No. 18-_____

In the
Supreme Court of the United States

Dwayne Barrett,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the residual clause at 18 U.S.C. § 924(c)(3)(B) is void for vagueness, a question that evenly divides six Courts of Appeals.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 903 F.3d 166 and appears at Pet. App. 1a-36a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on July 18, 2014. The Second Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and affirmed the district court's judgment on September 10, 2018. The circuit denied rehearing on November 26, 2018. Pet. App. 37a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Section 924(c)(3)(B) of Title 18 of the United States Code defines a "crime of violence" as a felony 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."

INTRODUCTION

Since this Court decided *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), six circuits have split evenly over the question here: whether the residual clause definition of "crime of violence" at 18 U.S.C. § 924(c)(3)(B) is void for vagueness under the Fifth Amendment's Due Process Clause.

In Petitioner Dwayne Barrett's case, the Second Circuit broke with three Courts of Appeals by finding the residual clause constitutional. Two circuits later joined the Second, making the current divide 3-3.

The government is seeking certiorari in two cases, *see United States v. Salas*, No. 18-428; *United States v. Davis*, No. 18-431, but it admits one is a flawed vehicle. *See Salas* Cert. Pet. at 8. And the second, *Davis*, is inferior to Barrett's case. Both concern whether § 924(c)(3)(B) allows a "case specific" rather than "ordinary case" approach to deciding what counts as a "crime of violence." But Barrett's case also poses a question that divides the First and Second Circuits and that a member of this Court has flagged: whether § 924(c)(3)(B) permits an "each case" (or "always") approach. *See Dimaya*, 138 S. Ct. at 1233 ("We might also have to consider an interpretation [of the text at § 924(c)(3)(B)] that would have courts ask not whether the [] crime of conviction ordinarily involves a risk of physical force, or whether the defendant's particular crime involved such a risk, but whether the defendant's crime of conviction *always* does so.") (Gorsuch, J., concurring; emphasis in original).

Neither *Davis* nor *Salas* poses this question: the parties did not argue it in the courts below, which did not address it, and it is not presented in the certiorari petitions. Moreover, the petition as to *Davis*, a short per curiam decision, makes frequent reference to *Barrett*, a lengthy analysis of § 924(c)(3)(B) that is the best vehicle for this Court to fully decide the provision's meaning and constitutionality.

Thus, by granting review in this case (either alone or alongside *Davis*), the Court's ruling on § 924(c)(3)(B) will be both final and comprehensive.

STATEMENT OF THE CASE

1. A jury convicted Barrett of seven counts relating to various robberies. During one, and when Barrett was not present, a co-participant shot and killed a man. *See* 2d Cir. No. 14-2641, Docket Entry 92 at 7. Barrett appealed.

Meanwhile, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court held the "violent felony" definition at the residual clause of the Armed Career Criminal Act (ACCA) is void for vagueness. The clause covered any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). "Under the categorical approach," the Court explained, "[d]eciding whether the residual clause covers a crime [] requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." 135 S. Ct. at 2557. This "ordinary case" approach prompts, first, "grave uncertainty about how to estimate the risk posed by a crime. . . . How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *Id.* (citation omitted). Second, there is "uncertainty about how much risk it takes for a crime to qualify as a violent felony" given that the inquiry turns on "a judge-imagined abstraction." *Id.* at 2558. In sum, "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

"[T]he dissent urges us to save the residual clause," the Court said, "by interpreting it to refer to the risk posed by the particular conduct in which the

defendant engaged, not the risk posed by the ordinary case of the defendant's crime. In other words, the dissent suggests that we jettison . . . the categorical approach." *Id.* at 2561-62. "We decline the dissent's invitation." *Id.* at 2562.

2. Barrett argued on appeal that, given *Johnson*, his conviction under Count Two could not stand. That conviction was for violating 18 U.S.C. § 924(c)(1)(A) based on possession of a gun in furtherance of a "crime of violence," namely conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951(a).

A "crime of violence" is an "offense that is a felony" and:

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

§ 924(c)(3).

Subsection (A) is called the "force" (or "elements") clause; subsection (B) is the "residual clause." Barrett noted on appeal that Hobbs Act robbery conspiracy does not fit the force clause given that physical force is not an element of the offense. And he argued § 924(c)'s residual clause, like ACCA's, is void for vagueness.

This Court then decided *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), which concerned the residual clause at 18 U.S.C. § 16(b). That clause, just like the one at § 924(c)(3)(B), defines a "crime of violence" as an "offense" 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." The Court held § 16(b) is void: "*Johnson* is a straightforward decision, with equally straightforward

application here." 138 S. Ct. at 1213. Like ACCA's residual clause, § 16(b) "also calls for a court to identify a crime's 'ordinary case' in order to measure the crime's risk. . . . And § 16(b) also possesses the second fatal feature of ACCA's residual clause: uncertainty about the level of risk that makes a crime 'violent.'" *Id*. at 1215.

As in *Johnson*, the *Dimaya* Court stuck to the "ordinary case" approach. "The question," five Justices explained,

> is not whether "the particular facts" underlying a conviction posed the substantial risk that § 16(b) demands. Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers. The § 16(b) inquiry instead turns on the "nature of the offense" generally speaking. More precisely, § 16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk.

138 S. Ct. at 1211 (footnote and citations omitted).

Though the Chief Justice dissented from the judgment, he agreed: "Under our decisions, [§ 16(b)] ask[s] the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk." *Id*. at 1235 (Roberts, C.J., dissenting). Thus, "a court must take into account how th[e] elements [of the offense] will ordinarily be fulfilled." *Id*. at 1236. A six-Justice majority therefore adhered to the "ordinary case" approach despite the dissent's wish to "abandon the categorical approach." *Id*. at 1254 (Thomas, J., dissenting).

One of the six in the majority, Justice Gorsuch, said he was "open to different arguments . . . in another case." *Id*. at 1233 (Gorsuch, J., concurring).

> We might [] have to consider an interpretation that would have courts ask not whether the [] crime of conviction ordinarily involves a risk of physical force, or whether the defendant's particular crime involved such a risk, but whether the defendant's crime of conviction *always*

> does so. After all, the language before us requires a conviction for an "offense . . . that, *by its nature*, involves a substantial risk of physical force." Plausibly, anyway, the word "nature" might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. . . . I would address th[is] in another case, . . . where the parties have a chance to be heard and we might benefit from their learning.

Id. (emphasis in original; citation omitted).

After *Dimaya*, the government asked the Second Circuit to scrap the categorical approach in favor of a fact-based "case specific" inquiry. Barrett replied that the "language" of the residual clause "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). Specifically, the text "requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk." *Dimaya*, 138 S. Ct. at 1211. As that text has not changed, there is no basis to reject the textually mandated "ordinary case" categorical approach. And given that approach, § 924(c)(3)(B) is void. Three circuits agree. *See United States v. Davis*, 903 F.3d 483 (5th Cir. 2018) (per curiam); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (per curiam); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018). Two circuits disagree, but not on the view that § 924(c)(3)(B) survives the "ordinary case" approach. Rather, those courts found the residual clause constitutional by doing what this Court has steadfastly refused to do: jettison the "ordinary case" approach. *See United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018); *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc). The Second Circuit did that and more.

3. In denying Barrett's appeal, the Second Circuit abandoned the "ordinary case" approach in favor of a "case specific" inquiry for § 924(c)(3)(B), thus

breaking with the rulings above from the Fifth, Tenth and D.C. Circuits.[1]

The Second Circuit rested its ruling on the canon of constitutional avoidance, which prefers a plausible and constitutional reading of a statute to a plausible but unconstitutional one. "Section 924(c)(3)(B) can be applied to a defendant's case-specific conduct," the court said, "with a jury making the requisite findings about the nature of the predicate offense and the attending risk of physical force being used in its commission. Such a conduct-specific approach avoids [the constitutional] concerns [with the "ordinary case" approach] identified in *Dimaya* and *Johnson*." Pet App. 22a. Barrett's jury never found he committed a "crime of violence," as at the time of his trial that question was for a judge contemplating the "ordinary case" of an offense, not a jury weighing "case-specific" conduct. The circuit deemed this error harmless, however, finding that the facts of Barrett's conspiracy made it a "crime of violence" under the court's new "case specific" approach. Pet. App. 34a.

The circuit also affirmed on a second basis, saying the vagueness problem can be avoided by reading § 924(c)(3)(B) to concern not the abstract "ordinary case" but "each case" of an offense. It said that, "if a substantive offense is categorically a crime of violence under § 924(c)(3)(A)," the force clause, then "a conspiracy to commit that crime, by its 'very nature' presents a substantial risk of physical force, so as also to be a violent crime under § 924(c)(3)(B)," the residual clause. Pet App.

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[1] In the Tenth Circuit case, the government did not make its "case specific" argument until it sought rehearing, which was denied. *See Salas* Cert. Pet. at 6-7. Yet the court had already rejected as "incorrect" the "suggest[ion] that whether an offense is a crime of violence depends on the defendant's specific conduct." *Salas*, 889 F.3d at 686.

17a. Citing its ruling that Hobbs Act robbery fits § 924(c)(3)(A), *see United States v. Hill*, 890 F.3d 51 (2d Cir. 2018), *cert. pet. filed* Nov. 20, 2018, No. 18-6798, the court said that, "'*in each case* that the [Hobbs Act robbery conspiracy] crime covers,' the risk of force is present" and thus the conspiracy fits § 924(c)(3)(B). Pet. App. 21a (emphasis and brackets in *Barrett*; quoting *Dimaya*, 138 S. Ct. at 1211). The First Circuit and government reject this reading. *See Douglas*, 907 F.3d at 16 ("[W]e do not hold that all conspiracies to commit Hobbs Act robbery would constitute crimes of violence under § 924(c)(3)(B). . . . In this, we differ from *Barrett*, which held, as an alternative to its adoption of the case-specific approach, that conspiracy to commit a Hobbs Act robbery is necessarily a crime of violence because 'conspiracy to commit a crime of violence is itself a crime of violence.' 903 F.3d at 175. And the government says it disagrees with this alternative holding in *Barrett*.").

The Second Circuit denied Barrett's petition for rehearing. Pet. App. 37a.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Divided on the Constitutionality of § 924(c)(3)(B)

As the government has noted, this "Court often grants certiorari 'in light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional,' even in the absence of a circuit conflict." *Davis* Cert. Pet. at 21 (citations omitted). Here, of course, there is a sharp and pronounced divide: three Courts of Appeals say § 924(c)(3)(B) is unconstitutional; three others say the opposite.

"In 2017 alone," moreover, "more than 2700 defendants were charged with a Section 924(c) violation." *Id.* at 24 (citation omitted). Thus, given the split here,

scores of people either face conviction under § 924(c)(3)(B) or not based solely on the fluke of where in the country they are prosecuted.

The Court should end this inconsistent application of a criminal law.

II. Barrett's Case is the Best Vehicle

Davis addresses, in summary fashion, whether § 924(c)(3)(B) permits a fact-based "case specific" inquiry. *See Davis*, 903 F.3d at 485 ("[T]he Government argues we can, and should, adopt a new 'case specific' method when applying the residual clause. . . . [W]e do not find [this] suggestion by a minority of justices in [*Dimaya*] sufficient to overrule our prior precedent.").

Barrett addresses the same question in detail and, in addition, one not posed in *Davis* or *Salas*: whether § 924(c)(3)(B) permits an "each case" approach to determining if an offense is a "crime of violence." *See* Pet. App. 21a (concluding that, in "'*each case* that the [Hobbs Act robbery conspiracy] crime covers,' the risk of force is present" and thus the conspiracy fits § 924(c)(3)(B)) (emphasis and brackets in *Barrett*; quoting *Dimaya*, 138 S. Ct. at 1211). This is the issue Justice Gorsuch has identified: "We might also have to consider an interpretation [of the text at § 924(c)(3)(B)] that would have courts ask not whether the [] crime of conviction ordinarily involves a risk of physical force, or whether the defendant's particular crime involved such a risk, but whether the defendant's crime of conviction *always* does so." 138 S. Ct. at 1233 (Gorsuch, J., concurring; emphasis in original).

The "each case" (or "always") reading of § 924(c)(3)(B) is the "alternative to [] adoption of the case-specific approach," *Douglas*, 907 F.3d at 16, that the Second

Circuit embraced and the First Circuit rejects. *Id.*

Deciding this question is necessary to resolve that circuit split and fully interpret § 924(c)(3)(B): does the clause refer to the "ordinary case" of an offense, or to "each case," or is the inquiry "case specific" based on the defendant's conduct? And may one choose between these approaches in a given prosecution? Only Barrett's case presents all these questions. It is thus the best vehicle for deciding § 924(c)(3)(B)'s meaning and constitutionality.[2]

III. The Second Circuit's Ruling is Wrong

A. The "Case Specific" Approach Does Not Apply to § 924(c)(3)(B)

The circuit noted its precedents require application of the "ordinary case" categorical approach to § 924(c)(3)(B). Pet App. 22a. It nonetheless cited this Court's decisions in *Johnson* and *Dimaya* as license to do exactly what this Court refused to do in those cases: abandon the "ordinary case" categorical approach.

In the circuit's view, this Court's ruling that text identical to § 924(c)(3)(B) is unconstitutionally vague authorized the circuit to "consider[] whether the statutory text might be construed in a different way to avoid the constitutional concerns identified by the Supreme Court." Pet. App. 22a. "[I]t is an 'elementary rule' in construing acts of Congress," the circuit said, "that 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.*

But the avoidance canon has no role here: the "case specific" approach is not a plausible reading of § 924(c)(3)(B) and, anyway, the approach is unconstitutional.

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[2] *See also* Davis's Brief in Opposition for why *Davis* is a poor vehicle.

First, the canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text," *Clark v. Martinez*, 543 U.S. 371, 381 (2005), but a fact-based "case specific" reading of § 924(c)(3)(B) is not plausible. This Court has construed § 16(b), which is identical to § 924(c)(3)(B). In a unanimous decision, the Court explained that the text "directs our focus to the 'offense'" and, specifically, to an

> "*offense* that is a felony and 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." This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.

Leocal, 543 U.S. at 7 (emphasis in *Leocal*).

The Second Circuit refused to acknowledge that *Leocal* exists.

The circuit cited *Nijhawan v. Holder*, 557 U.S. 29 (2009), which notes "words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime . . . and sometimes refer to the specific acts." *Id*. at 33-34. In adopting the latter reading for "fraud or deceit in which the loss to the . . . victims exceeds $10,000," *id*. at 34, the Court said this "language . . . is consistent with a circumstance-specific approach." *Id*. at 38. Here, in sharp contrast, the "language" of § 924(c)(3)(B) "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts." *Leocal*, 543 U.S. at 7. "The question, we have explained, is not whether 'the particular facts' underlying a conviction posed the substantial risk." *Dimaya*, 138 S. Ct. at 1211 (quoting *Leocal*, 543 U.S. at 7).

The Second Circuit found it "significant" that *Johnson* and *Dimaya* involved

"prior convictions" whereas § 924(c) concerns "crimes of *pending* prosecution." Pet. App. 29a (emphasis in original). Yet neither of those cases turned on that fact: both cite the text of the residual clause as the key reason for the categorical approach. *See Johnson*, 135 S. Ct. at 2562; *Dimaya*, 138 S. Ct. at 1211 (citing "nature of the offense" and the residual clause's "'by its nature' language").

Moreover, the "crime of violence" definition used in § 924(c) has always applied to both pending and past cases. The definition in § 924(c) comes from § 16, which Congress "enacted as part of the Comprehensive Crime Control Act of 1984."[3] *Leocal*, 543 U.S. at 6. "Congress employed the term 'crime of violence' in numerous places in the Act, such as for defining the elements of particular offenses" subject to present prosecution, *id.*, and for provisions concerning past conduct, such as laws "rendering an alien deportable for committing a crime of violence." *Id.* at 7 n.4. Congress "provided in § 16 a general definition of the term 'crime of violence' to be used throughout the Act." *Id.* at 6. There is no indication Congress wanted the definition to mean one thing for present conduct and another for past.

And this Court rejects "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Martinez*, 543 U.S. at 386. The "crime of violence" definition is a constant and requires the categorical

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[3] In the Act, Congress wrote § 16 and its "crime of violence" definition. *See* Pub. L. 98-473 § 1001(a); 98 Stat. 1837 (1984). Also in the Act, Congress narrowed § 924(c) – which had applied to "any felony" committed with a gun – to apply only to a "crime of violence" so committed. *Id.* § 1005(a). Two years later, Congress made § 924(c)'s reference to § 16 express by cutting and pasting § 16's "crime of violence" definition into § 924(c). *See* Pub. L. 99-308 § 104(a)(2); 100 Stat. 449 (1986).

approach. *See also United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995) (rejecting claim that, because "the practical difficulties inherent in relitigating a prior conviction . . . [are] not present in a section 924(c) case," a jury should "examine the circumstances of the defendant's crime. . . . Congress intended a categorical approach to the 'crime of violence' language in subsection (3)(B)."); *United States v. Bell*, 966 F.2d 703, 705 (1st Cir. 1992) (rejecting "fact-specific approach" for present offenses given the "weird asymmetry" that would follow if the "same crime, if committed contemporaneously, could be considered a crime of violence . . . but if committed in the past, could not. . . . We are hard pressed to believe that [] Congress . . . wished to foster so bizarre an anomaly.").

The text of § 924(c)(3)(B) does not support a "case specific" reading, and Congress knows it. A pending bill proposes striking the words "by its nature" from § 924(c)(3)(B) and replacing them with "based on the facts underlying the offense." H.R. 7113 § 2(a) (115th Cong., 2d Sess.). This change "shall apply to any offense committed on or after the date of the enactment of this Act," *id.* § 3(a), which also confirms § 924(c)(3)(B) requires (and always has required) the categorical approach. Indeed, the Second Circuit's ruling broke with uniform precedent.[4]

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[4] *See, e.g., United States v. Weston*, 960 F.2d 212, 217 (1st Cir. 1992) (The question whether offenses "constitute crimes of violence" under § 924(c) does not entitle one to "trial by jury on a factual issue. . . . [T]he court did no more than fulfill its proper function as the arbiter of the law, directing the jury" that certain offenses qualify.); *United States v. Ivezaj*, 568 F.3d 88, 95 (2d Cir. 2009) ("When determining whether an offense is a 'crime of violence' under [§ 924(c)], we employ a 'categorical approach,' in which 'we focus on the intrinsic nature of the offense rather than on the circumstances.'") (citation omitted); *Gould v. Attorney Gen. of U.S.*, 480 F. App'x 713, 717 (3d Cir. 2012) ("We generally employ the 'formal

Never during the decades that § 924(c)(3)(B) was universally understood to require the categorical approach did Congress rewrite it. This further confirms it requires that approach. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed" indicates "the judicial construction is the correct one.").

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categorical approach'" to § 924(c) "to determine whether an offense falls within the category 'crime of violence.'") (citation omitted); *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015) ("In determining whether an offense qualifies as a 'crime of violence' under [§ 924(c)], the court may . . . employ the 'categorical approach' or the 'modified categorical approach.'") (citation omitted); *United States v. Jennings*, 195 F.3d 795, 797 (5th Cir. 1999) ("In conducting [the § 924(c)] inquiry, we do not consider any facts specific to Jennings's case. Using a categorical approach, we ask whether the inherent nature of the offense . . . is a 'crime of violence.'"); *United States v. Rafidi*, 829 F.3d 437, 444 (6th Cir. 2016) ("We use a 'categorical approach' to determine whether an offense constitutes a 'crime of violence' for purposes of § 924(c)(3)."); *United States v. Enoch*, 865 F.3d 575, 579 (7th Cir. 2017) (Under § 924(c), "a court must use a categorical approach and look only to the statutory elements."); *United States v. Boman*, 873 F.3d 1035, 1042 (8th Cir. 2017) (A "judge, not a jury, decides whether an underlying offense constitutes a crime of violence under either § 924(c)(3)(A) or § 924(c)(3)(B)."); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995) ("[T]his circuit has taken a categorical approach to section 924(c)."); *United States v. Munro*, 394 F.3d 865, 870 (10th Cir. 2005) ("When 'determining whether a particular felony offense constitutes a crime of violence'" under § 924(c), we "'employ a "categorical" approach that omits consideration of the particular facts.'") (citation omitted); *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013) (Whether an offense is "a crime of violence within the ambit of 18 U.S.C. § 924(c)" is a "question of law . . . that we must answer 'categorically'— that is, by reference to the elements of the offense, and not the actual facts.") (O'Connor, Sup. Ct. J., ret.); *United States v. Kennedy*, 133 F.3d 53, 56 (D.C. Cir. 1998) ("A 'crime of violence'" under § 924(c) is "ordinarily designated as such by looking to the statutory definition of the crime, rather than the evidence presented to prove it.").

In 2016, the Third Circuit appears to have changed course with respect to § 924(c)'s force (or "elements") clause. *See United States v. Robinson*, 844 F.3d 137, 141 (3d Cir. 2016) ("Both Robinson and the government suggest that our analysis under the elements clause should be guided by the so-called 'categorical approach.' We do not agree that the categorical approach applies here."). *But see United States v. Lewis*, 720 F. App'x 111, 119 (3d Cir. 2018) ("The Majority chooses to ignore *Robinson*.") (Roth, J., concurring).

Finally here, the circuit's claim that *Johnson* and *Dimaya* license it to "consider[] whether the statutory text might be construed in a different way," Pet. App. 22a, is plainly wrong. This Court has "reject[ed] 'a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed.'" *Martinez*, 543 U.S. at 382 (citation omitted). The residual clause has long been read to require the categorical approach, which was always understood to be constitutional— until *Johnson*. But the new rule announced in *Johnson* did not change the clause's text, which cannot "require[]" the categorical approach, *Leocal*, 543 U.S. at 7, and then suddenly not. "That is not how the canon of constitutional avoidance works." *Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018). The canon "does not give a court the authority to rewrite a statute," *id*., even where, as here, the approach the statute "requires," *Leocal*, 543 U.S. at 7, falls victim to new constitutional jurisprudence. In such a case it is for Congress, not a court, to redraft the law.

Second, the avoidance canon applies only "if a reasonable alternative interpretation poses no constitutional question," *Gomez v. United States*, 490 U.S. 858, 864 (1989), but the "case specific" approach poses myriad problems.

For starters, if a "crime of violence" is a "case specific" question that hinges on specific facts rather than the "ordinary case," then countless people who pleaded guilty to § 924(c) did so without "real notice of the true nature of the charge," which is "the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618 (1998).

Each person was also "misinformed as to his right to have the charged ["crime of violence"] proved to a jury," and thus was denied due process: the plea "was not knowing [and] voluntary." *United States v. Gonzalez*, 420 F.3d 111, 134 (2d Cir. 2005).

Likewise for trials, the indictment did not "fairly inform[] [the] defendant of the charge against which he must defend." *Hamling v. United States*, 418 U.S. 87, 117 (1974). People like Barrett had neither notice nor opportunity to defend against the "crime of violence" charge: that was a legal issue for the judge.

Moreover, the indictment is "no longer the indictment of the grand jury who presented it." *Stirone v. United States*, 361 U.S. 212, 216 (1960). Barrett's grand jury alleged a conspiracy that is a "crime of violence" in the "ordinary case," not that his "case specific" conduct qualified.[5]

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[5] The Second Circuit thus "destroyed [Barrett's] substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be . . . dismissed as harmless error." *Stirone*, 361 U.S. at 217. This was no "omission of an element" to the jury, Pet. App. 33a, as in *Neder v. United States*, 527 U.S. 1 (1999). The element *changed*: the legal question at trial was whether the "ordinary case" of Hobbs Act robbery conspiracy fits § 924(c)(3)(B), which morphed into the factual question the Court of Appeals answered (in the first instance) by finding that Barrett's "case specific" conduct made his conspiracy a "crime of violence." No jury was asked that entirely different question, which makes harmless-error review entirely inapplicable. *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 absent. . . . There is no *object,* so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt. . . . That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action.") (emphasis in original; citations omitted); *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.").

The constitutional problems with the "case specific" approach are not limited to already-prosecuted cases.

The Second Circuit agreed the approach will "lead to inconsistent results, with certain crimes being found to satisfy the § 924(c)(3)(B) definition in some cases but not in others." Pet. App. 32a. This "violate[s] the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). When an offense can both count and not count, there is no "fair warning."

And with a "case specific" approach highlighting the presence of a gun, *see* Pet. App. 34a, there is no limit to what a jury may deem a "crime of violence." Knowing the defendant was armed, it may find there was a "substantial risk [of] physical force . . . in the course of" his counterfeiting money, *see* 18 U.S.C. § 471, paying a bribe, *see* § 201, sharing classified data with the press, *see* § 798, lying to the FBI, *see* § 1001, using someone else's identity, *see* § 1028, selling bootleg DVDs or fake Gucci bags, *see* §§ 2318, 2320, or anything else. When there is no limit to what a jury may deem a "crime of violence," there is no "fair warning."

In 1984, Congress narrowed § 924(c) – which had applied to "any felony" – to apply only to a "crime of violence." *See* Pub. L. 98-473 § 1005; 98 Stat. 1837 (1984). The Second Circuit's ruling undoes that: any felony can now qualify again. This is a "judicial enlargement of a criminal act by interpretation," *Bouie*, 378 U.S. at 352, and thus violates separation of powers principles. *See Dimaya*, 138 S. Ct. at 1212 (opinion of four Justices); *id*. at 1227-28 (Gorsuch, J., concurring).

The ruling also raises ex post facto problems: an armed counterfeiter (or whoever) now faces prosecution for pre-ruling conduct that did not violate § 924(c) but might today. *See Bouie*, 378 U.S. at 354 (The Constitution "bar[s] retroactive criminal prohibitions emanating from courts as well as from legislatures."); *Marks v. United States*, 430 U.S. 188, 196 (1977) (same).

The "case specific" approach thus spawns unconstitutionality of its own. Accordingly, the avoidance canon does not apply. *See Dimaya*, 138 S. Ct. at 1217 (opinion of four Justices); *id*. at 1254 (The canon does not apply if the alternate reading "create[s] problems of its own.") (Thomas, J., dissenting).

Actually, if *Leocal* did not exist or this Court were to "wipe the precedential slate clean," *id*. at 1233 (Gorsuch, J., concurring), the avoidance canon would itself be reason *not* to adopt the "case specific" approach.

Ultimately, the Second Circuit said, "it is far preferable for a jury to be able to distinguish between crimes . . . than for it to be told, as a matter of law, that [an] offense is a violent crime [or not]." Pet. App. 32a. "Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them." *Artuz v. Bennett*, 531 U.S. 4, 10 (2000).

The "law depends on respect for language and would be served better by statutory amendment (if Congress [wishes]) than by racking statutory language to cover a policy it fails to reach." *Watson v. United States*, 552 U.S. 74, 83 (2007). The "language" of § 924(c)(3)(B) "requires" the categorical approach. *Leocal*, 543 U.S. at 7. The implausible and unconstitutional "case specific" reading is no option.

B. The "Each Case" Approach Does Not Apply to § 924(c)(3)(B) and, Even if it Did, Barrett's Conviction Could Not Stand

The Second Circuit took up the question Justice Gorsuch posed in *Dimaya*: whether § 924(c)(3)(B) may be read to require that an offense must "*always*" present a substantial risk of force. 138 S. Ct. at 1233 (Gorsuch, J., concurring; emphasis in original). The circuit said yes and concluded "'*each case*'" of conspiracy to commit Hobbs Act robbery fits § 924(c)(3)(B). Pet. App. 21a (emphasis in *Barrett*; quoting *Dimaya*, 138 S. Ct. at 1211). This approach, which the First Circuit and government reject, *see Douglas*, 907 F.3d at 16, is wrong for various reasons.

First, it violates the "principle that judges can[not] give the same statutory text different meanings in different cases." *Martinez*, 543 U.S. at 386. The circuit read § 924(c)(3)(B) to permit both an "each case" categorical ruling by a judge and a "case specific" factual finding by a jury. This "render[s] [the] statute a chameleon, its meaning subject to change." *Id*. at 382. If a particular defendant's conduct posed no risk of violence, for example, § 924(c)(3)(B) could be read to demand an "each case" legal analysis. Where a defendant indeed used force, however, the statute could be read to require not a legal inquiry but a "case specific" factual one. The same text cannot have "different meanings in different cases." *Id.* at 386.

Second, the "each case" approach violates precedent. Indeed, the circuit's citation of *Dimaya* is puzzling, as *Dimaya* rejects an "each case" approach:

> To decide whether a person's conviction "falls within the ambit" of that clause [§ 16(b)], courts use a distinctive form of what we have called the categorical approach. The question, we have explained, is not whether "the particular facts" underlying a conviction posed the substantial risk that § 16(b) demands. *Neither is the question whether*

> *the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers*. The § 16(b) inquiry instead turns on the "nature of the offense" generally speaking. More precisely, § 16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk.

Dimaya, 138 S. Ct. at 1211 (emphasis added; footnote and citations omitted).

Granted, the *Dimaya* Court was talking about § 16's residual clause. But that clause is identical to § 924(c)(3)(B) and thus they are interpreted identically. *See, e.g., In re Hubbard*, 825 F.3d 225, 230 n.3 (4th Cir. 2016) ("[T]he language of § 16(b) is identical to that in § 924(c)(3)(B), and we have previously treated precedent respecting one as controlling analysis of the other."); *United States v. Benally*, 843 F.3d 350, 353-54 (9th Cir. 2016) (same); *United States v. Taylor*, 814 F.3d 340, 377 (6th Cir. 2016) (same); *United States v. Serafin*, 562 F.3d 1105, 1108 & n.4 (10th Cir. 2009) (same). The Second Circuit cited no court that takes an "each case" approach to § 924(c)(3)(B), which makes sense: precedent precludes it.

In matters of statutory interpretation, "*stare decisis* has 'special force [since] the legislative power is implicated, and Congress remains free to alter what we have done.'" *Watson*, 552 U.S. at 82 (brackets in *Watson*; citation omitted). Though this Court has not yet considered § 924(c)(3)(B), it has interpreted § 924(c)(3)(B)'s text as precluding an "each case" approach. And though § 924(c)(3)(B) concerns pending cases whereas § 16(b) concerns both pending and past ones, that is, as shown above, immaterial: Congress wrote one "crime of violence" definition to cover both past and present offenses, and that definition cannot have "different meanings in different cases." *Martinez*, 543 U.S. at 386.

Third, and finally, even if this Court were to "wipe the precedential slate clean," *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring), Barrett's conviction would still have to be reversed: "each case" of conspiracy to commit Hobbs Act robbery does not pose a "substantial risk [of] physical force." § 924(c)(3)(B).

"'[T]o establish a Hobbs Act conspiracy, the government does not have to prove any overt act. . . . The government needs to prove only that an agreement to commit extortion [or robbery] existed.'" *United States v. Gotti*, 459 F.3d 296, 338 (2d Cir. 2006) (quoting *United States v. Clemente,* 22 F.3d 477, 480 (2d Cir. 1994)). The agreement need not be acted on. Thus, where an undercover officer conspires with unwitting people to rob a "fictional stash house," *United States v. Tribble*, 320 F. App'x 85, 87 (2d Cir. 2009), the agreement to rob permits conviction even though there is nothing to rob: "'Factual impossibility' is no defense to . . . conspiracy under the Hobbs Act." *Clemente*, 22 F.3d at 480-81. Many conspiracies are acted on – perhaps that is the "ordinary case" – but "each case" requires only an agreement. And simply agreeing to do something, while taking no steps to actually do it, poses no "substantial" risk of force. *See also United States v. Stevens*, 559 U.S. 460, 478 (2010) ("[T]he text says 'serious' value, and 'serious' should be taken seriously.").

* * *

Barrett's case is the best vehicle for the Court to definitively answer the questions on § 924(c)(3)(B)'s meaning and constitutionality that split the circuits. The Court should thus grant review in this case— alone or, in the alternative, together with another § 924(c)(3)(B) case.

CONCLUSION

The petition for a writ of certiorari should be granted. If not granted, the petition should be held if review is granted in another case on § 924(c)(3)(B).

Respectfully submitted,

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