No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ARTHUR DURHAM,
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. In three circuits, pattern jury instructions extend Hobbs Act robbery (18 U.S.C. § 1951(b)) to an offense committed by causing fear of harm to intangible property. Because fear of economic harm can be caused without the use or threat of violent force, is Hobbs Act robbery categorically a "crime of violence" under the "force clause" of 18 U.S.C. § 924(c)(3)(A)?

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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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Arthur Durham, 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Circuit entered on April 5, 2019 affirming the denial of petitioner's motion for relief pursuant to 28 U.S.C. §2255 is unpublished and is found at Appendix A-1. The memorandum and order, order and judgment of the District Court are unpublished and are found at Appendix A-3.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 1951 provides, in pertinent part:

(a) Whoever, in any way or degree, obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined...or imprisoned..., or both.

(b) As used in this section –

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual

> or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

On September 29, 2008, Mr. Durham was sentenced in the United States District Court for the District of New Hampshire to a 192 month term of imprisonment following his pleas of guilty to two counts of conspiracy to violate 18 U.S.C. §1951 (the Hobbs Act), four counts of Hobbs Act robbery and one count of violating 18 U.S.C. §924(c)(1)(A)(ii) by using and brandishing a firearm during and in relation to a crime of violence: a Hobbs Act robbery.[1]

On June 23, 2016, through counsel, Mr. Durham filed a motion to vacate his §924(c) conviction based on *Johnson v. United States*, 135 S.Ct. 2551 (2015) (*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, like the residual clause of 18 U.S.C. §924(e) (the Armed Career Criminal Act, ACCA) held unconstitutionally vague in *Johnson II*, unconstitutionally vague and that the Hobbs Act offense charged in the superseding information was not a "crime of violence" under §924(c)'s force clause.

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

The district court denied relief on that claim in a Memorandum and Order dated September 15, 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. Durham's motion under 28 U.S.C. §2255 was untimely. App. A.12-13. In an order dated June 13, 2017 the district court issued a certificate of appealability (App. A-15-16) on the issue of "whether *Johnson v. United States*, 135 S. Ct. 2551 (2015) recognized a new right that applies retroactively to cases on collateral review, and extends to petitioners challenging their 18 U.S.C. § 924(c) convictions, such that [petitioner's] petition is timely under §2255(f)(3)." App. A-17.

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 United States Court of Appeals for the First Circuit lifted the stay on August 14, 2018. On September 27, 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 clause of §924(c) (§924(c)(3)(A)) did not render any challenge to the residual clause of that statute (§924(c)(3)(B)) irrelevant. Mr. Durham filed a timely response to that order, arguing that the court should reconsider its determination that Hobbs Act robbery is a crime of violence under §924(c)(3)(A). On April 4, 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 Hobbs Act Robbery Categorically Satisfies The Force Clause Of 18 U.S.C. § 924(c)(3)(A) Is Contrary To The Rules In At Least Three Circuits That Extend Hobbs Act Robbery To Offenses Committed Without The Use Of Violent Force At All. This Decision Has Far Reaching Impact Because Its Reasoning Applies To Cases Arising Under § 924(c), The ACCA, And The Sentencing Guidelines.

This case presents a narrow, but important, question: does Hobbs Act robbery categorically require the use of force when three circuits have adopted pattern jury instructions that extend robbery to crimes based on fear of harm to intangible property (economic loss)? An offense can qualify as a "crime of violence" under the categorical approach only if all the conduct proscribed by a statute, "including the most innocent conduct," matches or is narrower than the "crime of violence" definition—in this case the force clause of § 924(c)(3)(A). *United States v. Fish*, 758 F.3d 1, 5 (1st Cir. 2014). Jury instructions demonstrate how statutory language is applied in actual cases. *See, e.g., United States v. Hopper*, 723 Fed. App'x 645, 646 (10th Cir. 2018) (relying on Tenth Circuit pattern jury instructions to hold that 18 U.S.C. § 1201(a) was broader than the force clause of § 924(c)(3)(A)); *United States v. Libby*, 880 F.3d 1011, 1015-16 (8th Cir. 2018) (relying on pattern jury instructions, among other things, to conclude that Minnesota robbery falls within the ACCA's force clause). At least three circuits have adopted pattern jury instructions that extend Hobbs Act robbery to conduct that does not necessarily require the use of any force at all. Tenth Circuit, Criminal Pattern Jury Instructions §2.70 (2018) (App. A-18); Fifth Circuit, Pattern Jury Instructions

(Criminal Cases), 2.73A (2015 ed.) (App. A- 22); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016) (App. A-26); *see also* 3-50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.03 (2007).

Under the plain language of the statute, Hobbs Act robbery can be committed by causing "fear of injury, immediate or future, to . . . property." 18 U.S.C. §1951(b)(1). Courts have broadly interpreted the term "property," as used in the Hobbs Act, to "protect intangible, as well as tangible property." *United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 780 F.2d 267, 281 (3d Cir. 1986) (describing the circuits as "unanimous" on this point). "The concept of 'property' under the Hobbs Act is an expansive one" that includes "intangible assets, such as rights to solicit customers and to conduct a lawful business." *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (emphasis added) (citing 18 U.S.C. §1951(a)), *abrogated in part on other grounds by Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 401 n.8 (2003); *see also United States v. Iozzi*, 420 F.2d 512, 514 (4th Cir. 1970) (sustaining Hobbs Act conviction for threat "to slow down or stop construction projects unless his demands were met"). Thus, under this broad definition of property, a defendant may commit a Hobbs Act robbery via threats to harm some intangible economic interest like a stock option, a contract right, or a financial holding. These types of threats involve no threats of actual use of physical force—let alone the *violent* physical force required under §924(c)(3)(A).

There is no basis to conclude that "property" should be interpreted differently from one subsection of §1951 to another. "Property"—as used in the Hobbs Act for

both robbery and extortion—includes "intangible property," and the fear of future injury to intangible property is not necessarily caused by the threat of violent force.

More importantly, pattern jury instructions adopted in at least three circuits use this definition in the context of Hobbs Act robbery. For example, in the Tenth Circuit, the "fear" required for Hobbs Act robbery may be of injury "immediately or in the future," and it defines "property" to include other "intangible things of value." Tenth Circuit, Criminal Pattern Jury Instructions §2.70 (2018) (App. A-19). The "fear" required for robbery is not categorically limited to a fear of violence but includes "anxiety about . . . economic loss." *Id.*

The Fifth and Eleventh Circuits have also adopted pattern jury instructions that extend Hobbs Act robbery to situations where the defendant causes fear of future injury to intangible property. Fifth Circuit, Pattern Jury Instructions (Criminal Cases), 2.73A (2015 ed.) (App. A-23-24); Eleventh Circuit, Pattern Jury Instructions (Criminal Cases), O70.3 (2016) (App. A-27). Similarly, a leading treatise on jury instructions includes intangible property for both Hobbs Act robbery and extortion. 3-50 Leonard B. Sand et al., Modern Federal Jury Instructions Criminal ¶ 50.03 (2007).

In the Eleventh Circuit, Pattern Instruction O70.3 (Hobbs Act robbery) provides:

> It's a Federal crime to acquire someone else's property by robbery . . .
>
> The Defendant can be found guilty of this crime only if all the following facts beyond a reasonable doubt.
>
> (1) the Defendant knowingly acquired someone else's personal

property;

(2) the Defendant took the property against the victim's will, by using actual or threatened force, or violence or causing the victim to *fear harm*, either immediately or in the future; ...

"Property" includes money, tangible things of value, *and intangible rights that are a source or element of income or we*alth.

"Fear means a state of anxious concern, alarm, or anticipation of harm. *It includes the fear of financial loss as well as fear of physical violence.*

(Emphasis added) (App. A-30).

According to this instruction, a defendant's threat to harm intangible rights (such as a stock option, or the right to conduct business) by causing a victim to simply "fear" a financial loss – but without causing the victim to fear *any* physical violence – can constitute a Hobbs Act robbery. Indeed, one judge on the Eleventh Circuit relied on the pattern instructions to conclude that Hobbs Act robbery might not categorically require the use of violent force in every case because "'causing the victim to fear harm' can include causing fear of 'financial loss,' which 'includes . . . intangible rights that are a source or element of income or wealth.'" *Davenport v. United States*, No. 16-15939, Order at 6 (11th Cir. Mar. 28, 2017) (Martin, J.) (granting certificate of appealability on whether Hobbs Act robbery is an offense that categorically meets §924(c)'s force clause); *see also In re Hernandez*, 857 F.3d 1162, 1166-67 (2017) (Martin, J., joined by Jill Pryor, J. concurring in result) (noting that under the same definition of "fear" in the pattern Hobbs Act extortion instruction, "the plausible applications of attempted Hobbs Act extortion might not "all require the [attempted] use or threatened use of force").

These pattern instructions show that the broad definition of property is not limited to extortion cases and that Hobbs Act robbery does not fit categorically within the force clause of §924(c). Under these instructions, a Hobbs Act violation does not require the use of *any* physical force—taking a person's "intangible rights" by causing fear of a "financial loss" is not calculated to cause physical harm to any person, or to property.

Notwithstanding these jury instructions, several circuit courts have concluded that Hobbs Act robbery is categorically a crime of violence under the force clause of § 924(c) or the identical force clauses in the ACCA and Sentencing Guidelines. *See, e.g., United States v. Garcia-Ortiz*, 904 F.3d 102 (1st Cir. 2018); *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018); *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016); *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285 (6th Cir. 2017); *United States v. Anglin*, 846 F.3d 954 (7th Cir. 2017); *United States v. House*, 825 F.3d 381 (8th Cir. 2016); *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018); *United States v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018). However, none of these courts address the broad reach of Hobbs Act robbery under the pattern jury instructions; they are not persuasive in resolving the specific "crime of violence" challenge Petitioner raises here.

It does not matter to Petitioner's claim that the Eighth Circuit has a model instruction specifying that a Hobbs Act robbery can only be committed by committing or threatening "physical violence." *See* Eighth Circuit Model Jury Instruction 6.18.1951B (2017 ed.) (App. A-35). If just one circuit had an instruction informing

juries they could convict a defendant simply for causing fear of a financial loss, not personal violence, "violent force" would still not be an "element" of *every* Hobbs Act crime. But indeed, the fact that courts in three circuits (covering Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) routinely instruct juries in all Hobbs Act robbery cases that this offense does not necessitate the use, threat, or fear of physical violence, underscores the error by the court below in finding that a Hobbs Act robbery by "fear of injury" was categorically violent.

Although no court has included the pattern jury instructions in its analysis, some courts have considered whether a threat to harm intangible financial interests would take Hobbs Act robbery outside § 924(c)'s force clause. These courts have generally concluded that a threat to intangible property could occur only in an extortion case, and they conclude that the threat to injure intangible property is implausible in a robbery case, absent a citation to an actual case where Hobbs Act robbery was extended so far. *United States v. Garcia-Ortiz*, 904 F.3d 102, 107 (1st Cir. 2018); *United States v. St. Hubert*, 883 F.3d 1319, 1336 (11th Cir. 2018); *United States v. Hill*, 890 F.3d 51, 57 n.9 (2d Cir. 2018).[2] For example, in *Garcia-Ortiz*, the First Circuit concluded that a threat to "devalue some intangible economic interest

[2] The Third Circuit acknowledged the argument that Hobbs Act robbery might be applied to non-violent offenses, but it concluded that the "brandishing" requirement in a different subsection of § 924(c) supplied the element of force that would be missing under the scenarios presented here. *United States v. Robinson*, 844 F.3d 137, 144 (3d Cir. 2016). Interestingly, it did so only after acknowledging that this analytical move would not normally be allowed under the categorical approach. *Id.*

like a stock holding or contract right" . . . "sounds to us like Hobbs Act extortion" that could not plausibly be charged as Hobbs Act robbery. 904 F.3d at 107. The court said it would "not consider a theorized scenario unless there is a 'realistic probability' that courts would apply the law to find an offense in such a scenario." *Id.* This Court has explained that "[t]o show that realistic probability," an offender must "point to his own case or other cases in which the . . . courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Gonzales v. Duenas-Alvares*, 549 U.S. 183, 193 (2007).

The application of Hobbs Act robbery to crimes against intangible property are not merely hypothetical. For example, in *United States v. Kamahele*, 2:08-cr-758 TC (D. Utah Oct. 6, 2011), the defendants were charged with Hobbs Act robbery and § 924(c). The court told the jury it could convict the defendants of Hobbs Act robbery if it found they "attempted to obtain property from another" by use of "fear of injury, immediately or in the future, to . . . property." (App. A-40). The instructions defined "property" as "money and other tangible and intangible things of value." (*Id.* at 38.) And "fear" included "an apprehension, concern, or anxiety about . . . economic loss." *Id.* These instructions allowed the jury to convict based on a finding that the defendants caused anxiety about economic loss caused by future harm to intangible things of value.

This instruction is hardly unique, and similar instructions have been used in Hobbs Act robbery trials around the country. Consistent with the pattern instructions, these cases instruct the jury that "property" includes intangible

property that can be injured without the use of violent force. *See, e.g., United States v. Buck*, No. 4:13-cr-491 (S.D. Tex. Aug. 28, 2015) (App. A-41); *United States v. Tibbs*, 2:14-cr-20154 BAF (E.D. Mich. Aug. 29, 2014) (App. A-48); *United States v. Moody*, 8:09-cr-234 (M.D. Fla. Feb. 25, 2010) (App. A-52). The wide range of dates for these cases show that this broad application in actual cases is both longstanding and recent. That these cases can be found not only in the Fifth, Tenth, and Eleventh Circuits shows that it is not geographically limited. These cases undercut the conclusion that such broad application is merely hypothetical.

Under the categorical approach, it does not matter that most Hobbs Act robberies are committed with the use of violent force. Rather, the central question is whether Hobbs Act robbery *categorically* requires the use of violent force as an element. The Hobbs Act has long been understood to apply broadly, even to "intangible" property. And by adopting these pattern jury instructions for Hobbs Act robbery, circuit courts have made clear that this is the case even for Hobbs Act robbery—as a matter of law, it extends to non-forcible threats of injury to intangible property. The use of these pattern instructions in actual criminal prosecutions shows that this breadth is not merely hypothetical. The decisions by the First Circuit below and by other circuits that find Hobbs Act robbery to be categorically within the force clause are in tension with these longstanding rules that extend this crime to those based on fear of economic harm. As such, Hobbs Act robbery does not fall categorically within the force clause of § 924(c).

To be sure, the circuits are not divided in a typical "circuit split." The conflict

here is between those circuits that have expanded Hobbs Act robbery through their pattern jury instructions (and the district courts that have been using these instructions for many years) on one side, and the courts that say this breadth is merely hypothetical on the other. This Court should grant certiorari to resolve the tension between the recent decisions and the longstanding, widely used jury instructions that extend Hobbs Act robbery to threats of injury to intangible property.

This issue has far-reaching importance because it is not limited to § 924(c). The force clause in § 924(c)(3)(A) is virtually identical to the force clause in the ACCA and the Sentencing Guidelines. 18 U.S.C. § 924(e)(2)(B)(i); USSG §4B1.2(a)(1). As such, this appeal may impact numerous "crimes of violence" cases nationwide.

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 this case on the ground that Hobbs Act robbery qualifies as a crime of violence under the force clause of 18 U.S.C. §924(c)(3), the district court denied relief on the ground that the 28 U.S.C. §2255 motion was untimely because *Johnson v. United States*, 135 S.Ct. 2251 (2015) (*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 Hobbs Act 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.

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

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.

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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