No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES,

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 OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF RESPONDENTS

DONNA F. COLTHARP
DANIEL L. KAPLAN
Co-Chairs
Amicus Committee
NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
727 East Durango Boulevard,
Suite B-207
San Antonio, Texas 78206
(210) 472-6700

AMY BARON-EVANS
Counsel of Record
DANIEL T. HANSMEIER
FEDERAL DEFENDERS
NATIONAL SENTENCING RESOURCE
COUNSEL
51 Sleeper Street, 5th Floor
Boston, Massachusetts 02210
(617) 429-2403
abaronevans@gmail.com

Counsel for Amicus Curiae

286791

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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."

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Page

Page

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

Page

Page

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, non-profit, volunteer organization whose members are attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD attorneys represent tens of thousands of individuals in federal court each year, including thousands charged with or convicted of violating 18 U.S.C. § 924(c). Amicus therefore has particular expertise and interest in the subject matter of this litigation. The issues presented are of great importance to our work and to the welfare of our clients.

SUMMARY OF ARGUMENT

This Court should strike § 924(c)'s residual clause as void for vagueness, and reject the government's proposal to adopt a new "circumstance-specific" approach. The government's efforts to minimize the constitutional and practical problems that would be created by adoption of the "circumstance-specific" approach are unpersuasive. And the government overstates the practical impact of striking § 924(c)'s residual clause as void for vagueness.

Respondents and many others who were actually convicted of § 924(c) offenses under the categorical

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1. The parties to the case have consented in writing to the filing of this brief. Sup. Ct. R. 37.3(a). No counsel for a party authored any part of this brief, and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

approach are entitled to relief regardless of whether the Court adopts the government's "circumstance-specific" approach. To uphold their convictions, or order them to be retried, under the "circumstance-specific" approach" would itself violate the Constitution. The government is wrong that if this Court were to adopt a "circumstance-specific" approach, the claims of defendants convicted under a statute that "was in fact constitutionally indeterminate" under a rule that it admits is retroactively applicable on collateral review, would simply disappear. Instead, if the Court were to adopt a different reading now, it could not be used to affirm, reinstate, or require retrial of cases in which defendants were convicted under the unconstitutional categorical approach. The remedy in such cases, as always, would be vacatur and resentencing on any remaining counts.

Further, the "circumstance-specific" approach would create significant constitutional problems of its own, whether applied prospectively or retrospectively. The canon of constitutional avoidance thus cannot support it. Moreover, the "circumstance-specific" approach would generate multiple new constitutional challenges, to be raised at trial, on direct appeal, and on collateral review.

Finally, the government grossly overstates the practical impact of striking § 924(c)'s residual clause as void for vagueness. The government is correct that striking down § 924(c)'s residual clause will preclude § 924(c) prosecutions that rely solely on underlying offenses that would qualify as crimes of violence only under the residual clause, but such is the consequence of an unconstitutional statute. In any event, most crimes the government considers violent will still count as crimes

of violence under § 924(c)(3)(A)'s force clause. And even if "immunized" from prosecution under § 924(c), these defendants can still be prosecuted under other federal statutes and still be sentenced to lengthy prison terms under those statutes.

In short, constitutional and practical considerations weigh decidedly against adoption of a "circumstance-specific" approach, and this Court should strike § 924(c)'s residual clause as unconstitutionally vague.

ARGUMENT

I. Defendants Convicted of § 924(c) Offenses Under a Categorical Approach Are Entitled to Relief Regardless of Whether the Court Adopts the Government's Novel, "Circumstance-Specific" Approach to § 924(c)(3)(B).

The government asks this Court to adopt a novel interpretation of § 924(c), one that no court had seriously considered until last year. Its reason for doing so is unfortunate. As the government concedes, § 924(c)'s residual clause is void for vagueness. Pet. Br. 45 ("It is now clear that construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional."); *see also Ovalles v. United States*, 905 F.3d 1231, 1239-40 (11th Cir. 2018) (en banc) ("[I]f we are required to apply the categorical approach in interpreting § 924(c)(3)'s residual clause—as the Supreme Court did in voiding the residual clauses before it in *Johnson* and *Dimaya*—then the provision is done for."). And if this Court strikes down § 924(c)(3)(B) as unconstitutionally vague, the government further concedes that relief would

be available to defendants on collateral review. Pet. Br. 52. To avoid these results, the government wants a new approach. The government's "circumstance-specific" approach, it says, would permit this Court to affirm convictions despite the statute's unconstitutionality. Pet. Br. 44-53. In other words, the government wants an end run around the Constitution.

This Court should reject the government's position. Resp. Br. 12-47. But even if this Court were to adopt the government's "circumstance-specific" approach moving forward, the fact remains that the respondents (and many other defendants) were convicted under § 924(c)'s unconstitutionally vague residual clause (under a categorical approach). That error cannot be papered over by finding harmless a different error that would be created by the new reading the government proposes. Pet. Br. 53. Indeed, to reinstate or affirm such convictions on a basis that was never charged or presented to a jury would itself violate the Constitution. Instead, any § 924(c) conviction premised on § 924(c)(3)(B)'s unconstitutionally vague residual clause must be vacated (with resentencing to follow on any remaining counts). *See*, *e.g.*, *United States* v. *Simms*, 914 F.3d 229, 250-51 (4th Cir. 2019) (en banc) ("[P]ast convictions employing the ordinary-case categorical approach will be called into question regardless of whether [this Court] invalidate[s] the statute or adopt[s] a new conduct-specific reading that all rejected before *Dimaya*.").

Remember, defendants convicted under a categorical approach did not have a right to a jury trial to determine whether § 924(c)(3)(B)'s residual clause was satisfied. As the facts of the instant cases illustrate, under the

categorical approach, the indictment charged, and the district court instructed the jury, that the underlying offense is a "crime of violence." *See* ROA 1152, 1298, 1361. The indictments did not allege that the defendants' conduct, "by its nature, involves a substantial risk that physical force against the person or property may be used in the course of committing the offense." Nor were the juries instructed on that definition or that they must determine whether the defendants' conduct satisfied it. Nor were defendants who pled guilty told that whether the underlying crime is a "crime of violence" was not a legal question already decided against them but an open question of fact they could dispute to a jury. This practical reality confirms that, if applied to defendants who have already been convicted under the unconstitutional categorical approach (including the respondents here), the government's "circumstance-specific" approach would violate the Fifth Amendment's Due Process and Indictment Clauses and the Sixth Amendment's right to a jury trial.

Start with the Due Process Clause. This Court has repeatedly held that to uphold a defendant's conviction based on a construction of a statute under which he was not convicted itself violates the Due Process Clause. "To conform to due process of law, [criminal defendants are] entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U.S. 196, 202 (1948). In *Cole*, for instance, the state supreme court avoided defendants' constitutional challenge to the statute under which they were convicted by affirming "as though" they had been convicted of an offense "for which they were neither tried

nor convicted." *Id.* at 200-01. This Court reversed. "It is as much a violation of due process" for a reviewing court "to send an accused person to prison [for] a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201.

Similarly, because due process requires that the defendant have notice of the specific charge against him and the ability to defend against that charge, an appellate court may not affirm a conviction—and thus avoid vacating *that* conviction—by altering the elements of the offense of which the defendant was convicted. *See Rabe v. Washington*, 405 U.S. 313, 315-16 (1972) (holding state supreme court violated due process by affirming defendant's conviction "under a statute with a meaning quite different from the one he was charged with violating"); *Eaton v. Tulsa*, 415 U.S. 697, 698-99 (1974) (per curiam) (holding state court of appeals "denied petitioner constitutional due process in sustaining" his conviction by treating it "as a conviction upon a charge not made" or found by the trier of fact); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (holding state supreme court violated due process by affirming convictions for disorderly conduct, for which there was no evidentiary support, on the ground defendants were convicted for refusing to obey a police officer, a charge that "was never made"); *Presnell v. Georgia*, 439 U.S. 14, 15-17 (1978) (per curiam) (holding state supreme court violated due process when it sustained a death sentence by piecing together parts of the record to make out the elements of a crime that was never charged or submitted to the jury, depriving defendant of notice and the ability to defend himself); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 155 (1969) (state supreme court's "remarkable job

of plastic surgery on the face of the ordinance" to reinstate defendant's conviction could not "restore constitutional validity to a conviction that occurred . . . under the ordinance as it was written"); *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966) ("[W]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act.").

Additionally, the respondents' conduct necessarily pre-dated the ruling the government seeks. Thus, the respondents (and other similarly-situated defendants) could not be retroactively subjected to a change in "the legal definition of the offense," the "kind of proof required to establish guilt," or the "questions that may be considered by the court and jury in determining guilt or innocence." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). If Congress were to enact such a law, applying it to pre-enactment conduct would violate the Ex Post Facto Clause, *id.*, and achieving the same result by judicial construction would violate the Due Process Clause. *See Marks v. United States*, 430 U.S. 188, 191-92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964).

Likewise, a reviewing court cannot affirm, or reinstate, a past § 924(c) conviction obtained under the categorical approach by applying a different reading under which the defendant was not charged, tried, or convicted. "To uphold a conviction on a charge that was [not] presented to a jury at trial offends the most basic notions of due process," as "[f]ew constitutional principles

are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 442 U.S. 100, 106 (1979). While a jury "might" have "reached the same verdict"—*if* it had been instructed to determine whether the defendant's conduct factually satisfied the definition of "crime of violence" *and* the parties had built their cases on that basis—"the offense was not so defined, and appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Id.* at 107.

This latter point bleeds into the Sixth Amendment's right to a jury trial. Even if a question of law at trial could be retroactively transformed into a question of fact for the jury on appeal, a reviewing court could not affirm the conviction "on legal and factual grounds that were never submitted to the jury." *McCormick v. United States*, 500 U.S. 257, 270 (1991). In addition to violating due process, doing so would violate the Sixth Amendment. "This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *Id.* at 270 n.8.

The Fifth Amendment's Indictment Clause would also preclude the retrial of a defendant under the government's "circumstance-specific" approach. Such a retrial would "destroy[] the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361 U.S. 212,

217 (1960). "Deprivation of such a basic right is far too serious to be . . . dismissed as harmless error." *Id.*; *see also Russell*, 369 U.S. at 764, 770, 772 (reversing convictions outright where indictment "failed to sufficiently apprise the defendant of what he must be prepared to meet," for otherwise a defendant "could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him").

The constitutional error in the instant case (and ones like it) could not be deemed harmless. In the cases discussed above, this Court reversed outright, and the reasoning is entirely inconsistent with harmless error review. *See McCormick*, 500 U.S. at 270 n.8 ("Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury."); *Dunn*, 442 U.S. at 106 ("[A]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial."); *Shuttlesworth*, 394 U.S. at 155 (court's revision of ordinance on appeal did not "restore constitutional validity to a conviction that occurred . . . under the ordinance as it was written"). Here, the government claims, reviewing courts may affirm or reinstate convictions by finding harmless the purported omission of an "element" under its fact-based reading that did not exist when defendants were tried and convicted. Pet. Br. 53 (citing *Neder v. United States*, 527 U.S. 1 (1999)). Even if the error were omission of an element (it is not, Resp. Br. 50-51), harmless error review would be impermissible. Harmless error review applies under *Neder* only in a "narrow class of cases" where the defendant had the opportunity to contest the omitted element and failed to do so. *See Neder*, 527 U.S. at 15-16, 17 & n.2, 19.

In the end, if courts of appeals could find a constitutional error harmless by applying a new theory of guilt to facts they can glean from a record that was not developed on that basis, that reading would enable convictions to "rest on one point and the[ir] affirmance … to rest on another," and would give the prosecution "free hand on appeal to fill in the gaps of proof by surmise or conjecture," leaving it "free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell v. United States*, 369 U.S. 749, 766, 768 (1962). And so, the government is wrong that if this Court were to adopt a "circumstance-specific" approach, the claims of defendants convicted under a statute that "was in fact constitutionally indeterminate" under a rule that it admits is retroactively applicable on collateral review, would simply disappear. Pet. Br. at 52-53. Instead, if the Court were to adopt a different reading now, it could not be used to affirm, reinstate, or require retrial of cases in which defendants were convicted under the unconstitutional categorical approach. The remedy in such cases, as always, would be vacatur and resentencing on any remaining counts.

II. The Government's "Circumstance-Specific" Approach Does Not Fix § 924(c)(3)(B)'s Vagueness Problems, And It Creates Other Problems As Well.

The government invokes the canon of constitutional avoidance in support of its "circumstance-specific" approach. Pet. 44-53. But this canon does not apply here. The canon applies only "if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). The government's "circumstance-specific" approach is not only unreasonable,

Resp. Br. 12-36, but it would also create significant constitutional problems of its own (whether applied prospectively or retrospectively). Indeed, adopting the government's "circumstance-specific" approach would generate multiple new constitutional challenges to be raised at trial, on direct appeal, and on collateral review. The government's attempt to minimize its practical impact, Pet. Br. 52-53, is thus unavailing.

A. Section 924(c)(3)(B) would still be unconstitutionally vague under the government's "circumstance-specific" approach.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The "circumstance-specific" approach fails both prongs of this test.

1. The government's "circumstance-specific" approach would not give fair notice of what conduct § 924(c) prohibits. Bear in mind, the residual clause's actual language would not change. And that language, defining a crime of violence as an offence that "by its nature" poses a "substantial risk" of force against person or property, is simply not sufficiently definite to give ordinary people notice of what conduct the statute prohibits. *See United States v. Salas*, 889 F.3d 681, 686 (10th Cir. 2018) (holding § 924(c)(3)(B) would be unconstitutionally vague even if determined by a jury based on specific conduct). If this

Court could not figure out a plausible interpretation of this statutory language, a jury should not be expected to do so either. Whether one takes an "ordinary case" approach, or attempts to apply it to specific facts, the residual clause is simply too vague to "give fair warning of the conduct which it prohibits." *Bouie*, 378 U.S. at 350.

In practice, under the government's "circumstance-specific approach," § 924(c)(3)(B) would not have a "fixed," "settled and definite" meaning. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1226 n.1, 1227 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (citations omitted). Nor could it. The phrase "by its nature" is incomprehensible as applied to conduct-specific facts. *Simms*, 914 F.3d at 241 ("[E]ven under the Government's interpretation, giving 'by its nature' meaning would shift the § 924(c)(3)(B) inquiry away from conduct-specific facts and back towards a subjective consideration of that conduct's 'inherent features'—that is to say, another version of ordinary-case analysis."). Indeed, as shown by the jury instructions the government cites, judges are unable to explain to juries what the statute means. Resp. Br. 17. Three of the four instructions omit "by its nature," one replaces it with "as committed," another with "committed in a way," and another recites it but does not explain it. Resp. Add. 3a, 8a, 12a. One instruction even directs a verdict on two of five potential "crimes of violence," while also instructing the jury to make the determination with respect to all five. *Id*. at 16a-17a. When a law has not been defined in "understandable terms," and "the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced." *Ashton v. Kentucky*, 384 U.S. 195, 198 (1966). As Justice Scalia observed regarding the Court's use of statistics to interpret the ACCA's residual clause:

> Vagueness, of course, must be measured ex ante—*before* the Court gives definitive meaning to a statutory provision, not *after*. Nothing is vague once the Court decrees precisely what it means. And is it seriously to be expected that the average citizen would be familiar with the sundry statistical studies showing . . . that this-or-that crime is more likely to lead to physical injury than what sundry statistical studies . . . show to be the case for burglary, arson, extortion, or use of explosives? To ask the question is to answer it.

Sykes v. United States, 564 U.S. 1, 32-33 (2011) (Scalia, J., dissenting), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015). At least after *Sykes*, the average citizen was on notice that vehicular flight from a law enforcement officer was a "violent felony." Under the government's "circumstance-specific" approach, the provision would *never* have definitive meaning. With the definition converted from a legal determination to what the jury decides in one's own case, no one could predict in advance what crimes it covers.

The government is wrong that this is "exactly the type of fact-specific determination that juries are regularly called upon to make." Pet. Br. 15. Juries are called upon to decide historical facts, *viz.*, whether the defendant committed the elements of the underlying crime of violence, not the legal definition of the term "crime of violence." *See United States v. Gaudin*, 515 U.S. 506, 512-13 (1995) (explaining that the jury "[does] not [have the] power" to decide "*pure questions of law* in a criminal case," and instead "the judge must be permitted

to instruct the jury on the law and to insist that the jury follow his instructions"); *Hamling v. United States*, 418 U.S. 87, 118 (1974) (holding "definition of obscenity … is not a question of fact, but one of law," which "does not change with each indictment" and is thus "sufficiently definite in legal meaning to give a defendant notice"). If juries defined crimes on a case-by-case basis, crimes would have no settled meaning, ever.

2. The government's "circumstance-specific" approach would also encourage arbitrary and discriminatory enforcement. Indeed, § 924(c) is already arbitrarily and discriminatorily enforced. Making it broader and more indefinite, and thus leaving it to prosecutors to determine its reach from case to case, would exacerbate the problem.

For one thing, § 924(c) is already applied in a racially disparate manner. In 2004, the Sentencing Commission reported that Black defendants were 48 percent of drug offenders with a weapon involved in their offenses, but 64 percent of those charged and convicted of a § 924(c) offense.[2] In 2011, the Commission reported that Black defendants were 44.9 percent of drug offenders with a weapon involved in their offenses, but 54.7 percent of those charged and convicted of a § 924(c) offense.[3]

For another, prosecutors have often misused § 924(c) as a threat to induce guilty pleas and then to

2. U.S. Sent'g Comm'n, Fifteen Years of Guideline Sentencing at 90 (2004).

3. U.S. Sent'g Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* at 282 (Oct. 2011) (hereinafter "2011 Mandatory Minimum Report").

punish defendants who exercise their right to trial. *See United States v. Looney*, 532 F.3d 392, 398 (5th Cir. 2008) ("[W]e must observe that the power to use § 924(c) offenses, with their mandatory minimum consecutive sentences, is a potent weapon in the hands of prosecutors . . . that can be abused to force guilty pleas under the threat of an astonishingly long sentence."); *United States v. Hungerford*, 465 F.3d 1113, 1121 (9th Cir. 2006) ("Hungerford received her 159–year sentence because she refused to enter into a plea agreement with the government. . . . [I]n light of her mental illness, Hungerford may not have even understood the nature of the offenses for which she was convicted. Yet, incredibly, the prosecutor believed that Hungerford received a fair sentence.") (Reinhardt, J., concurring in the judgment). As the data demonstrates, whether the prosecution charges any, one, or multiple § 924(c) counts depends to a great extent on whether a defendant pleads guilty or exercises her right to trial. Offenders with a weapon involved in their offenses in 2012 were 2.5 times more likely to receive a § 924(c) enhancement if they went to trial than if they pled guilty.[4] Defendants convicted of § 924(c) offenses in 2010 were 3.6 times more likely to be charged and convicted of multiple ("stacked") § 924(c) counts than if they pled guilty.[5]

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4. Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead.

5. 2011 Mandatory Minimum Report, *supra* note 3, at 276 (4.8% of those who pled guilty and 17.4% of those went to trial were charged and convicted of multiple § 924(c) counts).

And this is very often unjust. For example, in *United States v. Holloway*, 68 F.Supp.3d 310 (E.D.N.Y. 2014), the government charged Holloway and an accomplice with three counts of carjacking and three § 924(c) counts for stealing three cars at gunpoint. Shortly before trial, the government offered to dismiss two of the § 924(c) counts, which would have required Holloway to spend about nine years in prison. He declined, went to trial, and was convicted. The judge imposed a sentence of 57 years and 7 months, consisting of 45 years under § 924(c)'s consecutive mandatory penalties and 151 months under the then-mandatory guidelines. Holloway's punishment for going to trial—his "trial penalty"—was 42 years in prison. His co-defendant, who pled guilty and testified against him, was sentenced to 27 months. *Id.* at 312-13. The judge stated, "the misuse of prosecutorial power over the past 25 years has resulted in a significant number of federal inmates who are serving grotesquely severe sentences." *Id.* at 316-17.

In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd,* 433 F.3d 738 (10th Cir. 2006), the government initially charged Angelos for selling $350 worth of marijuana to an informant in three controlled buys, and one § 924(c) count for having a gun in his car on one of those occasions. The government coupled an offer of 15 years for a guilty plea with a threat to bring additional § 924(c) charges requiring over 100 years if Angelos went to trial. He declined the offer, and the government charged additional § 924(c) counts, setting the combined mandatory minimum sentence at 105 years. The jury acquitted him of three of the charges but convicted him of three others, and the judge was required to impose a sentence of 55 years. *Id.* at 1231-32. According

to the former U.S. Attorney for the District of Utah, "law enforcement officials allowed Angelos to commit multiple offenses, knowing that the 924(c) mandatory minimum sentences could be unreasonably stacked on top of each other by the prosecutor."[6]

In *United States v. Looney*, *supra*, Ms. Looney, age 53, was sentenced to 45 years for selling drugs with her husband and having guns in the house. The prosecutor offered 15 years for a guilty plea, but added two § 924(c) charges when she opted for trial. "Although thirty years of her sentence can be attributed to possessing guns in furtherance of her methamphetamine dealing, there is no evidence that Ms. Looney brought a gun with her to any drug deal, that she ever used one of the guns, or that the guns ever left the house." 532 F.3d at 396. Nonetheless, "the prosecutor exercised his discretion—rather poorly we think—to charge her with counts that would provide for what is, in effect, a life sentence." *Id.* at 398. Ms. Looney's co-defendant received a 37-month guideline sentence simply by being prosecuted in an adjoining district.

In *United States v. Rivera-Ruperto*, undercover FBI agents hired Rivera-Ruperto to provide armed security for six fictitious drug deals. The drugs were fake, the agents posed as buyers and sellers, and an agent instructed Rivera-Ruperto to bring a pistol each time. The government charged six attempted drug trafficking crimes and six § 924(c)s, then offered 12 years for a guilty

6. Testimony of Brett Tolman, Former U.S. Attorney for the District of Utah, to U.S. Sen. Comm. on the Judiciary, at 3-4 (Oct. 19, 2015), https://www.judiciary.senate.gov/imo/media/doc/10-19-15%20Tolman%20Testimony.pdf.

plea. Rivera-Ruperto declined, was found guilty, and was sentenced to 161 years. His trial penalty was 149 years, 130 years of which was for bringing a pistol to the fake transactions as instructed. *See United States v. Rivera-Ruperto*, 852 F.3d 1 (1st Cir. 2017), *reh'g denied*, 884 F.3d 25 (1st Cir. 2018) (en banc); *id.* at 25-48 (Barron, J., concurring in denial of petition for rehearing, and joined by all active judges in urging Supreme Court to revisit its Eighth Amendment jurisprudence), *cert. denied*, __S. Ct.__, No. 18-5384, 2019 WL 888158, at *1 (U.S. Feb. 25, 2019).

In limited circumstances (and prospectively only), courts can save a vague statute by adopting a "narrower or more definite" interpretation of that statute. *Bouie*, 378 U.S. at 353. The government's "circumstance-specific" approach, however, would make § 924(c) broader and less definite than the categorical approach. As respondents demonstrate, the "circumstance-specific" approach would allow prosecution and conviction for *any* crime when a gun was found, possessed, or carried. *See* Resp. Br. at 41-42. To convict, the government need only convince a jury that the presence of a gun made the crime risky. *See Simms*, 914 F.3d at 247 ("[T]he use, carrying, or possession of a firearm, standing alone, will always suffice to generate [the requisite] risk in a conduct-specific analysis, regardless of the nature of the underlying offense."). The government's "circumstance-specific" approach would thus delegate to prosecutors the authority to "shap[e] a vague statute's contours through their enforcement decisions." *Dimaya*, 138 S. Ct. at 1228 (Gorsuch, J., concurring in part and concurring in the judgment) (internal citation omitted). Such a result would violate "the requirement that a [criminal statute] establish minimal guidelines to govern

law enforcement." *Kolender*, 461 U.S. at 358 (internal citation omitted). "Where a criminal law fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* (internal citation omitted).

The government's "circumstance-specific" approach would allow prosecution for offenses that were not "crimes of violence" even under the categorical approach. Resp. Br. 40-43, 44. A person who sold counterfeit designer bags in violation of 18 U.S.C. § 2320 on five occasions with his legally-owned gun in his backpack could be charged with five § 924(c) offenses carrying five consecutive minimum sentences. A person who on six occasions submitted false expense reports to his federal employer in violation of 18 U.S.C. § 641, while on-duty with his government issued gun in his holster, could be charged with six § 924(c) offenses carrying six consecutive minimum sentences.

The government has argued elsewhere that juries could be instructed not to find a crime of violence based *solely* on the presence of a firearm. *Simms*, 914 F.3d at 247-48. "But this solution offers no affirmative principle to guide jury decision-making. How, exactly, are jurors to keep these two showings apart? Should they cross out facts involving the firearm? Imagine the firearm wasn't there? Pretend it was inoperable?" *Id.* at 248.

In short, although the possession, use, or carrying of a gun plays no role in the judge's determination of whether the underlying offense is a "crime of violence" under § 924(c)(3)(A) or (B), under the government's "circumstance-specific" approach, that fact would be

considered by the jury in determining whether the defendant's conduct "by its nature" involved a substantial risk of force.[7] The categorical approach maintains the distinction between the "two separate acts" that constitute an offense under § 924(c). *See Rosemond v. United States*, 572 U.S. 65, 75 (2014); *Smith v. United States*, 508 U.S. 223, 227–28 (1993). "Instead of condemning jurors to such an ill-defined inquiry, categorical analysis limits § 924(c)'s additional sanctions to the discrete and particularly serious classes of felonies selected by Congress—drug trafficking crimes and crimes of violence." *Simms*, 914 F.3d at 248.

B. To apply the "circumstance-specific" approach to pre-ruling conduct would violate fair notice and *ex post facto* principles.

The government has not only asked this Court to adopt a novel interpretation of § 924(c), but it has also asked this Court to apply that interpretation in cases (like the ones at issue here) where the lower courts applied the categorical approach, and asserts generally that it can be applied "retrospectively." Pet. Br. 53.

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7. Indeed, in each case in which a court of appeals has (improperly) conducted a circumstance-specific inquiry to find a defendant guilty on appeal, the court expressly relied on the gun even where it appears the defendant himself or herself did not use or hold the gun. *See United States v. Barrett*, 903 F.3d 166, 184 (2d Cir. 2018) (someone in conspiracy threatened victims at gunpoint); *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (accomplice fired gun during attempted carjacking); *United States v. Douglas*, 907 F.3d 1, 17 (1st Cir. 2018) ("one or more conspirators" brandished firearms).

To punish a defendant for pre-ruling conduct that would not have violated § 924(c) at the time it was committed would violate the due process requirement that a criminal statute give "fair warning of the conduct which it prohibits," as well as *ex post facto* principles. *See Bouie*, 378 U.S. at 350, 353-54. It follows that to prosecute or retry a defendant for pre-ruling conduct under the circumstance-specific approach would violate the fair warning requirement and *ex post facto* principles as well. In *Marks*, 430 U.S. 188, for instance, the defendants were convicted under a statute that had always used "sweeping language." *Id.* at 196. This Court first severely restricted the statute's reach in *Memoirs v. Massachusetts*, 388 U.S. 413 (1966), then relaxed those restrictions in *Miller v. California*, 413 U.S. 15 (1973). *Memoirs* was the law at the time of the defendants' conduct, *id*. at 194, but the defendants were convicted over their objection on an instruction under the *Miller* test. *Id*. at 189-91. This Court reversed, holding, "in accordance with *Bouie*, that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller*[], to the extent that those standards may impose criminal liability for conduct not punishable under *Memoirs*." *Id*. at 196. Thus, the court of appeals' application of harmless error review to conclude that defendants' conduct satisfied either test was "not an adequate substitute" for a determination of guilt under *Memoirs*, and they were also entitled to application of "any constitutional principle enunciated in *Miller* which would serve to benefit" them. *Id.* at 196-97 & n.12 (internal citation omitted).

C. The government's attempt to minimize the impact if this Court were to adopt a "circumstance-specific" approach is unavailing.

The government asserts that if this Court were to adopt its "circumstance-specific" approach, it could be applied through harmless error review or retrial, and that the only "prisoners who might be eligible for collateral relief would be those who could show actual innocence under the statute as so construed." Pet. Br. 53, 55.

As explained in Part I, respondents and many others were convicted under § 924(c)'s unconstitutionally vague residual clause, and that error cannot be deemed harmless. The question in their cases, answered by judges, was whether the "ordinary case" of the underlying crime satisfied the legal definition in § 924(c)(3)(B) as a matter of law. *See* ROA 1361 ("I instruct you that the crimes alleged in Counts One and Six are crimes of violence.").[8] No jury was asked the entirely different question whether the facts of the case somehow fit § 924(c)(3)(B), which makes harmless error review entirely inapplicable.[9] *See Neder*,

8. *See also Brown v. United States*, 906 F.3d 159, 160–61 (1st Cir. 2018) ("At Brown's trial in 2009, the jury was instructed that the conspiracy counts were 'crimes of violence.'"); Trial Transcript at 197, *United States v. Barrett*, No. 1:12-cr-00045 (S.D.N.Y. Mar. 18, 2013) (ECF No. 183) ("I instruct you that the [robbery conspiracy and robberies alleged in Counts One, Three and Five] of the indictment qualify under the law as crimes of violence."); Trial Transcript at 123, *United States v. Salas*, No. 12-3183 (D.N.M. Mar. 1, 2015) (ECF No. 369) ("You are instructed that arson is a crime of violence.").

9. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (Because "there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of [harmless-error] review is simply

527 U.S. at 17 n.2 (reaffirming that a directed verdict is not subject to harmless error); *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("[T]he error in such a case is that the wrong entity judged the defendant guilty."). Nor can they be retried, at the government's instance, on a charge not presented in the indictment the grand jury returned against them. *See Stirone*, 361 U.S. at 217.

And if this Court holds that § 924(c)'s residual clause is a factual element for the jury, many prisoners, because they are serving such long sentences, will seek collateral review based on new claims created by the new construction itself.[10] For example, if § 924(c)(3)(B) is an element, prisoners would have cognizable claims that their indictments did not contain all of the elements of the offense or fairly inform them of the charge against which they had to defend, in violation of the Fifth Amendment's Due Process and Indictment Clauses. *See Hamling v. United States*, 418 U.S. 87, 117 (1974); *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("An indictment must set forth each element of the crime that it charges."). This error may not be subject to harmless error review. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 117-18 (2007) (Scalia. J., dissenting) (noting Court had not decided whether a constitutionally deficient indictment was amenable to harmless error, but would find the error to be structural) (citing *United States v. Gonzalez–*

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absent . . . . There is no *object,* so to speak, upon which harmless-error scrutiny can operate . . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action.").

10. If this Court were to accept the government's invitation to adopt a "circumstance-specific" approach, it would be a "new" rule, and would apply retroactively on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 354 (2004).

Lopez, 548 U.S. 140 (2006); *Neder,* 527 U.S. at 30 (Scalia, J., concurring in part and dissenting in part)).

Likewise, if § 924(c)(3)(B) is an element, the judge almost certainly directed a verdict on that element in violation of the Sixth Amendment. *See United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572–573 (1977); *Carpenters v. United States,* 330 U.S. 395, 408 (1947). That error can never be harmless. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) ("[D]irected verdicts for the State [are not] sustainable on appeal."); *Rose*, 478 U.S. at 578 (government cannot contend that a directed verdict was harmless regardless of evidence of guilt).

The government at least recognizes that prisoners who pled guilty would have cognizable claims that their pleas were not knowing and intelligent. Pet. Br. 53 (claiming that "the only prisoners who might be eligible for collateral relief would be those who could show actual innocence under the statute as so construed") (citing *Bousley v. United States*, 523 U.S. 614 (1998)). The Court has long held that "a plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley*, 523 U.S. at 618 (citations omitted). But the government is wrong that these prisoners would be eligible for relief only if they "could show actual innocence under the statute as so construed." Pet. Br. 53. While that is one way to overcome procedural default, a petitioner may also show cause and prejudice. Cause is established when, as here, a claim was "so novel that its legal basis [was] not reasonably available." *Bousley*, 523 U.S. at 622. Prejudice is shown by a reasonable probability that the

defendant would not have pled guilty had he been properly advised. *See Strickler v. Greene*, 527 U.S. 263, 289-90 (1999).

III. The Government Grossly Overstates the Practical Implications of Striking § 924(c)'s Residual Clause as Void for Vagueness.

The government claims that striking § 924(c)'s residual clause as void for vagueness "would inappropriately undermine Congress's law-enforcement efforts, with severe practical consequences." Pet. Br. 49. Doing so, the government claims, would "effectively immuniz[e] from Section 924(c) prosecution" "some of the most violent criminals on the federal docket." Pet. Br. 49. In support, the government cites the facts of this case and seven others. Br. 49-52 (citing *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018); *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017), *vacated*, 138 S.Ct. 1980 (2018); *Knight v. United States*, No. 17-6370 (6th Cir.); *Eizember v. United States*, No. 17-1406 (8th Cir.); *United States v. Cruz-Ramirez*, No. 11-10632 (9th Cir.)).

The government is correct that striking down § 924(c)'s residual clause will preclude § 924(c) prosecutions that rely solely on underlying offenses that would qualify as crimes of violence only under the residual clause. But such is the consequence of an unconstitutional statute. *Marbury v. Madison*, 5 U.S. 137, 178 (1803). "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they

both apply." *Id.* When this Court "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent,'" it necessarily "immunized" individuals from prosecution under those statutes. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010). If there was something impermissible or unjustified with "immunizing" individuals from the reach of an unconstitutionally vague residual clause, then this Court would have decided *Johnson v. United States*, 135 S.Ct. 2551 (2015), and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), differently.

In any event, the government's concerns are overblown in two important respects. First, most crimes the government considers violent will still count as crimes of violence under § 924(c)(3)(A)'s force clause. And second, even if "immunized" from prosecution under § 924(c), these worst-of-the-worst defendants (in the government's view) can still be prosecuted under other federal statutes (and still be sentenced to comparatively lengthy sentences under those statutes).

Start with this case. The lower courts have held that robbery qualifies under the force clause. *United States v. Jefferson*, 911 F.3d 1290, 1296 n.4 (10th Cir. 2018) (collecting cases). For this reason, there is no concern of "immunization" from prosecution under § 924(c), as the respondents were convicted of a § 924(c) offense predicated on a completed robbery. Pet. Br. 8. With at least one other viable § 924(c) count to charge in this case, the government cannot seriously suggest that it suffered "severe consequences" because it could not also charge another § 924(c) count based on the respondents' conspiracy to commit the robberies.

Additionally, aside from the § 924(c) counts, respondents were charged with three robberies under 18 U.S.C. § 1951(a) and the conspiracy to commit robbery (also under § 1951(a)). Pet. Br. 6. The statutory maximum on each of the § 1951 counts was twenty years (for a total of 80 years). 18 U.S.C. 1951(a). The respondents were also convicted of a robbery-premised § 924(c) count, which carried a mandatory minimum of ten years' imprisonment and a statutory maximum of life. 18 U.S.C. § 924(c)(1)(A)(ii). In light of these already-harsh penalties, there are no "severe practical consequences" to vacating the conspiracy-premised § 924(c) count in this case.

The facts in *Simms* are similar to this case. 914 F.3d at 232. The defendants there committed an armed robbery of a McDonald's restaurant (Simms himself crawled through the drive-through window, pointed a gun at the manager, and demanded money). *Id.* It is unclear why the government charged a conspiracy, rather than a substantive robbery offense, but it is clear that, based on Mr. Simms's conduct, he was not "immune" from a § 924(c) prosecution. To the extent that the defendant in *Simms* is now "immune" from § 924(c) prosecution, it is solely because of the government's own charging decision. *Abuelhawa v. United States*, 556 U.S. 816, 823 n.3 (2009) ("prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes"). And the total 199-month sentence imposed for the conspiracy and § 924(c) conviction still falls below the 20-year statutory maximum applicable to the latter offense. 18 U.S.C. § 1951(a). Again, the government's "severe consequences" rationale is fiction, not fact.

Eshetu also involved a conspiracy to commit armed robbery. *Eshetu*, 898 F.3d at 36. Unlike this case and

Simms, however, *Eshetu* involved a government-plotted scheme to rob a liquor store. *United States v. Eshetu*, 863 F.3d 946, 949-950 (D.C. Cir. 2017), *vacated in part*, 898 F.3d 36 (D.C. Cir. 2018). Because the defendants conspired with a confidential informant and an undercover officer, they were arrested before any robbery occurred. *Id.* at 950. But the defendants were still convicted of the underlying § 1951 robbery conspiracy. *Id.* at 951. And while two defendants were also convicted of a § 924 count (Lovo and Sorto), their sentences did not come close to exceeding the twenty-year statutory maximum for the § 1951 robbery conspiracy (Lovo received a 104-month term of imprisonment, *United States v. Lovo*, 263 F.Supp.3d 47, 48 (D. D.C. 2017), and Sorto received a 100-month term of imprisonment, *United States v. Sorto*, Case No. 1:13-cr-00262-RMC-2, D.E.241 (D. D.C. Apr. 20, 2015)). The district court could impose the identical sentences absent the since-vacated § 924(c) count. USSG § 2B3.1(a)(2) (increasing a robbery defendant's base offense level if a firearm was discharged, used, or possessed); 18 U.S.C. § 3553(a)(1) (requiring district courts to consider "the nature and circumstances of the offense" when imposing sentence).

The government's citation to such a sting operation in support of its "severe consequences" rationale is questionable for other reasons. Such prosecutions have been labeled "'tawdry' because the tired sting operation seems to be directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them." *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011). Still others have labeled such stings "a disreputable tactic." *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring and dissenting),

majority decision vacated, *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014). "Law enforcement use them . . . to jack up [defendants'] sentences." *Id.* at 414. There is also "no legitimate dispute that these stings primarily affect people of color." *United States v. Sellers*, 906 F.3d 848, 857 (9th Cir. 2018) (Nguyen, J., concurring). For these reasons, some have called for an end to the practice (to "relegate" the practice "to the dark corridors of our past"). *United States v. Brown*, 299 F.Supp.3d 976, 983-984 (N.D. Ill. 2018). Even if the government can "invent fake crimes and imprison people for long periods of time for agreeing to participate in them," *Sellers*, 906 F.3d at 856, eliminating § 924(c) prosecutions from this practice is not a "severe consequence" that should concern this Court.

Salas involved "various arson-related convictions." 889 F.3d at 683. Aside from the since-vacated § 924(c) conviction, the defendant in *Salas* (who used a "Molotov cocktail to firebomb a tattoo parlor") was convicted of three additional counts: (1) conspiracy to commit arson, 18 U.S.C. § 844(n); (2) aiding and abetting the arson, 18 U.S.C. § 844(i); and (3) possession of an explosive by a convicted felon, 18 U.S.C. § 842(i). *Id.* He received a 35-year sentence. *Id.* The statutory maximum sentence for each of the arson offenses was twenty years. 18 U.S.C. § 844(i), (n). The statutory maximum sentence for the felon-in-possession conviction was ten years. 18 U.S.C. § 844(a)(1). The 35-year sentence fits comfortably within the 50-year combined statutory maximum for the other three convictions, and it is possible that the district court will impose the same sentence on remand (the district court has not resentenced the defendant because of the government's pending petition for a writ of certiorari in this Court).

Jenkins involved an armed kidnapping under 18 U.S.C. § 1201(a). 849 F.3d at 391. The statutory maximum for kidnapping is life in prison. 18 U.S.C. § 1201(a). Mr. Jenkins received a 308-month term of imprisonment for the kidnapping and § 924(c) convictions. 849 F.3d at 391-92. The district court could impose that identical sentence on just the kidnapping count. 18 U.S.C. § 1201(a). Indeed, without the § 924(c) conviction, the defendant's offense level under the guidelines would increase by two levels (from 34 to 36 in this case). U.S.S.G. § 2A4.1(a)(3). There is no reason to think that the absence of a § 924(c) conviction will result in an unjustifiably low sentence in that case.

The defendant in *Knight* was convicted of ten counts, three of which involved § 924(c). *Knight v. United States*, 2017 WL 4018848, at *3 (E.D. Tenn. Sept. 12, 2017). One of the three § 924(c) counts was premised on a carjacking under 18 U.S.C. § 2119. *Id.* Mr. Knight has not challenged this conviction on appeal, *Knight v. United States*, No. 17-6370, Appellant's Br. 33 (6th Cir. Oct. 1, 2018), likely because the lower courts have held that carjacking qualifies as a crime of violence under the force clause, *United States v. Jackson*, __ F.3d __, 2019 WL 1122274, at *11 (6th Cir. Mar. 12, 2019) (collecting cases). Thus, it is factually incorrect to state that the defendant in *Knight* is "immune" from prosecution under § 924(c). And Mr. Knight faced up to life in prison on the carjacking § 924(c) conviction and a kidnapping conviction under § 1201(a) (not to mention lengthy statutory maximums on the other counts of conviction). Again, the district court could impose the identical sentence even absent the other two § 924(c) counts. The government's "severe consequences" do not exist.

The defendant in *Eizember* was convicted of two counts of kidnapping, one count of carjacking, and one § 924(c) count. *United States v. Eizember*, 485 F.3d 400, 402 (8th Cir. 2007). While the indictment tied the § 924(c) count to the kidnapping counts and not the carjacking count, the underlying facts indicate that the defendant used the gun to commit the kidnapping and the carjacking. *Eizember v. Trammell*, 803 F.3d 1129, 1134 (10th Cir. 2015). Section 924(c) was thus a viable charge in this case. *Jackson*, __ F.3d __, 2019 WL 1122274, at *11. And again, even without it, the defendant in *Eizember* faced a statutory maximum of life on both of the kidnapping counts. 18 U.S.C. § 1201(a). Mr. Eizember is also on death row in Oklahoma. *Eizember*, 803 F.3d at 1133-1134. In practice, the § 924(c) conviction is irrelevant. The government's "severe consequences" rationale is entirely absent.

Cruz-Ramirez involves a complex seven-defendant prosecution for multiple crimes committed by MS-13 gang members. *United States v. Cruz-Ramirez*, No. 11-10632, Gov't Br. 5-8 (9th Cir. Nov. 17, 2017). One defendant (Cruz-Ramirez) has challenged one of his § 924(c) convictions on appeal because that conviction is premised on a conspiracy conviction. *Id.* at 346. But this defendant was also convicted of a second § 924(c) count, with the underlying crime of violence of murder in aid of racketeering, 18 U.S.C. § 1959(a)(1), which has not been challenged on appeal. *Id.* at 6. Thus, this defendant was not "immune" from prosecution under § 924(c). And this defendant also received sentences of life imprisonment on three separate counts. *Cruz-Ramirez*, No. 11-10632, Gov't Br. 7. If the additional § 924(c) count is vacated, no "severe consequences" will result.

Federal prosecutors on the ground understand the point. Consider *United States v. Gabourel*, No. 2:10-cr-00923-SJO-30 (C.D. Cal.). There, the district court vacated a § 924(c) conviction predicated on two conspiracy counts. *Id.*, D.E.3145 (C.D. Cal. July 16, 2018). In its resentencing memorandum, the government asked the district court to impose the identical 40-year sentence previously imposed in the case. *Id.*, D.E.3231 at 5 (C.D. Cal. Mar. 1, 2019). According to the government, mere "technical changes to the case law's definition of a 'crime of violence'" required vacating the § 924(c) count. *Id.* at 4. The defendant "remain[ed] convicted of the two most significant offenses that drove the Court's original sentencing findings" (RICO conspiracy and conspiracy to commit murder). *Id.* The government noted that, even after vacatur of the § 924(c) count, the defendant still had an advisory guideline range of life. *Id.* at 5. In other words, rather than rail that the district court's vacatur of the § 924(c) count resulted in "severe consequences," the government explained that the vacatur was inconsequential. The district court concurred and imposed the identical 40-year sentence. *United States v. Gabourel*, No. 2:10-cr-00923-SJO-30, D.E.3242 (C.D. Cal. Mar. 4, 2019).

One last point. The government expresses concern for "Congress's law-enforcement efforts." Pet. Br. 49. But Congress makes laws; it does not enforce them. *Patchak v. Zinke*, 138 S. Ct. 897, 904 (2018). It is the executive branch that enforces the law. *Id.* "By vesting each branch with an exclusive form of power, the Framers kept those powers separate." *Id.* "Each branch exercises the powers appropriate to its own department, and no branch can encroach upon the powers confided to the others." *Id.* at 904-905 (cleaned up). "By separating the lawmaking and

law enforcement functions," *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting), reversed, 136 S.Ct. 1113 (2016), the Constitution makes clear that there is no such thing as "Congress's law-enforcement efforts." And here, as the above cases illustrate, the *government's* law-enforcement efforts will continue unimpeded after this Court strikes down § 924(c)(3)(B)'s residual clause as void for vagueness.

CONCLUSION

This Court should strike § 924(c)'s residual clause as void for vagueness, reject the government's proposal to adopt a "circumstance-specific" approach, and affirm the judgment of the Fifth Circuit. For the reasons stated above, even if the Court adopts a construction of § 924(c)(3)(B) different from that under which respondents were convicted, the Court should affirm the Fifth Circuit's judgment and remand with instructions that respondents' convictions not be reinstated and that they be resentenced.

Respectfully submitted,

DONNA F. COLTHARP
DANIEL L. KAPLAN
Co-Chairs
Amicus Committee
NATIONAL ASSOCIATION
OF FEDERAL DEFENDERS
727 East Durango Boulevard,
Suite B-207
San Antonio, Texas 78206
(210) 472-6700

AMY BARON-EVANS
Counsel of Record
DANIEL T. HANSMEIER
FEDERAL DEFENDERS
NATIONAL SENTENCING RESOURCE
COUNSEL
51 Sleeper Street, 5th Floor
Boston, Massachusetts 02210
(617) 429-2403
abaronevans@gmail.com

Counsel for Amicus Curiae