No. 13-9026

IN THE

Supreme Court of the United States

LARRY WHITFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice including issues involving criminal justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and numerous other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because the court of appeals and the government have adopted a broad interpretation

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief, and letters reflecting their consent were filed contemporaneously with this brief.

of an ambiguous provision in the federal bank robbery statute, 18 U.S.C. § 2113(e). Where, as here, the government seeks an expansive reading of an ambiguous mandatory minimum statute, NACDL has a strong interest in advocating that the rule of lenity be applied to interpret that ambiguity in favor of the petitioner, and in seeking clear standards for interpreting that statute in future cases.

INTRODUCTION AND SUMMARY

This Court has long used the rule of lenity to construe ambiguous criminal statutes in favor of the defendant. *United States* v. *Bass*, 404 U.S. 336, 347-48 (1971). Petitioner Whitfield makes a compelling argument that 18 U.S.C. § 2113(e) should be read in his favor without resorting to the rule of lenity. But if any residual doubts remain, the rule of lenity clarifies those doubts and dictates that a conviction under § 2113(e) requires substantial movement of the victim.

The phrase "forces any person to accompany him" is ambiguous. Although the term "accompany" connotes some movement of the victim, the statute is silent as to how much movement triggers the enhanced penalties of § 2113(e). This ambiguity is demonstrated by a myriad of lower court opinions, interpreting this phrase and reaching conflicting conclusions. Faced with dueling interpretations, "the tie must go to the defendant." See *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion).

The rule of lenity ought to be given special force in cases where an ambiguous statute such as § 2113(e) imposes a mandatory minimum sentence. Because of the conflicting interpretations in the lower courts, asymmetric punishments for the same conduct may result. Moreover, the principles supporting the rule

of lenity—fair notice and separation of powers—are heightened where, as here, severe mandatory sentences result from a vague statutory phrase.

In addition to the Court's finding that forced accompaniment requires substantial movement of the victim, amicus respectfully suggests that the Court look to the Model Penal Code's provision for kidnapping in interpreting § 2113(e). That is, a conviction for forced accompaniment under § 2113(e) requires evidence that a bank robber "unlawfully remove[d] another from his place of residence or business, or a substantial distance from the vicinity where he [was] found . . . ." See Model Penal Code ("M.P.C.") § 212.1.

A more definitive interpretation is especially important for statutes mandating minimum sentencing terms. With mandatory minimums, any ambiguity about Congress's intentions should trigger the rule of lenity in light of the drastic reductions in liberty at stake. Clarity also helps prevent arbitrary and inconsistent application of the statutory penalties to different defendants who commit similar acts in the course of a bank robbery or an escape.

ARGUMENT

I. THE RULE OF LENITY SUPPORTS THE NARROW CONSTRUCTION OF 18 U.S.C. § 2113(e) URGED BY PETITIONER IN THIS CASE

The rule of lenity dictates that "where text, structure, and history fail to establish that the Government's position is unambiguously correct," ambiguity should be resolved in the defendant's favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (citing *Bass*, 404 U.S. at 347-49). This longstanding principle is often used "when choice has to be made be-

tween two readings of what conduct Congress has made a crime," *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952), commanding that in such cases, "the tie must go to the defendant," *Santos*, 553 U.S. at 514 (plurality opinion).

Petitioner Whitfield sets forth a compelling argument that the forced accompaniment provision in 18 U.S.C. § 2113(e) is best read in his favor even without resorting to the rule of lenity. But, if after consulting the statute's text, structure, history, and purpose, ambiguity remains, the rule of lenity resolves any residual doubts. See *Granderson*, 511 U.S. at 54.

A. The Phrase "Forces Any Person To Accompany Him" Is Ambiguous

To be subject to the ten-year mandatory minimum sentence in § 2113(e) for forced accompaniment, a defendant must not only have robbed (or attempted to rob) a bank, but in the process he must have "force[d] any person to accompany him without the consent of such person."[2] Although the term "accompany" connotes some movement in tandem, the statute is silent as to how far the defendant must force his victim to travel before he becomes eligible for the additional ten-year mandatory minimum.

As a result of this ambiguity, lower courts have reached a myriad of conflicting interpretations of the forced accompaniment provision. The broadest read-

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[2] The full text of 18 U.S.C. § 2113(e) provides that "[w]hoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment."

ing of the term "accompany," and that applied in this case,[3] finds the defendant culpable for even slight movement of the victim. See, *e.g.*, *Turner*, 389 F.3d at 119-20 (finding forced accompaniment conviction appropriate where defendant forced victim to bank vault by gunpoint); see also *United States* v. *Bauer*, 956 F.2d 239, 241 (11th Cir. 1992) (finding that "[t]here is no requirement . . . that the defendant crossed a property line . . . , that the hostages traverse a particular number of feet, that the hostages be held against their will for a particular time period, or that the hostages be placed in a certain quantum of danger"). The narrowest reading of the term "accompany" finds that more substantial movement of a victim during a bank robbery is necessary to trigger the mandatory minimum. See, *e.g.*, *United States* v. *Marx*, 485 F.2d 1179, 1186 (10th Cir. 1973) (analogizing forced accompaniment to kidnapping and stating that "more is required than forcing [the victim] to enter his own house or forcing the [victim's] family to move from the den to a bedroom"). Still other interpretations require something in between *de minimis* and substantial movement. See, *e.g.*, *United States* v. *Strobehn*, 421 F.3d 1017, 1020 n.1 (9th Cir. 2005) (stating, without elaboration, that § 2113(e) does not apply to "*any* forced accompaniment, no matter how slight" (citation omitted)).

Beyond the particular tests applied, the type of conduct punished under § 2113(e) varies wildly. At the more egregious end of the spectrum are cases

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[3] In affirming Mr. Whitfield's conviction, the court of appeals conceded that Mr. "Whitfield required Mrs. Parnell to accompany him for only a short distance within her own home, and for a brief period" but stated that "no more is required to prove that a forced accompaniment occurred." *See* J.A. 65a (citing *United States* v. *Turner*, 389 F.3d 111, 119-20 (4th Cir. 2004)).

where defendants broke into bank employees' homes, held their relatives hostage for an extended period, and forced the bank employees, under threat of harming their families, to travel to the bank with them to withdraw funds. See, *e.g.*, *United States* v. *McCraw*, 1992 U.S. App. LEXIS 7111, at *1-4 (9th Cir. Apr. 9, 1992) (listing factual background, without analyzing application of § 2113(e)); *United States* v. *Smith*, 320 F.3d 647, 650-52 (6th Cir. 2003) (similar). In contrast, under the same statutory provision, conduct incidental to a routine bank robbery, such as moving a teller a small amount to gain entry to a credit union, has triggered punishment under § 2113(e). See, *e.g.*, *United States* v. *Carr*, 2014 U.S. App. LEXIS 14985, at *23-24 (9th Cir. Aug. 4, 2014) (upholding forced accompaniment conviction where defendant "shoved [teller] and forced her back into the credit union trailer after she managed to push her way outside").

To be sure, punishing conduct of varying degrees under the same statutory provision is not unusual. Here, however, such a wide swath of punishable (and not punishable) conduct stems from inherent ambiguity in the phrase "forces any person to accompany him." Such language connotes many different forms of hostage-taking. But because Congress left no specific record of its intention to punish an even wider range of conduct that would also include mere movement of persons from room to room during a robbery or an escape, lenity counsels in favor of a more narrow reading. See *Bass*, 404 U.S. at 348 (stating that lenity "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should'" (quoting *H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes*, *in Benchmarks* 196, 209 (1967))).

B. The Statute's Ambiguity Increases The Risk Of Inconsistent Application

The myriad of conflicting interpretations in the lower courts produces asymmetric punishments for the same conduct. The general bank robbery statute, § 2113(a), provides no statutory minimum and a maximum of twenty years imprisonment for bank robbery. Section 2113(e) thus specifies an aggravated version of the more general crime. As a result, defendants in the Fourth and the Eleventh Circuits, where forced accompaniment encompasses even slight movement of a victim, are more frequently faced with enhanced statutory penalties than defendants in the Tenth Circuit, where forced accompaniment requires substantially more movement.

Such arbitrary results are particularly problematic where a vague statutory phrase provides the basis for a very substantial mandatory minimum sentence. The constitutional principles supporting the rule of lenity—fair notice and separation of powers—suggest the rule should be applied rigorously to such statutes, especially where findings of ineligibility do not absolve the defendant of the underlying crime. See *Dean* v. *United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting) ("[I]nterpretive asymmetries give the rule of lenity special force in the context of mandatory minimum provisions."); see also Brief for Families Against Mandatory Minimums as Amicus Curiae Supporting Petitioner at 6-15, *Burrage* v. *United States*, 134 S. Ct. 881 (2014) (No. 12-7515) (describing rationale for rigorous application of rule of lenity to mandatory minimum sentencing statutes). In light of the severe punishment Congress mandated for forced accompaniment, the Court should not interpret the phrase "so as to increase the penalty when such an interpretation can be based on

no more than a guess as to what Congress intended." *Granderson*, 511 U.S. at 42-43 (internal quotation marks and alterations omitted) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)).

C. Section 2113(e) Requires Substantial Movement

Given the ambiguity of the forced accompaniment provision, § 2113(e) should be read to require substantial movement of the victim. Faced with several competing interpretations—*de minimis* movement, more than *de minimis* but less than substantial movement, and substantial movement—lenity counsels in favor of adopting the most narrow. See *Bell* v. *United States*, 349 U.S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

Applying this standard here, no reasonable factfinder could find that the movement of the victim in this case was "substantial." The petitioner accompanied Mrs. Parnell no more than nine feet, within her own home, for a brief period. J.A. 65a, 81a. Indeed, it is difficult to imagine the course of a bank robbery that does not, at some point, involve the forced movement of individuals in some respect, including from room to room, thereby enhancing the risk of asymmetrical punishments for similar conduct across different jurisdictions.

II. THE COURT SHOULD ADOPT A CLEAR RULE FOR INTERPRETING THE FORCED ACCOMPANIMENT PROVISION OF § 2113(e)

For the reasons stated above, forced accompaniment requires substantial movement of the victim, and given the extremely *de minimis* movement in

this case, petitioner's § 2113(e) conviction should be overturned. The specificity of the test advocated here draws support from the Court's precedents, especially where mandatory minimums are involved, see, *e.g.*, *Burrage*, 134 S. Ct. at 891, and finds appropriate references in the statutory history and in the Model Penal Code's discussion of kidnapping,[4] see M.P.C. § 212.1.

A. Specific Rules Are Especially Important In Applying Vague Mandatory Minimum Statutes

"Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute." *James* v. *United States*, 550 U.S. 192, 216 (2007) (Scalia, J., dissenting) (stating that "[i]f we are not going to deny effect to this statute as being impermissibly vague . . . , we have the responsibility to derive from the text rules of application that will provide notice of what is covered and prevent arbitrary or discriminatory sentencing"). The reasons for adopting a narrow rule for interpreting this statute mirror the reasons for rigorous application of the rule of lenity to statutes mandating minimum sentences. That is, providing further clarity to the forced accompaniment provision, even beyond holding that it requires substantial movement of the victim, would not only provide clear notice to criminal defendants of the type of conduct proscribed, but it would also prevent inconsistent application of the severe penalties mandated by the statute. Cf. *United States* v. *Lanier*, 520

[4] The Model Penal Code was written after the federal bank robbery statute was enacted in 1934, and Congress thus did not intend its definition of kidnapping to be incorporated into the statute. The Code, however, provides useful guidance here, as the drafters addressed analogous issues to those presented by § 2113(e).

U.S. 259, 266 (1997) ("[R]ule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct *clearly* covered." (emphasis added)).

1. Fair notice of the conduct proscribed by a criminal statute is essential, especially where a severe restriction on individual liberty is mandated. Cf. *Huddleston* v. *United States*, 415 U.S. 814, 831 (1974) (stating that lenity is rooted in the "belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property"). Here, under § 2113(e), a penalty range of a mandatory minimum of ten years to a maximum of life imprisonment is tied to a single factual determination, a determination that turns on six words of an imprecisely-phrased statute.

Although those six words must be interpreted in favor of the defendant, elaboration on what conduct constitutes "substantial movement" is helpful. Cf. *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (stating, in applying rule of lenity, "[t]o make the warning fair, so far as possible the line should be clear"). Such clarity is not only important to the potential criminal *before* a crime is committed, but even more so to the criminal defendant *after* a crime is committed, when contemplating the likelihood of conviction and the terms of a plea offer. See *id.* ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand . . . .").

2. Clarification of "the line" delimiting the scope of § 2113(e)'s forced accompaniment provision would help prevent arbitrary application of the statute, a particular concern with mandatory minimum sen-

tences. See *supra* Section I. By their nature, mandatory minimums shift the traditional balance of powers in the criminal justice system. In doing so, they restrict the sentencing judge's discretion to tailor criminal punishment to the particular circumstances of the crime and to the particular defendant. See 18 U.S.C. § 3553(a) (stating that "[t]he court shall impose a sentence sufficient, but not greater than necessary"). At the same time, mandatory minimums shift the sentencing judge's discretionary authority to the prosecutor, whose charging decisions affect not only the charges a defendant will face at trial, but also a defendant's willingness to plead guilty (and the substance of his plea) before trial. See Barbara S. Vincent & Paul J. Hofer, Federal Judicial Center, *The Consequences of Mandatory Minimum Prison Terms: A Summary of Recent Findings* 21 (1994)[5] ("The transfer of discretion from neutral judges to adversarial prosecutors tilts the sentencing system toward prosecution priorities, sometimes at the expense of other sentencing goals.").

Without statutory clarity, prosecutors have unrestrained discretion in their charging decisions under the bank robbery statute, which may ultimately lead to inconsistencies in sentencing. See United States Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 345-46 (Oct. 2011)[6] (finding that "different charging and plea practices have developed in various districts that result in the disparate applica-

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[5] *Available at* http://www.fjc.gov/public/pdf.nsf/lookup/conmanmin.pdf/$file/conmanmin.pdf.

[6] *Available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf.

tion of certain mandatory minimum penalties"). Such inconsistent results undermine "sentencing proportionality—a key element of sentencing fairness . . . ." *Harris* v. *United States*, 536 U.S. 545, 571 (2002) (Breyer, J., concurring in part and concurring in the judgment), *overruled by Alleyne* v. *United States*, 133 S. Ct. 2151 (2013). Moreover, these inconsistencies upset uniformity in sentencing, a primary purpose of mandatory sentencing schemes. See United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 89 (Nov. 2004)[7] ("Research over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply.").

3. The rule this Court adopts should be narrow. Although a narrow rule might not encompass all aggravating conduct contemplated by the statute, the societal costs of imposing a possibly under-inclusive rule are slight because the sentencing court has discretion to increase a sentence under § 3553(a). Cf. *Dean*, 556 U.S. at 584 (Breyer, J., dissenting) ("[I]n the case of a mandatory minimum, an interpretation that errs on the side of *exclusion* . . . still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence . . . is not legislatively *required*."). For example, under the discretionary Sentencing Guidelines for robbery, the judge may impose a four-level

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[7] *Available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

increase "[i]f any person was abducted[8] to facilitate commission of the offense or to facilitate escape" and a two-level increase "if any person was physically restrained to facilitate commission of the offense or to facilitate escape . . . ." U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A)-(B) (2013). For conduct falling in a gray area (that is, outside the confines of the Court's narrow statutory interpretation) the Guidelines provide for a more nuanced, judicial approach to punishment, ensuring that the harsh, legislatively-mandated punishment is applied only to "conduct clearly covered" by the statute. See *Lanier*, 520 U.S. at 266.

In addition, a too narrow interpretation of the statute can be more easily corrected through the legislative process. Those who may suffer from an under-inclusive interpretation (law enforcement) have far greater access to Congress than those who may suffer from an over-inclusive interpretation (criminal defendants). See *Santos*, 553 U.S. at 514 (stating that the rule of lenity "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

In contrast, the societal costs of a broad, over-inclusive rule are high. Cf. *Dean*, 556 U.S. at 585 (Breyer, J., dissenting) ("[A]n interpretation that errs on the side of *inclusion* . . . , by erroneously taking discretion away from the sentencing judge, would ensure results that depart dramatically from those Congress would have intended."). Such a rule would

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[8] Under the Sentencing Guidelines, "'Abducted' means that a victim was forced to accompany an offender to a different location." U.S. Sentencing Guidelines Manual § 1B1.1 cmt. n.1(A) (2013).

further limit judicial discretion at the expense of a corresponding increase in prosecutorial discretion and pressure for guilty pleas. See Anthony M. Kennedy, Address at the American Bar Association Annual Meeting 5 (Aug. 9, 2003)[9] (stating that mandatory minimums "give[] the decision to an assistant prosecutor not trained in the exercise of discretion and take[] discretion from the trial judge . . . the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way").

B. The Conflicting Tests Used By Lower Courts To Interpret § 2113(e) Are Inadequate

Lower courts have implemented a number of possible tests to aid in interpreting § 2113(e). Each of these conflicting tests is inadequate.

1. As discussed *supra* in Section I, at least two circuits, the Fourth and the Eleventh, appear to consider even *de minimis* movement of a victim to trigger the enhanced penalties of § 2113(e)'s forced accompaniment provision. See, *e.g.*, *Turner*, 389 F.3d at 119-20; *Bauer*, 956 F.2d at 241. But the *de minimis* test should be rejected out of hand. This test is both over-inclusive, see Br. Pet'r 31-34 (discussing "absurd results" produced by *de minimis* interpretation) and incompatible with the result dictated by the rule of lenity (*i.e.*, that § 2113(e) requires substantial movement of a victim), see *supra* Section I.

2. As an alternative to the *de minimis* test, other courts have found that a bank robber's forcing a vic-

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[9] *Available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf.

tim to cross the threshold of a building was sufficient[10] evidence to trigger the forced accompaniment enhancement. See, *e.g.*, *United States* v. *Davis*, 48 F.3d 277, 279 (7th Cir. 1995) ("Clearly, the phrase 'forces any persons to accompany him without . . . consent' encompasses forcing someone outside a building to enter the building."); *United States* v. *Reed*, 26 F.3d 523, 528 (5th Cir. 1994) ("[M]oving the victim as a hostage into the bank is an accompaniment, just as moving her out of the bank as a hostage would have been an accompaniment . . . ."). But a solely threshold-based test must also be rejected, as this test is both over- and under-inclusive.

Like the *de minimis* test, the threshold test could arbitrarily make conduct incidental to a routine bank robbery subject to § 2113(e)'s increased penalties, producing results contrary to Congress's graduated penalty scheme.[11] In a strict application of the threshold test, if the hypothetical bank robber, in pushing the security guard aside, happens to force the security guard to take one step inside the bank with him, his conduct will be subject to the ten-year mandatory minimum in § 2113(e). But if the shoved security guard's foot never crosses that threshold, the

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[10] Entering or exiting the building was deemed a *sufficient* condition for applying the enhanced penalty in each of these cases. Neither court elaborated on whether crossing the threshold was a *necessary* condition for finding forced accompaniment under § 2113(e).

[11] The *Reed* court was cognizant of the danger of an overbroad interpretation of § 2113(e), at least for movement solely within the bank. *See Reed*, 26 F.3d at 528 ("To conclude [robber-orchestrated movement within the bank] an aggravating accompaniment would likely convert numerous ordinary . . . bank robberies to aggravated bank robberies with only the faintest of distinctions between accompanied, *i.e.*, aggravated, and non-accompanied, non-aggravated bank robbers.").

bank robber's conduct will be punishable as a routine bank robbery under § 2113(a) and subject to no mandatory minimum.

On the other hand, the threshold test may also fail to capture truly aggravating conduct. A bank robber could, for example, force a bank customer in the parking lot to walk with him to a safe location, using that customer as a human shield against efforts of law enforcement to capture him. Because the customer never entered or exited a building (or even a vehicle) with the robber, under the threshold test, the robber's conduct will not be subject to § 2113(e)'s enhanced penalties. Although an under-inclusive test is preferable to an over-inclusive test, see *supra* Section II.A.3, the threshold test draws a particularly arbitrary line—unconnected to the history and purpose of the statute, see Br. Pet'r 27-30—and one this Court should not adopt.

3. To combat against such arbitrary results, still other judges have used, or advocated using, an over-inclusive and unwieldy three-part balancing test to interpret the forced accompaniment provision.[12] See *United States* v. *Sanchez*, 782 F. Supp. 94, 97 (C.D. Cal. 1992). In *Sanchez*, after first finding that "[k]idnapping under § 2113(e) requires asportation of the victim that is not insubstantial," the court elaborated further:

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[12] This test has not been adopted by any other court and was rejected by the majority in *United States* v. *Strobehn*, 421 F.3d at 1019-20. In *Strobehn*, Judge Fletcher used the *Sanchez* test to vigorously dissent against the majority's finding that a defendant who forced a security guard to enter a bank and lie on the floor during a 45-second bank robbery was properly convicted under the forced accompaniment provision. *Id.* at 1026-27 (Fletcher, J., dissenting).

> The substantiality of the asportation, although there can be no bright line, should be measured by duration, distance and any change in environment tending to increase the danger to which the victim is exposed, other than any danger inherent in the underlying offense.

782 F. Supp. at 97 (footnotes omitted).

Like the *de minimis* and the threshold tests, the multi-factor *Sanchez* test is over-inclusive in that it includes conduct that Congress did not speak to in the statutory text. Although the plain meaning of the term "accompany" connotes some *distance*, see Br. Pet'r 15-19, the law makes no mention of *duration* and no mention of *danger*, the remaining two factors in the *Sanchez* balancing test.

Certainly, if Congress had wanted § 2113(e) to focus on danger, it knew how do to so. See *United States* v. *Wiltberger*, 18 U.S. 76, 96 (1820) (cautioning against "departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest"). Instead, Congress included danger as an element in § 2113(d), by increasing the statutory penalties when the bank robber "puts in jeopardy the life of any person by the use of a dangerous weapon or device." Reading § 2113(e) to likewise include a danger analysis contradicts Congress's graduated penalty scheme, creating an absurd result. That is, § 2113(d) would provide one set of penalties if the bank robber endangers someone by the use of a dangerous weapon or device, while § 2113(e) would provide much more serious penalties if the bank robber endangers someone regardless of the presence of such device. In providing clarity, this Court should not give effect to such an absurd result. See *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a

statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Moreover, unlike the simplicity of the *de minimis* and the threshold tests, the *Sanchez* test may not, in fact, provide the clarity this statute needs. In an already dangerous situation, assessing whether the robber somehow enhanced risk might prove difficult. For example, even ordering bank patrons to lie on the floor might be seen as either enhancing risk (*e.g.*, through trampling or other physical injury) or as reducing risk (*e.g.*, because those on the floor might avoid flying bullets). The same can be said of ordering bank personnel into a room or a vault. Further, the scope and duration of any increased risk or danger could also prove vexing—as when a bank robber briefly ducks behind a large patron when the police have drawn weapons outside the bank window. Accordingly, adopting the *Sanchez* test merely invites new ambiguity into an already murky statute.

C. In Interpreting The Statute, The Court Should Rely On The Distinction For Kidnapping Already Drawn In The Model Penal Code

Because none of the alternative tests discussed above are adequate, amicus respectfully suggest the Court look to the Model Penal Code. See M.P.C. § 212.1 (definition of "kidnapping"). Consistent with that section, the Court should hold that forced accompaniment under § 2113(e) requires the bank robber to "unlawfully remove[] another from his place of residence or business, or a substantial distance from the vicinity where he is found . . . ."[13]

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[13] The Model Penal Code has an alternative definition for kidnapping where the defendant "unlawfully confines another for a

1. This rule is apt because the drafters of the Model Penal Code faced similar line-drawing problems to those presented by the forced accompaniment provision of § 2113(e). To address the "[m]any prior kidnapping statutes [that] combined severe sanctions with extraordinarily broad coverage," the drafters purposefully drew clear distinctions between kidnapping, felonious restraint, and false imprisonment. M.P.C. § 212 intro. note. In explaining their choice of words for the kidnapping provision (the most egregious of the three offenses), the drafters stated that "[b]y using the word 'vicinity' rather than 'place' and by speaking only of 'substantial' removal, the provision precludes kidnapping convictions based on trivial changes of location having no bearing on the evil at hand." M.P.C. § 212.1 cmt. 3.

The M.P.C. test, in making this meaningful distinction, would similarly give effect to Congress's graduated penalty scheme here. That is, applied to § 2113(e), the M.P.C. test separates conduct incidental to the crime itself (*e.g.*, directing a teller to the vault) from conduct that is truly egregious and extraordinary (*e.g.*, taking the teller hostage in the getaway car), and correspondingly worthy of Congress's enhanced punishment. See M.P.C. § 212.1 cmt. 3. ("This phrasing of the asportation requirement eliminates the absurdity of liability for kidnapping where a robber forces his victim into his own home or into the back of a store in order to retrieve valuables located there.").

2. The M.P.C. test has support in the history of the statute, suggesting that it more closely approxi-

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substantial period in a place of isolation" with any of four enumerated purposes in mind. M.P.C. § 212.1. This alternative definition is not instructive here because the term "accompany" in § 2113(e) signifies behavior beyond mere confinement.

mates Congress's intent than other possible bright-line or multi-factor tests. Both the Senate and the House reports, in referencing the provision that was to become § 2113(e), use the word "kidnapping."[14] See S. Rep. No. 73-537 (1934) (incorporating memorandum from Department of Justice stating that "[a] heavy penalty is imposed on anyone who commits a homicide or kidnaping [*sic.*] in the course of such unlawful act"); H.R. Rep. No. 73-1461 (1934) (stating that "[i]f murder or kidnaping [*sic.*] be committed in connection therewith the penalty shall be imprisonment from 10 years to life, or death if the jury shall so direct in the verdict"). And, under the contemporary understanding of "kidnapping," significant asportation of the victim was required. See *Marx*, 485 F.2d at 1186 (analogizing forced accompaniment provision to common law kidnapping, which required "tak[ing] and carry[ing] away any person by force and against his will" and federal kidnapping, which requires interstate transportation); see also Br. Pet'r 30 (summarizing common understanding of kidnapping at time of statute's enactment).

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[14] Numerous courts, including this one, have referenced kidnapping when discussing the forced accompaniment provision of § 2113(e). *See, e.g.*, *United States* v. *Tateo*, 377 U.S. 463, 464 (1964) (characterizing charge under § 2113(e) as "kidnap[p]ing in connection with the robbery"); *see also Strobehn*, 421 F.3d at 1022-23 (Fletcher, J., dissenting) (collecting cases). The United States Attorneys' Manual also refers to § 2113(e)'s proscriptions against "forcibly abduct[ing]" or "killing and kidnapping" during a bank robbery or escape therefrom. U.S. Dep't of Justice, *Criminal Resource Manual in U.S. Attorneys' Manual* § 1349, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01349.htm; *id.* at § 1354, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01354.htm.

3. The M.P.C. test is superior to possible alternative tests for interpreting forced accompaniment. First, in incorporating the substantial movement requirement, this distinction gives the statute the appropriate narrow reading. See *supra* Section I; see also M.P.C. § 212.1 (requiring the prosecution to prove that the defendant "unlawfully remove[d] another from his place of residence or business, or a *substantial* distance from the vicinity where he [was] found" (emphasis added)).

Second, the M.P.C. test best strikes the balance of being neither over- nor under-inclusive. In including only substantial movement, and thereby excluding *de minimis* movement or insignificant threshold crossings, the M.P.C. test captures only truly aggravating (and not arbitrary) conduct. Under this test, the hypothetical bank robber who pushes the security guard slightly into the bank to gain entry would not be subject to § 2113(e)'s mandatory minimum.

Further, unlike the threshold test, the M.P.C. test would also capture truly egregious acts committed entirely outside the bank or outside the victim's home. See M.P.C. § 212.1 cmt. 3 (stating that substantial distance test governs "situations in which the victim is seized elsewhere than in his residence or place of business"). For example, under the M.P.C. test, the hypothetical bank robber who forces the customer in the parking lot to walk with him to a safe location, using that customer as a human shield, could be found to have moved the victim "a substantial distance from the vicinity where he [was] found," thus subjecting the robber to the enhanced penalties of § 2113(e). See M.P.C. § 212.1.

Finally, the rule provides the clarity in application that the *Sanchez* multi-factor test lacks. The bank robber has either forced the victim to leave his home

or his business, or he has not. He has either forced the victim to move a substantial distance from the vicinity where he is found, or he has not. By focusing on distance, the M.P.C. test avoids the *Sanchez* test's unpredictable balancing of harms and the corresponding possibility of inconsistent application.

D. Under The M.P.C. Test, The Petitioner's § 2113(e) Conviction Should Be Reversed

Using the M.P.C. test as a guide, no reasonable factfinder could conclude that Mr. Whitfield forced Mrs. Parnell to accompany him in violation of § 2113(e). Mr. Whitfield did not "unlawfully remove [Mrs. Parnell] from [her] place of residence," see M.P.C. § 212.1, rather his interaction with Mrs. Parnell took place entirely within the walls of her home.

Movement within a victim's residence—conduct incidental to the underlying offense—is the type of conduct the M.P.C. drafters sought to distinguish from substantial asportation—movement that necessitates a more serious kidnapping (or forced accompaniment) charge. See M.P.C. § 212.1 cmt. 3. Because the asportation here was not substantial, and because it took place entirely within Mrs. Parnell's home, Mr. Whitfield's § 2113(e) conviction should be reversed.

CONCLUSION

For the foregoing reasons, petitioner's § 2113(e) conviction should be reversed and the remaining counts remanded for resentencing.

Respectfully submitted,

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