No. 18-6292

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY ROBINSON,
PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT IN REPLY

Mr. Robinson's petition for a writ of certiorari should be held pending this Court's decision in *United States v. Davis*, No. 18-431 (cert. granted Jan. 4, 2019). Alternatively, it should be granted and either the case should be set for argument or the judgment should be summarily reversed given the government's concession—implicit here and explicit elsewhere—that the Third Circuit's rejection of the categorical approach under 18 U.S.C. § 924(c)(3)(A)'s element-of-force clause is wrong as a matter of law.

A. The petition should be held pending *Davis*.

The most sensible course at this point is to hold Mr. Robinson's petition pending *Davis*. The Court is set to determine this Term in *Davis* whether § 924(c)'s residual clause, 18 U.S.C. § 924(c)(3)(B), requires use of the categorical approach or instead can be read to allow a case-specific, factual approach. If the categorical approach is required under § 924(c)'s residual clause, it is inconceivable that it would not be required under its element-of-force clause, where even the government concedes it applies. That is because the argument in support of a case-specific approach is the same for both clauses, even though the element-of-force clause textually precludes such an approach. *Compare* U.S. Pet. for Cert., *United States v. Davis*, No. 18-431, at 12-13 (contemporaneous prosecution of predicate and § 924(c) offenses permits case-specific

approach) *with United States v. Robinson*, 844 F.3d 137, 143 (3d Cir. 2016) (same). Indeed, the government relied on *Robinson* to make its argument in *Davis*. *Id*. at 18-19. The government's contrary claim now—that there is not even a reasonable probability that *Davis* will effect Mr. Robinson's case—is completely unfounded. Mem. of U.S. in Opp., at 5.

If *Davis* requires the categorical approach, the Court could then grant Mr. Robinson's petition, vacate the judgment, and remand to the Third Circuit for further consideration. On the other hand, if *Davis* approves a case-specific approach for the residual clause, Mr. Robinson's petition will stand ready for disposition just as it is today—with a 10-1 circuit split, the reasoning of this Court's precedents (perhaps including *Davis*), and the government's concession all favoring application of the categorical approach to the element-of-force clause.

B. Alternatively, the petition should be granted.

Alternatively, Mr. Robinson's petition should be granted and either the case should be set for argument or the judgment should be summarily reversed given the government's concession that the categorical approach applies under § 924(c)'s element-of-force clause.

As set forth in the petition, elsewhere the government has conceded that the categorical approach applies under § 924(c)'s element-of-force clause. Pet. at 12-13. The government does not dispute or withdraw that concession here, but instead merely argues that the Third Circuit's error is harmless because some other courts of appeals have held that Hobbs Act robbery is categorically a crime of violence under the element-of-force clause. Mem. of U.S. in Opp., at 3-4. The government therefore says the petition be denied. *Id.*

If the government has its way, the Third Circuit will never have to address Hobbs Act robbery's status under the properly applicable categorical approach. Instead, defendants in the Third Circuit alone will continue to be subject to a concededly erroneous legal standard for

crime-of-violence determinations, left to litigate the purported harmlessness of the error in an endless flow of certiorari petitions to this Court. That is bad news for everyone. And it is not limited to Hobbs Act robbery—in the Third Circuit, any offense that the government can plausibly argue might categorically satisfy the element-of-force clause will be immune from an actual determination in that regard. That is untenable. If it is not held pending *Davis*, Mr. Robinson's petition should be granted and either the case should be set for argument or the judgment should be summarily reversed.

CONCLUSION

For all of the foregoing reasons, and for those set forth in the petition, 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 December 19, 2016.

Respectfully submitted,

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