No._____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY ROBINSON,
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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QUESTION PRESENTED

This Court has consistently held that a "categorical approach" applies when determining whether an offense has as an element the use of force, and thereby qualifies as a predicate for purposes of various federal criminal provisions. The lower federal courts have at times deviated from the categorical approach in other contexts, and this Court has intervened to correct matters. *See, e.g.*, *Descamps v. United States*, 133 S. Ct. 2276 (2013). This case presents the starkest deviation to date, where the Third Circuit held—in conflict with the holdings of at least ten other courts of appeals and the position of the United States itself—that the categorical approach does not apply when determining whether an offense has an element of force and thereby qualifies as a "crime of violence" under 18 U.S.C. § 924(c)(3)(A). The question presented is:

> Whether the categorical approach applies in determining whether an offense has an element of force and thereby qualifies as a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3)(A).

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES (continued

PAGE(S)

FEDERAL STATUTES **PAGE(S)**

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IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY ROBINSON,
PETITIONER

– VS. –

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Robinson 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 July 9, 2018.

OPINION BELOW

The court of appeals summarily affirmed the district court's judgment by order dated July 9, 2018. The pertinent opinion of the court of appeals, upon which the summary affirmance was based, is reported at 844 F.3d 137 and is attached as Appendix A. That court's order denying rehearing is at Appendix B.

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 Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 924(c)(1)(A)(ii) prohibits the brandishing of 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).

STATEMENT OF THE CASE

In *Johnson v. United States*, 135 S. Ct. 2551, 2557-60 (2015), this Court held the so-called residual clause in the Armed Career Criminal Act (18 U.S.C. § 924(e)) to be unconstitutionally vague. Mr. Robinson's appeal questioned whether *Johnson*'s holding applies to the similarly worded residual clause in 18 U.S.C. § 924(c)—a question that has split the federal courts of appeals.[1]

But *Johnson*'s application to § 924(c) is not the subject of this petition, because the Third Circuit avoided that question by holding that the "categorical approach"—the familiar

[1] *Compare United States v. Taylor*, 814 F.3d 340, 375-79 (6th Cir. 2016) (§ 924(c) residual clause constitutional); *United States v. Barrett*, __ F.3d __, 2018 WL 4288566, *9-14 (2d Cir. Sept. 10, 2018) (same); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (same) *with United States v. Davis*, __ F.3d __, 2018 WL 4268432, *3 (5th Cir. Sept. 7, 2018) (§ 924(c) residual clause unconstitutional); *United States v. Cardena*, 842 F.3d 959, 995-96 (7th Cir. 2016) (same); *United States v. Salas*, 889 F.3d 681, 683 (10th Cir. 2018) (same); *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) (same).

methodology for determining whether an offense qualifies as a predicate for purposes of various federal criminal provisions—simply does not apply when determining whether an offense has as an element the use of force, thereby qualifying as a "crime of violence" under § 924(c)(3)(A). In its place, the Third Circuit crafted a new approach for determining whether an offense is a predicate crime of violence: courts should examine not just the elements of the predicate, but also any facts found by the jury (or admitted by the defendant) with respect to the gun portion of the § 924(c) offense to determine whether the predicate offense was committed in a forcible way. The Third Circuit saw this as a permissible extension of the "modified categorical approach."[2]

Certiorari should be granted to correct this major deviation from the categorical approach and to resolve the resulting conflict among the courts of appeals. The Third Circuit's approach is contrary to this Court's holdings on the categorical and modified categorical approaches, and employs the latter for a purpose the Court has expressly forbidden: to "shed light on the means by which the predicate offense was committed." App. A11. In deviating from the Court's holdings, the Third Circuit split with ten other courts of appeals, all of which hold that the categorical approach applies to § 924(c)(3)(A). The new approach is irreconcilable with the text of § 924(c), as well, leading to absurd results such as the inability to determine pretrial whether an offense is a crime of violence, the voiding of obviously correct statements of law in the model

[2] The modified categorical approach is nothing more than the categorical approach as applied to a predicate statute that is "divisible"—meaning a statute that defines multiple crimes (some qualifying predicates, some not) by reference to alternative elements. *See Descamps v. United States*, 133 S. Ct. 2276, 2283-86 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). Courts may examine a limited class of documents, including the indictment and jury instructions, to determine whether they specify the division of conviction. If they do, the categorical approach is then applied to the specified division.

jury instructions of nearly every circuit, the rendering of § 924(c) a tautology by which every offense is a potential crime of violence predicate, and the rendering of the same offense a crime of violence in some cases and not in others.

1. Mr. Robinson was charged with robbing a Subway sandwich shop and an Anna's Linens store, and brandishing a gun during each robbery, in violation of 18 U.S.C. § 1951(a) (Hobbs Act robbery) and § 924(c)(1)(A)(ii) (brandishing a firearm during and in relation to a crime of violence). He was convicted of robbery and brandishing with respect to the Subway incident, but only of robbery with respect to the Anna's Linens incident. Although the facts underlying that conviction are irrelevant to the legal issue raised in this petition, we point out for context that there was evidence that Mr. Robinson drew a gun during the robbery and threatened to hurt the Subway employee if she was lying about not knowing the code to the shop's safe.

2. On appeal, Mr. Robinson challenged his brandishing conviction on the ground that Hobbs Act robbery no longer qualifies as a predicate triggering § 924(c), because it is not categorically a crime of violence after *Johnson*. Section 924(c)(1)(A)(ii) prohibits the brandishing of 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. Robinson argued that § 924(c)'s residual clause is unconstitutionally vague—leaving Hobbs Act robbery to qualify as a § 924(c) predicate, if at all, under the element-of-force clause. He argued that Hobbs Act robbery does not qualify under that clause, because § 1951(a) does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another. Because the Third Circuit did not base its decision on this ground, the reach of Hobbs Act robbery is not before this Court.

3. The Third Circuit avoided the question of whether *Johnson* invalidates § 924(c)'s residual clause by holding that Hobbs Act robbery qualifies as a predicate crime of violence under the element-of-force clause. The court was deeply divided as to rationale, however.

a. The majority (Judge Roth and then-Chief Judge McKee) held that the categorical approach simply does not apply in the § 924(c) context. App. A7. That approach is "not necessary," the majority reasoned, because a predicate and § 924(c) offense are contemporaneously tried to a jury, and as a consequence "the record of all necessary facts [is] before the district court" such that any § 924(c) conviction "unmistakably shed[s] light" on whether the predicate offense was committed forcibly. App. A7. The majority recognized, though, that *Taylor v. United States*, 495 U.S. 575 (1990) and § 924(c)'s element-of-force clause prohibit a judicial inquiry into whether the predicate was, as a factual matter, committed forcibly. App. A11-12, 14.

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 § 924(c) offense to determine whether the predicate offense was committed in a forcible way. App. A12-14. 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*?"

App. A13 (emphasis in original). 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." App. A13. Thus, in the majority's view, the certainty of a jury finding (or defendant admission) of brandishing obviates the categorical approach and permits a court to "unmistakably" conclude that the Hobbs Act robbery was committed in a forcible way. App. A7.

The majority viewed this as a permissible extension of the modified categorical approach to the situation of contemporaneous offenses. App. A11. The majority seems to have 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." App. A11. But instead of being used to identify the relevant set of alternative elements, *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. App. A11, 14.

b. Judge Fuentes disagreed with this entire analysis. In an opinion concurring only in the judgment on the § 924(c) issue, he concluded that the categorical

approach applies and that the modified categorical approach has no bearing here because Hobbs Act robbery is not divisible. App. A21-29. Those conclusions are compelled, Judge Fuentes reasoned, by this Court's decisions in *Taylor* and *Mathis*, and by the text and legislative history of § 924(c). App. A21-29. 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 § 924(c) conviction to determine whether a predicate offense is a crime of violence. App. A24. 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. App. A28-30.

4. The Third Circuit remanded Mr. Robinson's case to the district court, however, to determine whether he was correctly classified as a "career offender" under the U.S. Sentencing Guidelines in light of *Johnson*. App. A19. Mr. Robinson concurrently petitioned this Court for *certiorari* on the § 924(c) issue, which was denied by order of October 2, 2017 (No. 17-5139). The district court then entered an amended judgment on January 23, 2018, reducing Mr. Robinson's sentence from 360 to 180 months' imprisonment upon the parties' agreement that he is not a career offender. It is that judgment that the Third Circuit summarily affirmed below, and which is the basis for the instant petition.

REASONS FOR GRANTING THE PETITION

The Third Circuit's new approach to determining whether a predicate offense has as an element the use of force for purposes of § 924(c) is contrary to this Court's precedent; contrary to the holdings of at least ten other courts of appeals; and contrary to the statute's text, leading to absurd results. If left uncorrected, it threatens to wreak doctrinal havoc in this already complicated area of the law. Mr. Robinson's case is the ideal vehicle for settling the categorical approach's application to § 924(c)(3)(A) and resolving the 10-1 circuit split, because the Third Circuit announced the new approach in this case and there are no procedural hurdles to further review.

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 the statutory text "has as an element"—the language at issue in § 924(c)(3)(A)—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)). The Third Circuit disregarded that straightforward holding 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 brandishing finding in a contemporaneous offense. App. A11-12. 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, 133 S. Ct. 2276, 2283-86 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251-54 (2016). The Third Circuit disregarded that straightforward holding 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 admission or jury finding is relied upon. App. A11-12. But those documents are before courts in prior-conviction cases, as well, and *Descamps* specifically held that it is irrelevant whether a defendant admits the means of violation:

> [W]hether [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.

133 S. Ct. at 2286.

Finally, this Court has made clear that an indivisible predicate offense cannot sometimes be a crime of violence and sometimes not. *See Descamps*, 133 S. Ct. at 2287. Yet, that is the result of the Third Circuit's approach here: the Hobbs Act robbery of the Subway is a crime of violence, but the Hobbs Act robbery of Anna's Linens is not, because the jury acquitted on the § 924(c) charge with respect to the latter.

B. The federal courts of appeals are now split 10-1 over whether the categorical approach applies to § 924(c)(3)(A).

The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits apply the categorical approach to determine whether an offense has as an element the

use of force for purposes of § 924(c).[3] No circuit has held otherwise.[4] The Ninth Circuit's decision in *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995), is particularly 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 here—that it is unnecessary given any factual confidence surrounding contemporaneous offenses. 68 F.3d at 1225. All of those decisions were cited to the Third Circuit, but none was addressed by it.

This split of authority is intolerable. The very same offense will serve as a § 924(c) predicate in the Third Circuit, but not in other circuits, based on the fortuity of locale. As demonstrated by the denial of *en banc* review earlier in this case, the Third Circuit has declined even to address the contrary holdings of the ten courts of appeals on the opposite side of the split, much less to harmonize the law. This Court's intervention is required to resolve the matter.

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

Section 924(c) is simple: it prohibits the brandishing of a gun during a limited and statutorily defined set of crimes, namely "crimes of violence" and "drug trafficking crimes." 18

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[3] *See United States v. Hill*, 832 F.3d 135, 139-40 (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 (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) ("*Prickett II*"); *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).

[4] In *Shuti v. Lynch*, 828 F.3d 440, 449-50 (6th Cir. 2016), a panel of the Sixth Circuit suggested that the categorical approach does not apply to § 924(c). That would be contrary to the Sixth Circuit's prior decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) and its subsequent decision in *Rafidi*.

U.S.C. § 924(c)(1)(A)(ii). In other words, § 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 courts to determine pretrial, 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.[5]

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 § 924(c) 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—instead, they will determine its status based on their brandishing finding. And as discussed above, an offense is now both a crime of violence and not, depending on how the case turns out.

This is absurd. By making the crime of violence determination turn on brandishing, 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 § 924(c) liability whenever the predicate offense plus brandishing involves force. And that will, of course, always be the case, rendering § 924(c) a tautology (or in Judge Fuentes's words, a "circularity"). App.

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[5] *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.

A24. 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 brandishing a firearm is a crime of violence. Indeed, all drug trafficking offenses involving gun brandishing are now crimes of violence, rendering half of § 924(c) surplusage.[6]

D. The Third Circuit's approach is contrary to the position of the United States.

In adopting its new approach to crime-of-violence determinations under § 924(c)(3)(A), the Third Circuit rejected not just Mr. Robinson's position, but also the position of the United States as was articulated in this and various other cases pending before the courts of appeals and this Court. *See, e.g.*, *Prickett*, 839 F.3d at 698 (granting the government's petition for rehearing and adopting its argument that the categorical approach applies to § 924(c)); *Sessions v. Dimaya*, No. 15-1498, Reply Br. of United States on *certiorari*, at 9-10 & nn.1-2 (Aug. 31, 2016) (reasoning that categorical approach applies to § 924(c)). In the wake of this Court's decision in *Dimaya*, however, the government now takes the position that the categorical approach *does not* apply to crime-of-violence determinations under § 924(c)'s *residual clause*. *See, e.g.*, *United States v. Jenkins*, No. 17-97, Supp. Br. of United States on *certiorari*, at 3-4 (Apr. 24, 2018). But

[6] The Third Circuit tried to avoid the tautology by emphasizing that Hobbs Act robbery has an "ambiguous" force-type element. App. A-14. That is a fudge, or as this Court called it in *Descamps*, a "name game." 133 S. Ct. at 2292 (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. By acknowledging that non-forcible scenarios can give rise to a Hobbs Act robbery conviction, the Third Circuit apparently concedes that the statute lacks an element of force. App. A-14.

even now, the government continues to concede—as it must, given this Court's precedent and basic logic—that the categorical approach *does* apply under § 924(c)'s *element-of-force clause*. *See, e.g., United States v. Barrett*, No. 14-2641, Supp. Br. of United States, at 12 (2d Cir. May 4, 2018) ("The categorical approach is well-suited to inquiries under the Force Clause.").[7]

E. This case is the ideal vehicle for settling the question presented.

Mr. Robinson's case is the ideal vehicle for settling the categorical approach's application to § 924(c)(3)(A) and resolving the 10-1 circuit split, because the Third Circuit announced the new approach in this case and there are no procedural hurdles to further review. Moreover, no better vehicles are likely to arise as nearly every other court of appeals has already held the categorical approach applicable to § 924(c)(3)(A), and the government agrees with those holdings.

[7] In *Barrett*, the Second Circuit recently held that the categorical approach does not apply to § 924(c)'s residual clause—as opposed to its element-of-force clause. *United States v. Barrett*, __ F.3d __, 2018 WL 4288566, *9-14 (2d Cir. Sept. 10, 2018). *Accord Ovalles v. United States*, __F.3d__, 2018 WL 4830079, *10-11 (11th Cir. Oct. 4, 2018) (*en banc*).

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 July 9, 2018.

Respectfully submitted,

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