No. 17-97

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ANTWON JENKINS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Pursuant to Rule 15.8, respondent submits this brief to address the proper disposition of the government's petition following this Court's decision in *Sessions* v. *Dimaya*, No. 15-1498 (April 17, 2018). In the government's view, the Court should grant the petition, vacate the decision below, and remand for further proceedings. As we explain below, that would not be an appropriate disposition of the petition.

1. The Court has explained that a GVR is warranted "[w]here intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). That does not describe this case.

Dimaya held that Section 16(a) is unconstitutionally vague under the reasoning of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). The Seventh Circuit held in this case that identical language appearing in Section 924(c)(3)(b) is unconstitutionally vague, also under the reasoning of *Johnson*. See Pet. App. 8a; *United States* v. *Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). Thus nothing suggests *any* probability, let alone a reasonable one, that the Seventh Circuit would reject the rationale underlying its decision below if given the opportunity for further consideration in light of *Dimaya*.

The government nevertheless insists that the Court's "resolution of *Dimaya*" indicates that there is a possibility that the Seventh Circuit will find that Section 924(c)(3)(b) is "amendable to a narrowing construction" by discarding the categorical approach. U.S. Suppl. Br. 1. That is manifestly wrong. To be sure, Justice Thomas—dissenting—concluded that

the vagueness doctrine calls for a non-categorical approach. Slip op. 16-20. And Justice Gorsuch—concurring—stated that he "remain[s] open" to such an approach. Slip op. 18. But a majority of the Court declined to adopt that view. And we are unaware of any case in which this Court has granted, vacated, and remanded for reconsideration in light of nonbinding statements in dissents and concurrences. The government certainly cites none.

2. Recognizing that plenary review is unwarranted at this time, the government says that the Court should grant, vacate, and remand to "put the Seventh Circuit on equal footing with other circuits that will be considering" the question whether the residual clause may be saved by abandoning the categorical approach. U.S. Suppl. Br. 6. In other words, the government asks this Court to vacate a duly entered judgment of a court of appeals, not because the merits of the judgment have been called into doubt by intervening developments, but to ensure parity in the distribution of cases presenting a particular issue among the courts of appeals. There is no basis in this Court's precedents or practice for such a bizarre rationale for a GVR order.

But setting that aside, remanding this case would not put the Seventh Circuit on "equal footing," for three reasons.

First, the government candidly admits that the government "did not advocate" in the court of appeals for an abandonment of the categorical approach under Section 924(c). U.S. Suppl. Br. 5. The same was true in *Dimaya* itself, which is precisely why Justice Gorsuch declined to reach the issue. As he aptly put it, "normally courts do not rescue parties from their concessions, maybe least of all conces-

sions from a party as able to protect its interests as the federal government." Slip op. 17 (Gorsuch, J., concurring in part and concurring in the judgment). There is thus little reason to think the Seven Circuit would be willing even to consider, much less to resolve, the issue upon which the government now requests a GVR.

Second, because respondent did not preserve the vagueness issue before the district court, the Seventh Circuit's review was for plain error. Pet. App. 8a-9a. In light of that complication, this case would not provide a suitable vehicle for the court of appeals to consider novel arguments concerning any non-categorical approach in any event.

Finally—and as the government itself stressed in *Dimaya* (see slip op. 15 (Roberts, C.J., dissenting))—prosecutions under Section 924(c) are hardly rare. Indeed, the Seventh Circuit has at least two cases already briefed and pending before it to serve as vehicles for addressing whether Section 924(c) is subject to the government's new-found narrowing construction. See *Bufkin* v. *United States*, No. 17-3306; *Toney* v. *United States*, No. 17-3307. Oral argument will be held in those cases this summer. Thus, even supposing this case offered an opportunity for the Seventh Circuit to consider a non-categorical approach (which it does not)—and supposing further that ensuring circuit parity were a valid basis for a GVR order (which it is not)—the Seventh Circuit would not require this Court's intervention to place it on "equal footing" with its sister circuits.

The Court accordingly should deny the government's petition for a writ of certiorari.

Respectfully submitted.

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