NO. 18-428

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

CLIFFORD RAYMOND SALAS,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

The government's petition is premised on the proposition that a case-specific approach should apply to determine whether an offense is a "crime of violence" under the residual clause of § 924(c). See 18 U.S.C. § 924(c)(3)(B). In Sessions v. Dimaya, 138 S.Ct. 1204 (2018), this Court held that the materially identical residual clause of 18 U.S.C. § 16(b) -- the two differ only in that § 924(c)'s residual clause speaks of "an offense," and § 16(b) speaks of "any other offense," see Pet. App. 13(a), 17(a) (reproducing provisions) -- is unconstitutionally vague on a categorical, ordinary-case approach. The government makes no argument that, if the categorical approach applies to § 924(c)'s residual clause, the clause can be upheld after Dimaya.

As the government candidly acknowledges in the related petition in United States v. Davis, No. 18-431, its advocacy for a case-specific approach is new. Davis Pet. at 12. Before Dimaya, the government had interpreted § 924(c)'s residual clause to require the categorical approach, id. at 17, and all but one circuit court to decide the issue had agreed with it. Now, in an about-face, it advocates for a case-specific approach. Id. at 12-16. It does so based on a supposed distinction with § 16(b), and with the

residual clause of the Armed Career Criminal Act that this Court held unconstitutionally vague on a categorical approach in Johnson v. United States, 135 S.Ct. 2551 (2015), that is evident on the face of § 924(c). Davis Pet. at 12-16.

That the government was previously of the opposite view creates problems for its request for review in this case. The government proposed a jury instruction that took the crime-of-violence issue from the jury, which is at odds with its present position that a jury must decide the issue. Id. at 13, 14-15. On appeal to the Tenth Circuit, the government likewise did not make an argument for a case-specific approach. And it failed to do so even though the Tenth Circuit had already held § 16(b) to be unconstitutionally vague under the categorical approach, as this Court would later hold in Dimaya, the reason the government offers for its change of heart. Id. at 20-21. Not until its petition for rehearing *en banc* did the government first present to the Tenth Circuit its current argument.

The government asks this Court to hold its petition in this case pending the disposition in Davis and then to dispose of the petition accordingly. Pet. at 8. As the government proposed the jury instruction

that it now seeks to controvert, and with its argument for a case-specific approach not having been properly presented to, or passed on, by the Tenth Circuit, this Court should not entertain its new argument. This Court should, instead, deny the petition regardless of what it does in Davis.

Even apart from this, review is unwarranted. The three circuits to rule against the government since Dimaya have done so on the basis of their circuit precedent that the categorical approach applies to § 924(c)'s residual clause. Accordingly, none has addressed, on its terms, the government's present argument for a case-specific approach. There is therefore not now the post-Dimaya split on the issue that the government asserts. The circuits may yet align with the position of the three circuits that have concluded, after Dimaya, that a case-specific approach applies.

The issue of whether a case-specific approach should apply to § 924(c)'s residual clause, central to the government's position here, may also benefit from further percolation. Numerous arguments that bear on the issue have not been satisfactorily addressed by the Courts of Appeals that have ruled on the government's new position on its terms. The *en banc*

Fourth Circuit has already heard argument on the question, and the D.C. Circuit is deciding whether to convene *en banc* on the government's petition, after receiving a response two months ago. There is therefore good reason to expect that such arguments will receive further scrutiny. And the issue is being litigated in many other circuits as well.

Finally, this case is a poor vehicle, for reasons beyond the one the government identities as making this case an inferior vehicle to Davis. As this case comes to this Court on plain-error review, this Court could resolve it on plainness grounds without reaching the underlying claim of error on which review is sought. Also, the government's proposal of a jury instruction that removed the crime-of-violence issue from the jury's consideration resulted in invited error in the Tenth Circuit.

REASONS TO DENY THE PETITION

I. Because the government proposed the jury instruction that the crime-of-violence issue was not for the jury to decide, and did not argue for a case-specific approach to the Tenth Circuit panel, this Court should deny the government's petition.

In the district court, the government affirmatively advocated for the position that whether arson is a crime of violence is a question of law, and thus not the proper subject of a jury determination. District Court Doc. 294 at 13. It proposed the jury instruction that the district court ultimately used on the § 924(c) charge. Compare id. at 13-14 with District Court Doc. 301 at 20-21 (court's instruction). The instruction informed the jury it was to determine if Mr. Salas committed arson. District Court Doc. 301 at 20. But the instruction did not require the jury to decide whether arson was a crime of violence. Rather, the jury was told, "[y]ou are instructed that arson is a crime of violence." Id.

The government now takes the opposite position. It urges this Court to adopt a case-specific approach in which a jury is to determine whether, on the facts at hand, the defendant has committed a crime of violence. Davis Pet. at 13, 19, 20. That is, the government asks this Court to conclude

that the approach it proposed in the district court, and that the district court used in instructing the jury, was wrong.

This should prevent the government from obtaining review on its present theory. A party may not "'assign as error any portion of the charge [given to the jury] . . . unless the party objects thereto before the jury retires to consider its verdict.'" United States v. Wells, 519 U.S. 482, 488 (1997) (quoting Fed. R. Crim. P. 30) (alterations by the Court in Wells).

In Wells, the government sponsored a jury instruction on materiality in a bank-fraud prosecution under 18 U.S.C. § 1014, but argued before this Court that materiality was not an element of the offense. Id. at 485, 487. Given the government's position that the jury need not decide materiality, this Court could properly characterize it as contending that "the instruction it proposed was harmless surplusage." Id. at 487. Because the government's position was not to "impute error to the trial court" in the instruction given, Rule 30 did not prevent review. Id.

But here, the necessary import of the government's position is indeed to impute such instructional error to the trial court. The government now urges that the jury *should* have been instructed to decide the crime-of-

violence issue, but at trial it asked the court to instruct the jury that it *not* decide the issue because arson is a crime of violence as a matter of law. The imputed error, moreover, is necessarily as to § 924(c)'s residual clause. The government expressly declined in the Tenth Circuit to defend Mr. Salas's § 924(c) conviction on the theory that federal arson satisfies the elements clause of the crime-of-violence definition. Pet. App. 2a-3a (noting parties' agreement on this point); see also 18 U.S.C. § 924(c)(3)(A) (elements clause) (reproduced in Pet. App. 17a). The government should be barred from assigning error to an instruction to which it not only failed to object, but that it actively sought.

Even analogizing to the more-flexible standard that obtains after certiorari is granted, it would not be appropriate to consider the government's argument. Under Springfield v. Kibbe, 480 U.S. 257, 259 (1987) (per curiam), this Court treats "an inconsistency between a party's request for a jury instruction and its position before this Court as just one of several considerations bearing on whether to decide a question on which [it] granted certiorari." Wells, 519 U.S. at 488. In Wells, this Court stressed that in Kibbe, where it had dismissed the writ as improvidently granted,

id. at 488 n.6, an issue necessary to decide the question presented was neither raised nor decided in the circuit court. As this Court explained its earlier decision, "the petitioner in Kibbe had not, in the Court of Appeals, raised an issue critical to resolving the question presented in its petition for a writ of certiorari, the Court of Appeals had not considered that related issue, and the petitioner had not explicitly raised that related issue in its certiorari petition." Id.

This case is a match with Kibbe. Here, as there, an issue critical to resolving the question presented was not properly advanced in the Court of Appeals, and was not passed on there. The government's argument for why § 924(c)'s residual clause is not unconstitutionally vague is premised on the case-specific approach applying, rather than the categorical approach. Davis Pet. at 12-16. This is a position it first raised to the Tenth Circuit in its petition for rehearing *en banc*. That was too late. The Tenth Circuit "will not consider new assertions presented for the first time on rehearing en banc." Herrera v. Lemaster, 301 F.3d 1192, 1196 (10th Cir. 2002) (en banc).

Likewise, the Tenth Circuit did not rule on the government's current position that a case-specific approach should apply to § 924(c)'s residual clause. It certainly did not do so by denying rehearing *en banc*. Even as to issues properly raised in an *en banc* petition, such a denial is merely a discretionary decision not to grant further review, akin to this Court's denial of certiorari, which does not express the full court's view on the merits of the issues raised.

The panel did not pass on the government's un-raised issue about the case-specific approach either. The government says that the Tenth Circuit "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." Pet. at 6 (citing Pet. App. 7a). This reads far too much into the panel decision.

On the cited page of the Appendix, the panel merely noted the Sixth Circuit's efforts, in a case in which it held § 16(b) unconstitutionally vague, Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016), cert. denied, 138 S.Ct. 1977 (2018), to explain why it had reached a different result as to § 924(c)'s residual clause in its earlier decision in United States v. Taylor, 814 F.3d

340 (6th Cir. 2016), cert. denied, 138 S.Ct. 1975 (2018). The Tenth Circuit quoted Shuti to the effect that § 924(c) is a criminal offense that has creation of risk as an element, requiring a jury finding, Pet. App. 7a, and added that Shuti also noted that risk is evaluated based on the defendant's actual conduct, id.

In disagreeing, the Tenth Circuit observed that a criminal law can be unconstitutionally vague even if it requires a jury finding, id. at 7a-8a, and that Shuti is "incorrect to the extent it suggests" that the crime-of-violence determination "depends on the defendant's specific conduct," id. at 7a. Rather, invoking its binding authority of United States v. Serafin, 562 F.3d 1105 (10th Cir. 2009), the Tenth Circuit stated that the determination is based on the categorical approach, which looks to the ordinary case of an offense, and not what the defendant did. Pet. App. 8a. So, "[r]egardless of whether a jury must find the defendant guilty of § 924(c) beyond a reasonable doubt," the combination of the ordinary-case requirement and a too-vague risk standard made § 924(c)'s residual clause unconstitutionally vague. Id.

The Tenth Circuit did not tackle any argument -- like the one the government would make in its rehearing *en banc* petition, and that it makes in its certiorari petition -- for *why* § 924(c)'s residual clause should be read as calling for a case-specific approach. At best, the panel distinguished a decision "to the extent it suggest[ed]," id. at 7a, the defendant's specific conduct mattered by stating that was not circuit law. This is not the consideration, on its terms, of the issue that is essential to the government's position in this Court.

In both the government's failure to raise the issue, and the Court of Appeals not deciding the issue, this case is the same as Kibbe. And although the government has stressed the case-specific approach in seeking review here, see Davis Pet. at 12-16, that the issue was squarely presented in the petition in Kibbe mattered because it bore on whether the respondent had timely objected. Kibbe, 480 U.S. at 260. The objection at the earliest opportunity in Kibbe led to dismissal of the writ as improvidently granted. Id. Here, with the other two factors a match with Kibbe, and with Mr. Salas objecting at the earliest opportunity, it should lead to denial of the writ.

The proceedings on appeal also show that, unlike in Wells, in which this Court declined to dismiss the writ as improvidently granted, to decide whether a case-specific approach should apply here would indeed be (at least) to "excuse inattention." Wells, 519 U.S. at 489. In Wells, it was this Court's decision in United States v. Gaudin, 515 U.S. 506 (1995), requiring a jury determination of materiality in 18 U.S.C. § 1001 prosecutions, that gave the government reason to rethink its prior position. Wells, 519 U.S. at 489. When the Eight Circuit in Wells requested supplemental briefing on the applicability of Gaudin to § 1014 offenses, the government argued, contrary to what the Eighth Circuit had assumed in several cases, id., that materiality is not an element of a § 1014 prosecution, and that the judge's resolution of materiality was therefore harmless. Id. at 486.

In contrast, the government in this case chose not to preserve a contention that the case-specific approach should apply to § 924(c)'s residual clause, even though the handwriting was on the wall for that clause by the outset of Mr. Salas's appeal. The Tenth Circuit had held in Golicov v. Lynch, 837 F.3d 1065 (10th Cir. 2016), cert. denied, 138 S.Ct. 2018 (2018), that the materially identical § 16(b) was unconstitutionally vague in

light of this Court's decision in Johnson. In doing so, it had reasoned that the same two factors that conspired to create unacceptable vagueness for the ACCA's residual clause -- the consideration of a hypothesized, ordinary case required by the categorical approach and an imprecise risk standard, Johnson, 135 S.Ct. at 2561 -- did so for § 16(b) as well. Golicov, 837 F.3d at 1072-73. The court in Golicov had also rejected the same arguments about textual differences between the ACCA's residual clause and § 16(b) that this Court would later reject in Dimaya. Compare id. at 1073-74 with Dimaya, 138 S.Ct. at 1218-21 (opinion of the Court). If those considerations would not distinguish § 16(b) from Johnson under the categorical approach, they would not distinguish § 924(c)'s residual clause under that approach either.

Nevertheless, when Mr. Salas relied on Golicov to argue that the same result was required for § 924(c)'s residual clause as for § 16(b), the government did not contend a case-specific approach should be used. To be sure, the Tenth Circuit had previously held that the categorical approach applies to § 924(c)'s residual clause. Serafin, 562 F.3d at 1107-08. But this did not excuse the government from the usual requirement of

preserving an argument it might later seek to advance. See, e.g., MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 125 (2007) (considering argument not waived where presented to circuit panel that could not itself grant relief because of contrary circuit precedent). Even if the panel could not adopt a case-specific approach, the government should have raised the issue to allow for its consideration by the *en banc* court. It did not do so. And it did not do so even though, by the time it filed its appellate brief in May 2017, this Court had already granted review in Dimaya. Lynch v. Dimaya, 137 S.Ct. 31 (2016).

Nor, in the two and one-half weeks between when Dimaya issued on April 17, 2018 and the panel ruled on May 4, did the government request the chance to make its argument for a case-specific approach. Perhaps this reflected a recognition that the time for making the argument to allow for its later consideration had long since passed.

Or perhaps (or perhaps also) it reflected a recognition that, contrary to what the government now suggests, Dimaya did not make the argument for a case-specific approach newly available. The government contends that "[b]efore Johnson and Dimaya, it made sense to treat the textual

similarities of the three statutes as an indication that all three should employ that same [categorical] approach." Davis Pet. at 20. (It makes sense afterwards too.) This description, of course, is at odds with the government's argument that the key reason for a case-specific approach as to § 924(c)'s residual clause is that the provision -- unlike, it says, the ACCA's residual clause and § 16(b) -- does not operate as to past convictions. Id. at 12-16. This aspect of the statute is evident on its face. See 18 U.S.C. § 924(c)(1)(A).

Likewise, Dimaya did not work a change in the importance of the categorical approach to the question of whether a residual clause like the one here is unconstitutionally vague. Id. at 21. It was Johnson that established the central role of the categorical approach to the vagueness inquiry. Johnson, 135 S.Ct. at 2561; see also Welch v. United States, 136 S.Ct. 1257, 1262 (2016) (vagueness of ACCA's residual clause "rests in large part" on use of categorical approach). Five Justices in Dimaya easily concluded, under Johnson, that § 16(b) is unconstitutionally vague on a categorical approach. Dimaya, 138 S.Ct. at 1213 (opinion of the Court) (Johnson's application "straightforward"), 1215-16; id. at 1231(Gorsuch, J.,

concurring in part and concurring in the judgment) (using categorical approach, "the answer comes readily for me" based on Johnson).

Of course, the government may have been banking on prevailing in Dimaya on its arguments that the risk standard that § 16(b) shares with § 924(c)'s residual clause is a sufficiently certain one. But that does not insulate it from the consequences of its litigating strategy here. Despite Golicov, and the pendency of Dimaya in this Court, the government chose not to argue that a case-specific approach, rather than the categorical approach, should apply to § 924(c)'s residual clause.

What Justice Gorsuch said in Dimaya about following the government's concession there that § 16(b) calls for the categorical approach applies equally to the government's considered decision not to press a case-specific approach here at the proper time. Just as "normally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government," Dimaya, 138 S.Ct. at 1232 (Gorsuch, J., concurring in part and concurring in the judgment), so this Court should not rescue the government from its litigation decision in this case.

II. There is not the division in the circuit courts the government describes and percolation on an issue on which the government switched positions after Dimaya would be beneficial.

The government asserts there is a "growing circuit disagreement" on its position in this Court. Davis Pet. at 11; see also id. at 21, 22 (similar). In fact, as to the premise on which the question presented is based, there is not. Again, the government's argument for why § 924(c)'s residual clause is not unconstitutionally vague depends on the proposition that a case-specific approach applies to that clause. The three circuits that have ruled against the government have not addressed that essential proposition on its terms. Two of the circuits have held that Dimaya -- a case applying a categorical approach to § 16(b) -- was not an intervening change in the law that would allow a panel to overrule circuit precedent that the categorical approach applies to § 924(c)'s residual clause. The other circuit is the Tenth Circuit in this case, in which the government did not even argue for a non-categorical approach until its *en banc* petition.

That these circuits had precedent calling for a categorical approach to § 924(c)'s residual clause is unsurprising. As the government acknowledges, it has previously "advocated" for the approach "to the

determination whether an offense constitutes 'a crime of violence' under Section 924(c)(3)(B)." Id. at 12. This no doubt contributed to the virtually unanimous view of the circuit courts, at least until the government changed its position after Dimaya, that the categorical approach that has long applied to § 16(b), Leocal v. Ashcroft, 543 U.S. 1, 7 (2004), applies to § 924(c)'s residual clause as well.[1]

The state of the law that the government induced led predictably to the rejection of its request for a different approach now to panels in the Fifth and D.C. Circuits, which simply followed their existing precedent. It also means the government is wrong to urge that further percolation would be of no benefit. Davis Pet. at 23.

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[1] See United States v. Ivezaj, 568 F.3d 88, 95-96 (2d Cir. 2009); United States v. Fuentes, 805 F.3d 485, 498 (4th Cir. 2015); United States v. Williams, 343 F.3d 423, 431 (5th Cir. 2003); United States v. Taylor, 814 F.3d 340, 378 (6th Cir. 2016); Bush v. Pitzer, 133 F.3d 455, 457 (7th Cir. 1997); United States v. Prickett, 839 F.3d 697, 698 (8th Cir. 2016) (per curiam), cert. denied, 138 S.Ct. 1976 (2018); United States v. Mendez, 992 F.2d 1488, 1490 (9th Cir. 1993); United States v. Serafin, 562 F.3d 1105, 1107-08 (10th Cir. 2009); United States v. McGuire, 706 F.3d 1333, 1336 (11th Cir. 2013); United States v. Kennedy, 133 F.3d 53, 56 (D.C. Cir. 1998). The only circuit before Dimaya to hold that the categorical approach did not apply to § 924(c)'s residual clause was the Third Circuit. See United States v. Robinson, 844 F.3d 137 (3d Cir. 2016), cert. denied, 138 S.Ct. 215 (2018).

A. No circuit to rule against the government has addressed on its terms the government's post-Dimaya position that a case-specific approach applies, but instead each has relied on circuit precedent consistent with the government's pre-Dimaya position that the categorical approach applies.

All three circuits to hold § 924(c)'s residual clause unconstitutionally vague after Dimaya have done so by applying their pre-Dimaya precedent that whether an offense is a crime of violence is determined under the categorical approach. Davis Pet. at 22 (recognizing this). Using that approach, they easily came to the same conclusion this Court did in Dimaya when it applied the categorical approach to § 16(b), and its identical risk standard. Pet. App. 8a; Davis Pet. App. 4a-5a; United States v. Eshetu, 898 F.3d 36, 37-38 (D.C. Cir.) (per curiam) (on panel rehearing as to Lovo and Sorto), petition for rehearing *en banc* filed (D.C. Cir. Aug. 31, 2018). None of these circuits reached, on its terms, the government's new, post-Dimaya position that a case-specific approach should instead be used for § 924(c)'s residual clause.

In Davis, the Fifth Circuit first noted the government was seeking to "abandon[] its longstanding position" that the categorical approach applies

to § 924(c)'s residual clause. Davis Pet. App. 4a. The panel explained that it did not consider Dimaya to allow it to "overrule our prior precedent" and to "adopt a new 'case specific' method," id., for that clause:

> Regardless of whether Dimaya would otherwise permit us to do so, we do not find a suggestion by a minority of justices in that case sufficient to overrule our prior precedent.

Id.

The D.C. Circuit likewise merely adhered to prior precedent in Eshetu. The panel did not address "the clean-slate merits" of the government's position that a fact-specific approach should be used. Eshetu, 898 F.3d at 37. This was because "as a panel," it was "not at liberty to adopt it; circuit precedent demands a categorical approach to section 924(c)(3)(B)." Id. Dimaya, the panel continued, did not require a conclusion that its prior precedent was "'clearly an incorrect statement of current law,'" id. at 38 (quotation omitted), the circuit standard for a panel to overrule circuit precedent with the full court's endorsement, id.

As for this case, the government did not even argue for a case-specific approach to the panel. The Tenth Circuit too relied on its pre-

Dimaya precedent that a categorical approach applied. Pet. App. 8a; *supra* at 9-10.

There is thus no post-Dimaya decision that rejects, on its terms, the government's position that a case-specific approach should be used for § 924(c)'s residual clause. The only three decisions to reach the issue on a "clean slate" following Dimaya have adopted the government's new position. United States v. Douglas, 907 F.3d 1 (1st Cir. 2018); Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc); United States v. Barrett, 903 F.3d 166 (2d Cir.), rehearing denied (2d Cir. Nov. 26, 2018), petition for cert. filed (U.S. Dec. 3, 2018).

B. Further percolation would be beneficial on the argument that the government first made only after Dimaya issued in April of this year.

To be sure, the circuits are split in terms of the result reached after Dimaya. The three circuits to follow their circuit precedent have held § 924(c)'s residual clause to be unconstitutionally vague, whereas the three circuits that addressed the merits of the government's new position have held the provision constitutional. But at this point, there is not yet a circuit conflict on whether a case-specific or categorical approach should apply to

§ 924(c)'s residual clause on the theory that the government presses in this Court.

Such a conflict may develop, but there is no way to know at this early stage, with the government having made its present arguments only since it lost in Dimaya less than eight months ago. The circuits may line up with the First, Second and Eleventh Circuits, obviating any need for this Court's review.

True, this may require some circuits to convene *en banc* to change from the categorical approach. But that may not be required in all the remaining circuits that now use the categorical approach (all but the Third Circuit, see United States v. Robinson, 844 F.3d 137 (3d Cir. 2016)), cert. denied, 138 S.Ct. 215 (2018), as the Second Circuit's decision in Barrett, in which that court held it could (and did) alter circuit precedent in light of Dimaya, shows. Barrett, 903 F.3d at 178 (noting that it does not apply as strict a standard for an intervening change as the D.C. Circuit does). And the circuits have shown a willingness to assemble *en banc* to decide the issue. The Eleventh Circuit has already produced the *en banc* decision in Ovalles, and the *en banc* Fourth Circuit, in United States v. Simms, heard

argument on the issue on September 26. Docket sheet in United States v. Simms, No. 15-4640 (4th Cir.). The D.C. Circuit has also called for responses to the government's *en banc* petition as to the codefendants in Eshetu, and the responses were filed at the beginning of October. See Docket sheet in United States v. Lovo, No. 15-3021 (D.C. Cir.) (entries of September 20 and October 4); Docket Sheet in United States v. Sorto, No. 15-3023 (D.C. Cir.) (same).[2]

Contrary to what the government says, the denial of rehearing *en banc* in this case does not mean that "Section 924(c)(3)(B) will now irrevocably be unenforceable in at least one part of the country unless and until this Court intervenes." Davis Pet. at 24. As explained, the government's argument for a case-specific approach came too late, and it had proposed a jury instruction inconsistent with that position. In any event, a denial of rehearing *en banc* in one case no more means the Tenth Circuit will not take up the issue in another case than this Court's denial of certiorari means this Court will never grant review on that issue. The

[2] The government did not even ask for rehearing *en banc* in the Fifth Circuit, but instead sought certiorari in Davis.

Tenth Circuit is perfectly capable of deciding to grant *en banc* review in an appropriate case, one free from problems of invited error and waiver.

There may be some disparity in result until the Fifth, Tenth and D.C. Circuits choose to convene *en banc.* Decisions by those full courts may result in agreement with the First, Second and Eleventh Circuits. If instead they produce decisions that apply the categorical approach and hold § 924(c)'s residual clause unconstitutionally vague, there will then be a true division on the underlying issue here. The disparate results in the interim, and that will persist in the event the latter scenario obtains until resolution by this Court, may well be a function of the government's position until very recently that the categorical approach applies to § 924(c)'s residual clause.

The effect of the present invalidation of that clause in three circuits may also not be as "massive [a] blow to federal law-enforcement interests" as the government suggests. Davis Pet. at 24. The government notes that more than 2,700 people were charged nationwide with § 924(c) offenses in 2017 (it does not say how many in the three circuits). Davis Pet. at 24. But § 924(c) reaches possessing, using or carrying a firearm not just in

connection with crimes of violence, but also in connection with drug trafficking offenses. 18 U.S.C. § 924(c)(1)(A). The government, which initiates prosecution, offers no statistics as to how many of the 2,700 people were charged with § 924(c) violations relating to drug trafficking, as opposed to crimes of violence. It likewise gives no indication of how often, as to crime-of-violence offenses, there was resort to the residual clause of § 924(c)(3)(B), as opposed to the elements clause of § 924(c)(3)(A), which is unaffected by any vagueness holding. And in many (though not all) cases that depend on § 924(c)'s residual clause, the statutory maximum for the associated offense will provide ample ability to account for the possession, carrying or use of a firearm.

With the government's current position of such recent vintage, this Court will also benefit from awaiting further decisions from the Courts of Appeals. Allowing more time for arguments to emerge and mature, and for appellate judges to address them, will help inform this Court's decision on whether a categorical approach should apply to § 924(c)'s residual clause.

The decisions in Douglas and Barrett illustrate the point. This Court in Leocal *unanimously* considered the text of § 16(b) itself to call for a categorical approach. Leocal, 543 U.S. at 7; see Ovalles, 905 F.3d at 1283 (Jill Pryor, J., dissenting) ("unanimously, and based on the statute's *text alone*, the Supreme Court [in Leocal] said that the crime of violence definition in § 16 *requires* a categorical approach") (emphasis in original). But neither Douglas nor Barrett even mentions Leocal. See Douglas, 907 F.3d at 9-13 (discussing this Court's precedent and text of § 924(c)(3)(B) under separate headings); Barrett, 903 F.3d at 178-84. What this Court held in Leocal is surely an important consideration in determining whether the fact that § 924(c)'s residual clause does not operate as to prior convictions could allow for a different result on the materially identical text. Accord Dimaya, 138 S.Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment) (stating that he "remain[s] open to different arguments about our precedent and the proper reading of language like" that in § 16(b) in future case).

Instead of grappling with Leocal, each decision looked only to Dimaya regarding the text of § 16(b). The First Circuit said that although

the plurality considered § 16(b)'s text to demand a categorical approach, there was no holding to this effect by a majority of the Court. Douglas, 907 F.3d at 12. This is not a basis for failing to confront Leocal.

As for the Second Circuit, it stated that by the time the plurality in Dimaya had written about what § 16(b)'s text demands, it had already concluded that a switch to a conduct-specific inquiry "would not achieve constitutional avoidance." Barrett, 903 F.3d at 182. But that observation came during a discussion of why it was significant that the government could not "bring itself to say that the fact-based approach . . . is a tenable interpretation of § 16's residual clause." Dimaya, 138 S.Ct. at 1217 (plurality opinion). It did not bear on what, moments later, the plurality said that "§ 16(b)'s text . . . demands." Id. That is inherent in the use of the word "demands," as well as the fact that the Court pivoted from the prior discussion with the phrase, "[i]n any event." Id. And once more, and in any event, it is not a basis for failing to take account of what Leocal held.

It was similar in the *en banc* decision in Ovalles. The majority there did acknowledge the holding of Leocal. Ovalles, 905 F.3d at 1242. But it waved away the importance of that holding with the comment that this

Court did not provide a "detailed explanation," id., thereby also "fail[ing] to account for Leocal," id. at 1288 n.9 (Jill Pryor, J., dissenting).

The principal dissent in Ovalles identified numerous other considerations that have not yet been fully explored and that are deserving of more judicial attention. For example, the dissent explained how, should the text not resolve matters and therefore allow resort to legislative history, that history supports a categorical reading of § 924(c)'s residual clause. Ovalles, 905 F.3d at 1294-95 (Jill Pryor, J., dissenting); see also Brief in Opposition in Davis at 18-19 (similar). The majority did not join issue on the point.

The dissent also noted that the language "offense that is a felony" appears in the prefatory portion of § 924(c)(3), and is therefore "part of the definition of 'crime of violence' in both the residual clause and the elements clause." Ovalles, 905 F.3d at 1288 (Jill Pryor, J., dissenting). This, it argued, called for reading the clauses consistently to require a categorical approach, as all agreed was true of the elements clause. Id.; see also Brief in Opposition in Davis at 16-17 (making similar argument). The majority elided the point. It first cited Nijhawan v. Holder, 557 U.S. 29 (2009), to the

effect that "offense" can sometimes refer to a generic crime, and sometimes to specific acts, Ovalles, 905 F.3d at 1246 n.6, which is non-responsive to the consistent-treatment-*within-a-subsection* argument. The same is true of the majority's observation that this Court in Nijhawan considered "adjacent statutory provisions" -- that is, not subsections of a single provision -- and that some referred to the offense categorically, and others to actual conduct. Id.

As well, the dissent noted that § 16(b) does not operate only as to past convictions. Rather, "in the vast majority of instances" where § 16 is incorporated into the criminal code, "the 'crime of violence' element is committed at the same time as the offense's other elements." Ovalles, 905 F.3d at 1280 (Jill Pryor, J., dissenting); see also id. at 1280-81 & n.3 (giving examples). With this Court in Leocal having held that § 16(b) is to be interpreted consistently in the civil and criminal context, id. at 1280 (citing Leocal, 543 U.S. at 11 n.8), the dissent argued, "many incorporations of § 16 function very similarly to the incorporation of the 'crime of violence' definition in § 924(c)(3) -- the elements and residual clauses -- into § 924(c)(1) -- which includes the offense's other elements," id. at 1281.

The majority's response is unsatisfying here too. It said it focused on § 16(b) as incorporated into the immigration act because this Court's holding in Dimaya was limited in this way. Id. at 1249 n.7. Its citations to Dimaya, see id. (citing Dimaya, 138 S.Ct. at 1210-12, 1213-16, 1223), do not show this to be so. And it would be flatly inconsistent with Leocal to read § 16(b) differently depending on the context in which it is used. Leocal, 543 U.S. at 11 n.8 ("we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context").

As for Justice Gorsuch stating he was open to different arguments about "language like this" (and precedent), and to addressing them "in another case, whether involving the INA or a different statute," Dimaya, 138 S.Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment); see Ovalles, 905 F.3d at 1249 n.7, this hardly shows he thought § 16(b) could take on different meanings depending on where it was used. After all, such a "novel interpretive approach" would "render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." Clark v.

Martinez, 543 U.S. 371, 382 (2005); see also Brief in Opposition in Davis at 23 (making Clark argument as to § 924(c)'s residual clause).

The decisions to date also have not addressed a point made by Justice Gorsuch in Dimaya. He offered that the "by its nature" language in § 16(b) "might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. Dimaya, 138 S.Ct. at 1233 (Gorsuch, J., concurring in part and concurring in the judgment). The circuit decisions are silent on this possibility.

These examples do not exhaust the universe of arguments that may be advanced by litigants in upcoming cases and whose examination by appellate courts will aid in this Court's determination of the issue on which the government's position rests. The concept of percolation presupposes that, through the efforts of litigants and judges in numerous cases, fresh insights will emerge that will lead to better determinations by this Court.

Other circuits may well provide helpful guidance on the arguments noted above, which have not yet been adequately joined and tested, as well as other arguments that bear on the issue at hand. The Fourth Circuit will be issuing its *en banc* decision in Simms. The D.C. Circuit has been

considering for two months whether to grant rehearing *en banc* in Eshetu. That it has not denied rehearing suggests it may be waiting to see whether this Court grants review in this case or in Davis. And the issue is being litigated in other circuits as well.

Granting review in Davis or this case would short-circuit this process and deprive this Court of its obvious benefits. With the circuit courts acting with commendable speed, this Court should allow the underlying issue here to percolate. It can then address the issue, if that proves warranted, when the arguments for and against the government's position have been sharpened and fully vetted.

III. This case is a poor vehicle for reasons beyond that identified in the petition.

The government believes this case to be an inferior vehicle to Davis. Pet. at 7-8. In addition to the waiver problem discussed in Section I, which should call for denial of the writ and not the requested hold, there are other reasons that the government does not note that make this case a poor vehicle.

One is that this case comes to this Court on plain-error review. This could allow this Court to reverse the judgment of the Tenth Circuit without reaching the question the government has presented. Under Federal Rule of Criminal Procedure 52(b), which permits relief for plain error, there must be error *and* the error must be plain. United States v. Olano, 507 U.S. 725, 732-34 (1993). This Court could hold that it is not plain that § 924(c)'s residual clause calls for a categorical approach, and so that it is not plain the clause is unconstitutionally vague. If so, it would not have to reach the question of whether § 924(c)'s residual clause is in fact unconstitutionally vague.

Another vehicle problem involves the lack of a determination by the Tenth Circuit on the issue that is at the heart of the government's position.

In seeking certiorari in Davis, the government describes that case as a "particularly good vehicle," asserting that "[t]he court of appeals directly addressed and rejected the cases-specific [sic] approach advanced by the government, without suggesting that it had been waived or forfeited." Davis Pet. at 25. It makes no similar claim of procedural regularity as to this case. Pet. at 7-8.

With the government not having properly raised the case-specific approach to the Tenth Circuit, the panel did not have occasion to comment on whether there had been waiver or forfeiture. In fact, there had been under Tenth Circuit law. This is so because of the government's sponsoring of the jury instruction that the crime-of-violence issue was not for the jury, a position inconsistent with the case-specific approach. In the Tenth Circuit, "the invited-error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt." United States v. Deberry, 430 F.3d 1294, 1302 (10th Cir. 2005).

Nor would the government have been able to invoke an exception to the invited-error doctrine because its instruction followed settled law.

Under that exception, the "invited-error doctrine does not apply when a party relied on settled law that changed while the case was on appeal." United States v. Titties, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017). There was no such change here. The Tenth Circuit followed its precedent and applied the categorical approach. And the government acknowledges that this Court has never decided whether the categorical approach or a case-specific approach is to be used in connection with § 924(c)'s residual clause. Davis Pet. at 16.[3]

For these reasons, as well as the one identified by the government, this case is not a good vehicle.

[3] Also, a ruling for the government would introduce an indictment defect that would be structural error. See Brief in Opposition in Davis at 10-11. That poses an additional vehicle problem.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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