No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLIFFORD RAYMOND SALAS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using, or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally vague.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 889 F.3d 681.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2018. A petition for rehearing was denied on May 23, 2018 (App., *infra*, 12a). On August 10, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 20, 2018. On September 7, 2018, Justice Sotomayor further extended the time to October 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 13a-20a.

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, respondent was convicted of conspiracy to commit arson, in violation of 18 U.S.C. 844(n); arson, in violation of 18 U.S.C. 844(i) and 2; using, carrying, or possessing a destructive device in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(ii); and possession of an explosive by a felon, in violation of 18 U.S.C. 842(i) and 844(a). Judgment 1-2. The district court sentenced respondent to 420 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3-4. The court of appeals vacated his Section 924(c) conviction and remanded. App., *infra*, 1a-11a.

1. In the early morning hours of August 31, 2012, respondent used two homemade Molotov cocktails to firebomb a tattoo parlor in Las Cruces, New Mexico. App., *infra*, 2a; see Gov't C.A. Br. 1-3.

Respondent committed the firebombing at the instigation of Conrad Salazar, a fellow member of a violent New Mexico prison gang called the Syndicate. 3/9/15 Tr. 95-96, 98, 120-121. Salazar was angry that his tattoo business had failed and believed that his former business associates, who had left him to open their own tattoo parlor, had stolen from him. *Id.* at 103-104. Salazar had warned his former associates that if they opened their own tattoo shop, he was "going to burn it down." *Id.* at 107-108. Salazar made two Molotov cocktails by filling empty 40-ounce beer bottles with gasoline and shoving

rags into the tops of the bottles. *Id.* 113-115. But because Salazar was wearing a monitoring device on his ankle at the time, he did not want to firebomb the shop himself. *Id.* at 104-105.

Respondent volunteered to firebomb the tattoo parlor for Salazar using the two Molotov cocktails Salazar had already made. 3/9/15 Tr. 119-121, 127. Salazar's brother drove respondent to the tattoo parlor, located in a strip mall, at around 2 a.m. *Id.* at 11, 31-32, 134-135. When they arrived, respondent pulled a mask over his face, exited the car, and used a metal bar to hammer the tattoo parlor's glass window until it shattered. *Id.* at 136-137. He then retrieved one of the Molotov cocktails from the car, lit the rag sticking out of the top, and threw it into the parlor, where it exploded. *Id.* at 137. Respondent ran back to the car, grabbed the second Molotov cocktail, lit it, and tossed it into the tattoo parlor as well. *Id.* at 137-138. The business was completely destroyed. 3/10/15 Tr. 179.

2. A federal grand jury in the District of New Mexico indicted respondent on charges of conspiracy to commit arson, in violation of 18 U.S.C. 844(n); arson, in violation of 18 U.S.C. 844(i) and 2; using, carrying, or possessing a destructive device in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (B)(ii); and possession of an explosive by a felon, in violation of 18 U.S.C. 842(i) and 844(a). Third Superseding Indictment 1-4.

Section 924(c) makes it a crime to "possess[]" a "firearm" (defined to include a "destructive device," 18 U.S.C. 921(a)(3)) "in furtherance of" any federal "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A). The statute contains its own specific definition of "crime of violence," which is applicable only "[f]or purposes of

this subsection," 18 U.S.C. 924(c)(3), and which has two subparagraphs, (A) and (B). Section 924(c)(3)(A) specifies that the term "crime of violence" includes any "offense that is a felony" and "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). Section 924(c)(3)(B) specifies that the term "crime of violence" also includes any "offense that is a felony * * * that 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). The indictment alleged that the "crime of violence" for respondent's Section 924(c) count was arson. Third Superseding Indictment 2.

The jury found respondent guilty on all counts. Verdict 1. The district court sentenced him to 30 years of imprisonment on the Section 924(c) count, see 18 U.S.C. 924(c)(1)(B)(ii), to be served consecutively to concurrent terms of 60 months of imprisonment on the other counts, for a total sentence of 420 months. Judgment 3-4.

3. On appeal, respondent argued for the first time that arson does not qualify as a crime of violence under 18 U.S.C. 924(c)(3). App., *infra*, 3a. Respondent contended that arson does not satisfy Section 923(c)(3)(A) and that Section 924(c)(3)(B) is unconstitutionally vague in light of this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Court invalidated on vagueness grounds the residual clause in the sentence-enhancement provisions of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), which classifies an offense underlying a prior conviction as a "violent felony" if that prior offense "otherwise involves conduct that presents a serious potential risk of physical injury to another."

While respondent's appeal was pending, this Court decided *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). In *Dimaya*, the Court held unconstitutionally vague the definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into the removability provisions of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 138 S. Ct. at 1210, 1213. Section 16(b)—which defines a "crime of violence" to include "any other offense that is a felony and that, 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. 16(b)—is linguistically nearly identical to Section 924(c)(3)(B). But unlike Section 924(c)(3)(B), and like the ACCA's residual clause, it applies in circumstances that include the classification of prior convictions—as in *Dimaya* itself, where an alien's state conviction had led to federal removal proceedings. See 138 S. Ct. at 1212-1213.

The Court explained that Section 16(b), as incorporated into the INA, suffered from "the same two features," "combined in the same constitutionally problematic way," that had led the Court to find the ACCA's residual clause unconstitutionally vague in *Johnson*. *Dimaya*, 138 S. Ct. at 1213. The first feature was a "categorical approach" to the crime-of-violence inquiry, under which a court would seek "to identify a crime's 'ordinary case'" and to assess whether the crime, in that idealized "ordinary case," poses a substantial risk that physical force will be used. *Id.* at 1215. Second, the statute left "uncertainty about the level of risk that makes a crime 'violent.'" *Ibid.* The Court emphasized in *Dimaya*, as it had in *Johnson*, that it "'d[id] not doubt' the constitutionality of applying" a "'substantial risk'" standard like Section 16(b)'s "'to real-world conduct,'" rather

than "'a judge-imagined abstraction.'" *Id.* at 1215-1216 (quoting *Johnson*, 135 S. Ct. at 2558, 2561).

4. The court of appeals held that the definition of "crime of violence" in Section 924(c)(3)(B) is unconstitutionally vague and vacated respondent's Section 924(c) conviction. App., *infra*, 1a-11a.

The court of appeals first noted that the parties agreed that arson, in violation of 18 U.S.C. 844(i), does not categorically qualify as a crime of violence under Section 924(c)(3)(A) because it "does not require, as an element, the use of force against the property 'of another.'" App., *infra*, 2a. "[F]or example, § 844(i) may apply to a person who destroys his or her own property." *Id.* at 2a-3a.

The court of appeals then concluded that "*Dimaya*'s reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B)." App., *infra*, 8a. The court declined to construe Section 924(c)(3)(B) to incorporate a case-specific approach to the crime-of-violence inquiry that would avoid constitutional concerns. *Id.* at 7a. The court stated that its precedent required an ordinary-case categorical approach to Section 924(c)(3)(B) of the sort ascribed to Section 16(b) in *Dimaya* and that the statute was unconstitutional under that interpretation. *Id.* at 7a-8a. And the court held that petitioner was entitled to reversal of his Section 924(c) conviction even under the plain-error standard of review. *Id.* at 9a-11a.

5. The government petitioned for rehearing en banc. In its petition, the government acknowledged that it had previously taken the position that Section 924(c)(3)(B) requires a categorical approach. Gov't C.A. Pet. for Reh'g 4. The government observed, however, that such an interpretation would raise "constitutional concerns" in light of *Dimaya*. *Ibid.* It thus urged the court of appeals to construe Section 924(c)(3)(B) to employ a

"case-specific approach," under which a jury would determine whether "a defendant's own conduct," as proved at trial, satisfied the statutory definition. *Id.* at 8.

The court of appeals denied rehearing en banc. App., *infra*, 12a.

REASONS FOR GRANTING THE PETITION

For reasons explained in the government's petition for a writ of certiorari in *United States* v. *Davis*, which is being filed in conjunction with this petition, the court of appeals' holding—that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague—is wrong and warrants this Court's review. See Pet. at 12-26, *Davis*, *supra* (*Davis* Pet.). That holding rests on a construction of Section 924(c)(3)(B) that employs a categorical "ordinary-case approach" to determine whether an offense qualifies as a crime of violence under Section 924(c)(3)(B). Although the government and courts of appeals construed the statute that way before *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), it is now clear that such a construction raises serious questions about the statute's constitutionality. Accordingly, as explained in the government's petition in *Davis*, courts should construe Section 924(c)(3)(B)—which, unlike the provision at issue in *Dimaya*, is used solely to categorize a defendant's *current* offense, not any prior conviction—to require a case-specific approach that considers the defendant's own conduct, rather than an idealized "ordinary case." See *Davis* Pet. 12. Such a construction is a natural reading of the provision's text and is unquestionably constitutional. See *id.* at 12-16; *Dimaya*, 138 S. Ct. at 1215; *Johnson* v. *United States*, 135 S. Ct. 2551, 2561 (2015).

Davis provides the best vehicle for addressing the question presented. See *Davis* Pet. at 25-26. Although

this case shares many of *Davis*'s optimal features—disposition by trial, direct review, and conduct that would plainly constitute a crime of violence under a case-specific approach—then-Judge Gorsuch's participation on a motions panel at an earlier stage of this case may preclude it from being heard by the full Court. See 8/24/16 Order 1-3 (substituting federal public defender for petitioner's previous appointed counsel). The Court should accordingly grant the petition for a writ of certiorari in *Davis*, hold the petition in this case pending its disposition of *Davis*, and then dispose of this petition as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *United States* v. *Davis* (filed Oct. 3, 2018), and then be disposed of as appropriate.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-2170

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLIFFORD RAYMOND SALAS, DEFENDANT-APPELLANT

Filed: May 4, 2018

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:12-CR-03183-RB-3)

Before: HOLMES, KELLY, and BACHARACH, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Clifford Raymond Salas was found guilty of various arson-related offenses, and he now appeals from his conviction and sentence under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of a crime of violence. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we remand to the district court with instructions to vacate Mr. Salas's § 924(c)(1) conviction and resentence him because § 924(c)(3)(B), the provision defining a "crime of violence" for the purposes of his conviction, is unconstitutionally vague.

Background

After using a Molotov cocktail to firebomb a tattoo parlor, Mr. Salas was convicted under 18 U.S.C. § 844(n) for conspiracy to commit arson (count 1), 18 U.S.C. §§ 2 and 844(i) for aiding and abetting the commission of arson (count 2), and 18 U.S.C. § 842(i) for being a felon in possession of an explosive (count 4). 1 R. 5-7, 82-83. He was also convicted under 18 U.S.C. § 924(c)(1) for using a destructive device in furtherance of a crime of violence (count 3)—the "destructive device" being a Molotov cocktail,[1] and the "crime of violence" being arson. Id. For his offenses, Mr. Salas was sentenced to a total of 35 years' imprisonment: 5 years for counts 1, 2, and 4 and, pursuant to § 924(c)(1)(B)(ii)'s mandatory minimum sentence, 30 years for count 3. Id. at 84; 5 R. 13-14. He was also sentenced to 3 years' supervised release. 1 R. 85.

Section 924(c)(3) defines the term "crime of violence" as either a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or a felony "that 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." Both parties agree that the first definition, known as the "elements clause," does not apply here because § 844(i) arson does not require, as an element, the use of force against the property "of another"; for example, § 844(i) may apply to a person who destroys his or her own

[1] A Molotov cocktail qualifies as a "destructive device" for the purposes of § 924(c)(1)(B)(ii) and as an "explosive" for the purposes of § 844(i). E.g., United States v. Gillespie, 452 F.3d 1183, 1185 (10th Cir. 2006).

property. See 18 U.S.C. § 844(i) (2012) (prohibiting damaging or destroying "any building, vehicle, or other real or personal property" used or affecting interstate or foreign commerce (emphasis added)); see also Torres v. Lynch, 136 S. Ct. 1619, 1629-30 (2016) (noting that a similar "crime of violence" provision would not apply to definitions of arson that include the destruction of one's own property). Consequently, Mr. Salas could have been convicted only under the second definition, known as § 924(c)(3)'s "residual clause."

At trial, Mr. Salas did not argue that § 844(i) arson does not satisfy § 924(c)(3)'s crime-of-violence definition, and he did not object when the district court determined that arson is a crime of violence and instructed the jury to that effect. On appeal, Mr. Salas argues that § 924(c)(3)'s residual clause is unconstitutionally vague.

Discussion

Because Mr. Salas raises this issue for the first time on appeal, we review for plain error. See United States v. Avery, 295 F.3d 1158, 1181-82 (10th Cir. 2002). "Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." United States v. Price, 265 F.3d 1097, 1107 (10th Cir. 2001). "However, we apply this rule less rigidly when reviewing a potential constitutional error." United States v. James, 257 F.3d 1173, 1182 (10th Cir. 2001); accord United States v. Benford, 875 F.3d 1007, 1016 (10th Cir. 2017). The government concedes that if Mr. Salas can prove the first two elements, the third and fourth would be satisfied, too. Aplee. Br. at 12 n.11. The issues, then, are

whether there was error—that is, whether § 924(c)(3)(B) is unconstitutionally vague—and, if so, whether that error was plain.

A. Section 924(c)(3)(B) Is Unconstitutionally Vague

In Sessions v. Dimaya, No. 15-1498, 2018 WL 1800371 (U.S. Apr. 17, 2018), the Supreme Court held that 18 U.S.C. § 16(b)'s definition of a "crime of violence" is unconstitutionally vague in light of its reasoning in Johnson v. United States, 135 S. Ct. 2551 (2015), which invalidated the similarly worded residual definition of a "violent felony" in the Armed Career Criminal Act (ACCA). 2018 WL 1800371, at *4; see also Golicov v. Lynch, 837 F.3d 1065, 1072 (10th Cir. 2016) (ruling that § 16(b) "must be deemed unconstitutionally vague in light of Johnson"). The Dimaya Court explained that the same two features rendered the clauses unconstitutionally vague: they "'require[] a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents' some not-well-specified-yet-sufficiently-large degree of risk." Dimaya, 2018 WL 1800371, at *9 (quoting Johnson, 135 S. Ct. at 2557). The Court also rejected several reasons for distinguishing § 16(b) from the ACCA, namely that § 16(b) requires a risk that force be used in the course of committing the offense, focuses on the use of physical force rather than physical injury, does not contain a confusing list of enumerated crimes, and does not share the ACCA's history of interpretive failures. Id. at *12-16.

Mr. Salas argues that § 924(c)(3)(B)'s definition of a "crime of violence," which is identical to § 16(b)'s,[2] is likewise unconstitutionally vague. Indeed, we have previously noted the similarity between the two provisions and consequently held that "cases interpreting [§ 16(b)] inform our analysis" when interpreting § 924(c)(3)(B). United States v. Serafin, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009). Other circuits interpret § 16(b) and § 924(c)(3)(B) similarly, as well. See In re Hubbard, 825 F.3d 225, 230 n.3 (4th Cir. 2016) ("[T]he language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other."). In fact, the Seventh Circuit has faced the same scenario that we face now: it ruled that § 16(b) was unconstitutionally vague in United States v. Vivas-Ceja, 808 F.3d 719 (7th Cir. 2015), and then addressed the constitutionality of § 924(c)(3)(B) in United States v. Cardena, 842 F.3d 959 (7th Cir. 2016). In Cardena, the Seventh Circuit ruled that § 924(c)(3)'s residual clause was "the same residual clause contained in [§ 16(b)]" and accordingly held that "§ 924(c)(3)(B) is also unconstitutionally vague." Cardena, 842 F.3d at 996.

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[2] For the sake of comparison, § 16 provides:

> The term "crime of violence" means . . . (b) any other offense that is a felony and that, 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.

And § 924(c)(3) provides:

> For purposes of this subsection the term "crime of violence" means an offense that is a felony and . . . (B) that 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.

In support of § 924(c)(3)(B)'s constitutionality, the government "submits that § 924(c)(3)(B) is distinguishable from the ACCA's residual clause for the same reasons it argued that § 16(b) was distinguishable." Aplee. Br. at 7. That is, § 924(c)(3)(B) requires the risk that force be used in the course of committing the offense, which the ACCA does not; § 924(c)(3)(B) focuses on the use of physical force rather than physical injury; § 924(c)(3)(B) does not contain the confusing list of enumerated crimes that the ACCA does; and, unlike the ACCA, § 924(c)(3)(B) does not have a history of interpretive failures. Dimaya, however, explicitly rejected all of these arguments. 2018 WL 1800371, at *12-16.

The only way the government distinguishes § 924(c)(3)(B) from § 16(b) is by noting that, pursuant to § 924(c)(1)(A), the former requires a sufficient nexus to a firearm, which narrows the class of offenses that could qualify as crimes of violence. See Ovalles v. United States, 861 F.3d 1257, 1265-66 (11th Cir. 2017) ("The required 'nexus' between the § 924(c) firearm offense and the predicate crime of violence makes the crime of violence determination more precise and more predictable."). But this firearm requirement simply means that the statute will apply in fewer instances, not that it is any less vague. The required nexus does not change the fact that § 924(c)(3)(B) possesses the same two features that rendered the ACCA's residual clause and § 16(b) unconstitutionally vague: "an ordinary-case requirement and an ill-defined risk threshold," Dimaya, 2018 WL 1800371, at *16. Requiring a sufficient nexus to a firearm does not remedy those two flaws.

Other circuits have upheld § 924(c)(3)(B)'s constitutionality, but they were not faced, as we are here, with binding authority holding § 16(b) unconstitutional. See United States v. Garcia, 857 F.3d 708, 711 (5th Cir. 2017); United States v. Eshetu, 863 F.3d 946, 955 (D.C. Cir. 2017); Ovalles, 861 F.3d at 1265 (11th Cir.); United States v. Prickett, 839 F.3d 697, 699 (8th Cir. 2016); United States v. Hill, 832 F.3d 135, 150 (2d Cir. 2016); United States v. Taylor, 814 F.3d 340, 379 (6th Cir. 2016). For the most part, the grounds for their decisions apply equally to § 16(b) and mirror the distinctions between the ACCA's residual clause and § 16(b) that were rejected in Dimaya.

Notably, only the Sixth Circuit has held that § 924(c)(3)(B) is constitutional while § 16(b) is not. See Shuti v. Lynch, 828 F.3d 440, 446 (6th Cir. 2016) (ruling that § 16(b) is unconstitutionally vague); Taylor, 814 F.3d at 375-76 (rejecting a void-for-vagueness challenge to § 924(c)(3)(B)). The Sixth Circuit stated that the provisions differed because, in contrast to § 16(b), "§ 924(c) is a criminal offense and 'creation of risk is an element of the crime,'" which "requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding." Shuti, 828 F.3d at 449 (quoting Johnson, 135 S. Ct. at 2557). It further noted that courts evaluate this risk based on the defendant's actual conduct. Id.

This is a distinction without a difference, though, and is incorrect to the extent it suggests that whether an offense is a crime of violence depends on the defendant's specific conduct. As an initial matter, a law can be unconstitutionally vague even if it is a criminal offense that requires a determination of guilt beyond a

reasonable doubt. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (invalidating a vagrancy ordinance). Additionally, "[w]hether a crime fits the § 924(c) definition of a 'crime of violence' is a question of law," United States v. Morgan, 748 F.3d 1024, 1034 (10th Cir. 2014), and we employ the categorical approach to § 924(c)(3)(B), meaning we determine whether an offense is a crime of violence "without inquiring into the specific conduct of this particular offender," Serafin, 562 F.3d at 1107-08 (quoting United States v. West, 550 F.3d 952, 957 (10th Cir. 2008)). Consequently, § 924(c)(3)(B), like § 16(b), "requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk." Dimaya, 2018 WL 1800371, at *5 (quoting James v. United States, 550 U.S. 192, 208 (2007), overruled on other grounds by Johnson, 135 S. Ct. 2551). Regardless of whether a jury must find the defendant guilty of § 924(c) beyond a reasonable doubt, then, this "ordinary-case requirement and an ill-defined risk threshold" combines "in the same constitutionally problematic way" as § 16(b) and "necessarily 'devolv[es] into guesswork and intuition,' invit[es] arbitrary enforcement, and fail[s] to provide fair notice." Id. at *7, *16 (quoting Johnson, 135 S. Ct. at 2559).

Ultimately, § 924(c)(3)(B) possesses the same features as the ACCA's residual clause and § 16(b) that combine to produce "more unpredictability and arbitrariness than the Due Process Clause tolerates," Id. at *16 (quoting Johnson, 135 S. Ct. at 2558), and Dimaya's reasoning for invalidating § 16(b) applies equally to § 924(c)(3)(B). Section 924(c)(3)(B) is likewise unconstitutionally vague.

B. Mr. Salas's Conviction Constitutes Plain Error

Even though Mr. Salas's conviction and sentence under 18 U.S.C. § 924(c)(1) was erroneous because § 924(c)(3)(B) is unconstitutionally vague, we can grant him relief only if the error was "plain" because Mr. Salas did not raise that argument at the district court level. See United States v. Ruiz-Gea, 340 F.3d 1181, 1187 (10th Cir. 2003). An error is plain if it is "clear or obvious at the time of the appeal." United States v. Gonzalez-Huerta, 403 F.3d 727, 732 (10th Cir. 2005); see also Henderson v. United States, 568 U.S. 266, 276 (2013) ("[A]n appellate court must apply the law in effect at the time it renders its decision." (quoting Thorpe v. Hous. Auth., 393 U.S. 268, 281 (1969))). In turn, "[a]n error is clear and obvious when it is contrary to well-settled law." United States v. Whitney, 229 F.3d 1296, 1309 (10th Cir. 2000). "In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue. The absence of such precedent will not, however, prevent a finding of plain error if the district court's interpretation was 'clearly erroneous.'" Ruiz-Gea, 340 F.3d at 1187 (citation omitted). In the absence of Supreme Court or circuit precedent directly addressing a particular issue, "a circuit split on that issue weighs against a finding of plain error." United States v. Wolfname, 835 F.3d 1214, 1221 (10th Cir. 2016). But disagreement among the circuits will not prevent a finding of plain error if the law is well settled in the Tenth Circuit itself. See id. at 1221-22.

We have found plain error where a holding was "implicit" in a previous case but have declined to find plain error where a previous case addressed the relevant

issue merely in dicta. Compare id. at 1218, with Whitney, 229 F.3d at 1309. Here, although neither the Supreme Court nor this circuit has explicitly addressed the constitutionality of § 924(c)(3)(B), both have directly ruled on the constitutionality of identical language in § 16(b). See Dimaya, 2018 WL 1800371, at *4; Golicov, 837 F.3d at 1072. The identical wording of § 16(b) and § 924(c)(3)(B) means that the provisions contain the same two features of the ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." Dimaya, 2018 WL 1800371, at *16 (alteration in original) (quoting Johnson, 135 S. Ct. at 2557). Accordingly, Dimaya compels the conclusion that § 924(c)(3)(B) is unconstitutional, too.

There is ostensibly a circuit split on the issue of § 924(c)(3)(B)'s constitutionality, which ordinarily weighs against a finding of plain error. See Wolfname, 835 F.3d at 1221. But Dimaya has since abrogated the reasoning of those cases. Moreover, we do not view a circuit split as persuasive evidence that an error was not plain if the other circuits were "writing on a clean slate," while we have relevant precedent to consider. Id. at 1221 n.3.

The government makes two additional points for why error, if found, would not be plain. The first is that this circuit has repeatedly upheld § 924(c) convictions that were based on § 844(i) predicates. All of those cases, though, were pre-Dimaya (and pre-Johnson, for that matter), and none of them addressed a void-for-vagueness challenge. The second additional point is that the Eleventh Circuit found no plain error regarding a challenge to § 924(c)(3)(B)'s constitutionality in United States v. Langston, 662 F. App'x 787, 794 (11th Cir. 2016), cert. denied, 137 S. Ct. 1583 (2017).

When that case was decided, however, neither the Supreme Court nor the Eleventh Circuit had ruled that § 16(b) was unconstitutionally vague, which distinguishes Langston from the current appeal.

In sum, the reasons why § 16(b) is unconstitutionally vague apply equally to § 924(c)(3)(B). Because they are identically worded, we interpret § 16(b) and § 924(c)(3)(B) similarly and apply caselaw interpreting the former to the latter. Serafin, 562 F.3d at 1108 & n.4. Additionally, we apply the plain error rule "less rigidly when reviewing a potential constitutional error." James, 257 F.3d at 1182. As a result, Mr. Salas's conviction under § 924(c)(1) was clearly erroneous under Supreme Court and Tenth Circuit precedent and constitutes plain error.

REMANDED for resentencing, with instructions to the district court to vacate count 3 of Mr. Salas's conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-2170

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLIFFORD RAYMOND SALAS, DEFENDANT-APPELLANT

Filed: May 23, 2018

ORDER

Before: HOLMES, KELLY, and BACHARACH, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, 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.

3. 18 U.S.C. 842(i) provides:

Unlawful acts

(i) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce.

4. 18 U.S.C. 844 provides in pertinent part:

Penalties

(a) Any person who—

(1) violates any of subsections (a) through (i) or (*l*) through (*o*) of section 842 shall be fined under this title, imprisoned for not more than 10 years, or both; and

(2) violates subsection (p)(2) of section 842, shall be fined under this title, imprisoned not more than 20 years, or both.

* * * * *

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign com-

merce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

* * * * *

(n) Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense the commission of which was the object of the conspiracy.

* * * * *

5. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment

if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that 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.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection,

or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence

of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *