No._____

IN THE SUPREME COURT OF THE UNITED STATES

CORY FOSTER,
PETITIONER

-VS.-

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 15, 2018

QUESTION PRESENTED

This Court has consistently held that a "categorical" approach applies when determining whether an offense qualifies as a predicate supporting greater punishment under various federal criminal provisions. Under this approach, qualifying predicates are identified strictly by reference to the offense's statutory definition, rather than to the particular facts of a defendant's case. The lower federal courts have at times deviated from the categorical approach, prompting this Court's intervention to reaffirm it. *See, e.g.*, *Descamps v. United States*, 570 U.S. 254 (2013). A major deviation occurred here, where the Third Circuit—in conflict with ten other courts of appeals—declined to apply the categorical approach in determining whether an offense qualifies as a predicate "crime of violence" supporting conviction under 18 U.S.C. § 924(c).

The question presented is:

> Whether the categorical approach applies in determining whether an offense is a "crime of violence" supporting conviction under 18 U.S.C. § 924(c), a question that has split the circuits 10-1.

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IN THE SUPREME COURT OF THE UNITED STATES

CORY FOSTER,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cory Foster respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on May 23, 2018.

ORDERS AND OPINION BELOW

The case-dispositive order entered as the judgment in the court of appeals is at Appendix A. The non-precedential opinion of the court of appeals affirming the district court's judgment is at Appendix B. The district court judgment is at Appendix C.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This petition is timely filed pursuant to Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 of the United States Code, Section 924(c)(1)(A)(ii), mandates a sentence of not less than seven years for brandishing a gun "during and in relation to any crime of violence or drug trafficking crime." Section 924(c)(1)(C)(i), mandates for each "second or subsequent conviction under this subsection" a sentence "of not less than 25 years."

"Crime of violence," in turn, is defined as any felony offense that:

> (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).

The Hobbs Act provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

18 U.S.C. § 1951.

The federal carjacking statute provides that:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall--

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119

STATEMENT OF THE CASE

In *Johnson v. United States*, 135 S. Ct. 2551, 2557-60 (2015), this Court held the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), to be unconstitutionally vague. In *Sessions v. Dimaya*, 138 S. Ct. 1204, 1210 (2018), this Court held that the residual clause in 18 U.S.C. § 16(b), which is worded identically to the residual clause in 18 U.S.C. § 924(c), is unconstitutionally vague as used in the INA's criminal-removal provisions. Petitioner Cory Foster similarly contended in the court of appeals that the residual clause in 18 U.S.C. § 924(c) is unconstitutionally vague.

The court of appeals declined to engage that question, finding that the predicate offenses were crimes of violence under the element-of-force clause (Section 924(c)(3)(A)). In doing so, the court of appeals employed the novel approach it had adopted in *United States v. Robinson*, 844 F.3d 137 (2016). There, the circuit held that the "categorical approach"—the established methodology whereby courts determine whether an offense qualifies as a predicate by looking strictly to its statutorily defined elements—does not apply under Section 924(c). Instead, the circuit crafted a new approach to the element-of-force clause, allowing a court to rely upon facts found by the jury or admitted by the defendant in order to determine whether the alleged predicate was a "crime of violence." The Third Circuit thus broke with ten other circuits, all of which apply the categorical approach dictated by this Court's precedent. Certiorari should be granted to reestablish a uniform methodology for determining what offenses qualify as predicates supporting the steep mandatory penalties provided by Section 924(c).

1. Mr. Foster was charged in the Eastern District of Pennsylvania with three counts of robbery under the Hobbs Act (18 U.S.C. § 1951) (Counts 1, 3 and 5); carjacking (18 U.S.C. § 2119) (Count 7); and four counts of using, carrying, and brandishing a firearm during and in

relation to a crime of violence (18 U.S.C. § 924(c)) (Counts 2, 4, 6 & 8). The Hobbs Act robbery and carjacking counts stemmed from three robberies at gas station convenience markets, committed in three counties adjacent to Philadelphia (Bucks, Montgomery and Chester), on different dates in November and December of 2014. In the last robbery, a customer's car was taken, leading to the carjacking and additional firearms charge. Each offense involved two perpetrators.

The separate incidents were joined for trial. The jury convicted Mr. Foster of all charges. At Mr. Foster's April 12, 2017 sentencing, the government made an oral motion to withdraw Count 6, the firearms charge relating to the third Hobbs Act robbery (Count 5), and the district court granted the motion. Mr. Foster was sentenced to an aggregate 714-month term of imprisonment, to be followed by two years of supervised release. The sentence represented consecutive mandatory minimum sentences on the three firearms counts totaling 684 months, and terms of 30 months for each Hobbs Act count and the carjacking count, to run consecutively to the sentences under Section 924 but concurrently with each other.

2. In the district court and on appeal, Mr. Foster challenged the firearms charges on the ground that Hobbs Act robbery and the federal carjacking statute do not qualify as predicates triggering Section 924(c), because they are not categorically crimes of violence after *Johnson*. Section 924(c)(1)(A) prohibits using or carrying a gun "during and in relation to any crime of violence or drug trafficking crime." "Crime of violence," in turn, is defined as any felony offense that:

> (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). Subsection (A) is known as the element-of-force clause, and subsection (B) is known as the residual clause.

Based on *Johnson*, Mr. Foster argued that Section 924(c)'s residual clause is unconstitutionally vague—leaving Hobbs Act robbery and carjacking to qualify as Section 924(c) predicates, if at all, under the element-of-force clause. He argued that the respective statutes do not qualify under that clause, because neither has as an element the use, attempted use, or threatened use of physical force against the person or property of another.[1]

3. The Third Circuit avoided the question of whether *Johnson* invalidates § 924(c)'s residual clause by holding that Hobbs Act robbery and federal carjacking offense qualify as predicate crimes of violence under the element-of-force clause. In doing so, the court followed its ruling in *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016). That case involved brandishing a gun during a Hobbs Act robbery in violation of § 924(c)(1)(A)(ii).[2]

a. The *Robinson* majority (Judge Roth and then-Chief Judge McKee) held that the categorical approach simply does not apply in the Section 924(c) context. 844 F.3d at 141-44. That approach is "not necessary," the majority reasoned, because predicate and Section 924(c) offenses are contemporaneously tried to a jury, and as a consequence "the record of all necessary facts [is] before the district court" such that any Section 924(c) conviction

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[1] Because the Third Circuit did not base its decision on this ground, the reach of Hobbs Act robbery and 18 U.S.C. § 2119, are issues not before this Court. Based on the statutory language, Mr. Foster principally argued that the least culpable conduct necessary for conviction of Hobbs Act robbery is taking something by placing someone in fear of future injury to his property—with "property" including money and intangible things of value; and that the least culpable conduct necessary for conviction under 18 U.S.C. § 2119 is "intimidation," which can be accomplished without any violent force. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (least culpable conduct test).

[2] Mr. Foster acknowledged in his opening brief that under *Robinson* he would not prevail in the circuit; however, he preserved the issue for the instant petition and later review.

"unmistakably shed[s] light" on whether the predicate offense was committed forcibly. *Id*. at 141. The majority recognized, though, that *Taylor v. United States*, 495 U.S. 575 (1990) and Section 924(c)'s element-of-force clause prohibit a judicial inquiry into whether the predicate was, as a factual matter, committed forcibly. *Id*. at 143-44.

The majority therefore crafted a new approach. Courts are no longer to make a purely legal inquiry into the elements of the predicate offense to determine if it is a crime of violence, but should consider any facts found by the jury (or admitted by the defendant) with respect to the gun portion of the Section 924(c) offense to determine whether the predicate offense was committed in a forcible way. 844 F.3d at143-44. Thus, according to the majority,

> [t]he question . . . is not "is Hobbs Act robbery a crime of violence?" but rather "is Hobbs Act robbery *committed while brandishing a firearm* a crime of violence?"

Id. at 144 (emphasis in original).[3] Once a jury has found (or the defendant has admitted) that he brandished a gun, "[t]he answer to [the question of whether the predicate offense is a crime of violence] must be yes." *Id*. Thus, in the majority's view, the certainty of a jury finding of brandishing obviates the categorical approach and permits a court to "unmistakably" conclude that the Hobbs Act robbery was committed in a forcible way. *Id*. at 141.

The majority viewed this as a permissible extension of the modified categorical approach to the situation of contemporaneous offenses. 844 F.3d at 143. The majority acknowledged that Hobbs Act robbery can be committed without force, and did not contend that the statute is divisible. Nonetheless, the majority viewed the modified categorical approach as "inherent[ly]" applicable in the contemporaneous offense situation "because the relevant indictment and jury instructions are before the court." *Id*. But instead of being used to identify the set of alternative

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[3] The panel echoed this analysis in Mr. Foster's case, as well.

elements under which the defendant was convicted, *Mathis*, 136 S. Ct. at 2251-54, the majority's version of the modified categorical approach is designed to "shed light on the means by which the predicate offense was committed" and thereby "elucidate[e]" an "otherwise ambiguous element" in a predicate statute. *Id*. at 143-44.

b. Judge Fuentes disagreed with this entire analysis. In an opinion concurring only in the judgment on the Section 924(c) issue, he concluded that the categorical approach applies and that the modified categorical approach has no bearing because Hobbs Act robbery is not divisible. 844 F.3d at 147-50. Those conclusions are compelled, Judge Fuentes reasoned, by this Court's decisions in *Taylor* and *Mathis*, and by the text and legislative history of Section 924(c). *Id*. Moreover, Judge Fuentes explained that applying the categorical approach avoids the "circularity and ambiguity" of the majority's approach, which looks to the gun portion of a Section 924(c) conviction to determine whether a predicate offense is a crime of violence. *Id*. at 148-49. Judge Fuentes concluded, however, that Hobbs Act robbery categorically qualifies as a predicate under the element-of-force clause, because it necessarily entails the use, attempted use, or threatened use of physical force. *Id*. at 150-51.

REASONS FOR GRANTING THE PETITION

If left uncorrected, the Third Circuit's newly revised approach to determining whether a predicate offense is a crime of violence for purposes of Section 924(c) threatens to wreak doctrinal havoc in this already complicated area of the law. Indeed, at least one circuit has already championed wider adoption of this new, non-categorical approach. *See United States v. St. Hubert*, 883 F.3d 1319, 1334-36 (11th Cir. 2018). The Third Circuit's innovation is contrary to this Court's precedent; contrary to the holdings of ten other courts of appeals; and contrary to the statute's text, leading to unintended results.

A. The Third Circuit's approach is contrary to this Court's precedent regarding the categorical and modified categorical approaches.

This Court has expressly held that statutory text that reads "has as an element"—the language in Section 924(c)—compels the categorical approach. *See Taylor v. United States*, 495 U.S. 575, 600 (1990) (addressing 18 U.S.C. § 924(e)); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (addressing 18 U.S.C. § 16(a)); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1218 (2018) (applying categorical approach to invalidate Section 16(b)'s residual clause, and observing that as "in the ACCA context, the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit."). The Third Circuit disregarded these straightforward holdings because a tertiary rationale for the categorical approach discussed in *Taylor*, the practical and Sixth Amendment problems with judicial fact-finding about prior convictions, is supposedly not implicated when a court looks to a jury's finding or defendant's admission of a contemporaneous offense. 844 F.3d at 141-43. But *Taylor*'s primary and independently sufficient rationale for the categorical approach was statutory text – indeed, classifying an offense by its elements is the very definition of a "categorical approach."

This Court has also expressly barred extending the modified categorical approach to determine the means by which an indivisible predicate statute was violated. *See Descamps v. United States*, 570 U.S. 254, 260-64 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). The Third Circuit disregarded that precedent because, in the contemporaneous offense situation, "the indictment and jury instructions are before the court," and because there is supposedly no Sixth Amendment problem when a defendant's admission or jury's finding is relied upon. 844 F.3d at 143. But those same documents are before courts in prior-conviction cases, as well, and *Descamps* specifically explained that the specific factual findings are irrelevant, even when a defendant admits the means of violation:

> Whether [the defendant] *did* break and enter makes no difference. And likewise, whether [the defendant] ever admitted to [the relevant means] is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [the predicate offense] not (as here) overbroadly, but instead alternatively, with one [set of elements] corresponding to the [qualifying] crime and another not.

570 U.S. at 265. The Third Circuit's extension of the modified categorical approach is thus no more sound than were the extensions in *Mathis* and *Descamps*, and should meet the same fate.

B. The federal courts of appeals are now split 10-1 over whether the categorical approach applies to Section 924(c).

The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits apply the categorical approach to determine whether an offense is a predicate for a contemporaneously charged § 924(c) offense.[4] No circuit, other than the Third, has held otherwise.[5] The Ninth Circuit's decision in *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995), is instructive. There, the court explained that the categorical approach is compelled by the text and legislative history of § 924(c), and rejected the view—advanced by the Third Circuit—that the categorical approach is unnecessary given any factual confidence surrounding contemporaneous offenses. 68 F.3d at 1225. The Third Circuit addressed neither *Amparo* nor any of the other precedents applying the categorical approach to decide if an offense is a

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[4] *See United States v. Hill*, 832 F.3d 135, 139 (2d Cir. 2016); *United States v. Fuertes*, 805 F.3d 485, 497-99 (4th Cir. 2015); *United States v. Jennings*, 195 F.3d 795, 797-98 (5th Cir. 1999); *United States v. Rafidi*, 829 F.3d 437, 444-45 (6th Cir. 2016); *United States v. Williams*, 864 F.3d 826, 828 (7th Cir. 2017); *United States v. Prickett*, 839 F.3d 697, 698 (8th Cir. 2016); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Serafin*, 562 F.3d 1105, 1107-08 (10th Cir. 2009); *United States v. McGuire*, 706 F.3d 1333, 1336-37 (11th Cir. 2013); *United States v. Kennedy*, 133 F.3d 53, 56-57 (D.C. Cir. 1998).

[5] One circuit's cases are in internal discord, but the weight of its precedent follows the categorical approach. *Compare United States v. Rafidi*, 829 F.3d 437, 444-45 (6th Cir. 2016) (holding categorical approach to apply in identifying Section 924(c) predicates) *and United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) (same), *with Shuti v. Lynch*, 828 F.3d 440, 449-50 (6th Cir. 2016) (suggesting categorical approach does not apply in § 924(c) context).

predicate "crime of violence" under Section 924(c). This split of authority is intolerable and calls for review on certiorari.

Robinson is already lending complexity to the identification of Section 924(c) predicates by suggesting that, insofar as an offense does not categorically qualify, there follows an additional inquiry under a "modified" approach. In *United States v. St. Hubert*, 883 F.3d 1319, 1334-36 (11th Cir. 2018), the Eleventh Circuit volunteered an extended *dictum* endorsing *Robinson*'s innovation. That court read *Robinson* to have adopted a newly expanded "modified" approach inasmuch as the defendant is adjudged guilty of "a contemporaneous federal crime charged in the same indictment." *Id*. The Eleventh Circuit added that this rule might call for divergent applications of identical statutory language in Section 16(b) and Section 924(c). *Id*. Meanwhile, in the only circuit with jurisdiction over criminal appeals where the question remains open, a district court has followed *Robinson* to "conclude that categorical analysis is not appropriate" for purposes of identifying Section 924(c) predicates. *United States v. Hernandez*, 228 F. Supp. 3d 128, 132 (D. Me. 2017) (alternative holding).

The Third Circuit's deviation promises nothing but mischief in the field of identifying predicate offenses supporting the imposition of greater punishment under Section 924(c) and other statutes. Before a renewed campaign to extend a so-called "modified" approach again disorders the law, certiorari should be granted and the Third Circuit's judgment vacated.

C. The Third Circuit's approach is contrary to the text of Section 924(c) and leads to absurd results.

Section 924(c) is simple: it prohibits using or carrying a gun during a limited and statutorily defined set of crimes, namely "crimes of violence" and "drug trafficking crimes." 18 U.S.C. § 924(c)(1)(A). In other words, Section 924(c) prohibits "the temporal and relational conjunction of two separate acts"—the underlying crime of violence or drug trafficking crime

and the use of a gun. *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014). "Crime of violence" is defined as a felony offense with an element of force. 18 U.S.C. § 924(c)(3)(A). As such, an offense's status as a crime of violence has always been a purely legal issue for the trial court to determine, and at trial the jury must be instructed that the predicate offense is, as a matter of law, a crime of violence. *See, e.g*., Third Cir. Model Crim. Jury Instr. 6.18.924A.[6]

The Third Circuit's approach upends this statutory structure. Now, it cannot be determined pretrial (or pre-plea) whether an offense is a crime of violence, because that will depend on a jury finding or plea admission. And Section 924(c)'s model instructions given throughout the country are now inaccurate, because juries can no longer be told that an offense is a crime of violence as a matter of law. Indeed, the same statutory offense is now both a crime of violence and not, depending on how the case turns out.

By making the crime of violence determination turn on case-specific factual findings, the Third Circuit has disregarded the statute's (and this Court's) denomination of the crime of violence a "separate act" distinct from the use of a gun, and instead imposes Section 924(c) liability whenever the predicate offense plus the use or carriage involves force. And that will, of course, always be the case, rendering Section 924(c) a tautology (or in Judge Fuentes's words in *Robinson*, a "circularity"). Once the predicate offense itself need not have an element of force, every offense becomes a potential crime of violence. To paraphrase the Third Circuit, it is not whether mail fraud is a crime of violence, but whether mail fraud committed while carrying a firearm is a crime of violence. After *Robinson*, regardless of whether the necessary force element

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[6] *Accord* Fifth Cir. Pattern Crim. Jury Instr. 2.48; Sixth Cir. Pattern Crim. Jury Instr. 12.02; Seventh Cir. Pattern Crim. Jury Instr. 18 U.S.C. § 924(c)(1)(A); Eighth Cir. Model Crim. Jury Instr. 6.18.924C; Ninth Cir. Model Crim. Jury Instr. 8.71; Tenth Cir. Pattern Crim. Jury Instr. 2.45; Eleventh Cir. Pattern Crim. Jury Instr. 35.2.

exists in the predicate, the firearm charge will always supply the necessary force; rendering the statutory language of the predicate irrelevant.[7]

D. The Third Circuit's approach is contrary to the position that the United States took before this Court in *Sessions v. Dimaya*, as well as in ongoing litigation before lower courts.

In its new approach to crime-of-violence determinations under Section 924(c), the Third Circuit has not only broken with ten circuits, but rejected the government's own position in *Robinson* itself, as well as before this Court in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Indeed, the government continues to disavow *Robinson*'s approach in district courts within the Third Circuit. *See* Government's Supplemental Sent'g Mem., filed Dec. 13, 2017, at Dkt. No. 48 in *United States v. Raul Rodriguez*, E.D. Pa. Crim. No. 16-288, at 3 n.1 (explaining that "government does not agree with the reasoning of *Robinson*" and opposing *Robinson*'s extension to question of whether Hobbs Act robbery constitutes "crime of violence" under 'career offender' sentencing guideline).

That is consistent with the government's position in the other courts of appeals. For instance, when a panel of the Eighth Circuit held that the categorical approach does *not* apply to Section 924(c), *United States v. Prickett*, 830 F.3d 760 (8th Cir. 2016), the government itself—through the Appellate Section of the Justice Department—filed a rehearing petition seeking to overturn that ruling. The government correctly argued that Section 924(c)'s "statutory text alone requires a categorical approach," and that any factual confidence surrounding contemporaneous

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[7] The Third Circuit tried to avoid the tautology by emphasizing that Hobbs Act robbery has an "ambiguous" force-type element. 844 F.3d at 144. That is a fudge, or as this Court called it in *Descamps*, a "name game." 570 U.S. at 276 (rejecting attempt to recast statute missing requisite element as one containing an "overbroad" element). A predicate offense either has an element of force, or it does not. Because non-forcible scenarios, can give rise to Hobbs Act robbery and federal carjacking convictions, those statutes lack elements of force.

offenses does not justify abandoning it.[8] The Eighth Circuit corrected its error, and held that the categorical approach applies to § 924(c). *Prickett II*, 839 F.3d at 698.

The government took the same position before this Court in *Dimaya*. In its reply brief in the certiorari proceedings, the government explained that 18 U.S.C. § 16(b)'s residual clause is identical to Section 924(c)'s, and that because the categorical approach applies to both Sections 16(b) and 924(c), conflicting circuit decisions in Sections 16(b) and 924(c) cases supported the granting of certiorari. *See* Reply Brief for Petitioner, filed Aug. 31, 2016, in No. 15-1498, at 9-10 & nn.1-2. The government again noted the equivalence of Section 16(b) and "its counterpart in § 924(c)" when *Dimaya* was reargued this Term. *See* Transcript of Argument on Oct. 2, 2017, in No. 15-1498, at 58.

The government also declined to endorse *Robinson*'s innovation in *United States v. Galati*, 844 F.3d 152 (3d Cir. 2016), a decision issued on the same day as *Robinson* and likewise authored by Judge Roth. In *Galati*, the circuit extended *Robinson* to Section 924(c) discharge offenses, holding that solicitation of murder for hire qualifies as a Section 924(c) predicate when the evidence at trial indicated the jury must have found a confederate shot the intended victim, injuring but not killing him. 844 F.3d at 154-55; *see* 18 U.S.C. § 924(c)(1)(A)(iii) (providing 10-year mandatory minimum for "discharge" of firearm in "crime of violence"). The government opposed certiorari in *Galati*, submitting that any error in the Third Circuit's approach "did not affect the result," on the view that 18 U.S.C. § 1958, providing for imprisonment of up to 20 years for participating in a murder-for-hire plot that results in personal injury, is categorically a

[8] United States' Petition for Panel Rehearing in No. 15-3486 (8th Cir. Sept. 9, 2016), at 7 n.7 (addressing Section 924(c)(3)(B)'s "by its nature" language, but equally applicable to § 924(c)(3)(A)'s "has as an element" language).

crime of violence under *United States v. Castleman*, 134 S. Ct. 1405 (2014). *See* Br. in Opposition, filed Nov. 17, 2017, in No. 17-5229, at 9.

The Government and all but one of the circuits that have addressed the issue, have concluded that the categorical approach must be employed to determine whether an offense is a predicate for a contemporaneously charged Section 924(c) offense. This Court should grant certiorari to correct the novel, erroneous and non-categorical procedure the Third Circuit now employs to make that determination.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on May 23, 2018.

Respectfully Submitted:

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