Nos. 17-97 and 17-651

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTWON JENKINS

UNITED STATES OF AMERICA, PETITIONER

v.

DOUGLAS D. JACKSON

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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Pursuant to Rule 15.8 of this Court, the Solicitor General files this supplemental brief to address the proper disposition of the above-captioned cases in light of *Sessions* v. *Dimaya*, No. 15-1498 (Apr. 17, 2018), slip op. The petitions in these cases present the question whether the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. The Court's resolution of *Dimaya* suggests the possibility, not addressed in the decisions below, that Section 924(c)(3)(B) may be amenable to a narrowing construction under the canon of constitutional avoidance. The government

therefore respectfully requests that this Court grant the petitions for writs of certiorari in these cases, vacate the judgments below, and remand to the court of appeals to allow that court the opportunity to consider whether the statute may be construed in a manner that preserves its constitutionality.

1. Section 924(c) prohibits a person from using or carrying a firearm "during and in relation to any crime of violence or drug trafficking crime * * * for which the person may be prosecuted in a court of the United States." 18 U.S.C. 924(c)(1)(A). The statute defines a "crime of violence" as a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 924(c)(3)(B).

In *Dimaya*, this Court held that the definition of a "crime of violence" in 18 U.S.C. 16(b)—the language of which is identical to Section 924(c)(3)(B)—is unconstitutionally vague. Slip op. 24-25. The Court determined that "[t]wo features" on which it had previously relied to invalidate the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), are likewise present in Section 16(b). Slip op. 11 (quoting *Johnson* v. *United States*, 135 S. Ct. 2551, 2557 (2015)) (brackets in original). The Court explained that Section 16(b) "calls for a court to identify a crime's 'ordinary case' in order to measure the crime's risk" and creates "uncertainty about the level of risk that makes a crime 'violent.'" *Id.* at 9-10. The Court emphasized, however, that the second "substantial risk" feature

gives rise to constitutional concerns only when combined with the first "categorical approach" feature. *Id.* at 10-11. The Court disavowed the view that the substantial-risk feature "is alone problematic," and it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk [standard] to real-world conduct.'" *Ibid.* (citation omitted; second set of brackets in original).

The Court also did not hold in *Dimaya* that the language at issue invariably mandates a categorical approach under which a court must disregard real-world conduct in favor of attempting to identify the "ordinary case." A plurality of the Court viewed Section 16(b)—which often, as in *Dimaya* itself, is applied to classify a conviction entered by another court in otherwise unrelated prior proceedings—as "[b]est read" to require such an approach. Slip op. 14 (opinion of Kagan, J.); see *id.* at 12-15. But Justice Gorsuch, concurring in part and concurring in the judgment, stressed that the government had conceded that issue and expressed his willingness to consider "in another case" whether "precedent and the proper reading of language" like Section 16(b)'s in fact requires a categorical analysis. Slip op. 17-18 (opinion of Gorsuch, J.). And Justice Thomas, joined by Justices Kennedy and Alito, filed a separate dissenting opinion in which he expressed his view that the Court "should abandon [the categorical] approach" entirely under Section 16(b). Slip op. 2 (opinion of Thomas, J.).

A non-categorical approach, under which a district court considers the defendant's own conduct rather than the "ordinary case" of his crime, may make particular sense in the context of Section 924(c)(3)(B). Unlike Section 16(b) or the ACCA's residual clause, Section 924(c)(3)(B)'s definition of a "crime of violence" is never applied to a prior conviction, the specific facts of which

may not be before the court. Section 924(c) instead employs the term "crime of violence" to describe the conduct involved in the *present* offense with which the defendant is charged. See 18 U.S.C. 924(c)(1)(A) (making it a crime to "use[] or carr[y] a firearm" "during and in relation to any crime of violence"); cf. *Johnson*, 135 S. Ct. at 2561 ("[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."). At least one court of appeals has held that the categorical approach does not apply to Section 924(c) for that reason. See *United States* v. *Galati*, 844 F.3d 152, 155 (3d Cir. 2016), cert. denied, 138 S. Ct. 636 (2018). Another has recently requested supplemental briefing on that question in light of the opinions expressed by the Members of this Court in *Dimaya*. See Order, *Ovalles* v. *United States*, No. 17-10172 (11th Cir. Apr. 17, 2018).

2. The Seventh Circuit's conclusion that Section 924(c)(3)(B) is unconstitutionally vague is premised, at least in part, on its view of this Court's precedents. It would be open to that court to revisit its view in light of the opinions in *Dimaya*.

The decisions below rely on the Seventh Circuit's prior decisions in *United States* v. *Vivas-Ceja*, 808 F.3d 719 (2015), and *United States* v. *Cardena*, 842 F.3d 959 (2016), cert. denied, 138 S. Ct. 247 (2017). 17-651 Pet. App. 10a-14a; 17-97 Pet. App. 8a. In *Vivas-Ceja*, the Seventh Circuit held that Section 16(b) requires courts to conduct a categorical, ordinary-case analysis and that the application of that approach renders the statute unconstitutionally vague. 808 F.3d at 722-723. The court's conclusion that Section 16(b) requires the categorical approach was based in part on this Court's description of Section 16(b) in *Leocal* v. *Ashcroft*, 543 U.S.

1 (2004). See *Vivas-Ceja*, 808 F.3d at 722-723. And in *Cardena*, the Seventh Circuit, without detailed analysis, viewed Section 924(c)(3)(B) to be the "same" as Section 16(b) and held that it "is also unconstitutionally vague." 842 F.3d at 996.

The opinions in *Dimaya*, however, suggest that a court could, consistent with the canon of constitutional avoidance, construe Section 924(c)(3)(B) to permit application of a non-categorical approach that considers the defendant's conduct rather than the "ordinary case" of his offense. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (explaining that a court is "obligated to construe [a] statute to avoid [constitutional] problems" if it is "'fairly possible'" to do so) (citations omitted). The government did not advocate such a construction below, and the court of appeals accordingly did not consider it. But, as the *Dimaya* plurality recognized, a court is not "foreclosed from" adopting such a construction "just because the Government has not done so." Slip op. 13; see, *e.g.*, *Grove City Coll.* v. *Bell*, 465 U.S. 555, 562 n.10 (1984) (recognizing that a party's concession on a nonjurisdictional question of law generally is "not binding" on a court). A court may consider a possible savings construction before it strikes down an Act of Congress, even if the parties had not previously advanced that construction.

3. Section 924(c) is a commonly charged federal offense, and the question presented in these cases is exceptionally important. But rather than requesting that this Court grant the petition for a writ of certiorari in one or both of these cases (or another case presenting the same issue) immediately, the government believes that the most orderly course would be to allow the courts of appeals an opportunity to consider in the first instance whether they are compelled, in light of *Dimaya*, to hold

Section 924(c)(3)(B) unconstitutional. Such consideration could include the question whether that provision must be read to require the categorical approach.

In order to put the Seventh Circuit on equal footing with other circuits that will be considering that question, the best course in these cases is to grant the petitions for writs of certiorari, vacate the judgments below, and remand to the court of appeals for any further reconsideration it may view as appropriate in light of *Dimaya*. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (noting that such a disposition is appropriate "[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"). The court of appeals should be afforded the opportunity to reconsider the decisions below. And even if the court elects not to review the construction of Section 924(c)(3)(B) in these particular cases, a remand would give it the opportunity to clarify whether it, like Members of this Court, would be open to considering that issue in a different case.

* * * * *

For the foregoing reasons, the petitions for writs of certiorari in these cases should be granted, the judgments below should be vacated, and the cases should be remanded to the court of appeals for further consideration in light of *Sessions* v. *Dimaya*, No. 15-1498 (Apr. 17, 2018).

Respectfully submitted.

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