No.

In the Supreme Court of the United States

ISHMAEL DOUGLAS,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the First Circuit

PETITION FOR WRIT OF CERTIORARI

J. HILARY BILLINGS, ESQ.
Assistant Federal Public Defender
Counsel of Record for the Petitioner
One City Center, Second Floor
P.O. Box 595
Portland, Maine 04112-0595
207-553-7070

January 7, 2019

QUESTIONS PRESENTED

1. Whether the residual clause of 18 U. S. C. § 924(c)(3)(B) is unconstitutionally vague.

PARTIES TO THE PROCEEDING

The only parties to the proceeding below in the United States Court of Appeals for the First Circuit were Petitioner Ishmael Douglas, and the United States of America.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit in *United States v. Douglas,* 907 F.3d 1 (1st Cir. 2018).

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit, attached as Appendix A, styled as *United States v. Douglas*, can be found at 907 F.3d 1 (1st Cir. 2018). The decision of the District Court that was reviewed by the court of appeals may be found in *United States v. Douglas,* 179 F. Supp. 3d 141 (D. Me. 2016). That decision is attached hereto as Appendix B.

JURISDICTION

The Court of Appeals for the First Circuit issued its decision on October 12, 2018. A Petition for Certiorari is timely in this court if submitted on or before January 10, 2019. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The "Due Process Clause" of the Fifth Amendment to the United States Constitution provides the "[n]o person shall .... be deprived of life, liberty or property without due process of law; ..." In pertinent part, the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

Title 18 U. S. C. § 924(c)(3)(B) provides as follows: "(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--(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."

STATEMENT OF THE CASE

1. Travel in the District Court

On April 7, 2015, Petitioner, Ishmael Douglas, was charged in the United States District Court for the District of Maine with, among other things, conspiracy to commit a Hobbs Act robbery in violation of 18 U. S. C. § 1951(a), and knowingly using, carrying, and brandishing a firearm during and in relation to a crime of violence – namely the robbery conspiracy – in violation of 18 U. S. C. § 924(c)(1)(A)(ii).

On August 24, 2015, Douglas moved to dismiss the allegations that charged him with use of a firearm during and in relation to a "crime of violence," asserting that conspiracy to commit a Hobbs Act robbery was not a qualifying predicate "crime of violence" pursuant to 18 U. S. C. § 924(c)(3). Douglas first asserted that the conspiracy was deficient under the "force clause" of §

924(c)(3)(A), and, secondly, he asserted that the "residual clause" in the definition of "crime of violence" found at § 924(c)(3)(B) was unconstitutionally vague, citing *United States v. Johnson*, 135 S. Ct. 2251 (2015), decided on June 26, 2015. *Johnson* had determined that the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e)(2)(B)(ii), was unconstitutionally vague.

The government opposed Douglas' motion to dismiss, asserting that the reasoning of *Johnson* did not extend to the similar, but not identical, language of the residual clause of § 924(c)(3)(B). The government further asserted that a conspiracy to commit a Hobbs Act robbery also qualified as a "crime of violence" under the "force clause" of § 924(c)(3)(A).

Before the district court, both parties agreed that the "categorical approach" was the proper analytical method to be employed in assessing whether a conspiracy to commit a Hobbs Act robbery qualified as a "crime of violence" under § 924(c)(3)(B). In their memorandum filed in response to the Motion to Dismiss, the government, in fact, *invited* the district court to employ a categorical analysis when they 'acknowledge[d] that, like ACCA, § 924(c)(3)(B) involves a risk-based analysis of the "ordinary case" of a predicate offense ...' (*Govt. Memo*, D. Ct. ECF No. 120, p.4).

The district court denied the motion to dismiss. Employing a categorical analysis, the district court ultimately determined that conspiracy to commit a Hobbs Act robbery qualified as a crime of violence under the *force clause* of § 924(c)(3)(A), thus finding no reason to address whether the residual clause of § 924(c)(3)(B) was unconstitutionally vague. Following this ruling, Douglas entered a conditional plea to both counts, preserving his right to appeal from the denial of his motion to dismiss.

Less than six months before the circuit argument in Douglas' appeal, the Supreme Court decided *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Employing "a distinctive form of what is called the categorical approach," *Dimaya*, 138 S. Ct. at 1211, the Supreme Court extended the rule of *Johnson* to the similarly worded "residual clause" of 18 U. S. C. § 16(b), finding that this provision is also unconstitutionally vague. Douglas relied on both *Johnson* and *Dimaya* in his appeal to the First Circuit, asserting that the residual clause at 18 U. S. C. § 924(c)(3)(B) suffers from the same infirmities as the residual clause definitions of "crime of violence" in the ACCA and § 16(b).

2. The parties' arguments in the circuit court

Douglas' initial appellate brief first challenged the district court's ruling that conspiracy to commit Hobbs Act robbery qualified as a § 924(c) predicate under the "force clause" in § 924(c)(3)(A). Douglas also maintained his position

that the residual clause of § 924(c)(3)(B) required application of the "ordinary-case" risk analysis of the "categorical approach," and, accordingly, was unconstitutionally vague under the rulings in *Johnson* and *Dimaya.* Douglas asked the First Circuit, in light of *Dimaya*, to re-examine its own holding in *United States v. Turner*, 501 F.3d 59, 67-68 (1st Cir. 2007), in which the court relied expressly on § 924(c)(3)(B) to find that conspiracy under the Hobbs Act constitutes a "crime of violence" for the purposes of § 924(c).

Changing their tune, the government asserted for the first time in their Appellee's brief, that the "categorical analysis" should give way to application of a conduct-based "case-specific" analysis in determining whether a proposed predicate offense qualified as a "crime of violence" under § 924(c)(3)(B).The government conceded that the district court was wrong in ruling that conspiracy to commit Hobbs Act robbery qualified as a "crime of violence" under the "force clause" of § 924(c)(3)(A) because such a conspiracy did not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." Instead, the government claimed that *Dimaya* "requires a re-evaluation of the analytical framework that the parties and the district court previously applied to 924(c)'s risk clause in this case." *Govt. Brief., p.12.* This claim was asserted despite the fact that *Dimaya* itself used a categorical analysis to invalidate § 16(b). The government claimed that application of a "conduct-

based" approach to assess a predicate offense under § 924(c)(3)(B) would save that provision from the constitutional vagueness arguments sustained in *Johnson* and *Dimaya*. The government asserted that Douglas had admitted conduct during his conditional plea procedure that, "by its nature," posed a "substantial risk that physical force against the person of another may be used in the course of committing the offense." According to the government, if the appellate court determined that a "conduct-based" approach applied under § 924(c)(3)(B), they could simply affirm the conviction entered pursuant to Douglas' conditional plea.

Somewhat shocked by the turn-around in the government's position, Douglas argued in Reply that *Dimaya* compelled application of the "categorical approach," and neither required nor invited re-examination of the proper analytical framework for identifying "crimes of violence" under § 924(c)(3)(B). Douglas argued that existing First Circuit precedent required use of the categorical approach, and that the government waived their only appellate argument by asserting exactly the opposite position in the district court and *inviting* the district court to employ a categorical analysis. Douglas' primary Reply argument in favor of the categorical approach – statutory construction – was supported by the finding in *Dimaya* that the language in § 16(b)'s residual clause – identical to the language in § 924(c)(3)(B) – 'has no "plausible" fact-

based reading.' *Dimaya*, 138 S. Ct. at 1218, *citing, Johnson*, 135 S. Ct. at 2562. Douglas also argued that a "conduct-based" approach would be unworkable on a practical level, lead to absurd results, and open the floodgates of post-conviction litigation. He further offered that the canon of constitutional avoidance was inapposite because constitutional problems also existed if a fact-based approach was employed, and the canon does not apply if the result is substitution of one constitutional problem for another.

3. The circuit court's ruling

The circuit court found that Douglas' appeal squarely presented "important questions under federal criminal law, particularly whether it is appropriate to use the categorical approach in determining what is a "crime of violence" under 18 U. S. C. § 924(c)(3)(B)." *Douglas*, 907 F.3d at 4.

a. Concession v. Waiver

The circuit court first considered whether the government had waived their key argument by asserting the opposite position in the district court. The government acknowledged they made a concession, but suggested this did not constitute a waiver. The circuit court noted that a "concession by either party in a criminal case as to a legal conclusion is not binding on an appellate court," citing *United States v. Sanchez-Berrios*, 424 F.3d 65, 81 (1st Cir. 2005). Assessing the "pertinent considerations," the court found that the issue in question is

recurrent, so a decision would give guidance to the district courts. They also found it would be "unseemly" to hold the government to its earlier position when *Dimaya* had "substantially changed this area of law." *Douglas*, 907 F.3d at 7. Third, the court found that the proper approach to the residual clause at § 924(c)(3)(B) is a technical issue, and this issue arose in its current form only after *Dimaya*, and that the issue "merits our serious evaluation." *Id.* The court found there was no waiver because there was no "intentional abandonment by the government" of the issue regarding the proper analytical approach. The circuit court found the "government has been forthright about its changed position and the reasons underlying this change." *Id.*, at 8. Regardless, said the court, 'we do not "religiously hold waiver against the Government" when fairness dictates otherwise." *Id.*, at 7-8.

b. The Merits of the Issue

Next, the circuit court reached the merits of the issue by considering whether the holdings in *Johnson* and *Dimaya* extended to § 924(c)(3)(B), rendering this residual clause void for vagueness just like those in ACCA and § 16(b). In doing so, the circuit court considered Supreme Court precedent, the text of § 924(c)(3)(B), the context of § 924(c)(3)(B), and the canon of constitutional avoidance.

(i) Supreme Court Precedent

The circuit court's substantive discussion of Supreme Court precedent mentioned only *Taylor v. United States*, 495 U. S. 574 (1990) and *James v. United States*, 550 U. S. 192 (2007) before moving on to address the holdings in *Johnson* and *Dimaya*. In its discussion of *Taylor* and *Dimaya*, the circuit opinion focused on comments suggesting that adoption of the categorical analysis was "in part to avoid .... Sixth Amendment concerns," *Douglas*, at 10, *citing*, *Dimaya*, at 1217.[1] The circuit opinion minimized the primary role of statutory construction in both *Taylor* and *Dimaya* in establishing the necessity of the categorical approach. When it did address statutory construction within the Supreme Court's precedent, the circuit opinion cited to the *Dimaya* dissent, and offered Justice Thomas' statement that the "categorical approach was never really about the best reading of the text." *Id.*, *citing, Dimaya* at 1256.[2]

Finally, in the section of the opinion dealing with Supreme Court precedent, the circuit court emphasized that both *Johnson* and *Dimaya* had dismissed the notion that uncertainty as to risk evaluation in the determination of what constitutes a crime of violence was a problem by itself. *Douglas*, at 11.

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[1]This quotation actually involves a citation to a portion of the plurality opinion of Justice Kagan quoting the dissent of Justice Thomas

[2]The circuit court decision ignored that portion of the plurality opinion in *Dimaya* that analyzed the text of § 16(b) and the ACCA and found '[t]he upshot of all this textual evidence is that § 16(b)'s residual clause – like ACCA's, except still more plainly – has no "plausible" fact-based reading.' *Dimaya*, 138 S. Ct. at 1218.

This portion of the opinion ignored the Supreme Court's binding construction of the text in the ACCA's and § 16(b)'s residual clauses, finding that each "require[d] application of the "serious potential risk" standard to an idealized ordinary case of the crime." *Johnson*, at 2561. It was these *dual uncertainties* that domed each statute. *Dimaya*, at 1214-15.

(ii) The Text of § 924(c)(3)(B)

When it examined the text of § 924(c)(3)(B), the circuit court found it was not convinced that the statute required application of the categorical approach. Discussing *Dimaya*, the circuit court observed that "there was no holding by a majority of the court that a categorical approach was required by the text of [§ 16(b)]." *Douglas*, at 12. Yet, the circuit court acknowledged a plurality of the court read § 16(b) as "demanding a categorical approach," and then quoted a fifth justice, Justice Gorsuch, who "proceeded on the premises that .... § 16(b) of the criminal code[] *commands* courts to determine the risk of violence attending the ordinary case of conviction for a particular crime .... because our precedent seemingly requires this approach ..." *Id.*

Additionally, there was little doubt that Justice Roberts accepted application of the categorical approach (as did the government), but he chose to focus on the linguistic distinctions between the residual clauses in the ACCA and

§ 16(b). This focus led him conclude the later was not void for vagueness, but it did not cause him to call into question application of the categorical approach.

(iii) The context of § 924(c)(3)(B)

The circuit court turned next to the context of § 924(c)(3)(B), and noted that *Dimaya* and *Johnson* both dealt with statutes requiring judicial consideration of *prior* convictions in subsequent proceedings. In contrast, § 924(c)(3)(B) applies only to the predicate offense for a pending charge. This distinction was crucial to the circuit court because it meant that the predicate offense and the § 924(c) charge could be considered at the same time by the same fact finder. The circuit court observed that the Supreme Court has not yet applied the categorical approach to a residual clause that defines a predicate offense for a crime of pending prosecution.

The circuit opinion continued to portray the categorical approach as merely a "judicial construct" designed to remedy practical and constitutional considerations involved when courts have to assess prior convictions from a different tribunal, based on facts that occurred long ago. At every turn, the circuit court minimized, to the point of irrelevance, the role that the literal text in each respective residual clause played in the *Johnson* and *Dimaya* decisions. They ignored that the *Dimaya* decision itself stated that '§ 16(b)'s text creates no draw: Best read, it demands a categorical approach. Our decisions have

consistently understood language in the residual clauses of both ACCA and § 16 to refer to the "statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, at 1217, *citing Taylor*, 495 U. S. at 601.

The circuit court has also suggested that Congress has indicated no preference for applying the categorical approach to § 924(c)(3)(B). To support this statement, the court points out that this residual clause, in exactly the same language as today, was in place before the Supreme Court decided *Taylor* in 1990. Congress, says the circuit court, could not have demonstrated a preference for a judicial approach that did not yet exist when the statute was passed. Ironically, the court fails to also observe that Congress has not undertaken to amended or altered the residual clause language in the 28 years that have passed since *Taylor* construed the language to demand a categorical approach.

(iv) Constitutional Avoidance

As a final point of analysis, the circuit court addressed the canon of "constitutional avoidance." This canon of statutory construction comes into play when a statute is "ambiguous," that is, when, after "ordinary textual analysis," multiple "plausible" interpretations of the statute are available. *Douglas*, 907 F.3d at 16-17. According to the canon, courts must adopt the interpretation that avoids constitutional problems. Here, the circuit court suggests, a fact-based approach to § 924(c)(3)(B) is a "plausible" reading which avoids the

constitutional problem of vagueness that arises with the categorical analysis. The circuit court suggests that they cannot determine as a matter of law whether a Hobbs Act conspiracy, "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." Rather, they suggest, the same question should properly go to the jury for determination if there is a trial. *Id.* Ironically in this case, the circuit court *itself*, under *their own* assessment of the facts of the case, decided that Douglas' conduct, "by its nature, involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

REASONS FOR GRANTING THE WRIT

1. The Circuits are in Conflict Regarding the Constitutionality of § 924(c)(3)(B)

Above all, this court should grant Certiorari because the circuits are significantly split over whether § 924(c)(3)(B) is unconstitutionally vague, and whether a categorical or fact-specific approach is the appropriate method to assess a proposed predicate in § 924(c) cases. There is an even split among the six circuits to have addressed this issue since this court's decision in *Dimaya*.

Of the three circuits holding § 924(c)(3)(B) to be unconstitutionally vague sine *Dimaya*, each employs the "categorical approach" in determining whether an offense qualifies as a § 924(c) predicate. *United States v. Salas*, 889

F.3d 681, 686 (10th Cir. 2018)('we employ the categorical approach to § 924(c)(3)(B) .... § 924(c)(3)(B) possesses the same two features that rendered the ACCA's residual clause and § 16(b) unconstitutionally vague: "an ordinary-case requirement and an ill-defined risk threshold ... '"); *United States v. Eshetu*, 898 F.3d 35, 37 (D. C. Cir. 2018)('*Dimaya* nowise calls into question [our precedent's] requirement of a categorical approach. To the contrary, a plurality of the High Court concluded that section 16(b)—which, again, is textually parallel with section 924(c)(3)(B)—is "[b]est read" to "demand[ ] a categorical approach" "*even if* that approach [cannot] in the end satisfy constitutional standards." *Dimaya*, 138 S.Ct. at 1217 (plurality opinion)(emphasis added).'); *United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018)("Because the language of the residual clause here and that in § 16(b) are identical, this court lacks the authority to say that, under the categorical approach, the outcome would not be the same. We hold that § 924(c)'s residual clause is unconstitutionally vague.").

Of the three circuits holding § 924(c)(3)(B) to be constitutional since *Dimaya*, each has jettisoned the categorical approach in favor of a fact-based approach to assess potential predicates under this residual clause. *United States v. Douglas*, 907 F. 3d 1,4 (1st Cir. 2018)("we conclude that § 924(c)(3)(B) is not, as Douglas argues, void for vagueness. That is because the statute reasonably allows for a case-specific approach, considering real-world conduct, rather than

a categorical approach ....); *United States v. Ovalles*, 905 F.3d 1231, 1252 (11th Cir. 2018)(en banc)("Having jettisoned the categorical interpretation in favor of the conduct-based approach for cases arising under § 924(c)(3)'s residual clause, we can make quick work of the contention that the clause is unconstitutionally vague in the light of *Dimaya*. It is not."); *United Sates v. Barrett*, 903 F.3d 166 (2nd Cir. 2018)(" § 924(c)(3)(B) is not invalid after *Dimaya/Johnson* because it can reasonably be construed to warrant conduct-specific application by a trial jury ....").

Beyond these six circuits, there are additional divisions among the circuits to have addressed § 924(c)(3)(B)'s constitutionality after *Johnson* but before *Dimaya.* One such circuit, the Seventh, applying the holding in *Johnson*, found § 924(c)(3)(B) to be unconstitutionally vague in 2016. *See, United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). Two other circuits, the Sixth and Eighth, applying *Johnson*, found that the differences between the ACCA residual clause and § 924(c)(3)(B) were a sufficient basis to hold § 924(c)(3)(B) constitutional. *See, United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016); *and in accord, United States v. Prickett,* 839 F.3d 697, 699 (8th Cir. 2016), cert. denied, 138 S. Ct. 1976 (2018). Others have simply recognized the categorical approach to be the proper analytical method for § 924(c)(3)(B). *See, United States v. Fuertes*, 805 F.3d 485, 497-99 (4th Cir. 2015); *United States v, Butler*, 496 Fed.

Appx. 158 (3rd Cir. 2012); *United States v. Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995); *United States v. Moore*, 38 F.3d 977 (8th Cir. 1994). When these circuits address the impact of *Dimaya*, it is likely that the evolving split will grow and deepen.

Even among the circuits holding that a "case specific" approach is appropriate to assess § 924(c) predicates, there are significant irreconcilable differences. *Contrast, Douglas,* supra.*, with Barrett,* supra. In the present case, the First Circuit expressly refused to hold that "all conspiracies to commit Hobbs Act robbery would constitute crimes of violence." *Douglas*, 907 F.3d at 16. For *Douglas*, the central question – a question of fact that "properly must go to the jury for determination" – is whether the particular conspiracy qualifies as a "crime of violence" because, "by its nature, [it] involve[d] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.*, at17. *Douglas* found that, '[i]n 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."' *Id.,* at 16 (emphasis added), *citing, United States v. Barrett*, 903 F.3d 166, 175 (2nd Cir. 2018).

Barrett actually adds a third analytical method to the mix, one seemingly suggested by the concurrence of Justice Gorsuch in *Dimaya* ("We might also 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." *Dimaya*, 138 S. Ct. at 1233 (emphasis in original)). *Barrett* suggests that identification of the "ordinary case" is not a question of statutory interpretation, but rather "'a distinctive form of .... the categorical approach," developed by the Supreme Court specifically for application to residual definitions of a crime of violence." 903 F.3d at 176. *Barrett* found that there is 'no need to identify an "ordinary case" of Hobbs Act conspiracy to make a violent crime determination under § 924(c)(3).' *Id.* Rather, *Barrett* suggests, they can employ a "traditional categorical analysis" by reference only to the crime's elements. From their view, an agreement to commit an offense with elements that are categorically violent under § 924(c)(3)(A) is, itself, automatically violent under § 924(c)(3)(B) without employment of an "ordinary case" analysis. This, says *Barrett*, saves § 924(c)(3)(B) from unconstitutional vagueness under *Johnson* and *Dimaya*.

These divergent views within the "case-specific" approach now constitute established subsets within one side of the more fundamental split in the circuits

– a split that only this court can resolve. These differences are only the tip of the analytical iceberg regarding problems inherent in deciding to jettison the approach that has guided federal courts sine 1990.

There can be no doubt that these fractured views in the circuits present a significant problem in the national administration of justice. Prosecutions under § 924(c) are common in the federal courts, and a significant number of litigants will receive disparate treatment on the basis of the venue of their prosecution. Notice to defendants, necessary under the due process clause, will be laced with uncertainty if this area of law evolves without guidance from this court.

The Sentencing Commission has collected data which reflects the significance of this issue, and has published statistical information regarding § 924(c) prosecutions on its website (*See,* https://www.ussc.gov/topic/firearms). In fiscal year 2017, there were 2,075 offenders convicted under 18 U. S. C. § 924(c), accounting for 3.1% of all federal offenders sentenced under the guidelines. Of those, 124 offenders were convicted of multiple counts, accounting for 6.0% of all § 924(c) offenders. Some of the federal districts bore the burden of having the highest proportion of their caseload comprised of § 924(c) offenders. One of the reasons that Douglas' case is the most appropriate vehicle to address issues with the administration of this statute is that the District of Puerto Rico in the First

Circuit is the district with the highest percentage of its overall caseload comprised of § 924(c) prosecutions (13.7% of the overall caseload). The next four districts are as follows: Eastern District of Wisconsin, 12.5%; Eastern District of North Carolina, 11.8%; Southern District of New York, 10.8%; and the Middle District of Alabama; 10.3%. In fiscal year 2017, the average length of sentence for offenders convicted under 18 U. S. C. § 924(c) was 149 months.

2. The First Circuit has wrongly decided the question of the constitutionality of § 924(c)(3)(B)

In *Dimaya*, this court struck down as unconstitutional a statutory clause, 18 U. S. C. § 16(b), that is *identical* to the one that must be interpreted in this case. The text of that statute was central to the court's decision, and if § 16(b) is void for vagueness under the Due Process clause, then so is § 924(c)(3)(B).

If this court reviews the legislative history of § 924(c)(3)(B), construes § 924(c) as a whole and in context, and then is guided by what has already determined in *Johnson v. United States,* 135 S. Ct. 2551 (2015); *James v. United States*, 550 U. S. 192 (2007)*; Leocal v. Ashcroft*, 543 U. S. 1 (2004); and *Dimaya v. Sessions*, 138 S. Ct. 1204 (2018), only one conclusion is available. § 924(c)(3)(B) presents an even stronger case for application of the categorical approach than the residual clauses of the ACCA or § 16(b). Further, the canon of constitutional avoidance has no applicability here because the case-specific approach causes its own constitutional problems, rendering the avoidance canon inapposite.

(a) Legislative History

In the mid-1980s, Congress, as part of a movement to get tougher on crime, passed the Comprehensive Crime Control Act of 1984 (the "CCCA"), which overhauled the federal criminal code for the first time in over half a century. *Pub. L. No. 98-473, 98 Stat. 1976 (1984)*. The CCCA either enacted or revised all three of the statutes that are relevant to this case: § 924(c), § 16, and § 924(e)(2)(B)(ii) (ACCA). *See Pub. L. No. 98-473, 98 Stat. 2136, 2138, 2185 (1984)*; *Leocal*, 543 U.S. at 6 (explaining § 16's enactment as part of the CCCA). The statute at issue here, 18 U.S.C. § 924(c), was revised in the CCCA. Prior to 1984, § 924(c) provided for the imprisonment of someone who used a firearm to commit *any* felony. Congress narrowed the language to provide that the statute's enhanced penalty should apply only to those who, with the use or possession of a firearm, engaged in a "crime of violence." *United States v. Cruz*, 805 F.3d 1464, 1470 (11th Cir. 1986).

Additionally, before the revisions to the statute in 1984, the Supreme Court had interpreted § 924(c) to *exclude* certain potential predicate criminal "statutes," like the bank robbery statute and the assault-on-a-federal-officer statute, which contained penalty enhancements of their own. Congress then amended § 924(c) to include these *statutes*. In doing so, the Senate expressly acknowledged the Supreme Court decisions as the motivating factor for its

revisions. And those revisions were to include specified statutes, not to determine which facts or conduct would qualify as violent. *See generally, Ovalles v. United States,* 905 F.3d 1231, 1294-95 (11th Cir. 2018)(dissenting opinion, Pryor, J.); *see also, United States v. Robinson*, 884 F.3d 137, 148 (3rd Cir. 2016) (Fuentes, J., concurring in judgment) ("The Senate report discussion of Section 924(c) included comments on which precise offenses are 'crime[s] of violence' under the statute, but never which facts would qualify a conviction as a 'crime of violence' and which facts would disqualify the same conviction."). The significant point here is that nearly every federal court in the nation has consistently applied the categorical approach to § 924(c)(3), and Congress has not once sought to intervene despite the fact that, as evidenced by the above legislative history, Congress previously has substantially revised the statute in response to the federal courts' construction of it. *Ovalles*, 905 F.3d at 1295.

The uniformity of treatment Congress intended for these statutes can be inferred from several indisputable facts. All three relevant statutes were revised or enacted at the same time in the same piece of comprehensive legislation. All three are similarly structured with an "elements clause" and a "residual clause." Section 924(c)(3), § 16, and § 924(e)(2)(B), are also notably similar in their text, and the courts have established that all three statutes are to be analyzed using the same "categorical approach."

(b) The text and context of § 924(c)(3)(B) requires an "ordinary case" categorical approach

§ 924(c)(3)(B) defines "crime of violence" to mean "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" (emphasis added). Similar or identical language has been reviewed *ad nauseam* by the Supreme Court, leading the court to adopt and reaffirm the categorical approach from *Taylor*, 495 U. S. at 599-602, through *James*, 550 U. S. at 202; *Begay,* 553 U. S. at 141; *Chambers,* 555 U. S. at 125; *Sykes,* 564 U. S. at 7-8; *Johnson,*135 S. Ct. at 2561-62; and finally *Dimaya* 138 S. Ct. at 1217-18. The interpretation of this language has remained consistent throughout. Simple references to a "conviction," "felony," or "offense," are "read naturally" to denote the "crime as generally committed." *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009); *see Leocal*, 543 U.S., at 7; *Johnson*, 135 S.Ct., at 2561–2562. The statute directs courts to consider whether an offense, *by its nature*, poses the requisite risk of force. An offense's "nature" means its "normal and characteristic quality." *Webster's Third New International Dictionary* 1507 (2002). This statutory language "tells courts to figure out what an offense normally—or, as we have repeatedly said, "ordinarily"—entails, not what happened to occur on one occasion." *Dimaya*, at 1217-18.

The same conclusion follows from observing what is missing from the statute. As the Supreme Court has observed 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." *See, Descamps v. United States*, 570 U.S. 254, 267 (2013). If Congress had wanted judges to look into a felon's actual conduct, "it presumably would have said so; other statutes, in other contexts, speak in just that way." *Id.*, at 267–268. *See, e.g., United States v. Hayes,* 555 U. S. 415 (2009)(statute referring to former crimes as "committed by" specified persons), and *Nijhawan v. Holder*, 557 U. S. 29 (2009) (an offense "in which the loss to the victim or victims exceeds $10,000). "The upshot of all this *textual evidence* is that [§ 924(c)(3)]'s residual clause—like ACCA's, except still more plainly—has no "plausible" fact-based reading. *Johnson*, 576 U.S., at ——, 135 S.Ct., at 2562." *Dimaya*, at 1218 [speaking about § 16(b), a statute with language that is *identical* to § 924(c)(3)(B)].

The circuit opinion here suggests there is a significant contextual difference between § 924(e)(2)(B)(ii), § 16(b), and § 924(c)(3)(B), in that it is only the later that addresses *pending* as opposed to *prior* offenses. This distinction is both false and artificial.

A focus on the fact that *Leocal* and *Dimaya* involved the impact of prior convictions on *immigration* cases ignores all of the other ways § 16 is

incorporated into the federal code. Since passage of the CCCA, § 16's general "crime of violence" definition "has ... been incorporated into a variety of statutory provisions, both criminal and noncriminal." *Leocal*, 543 U.S. at 7. In fact, for the vast majority of instances where § 16's definition is incorporated into the criminal code, the "crime of violence" element is committed at the same time as the offense's other elements. For example, 18 U.S.C. § 25 criminalizes the conduct of, and provides penalties for, an adult "who intentionally uses a minor to commit a crime of violence," as that term is defined in § 16. For a person who violates § 25, the "crime of violence" element is committed at the same time as the offense's other elements. There are many other such examples.[3] These

[3]Other incorporations of § 16 in this manner abound. See, e.g., 18 U.S.C. § 119(a)(1) (criminalizing knowingly making public restricted personal information about certain persons performing official duties "with the intent to threaten, intimidate, or incite the commission of a crime of violence against that covered person" or a member of the person's family); 18 U.S.C. § 842(p)(2)(A) (forbidding the teaching or demonstrating of how to make an explosive device with the intent that the teaching "be used for, or in furtherance of, an activity that constitutes a Federal crime of violence"); 18 U.S.C. § 1952(a)(2) (criminalizing interstate travel with intent to "commit any crime of violence to further any unlawful activity"); 18 U.S.C. § 1956(a)(1), (c)(7)(B)(ii) (incorporating § 16's crime of violence definition into the money laundering statute); 18 U.S.C. § 1959(a)(4) (enhancing penalties for violent crime in aid of racketeering where a defendant threatens to commit a crime of violence); 18 U.S.C. § 2261(a)(1) (criminalizing interstate travel to commit a crime of violence against a domestic partner); 18 U.S.C. § 3663A(c)(1)(A)(i) (incorporating § 16's crime of violence definition into the Mandatory Victims Restitution Act, which requires an award of restitution if the defendant is convicted of a crime of violence). Section 16 also is incorporated into the definitions of other noncriminal statutes. See, e.g., 34 U.S.C. § 30503(a)(1)(A) (providing, in the federal hate crimes statute, federal assistance for the prosecution of any "crime of violence"); 34 U.S.C. § 12361(d)(2)(A) (incorporating § 16's crime of violence definition into the definition of "crime of violence motivated by gender" in the Violence Against Women Act).

incorporations of § 16 into criminal statutes function in identical fashion to the way § 924(c)(1) incorporates the "crime of violence" definition of § 924(c)(3) into the provision creating the offense. The application of § 16(b) to *pending* criminal cases had no impact on the decision in *Dimaya* to require application of the "ordinary case" categorical approach. What is more significant is that the application of § 16 to *pending* cases completely undermines the argument that § 924(c) operates in a different context.

(c) Case Precedent Requires a Categorical Analysis

When Congress passed the CCCA, in which it revised § 924(c) to include a "crime of violence" definition and enacted § 16 and ACCA, it did so with the expressed intention to capture certain crimes—not conduct—as crimes of violence. *See generally, Taylor*, 495 U.S. at 581-90. The Supreme Court gave effect to Congress's expressed intent when it interpreted ACCA, which imposes enhanced sentences on a defendant who has been convicted of prior crimes that meet ACCA's definition of "violent felony." The Court explained that ACCA "always has embodied a categorical approach to the designation of predicate offenses." *Taylor*, 495 U.S. at 588. To decide which prior crimes qualify as predicate offenses, the Supreme Court said, courts must look not to whether the defendant's actual conduct in committing the crime was violent, but rather to whether the statute creating the crime described a violent offense. *See id.* at 600.

The circuit opinion here incorrectly describes the categorical approach as nothing more than a "judicial construct" that is "designed for a *particular context,*" namely the "judicial consideration .... of prior convictions." *Douglas*, 907 F.3d at 13 (emphasis in original). In so finding, the circuit ignores binding precedent regarding statutory construction of the text of § 924(e)(2)(B)(ii), § 16(b), and § 924(c)(3)(B).

In *Taylor* the Supreme Court explained that the statute "always" has embodied the categorical approach. In other words, the categorical approach is not a pure judicial creation; rather, it is a judicial explanation of congressional intent. In *Taylor*, the court explained that ACCA's text "generally supports" a categorical approach because it refers to "convictions," not commissions of an offense, and because its elements clause refers to a statute's "elements," not to any particular facts or conduct. Given this context, the court determined that the enumerated crimes clause should be read categorically. *Taylor*, at 600-01. The court also noted that "the legislative history of [ACCA] shows that Congress generally took a categorical approach to predicate offenses." *Id.*, at 601. In Congress, "[t]here was considerable debate over what kinds of offenses to include and how to define them, but no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Id.*

After *Taylor*, the Supreme Court held that the categorical approach must be applied to ACCA's elements and residual clauses as well. *See, Johnson v. United States*, 559 U. S. 133, 137 (2010)(applying categorical approach to ACCA's elements clause); *James v. United States*, 550 U. S. 192, 208 (2007), *overruled on other grounds, Johnson v. United States*, 135 S. Ct. at 2551 (applying categorical approach to ACCA's residual clause). The categorical approach requires courts to decide "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents" a risk that satisfies the risk standard in the statute—in ACCA, "serious potential risk." *James*, 550 U.S. at 208.

In contrast to the multi-factored reasoning in *Taylor*, when the Supreme Court first construed § 16, it applied the categorical approach based *solely* on the text of the statute, without reference to legislative history or practical concerns. *Leocal v. Ashcroft*, 543 U. S. 1, 7 (2004). The court said this reading of the statute was not merely best, but "require[d]." *Id*. The court *unanimously* stated that "[i]n determining whether the petitioner's conviction falls within the ambit of § 16, the statute directs our focus to the 'offense' of conviction." *Id*. The term "offense," the Court noted, was present in both § 16(a), the elements clause, and § 16(b), the residual clause. Additionally, for the residual clause, the Court emphasized that the "offense" was one that "*by its nature*" involved a substantial

risk that physical force may be used. *Id.* (emphasis in original). The Supreme Court said, in no uncertain terms, that "*[t]his language requires* us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the] petitioner's crime." *Id* (emphasis added).

It bears repeating that a unanimous Supreme Court, based on the statute's text alone, said that the "crime of violence" definition in §16 requires a categorical approach. It did not matter that this construction came in the context of a deportation case. "§ 16 is a criminal statute, and it has both criminal and non-criminal applications," and "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context ...." *Id*., at 11, n.8.

And then came *Dimaya*, holding that a categorical approach applies to the definition of "crime of violence" found in § 16(b). Because this statute requires use of "ordinary case" risk analysis, the court determined that § 16(b) suffers from the same constitutional infirmities found in *Johnson* to invalidate the ACCA residual clause. The opinion expressly found that § 16(b) "has no plausible fact-based reading." *Dimaya*, 138 S. Ct. at 1235-36.

Here, the government fully acknowledges that the categorical approach applies to § 924(c)(3)(A). The categorical approach also applies, without a doubt, to the other possible type of predicate offense described in the statute, a "drug

trafficking crime." *See,* 18 U.S.C. § 924(c)(2). That the categorical approach applies to the "drug trafficking crime" definition as well as the elements clause's "crime of violence" definition is evidence that the same approach must also apply to the residual clause's "crime of violence" definition. *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009)

There is binding Supreme Court precedent applying the categorical approach to the ACCA enumerated offense clause (*Taylor)*, the ACCA elements clause (*Johnson I*), the ACCA residual clause (*Johnson II*), § 16(a) (*Leocal)*, and § 16(b) (*Dimaya).* The parties also acknowledge, with good reason, application to the categorical approach to the § 924(c)(3)(A) elements clause. Could it be that one single clause, § 924(c)(3)(B), out of the entirety of this comprehensive legislative construct, was intended by Congress to employ a distinctly unique method of analysis in determining the meaning of the phrase "crime of violence?"

Stare Decisis is a powerful and necessary doctrine. Judicial dissatisfaction with the results from application of the categorical approach in the § 924(c) context is not an excuse to re-write the statute by rejecting this approach, especially in view of the considerable evidence of Congressional intent to the contrary. Additionally, the circuit court simply cannot ignore the numerous and repeated decisions of the Supreme Court construing similar and, in fact, identical statutory language to require the categorical approach. It is up to

Congress to amend statutes, not the courts. It is also up to circuit courts to follow, and not to lead in a different direction, when Supreme Court precedent is already guiding the way.

(d) The Canon of Constitutional Avoidance Has No Application in this Case

Here, the circuit court acknowledged that if they were to take a categorical approach to § 924(c)(3)(B), there would be constitutional vagueness problems after *Dimaya*. Accordingly, the circuit court suggests, the canon of constitutional avoidance supports their decision that a case-specific approach applies to this statute. The opinion described constitutional avoidance as an "interpretive tool ... counseling that ambiguous statutory language be construed to avoid serious constitutional doubts." *Douglas*, 907 F.3d at 15. The canon directs that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id*. The circuit also recognized the limitation of this canon in that it "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more then one construction." *Id*. at 16, *citing Clark v. Martinez,* 543 U. S. 371, 385 (2001). The chosen interpretation must be "plausible," *Id.*, and the cannon "has no application in the absence of .... ambiguity." *Id*., *citing United States v. Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 494 (2001).

There can be no doubt that the *only* consideration relevant to constitutional avoidance is the text. *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018). Only when the text is ambiguous can the canon be employed. Extra-textual considerations, such as "practical concerns" or "government concessions," have no place in statutory construction, and their role *vis-a-vis* the canon of constitutional avoidance only arises when a court has already determined the statute's language to be ambiguous. *Id.*

Application of this canon has been suggested several times by a minority of the Supreme Court Justices, starting with Justice Alito's dissent in *Johnson*. There, he suggested a plausible conduct-based reading of the ACCA residual clause could save the statute from unconstitutional vagueness. *Johnson*, at 2578-2580 (Alito,J., dissenting). The majority in *Johnson* expressly rejected this argument, observing that "the dissent suggests that we jettison for the residual clause (though not for the enumerated crimes) the categorical approach adopted in *Taylor*, *see* 495 U.S., at 599–602, 110 S.Ct. 2143, and reaffirmed in each of our four residual-clause cases, *see James*, 550 U.S., at 202, 127 S.Ct. 1586; *Begay*, 553 U.S., at 141, 128 S.Ct. 1581; *Chambers*, 555 U.S., at 125, 129 S.Ct. 687; *Sykes*, 564 U.S., ——, 131 S.Ct., at 2272–2273. We decline the dissent's invitation." *Johnson*, 135 S. Ct. at 2562. "*Taylor* had good reasons to

adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes." *Id.*

Again in *Dimaya*, a minority dissent argued that the court should have employed the canon of constitutional avoidance to save § 16(b). Justice Thomas' dissent asserted that "[t]he text of § 16(b) does not require a categorical approach." *Dimaya*, at 1254. Incredibly, this comment was offered despite *Leocal*'s unanimous holding to the contrary. *Leocal*, 543 U.S. at 7. A majority of the justices in *Dimaya* – the plurality of four justices plus Chief Justice Roberts in a separate dissent – rejected Justice Thomas's view that § 16(b) is amenable to more than one reading. The *Dimaya* opinion stated that the "avoidance canon cannot serve, as [Justice Thomas] would like, as the interpretive tie breaker. In any event, § 16(b)'s text creates no draw .... it demands a categorical approach." *Dimaya*, at 1217. After discussing the key textual language in both the ACCA and § 16(b)'s residual clauses relied upon in *Taylor, Leocal,* and *Johnson*, the court stated that "[t]he upshot of all this textual evidence is that § 16's residual clause—like ACCA's, except still more plainly—has no "plausible" fact-based reading." *Id.*, at 1218. Thus, because there is no ambiguity in the statute's language, there is no application of the canon of constitutional avoidance.

There is another compelling reason why the canon has no application in this case. Assuming, *arguendo*, Justice Thomas' view that § 924(c)(3)(B) is

susceptible to more than one interpretation, the canon will still not apply if the "plausible" alternative interpretation of the statute's language poses constitutional problems of its own. *Gomez v. United States*, 490 U. S. 858, 864 (1989) (the avoidance canon applies only "if a reasonable alternative interpretation poses no constitutional questions."). The *Dimaya* court suggested that one reason why, in that case, the government was unwilling to say that a fact-based approach to § 16's residual clause was tenable was because "such an approach would generate its own constitutional questions." The court observed that § 16(b) is a criminal statute, with criminal sentencing consequences, and "we must interpret the statute consistently, whether we encounter its application in a criminal or non-criminal context." *Dimaya*, at 1217, *citing Leocal*, 543 U. S. at 12, n.8. The court then stated that "Justice Thomas' suggestion would merely ping-pong us from one constitutional issue to another," *Id.,* which would mean that the avoidance canon does not apply.

The *Dimaya* court's citation to footnote 8 in the *Leocal* decision is of some consequence. This footnote points out that, because the court must interpret the statute consistently whether in a criminal or non-criminal context, the rule of lenity applies. Pursuant to this rule, a criminal statute must be strictly construed, and any ambiguity in the statute must be resolved in favor lenity toward the defendant. This suggests that if there actually was ambiguity in §

924(c)(3)(B), lenity would require invalidating the statute as opposed to saving the statute through a broad reading. These two canons of statutory construction, each based in constitutional principles, would be in tension.

If a conduct specific rule is determined to be required, then there are Due Process and Sixth Amendment problems in the present case with Douglas' conviction. Douglas' plea was entered conditionally after a judge determined that a conspiracy to commit a Hobbs Act robbery qualified categorically as a "crime of violence" under the *force clause* of § 924(c)(3)(A). Douglas entered the plea only because he was affirmatively mis-informed by the presiding judge that his conspiracy charge was a crime of violence *per se,* a determination that even the government now concedes is error. To make matters worse, the circuit court itself became the fact finder, concluding on their own that the facts of his case met the standards of the §924(c)(3)(B) residual clause. This is certainly not a jury determination. It appears the circuit opinion violates Douglas' Sixth Amendment rights in an attempt to affirm such rights for others.

Additionally, if a "conduct-specific" rule is required by this court going forward for § 924(c) cases, then constitutional infirmities abound for all of the past convictions of people, especially for those presently in jail, in § 924(c) cases. Thousands of collateral attacks upon § 924(c) convictions will be filed asserting the petitioner was convicted either on the basis of an unknowing guilty plea in

violation of the Due Process Clause, or without having had a elemental factual matter determined by a jury in violation of the Sixth Amendment. Both present and collateral constitutional problems suggest the avoidance canon is inapplicable, and weigh in favor of staying the course by upholding application of the categorical approach in § 924(c)(3)(B) cases.

Conclusion

For all of these reasons, this court should grant a Writ of Certiorari to the United States Court of Appeals for the First Circuit so that it may review and vacate the decision below in *United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018), and remand the case with instructions that the motion to dismiss be granted.

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Respectfully Submitted,

/s/ J. Hilary Billings

J. Hilary Billings, Esq.
Assistant Federal Public Defender
Counsel of Record for the Petitioner
Federal Defender's Office
One City Center
P.O. Box 595
Portland, Maine 04112-0595
207-553-7070