No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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AVERY BLODGETT,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS FOR
THE FIRST CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether federal bank robbery under 18 U.S.C. §2113 is a categorical "crime of violence" under the force clause of 18 U.S.C. §924(c)(3)?

2. Whether the new rule of constitutional law set out in *Johnson v. United States* and held to be retroactively applicable to cases on collateral review by this Court in *Welch v. United States* applies to the definition of "crime of violence" in the residual clause of 18 U.S.C. §924(c)(3)?

## PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS



## OTHER

## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Avery Blodgett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

## OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit entered on April 5, 2019 affirming the denial of petitioner's motion for relief pursuant to 28 U.S.C. §2255 is unpublished and is found at Appendix A-1. The transcript of the telephone conference in which the United States District Court for the District of New Hampshire court denied the §2255 motion and the judgment of the district court are not reported and are found at Appendix A-3.

## JURISDICTION

The judgment of the Court of Appeals affirming the denial of petitioner's motion for relief pursuant to 28 U.S.C. §2255 was entered on April 5, 2019. This petition is filed within ninety days of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28, Section 2255(f) of the United States Code provides, in pertinent part:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-
>
> (1) the date on which the judgment of conviction becomes

final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Title 18, Section 924(c) of the United States Code provides, in pertinent part:

(3) For purposes of this subsection the term "crime of violence" means 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.

Title 18, Section 2113 provides, in pertinent part:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association,... [s]hall be fined...or imprisoned...or both.

(d) Whoever, in committing, or attempting to commit any offense defined in subsections (a) and (b) of this section,

> assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined...or imprisoned...or both.

## STATEMENT OF THE CASE

On April 20, 2007, Mr. Blodgett was sentenced in the United States District Court for the District of New Hampshire to an 84 month term of imprisonment for a violation of 18 U.S.C. §924(c), use of a firearm during and in relation to a crime of violence: bank robbery in violation of 18 U.S.C. §2113(d) (armed bank robbery). That sentence was consecutive to a 132 month term of imprisonment imposed pursuant to his pleas of guilty to federal bank robbery and conspiracy charges.[1] In his plea agreement Mr. Blodgett retained his right to collaterally challenge his conviction based on new legal principles with retroactive effect set out in Supreme Court or First Circuit case law decided after the date of the plea agreement.

On June 8, 2016, while in the custody of the Bureau of Prisons, Mr. Blodgett submitted a pro se motion to the Court of Appeals for the First Circuit for leave to file a second or successive motion pursuant to 28 U.S.C. §2255 to vacate his conviction under 18 U.S.C. §924(c) based, *inter alia*, on *Johnson v,. United States*, 135 S.Ct. 2551 (2015) (*Johnson II*). On June 21, 2016 the Court of Appeals entered a judgment transmitting Mr. Blodgett's motion to the District Court for the District of New Hampshire as it was Mr. Blodgett's first motion for relief pursuant to §2255. App. A-10.

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[1] The district court had jurisdiction over the offenses pursuant to 18 U.S.C. §3231.

On October 15, 2016 Mr. Blodgett through counsel, filed an amended motion to vacate his §924(c) conviction based on *Johnson II* and *Welch v. United States*, 136 S.Ct. 1257 (2106). He argued that the residual clause of 18 U.S.C. §924(c) was unconstitutionally vague, like the residual clause of 18 U.S.C. §924(e) (the Armed Career Criminal Act, ACCA) held unconstitutionally vague in *Johnson II*, and that the armed bank robbery offense charged as the predicate offense was not a "crime of violence" under §924(c)'s force clause.

The district court denied relief in an oral order entered during a telephone conference on October 21, 2016. App. A-3. The court concluded that *Johnson II* did not recognize a new right requiring the invalidation of the residual clause of §924(c) for purposes of 28 U.S.C. §2255(f)(3) and, therefore, Mr. Blodgett's motion under 28 U.S.C. §2255 was untimely. App. A-5. It also concluded that federal armed bank robbery was a crime of violence under the force clause of §924(c) and, therefore Mr. Blodgett could not show cause and prejudice even if the residual clause of §924(c) was unconstitutionally vague. *Id.* It entered judgment in accordance with that oral order on October 21, 2016. App. A-9. The district court granted a certificate of appealability as to both issues. App. A-6-8.

After staying proceedings pending this Court's resolution of the then-pending cases of *Beckles v. United States*, 137 S.Ct. 886 (2017) and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), the Court of Appeals for the First Circuit lifted the stay on August 14, 2018. On September 28, 2018, during the pendency of the briefing schedule, the First Circuit issued an order to show cause why recent decisions of the

court holding that various federal offenses were categorically "crimes of violence" under the force clauses of §924(c) (§924(c)(3)(A)) and the United States Sentencing Guidelines (§4B1.2(a)(1)) did not render any challenge to the residual clause of (§924(c)(3)(B)) irrelevant. Mr. Blodgett filed a timely response to that order, arguing that the court should reconsider its determination that federal bank robbery is a crime of violence under the force clauses of §924(c). On April 5, 2019 the First Circuit entered judgment concluding that "the district court's denial of §2255 relief was not erroneous." App. A-1.

## REASONS WHY THE PETITION SHOULD BE GRANTED

### I. The First Circuit's Determination That Federal Bank Robbery Under 18 U.S.C. §2113 is a Categorical "Crime of Violence" Under the Force Clause of 18 U.S.C. §924(c)(3) Raises Important Questions of Federal Law That Should be Reviewed by This Court

#### A. Taking by Intimidation

The force clause of 18 U.S.C. §924(c)(3) defines a crime of violence as one that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

The federal bank robbery statute provides that the offense of unarmed bank robbery is committed by a taking "by force and violence, or by intimidation" or an obtaining "by extortion" any property or money or any other thing of value from a bank. 18 U.S.C. §2113(a).

In *United States v. Ellison*, 866 F.3d 32 (1st Cir. 2017), the court analyzed whether bank robbery committed in violation of 18 U.S.C. §2113(a) qualifies as a

crime of violence under the force clause contained in the United States Sentencing Guidelines, U.S.S.G. §4B1.2(a)(1), which defines a "crime of violence" as any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 866 F.3d at 34-35.

The court employed the categorical approach and recognized that under that approach an offense qualifies as a "crime of violence" only if "the least serious conduct encompassed by the elements of the offense still falls within the force clause." 866 F.3d at 35. Since the parties agreed that the "taking by force, violence or intimidation set out "a separate offense" ( *id.*) the court did not address whether the "taking" and extortion phrases of 18 U.S.C. §2113(a) are alternative means of committing an indivisible, overbroad offense. 866 F.3d at 36. Taking by intimidation was the least serious means of committing that offense. Examining its prior precedent and precedent from other circuits, it determined that intimidation required proof of "action by the defendant that would, as an objective matter, cause a fear of bodily harm." Such a threat could not, in the court's view, be made without the threatened use of physical force sufficient to qualify as a crime of violence. 866 F.3d at 37-38. In *Hunter v. United States*, 873 F.3d 388 (1st Cir. 2017) the court applied *Ellison* to hold that federal bank robbery was a crime of violence under the force clause of 18 U.S.C. §924(c)(3).

Other circuits have also held that intimidation suffices to establish the threat of the use of physical force sufficient to qualify as a crime of violence or violent felony. *See, e.g. United States v. Evans*, 924 F.3d 21 (2d Cir. 2019); *United States v.*

*Wilson*, 880 F.3d 80 (3d Cir. 2018); *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016); *United States v. Brewer*, 848 F.3d 711 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293 (6th Cir. 2016); *United States v. Williams*, 864 F.3d 826 (7th Cir. 2017); *United States v. Harper*, 869 F.3d 624 (8th Cir. 2017); *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018).[2]

However, "physical force" is a term of art that is defined as "violent force," meaning "strong physical force" that is "capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) ("*Johnson I*"). Yet, a number of cases suggest courts have viewed conduct that does not rise to the level of force required under *Johnson I* as sufficient to constitute bank robbery by intimidation.

In *United States v. Graham*, 931 F.2d 1442 (11th Cir. 1991), the defendant entered a bank and handed a teller a note that read, "This is a robbery. Please give me small, unmarked bills, touch off no alarms, and alert no one for at least ten minutes. Thank you." *Id.* at 1442-43. At first, the teller thought the defendant was joking, but after seeing the defendant's serious demeanor, she gave the defendant money. The defendant continued to stare at the teller and lean over the counter at her as she pulled money out of her drawer. The defendant made no threatening gestures.

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[2] That federal appellate courts may all take the same position should not deter this Court from granting review. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 169 (1994) (granting certiorari and reversing by rejecting unanimous position of courts of appeals on question of statutory interpretation); *id.* at 192 (Stevens, J., dissenting) (stating that eleven courts of appeals had agreed on interpretation that Supreme Court there rejected).

Under these facts, even as the court acknowledged that "the robber did not have a weapon, did not use force, and did not verbally threaten the bank teller," the Eleventh Circuit found that the defendant's note and subsequent glares amounted to intimidation. *Id.* at 1442.

Similarly, in *United States v. Henson*, 945 F.2d 430 (1st Cir. 1991), the defendant, standing within two feet of the teller, handed her a note reading "put fifties and twenties into an envelope now!!" The defendant made no threatening gestures and engaged in no acts of force or violence, but the teller was very nervous and upset. 945 F.2d at 439. The court found these facts sufficient to establish intimidation. *See also United States v. Yockel*, 320 F.3d 818, 821 (8th Cir. 2003) (upholding bank robbery conviction even though there was no evidence that defendant intended to put teller in fear of injury: defendant did not make any sort of physical movement toward the teller and never presented her with a note demanding money, never displayed a weapon of any sort, never claimed to have a weapon, and by all accounts, did not appear to possess a weapon).

Indeed, a defendant need not even directly approach a teller to be convicted of bank robbery by intimidation. In *United States v. Kelley*, 412 F.3d 1240 (11th Cir. 2005), after a teller walked away from her station, two men jumped over the teller's counter, opened her unlocked cash drawer, and grabbed handfuls of cash. 412 F.3d at 1242. The neighboring teller, however, was within arm's reach of the defendants. The Eleventh Circuit held that this was intimidation because leaping onto the nearby counter and being in reasonable proximity to the neighboring teller would cause a

reasonable person in the neighboring teller's position to fear bodily harm. *Id.* at 1245-46.

The Tenth Circuit has found even lesser facts to constitute intimidation. In *United States v. Slater*, 692 F.2d 107 (10th Cir. 1982), a man walked into a bank and went directly behind the tellers' counter and began removing money from the tellers' drawers without speaking or interacting with anyone other than to tell a manager to "shut up." *Id.* at 107. Despite the lack of any weapon or even verbal threats, the Tenth Circuit found the evidence sufficient to constitute intimidation. *Id.* at 109.

In short, cases like *Graham*, *Henson, Yockel*, *Kelley*, and *Slater* confirm that the least culpable actions that may cause a reasonable person to fear bodily harm, i.e., to be intimidated, do not require the intentional use of any threats or threatening gestures – let alone the threatened use of *violent* force as this Court interpreted that phrase in *Johnson I.* Accordingly, this Court should examine the relationship between intimidation and the threatened use of physical force and delineate that relationship to provide guidance to the lower courts.

**B. The "Taking" and "Extortion" Phrases of 18 U.S.C. §2113(a)**

In *Ellison*, the court did not address whether 18 U.S. C. §2113(a) is divisible between the "taking" and "extortion" phrases of that paragraph. It did, however, note that intimidation may include extortion. 866 F.3d at 36 n.2. While the courts in *United States v. Evans*, 924 F.3d 21 (2d Cir. 2019) and *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018) have found divisibility between those two phrases, the

cases from other circuits listed *supra* at pp.6-7 have not addressed the question.

This Court should consider whether the multiple phrases used to define the offense in the first clause of §2113(a) – "[w]hoever, by force and violence, or by intimidation, ...or attempts to obtain by extortion..."– are alternative means of committing one, indivisible offense or alternative elements of separate offenses under this Court's decisions in *Descamps v. United States*, 133 S.Ct. 2276 (2013) and *Mathis v. United States*, 136 S.Ct. 2243 (2016).

In addressing the sentencing guideline to be applied to a conviction under 18 U.S.C. §2113(a), the First Circuit stated that "subsection 2113(a) covers a variety of conduct" and explained: "As its text makes clear, subsection 2113(a) can be violated in two distinct ways: (1) bank robbery, which involves taking or attempting to take from a bank by force, intimidation, or extortion; and (2) bank burglary,...." *United States v. Almeida*, 710 F.3d 437, 440 (1st Cir. 2013). *See also United States v. Williams*, 841 F.3d 656, 659 (4th Cir. 2016) (quoting *Almeida*).

Extortion does not qualify as a force clause predicate. The wrongful use of fear sufficient to establish extortion does not require the use of any physical force; it includes fear of economic loss. *See e.g. United States v. DiDonna*, 866 F.3d 40, 41,46-47 (1st Cir. 2017) (fear of economic loss created by threats to wreck the victim's business by disclosing information). *See also United States v. Sturm*, 870 F.2d 769 (1st Cir. 1989) (creditor's fear of loss created by absence of logbooks necessary to sell repossessed plane for commercial purposes; defendant-debtor demanded cash payments for returning logbooks); *United States v. Lisinski*, 728

F.2d 887, 892 (7th Cir. 1984) ("The wrongful use of fear is satisfied if the extortioner exploits the victim's fear of economic loss, ....").

Since extortion does not require physical force, if the "taking" and "extortion" phrases of § 2113(a) constitute a single offense with alternative means by which the offense may be committed, it is overbroad and cannot qualify as a crime of violence.

## II. Whether the New Rule of Constitutional Law Set Out in *Johnson v. United States* and Held to be Retroactively Applicable to Cases on Collateral Review by This Court in *Welch v. United States* Applies to the Definition of Crime of Violence in the Residual Clause of 18 U.S.C. §924(c)(3)

While the First Circuit resolved Mr. Blodgett's challenge to his §924(c) conviction on the ground that federal bank robbery qualifies as a crime of violence under the force clause of 18 U.S.C. §924(c)(3), the district court denied relief both on that ground and on the ground that the 28 U.S.C. §2255 motion was untimely because *Johnson II*, holding the residual clause of the definition of violent felony in 18 U.S.C. §924(e) to be unconstitutionally vague, did not recognize a new rule applicable to the residual clause in the definition of crime of violence in 18 U.S.C. §924(c)(3).

If this Court determines that federal bank robbery is not a crime of violence under the force clause of §924(c)(3), this case presents an excellent vehicle for addressing the issue of whether this Court's holding in *United States v. Davis*, 2019 WL 2570623 (June 24, 2019) that the residual clause of §924(c)(3) is unconstitutionally vague is a straightforward application of the new rule of constitutional law set out in *Johnson II* and made retroactively applicable to cases on collateral review by this Court in *Welch v. United States*, 136 S.Ct. 1257 (2016).

This Court first addressed the scope of *Johnson II's* new rule of constitutional law in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), holding that the definition of "crime of violence" in the residual clause of 18 U.S.C. §16(b) (including as a crime of violence 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") is unconstitutionally vague in light of the Court's reasoning in *Johnson II*.

In *Johnson II*, the Court explained that in order to determine the risk posed by the statute, the ACCA residual clause "require[d] a court to [apply the categorical approach] and picture the kind of conduct that the crime involves 'in the ordinary case'" rather than looking at the "real-world" facts in the individual case at hand to determine the risk of injury. *Johnson*, 135 S. Ct. at 2557 (citation omitted). The Court evaluated the offense "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." The court must judge whether that abstraction presents a serious potential risk of physical injury. *Id.*

*Johnson II* singled out two features of the ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." 135 S. Ct at 2557. First, the clause left "grave uncertainty" about how to estimate the risk posed by a crime by asking judges "to imagine how *the idealized ordinary case* of the crime" occurs. *Id.* at 2557-58 (emphasis added).

Second, compounding that uncertainty, the ACCA's residual clause layered

an imprecise "serious potential risk" threshold on top of the requisite "ordinary case" inquiry. The combination of "indeterminacy" created by the ordinary case inquiry and an ill-defined risk threshold resulted in "more unpredictability and arbitrariness than Due Process tolerates." 135 S.Ct. at 2558. Accordingly, "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges," rendering the residual clause unconstitutional. *Id.* at 2557.

The *Dimaya* Court held that the categorical approach also applied to 18 U.S.C. §16(b). "The question, we have explained, is not whether 'the particular fact' underlying a conviction posed the substantial risk that §16(b) demands. [citation omitted] 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. [citation omitted] (referring to §16(b)'s 'by its nature' language). More precisely, §16(b) requires a court to ask whether 'the ordinary case' of an offense poses the requisite risk. [citation omitted]. 138 S.Ct. at 1211.

Holding that the void-for-vagueness doctrine applied to §16(b) as incorporated into the immigration statute, the Court asserted that "*Johnson* is a straightforward decision, with equally straightforward application here." (138 S.Ct. at 1213) and concluded that "*Johnson* tells us how to resolve this case." (*id.* at 1223). The *Dimaya* Court found that §16(b) suffers from the same two flaws found in the ACCA in *Johnson II* and was, accordingly, also unconstitutionally vague.

In *United States v. Davis*, this Court held that the residual clause of the crime of violence definition in 18 U.S.C. §924(c)(3) is unconstitutionally vague because the same categorical approach that rendered the residual clauses at issue in *Johnson II* and *Dimaya* unconstitutionally vague applied to the residual clause of §924(c)(3).[3]

In *Davis* this Court asked: "What do *Johnson* and *Dimaya* have to say about the statute before us?" It answered: "Those decisions teach that the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case'." *Davis,* 2019 WL 2570623 at *5. The government conceded that §924(c)(3)(B) was unconstitutional under the categorical approach required in *Johnson II* and *Dimaya*, but argued that a case-specific, rather than the categorical approach, could be used to analyze §924(c)(3)(B). This Court rejected that argument and, employing the categorical approach, held §924(c)(3)(B) unconstitutionally vague.

The ruling in *Davis*, is, like the ruling in *Dimaya*, a straightforward application of the rule of *Johnson II*, made retroactive to cases on collateral review by this Court in *Welch*. Accordingly a motion filed pursuant to 28 U.S.C. §2255(f)(3) challenging the constitutionality of the residual clause of 18 U.S.C. §924(c)(3) filed within a year of *Johnson II* should be held timely.

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[3] The language of that residual clause is identical to the language of the residual clause in §16(b).

## CONCLUSION

For the foregoing reasons this Court should grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, determine that the court below erred in affirming the denial of relief under 28 U.S.C. §2255, and remand the case for further proceedings.

Respectfully submitted,
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