

No. 17-651

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DOUGLAS D. JACKSON

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

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1. The court of appeals held in this case that the definition of a “crime of violence” in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. Pet. App. 10a. The court based that conclusion on its earlier decision in *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), which held that a similarly worded statute, 18 U.S.C. 16(b), is unconstitutionally vague. Pet. App. 10a-12a; see *id.* at 12a-13a (noting that the court’s “holding in *Vivas-Ceja* compelled the conclusion that [S]ection 924(c)[(3)(b)] too was unconstitutionally vague”) (citing *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016), cert. denied, 138 S. Ct. 247 (2017)).

In *Sessions v. Dimaya*, No. 15-1498 (reargued Oct. 2, 2017), this Court has granted review to consider whether Section 16(b), as incorporated into the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, is void for vagueness. As the court of appeals acknowledged in the decision below, “[g]iven the

obvious parallels between § 16(b) and § 924(c)(3)(B),” if this Court upholds the constitutionality of Section 16(b) in *Dimaya*, the “holding in *Vivas-Ceja* would likewise be undermined and its rationale [would be] inapplicable to § 924(c)(3)(B).” Pet. App. 12a. The court further acknowledged that its determination that Section 924(c)(3)(B) is unconstitutional is in conflict with the holdings of every other court of appeals to have considered that question. *Id.* at 13a-14a; see Pet. 7 n.2 (citing cases). Nonetheless, the court concluded that, “unless we hear differently from the Supreme Court in *Dimaya*, stare decisis and our recent precedents compel the conclusion that § 924(c)(3)(B) is unconstitutionally vague.” Pet. App. 14a.

The court of appeals correctly recognized that this Court’s decision in *Dimaya* may require that the decision below be vacated. If the Court holds in *Dimaya* that Section 16(b) is constitutional, that ruling will eliminate the foundation for the decision below and will likely resolve any doubt as to the constitutionality of Section 924(c)(3)(B). If the Court holds that Section 16(b) is unconstitutional, that decision may—depending on the Court’s reasoning—inform whether Section 924(c)(3)(B) is properly subject to the same rule. See Pet. 8-9. The appropriate course, therefore, is to hold the petition for a writ of certiorari in this case pending the decision in *Dimaya* and to dispose of the petition as appropriate in light of that decision.

2. Respondent raises three arguments for denying the petition, none of which has merit.

First, respondent contends (Br. in Opp. 2) that, in light of the 235-month sentence he received on other counts, he “will be severely punished” even if his con-

secutive 60-month sentence under Section 924(c) is vacated. But respondent's lengthy sentence for other offenses does not suggest that the government lacks a "sufficiently important" interest in his conviction for a separate firearms offense under Section 924(c) or in the consecutive minimum sentence that Congress has mandated for that offense. *Ibid.* Respondent's assertion that he will be adequately punished without serving a consecutive sentence for his Section 924(c) offense is inconsistent with the judgments of Congress and the district court.

Second, respondent argues (Br. in Opp. 2-3) that holding this case for *Dimaya* will "complicate" the ability of the district court to resentence him on remand because the court could consider his mandatory minimum sentence under Section 924(c) in determining the appropriate sentence on the other counts of conviction. See *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017). If anything, that supports the government's request to hold this case for *Dimaya*, which will avoid any need for multiple resentencing proceedings. The court of appeals remanded to the district court with instructions to resentence respondent without the consecutive 60-month sentence under Section 924(c) and without applying a two-level Sentencing Guidelines enhancement related to other counts. See Pet. App. 14a-16a, 18a. If the government's petition for a writ of certiorari were denied, and petitioner were resented while *Dimaya* is pending, the decision in *Dimaya* could still provide the basis for a further motion or appeal by the government seeking reinstatement of the Section 924(c) count and another resentencing. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions

determined in earlier stages of the litigation where certiorari is sought from” the most recent judgment). As matters currently stand, the district court has not scheduled a resentencing proceeding while the government’s petition remains pending. See D. Ct. Doc. 125 (Jan. 18, 2018) (scheduling further status conference for April 2, 2018). The better course is to hold this case until *Dimaya* is decided to ensure that the district court resentences respondent only once.

Third, respondent asserts (Br. in Opp. 3-4) that, because this case concerns the constitutionality of Section 924(c)(3)(B) in the context of a criminal case, and not the constitutionality of Section 16(b) as incorporated into the immigration laws, the decision in *Dimaya* will not necessarily resolve the question presented here. But the extent to which *Dimaya* affects this case will depend on the Court’s holding and its reasoning. The court of appeals itself viewed the constitutionality of Section 924(c)(3)(B) as being related to the constitutionality of Section 16(b), and this Court’s decision on the latter issue in *Dimaya* may not be limited to the immigration context. As explained in the government’s petition (at 7-8 n.3), this Court appears to be holding other petitions for writs of certiorari raising constitutional challenges to Section 924(c)(3)(B) pending the decision in *Dimaya*, including the petition in *Prickett v. United States*, No. 16-7373 (filed Dec. 28, 2016), on which respondent relies. The same course is appropriate here.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be held pending this Court's decision in *Sessions v. Dimaya*, No. 15-1498 (reargued Oct. 2, 2017), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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Solicitor General

FEBRUARY 2018