No. 18-6985

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

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 15.8, Petitioner Dwayne Barrett submits this brief to call the Court's attention to "matter not available at the time of [his] last filing."

On December 3, 2018, Barrett filed his Petition for a Writ of Certiorari, which presents the overall question whether 18 U.S.C. § 924(c)(3)(B) is constitutional. The underlying questions are whether § 924(c)(3)(B) requires an "ordinary case" or "case specific" approach (an issue that evenly divides six circuits) and whether the statute permits an "each case" approach (an issue that Justice Gorsuch has flagged and that splits the First and Second Circuits). Only Barrett's case presents all these questions. *See* Cert. Pet. at 2, 9-10. The government is seeking certiorari in two cases, *United States v. Salas*, No. 18-428, and *United States v. Davis*, No. 18-431, but it admits *Salas* is a flawed vehicle. *See Salas* Cert. Pet. at 8. And *Davis* is a short per curiam ruling summarily rejecting the "case specific" reading that *Barrett* discussed in detail and ultimately adopted. Moreover, neither *Davis* nor *Salas* poses the "each case" question Justice Gorsuch identified even before the circuits disagreed over its answer.

There is now additional reason Barrett's case is the best vehicle to decide the questions on § 924(c)(3)(B) that split the circuits. On December 19, 2018, the government pointed out that *Davis* does not present the question whether the "case specific" approach is constitutional: Davis does "not dispute that, if [§ 924(c)(3)(B)] is construed to refer to the actual conduct underlying the Section 924(c) prosecution, it is fully constitutional." *Davis* Reply Br. at 9. By contrast,

Barrett has identified myriad constitutional problems with the "case specific" approach. *See Barrett* Cert. Pet. at 15-18. Those problems show why the canon of constitutional avoidance – which the Second Circuit invoked in *Barrett* to adopt the "case specific" reading – actually precludes that reading: the avoidance canon is a tool for steering clear of constitutional problems, not running headlong into them.

Because Davis does not dispute the constitutionality of the "case specific" reading, his case is the wrong vehicle for deciding whether to adopt that reading. Barrett's case is the right one: it involves both the plausibility and constitutionality of the "case specific" construction of § 924(c)(3)(B), *see Barrett* Cert. Pet. at 10-18, as well as the divisive "each case" question Justice Gorsuch has highlighted.[1]

Only Barrett's case poses the questions that must be answered to resolve the circuit splits over the meaning and constitutionality of § 924(c)(3)(B).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] As with the "case specific" reading, switching to an "each case" approach would be unconstitutional. It would mean, among other things, that a defendant who pleaded guilty under the "ordinary case" regime did so without "real notice of the true nature of the charge," *Bousley v. United States*, 523 U.S. 614, 618 (1998), and that the indictment of a defendant convicted after trial is "no longer the indictment of the grand jury who presented it." *Stirone v. United States*, 361 U.S. 212, 216 (1960).