No. 18-431

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MAURICE LAMONT DAVIS AND ANDRE LEVON GLOVER,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF FOR FAMM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)'s residual clause is—like the identical residual clause in § 16(b)—unconstitutionally vague because it requires an ordinary-case categorical approach to identifying a "crime of violence."

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INTEREST OF AMICUS CURIAE[1]

Amicus FAMM (formerly known as Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to challenge mandatory sentencing laws and the inflexible and excessive penalties they require. Founded in 1991, FAMM currently has more than 50,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

FAMM submits this brief cognizant of the toll mandatory minimums exact on its members in prison, their loved ones, and our communities. The court of appeals correctly recognized that the residual clause of Section 924(c)(3)(B) is unconstitutionally vague because it fails to provide fair warning of what conduct can subject individuals to harsh mandatory minimum sentences. In light of the grave harm wreaked by these sentences, FAMM is keenly interested in ensuring they be used sparingly and only in accordance with due process.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Petitioner and Respondents have both received timely notice and have granted consent to the filing of this brief pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

Section 924(c)(3) defines a "crime of violence" as "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.

18 U.S.C. § 924(c)(3). This Court's teachings make clear that "'[t]he only plausible interpretation'" of analogous language in the Armed Career Criminal Act (ACCA) "'requires'" an ordinary-case, "'categorical approach'—even if that approach could not in the end satisfy constitutional standards." *Sessions v. Dimaya*, 584 U.S. — , 138 S. Ct. 1204, 1217 (2018) (plurality op.) (quoting *Johnson v. United States*, 576 U.S. — , 135 S. Ct. 2551, 2562 (2015)). "The same is true . . . except more so" with respect to Section 16's residual clause, which is identical to the residual clause in Section 924(c) in every material respect. *Id.* As with the residual clauses in the ACCA and Section 16, Section 924(c)'s residual clause must be invalidated as unconstitutionally vague. *See* Resp. Br. 12–24.

Although Section 924(c)'s residual clause requires a categorical, ordinary-case approach, if the Court decides it must look elsewhere, the only possible alternative is Justice Gorsuch's suggestion that the clause may be read as looking to what the "crime of conviction *always*" entails. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring). Especially when modifying the generic word "offense," the phrase "by its nature"

must refer to an inherent characteristic of an offense; it cannot refer to case-specific conduct. This "always-a-risk" approach also avoids additional constitutional concerns that the government's proposed conduct-based approach raises. If the Court rejects the ordinary-case construction, it should adopt always-a-risk instead.

Under the always-a-risk approach, Respondents' Section 924(c) convictions for Hobbs Act conspiracy must be vacated. Hobbs Act conspiracy requires only "proof that [the defendant] reached an agreement" to commit robbery. *Ocasio v. United States*, 578 U.S. — , 136 S. Ct. 1423, 1436 (2016). Accordingly, many Hobbs Act conspiracy convictions—such as those involving fake stash-house stings or agreements without subsequent unlawful action—do not involve a substantial risk of physical force against others. Because Hobbs Act conspiracy does not always involve a substantial risk that force may be used against others, it is not a crime of violence under Section 924(c).

The Court should affirm the decision below.

ARGUMENT

I. SECTION 924(c)'S RESIDUAL CLAUSE REQUIRES AN ORDINARY-CASE APPROACH.

This Court has previously construed two residual clauses—in the ACCA and in Section 16—that are indistinguishable from Section 924(c)'s residual clause. With respect to the ACCA's residual clause, the Court held that "'[t]he only plausible interpretation' . . . requires use of the categorical approach," under which a court looks to what an offense ordinarily entails. *Johnson v. United States*, 576 U.S. — , 135 S. Ct. 2551, 2562 (2015) (discussing

18 U.S.C. § 924(e)(2)(B)). As for Section 16's residual clause—which is identical to Section 924(c)'s residual clause—the Court held that "[t]he same is true here—except more so." *Sessions v. Dimaya*, 584 U.S. — , 138 S. Ct. 1204, 1217 (2018) (plurality op.) (discussing 18 U.S.C. § 16(b)); *accord Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (unanimously applying a categorical, ordinary-risk approach to Section 16(b)). And because both provisions required an ordinary-case approach, both were held unconstitutionally vague. *See Dimaya*, 138 S. Ct. at 1223 (majority op.); *Johnson*, 135 S. Ct. at 2557.

The same outcome—an ordinary-case approach—is warranted here too for several reasons. Most saliently, the use of the word "offense" in Section 924(c)(3) demands a categorical approach. That single word is distributed over *both* the elements clause (subsection (3)(A)) and the residual clause (subsection (3)(B)). Because "offense" indisputably refers to "the statute of conviction" in the context of the elements clause, *Taylor v. United States*, 495 U.S. 575, 601 (1990), it must also refer to the statute of conviction under the residual clause. It would be a "dangerous principle" for courts to "give the *same* statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (emphasis added).

An ordinary-case approach is further required by the phrase "by its nature." 18 U.S.C. § 924(c)(3)(B); *see* Resp. Br. 14–18. That language "tells courts to figure out what an offense normally—or, as [this Court] ha[s] repeatedly said, 'ordinarily'—entails." *Dimaya*, 138 S. Ct. at 1217–18; *see also Leocal*, 543 U.S. at 7 ("This language requires us to look to . . . the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime."). The

"upshot of all this textual evidence" is that Section 924(c)(3)(B)—like identical language in other statutes—"has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (plurality op.) (quoting *Johnson*, 135 S. Ct. at 2562).

The government contends (at 44) that the canon of constitutional avoidance warrants charting a new course and adopting a fact-based approach. This Court has twice "decline[d] [that] invitation." *Johnson*, 135 S. Ct. at 2562; *see also Dimaya*, 138 S. Ct. at 1217 (plurality op.) ("[T]he avoidance canon cannot serve . . . as the interpretive tie breaker."). After all, statutory language cannot be "dynamic" and "mean one thing when enacted yet another [thing when] the prevailing view of the Constitution later change[s]." *Clark*, 543 U.S. at 382. Because "application of ordinary textual analysis" *requires* an ordinary-case approach here, the avoidance canon simply does not "come[ ] into play." *Jennings v. Rodriguez*, 583 U.S. — , 138 S. Ct. 830, 842 (2018).[2]

The constitutional defect in Section 924(c)(3)(B) "is the product of the law Congress has written. It is not for [this Court] to rewrite the statute . . . to achieve what [it] think[s] Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010). Rewriting the text under the guise of constitutional avoidance

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[2] The government's attempt (at 32) to cabin the categorical approach to statutes involving prior convictions fares no better. The government's view leaves unanswered what courts should do where a "crime of violence" determination must be made *before* trial under other statutes that employ materially identical language. *See*, *e.g.*, *United States v. Rogers*, 371 F.3d 1225, 1228–29 (10th Cir. 2004) (discussing "crime of violence" determination for bail eligibility under 18 U.S.C. §§ 3142(f)(1)(A) and 3156(a)(4)(B)).

would allow legislators to "'abdicate their responsibilities for setting the standards of the criminal law.'" *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) (citation omitted).

Accordingly, this Court should reject the government's invitation to revise Section 924(c)(3)(B). And because that provision is unconstitutionally vague under *Johnson* and *Dimaya*, Respondents' convictions under it were properly vacated. *See* Resp. Br. 12.

II. IF THE COURT REINTERPRETS THE RESIDUAL CLAUSE, THE ONLY POSSIBLE ALTERNATIVE IS AN ALWAYS-A-RISK APPROACH.

If the Court nevertheless concludes that it must reinterpret the statutory language, it should reject the government's conduct-based approach. There is only one possible alternative interpretation of Section 924(c)'s residual clause: As Justice Gorsuch suggested in his *Dimaya* concurrence, that clause could require courts to decide "whether the defendant's crime of conviction *always* . . . 'involves a [substantial] risk of physical force,'" rather than whether it *ordinarily* does so. 138 S. Ct. at 1233.

The text, history, and purpose of Section 924(c)'s residual clause show that, as between an always-a-risk approach and the government's conduct-based approach, the latter must be rejected.

A. The Statutory Text Requires Analysis of a Generic Offense.

When interpreting a statute, this Court "begin[s], as always, with the text." *Esquivel-Quintana v. Sessions*, 581 U.S. — , 137 S. Ct. 1562, 1568 (2017). Here, the relevant language is "an offense . . . that by

its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B).

"Best read," this language "tells courts to figure out what an offense normally . . . entails." *Dimaya*, 138 S. Ct. at 1217–18 (plurality op.); Resp. Br. 13–22. The "nature" of the offense could also potentially tell courts to figure out what the "crime of conviction *always*" entails. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring). Contrary to the government's argument (at 20–33), however, the text cannot refer to what the offense entails in a specific case. Indeed, the government never explains why Congress would choose such a convoluted route to reach that straightforward result.

1. The residual clause unmistakably requires a court to look at an offense in the abstract. An always-a-risk-approach would be consistent with this language; the government's interpretation would not.

The key language is Section 924(c)(3)'s reference to an "offense . . . by its nature." This Court has repeatedly held that a "[s]imple reference[ ]" to an "offense"—without more—is "'read naturally' to denote the 'crime as *generally* committed.'" *Dimaya*, 138 S. Ct. at 1217 (plurality op.) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009)). Section 924(c)(3) includes that simple reference: It mentions "offense" only generally, without any added language specifying the circumstances of conviction. The phrase "by its nature" "make[s] that meaning all the clearer," for it "entails, not what happen[s] to occur on one occasion," but what occurs in the abstract offense. *Id.* at 1217–18.

The modifying phrase "by its nature" is "[b]est read" as "tell[ing] courts to figure out what an offense

normally . . . entails." *Dimaya*, 138 S. Ct. at 1217–18 (plurality op.). But it could also "refer to an *inevitable* characteristic of the offense." *Id.* at 1233 (Gorsuch, J., concurring) (emphasis added). The government concedes that the definition of "nature" is "the basic or inherent feature[ ], character, or qualit[y] of something." U.S. Br. 30 (ultimately quoting *Oxford Dictionary of English* 1183 (3d ed. 2010)). The "nature" of something is its "fundamental" quality or "essence." *Webster's Third New International Dictionary* 1507 (1976). In other words, the residual clause could mean that a "crime of conviction *always*" involves a substantial risk of physical force. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring).

As with the ordinary-case approach, an always-a-risk approach harmonizes the statute by ensuring that the single word "offense" means the same thing in both the elements and residual clauses. The always-a-risk approach ensures that courts always make a "crime of violence" determination based on the crime of conviction—by looking to the elements of the offense in subsection (3)(A) and the inherent qualities of that offense in subsection (3)(B). If an offense lacks as an element the use, attempted use, or threatened use of physical force against the person or property of another, it nevertheless may satisfy the residual clause because its commission always involves a substantial risk that such force "may be used." 18 U.S.C. § 924(c)(3)(B). For example, certain offenses that lack an element of force because they can be committed by means of persuasion or fraud—*e.g.*, kidnapping, *id.* § 1201, or sex trafficking of a minor, *id.* § 2422(b)—may yet always involve a substantial *risk* that force may be used.

An always-a-risk approach is also consistent with case law construing the "nature" of an offense as its essential qualities in the abstract. For example, the Bail Reform Act provides for detention hearings where the case involves "any other offense that is a felony and that, by its nature, involves a substantial risk" of physical force. 18 U.S.C. § 3156(a)(4)(B) (definition of "crime of violence" as used in 18 U.S.C. § 3142(f)(1)(A)). "[T]he majority" of courts to construe the pretrial-detention statute have held that "the possibility of force must result from the nature of the elements of the offense rather than from the particular way that the defendant allegedly committed the crime." *Rogers*, 371 F.3d at 1228 n.5.

Similarly, the statutory definition of "serious violent felony" includes "any other offense" punishable by up to ten or more years in prison that has a force element "or that, by its nature, involves a substantial risk" of physical force. 18 U.S.C. § 3559(c)(2)(F)(ii) ("three strikes" provision). Based on that language, courts have looked to the generic nature of the offense—not the factual particulars of the defendant's conduct. *See*, *e.g.*, *United States v. Abraham*, 386 F.3d 1033, 1037–38 (11th Cir. 2004).

2. The government suggests that an "offense" "by its nature" refers to "'an offender's actual underlying conduct.'" U.S. Br. 30–31 (citation omitted). On its view, "[t]wo violations of the same criminal statute can have very different natures." *Id.* That counterintuitive result is as good a sign as any that the government's interpretation is wrong from the start.

a. To begin, the government's approach implausibly requires reading the phrase "offense that is a felony" as referring to a generic offense in Section

924(c)(3)(A) yet to the specific circumstances of the defendant's conviction in Section 924(c)(3)(B). What makes an "offense" a "felony" are its elements, not the specific circumstances of the defendant's conduct. Nor can the word "offense" have one meaning at the beginning of the sentence and transform into another meaning before the end of the same sentence. A textual interpretation that requires a *single* word to mean two different things depending on which clause of the statute applies is not plausible. *See Clark*, 543 U.S. at 378 ("To give the[ ] same word[ ] a different meaning for each category would be to invent a statute rather than interpret one.").

The government's approach misconstrues not just the word "offense," but also the word "nature." The "nature" of an "offense" cannot plausibly change depending on factual circumstances. According to contemporary dictionary definitions, a characteristic that appears in only some instances, but not others, is not a "fundamental" or "inherent" quality of an offense. *See Webster's Third New International Dictionary* 921 (1976) (defining "fundamental" as "constituting a necessary or elemental quality, part, or condition; indispensable"); *Black's Law Dictionary* 703 (5th ed. 1979) (defining "inhere" as "[t]o exist in and inseparable from something else"). It therefore cannot be part of the "nature" of the offense.

The government only proves this point with its examples of conspiracy to commit arson "of a rival gang's headquarters" and conspiracy to commit arson of "one's own property for insurance money." U.S. Br. 31. It makes little sense to say that, by its nature, the former "offense" involves a risk of physical force but the latter does not. There is no separate "offense" for conspiracy to commit arson of a rival gang's

headquarters, just as there is no "offense" for conspiracy to commit arson of one's own property for insurance money. There is only a single "offense"—conspiracy to commit arson—and the nature of that *offense* does not change from one case to another, even if the underlying offense *conduct* changes.

In addition to rewriting two words in the statute, the government's approach makes the entire phrase "by its nature" superfluous. "'It is . . . a cardinal principle of statutory construction that [this Court] must give effect, if possible, to every clause and word of a statute.'" *NLRB v. SW Gen., Inc.*, 580 U.S. — , 137 S. Ct. 929, 941 (2017) (ellipsis in original; citation omitted). Yet the government's approach gives no effect to the phrase "by its nature." Because the word "offense" *already* connotes a conduct-specific approach (on the government's view), the phrase "by its nature" does no work. The statute would mean the same thing if it referred to, simply, "an offense that is a felony and . . . involves a substantial risk" of physical force. 18 U.S.C. § 924(c)(3)(B).

The government suggests (at 27–29) that the word "involves" further supports a conduct-based approach here. But when a statute uses such "an elastic word," this Court "construe[s] [the] language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9. Here, the subject of the verb "involves" is "offense," and the verb "involves" is modified by the phrase "by its nature." That context makes clear that "involves" does not intend a conduct-based approach. If anything, the repeated use of the present tense—"involves" a risk that physical force "may be used," as opposed to "involved" a risk that physical force "may have been used"—confirms that the statute refers to

the generic offense, not the defendant's historical conduct. *See* Resp. Br. 20–21.

b. The government's interpretation not only rewrites the statutory text, but also runs roughshod over the statutory context by fusing the two acts necessary to commit a Section 924(c) offense. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (citation omitted)).

A Section 924(c) offense is a "combination crime" that requires both the possession of a gun and the commission of a crime that is independently a "crime of violence." *Rosemond v. United States*, 572 U.S. 65, 75 (2014). In other words, it is "a freestanding offense distinct from . . . just . . . using a gun." *Id.* Congress chose, with its enactment of Section 924(c), to "set[ ] out an offense distinct from the underlying felony"; it "is not simply a penalty provision." S. Rep. No. 98-225, at 312 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3490.

The government's conduct-based approach collapses that well-established distinction. Under the government's view, just carrying a gun could be the very reason that an offense is deemed a crime of violence. Virtually *any* felony—even inherently nonviolent felonies—could be found to involve a substantial risk of physical force against another if committed while armed, particularly when one considers the victim's potential reaction or resistance. That would effectively transform Section 924(c) into a penalty provision.

3. The government never explains *why* Congress would have written the residual clause in such a roundabout way if that clause means what the government says. Had Congress intended a conduct-based analysis here, "it presumably would have said so; other statutes, in other contexts, speak in just that way." *Descamps v. United States*, 570 U.S. 254, 267–68 (2013).

a. The government posits (at 53) that Congress created the residual clause for conduct that is "*actually* violent." But under the government's own view, that is the one thing Congress failed expressly to say. Subsection (3)(A) indisputably covers only generic crimes with certain elements, and, in the government's view, subsection (3)(B) reaches *specific* conduct that "by its nature" poses a "substantial risk" that force "may be used." 18 U.S.C. § 924(c)(3)(B). But if Congress wanted the government's conduct-specific approach, it omitted a provision expressly covering persons who actually use physical force in the commission of their crimes. The statute is missing a third prong that reads simply: "an offense that is a felony" and "the defendant used physical force against the person or property of another in the course of committing the offense."

It boggles the mind that Congress would have expressed the straightforward idea that courts should look to what the defendant actually did by (1) requiring the single word "offense" to mean two different things; (2) including an unnecessary phrase that strains the meaning of the word "nature"; (3) foregoing "the defendant used physical force" (or even "the offense involved the use of physical force") in favor of an offense that "involves a substantial risk" that physical force "*may* be used"; and (4) leaving

unexplained how a crime of violence remains distinct from simply using or carrying a gun.

Making matters worse is the government's suggestion that Congress's placement of the words "by its nature" has "the practical effect of limiting the jury's inquiry to the *offense*, rather than the *offender*." *See* U.S. Br. 31. Under that view, where the defendant actually uses force in committing an offense that lacks a force element under subsection (3)(A), the jury would have to parse whether the "particular conduct in violation of federal law," *id.* at 30, resulted from the violent nature of the *offense*, without factoring in the nature of the *offender*. The government never explains why Congress would create a statute that requires a jury to draw such fine distinctions. Moreover, if Congress really had intended to enact a case-specific approach that examines the defendant's actual conduct, it created a gaping hole for cases where the "offense" is not violent "by its nature" (*e.g.*, arson of "one's own property for insurance money," *id.* at 31), but is committed in a violent way (*e.g.*, by recklessly wielding a flamethrower).

b. The government fails to identify, and *amicus* has not found, a single statute that similarly uses the generic words "offense" and "by its nature" to adopt a conduct-based approach. In fact, when the government itself *has* chosen a conduct-based approach, it has expressly used the word "conduct"—not "by its nature." *See*, *e.g.*, 28 C.F.R. § 550.58 (prohibiting early release for inmates who committed a felony "[t]hat by its nature *or conduct*, presents a serious potential risk of physical force" (emphasis added)). The inclusion of both "by its nature" and "conduct" is a sure sign that they mean different

things. *See Bush v. Pitzer*, 133 F.3d 455, 458 (7th Cir. 1997) ("Conspiracy does not by its 'nature' present a serious risk; but Bush's 'conduct' did so.").

The government relies (at 27–29) on a smorgasbord of other statutes. But each statute uses the sort of conduct-specific "language that almost certainly . . . refers to specific circumstances," *Nijhawan*, 557 U.S. at 37—and that Section 924(c)(3)(B) assuredly lacks.

Take, for example, the sentencing-enhancement provisions the government cites. The penalties for importation, manufacture, distribution or storage of explosive materials provide a sentencing enhancement for "conduct" that "creates a substantial risk of injury to any person." 18 U.S.C. § 844(f)(2). The penalty provision for drive-by shootings similarly provides a sentencing enhancement for anyone who "in the course of such conduct"—*i.e.*, firing a weapon into a group of people—"causes grave risk to any human life." *Id.* § 36(b)(2); *see also id.* § 1365(a) (tampering with consumer products "under circumstances manifesting extreme indifference to such risk"). In addition to expressly denoting "conduct," these statutes specifically require that the conduct actually "cause" a grave or substantial risk of harm.

Section 924(c)'s residual clause is different. It does not include the word "conduct," and it refers only to a "substantial risk" that physical force "*may* be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(B) (emphasis added). The use of the verb "may" indicates a hypothetical that will not necessarily materialize in a specific case, even if the risk is present in every case. By focusing on what could have happened, the statute necessarily steers

away from a conduct-based approach that requires looking at what actually happened.

All of the remaining federal statutes the government cites likewise refer to *specific conduct*—such as "theft" (18 U.S.C. §§ 666(b), 670(b)(2)(A)); "assault" (*id.* §§ 111(a), 351(e)); "fraud" (*id.* §§ 1028(b)(1)(D), 2118(a)); a "course of conduct" (*id.* §§ 43(a)(1), (2)(B)); or "manufacturing a controlled substance" (21 U.S.C. § 858)—that "involves" the use or threat of force. The state statutes, too, either expressly refer to the circumstances of the violation or include a *mens rea* element that signals the defendant's violation.[3]

No similar cues appear in Section 924(c)(3)(B). That provision neither contains a *mens rea* element nor refers to any "conduct" or specific circumstances.

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[3] *See* Ala. Code § 13A-6-2(a)(2) ("recklessly engages in conduct which creates a grave risk of death"); Conn. Gen. Stat. Ann. § 53a-112(a)(1)(A) ("with intent to destroy or damage a building"); Ind. Code Ann. § 35-43-4-2(a)(2) ("knowingly or intentionally exerts unauthorized control over property"); Iowa Code Ann. § 709.3(1)(a) ("[d]uring the commission of sexual abuse the person . . . uses or threatens to use force creating a substantial risk of death or serious injury to any person"); Mass. Gen. Laws Ann. ch. 265, § 13L ("wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child"); Md. Code Ann., Crim. Law § 3-1001(c) ("knowingly threaten to commit . . . a crime of violence . . . if as a result of the threat, regardless of whether the threat is carried out"); Mo. Stat. § 565.120(1) ("knowingly restrains another unlawfully and without consent . . . and exposes him or her to a substantial risk of serious physical injury"); Utah Code Ann. § 76-5-301(1)(b) ("intentionally or knowingly . . . detains or restrains the victim in circumstances exposing the victim to risk of bodily injury").

Although the provision requires that the offense involve a substantial risk of physical force that "may be used in the course of committing the offense," the bare phrase "committing the offense" is wholly generic. 18 U.S.C. § 924(c)(3)(B). As this Court has explained with respect to identical language in Section 16, "the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit." *Dimaya*, 138 S. Ct. at 1218 (plurality op.).[4]

If the text does not clearly require the ordinary-case approach, the only possible alternative is the always-a-risk approach.

B. A Conduct-Based Approach Conflicts with the Legislative History.

This Court has also looked to legislative history when construing similar provisions of the ACCA. *E.g.*, *Stokeling v. United States*, 586 U.S. — , 139 S. Ct. 544, 551 (2019); *Taylor*, 495 U.S. at 601. That legislative history is consistent with the always-a-risk approach and forecloses a conduct-based approach under Section 924(c)(3)(B). As this Court has explained, "[t]here was considerable debate over" which offenses to include when Congress enacted the ACCA (and simultaneously amended Section 924(c)), "but *no one* suggested that a particular crime might sometimes count towards enhancement and sometimes not,

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[4] The always-a-risk approach is not precluded by *James v. United States*, 550 U.S. 192 (2007), *overruled by Johnson*, 135 S. Ct. 2551. *James* involved a statute that defined a "violent felony" only by reference to a "serious *potential* risk of physical injury." *Id.* at 207 (emphasis added). Because Section 924(c)(3) does not include a "potential" qualifier, it can support an always-a-risk approach.

depending on the facts of the case." *Taylor*, 495 U.S. at 601 (emphasis added).

1. Nothing indicates that Congress intended two identical statutes—Sections 16(b) and 924(c)(3)(B)—to mean two quite different things.

Before 1984, Section 924(c) penalized using or carrying a firearm in relation to any federal felony. S. Rep. No. 98-225, at 312. In 1984, Congress amended Section 924(c) by limiting it to crimes of violence, while simultaneously defining the term "crime of violence" in Section 16. Pub. L. No. 98-473, §§ 1001(a) & 1005(a), 98 Stat. 1837, 2136 & 2138 (1984). Two years later, Congress copied Section 16's "crime of violence" definition into Section 924(c), with one slight change specifying that a *felony* offense was required under both clauses—not just the residual clause. *See* Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 449, 457 (1986). That minor tweak cannot justify a seismic shift toward a conduct-specific approach in Section 924(c). *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" (citation omitted)). "Congress . . . does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

Even within the 1984 bill, Congress demonstrated that it knew how to craft a provision requiring a conduct-based approach. The Bail Reform Act requires a judicial officer to "take into account the available information concerning—(1) the nature *and circumstances* of the offense charged, *including* whether the offense is a crime of violence or involves a narcotic drug." 98 Stat. at 1980 (emphases added). Congress thus plainly knew how to require

consideration of case-specific circumstances when it so wanted.

But Congress did not want that in Section 924(c). At the same time that Congress imported Section 16's "crime of violence" definition into Section 924(c), it expressly rejected an amendment to a different subsection of Section 924(c) that would have required "analysis of the defendant's conduct [and] the circumstances of the violent crime." H.R. Rep. No. 99-495, at 9 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1327, 1335. The House Judiciary Committee feared this analysis would impose a "substantial burden on the prosecution." *Id.* That circumstance-specific analysis (and prosecutorial burden) would have already existed, however, if the government's conduct-based interpretation of the statute's "crime of violence" definition were correct. The Committee's report confirms that Section 924(c)(3)(B) has never required a conduct-based approach.

There are easy ways for Congress to craft a conduct-based approach if it so desires. In fact, a pending bill proposes one: strike the words "by its nature" from Section 924(c)(3)(B) and replace them with "based on the facts underlying the offense." H.R. 7113, 115th Cong., 2d Sess. § 2(a) (2018). It is for Congress, not this Court, to decide whether to rewrite the statute from the categorical "by its nature" approach to one "based on the facts underlying the offense." *Cf.* U.S. Br. 30 (seeking to equate "by its nature" with "'an offender's actual underlying conduct'" (citation omitted)).

2. Congressional reports accompanying the 1984 amendments further confirm that the residual clause of Section 924(c) refers to the crime of conviction, and cannot refer to a defendant's conduct.

The reports uniformly refer to the "offenses" mentioned in Section 924(c)(3) as generic, not case-specific crimes. For example, the Senate Report explained that Section 924(c) would "ensure that all persons who commit federal crimes of violence, including *those crimes set forth in statutes* which already provide for enhanced sentences for their commission with a dangerous weapon, receive a mandatory sentence." S. Rep. No. 98-225, at 313 (emphasis added). The Report further elaborated that the new definition of "crime of violence" would "expand[ ] the scope of *predicate offenses*, as compared with current law, by including some violent misdemeanors, but restrict[ ] it by excluding non-violent felonies." *Id.* at 425 n.818 (emphasis added); *see also id.* at 390 (explaining that "[p]rosecution may be sought" for juvenile offenses "if the offense charged is a crime of violence or one of four specified serious drug offenses"). These explanations would be incoherent if the "crime of violence" determination actually turned on case-specific circumstances.

The reports also repeatedly assumed that "offenses" either were crimes of violence or were not. The Senate Report, for example, explained the offenses that fell within the elements clause and residual clause, respectively: "The former category would include a threatened or attempted assault or battery on another person; offenses such as burglary . . . would be included in the latter category inasmuch as such an offense would involve the substantial risk of physical force." S. Rep. No. 98-225, at 307. There is no reason to think that the Senate intended these "categor[ies]" to be mutable based on the underlying facts of each case—much less that Congress signaled this result by shifting *sub silentio* from a "category" of generic offenses under the elements clause to a porous

"category" of case-specific offenses under the residual clause.

The legislative history is therefore consistent with an always-a-risk approach, but rules out a conduct-based approach.

C. A Conduct-Based Approach Conflicts with Congressional Purpose.

Unlike an always-a-risk approach, a conduct-based approach would also dramatically frustrate Congress's purpose in revising Section 924(c).

Congress amended the statute to *narrow* coverage from any felony to crimes of violence, S. Rep. 98-225, at 425 n.818, and then to felony crimes of violence, Pub. L. No. 99-308 § 104(a)(2), 100 Stat. 457. A conduct-based approach would do just the opposite, expanding the statute's harsh mandatory minimum penalties to traditionally nonviolent offenses. It could sweep in any felony where a gun was brandished, including paying a bribe (18 U.S.C. § 201); possessing forged citizenship documents (*id.* § 1426); or selling counterfeit art (*id.* § 2318). A conduct-based approach, in short, would kick open the door that Congress firmly shut.

This Court should be especially hesitant to read Section 924(c) broadly because mandatory-minimum provisions grant prosecutors immense power to extract guilty pleas to lesser offenses (or even offenses the defendant did not commit) from risk-averse defendants. Under a case-specific approach, a prosecutor would have discretion to charge a Section 924(c) violation for *every* felony offense with some nexus to possession of a gun. A conviction and sentence, in turn, could "guarantee the defendant a prison term of many decades" or even—"no fanciful

possibility"—a term that "outlast[s] the defendant's life and the lives of every person now walking the planet." *United States v. Smith*, 756 F.3d 1179, 1181 (10th Cir. 2014).

The power to charge this additional crime and threaten its mandatorily consecutive sentence "would predictably be used to induce a plea bargain to [a] lesser charge" from a risk-averse defendant. *United States v. Santos*, 553 U.S. 507, 516 (2008) (plurality op.); *see also* Richard A. Oppel, *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html ("[R]esearchers say the most important force in driving down the trial rate has been" the imposition of "mandatory sentences and other harsher and more certain penalties for many felonies . . . .").

Those defendants who are less risk-averse would lose incentives to plead guilty under a conduct-based approach. The advisory range for a Section 924(c) conviction is the statutory minimum, irrespective of whether the defendant accepts responsibility by pleading guilty. *See* U.S.S.G. §§ 2K2.4(b), 3E1.1. As a result, defendants with plausible arguments that their crimes presented no substantial risk of physical force would have little incentive to plead guilty. They would have every incentive to try, instead, to convince a jury that their actions did not satisfy the statute. *See* Richard T. Boylan, *The Effect of Punishment Severity on Plea Bargaining*, 55 J. L. & ECON. 565, 583 (2012) (finding positive correlation between punishment severity and probability of a trial).

In contrast, an always-a-risk approach, like the ordinary-case interpretation, furthers the purpose of Section 924(c) by narrowing the predicate offenses in

accordance with congressional intent and by preventing arbitrary enforcement. The purpose of Section 924(c) thus could support an always-a-risk approach, but not a conduct-based approach.

D. The Avoidance Canon Supports Only the Always-a-Risk Approach.

If the Court were to apply the avoidance canon to reinterpret Section 924(c)(3)(B), it should not adopt the government's conduct-based approach. Constitutional avoidance simply does not authorize adopting an implausible construction of the statute, especially when that construction conflicts with the rule against surplusage, the presumption of consistent usage, and the rule of lenity, while raising constitutional issues of its own. Rather, the only possible alternative would be to adopt the always-a-risk approach—which suffers from none of the same problems.

Because the conduct-based approach is an "implausible construction[ ]" of the statutory text, *see supra* II.A, it cannot be adopted under the avoidance canon. *Jennings*, 138 S. Ct. at 836 ("[A] court relying on that canon still must *interpret* the statute, not rewrite it."). Moreover, this Court has long refused to apply the avoidance canon when it would frustrate congressional intent and the overriding purposes of the statute. *See United States v. Locke*, 471 U.S. 84, 95–96 (1985); *Shapiro v. United States*, 335 U.S. 1, 31–32 (1948); *see also Jennings*, 138 S. Ct. at 843 ("Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases."). The conduct-based approach does both, while the always-a-risk approach does neither. *Supra* II.B–C.

Three other interpretive canons further foreclose the conduct-based approach here. First, the rule against surplusage provides that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (alteration in original; citation omitted). Yet the conduct-based approach gives no effect to the phrase "by its nature." *Supra* II.A.2. Constitutional avoidance does not permit the Court to toss aside "one of the most basic interpretive canons" and its obvious implications for this case. *Corley*, 556 U.S. at 314.

Second, when this Court interprets a statute, there is a "presumption of consistent usage." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). The conduct-based approach violates that presumption by treating identical language in Section 16 and Section 924(c) differently. This Court has previously refused to apply constitutional avoidance in similar circumstances because that "would render every statute a chameleon," as the same language could change meaning "depending on the presence or absence of constitutional concerns." *Clark*, 543 U.S. at 382; *see also id.* at 378 ("To give the[ ] same words a different meaning" is "to invent a statute rather than interpret one.").

Third, even if the Court were to deem both the always-a-risk approach and the conduct-based approach to be plausible, nonredundant, and consistent constructions, the rule of lenity would "demand resolution of [that] ambiguit[y] in [a] criminal statute[ ] in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990); *see also*

United States v. Granderson, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity . . . ."). Whereas the conduct-specific approach expands the scope of Section 924(c) to potentially any crime involving the use or possession of a firearm, the always-a-risk approach cabins the statute to inherently dangerous offenses that lack force as an element. The rule of lenity requires this narrower scope.

Finally, the avoidance canon applies only "if a reasonable alternative interpretation poses no constitutional question[s]" of its own. *Gomez v. United States*, 490 U.S. 858, 864 (1989); *see also Dimaya*, 138 S. Ct. at 1217 (plurality op.) (refusing to apply avoidance canon because it "would merely ping-pong [the Court] from one constitutional issue to another"). As this Court has already recognized, however, a conduct-based approach "would generate its own constitutional questions." *Dimaya*, 138 S. Ct. at 1217 (plurality op.).

The government warns (at 52–53) of a flood of post-conviction petitions—but courts would face even more under the government's interpretation. For starters, the government's conduct-based approach creates a host of Sixth Amendment concerns in previously adjudicated cases, arising from courts' "'making findings of fact that properly belong to juries.'" *Dimaya*, 138 S. Ct. at 1217 (plurality op.) (quoting *Descamps*, 570 U.S. at 267). If the "crime of violence" determination were conduct-specific—*i.e.*, fact-dependent—it would become an element of the offense, which must be submitted to the jury. *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Here and in thousands of prior cases, though, the jury was *not*

asked to find that the defendant's underlying crime was a crime of violence under Section 924(c)(3)(B). Resp. Br. 50. And as the government acknowledges (at 53), each petition for relief under a conduct-based approach would require careful factual examination of the underlying record.

The conduct-based approach also raises grave due process concerns for wide swaths of past Section 924(c)(3)(B) defendants. If a "crime of violence" were to turn on specific factual findings, defendants who pleaded guilty to a Section 924(c)(3)(B) violation would have done so without "'real notice of the true nature of the charge,'" which is "'the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (citation omitted). If a defendant did not understand "the essential elements of the crime with which he was charged," his guilty plea would be "constitutionally invalid." *Id.* at 618–19. Similarly, previous indictments would not have "fairly inform[ed] [the] defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). An indictment that failed to allege all elements of a crime—including the facts underlying the "crime of violence" determination—would fail to satisfy due process, *United States v. Carll*, 105 U.S. 611, 612–13 (1881), and would serve as another basis for post-conviction relief for numerous defendants.

The government's proposed conduct-based approach creates due process concerns for future defendants as well. Section 924(c)(3)(B) would not "give fair warning of the conduct which it prohibits" under the government's approach. *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). The same offense may constitute a "crime of violence" in some

circumstances, but not others. And virtually any felony could be found to involve a "substantial risk [of] physical force" if committed by an armed defendant. There is no fair warning when *any* offense—including bribery, selling bootleg DVDs, and counterfeiting currency—can be a crime of violence.

None of these constitutional problems arises with the always-a-risk approach. That interpretation would require courts to look only at the generic offense, consistent with the text, history, and purpose of the statute. No jury findings about a defendant's particular conduct would be necessary. The "crime of violence" determination would remain a legal question, causing no new concerns about past indictments or fair notice to future defendants. And because courts would have no need to search for an "idealized ordinary case," *Johnson* would not be controlling. 135 S. Ct. at 2557. An always-a-risk approach not only would maintain the status quo, but also could avoid most of the torrent of post-conviction petitions that the conduct-based approach would generate.

The government's conduct-based approach simply is not the answer to Section 924(c)'s constitutional questions. The only possible alternative is the always-a-risk approach.

III. UNDER THE ALWAYS-A-RISK APPROACH, THE HOBBS ACT CONSPIRACY CONVICTIONS MUST BE VACATED.

Under the always-a-risk approach, Hobbs Act conspiracy is not a "crime of violence" because it requires only a bare agreement to pursue a criminal objective. That much is clear from the government's routine prosecution of Hobbs Act conspiracies

involving fake stash-house robberies, which do not present any risk of physical force against others because the "others" involved are entirely fictional. *See*, *e.g.*, *United States v. Washington*, 869 F.3d 193, 196–97 (3d Cir. 2017). And because Hobbs Act conspiracy is not a crime of violence, Respondents' convictions were properly vacated.

A. Hobbs Act conspiracy requires proof of nothing more than an agreement to commit robbery that would affect commerce. And it is that offense, not the underlying target offense of robbery, that matters for purposes of the residual clause.

The Hobbs Act prohibits, as relevant here, not only committing "robbery or extortion," but also merely "conspir[ing] so to do." 18 U.S.C. § 1951. Unlike the general conspiracy statute, which requires that a conspirator "do any act to effect the object of the conspiracy," *id.* § 371, the Hobbs Act does not require an overt act in furtherance of the agreement. As this Court has explained, such congressional silence "speaks volumes" and demands application of the common-law definition of conspiracy, which "'does not make the doing of any act other than the act of conspiring a condition of liability.'" *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (drug conspiracy).

A mere agreement to commit robbery is thus itself sufficient to sustain a conviction for Hobbs Act conspiracy. *See Ocasio v. United States*, 578 U.S. — , 136 S. Ct. 1423, 1436 (2016) ("A defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an agreement . . . to obtain . . . property under color of official right."). As the Seventh Circuit recently explained, "every other court of appeals to have directly addressed the question after *Shabani*" has agreed "that a Hobbs Act

conspiracy does not have an overt-act requirement." *United States v. Jett*, 908 F.3d 252, 265 (7th Cir. 2018); *see also United States v. Monserrate-Valentin,* 729 F.3d 31, 62 (1st Cir. 2013); *United States v. Clemente,* 22 F.3d 477, 480 (2d Cir. 1994); *United States v. Salahuddin*, 765 F.3d 329, 339–40 (3d Cir. 2014); *United States v. Pistone,* 177 F.3d 957, 960 (11th Cir. 1999).

Where conspiracy to commit Hobbs Act robbery is the crime of conviction, a court should look to whether *that* offense, as opposed to the target offense of robbery, always involves a substantial risk of physical force. By its terms, the residual clause asks whether the "offense"—meaning the crime of conviction—"by its nature, involves a substantial risk" of physical force. 18 U.S.C. § 924(c)(3)(B). Had Congress intended courts to delve into the target offense underlying the conspiracy, it easily could have added conspiracy to the elements clause—as it did for attempt crimes. *See id.* § 924(c)(3)(A) (defining as a "crime of violence" a felony offense that "has as an element the use, *attempted use*, or threatened use of physical force" (emphasis added)). Any ambiguity in this respect must, of course, be resolved in favor of lenity "to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

B. Because the offense of Hobbs Act conspiracy requires only an agreement to commit robbery, it does not always involve a substantial risk of physical force.

In fact, many Hobbs Act conspiracy cases cannot *possibly* involve a substantial risk of physical force against others. The federal government routinely prosecutes such conspiracies when it sets up reverse

sting operations involving fake stash-houses. These stings have "fast becom[e] a rather shopworn scenario" in lower courts. *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011). The typical script involves the government "trawling for crooks in seedy, poverty-ridden areas—all without an iota of suspicion that any particular person has committed similar conduct in the past." *United States v. Hudson*, 3 F. Supp. 3d 772, 780 (C.D. Cal. 2014), *rev'd on other grounds sub nom. United States v. Dunlap*, 593 F. App'x 619 (9th Cir. 2014). After finding a mark, the government goes "to great lengths to construct" a plan for that individual to agree to intercept a drug delivery by a drug cartel at a stash house. *United States v. Clarke*, 649 F. App'x 837, 845 (11th Cir. 2016) (per curiam). "In reality, there [i]s no upcoming delivery, no stash house, and no cartel to rob." *United States v. Blitch*, 622 F.3d 658, 661 (7th Cir. 2010).

Precisely because these stings are completely made up, they "appear[ ] highly susceptible to abuse." *United States v. Hare*, 820 F.3d 93, 103–04 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 224 (2016). The government can "cast . . . bait in places defined only by economic and social conditions" and "create a criminal enterprise that would not have come into being but for the temptation of a big payday." *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013). After recruiting candidates for the crime, the government exercises "virtually unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant." *United States v. Briggs*, 623 F.3d 724, 729 (9th Cir. 2010). The defendant need only enter the agreement fabricated by the government to face liability and a sentencing enhancement.

But while fake stash-house stings create real harm for the defendants they ensnare, they involve no risk of physical force *against others* because the targets of the conspiracy—the witnesses or victims who might be harmed in a real robbery—do not exist. As one federal agent testified, the reverse sting operation is ultimately designed to be "a make-believe scenario [in] which a real victim or real witness *cannot* be hurt." Tr. of Trial Proceedings at 13, 124, *United States v. Jenkins*, No. 13-cr-20334-CMA (S.D. Fla. Feb. 4, 2014), ECF No. 137 (emphasis added).

Even conspiracy offenses that do require an overt act do not inherently involve a substantial risk of physical force against others. The general conspiracy statute, for example, requires merely an agreement and "*any* act to effect the object of the conspiracy." 18 U.S.C. § 371 (emphasis added). That act need not be unlawful, nor need it involve any risk of physical force against others. It could be as simple as purchasing supplies or undertaking other nonviolent preparatory actions.

As this case shows, the public interest is properly served under this approach. If a conspiracy matures beyond an unlawful agreement to an actual robbery (or just an attempted robbery), the defendants may be properly convicted under Section 924(c)(3)(A) for that robbery offense. In this case, for example, the court below affirmed Respondents' Section 924(c) convictions for Hobbs Act robbery because that offense—as opposed to an agreement beforehand—satisfies the elements clause. And if a conspiracy includes multiple robberies (or attempted robberies), the government may charge each robbery as a separate Section 924(c) offense if a firearm is involved in each. The government therefore retains its ability

to obtain sentencing enhancements for crimes that actually pose a substantial risk of physical force against others.

Because Hobbs Act conspiracy does not always involve a substantial risk of physical force against others, it is not a crime of violence under Section 924(c)(3)(B). Respondents' convictions under that provision were properly vacated.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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