No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER,

Respondents.

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

BRIEF IN OPPOSITION FOR ANDRE LEVON GLOVER

JEFFREY T. GREEN
TOBIAS LOSS-EATON
SIDLEY AUSTIN LLP
1501 K STREET, N.W.
Washington, D.C. 20005
(202) 736-8000

J. JOSEPH MONGARAS*
TIFFANY TALAMENTEZ
UDASHEN & ANTON
2311 CEDAR SPRINGS #250
Dallas, TX 75201
(214) 468-8100
jjm@udashenanton.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

BRANDON E. BECK
ASSISTANT FEDERAL PUBLIC DEFENDER
1205 TEXAS AVENUE #507
Lubbock, TX 79401
(806) 472-7236

Counsel for Respondents

* Counsel of Record

November 30, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

COURT DOCUMENTS

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

INTRODUCTION

The government's petition asks the Court to decide whether 18 U.S.C. § 924(c)(3)(B)—the residual clause of the statute's definition of "crime of violence"—is unconstitutionally vague. This case is not the right vehicle to decide that question, for several reasons.

First, the government invited the purported error about which it now complains. The government does not seriously dispute that, if § 924(c)'s residual clause is construed to require a categorical approach to identifying a "crime of violence," it is unconstitutionally vague. It argues instead that the lower courts erred by applying a categorical approach rather than a conduct-based one. But that is precisely what the government urged the lower courts to do: in its response to a motion to dismiss, in the proposed jury instructions, and in the initial appeal. And the government was successful: the district court instructed the jury that Respondents' conspiracy offenses were "crimes of violence" as a matter of law, thereby depriving Respondents of the opportunity to dispute that their conduct in this case satisfied the statutory definition. Principles of invited error, waiver, and judicial estoppel all bar the government, having obtained Respondents' convictions under a categorical reading of the statute, from now arguing in this case that such a reading is erroneous. In turn, these principles also stand as an obstacle to the resolution of the question presented here.

Second, the question presented has no impact on the outcome of this case. The Fifth Circuit vacated Respondents' § 924(c) convictions under Count Two of the indictment, which alleged the use of a firearm in furtherance of a conspiracy to commit Hobbs Act robbery, because "Defendants could only have been con-

victed as to Count Two under the residual clause," and § 924(c)'s residual clause is unconstitutionally vague. Pet. App. 4a–5a. But even if this Court were to uphold the residual clause, the result would not change. If the government's conduct-based approach to the residual clause is correct, then (as the government concedes) applying the clause requires "a jury finding beyond a reasonable doubt about the 'real-world conduct' proved in the case." Pet. 12. No such finding was sought or made. Nor did the indictment allege that Respondents' conduct in this case satisfied the residual clause. Consequently, on the government's own account of the statute, Respondents' convictions would violate their rights to indictment, due process, and trial by jury.

Further, any deprivation of the right to a jury trial would not be harmless. The indictment's failure to allege facts supporting application of the residual clause is structural error, and the omission of this element from the jury charge was not uncontested, barring any harmless error finding.

At the very least, these issues present threshold questions the Court would need to decide before reaching the question presented, lest it render an advisory opinion. At most, they demonstrate at the outset that the question presented has no effect on the judgment below. In either case, they show that the Court should not grant review in this case when it can easily decide the question in another case without these vehicle problems. Certainly, the government can wait for a case in which it has not actively sought to deprive the defendant of the fundamental right to a jury trial it now says applies here.

Third, the government's petition is premature. Only six circuits have considered the question presented after *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and

only one has done so *en banc*. The courts of appeals may yet converge on a consensus view that renders this Court's review unnecessary. In all events, granting review now would truncate the evolving arguments for and against the statute's validity. Further percolation, by contrast, would ensure that (if the split remains) this Court will benefit from the most developed and sharpened versions of those arguments.

Fourth, the decision below was correct. Section 924(c)'s residual clause shares the same textual features that prompted this Court to apply the categorical approach under the residual clauses of the Armed Career Criminal Act (ACCA) and the "crime of violence" definition in 18 U.S.C. § 16(b). In particular, the § 924(c) residual clause's insistence on judging an "offense" "by its nature" makes clear that the clause "tells courts to figure out what an offense normally—or . . . 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality opinion). These parallels are unsurprising, as § 924(c)'s legislative history shows that its "crime of violence" definition grew out of § 16 and was intended to be applied in the same way. Indeed, that is how the courts of appeals have interpreted the residual clause for years, and Congress—despite often amending § 924(c), including in response to judicial decisions it disagrees with—has never acted to modify that approach.

The canon of constitutional avoidance cannot overcome the clear statutory text, this Court's precedents construing materially identical clauses, and § 924(c)'s legislative history. Avoidance requires more than one plausible reading of the statute. Here, there is only one: a categorical reading that considers the "nature" of an offense in the abstract. The government's pro-

posed alternative reading renders the phrase "by its nature" superfluous and requires the word "offense" to have two different meanings in the same provision. The avoidance canon does not license such departures from normal interpretive principles. Consequently, the Fifth Circuit was correct that § 924(c)'s residual clause must be applied categorically, and equally correct that it is therefore invalid under *Dimaya*.

The Court should deny the petition and, if the question presented still requires resolution, await another case where the question was properly preserved and will affect the outcome.

REASONS TO DENY THE PETITION

I. THE GOVERNMENT INVITED AND WAIVED ANY ERROR WHEN IT REPEATEDLY INSISTED ON THE CATEGORICAL APPROACH BELOW.

The government contends that the Fifth Circuit "erred in construing 18 U.S.C. § 924(c)(3)(B)" to require the categorical "ordinary case" approach. Pet. 11–12. But that is exactly what the government advocated below. The government had several opportunities to express a different view. Not only did the government fail to object to the categorical approach, it actively advocated for it at every turn. In doing so, the government invited the very "error" it now complains of and waived any argument that the lower courts should have construed the § 924(c) residual clause differently. The government has positioned itself poorly to invoke this Court's discretionary jurisdiction to vindicate a position it fought against in the lower courts.

This issue first arose in Respondents' pretrial Motion to Dismiss Counts Two and Seven of the indict-

ment. Respondents argued that, under the categorical approach, the § 924(c) residual clause was void for vagueness in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Defendants' Motion to Dismiss Counts Two and Seven at 1–6, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 3, 2015), ECF No. 56. The government's response wholly embraced the categorical approach as the appropriate interpretive framework. The government acknowledged that the § 924(c) residual clause, like the statute in *Johnson*, involves an "ordinary-case inquiry," and insisted that the clause "does not go beyond the elements of the offense to consider potential extra-offense conduct." Government's Response to Defendants' Motion to Dismiss Counts Two and Seven at 3, 5, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 5, 2015), ECF No. 59. And the government relied heavily on *Leocal* v. *Ashcroft*, see *id*. at 6, in which this Court construed § 16 to "require us look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime," 543 U.S. 1, 7 (2004). In short, the government "advocated an ordinary-case categorical approach . . . under Section 924(c)(3)(B)," cf. Pet. 12, urging the district court to apply the § 924(c) residual clause the same way this Court applied § 16(b) in *Leocal*—categorically.

The government's second (and best) opportunity to object to the categorical approach was in its proposed jury instructions. Again it took the opposite tack. The government, joined by Respondents, proposed a jury charge under which the district court would apply § 924(c)'s "crime of violence" definition categorically and instruct the jury that robbery and conspiracy to commit robbery were "crimes of violence" as a matter of law. See Agreed Jury Charge at 30, *United States*

v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 11, 2015), ECF No. 64 ("I instruct you that the crimes alleged in Counts One and Six are crimes of violence."). This phrase remained in the final jury charge, unaltered and without objection. Jury Charge at 13, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Nov. 19, 2015), ECF No. 82 ("Jury Charge"); see Fed. R. Crim. P. 30(d) ("Failure to object [to a jury instruction] in accordance with this rule precludes appellate review . . . .").

The government's third opportunity came in its response to Mr. Glover's initial appeal. Mr. Glover argued that the district court erred by refusing to let the jury decide whether Hobbs Act Robbery or Conspiracy to Commit Hobbs Act Robbery were "crimes of violence" under § 924(c). Initial Brief for Appellant at 25–26, *United States* v. *Davis*, No. 16-10330 (5th Cir. Sept. 14, 2016). In response, the government argued that "the [jury] instruction was correct" and that Mr. Glover's "argument should be rejected because he invited the court to instruct the jury as it did." Brief for the United States, *United States* v. *Davis*, No. 16-10330 (5th Cir. Oct. 17, 2016). But what is good for the goose is good for the gander: if the government is held to the same waiver standard it urged below, it too must accept the jury instruction it affirmatively advocated, under which the § 924(c) residual clause is applied categorically.

The government first "attempt[ed] to change its prior approach to these cases" in its supplemental briefing in the Fifth Circuit, Pet. App. 4a, after this case had already been remanded by this Court in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018). *Dimaya*, of course, did not change the text of § 924(c). Indeed, it confirmed that an identically worded statute requires the categorical approach. At most, *Di-*

maya's constitutional holding created a new *incentive* for the government to read the statute differently. If litigation is to be more than a game, however, a party cannot reverse its position merely because that position turns out to be less advantageous than it previously seemed.

The government's attempt to reverse course here is particularly inappropriate because the conduct-based approach would have benefited Respondents at trial. Under the conduct-based approach, the district court would have had no choice but to dismiss Count Two because the grand jury did not allege that the conspiracy, by its nature, presented a substantial risk of force against the person or property of another. Further, Respondents lost the chance to argue to the jury that the facts of this particular conspiracy did not constitute a crime of violence.

Having secured Respondents' indictment and conviction by relying on the categorical approach, the government cannot now attempt to preserve those victories by adopting the opposite interpretation of the statute. See *Zedner* v. *United States*, 547 U.S. 489, 504 (2006) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). The government successfully avoided a jury trial on the risk of force by arguing for the categorical approach. Now, without offering Respondents a jury trial, it wants this Court to hold that they should have been given one. This Court can surely find a way to address this question, if necessary, without condoning the government's contortions in this case.

For these reasons, this is not the appropriate case to decide whether the § 924(c) residual clause requires a categorical approach. The Court should wait for a case where the issue was timely raised and preserved by the party seeking review. That might be a case arising from a circuit that has adopted a conduct-based approach after *Dimaya* or (at the very least) a case in which the government objected to the categorical approach in the district court. Neither occurred here.

II. THE ANSWER TO THE QUESTION PRESENTED WILL NOT AFFECT THE OUTCOME OF THIS CASE.

Respondents were convicted under a reading of the § 924(c) residual clause that permitted the district judge to decide—and to instruct the jury—that their predicate offenses were categorically "crimes of violence" as a matter of law. The Fifth Circuit vacated Respondents' § 924(c) convictions on Count Two because, so construed, the § 924(c) residual clause is unconstitutionally vague. Pet. App. 6a.

Even if this Court were to grant review and uphold the residual clause, that holding would have no effect on the outcome of this case: Respondents' convictions on Count Two would remain vacated. Contra Pet. 25–26. Accordingly, there is no basis to disturb the judgment below. See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."); Stern & Gressman, *Supreme Court Practice* § 4.I.4(f), p. 249 (10th ed. 2013) (even "a clear conflict" does not warrant review if it "is irrelevant to the ultimate outcome"). In the government's own words, "this case would be a poor vehicle for addressing the question presented" because "a decision in [the government's] favor on the question presented would not change the

result in this case." *E.g.*, Brief for the United States in Opposition at 14–15, *Piszel* v. *United States*, 138 S. Ct. 85 (2017) (No. 16-1356), 2017 WL 3447922.

That is true for two related reasons: (1) if a conduct-based approach is appropriate, then the indictment and jury instructions violated the Fifth and Sixth Amendments; and (2) these errors were not harmless, but structural.

First, if the government is correct that § 924(c)'s residual clause requires a conduct-based approach, then the clause's application becomes an element of the offense, requiring (as the government admits) "a jury finding beyond a reasonable doubt." Pet. 12. "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." See *Alleyne* v. *United States*, 570 U.S. 99, 103 (2013); *accord In re Winship*, 397 U.S. 358, 364 (1970). Thus, if the government is right, the indictment had to allege that Respondents' offense conduct presented a substantial risk of the use of physical force, and the prosecution had to prove it to the jury.

None of that happened here. The grand jury did not find, and the indictment did not allege, that the conspiracy in Count One "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." See 18 U.S.C. § 924(c)(3)(B). And the trial jury was never asked to apply the § 924(c) residual clause's uncertain "risk" standard to the "nature" of the conspiracy because the district court instructed the jury that Respondents' offenses were categorically "crimes of violence" as a matter of law. Jury Charge 12–14. So, if § 924(c)'s residual clause is to be applied based on the facts of a particular case, Respondents' convictions would violate their

constitutional rights to indictment, due process, and trial by jury. U.S. Const. amends. V, VI; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 477–78 (2000); *In re Winship*, 397 U.S. at 364.

Second, contrary to the government's argument, these errors would *not* be "harmless" under *Neder* v. *United States*, 527 U.S. 1 (1999). Pet. 26. To find that the omission of an essential element was harmless, the Court must conclude that "the omitted element was *uncontested* and supported by overwhelming evidence." *Neder*, 527 U.S. at 17 (emphasis added). *Neder* assumes that the defendant was on notice of the elements of the charged crimes, giving him a full and fair *opportunity to contest* the omitted element. That is not this case here. The government cannot invoke *Neder* for the proposition that the omitted element was "uncontested" in the evidence when the only reason that it was uncontested is that Respondents were not on notice that they *could* contest it. Had the law—and the government—given notice that defendants could contest the risk of force associated with their own, particular conspiracy, they could have investigated or presented evidence on that subject. At a minimum, Respondents could have testified to the jury about whether they were individually prepared to use force to complete the offense, or whether, instead, they were bluffing. The loss of this opportunity cannot be termed harmless.

Likewise, "an indictment is sufficient" only if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). If the government were correct that the conduct-based approach applies, the indictment in this case would have violated *Hamling*. Respondents had no notice that they had to (or even

could) defend factually against the "crime of violence" charge, which was treated as a legal issue for the judge rather than a factual issue for the jury. In fact, Fifth Circuit precedent at the time required this result. See Pet. App. 4a–5a; *United States* v. *Williams*, 343 F.3d 423, 431 (5th Cir. 2003).

This lack of notice is a structural error. Since early in the Nation's history, "it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone* v. *United States*, 361 U.S. 212, 215–16 (1960). Here, the grand jury alleged only that Respondents used a firearm during a "crime of violence" defined *categorically*; it did not charge any conduct specifically alleged to involve a substantial risk that physical force would be used "by its nature." See Indictment at 5, 10, *United States* v. *Glover*, No. 3:15-CR-00094-O (N.D. Tex. Mar. 3, 2015), ECF No. 1. Thus, accepting the government's argument that Respondents' convictions should be affirmed would "destroy[] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone*, 361 U.S. at 217. Because "[d]eprivation of such a basic right is far too serious to be . . . dismissed as harmless error," vacatur is necessary even if the Court accepts the government's conduct-based approach. *Id.*

These issues underscore that this case is a poor vehicle. If the Court grants review, it will at least have to decide whether these errors were harmless or structural. The answer to that question, in turn, may prevent the Court from reaching the merits of the question presented. See *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the

case before them.'"). And even if it does not, there is no need to complicate the resolution of the question presented by granting review in this case instead of another case that does not present these threshold issues.

III. THE GOVERNMENT'S PETITION IS PREMATURE.

A. The circuit split is not entrenched and the arguments are not fully developed.

Just six circuits have considered the constitutionality of the § 924(c) residual clause in light of *Dimaya*. Pet. App. 1a–9a; *United States* v. *Barrett*, 903 F.3d 166 (2d Cir. 2018); *Ovalles* v. *United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc); *United States* v. *Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (per curiam); *United States* v. *Salas*, 889 F.3d 681 (10th Cir. 2018), *petition for cert. filed* (U.S. Oct. 3, 2018) (No. 18-428); *United States* v. *Douglas*, 907 F.3d 1 (1st Cir. 2018). Only the Eleventh Circuit has done so *en banc*. See *Ovalles*, 905 F.3d 1231. Many other cases are still pending below. It is still possible that the other circuits, after *en banc* reconsideration of their own precedent, will join the Eleventh in agreeing with the government. If that happens, review will be unnecessary. The Court should hesitate to review this issue until at least one circuit, sitting *en banc* after *Dimaya*, holds the § 924(c) residual clause unconstitutional. Until that time, further percolation may resolve the issue without this Court's intervention.

In all events, this Court should at least delay review so the parties' arguments and the lower courts' analyses can sharpen into their most focused and mature form. To illustrate: right now, the argument carrying the day for the government is the canon of constitutional avoidance. See *Barrett*, 903 F.3d at 178;

Ovalles, 905 F.3d at 1240; *Douglas*, 907 F.3d at 15–16. But the government's arguments based on constitutional avoidance and constitutional doubt did not see any traction until the Second Circuit decided *Barrett* on September 10, 2018. And the argument has continued to evolve in *Ovalles* and, most recently, in *Douglas*. See 907 F.3d at 15–16. There were different arguments prior to *Barrett*, and there will likely be new arguments after *Douglas*.

It is important to let this process develop so the Court may benefit from the best and final versions of the arguments being advanced, and from the views of additional courts of appeals. Granting review now, while the arguments and case law are in a state of dramatic flux, would prematurely terminate this salutary process. Conversely, delaying review would provide enormous benefit to this Court and may render review unnecessary.

The government contends that review cannot await further development. Not so. The present issue pertains only to a tiny fraction of 924(c) prosecutions: those involving not merely a crime of violence rather than a drug offense, but involving a particular crime of violence that does not involve the use of force as an element. The mine-run of completed bank robberies, Hobbs Act robberies, and carjackings all remain valid bases for § 924(c) liability under any interpretation.

B. The judgment below is not yet final.

Both Respondents have moved for panel rehearing on matters unrelated to the constitutionality of the § 924(c) residual clause. These petitions deal with the application of the ACCA sentencing enhancement in light of current Fifth Circuit precedent and the correct application of the sentencing package doctrine. Both grounds would require resentencing irrespective

of the outcome of the question presented. On November 27, 2018, the Fifth Circuit directed the government to respond to these petitions.

Until Respondents are resentenced, the government's petition is premature. And once Respondents are resentenced, the government would be free to seek certiorari in this case (if warranted) or any other.

IV. THE DECISION BELOW IS CORRECT.

A. The text of the § 924(c) residual clause requires a categorical approach, and this Court's precedents confirm it.

Section 924(c)'s residual clause provides, in full: "For purposes of this subsection the term 'crime of violence' means an 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. § 924(c)(3)(B). Two particular characteristics of this language call for a categorical approach: (1) the phrase "by its nature"; and (2) the function that the term "offense" performs in this provision. Moreover, the Court's precedents "have consistently understood [materially indistinguishable] language in the residual clauses of both the ACCA and § 16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, 138 S. Ct. at 1217 (plurality opinion).[1]

Like § 16(b), the § 924(c) residual clause uses the phrase "by its nature." The *Dimaya* plurality ex-

---

[1] Section 16(b) covers "any . . . 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).

plained that an "offense's 'nature' means its 'normal and characteristic quality.'" 138 S. Ct. at 1217 (plurality opinion); see also *id.* at 1233 (Gorsuch, J., concurring) ("the word 'nature' might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated"). Likewise, Black's Law Dictionary defines "nature" as "[a] fundamental quality that distinguishes one thing from another; the essence of something." *Nature*, Black's Law Dictionary (10th ed. 2014). And the Collins English Dictionary defines the phrase "by its nature" to mean that "things of that type always have that characteristic." *By Its Nature*, Collins English Dictionary (12th ed. 2014). Indeed, this Court has used "nature" in precisely this way to refer to a generic offense. See *James* v. *United States*, 550 U.S. 192, 207–08 (2007), *overruled by Johnson*, 135 S. Ct. 2551 (using "by its nature" to define the "ordinary case" approach); *Leocal*, 543 U.S. at 7 ("This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.").

Courts of appeals before *Dimaya* likewise understood the simple, plain meaning of "by its nature" to call for a categorical approach. As the Fifth Circuit aptly summarized, "the phrase 'by its nature' compels a categorical approach to determining whether an offense is a crime of violence under Section 16(b) . . . . The reason is clear: either a crime is violent 'by its nature' or it is not. It cannot be a crime of violence 'by its nature' in some cases, but not others, depending on the circumstances." *United States* v. *Velazquez-Overa*, 100 F.3d 418, 420–21 (5th Cir. 1996); see also *United States* v. *McGuire*, 706 F.3d 1333, 1336–37 (11th Cir. 2013) (similar); *United States* v. *Venegas-Ornelas*, 348 F.3d 1273, 1276 (10th Cir. 2003) (simi-

lar); *Sareang Ye* v. *I.N.S.*, 214 F.3d 1128, 1133 (9th Cir. 2000) (similar). These consistent interpretations lead to one conclusion: the residual clause "tells courts to figure out what an offense normally—or . . . 'ordinarily'—entails, not what happened to occur on one occasion." *Dimaya*, 138 S. Ct. at 1217–18 (plurality opinion).

Indeed, it is difficult to understand what role the phrase "by its nature" might play in the statute if not to demand the categorical approach. It is not at all clear how a court asked to decide whether the *facts* of an offense create the risk of force would approach its job differently than one asked to make the same determination based on *"the nature"* of those particular facts. By contrast, Respondents' interpretation—and the interpretation of every court to confront that language before *Dimaya*—gives the phrase a clear function: "the nature" of an offense is its statutory elements. Requiring that it pose a risk of force "by its nature" requires that it examine the elements of the statute, not the particular facts. Respondents' position—but not the government's—thus "avoid[s] a reading which renders [these] words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

This reading is bolstered by the role of the term "offense" in the residual clause. "Offense" makes two appearances in § 924(c)(3): First, as a global term that is distributed across both the elements clause and the residual clause ("an offense that is a felony"); and second, as a stand-alone term in the residual clause ("in the course of committing the offense"). It is undisputed that the global term "offense," as distributed across both clauses, refers to the criminal violation generically rather than the facts of the case. But the government overlooks that it is *this* use of "of-

fense"—which is undisputedly categorical—to which the phrase "by its nature" attaches. In other words, the statute uses "by its nature," which refers to things that "always have [a given] characteristic," to refer back to the generic "offense that is a felony." All of this shows that the statute calls for a categorical inquiry.

The Court's precedents interpreting materially indistinguishable language in § 16(b) support the same reading. *Leocal* emphasized § 16(b)'s use of the phrase "by its nature" in concluding that "the statute directs our focus to the 'offense' of conviction . . . rather than to the particular facts relating to [the defendant's] crime." 543 U.S. at 7. And *Dimaya* again explained that § 16(b)'s text—which is materially identical to § 924(c)'s residual clause—"creates no draw: Best read, it demands a categorical approach." 138 S. Ct. at 1217 (plurality opinion). As the Court explained, the phrase "by its nature" supports a categorical interpretation, *id.*, and terms such as "conviction," "felony," and "offense" "are 'read naturally' to denote the 'crime as *generally* committed," *id.* (quoting *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009)).

Because the § 924(c) residual clause's language is materially identical to § 16(b)'s, this Court should follow the same construction for the same textual reasons. To hold otherwise would be to assume that Congress intended the same language, as used in provisions serving very similar purposes, to be read in fundamentally different ways. There is no textual indication that Congress intended that anomalous result.

B. Section 924(c)'s legislative history shows that it was intended to be applied the same way as § 16.

Section 924(c)'s legislative history shows that Congress intended courts to use the categorical approach. Section 924(c) was initially enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968). The section imposed a mandatory minimum sentence for the use or carrying of a firearm in the commission of a felony. See *id*. § 102, 82 Stat. at 1223–24.

In 1984, Congress amended § 924(c) to abrogate *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Busic* v. *United States*, 446 U.S. 398 (1980), which had in Congress's view "greatly reduced [the statute's] effectiveness as a deterrent to violent crime." S. Rep. No. 98-225, at 312 (1983). In keeping with the categorical approach, the Senate Report said that § 924(c) is targeted to reach specific *statutes* that "are precisely the type of extremely dangerous offenses for which a mandatory punishment for the use of a firearm is the most appropriate." *Id*.

However, the 1984 Amendment did not explicitly define "crime of violence" for § 924(c)'s purposes. Rather, Congress relied on the general definition of "crime of violence" found in § 16. *Id.* at 307 ("[T]he phrase is commonly used throughout the bill, and accordingly the Committee has chosen to define it for general application in title 18.") (footnote omitted); *id.* at 389 n.7 ("The term 'crime of violence' is defined in 18 U.S.C. 16 . . . ."); *id.* at 316 n.3 (similar); *id.* at 313 n.9 (similar). Under § 16's general definition, "crime of violence" meant "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 any felony that, by its nature, involves the

substantial risk that physical force against another person or property may be used in the course of its commission." *Id.* at 307.

Finally, in 1986, Congress amended § 924(c) to explicitly define "crime of violence"—using the same language as § 16. See Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2)(F), 100 Stat. 449, 457 (1986); S. Rep. No. 98-583, at 22 (1984) (noting the "amendment to Section 924(c) which, with some modifications, incorporates virtually verbatim the language from . . . the Comprehensive Crime Control Act of 1984"). Thus, § 924(c)'s "crime of violence" definition grew out of § 16's definition of the same term. This history, together with the close linguistic parallels, shows that § 924(c)(3) must be construed—like § 16—to require the categorical approach.

C. Congress has acquiesced in the court of appeals' long-standing and consistent application of the categorical approach under § 924(c).

In the nearly thirty years since this Court created the categorical approach in *Taylor*, the overwhelming majority of circuits have followed the Court's lead by applying the categorical approach under § 924(c). See, *e.g., United States* v. *Taylor*, 814 F.3d 340, 378 (6th Cir. 2016) (observing that the § 924(c) residual clause "requires the application of a categorical approach"), *cert. denied,* 138 S. Ct. 1975 (2018); *United States* v. *Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995) (applying "a categorical approach to determining which offenses are included under section 924(c) as 'crimes of violence'"); *United States* v. *Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (holding that the text of the § 924(c) residual clause requires a categorical approach), *abrogation recognized by United States* v. *Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007). Prior to *Ovalles*, the

Second and Eleventh Circuits likewise applied the categorical approach to both the residual and elements clauses of § 924(c) without qualification. See *United States* v. *Hill*, 890 F.3d 51, 55 (2d Cir. 2018) (explaining that "the categorical approach is '"not only consistent with both precedent and sound policy' but [ ] also . . . 'necessary in view of the language of [§ 924(c)]'" (first alteration in original)); *McGuire*, 706 F.3d at 1336–37 (applying the categorical approach to both clauses).

Congress, meanwhile, has been notably silent on the courts of appeals' widespread adoption of the categorical approach, despite a demonstrated willingness over the same period of time to take swift corrective action in the wake of what it views as problematic judicial decisions involving § 924(c).

For example, in 1984, Congress wasted little time in amending § 924(c)(1) in direct response to *Simpson* and *Busic*. See *supra* § IV.B. That vigilance was once again on display in 1998, when Congress approved the "Bailey Fix Act," see 144 Cong. Rec. 26608 (1998), in direct response to a series of decisions in which the Court wrestled with the meaning of the terms "use" and "carry" in § 924(c)(1). *E.g.*, *Bailey* v. *United States*, 516 U.S. 137 (1995), *superseded by statute as recognized in Welch* v. *United States*, 136 S. Ct. 1257 (2016). Unhappy with the limiting effect of these decisions, Congress responded by making it an offense under § 924(c)(1) to "posses[s]" a firearm "in furtherance of" one of the predicate offenses and adding sentencing enhancements for brandishing and discharge. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998).

Since that time, Congress has continued to amend § 924(c) to expand, refine, or clarify its terms. *E.g.*, Protection of Lawful Commerce in Arms Act, Pub. L.

No. 109-92, § 6(b), 119 Stat. 2095, 2102 (2005); Act of Oct. 6, 2006, Pub. L. No. 109-304, § 17(d)(3), 120 Stat. 1485, 1707 (2006). Yet, despite the fact that Congress has repeatedly and substantially revised § 924(c)—including in response to the federal courts' construction of it—not once have lawmakers responded to the circuits' continued application of the categorical approach in cases dating back decades.

In light of the circuits' consistent, long-term, and nearly universal application of the categorical approach—and Congress's demonstrated willingness to overturn interpretations of § 924(c) it disagrees with—congressional silence on the issue speaks volumes. See *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599 (1983) (finding that "Congress' awareness of the denial of tax-exempt status for racially discriminatory schools when enacting other and related legislation make out an unusually strong case of legislative acquiescence.").

D. The doctrine of constitutional avoidance does not permit a conduct-based interpretation of § 924(c).

The petition relies heavily on "the principle of constitutional avoidance." Pet. 20. This argument did not prevail in *Johnson*, 135 S. Ct. at 2562, or *Dimaya*, 138 S. Ct. at 1217, and it cannot do so here.

The avoidance canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005). "[A] court relying on that canon still must *interpret* the statute, not rewrite it." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018). Here, Section 924(c)'s text unambiguously requires a categorical

approach. The "upshot of all [the] textual evidence" discussed above is that § 924(c)'s residual clause—like the clauses in § 16(b) and the ACCA—"has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (plurality opinion); see *Johnson*, 135 S. Ct. at 2562; *supra* § IV.A. Thus, "[i]n the absence of more than one plausible construction, the canon simply 'has no application.'" *Jennings*, 138 S. Ct. at 842.

The government's effort to show otherwise falls flat. In particular, it would make no sense to use the phrase "by its nature" to refer to the facts of a defendant's actual underlying conduct. Contra Pet. 16. A single discrete criminal act has no "fundamental quality"—or in Justice Gorsuch's term, no "inevitable characteristic"—that "distinguishes [it] from another" example of the same crime. See *supra* p. 15. Indeed, the government's reading of the statute would be exactly the same if the words "by its nature" were simply omitted: "[A]n offense that is a felony and . . . that . . . involves a substantial risk . . . ." A construction that would render some of the clause's language "inoperative or superfluous" is not a plausible one. See *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004).

Nor does the government find support in the standalone use of "offense" in the § 924(c) residual clause. See Pet. 13–14. Even if the word "offense" can, in a vacuum, refer either to a generic criminal violation or to a defendant's specific acts, see *id.*, it cannot do so here. Clause (c)(3)(B)'s language—"in the course of committing *the offense*"—refers back to the generic "offense that is a felony." "The use of the definite article means an [offense] specifically provided for" in the statutory text. See *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923). The only "offense" previously provided for in this subsection is the generic felony that applies to

both the elements clause and the residual clause. Thus, the phrase "the offense" in the residual clause—like "by its nature"—refers back to the generic use of "offense" in § 924(c)(3)'s introductory phrase.

Given all of this, there is no way for the word "offense" to carry a "case-specific meaning" in the residual clause. Pet. 14. The government's argument could prevail only if the very same use of the term "offense" in § 924(c)(3) meant one thing for purposes of the elements clause, but something different for purposes of the residual clause. But statutory language cannot change on a case-by-case basis—not even to avoid constitutional concerns. See *Clark*, 543 U.S. at 382 (rejecting a "novel interpretive approach . . . which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case").

Finally, the government's position would give the § 924(c) residual clause a different meaning from the nearly identical language in § 16, which this Court has unanimously read to refer to "the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal*, 543 U.S. at 7; see also *id.* at 10. The Court confirmed the unambiguous nature of this language last Term in *Dimaya*, explaining that "the avoidance canon cannot serve . . . as the interpretive tie breaker" because § 16's language "demands a categorical approach." 138 S. Ct. at 1217 (plurality opinion). So too in *Johnson*, which rejected the avoidance argument because "'[t]he only plausible interpretation' of the [ACCA residual clause] . . . requires use of the categorical approach." 135 S. Ct. at 2562. Section 924(c)'s materially indistinguishable language requires the same result. There is no "competing

plausible interpretation[ ]" here. See *Clark*, 543 U.S. at 381–82.

E. Under the categorical approach, the § 924 residual clause suffers from the same fundamental defects as the ACCA residual clause and § 16(b).

Properly construed, the § 924(c) residual clause suffers from the same constitutional defects as the ACCA residual clause and § 16(b). All of these residual clauses "leave[] grave uncertainty about how to estimate the risk posed by a crime," offering "no reliable way to choose between . . . competing accounts" of what the ordinary case of the crime at issue may entail. *Johnson*, 135 S. Ct. at 2557–58. They further "leave[] uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. Section 924(c)'s definition of "crime of violence," then, "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

In *Dimaya*, this Court held that § 16(b)'s validity was "straightforward[ly]" resolved by *Johnson*. 138 S. Ct. at 1213 (plurality opinion). This was so because *Johnson*'s two-part reasoning applied equally to both residual clauses. *Id.* at 1216 (plurality opinion). Just as *Dimaya* was a straightforward application of *Johnson*, this case is a straightforward application of both *Johnson* and *Dimaya*.

Like its corollaries in the ACCA and § 16(b), the § 924(c) residual clause requires courts to assess the risk of the use of physical force by imagining what the "ordinary case" of a candidate for a "crime of violence" might be, but provides "no guidance on how to figure out what that ordinary case" constitutes. *Dimaya*, 138 S. Ct. at 1207–08. A judge is left to her own imagination in constructing the "ordinary case";

under the § 924(c) residual clause there could therefore be as many "ordinary cases" of the same crime as there are federal judges, and the statute provides no way to distinguish among them. See *Johnson*, 135 S. Ct. at 2558. The text of § 924(c)'s residual clause is exactly the same as the text of § 16(b) that was invalidated in *Dimaya*, see 138 S. Ct. at 1223 (plurality opinion), and is thus equally "speculative" and indeterminate, see *id*. at 1214.

The uncertainty of the "ordinary case" analysis is only exacerbated by the statute's fuzzy "substantial risk" standard, which provides no meaningful threshold for the quantum of risk needed to constitute a "crime of violence." Though the use of an imprecise qualitative standard such as "substantial risk" is not in itself unconstitutional, *Johnson* and *Dimaya* held that it *becomes* unconstitutional when a statute requires that it be applied "to an idealized ordinary case of the crime." *Dimaya*, 138 S. Ct. at 1214 (plurality opinion). The underlying indeterminacy of the "ordinary case" determination, plus the uncertainty of what constitutes "substantial risk," together make the § 924(c) residual clause so vague as to violate due process. See *id.* 1214–15.

In his concurrence in *Dimaya*, Justice Gorsuch wrote that § 16(b) "isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. . . . Will, not judgment, dictates the result." *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring). The § 924(c) residual clause—containing the same language as § 16(b)—suffers from the same fatal flaws. The decision below was correct. Pet. App. 5a–6a.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JEFFREY T. GREEN
TOBIAS LOSS-EATON
SIDLEY AUSTIN LLP
1501 K STREET, N.W.
Washington, D.C. 20005
(202) 736-8000

J. JOSEPH MONGARAS*
TIFFANY TALAMENTEZ
UDASHEN & ANTON
2311 CEDAR SPRINGS #250
Dallas, TX 75201
(214) 468-8100
jjm@udashenanton.com

SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

BRANDON E. BECK
ASSISTANT FEDERAL PUBLIC DEFENDER
1205 TEXAS AVENUE #507
Lubbock, TX 79401
(806) 472-7236

Counsel for Respondents

* Counsel of Record

November 30, 2018