No. 18-428

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CLIFFORD RAYMOND SALAS

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

REPLY BRIEF FOR THE PETITIONER

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The Tenth Circuit held that the definition of a "crime of violence" in 18 U.S.C. 924(c)(3)(B) is "unconstitutionally vague" in light of this Court's decisions in *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Pet. App. 8a. For the reasons set forth in the government's petition for a writ of certiorari in *United States* v. *Davis*, No. 18-431 (filed Oct. 3, 2018) (*Davis* Pet.), and its reply in support of that petition (*Davis* Reply Br.) (filed Dec. 19, 2018), the question whether Section 924(c)(3)(B) is unconstitutionally vague warrants this Court's urgent review. *Davis* provides the best vehicle for addressing that question. See Pet. 7-8; *Davis* Pet. at 25-26. Accordingly, the Court should hold the government's petition in this case pending the disposition of the petition for a writ of certiorari in *Davis* and then dispose of this petition as appropriate.

1. Respondent contends (Br. in Opp. 2-3, 8-11, 20-21) that a hold is unwarranted because the Tenth Circuit did not pass on the government's arguments in favor of a case-specific approach to Section 924(c)(3)(B). But the decision below squarely addressed the relevant issue when it expressly rejected the reasoning of the Sixth Circuit's decision in *Shuti* v. *Lynch*, 828 F.3d 440 (2016), cert. denied, 138 S. Ct. 1977 (2018), "to the extent it suggests that whether an offense is a crime of violence depends on the defendant's specific conduct." Pet. App. 7a. *Shuti* had posited that *Johnson* did not call into question the constitutionality of Section 924(c)(3)(B) because Section 924(c)(3)(B) applies to "real-world conduct." *Shuti*, 828 F.3d at 449.

In contrast to other circuits, see *Davis* Reply Br. at 3-4, the Tenth Circuit here relied on its own precedent and understanding of *Dimaya* to hold that Section 924(c)(3)(B) requires a categorical approach and is unconstitutional. In particular, the court concluded that its precedent requires "employ[ing] the categorical approach to [Section] 924(c)(3)(B)," such that a court, not a jury, "determine[s] whether an offense is a crime of violence 'without inquiring into the specific conduct of this particular offender.'" Pet. App. 8a (quoting *United States* v. *Serafin*, 562 F.3d 1105, 1107-1108 (10th Cir. 2009)). The court also concluded that, under the categorical approach, Section 924(c)(3)(B) "possesses the same features" as the statutes at issue in *Dimaya* and *Johnson* and that the reasoning of those cases "applies equally to" Section 924(c)(3)(B), which the court deemed "unconstitutionally vague." *Ibid.*

The government disputed the panel's conclusions—including, in particular, the interpretation of Section 924(c)(3)(B) to require a categorical, rather than case-

specific, approach—in its petition for rehearing en banc. Pet. 6-7; see Gov't C.A. Pet. for Reh'g 5-15. The court of appeals denied that petition. Pet. App. 12a. Although respondent speculates (Br. in Opp. 23) that it did so solely because it viewed the government's arguments not to be properly presented, that speculation lacks support. Nothing in the panel decision, or the denial of rehearing en banc, suggests that the Tenth Circuit would be open to a different approach in a future case, let alone that a future panel would be free to disregard the decision below and reconsider the constitutionality of Section 924(c)(3)(B).

To the contrary, the Tenth Circuit vacated respondent's conviction in this case notwithstanding that his forfeiture of his constitutional claim in the district court limited relief to plain error. Pet. App. 9a. The Tenth Circuit has accordingly stated on multiple occasions that the decision below established as the law of the circuit that Section 924(c)(3)(B) is unconstitutionally vague. See, *e.g.*, *United States* v. *Mann*, 899 F.3d 898, 901 (2018) (referring to the court's "recent holding that [Section] 924(c)(3)(B) is unconstitutionally vague") (citing 889 F.3d 681, 683); *United States* v. *Melgar-Cabrera*, 892 F.3d 1053, 1060 n.4 (2018) (noting that the court "recently held that the residual clause in [Section] 924(c)(3)(B) is indeed unconstitutionally vague") (citing 889 F.3d at 687-688), cert. denied, No. 18-6302 (Nov. 13, 2018). And the court has relied on the decision below to vacate at least one other Section 924(c) conviction. See *United States* v. *Hopper*, 723 Fed. Appx. 645, 646 (10th Cir. 2018). No reasonable prospect exists that the Tenth Circuit will reverse course without this Court's intervention.

2. Respondent also contends (Br. in Opp. 1-2, 5-8, 11-16) that the petition should be denied rather than

held because the government "invited error" in this case. As the petition acknowledges (Pet. 6), the government had argued before this Court's decision in *Dimaya* that Section 924(c)(3)(B) calls for a categorical approach. Here, for example, the government sought jury instructions in which the jury was not asked to resolve the question whether respondent's arson offense, 18 U.S.C. 844(n), was a crime of violence for purposes of Section 924(c). See D. Ct. Doc. 294, at 14 (Mar. 4, 2015) (proposed instruction); D. Ct. Doc. 301, at 20-21 (Mar. 11, 2015) (actual instruction).

As explained in the government's reply in *Davis*, however, the government's pre-*Dimaya* position does not preclude it from seeking to preserve the Section 924(c)(3) convictions of respondent and other current and past defendants. *Davis* Reply Br. at 6-7. This Court's decision in *Dimaya* "shifted the relevant legal landscape," and the "government has been forthright about its changed position and the reasons underlying this change." *United States* v. *Douglas*, 907 F.3d 1, 7-8 (1st Cir. 2018). Any suggestion (Br. in Opp. 12) that the government should have reexamined its approach to Section 924(c)(3)(B) earlier in the Tenth Circuit, in light of circuit-specific precedent anticipating *Dimaya*, disregards the pre-*Dimaya* circuit conflict and the general unreasonableness of requiring the government to affirmatively advocate different interpretations of the same federal statute in different federal courts.

Respondent argues (Br. in Opp. 6-7) that a party may not obtain relief on appeal from an instruction the party proposed. That principle does not apply here. The government does not seek relief from the jury instructions, but rather from the Tenth Circuit's holding (on a claim that respondent himself forfeited, see Pet. App. 9a) that

Section 924(c)(3)(B) is unconstitutional. This Court analogously declined to find any "invited error" in *United States* v. *Wells*, 519 U.S. 482, 487 (1997), where the government had sought jury instructions consistent with circuit precedent and a decision of this Court intervened. *Id.* at 489. Here, as there, the government "is not challenging the jury instruction in an effort to impute error to the trial court," but is instead "merely arguing that the instruction it proposed was harmless," *id.* at 487. Under a case-specific approach, respondent's firebombing of a tattoo parlor in a strip mall, using homemade Molotov cocktails, was indisputably a crime of violence—*i.e.*, 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," 18 U.S.C. 924(c)(3)(B). See *Neder* v. *United States*, 527 U.S. 1, 17-19 (1999); *Davis* Reply Br. at 6. At a minimum, respondent's remedy should be limited to a new trial at which the government can make that argument to a jury. *Davis* Reply Br. at 6; see *Wells*, 519 U.S. at 486 (noting that the court of appeals there had ordered a new trial).

3. Because the government is not seeking plenary review in this case, but instead a hold for *Davis*, respondent's argument (Br. in Opp. 33-35) that this case would be a "poor vehicle" for such review is largely beside the point (even if it had merit). Respondent's argument (*id.* at 17-32) that the question presented does not warrant this Court's review *at all* contains the same flaws as the similar argument by the respondents in *Davis*. See *Davis* Reply Br. at 9-11. For reasons discussed above, and in the *Davis* reply, no reason exists to believe that the growing circuit conflict on the ques-

tion presented will resolve itself. Respondent's apparent suggestion that the government might run the table in the remaining circuits, and then circle back to pick up the circuits in which the statute has already been invalidated, is at odds with the denial of en banc review in this case and with his own stated view of the merits.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be held pending the Court's disposition of the petition for a writ of certiorari in *Davis*, *supra*, and then be disposed of as appropriate.

Respectfully submitted.

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