No. 19 –

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2019

Xing Lin,

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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QUESTIONS PRESENTED

1. Is the residual clause at 18 U.S.C. § 924(c)(3)(B) void for vagueness?

2. Should this Court hold petitioner's case for a ruling in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), *cert. granted,* 139 S.Ct. 782 (2019) (No. 18-431)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Xing Lin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and life sentence. Petitioner also asks this Court to hold his petition for disposition pending a decision in *United States v. Davis*, 903 F.3d 483 (5th Cir. 2018), *cert. granted*, 139 S.Ct. 782 (2019) (No. 18-431) ("*Davis*"), and then grant certiorari, vacate the judgment of the United States Court of Appeals for the Second Circuit and remand the case for further proceedings in light of *Davis*.

OPINIONS BELOW

The relevant opinion of the United States Court of Appeals for the Second Circuit was not published in the federal reporter but can be found at 752 Fed. App'x 106 (2d Cir. 2019), and appears here at Pet. App. 1A *et seq.*[1]

JURISDICTION

On February 14, 2019, following a previous Order of this Court granting an earlier petition for a writ of certiorari filed by Mr. Xing Lin, vacating his judgment and remanding the case for further consideration in light of *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), the United States Court of Appeals for the Second Circuit entered judgment and again affirmed Petitioner's conviction and life sentence, which had been imposed by the United States District Court for the Southern District of New York. Pet. App. 1A - 7A.

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[1] References to petitioner's appendices are indicated by "Pet. App." followed by the page number and letter corresponding to the appendix, as listed in the table of contents.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provision involved in this petition is the Fifth Amendment to the United States Constitution, which provides, as relevant here, that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

STATUTORY PROVISIONS INVOLVED

Two statutory provisions are involved in this case. As relevant here, 18 U.S.C. § 924(c) criminalizes the use of a firearm "in relation to any crime of violence" and in its residual clause defines a "crime of violence" as "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." 18 U.S.C. § 924(c)(3)(B). The "crime of violence" that "by its nature" involved a substantial risk of force was a Hobbs Act extortion, codified at 18 U.S.C. § 1951(b)(2). The full text of the statutory provisions can be found in Petitioner's Appendix 1B – 10B to this Petition.

STATEMENT OF THE CASE

1. A jury convicted Petitioner of four counts relating to (1) a scheme to control income from Chinatown-based bus lines and (2) the operation of illegal gambling parlors. *See United States v. Lin*, 683 Fed. App'x 41 (2nd Cir. 2018). In furtherance of the bus scheme, charged as a Hobbs Act extortion (in violation of 18 U.S.C. § 1951(b)(2)), a co-participant shot and killed two individuals, which was the

factual predicate for Count Three of the indictment, charging a violation of 18 U.S.C. § 924(c)(3)(B) and (j).

The only evidence of force used in furtherance of the bus lines extortion scheme was the shooting that formed the basis of the Count Three charge. Following the close of evidence, the district court instructed the jury that "extortion and extortion conspiracy are crimes of violence." The jury convicted Mr. Lin of the Hobbs Act extortion and the Count Three gun charge.[2]

Mr. Lin was sentenced to a life term in prison.

2. Following Mr. Lin's conviction, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). There, the Court held that the "violent felony" definition in the residual clause of the Armed Career Criminal Act ("ACCA") was unconstitutionally vague. The ACCA residual clause defined a "violent felony" as 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" that had to apply, this Court explained in *Johnson*, "[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 prompted, 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

[2] Mr. Lin was acquitted of an extortion conspiracy and convicted of two racketeering charges, neither of which was a predicate for the Count Three charge.

case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *Id.* (citation omitted). The ordinary case analysis further involved "uncertainty about how much risk it takes for a crime to qualify as a violent felony" given that the inquiry turned on "a judge-imagined abstraction." *Id.* at 2558. Ultimately, this Court ruled that "the [ACCA] residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

The dissent urged "sav[ing] the residual clause 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 suggest[ed] . . . jettison[ing] . . . the categorical approach." *Id.* at 2561-62. The majority, however, "decline[d] the dissent's invitation" and adhered to its conclusion that the "ordinary case" test was constitutionally unworkable. *Id.* at 2562.

3. In his first appearance before the Second Circuit, Mr. Lin argued that his Count Three conviction had to fall in light of *Johnson*'s invalidation of the ACCA residual clause. The Second Circuit disagreed and affirmed Mr. Lin's conviction, applying the "ordinary case" test that *Johnson* had discredited. ("It is far from clear that the 'ordinary case' of Hobbs Act extortion would not entail a substantial risk of the use of physical force.") Mr. Lin then sought review from this Court on the basis that 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague and that the "ordinary case" analysis could not be constitutionally applied to 18 U.S.C. § 924(c)(3)(B). *See Lin v. United States*, petition for certiorari filed (U.S. Aug. 28, 2017) (No. 17-5676).

4. While holding Mr. Lin's petition, this Court decided *Dimaya*, 138 S.Ct. 1204, which concerned the constitutionality of the residual clause in 18 U.S.C. § 16(b) in light of *Johnson's* rejection of the "ordinary case" rubric. Section 16(b) defined a "crime of violence" as any 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." The definition of a "crime of violence" in 18 U.S.C. § 924(c)(3)(B) – the subsection at issue in Mr. Lin's case – is identical to the § 16(b) definition.

In *Dimaya* this Court held that the text of § 16(b) "demands a categorical approach" (138 S.Ct. at 1216) and, upon application of that approach, further held that the § 16(b) residual clause was void for vagueness. Thereafter, the Court granted, vacated and remanded (GVR) Mr. Lin's first petition for further consideration by the Second Circuit. 138 S.Ct. 1982 (2018).

5. On remand, the Second Circuit asked the parties for additional briefing under a new "conduct-specific approach" analysis, which the Second Circuit had adopted in *Barrett v. United States*, 903 F.3d 166 (2018), subsequent to *Dimaya*. In *Barrett*, the Second Circuit opted not to apply the categorical approach when considering the § 924(c)(3)(B) residual clause and designed a new test that looked at the specific conduct at issue in each individual case, despite the fact that the §924(c)(3)(B) language was identical to the residual clause in § 16(b), which this Court had just struck as unconstitutionally vague in *Dimaya*.

In the post-GVR briefing, Mr. Lin argued that in light of this Court's holdings in *Johnson*, 135 S.Ct. 2551, and *Dimaya*, 128 S.Ct. 1204, § 924(c)(3)(B) had to be analyzed under the categorical approach and that upon such analysis it, like § 16(b), was void for vagueness. He also argued that the "conduct-specific approach" was in conflict with the holding and reasoning of *Dimaya* and other Supreme Court precedent.

Petitioner maintained that the text of § 924(c)(3)(B) is identical to the unconstitutionally vague text of § 16(b); there was no good reason to depart from the categorical approach that applied to § 16(b); and under that approach § 924(c)(3)(B), just like § 16(b), was void for vagueness.

Mr. Lin also asked the Second Circuit to hold a decision until this Court decided *Davis*, which had just been granted a writ of certiorari and which raised substantially similar issues concerning the constitutionality of §924(c)(3)(B).

6. Rejecting Mr. Lin's substantive arguments and refusing to hold the case for a decision in *Davis*, the Second Circuit ruled that "Section 924(c)(3)(B) is not unconstitutionally vague because it applies to a defendant's case-specific conduct, '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.'" Pet. App. 3A, citing *Barrett*, 903 F.3d at 178. Then, because the "conduct-specific determination" was not made by the jury, the Court of Appeals reviewed the record to determine if evidence from Mr. Lin's trial could rationally lead a juror to conclude that the predicate Hobbs Act bus line extortion did *not* involve a "substantial risk

that physical force against the person or property of another" would be used. Pet. App. 3A. Relying largely on the evidence concerning the very conduct that formed the basis of the Count Three shooting, the Second Circuit concluded that the "failure to submit the [Count Three] section 924(c)(3) inquiry to the jury [was] harmless error beyond a reasonable doubt." *Id.*[3]

REASONS FOR GRANTING THE WRIT

Courts of Appeals are intractably divided as to whether the same problematic language that rendered 18 U.S.C. § 16(b) unconstitutionally vague in *Dimaya* can somehow be saved in the context of 18 U.S.C. § 924(c).

This split is premised on the question of whether the analysis of a predicate act as a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3)(B) must comport with this Court's jurisprudence regarding the Armed Career Criminal Act and 18 U.S.C. § 16(b). The split further presents the novel question of whether, unlike in any of this Court's ample ACCA jurisprudence, a case-specific approach can save 18 U.S.C. § 924(c)(3)(B) from the constitutional infirmity that felled the identically-worded 18 U.S.C. § 16(b) residual clause in *Dimaya*.

This Petition presents critically-important and frequently- recurring matters of federal criminal administration. The federal government prosecutes 18 U.S.C. § 924(c) charges aggressively, and the presence of such a count with its mandatory

[3] The Second Circuit recognized that the only actual violence (or force) employed in the furtherance of the Hobbs Act extortion was the shooting that was charged in Count Three. Pet. App. 3A (citing threats but only one act involving the use of force).

minimum (and mandatory consecutive) sentencing consequences in an indictment can be the pressure point that convinces a criminal defendant to accept a guilty plea in a case that might otherwise be tested at trial.

I. The Courts of Appeals are Divided on the Constitutionality of 18 U.S.C. § 924(c)(3)(B)

Following this Court's decision in *Dimaya*, 138 S. Ct. 1204, seven Courts of Appeals have split over the question presented 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.

Four circuits have concluded that the § 924(c)(3)(B) residual clause is unconstitutionally vague for the same reasons that this Court struck the identically-worded § 16(b) residual clause as unconstitutionally vague. *See United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc), petition for cert. filed (U.S. April 24, 2019) (No. 18-1338); *United States v. Davis*, 903 F.3d 483, petition for cert. granted, 139 S.Ct. 782 (2019); *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (per curiam) (reh'g en banc denied); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018), petition for cert. filed (U.S. Aug. 9, 2018) (No. 18-428). Three circuits disagree, doing what this Court has repeatedly exhorted against – abandoning the categorical approach. *See United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018), petition for cert. filed (U.S. Jan. 7, 2019) (No. 18-7331); *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc), petition for cert. filed (U.S. March 8, 2019) (No. 18-8393); and *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018), petition for cert. filed (U.S. Dec. 3, 2018) (No. 18-6895).

Only this Court can resolve the split of authority among the Courts of Appeals on this issue.

II. The Questions Presented Will Have a Substantial Impact on the Administration of the Federal Criminal Justice System

Federal prosecutors indict 18 U.S.C. § 924(c) charges with great frequency and the questions in this Petition therefore beg for this Court's attention. In Fiscal Year 2017, over 2,075 individuals were convicted of an 18 U.S.C. § 924(c) violation. *See United States Sentencing Commission Quick Facts About Section 924(c) Firearms Offenses,* available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY17.pdf, last accessed May 14, 2019. The average sentence for those convictions was over 12 years. *Id.*[4] Indeed, as the Government stated in its petition for certiorari to this Court in *Davis*, "[i]n 2017 alone more than 2700 defendants were charged with a Section 924(c) violation." Government Petition for Certiorari, *Davis*, No. 18-431, at 24.

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[4] By contrast, convictions for violations of the ACCA accounted for fewer than 450 convictions in the final year before this Court struck its residual clause as unconstitutionally vague in *Johnson*. *See United States Sentencing Commission Overview of Federal Criminal Cases FY 2015*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf, last accessed May 14, 2019. Though ACCA convictions annually were only about 1/6 the number of 18 U.S.C. § 924(c) convictions, this Court addressed the ACCA ten times over eight years. *See Mathis v. United States*, 136 S.Ct. 2243 (2016); *Welch v. United States*, 136 S.Ct. 1257 (2016); *Johnson*, 135 S. Ct. 2551; *Descamps v. United States*, 133 S.Ct. 2276 (2013); *Sykes v. United States*, 564 U.S. 1 (2011); *Johnson v. United States*, 559 U.S. 133 (2010); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007); *see also Taylor v. United States*, 495 U.S. 575 (1990).

This Court's consideration on the question of Section 924(c)'s vagueness is urgently necessary and will have a substantial impact on the administration of the federal criminal justice system.

III. The Second Circuit's "Case-Specific" Rule is Wrong and the "Categorical Approach," Devised in the ACCA Context and Applied to 18 U.S.C. § 16(b), Renders 18 U.S.C. § 924(c)(3)(B) Unconstitutional

The Second Circuit's "case-specific" contortion to save 18 U.S.C. § 924(c)(3)(B)'s residual clause is inconsistent with the plain text of the statute as well as this Court's prior jurisprudence and must be addressed by this Court.

A. The Plain Language of the Text is Subject Only to the Categorical Approach

Under the plain text of § 924(c)(3), "the term 'crime of violence' means an offense that is a felony and" either includes force as an element of the underlying crime or is a crime that "*by its nature*, involves a substantial risk that physical force against the person or property of another may be used ... ." This Court's decision in *Dimaya* interpreting the very same language as it appears in § 16(b) requires that the categorical approach apply to § 924(c)(3)(B).

"We begin, as always, with the text." *Esquivel- Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017). The text of the residual clause – referring to "an offense that is a felony" – is a generic statement about the statute the defendant has violated, not the offender's case-specific conduct. *Dimaya*, 138 S. Ct. at 1217 (plurality) (quoting *Nijhawan v. Holder,* 557 U.S. 29, 34 (2009)); see, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (using the phrase "felony offense" in this way). The

phrase "offense that is a felony" thus requires a court "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a defendant's] crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004).

That phrase – "offense that is a felony" – precedes both the elements clause and the residual clause. There is no question that the elements clause refers to crimes categorically, not in a case-specific fashion. *See, e.g., Leocal*, 543 U.S. at 7 – 10. No compelling reason justifies reading the residual clause differently.

"'[W]hen Congress uses the same language in two statutes having similar purposes'" the "presumption of consistent usage" applies. *United States v. Castleman*, 134 S.Ct. 1405, 1417 (2014) (Scalia, J. concurring), quoting *Smith v. City of Jackson*, 544 U.S. 228, 233 (1973) (*per curiam*). Here, given that the same "offense that is a felony" language appears in a single statutory provision, it would be contrary to the presumption of consistent usage to interpret the elements and the residual clauses differently.

If a conduct-specific reading does not apply to the elements clause, it cannot apply to the residual clause. "[T]he statute's single reference to an 'offense that is a felony' has a single meaning: it refers to a crime as defined by statute." *Simms*, 914 F.3d at 242. Any other interpretation would give this single statutory phrase "two contradictory meanings, depending on whether the force clause or the residual clause is in play." *Id.*; *see* Brief for the Government, *Davis*, No. 18-431, at 27. To "interpret" a statutory term "to mean [one thing] for some predicate crimes, [and another] for others" would require too much "interpretive contortion." *United States*

v. Santos, 553 U.S. 507, 522 (2008) (plurality). Rather, the Court has "forcefully rejected" the idea of "giving the same word, *in the same statutory provision,* different meanings *in different factual contexts*." *Id.* (citing *Clark v. Martinez*, 543 U.S. 371, 378) (2005). To do so "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

As to the second key textual phrase at issue here, "by its nature," this Court has already (unanimously) held that the categorical approach applies to a statute precisely because of that language, which "requires us to look at the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime." *Leocal*, 543 U.S. at 7. "The upshot of all this textual evidence is that the residual clause" – whether of § 16(b), §924(C)(3)(B) or the ACCA – "has no 'plausible' fact-based reading." *Dimaya*, 138 S.Ct. at 1218 (quoting *Johnson*, 135 S.Ct. at 2562). No principled argument for a different reading of the identical language as it appears in § 924(c)(3)(B) can save that residual clause, and this Court should grant certiorari to say so.

B. A "Case-Specific" Approach is Contrary to this Court's Jurisprudence

For the past decade, this Court has worked to devise a constitutionally permissible method for determining whether a prior conviction is a "violent felony" for purposes of various statutes, primarily in the context of the ACCA – caselaw that this Court relied upon when ruling that the 18 U.S.C. § 16(b) residual clause.

In the ACCA context, this Court has held that a predicate crime must be assessed "'in terms of how the law defines the offense and not in terms of how an

individual might have committed it on a particular occasion." *Johnson*, 135 S.Ct. at 2557 quoting *Begay*, 553 U.S. at 141. In any ACCA case, then, for a prior conviction to qualify as a "violent felony" the crime in its least serious incarnation must present a risk of "*violent* force – that is, force capable of causing physical pain or injury to another person." *Johnson* (2010), 559 U.S. at 141 (emphasis in original).

Determining whether a prior conviction fell within the ACCA residual clause's definition of a felony presenting a "serious potential risk of physical injury to another" proved to be a highly problematic exercise. After five separate cases over the course of a decade that attempted to read the ACCA residual clause constitutionally, this Court in 2015 concluded that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Johnson*, 135 S.Ct. at 1560. Thus, in *Johnson*, the ACCA's residual clause was officially laid to rest.

This Court also examined a related problem that amplified the constitutional infirmity of the ordinary case analysis that *Johnson* abandoned – the absence of a meaningful gauge for determining when the quantum of risk that was enough to constitute a "serious potential risk of physical injury." *Johnson*, 135 S.Ct. at 2558. Although the level of risk required under the residual clause had to be similar to the ACCA enumerated offenses, *Johnson* rejected the notion that comparing a putative ACCA predicate violent felony's ordinary case to the risk posed by certain enumerated offenses could cure the constitutional problem. *Id.*

Thus, *Johnson* not only invalidated the ACCA residual clause, but it invalidated the ordinary case methodology, as the analysis itself was impossible to apply in a constitutional manner, "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Id.*

This Court thereafter struck down § 16(b), finding that it required an ordinary-case categorical approach with "the same two features," "combined in the same constitutionally problematic way," as did the ACCA residual clause the Court invalidated in *Johnson,* 135 S. Ct. 2551. *See Dimaya*, 138 S. Ct. at 1213; *Leocal v. Ashcroft*, 543 U.S. at 7.

As with comparing the "offense that is a felony" language, above, the presumption of common usage must apply when comparing both the text of the ACCA residual clause with the § 924(c)(3)(B) residual clause and the analysis applicable to each. Both provisions appear in the same statutory section (18 U.S.C. § 924) and given their similar purposes – to enhance penalties for firearm crimes – the presumption of consistent usage again commands that the residual clause of § 924(c)(3)(B) should be interpreted consistently with the residual clause of the ACCA § 924(e)(2)(B)(ii)). The same ACCA analysis that applied in *Dimaya* must therefore likewise apply to §924(c)(3)(B).

Indeed, in *Dimaya*, the government practically conceded that the residual clauses in § 16(b) and 924(c)(3)(B) had to be interpreted identically, warning that by striking the § 16(b) residual clause this Court would necessarily have to strike §

924(c)(3) as well. *See* Brief for the Government, *Dimaya*, No. 15-1498 at 52 – 53 (the two provisions employ "the same statutory language.") There thus is no longer any question that "construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional." Brief for Government, *Davis*, No. 18-431, at 45.

Accordingly, the only way to preserve the constitutionality of 18 U.S.C. § 924(c)(3)(B) would be to interpret that language that is identical in 18 U.S.C. § 16(b) in a manner wholly inconsistent with this Court's interpretation of § 16(b) and jurisprudence concerning the Armed Career Criminal Act – by use of a "case-specific" test, which would require reversing (or ignoring) decades of Supreme Court caselaw.

IV. This Case is an Ideal Vehicle to Address the Questions Presented

As a final matter, this case is unique among those petitions seeking certiorari to review the constitutionality of the 18 U.S.C. § 924(c)(3)(B) residual clause in that the underlying crime was one that infrequently involves violence. As Justice Breyer observed during oral argument in *Davis*, when listing those offenses that might be serve as a § 924(c)(3)(B) predicate crime: "burglary, which is sometimes violent; arson, probably a lot of violence; *extortion, hardly ever violent*; explosives, often violent ... ." Transcript of Oral Argument, *Davis,* No. 18-431, at 41.

Unlike a robbery conspiracy (*Davis, Douglas, Simms*), arson (*Salas*), robbery (*Barrett*) or attempted carjacking (*Ovalles*), extortion is a crime that is rarely violent and therefore highlights the perils of a "case-specific" approach, particularly

insofar as the Second Circuit decision removed any "case-specific" determination from the province of the jury as part of its harmless error anaylsis.

So, for example, "economic pressure aimed at" eliminating "competitive bidding" establishes a Hobbs Act extortion. *United States v. Gigante*, 39 F.3d 42, 46 (2d Cir. 1994), *vacated and superseded in part on denial of reh'g,* 94 F.3d 53 (2d Cir. 1996). As does an offer to cease publishing derogatory articles in exchange for monetary payment constitutes a Hobbs Act extortion as the threat of publication "prey[ed] on [the victim's] fear of economic harm." *United States v. Granados,* 142 F.3d 1016, 1020 (7th Cir. 1998); *see also United States v. Tomblin*, 46 F.3d 1369, 1385 (5th Cir. 1995) (affirming Hobbs Act extortion conviction based on victims' fear that they would lose a financial investment.) Whether a jury should be charged with deciding whether those extortionate acts satisfy the § 924(c)(3)(B) requirement will push the "case-specific" analysis to its logical extreme. This Court must, if it is going to adopt a "case-specific" approach, grapple with the outer bounds of jury decisions and an extortion case will better present such an opportunity than a robbery, arson or carjacking case.

Last, unlike those cases that were resolved by plea agreements (*Simms, Douglas*), Mr. Lin proceeded to trial with a full record that will be available when considering how it might be that a jury could reach a decision about whether the underlying case-specific conduct was sufficient to satisfy the violence requirement of § 924(c)(3)(B), should this Court want to explore how the application of a "case-specific" approach would play out in the context of a jury trial.

Only Mr. Lin's petition allows exploration of the case-specific approach with a robust trial record in the context of a crime that is not, in its generic version, "by its nature" a crime of violence. As such, it is uniquely well-situated as a vehicle by which this Court can answer the critical questions about the constitutionality of 18 U.S.C. § 924(c)(3)(B).

V. In the Alternative, This Court Should Hold Petitioner's Case for a Ruling on the Constitutionality of 18 U.S.C. § 924(c)(3)(B) in *United States v. Davis*

This Court granted a writ of certiorari in *Davis,* No. 18-431, to determine whether the definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, the same question posed by Mr. Lin's case. If this Court does not grant Mr. Lin's petition on the merits, it should at least hold his petition for a writ of certiorari pending the decision in *Davis* and then dispose of Mr. Lin's case in light of that decision.

CONCLUSION

For the foregoing reasons, Mr. Lin requests that this Court grant his petition for certiorari. In the alternative, petitioner asks this Court to hold the case for disposition pending its decision in *United States v. Davis*, No. 18-431, and then grant certiorari, vacate the judgment of the United States Court of Appeals for the Second Circuit, and remand the case for further proceedings in light of *Davis*.

Dated: May 14, 2019

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