in original). Judge Ebel wrote separately, however, "to point out that there is still an open question as to whether the facts can satisfy [the requirement] that the taking occurred '*from* the person or presence of another'" under 18 U.S.C. 2113(a). Pet. App. 16a (quoting 18 U.S.C. 2113(a)). He emphasized that the court of appeals "ha[s] not yet decided whether this clause can be satisfied under the alleged facts" and that, to obtain a conviction, the government would be obligated to "satisfy this clause on remand." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 11-30) that it is legally impossible for him to have committed attempted bank robbery under 18 U.S.C. 2113(a) by ordering two bank customers at gunpoint to withdraw funds for him from a nearby ATM. The interlocutory posture of his case makes any further review of this case premature at this time. In any event, the court of appeals' decision is correct, disagreement in the courts of appeals is shallow, and the issue does not require this Court's immediate intervention. The petition for a writ of certiorari should be denied.

1. This case is currently in an interlocutory posture because the court of appeals remanded for further proceedings—including a potential trial on the counts at issue here. See Pet. App. 1a-16a. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of

certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to district court "is not yet ripe for review"); see also *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

In particular, this Court routinely denies petitions for writs of certiorari filed by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if the defendant is convicted and his conviction and sentence ultimately are affirmed on appeal. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-55 n.72 (11th ed. 2019). That approach promotes judicial efficiency because the issues raised in the petition may be rendered moot by further proceedings on remand.

Concerns of judicial efficiency are particularly acute in this case. Even if petitioner is ultimately convicted of attempted bank robbery, the court of appeals left open multiple issues that might affect the validity of that conviction. For one thing, it expressly declined to decide whether "the person-or-presence requirement would be met" in the circumstances that it considered, Pet. App. 12a n.1, and Judge Ebel's concurrence emphasized that the issue remained open, see *id.* at 16a. Although the petition appears to assume (*e.g.*, Pet. 21-22), that the requirement would be satisfied here, he could potentially argue otherwise in the further proceedings, and the argument might benefit from further factual development about his crime.

The absence of detailed facts may also impede consideration of the question presented. The court of ap-

peals declined to "consider whether [petitioner] intended to take the money from the ATM tray himself, intended to demand that the accountholders hand it to him, or had other plans." Pet. App. 14a n.2. If further factual proceedings were to provide an answer to that question, it might affect petitioner's argument about Section 2113(a)'s application to his conduct. He does not argue, for example, that the statute fails to cover snatching the cash directly from the ATM tray, but instead argues only that "the bank-robbery statute does not apply when a defendant forces a bank customer to withdraw the customer's money from an ATM in order to take the money *from the customer's person*." Pet. 21 (emphasis added); see 18 U.S.C. 2113(a) (applying to a taking "from the person *or presence* of another") (emphasis added).

To the extent that petitioner might contend that further proceedings are unlikely to illuminate that point, because the charge in this case involves attempted rather than completed bank robbery, any distinction between attempted and completed bank robbery would identify an additional problem with the case as a vehicle for addressing the court of appeals' interpretation of the completed bank-robbery crime. See p. 14, *infra*. If the legal issue presented by petitioner remains live following further proceedings on remand, petitioner could raise that issue, along with any other issues, in a single petition following the entry of final judgment. See *Hamilton-Brown Shoe*, 240 U.S. at 258. Petitioner identifies no sound reason to depart from this Court's usual practice of awaiting final judgment.

2. In any event, the court of appeals' decision is correct.

a. The federal bank robbery statute makes it a crime to, "by force and violence, or by intimidation, take[], or attempt[] to take, from the person or presence of another * * * any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank." 18 U.S.C. 2113(a). To convict a defendant of attempted armed bank robbery, the government must prove that the defendant had the "intent to commit the substantive offense" and took a "substantial step towards commission of the substantive offense." *United States* v. *Faulkner*, 950 F.3d 670, 676 (10th Cir. 2019) (citation omitted). The statute prescribes an increased statutory-maximum punishment if, in the crime or the attempt, the defendant "assault[ed] any person, or put[] in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. 2113(d).

As the court of appeals recognized, Pet. App. 9a-16a, a defendant who forces a bank customer to withdraw money from an ATM at gunpoint "takes" "by intimidation" property "belonging to, or in the care, custody, control, management, or possession of, any bank," 18 U.S.C. 2113(a). "When a customer deposits funds, the bank ordinarily becomes the owner of the funds." *Shaw* v. *United States*, 137 S. Ct. 462, 466 (2016). For that reason, if a defendant "were to take money from an ATM directly, he would be taking a bank's money within the statute's contemplation." Pet. App. 13a. The same would be true if the defendant coerced a bank customer to pry open the ATM and forcibly remove funds, or forced a bank customer to insert another victim's ATM card and type in that victim's PIN number. See *ibid.*

The fact that the bank customer is coerced into withdrawing money that he has a right to withdraw does not change that result. As a threshold matter, Section 2113(a) prohibits "tak[ing]" or "attempt[ing] to take" the bank's property. 18 U.S.C. 2113(a). And to "take" means "[t]o get possession or control of." *Webster's New International Dictionary of the English Language* 2569 (2d ed. 1942); see, *e.g.*, *The American Heritage Dictionary* 1311 (1970) ("[t]o appropriate for one's own or another's use or benefit"). When a defendant threatens a bank customer into approaching an ATM and typing in the customer's PIN number, the defendant is exercising control over the funds in the ATM, and is doing so in the "presence" of the customer. 18 U.S.C. 2113(a). That exercise of control, at that moment in time, constitutes the requisite "tak[ing]" or, at a minimum, the requisite "attempt[] to take." *Ibid.*

In any event, even assuming that the statutory language required such a narrow focus, the bank's property interest is also "take[n]" when the defendant physically acquires the funds. Although the customer has a right to withdraw a certain amount of cash from the supply that the bank keeps at the ATM, the debiting of the customer's account to compensate for the cash that the defendant takes does not vitiate the harm to the bank. A bank has "property rights in [a customer's] account," such as "us[ing] the funds as a source of loans that help the bank earn profits." *Shaw*, 137 S. Ct. at 466. This Court has accordingly recognized that, "a scheme fraudulently to obtain funds from a bank depositor's account" can be "a scheme fraudulently to obtain property from a 'financial institution'" under the bank-fraud statute. *Ibid.* (quoting 18 U.S.C. 1344). Similarly, a defendant who acquires money that

would otherwise be in the bank is "tak[ing] * * * property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank," 18 U.S.C. 2113(a).

b. Petitioner's contrary argument (Pet. 24) centers on the contention that "the taking of property from the person or presence of another[] occur[s] *after* the lawful withdrawal of money from the bank." But for reasons just discussed, each of the premises necessary for his approach—that the taking occurs only at the moment the defendant acquires physical possession and that the bank has been divested of all property rights prior to that time—are flawed. Nothing in the statute requires a snapshot focus on the moment of physical acquisition, and the customer's entitlement to carry out an identical transaction of his own volition is textually irrelevant. Section 2113(a) applies to property "belonging to, or in the care, custody, control, management, or possession of, any bank," which turns on *the bank's* interest in the stolen funds. 18 U.S.C. 2113(a). And the bank's interest is the same whether or not the victim is also the depositor.

Petitioner does not appear to dispute that forcing or intimidating a bystander to withdraw funds from someone else's account would qualify as a violation of Section 2113(a). And the bank's property interest in the funds is the same in that scenario as it is here. In the bank-fraud context, this Court has rejected the assertion that taking "money in [a customer's] bank account" would "obtain only a bank *customer's* property, not a bank's *own* property." *Shaw*, 137 S. Ct. at 466 (citation and internal quotation marks omitted). The same is true here. No matter how it is acquired, making off with money that would be debited from a cus-

tomer's account takes a property interest not only of the customer's, but of the bank's as well. Petitioner's focus (Pet. 23-26) on how the law might treat an "innocent intermediary" for purposes of shared liability is accordingly misplaced. The "innocent intermediary" here is not an unwilling accomplice; he is simply the means by which the defendant takes money or property that the bank would otherwise have. That particular means of taking hold of cash from a bank's ATM is as culpable as any other.

Petitioner asserts (Pet. 27-29) that the court of appeals' decision goes beyond the purpose of Section 2113(a) by protecting "bank *customers*" rather than banks themselves. Pet. 28. But because the robber in the forced-ATM-withdrawal scenario is specifically targeting, and taking control of, a bank's property, the statute serves its bank-protective function in that case, just as the bank-fraud statute serves a bank-protective function in analogous circumstances. Cf. *Shaw*, 137 S. Ct. at 466. Furthermore, the bank-robbery statute is not indifferent to the welfare of bank customers. The "another" who satisfies the "person or presence of another" element, 18 U.S.C. 2113(a), could readily be a bank customer, rather than a bank employee. The statutory scheme as a whole mirrors that concern. Section 2113 establishes a tiered scheme of penalties from bank larceny, with no requirement of taking it from the person or presence of another individual, see 18 U.S.C. 2113(b) and (c); to bank robbery, which includes such a requirement, see 18 U.S.C. 2113(a); to aggravated forms of bank robbery involving the use of dangerous weapons, forced accompaniment, or causing death, see 18 U.S.C. 2113(d) and (e).

Finally, petitioner's resort (Pet. 29) to the rule of lenity is misplaced. That rule "applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended." *Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016) (citation and internal quotation marks omitted); see, *e.g.*, *Shaw*, 137 S. Ct. at 469 (rejecting similar argument in bank-fraud context). Here, the traditional tools of statutory construction establish that the statute covers conduct like petitioner's, leaving no place for the rule of lenity.

3. The Seventh Circuit, like the court of appeals below, has recognized that Section 2113(a) covers a forced ATM withdrawal. *United States* v. *McCarter*, 406 F.3d 460, 462 (2005), overruled on other grounds by *United States* v. *Parker*, 508 F.3d 434 (7th Cir. 2007). The Fifth Circuit, however, has refused to apply Section 2113(a) in such circumstances. See *United States* v. *Burton*, 425 F.3d 1008, 1010-1011 (2005); *United States* v. *Van*, 814 F.2d 1004, 1006-1008 (1987).

There is no need for this Court to grant certiorari in this case to resolve the issue. Only one court has endorsed petitioner's construction of the statute, and its opinions have little textual analysis and predate this Court's explanation in *Shaw*, 137 S. Ct. at 466, about the breadth of a bank's property interest in the funds in a customer's account. See *Burton*, 425 F.3d at 1010-1011; *Van*, 814 F.2d at 1006-1008. Additional development would aid this Court's consideration of the issue, should its intervention ultimately prove necessary.

In urging the Court to review the question now, petitioner observes (see Pet. 14-16) that ATM thefts occur frequently, but he does not provide strong support

for his assertion that scenarios like the one at issue here are routinely charged as bank robbery. He cites (Pet. 15) only a handful of cases from the last 35 years that, in his view, present an analogous scenario. And it is not clear that statistics on federal bank-robbery charges involving ATMs, see *ibid.*, necessarily reflect cases involving forced withdrawals, as opposed to, say, bank employees or contractors (such as technicians) with access to the ATMs. If this issue arises as frequently as he suggests, then other courts will weigh in on it, and this Court will have other opportunities to address it.

Nor is this case a good vehicle in which to consider the question. As noted earlier (see p. 8, *supra*), in addition to the lack of factual development because of the early stage at which this case reached the court of appeals, the statutory question is particularly abstract in this case because petitioner was charged with attempted, rather than completed, bank robbery. If, as petitioner contends (Pet. 21-27), the moment of physical transfer is relevant, this Court would benefit from a case presenting a concrete context of a completed transfer, as opposed to one like this, in which the current pretrial record lacks useful detail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
ROSS B. GOLDMAN
Attorney

OCTOBER 2022