No. 18-989

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARVIN LEWIS

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

REPLY BRIEF FOR THE PETITIONER

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As explained in the petition for a writ of certiorari (Pet. 6), the Court should hold this case pending the disposition of *United States* v. *Davis*, No. 18-431 (argued Apr. 17, 2019). Respondent does not dispute that this case presents the same question the Court is presently considering in *Davis*: whether the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. See Br. in Opp. 1 (recognizing that "[t]he question the government presents in this case" is the same "as in *Davis*"). Indeed, the Fifth Circuit expressly applied its decision in *Davis* to vacate respondent's Section 924(c) conviction, and the underlying crime of conviction here (as in *Davis*) was a Hobbs Act conspiracy, in violation of 18 U.S.C. 1951. See Pet. 5-6; Pet. App. 5a-6a.

Respondent's principal contention—that the Court should decide the issue in *Davis* in a manner that supports the judgment in his case (Br. in Opp. 3-10)—

simply illustrates why the Court's resolution of *Davis* will dictate the appropriate disposition of this petition. Respondent separately contends (Br. in Opp. 10-13) that his Section 924(c) conviction cannot be upheld even under the construction of the statute that the government has urged the Court to adopt in *Davis*—namely, that the application of Section 924(c)(3)(B) turns on the real-world circumstances of the defendant's conduct, rather than a hypothetical "ordinary case." See Pet. Br. at 20-32, *Davis*, *supra* (No. 18-431). Respondent's contention is mistaken and does not, in any event, counsel against holding the petition. If the Court determines in *Davis* that Section 924(c)(3)(B) is constitutionally valid by interpreting the statute to require a circumstance-specific determination of the risks posed by the defendant's underlying conduct, then respondent's only claim of error would be that the jury was not instructed in this particular case to make that determination—a claim that would be subject to harmless-error analysis. See *id.* at 53 (citing *Neder* v. *United States*, 527 U.S. 1, 8-13 (1999)); see also Pet. Merits Reply Br. at 21-23, *Davis*, *supra* (No. 18-431) (explaining why any error would be, at most, instructional and would not suggest any defect in the indictment).

A properly instructed jury would undoubtedly have found that respondent's conduct in this case "by its nature, involve[d] 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). Respondent conspired to commit a series of gunpoint robberies, which involved holding store personnel—including a police officer working as a security guard—and customers at bay with a firearm while grabbing diamonds and other luxury goods. See Pet. 2-

3; Gov't C.A. Br. 4-14. Even if the evidence permitted another conclusion, the court of appeals' decision, which requires vacatur with no possibility of a new trial, would lack justification if its constitutional holding is wrong. Thus, if this Court determines in *Davis* that Section 924(c)(3)(B) is constitutionally valid, the appropriate course here would be to the grant the government's petition, vacate the judgment below, and remand to the court of appeals to reconsider its decision in light of *Davis*.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's decision in *United States* v. *Davis*, No. 18-431 (argued Apr. 17, 2019), and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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