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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the definition of the term "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 865 F.3d 946. The opinion and order of the district court (App., *infra*, 19a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 37a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, respondent was convicted on three counts of transporting a minor in interstate commerce to engage in illegal sexual activity, in violation of 18 U.S.C. 2423(a); three counts of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a) (2012); and one count of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). App., *infra*, 1a; see Indictment 1-7. The district court sentenced respondent to 235 months of imprisonment on the transportation and sex trafficking counts and to a mandatory minimum consecutive term of 60 months of imprisonment on the Section 924(c) count. Judgment 3. The court of appeals vacated respondent's conviction and sentence on the Section 924(c) count. App., *infra*, at 1a-18a.

1. In May 2014, respondent met a 15-year-old girl, J.T., at a party in South Bend, Indiana. App., *infra*, 2a-3a; see Presentence Investigation Report ¶ 14. Respondent, who was then 25 years old, asked J.T. "if she was interested in making some money." App., *infra*, at 2a. Respondent bought J.T. clothes and paid to have her hair and nails done. *Ibid.*

A few weeks later, respondent took J.T. on a road trip to Atlanta, Georgia. App., *infra*, 2a. When they arrived, respondent posted an advertisement on the website Backpage.com in which he solicited customers to have sex with J.T. *Ibid.* Respondent charged the customers $150 for 30 minutes with J.T or $200 for an hour. *Id.* at 3a.

After spending two nights in Atlanta, respondent drove J.T. to Louisville, Kentucky, where he posted a similar advertisement on Backpage.com and solicited

more customers to engage in illegal sexual conduct with J.T. App., *infra*, 3a. When one customer overstayed his allotted time with J.T., respondent became angry and threatened to terminate the encounter himself if J.T. did not do so. *Ibid.*

Respondent then drove J.T. to Grand Rapids, Michigan, where he again used Backpage.com to advertise J.T.'s availability for prostitution. App., *infra*, 3a. In response to that advertisement, respondent received a request for J.T. to meet a customer at a local motel. *Ibid.* Respondent drove J.T. to the motel shortly before midnight. *Ibid.* J.T. went to the customer's room but returned to respondent's car shortly thereafter because "the customer had been acting weird." *Id.* at 3a-4a.

While respondent and J.T. were sitting in respondent's car, two police officers approached. App., *infra*, 4a. When she saw the officers, "J.T. hastily exited the vehicle with her shorts unbuttoned and her underwear exposed." *Ibid.* Respondent sat up, reached toward the car's floorboard, and got out of the car. *Ibid.* One of the officers shined his flashlight into the car and saw a loaded handgun on the floor. *Ibid.*

2. A federal grand jury in the Northern District of Indiana charged respondent with three counts of transporting a minor in interstate commerce to engage in illegal sexual activity, in violation of 18 U.S.C. 2423(a); three counts of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a) (2012); and one count of possessing a firearm in furtherance of a "crime of violence," in violation of 18 U.S.C. 924(c). App., *infra*, 4a-5a; see Indictment 1-7. The indictment alleged that the "crime of violence" for purposes of the Section 924(c) count was sex trafficking of a minor. Indictment 7. A jury found respondent guilty on all counts. App., *infra*, 6a.

3. Respondent filed a post-trial motion for a judgment of acquittal on the Section 924(c) count. App., *infra*, 6a. Section 924(c) defines a "crime of violence" as a felony that either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), or, "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). Respondent argued that sex trafficking of a minor, in violation of 18 U.S.C. 1591(a) (2012), does not qualify as a crime of violence under Section 924(c)(3)(A) because the offense does not categorically require the use or threatened use of physical force. D. Ct. Doc. 68, at 3 (Oct. 14, 2015).[1] Respondent further argued that Section 924(c)(3)(B) is unconstitutional in light of *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). D. Ct. Doc. 68, at 2-4; see App., *infra*, 6a. In *Johnson*, this Court held that the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA), which defines a "violent felony" as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), is unconstitutionally vague. 135 S. Ct. at 2557.

The district court denied respondent's motion. App., *infra*, 19a-36a. The court reasoned that *Johnson* did not affect the constitutionality of Section 924(c)(3)(B)

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[1] At the time of petitioner's offense, Section 1591(a) provided that whoever, in or affecting commerce, knowingly "recruits, entices, harbors, transports, provides, obtains, or maintains by any means" a minor for the purpose of "engag[ing] in a commercial sex act" has committed a crime. 18 U.S.C. 1591(a) (2012).

because that section is different from the ACCA's residual clause in several ways. *Id.* at 23a-29a (explaining that Section 924(c)(3)(B) contains a narrower definition of the requisite risk of force than the residual clause, is not linked to a "confusing" list of enumerated offenses, and has not generated significant judicial confusion); see *id.* at 7a-8a. The court further held that sex trafficking of a minor qualifies as a crime of violence under Section 924(c)(3)(B) because, unlike in the case of an adult, "the surest method of securing a child's compliance" with sexual demands "is likely to be violent force." *Id.* at 33a; see *id.* at 33a-34a ("[O]wing to their greater vulnerability, sex trafficking of children inherently involves a substantial risk of physical violence.").

The district court sentenced respondent to 235 months of imprisonment on the transportation and sex trafficking counts and to a mandatory minimum consecutive term of 60 months of imprisonment on the Section 924(c) count. Judgment 3.

4. The court of appeals vacated respondent's conviction and sentence on the Section 924(c) count. App., *infra*, 1a-18a. The government acknowledged, and the court of appeals agreed, that sex trafficking of a minor does not qualify as a crime of violence under Section 924(c)(3)(A) because the offense does not require proof of the use or threatened use of physical force. *Id.* at 9a (noting that the offense could be committed "by luring an individual into sex trafficking by fraud, money, clothing, or other non-violent enticements"). The court also held that sex trafficking of a minor could not qualify as a crime of violence under Section 924(c)(3)(B) because that provision is unconstitutionally vague in light of *Johnson*. *Id.* at 10a.

The court of appeals rested that holding on two of its earlier decisions. In *United States* v. *Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015), the court had extended *Johnson*'s vagueness holding to the definition of a "crime of violence" contained in 18 U.S.C. 16(b). See 808 F.3d at 721-723. And in *United States* v. *Cardena*, 842 F.3d 959 (7th Cir. 2016), cert. denied, No. 17-5321 (Oct. 2, 2017), the court had relied on *Vivas-Ceja* to conclude that the similarly worded definition of a "crime of violence" contained in Section 924(c)(3)(B) is also unconstitutionally vague. See *id.* at 996. The court thus held in this case that principles of *stare decisis* "compel[led] the conclusion that [Section] 924(c)(3)(B) is unconstitutionally vague." App., *infra*, 14a.

The court of appeals acknowledged that every other circuit to have addressed the question following *Johnson* has held that Section 924(c)(3)(B) is constitutional. App., *infra*, 13a-14a (citing cases). The court also noted that this Court has granted review in *Sessions* v. *Dimaya*, No. 15-1498 (reargued Oct. 2, 2017), "to consider the continued viability of [Section] 16(b) in the wake of *Johnson*." App., *infra*, 12a. The court recognized that a decision in the government's favor in *Dimaya* would "undermine[]" the decision in *Vivas-Ceja* and render "its rationale inapplicable to [Section] 924(c)(3)(B)." *Ibid.*; see *id.* at 14a (noting that the panel was bound by *stare decisis* "unless we hear differently from the Supreme Court in *Dimaya*").

REASONS FOR GRANTING THE PETITION

The court of appeals held that the definition of the term "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. The court's decision was based on an application of its prior decisions applying the void-for-vagueness doctrine to Section 924(c)(3)(B)

and the similarly worded definition of a "crime of violence" in 18 U.S.C. 16(b). App., *infra*, 10a-13a (citing *United States* v. *Cardena*, 842 F.3d 959, 996 (7th Cir. 2016), cert. denied, No. 17-5321 (Oct. 2, 2017), and *United States* v. *Vivas-Ceja*, 808 F.3d 719, 720-723 (7th Cir. 2015)).[2]

As the court of appeals acknowledged (App., *infra*, 12a), the question presented in this case is related to the issue currently before this Court in *Sessions* v. *Dimaya*, No. 15-1498 (reargued Oct. 2, 2017). *Dimaya* presents the question whether the definition of a "crime of violence" contained in 18 U.S.C. 16(b), as incorporated into the provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, governing an alien's removal from the United States, is unconstitutionally vague. The petition in this case should be held pending this Court's decision in *Dimaya* and then disposed of as appropriate in light of that decision.[3]

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[2] Since this Court issued its decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), the Seventh Circuit is the only court of appeals to hold that Section 924(c)(3)(B) is unconstitutionally vague. Five courts of appeals have held that *Johnson*'s rationale does not render Section 924(c)(3)(B) unconstitutional. See *United States* v. *Eshetu*, 863 F.3d 946, 953-955 (D.C. Cir. 2017); *Ovalles* v. *United States*, 861 F.3d 1257, 1265 (11th Cir. 2017); *United States* v. *Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (per curiam), petition for cert. pending, No. 16-7373 (filed Dec. 28, 2016); *United States* v. *Hill*, 832 F.3d 135, 145-149 (2d Cir. 2016); *United States* v. *Taylor*, 814 F.3d 340, 375-379 (6th Cir. 2016), petition for cert. pending, No. 16-6392 (filed Oct. 6, 2016).

[3] The government has filed a similar petition for a writ of certiorari in *United States* v. *Jenkins*, No. 17-97 (filed July 19, 2017). The government has urged the Court to deny petitions for writs of certiorari in *Prickett* v. *United States*, No. 16-7373 (filed Dec. 28, 2016), and *Taylor* v. *United States*, No. 16-6392 (filed Oct. 6, 2016), which

Unlike in this case, the dispute in *Dimaya* involves an alien's removability from the United States, not the validity of a criminal conviction. The government has argued in part that, because removal of an alien is a civil proceeding, the statutes that govern removability are subject to a lesser standard of definiteness than is applied in the criminal context. See Gov't Br. at 13-25, *Dimaya*, *supra* (No. 15-1498). If the Court rejects Dimaya's vagueness challenge on that ground, its decision may not resolve the question whether 18 U.S.C. 16(b) or 924(c)(3)(B) are unconstitutionally vague in the context of a criminal prosecution.

The government in *Dimaya* has also argued, however, that Section 16(b) is not unconstitutionally vague under the standard that applies to criminal laws. See Gov't Br. at 28-52, *Dimaya*, *supra* (No. 15-1498). The government has explained, in particular, how Section

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likewise present the question whether Section 924(c)(3)(B) is unconstitutionally vague. In both of those cases, the government has argued that any error in applying Section 924(c)(3)(B) was harmless. See Br. in Opp. at 11-13, *Prickett*, *supra* (No. 16-7373) (arguing that the predicate offense of assault with intent to commit murder would qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A)); Br. in Opp. at 26-29, *Taylor*, *supra* (No. 16-6392) (arguing that any error in classifying kidnapping as a "crime of violence" under Section 924(c)(3)(B) would not affect petitioner's death sentences on three other counts). The government further argued in *Prickett* that the circuit conflict over whether Section 924(c)(3)(B) is constitutional did not warrant plenary review because the Seventh Circuit could reconsider its decision in *Cardena* in an appropriate case, particularly after this Court issues its decision in *Dimaya*. See Br. in Opp. at 9-11, *Prickett*, *supra* (No. 16-7373). Although the filings in *Prickett* were distributed for the conference on May 11, 2017, and the filings in *Taylor* were distributed for the conference on September 25, 2017, this Court has not acted on either petition.

16(b) is drafted more precisely than the statutory provision that was held to be unconstitutionally vague in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). See Gov't Br. at 29-31, *Dimaya*, *supra* (No. 15-1498). If the Court in *Dimaya* concludes on that basis that Section 16(b) is not unconstitutionally vague, that holding would likely supersede the court of appeals' decision in this case, as the decision below recognized. See App., *infra*, 12a, 14a.

Finally, even if the Court holds that Section 16(b) is unconstitutional as applied in *Dimaya*, Section 924(c) could be distinguished on the ground that conviction under that statute requires a specified nexus to the use, carrying, or possession of a firearm. See Gov't Br. at 53 n.11, *Dimaya*, *supra* (No. 15-1498). This Court's decision in *Dimaya* may shed light on the significance of that distinction. The petition should therefore be held pending the decision in *Dimaya* and then disposed of as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari 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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NOVEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-3693

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DOUGLAS D. JACKSON, DEFENDANT-APPELLANT

Argued: Oct. 28, 2016
Decided: Aug. 4, 2017

Appeal from the United States District Court for the
Northern District of Indiana, South Bend Division
No. 3:15-CR-6—**Robert L. Miller, Jr.**, *Judge*

Before RIPPLE, KANNE, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Douglas Jackson appeals following a jury trial at which he was convicted of three counts of transporting a minor in interstate commerce with the intent that she engage in illegal sexual activity, *see* 18 U.S.C. § 2423(a), three counts of sex trafficking of a minor, *see* 18 U.S.C. § 1591(a), and one count of possessing a firearm in furtherance of a crime of violence (sex trafficking of a minor), *see* 18 U.S.C. § 924(c). The district court sentenced Jackson to 295 months' imprisonment. He appeals, arguing that his conviction under § 924(c) is invalid because the portion of that statute applicable to his crime is unconstitutionally vague. He also challenges the district court's conclu-

sion under the United States Sentencing Guidelines that he was a leader or supervisor of the offense, *see* U.S.S.G. § 3B1.1(1)(c), and that he obstructed justice when he testified on his own behalf, *see* U.S.S.G. § 3C1.1. For the reasons discussed below, we vacate Jackson's conviction under § 924(c) and vacate and remand for resentencing.

I.

Jackson met the minor victim, J.T., at a party in May of 2014, when J.T. was fifteen years old and Jackson was twenty-five. J.T., who was just finishing the 9th grade, told Jackson her actual age, but he claimed to be only seventeen. He asked her if she was interested in making some money, and then proceeded to buy her clothes and pay to have her hair and nails done.

Within several weeks, on June 6, 2014, Jackson drove the two of them in a rented car to Atlanta, Georgia, where J.T. had some family, including her father and siblings. Jackson paid for the two of them to stay for two nights in a hotel. He also used his cell phone and a prepaid credit card to post an ad in the Atlanta section of the classified advertising website "Backpage.com," which prior to January 2017 contained an adult section advertising different categories of sex work.[1] The title of the ad said, "Sexy star beautiful mixed puerto rican in town looking for a great time." The

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[1] *See* Amicus Curiae Brief of The National Center for Missing and Exploited Children at 2-7, *J.S., S.L., & L.C. v. Village Voice Media Holdings, L.L.C.*, 184 Wash. 2d 95 (Wash. 2015) (asserting that Backpage enables and disseminates child sex trafficking content and that its ads facilitate sex with children).

e-mail address connected to the ad was Jackson's e-mail, and the listed contact number was for a prepaid flip phone that Jackson had purchased. Jackson and J.T. used the prepaid cell phone to text customers, who were charged $150 for thirty minutes with J.T. or $200 for an hour.

On June 8th, Jackson and J.T. moved on to Louisville, Kentucky, basically repeating what they had done in Atlanta. The Backpage.com ad from Atlanta was reposted with only minor differences, and Jackson again paid for motels and food. While in Louisville, J.T. stayed with a customer beyond the allotted time frame, and Jackson began texting her. In response to Jackson's query, "Wtf is takin so long" J.T. texted back that the customer "spent another 15 mins." The call log reflected that Jackson attempted to call J.T. on the prepaid phone approximately fifteen minutes later, after which the following text exchange took place:

J.T.: I'm tryin to make him cum

Jackson: Bitch its a time limit not that he got to go now or I'm comin in

J.T.: Alright

Shortly after that encounter, Jackson's cell phone was used to repost the Backpage.com ad.

After their stay in Louiville, Jackson and J.T. returned briefly to South Bend, Indiana. Next they headed to Grand Rapids, Michigan with J.T.'s brother. After reserving a hotel in Grand Rapids, Jackson reposted the original Backpage.com ad, and J.T. responded to a call shortly before midnight at a local Super 8 motel. She returned to Jackson's car shortly after going into the hotel room and reported that the cus-

tomer had been acting weird. While she was sitting with Jackson in the car, two police officers conducting a routine patrol approached. One of the officers testified that they frequently patrolled that Super 8 parking lot because it was often the site of drug and prostitution activity. The officers saw J.T.'s bare leg propped up in the driver's side of the car, and as they got closer to investigate, J.T. hastily exited the vehicle with her shorts unbuttoned and her underwear exposed. Jackson also sat up and got out, reaching toward the floorboard as he did so. One of the police officers shined his flashlight onto the car's floorboard, revealing a loaded Hi-Point .380 firearm, for which Jackson had an Indiana permit.

Jackson was arrested and J.T. was taken into police custody. Under initial questioning, J.T. maintained that she was simply joyriding and hanging out with Jackson and that she had never had sex with him or anyone else for money. When faced with the prospect of going into foster care, however, she admitted that she was in Grand Rapids for prostitution.

Based on alleged criminal conduct with J.T. on June 6, 2014, June 8, 2014, and June 13-14, 2014, Jackson was charged first by complaint in December 2014 with two counts of sex trafficking of a minor, *see* 18 U.S.C. § 1591(a). Then in February 2015, Jackson was ultimately indicted on three counts of knowingly transporting a minor in interstate commerce to engage in criminal sexual activity, *see* 18 U.S.C. § 2423(a); three counts of recruiting, enticing, harboring, transporting, providing, obtaining, and maintaining a minor in interstate commerce in order to engage in a commercial sex act, *see* 18 U.S.C. § 1591(a), and one count of possession

of a firearm during a crime of violence, namely, sex trafficking, *see* 18 U.S.C. § 924(c).

At trial, both J.T. and Jackson testified, as well as several government witnesses involved in investigating the case. Contrary to her initial insistence to officers that she was not engaging in prostitution, J.T. testified at trial that prostitution was the intended purpose of the trips to Atlanta, Louisville, and Grand Rapids, and that she engaged in commercial sex acts in each city after Jackson posted the Backpage.com ads. J.T. also explained that she and Jackson split the proceeds evenly between them.

Jackson also testified, claiming that J.T. had told him when they met that she was nineteen and that he had truthfully told her that he was twenty-five. He also maintained that their trips were simply to travel and visit family and friends, and denied posting any advertisements on Backpage.com. Although he admitted knowing about the ads on Backpage.com, he claimed that J.T. posted them herself using his phone. He asserted that he assumed when she responded to the ads she was simply giving men massages or talking with them. He also denied knowing that there were condoms in his car and insisted that he had not received any money as a result of J.T.'s responses to the Backpage.com postings.

After being confronted with the text message exchange from Louisville, Jackson conceded knowing that J.T. had engaged in a sex act that time. But he insisted that he was upset about it and believed it to be a one-time occurrence.

The jury convicted Jackson on all counts. After trial, he filed a motion under Federal Rule of Criminal Procedure 29 seeking a judgment of acquittal on the charge under 18 U.S.C. § 924(c) of using a firearm in furtherance of a crime of violence, "to wit: sex trafficking of a minor." Section 924(c)(3) defines a "crime of violence" as any felony that (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "elements clause") or (B) "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" (the "residual clause" or "risk-of-force clause"), *id.* at § 924(c)(3)(A), (B). Specifically, Jackson argued that § 924(c)(3)(B) was subject to the same deficiencies that had led the Supreme Court in *Johnson v. United States*, —U.S.—, 135 S. Ct. 2551 (2015) to invalidate as unconstitutionally vague the similarly worded "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B).

The district court denied Jackson's motion after concluding that § 924(c)(3)(B)'s definition of "crime of violence" was distinguishable in several critical respects from the ACCA residual clause. In *Johnson*, the Court considered the provision in the ACCA mandating more severe penalties for a felon in possession of a firearm with three or more previous convictions of a "violent felony," defined in 18 U.S.C. § 924(e)(2)(B)(iii) as a felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Johnson* concluded the residual clause was unconstitutionally vague first because of the "grave uncertainty" in determining the

risk posed by the generic "ordinary case" of a given crime and second, because the clause itself left uncertainty about how much risk was required for a crime to qualify as a violent felony. *Johnson*, 135 S. Ct. at 2257-58. The Court also noted its own repeated failures to "craft a principled and objective standard out of the residual clause" demonstrated its "hopeless indeterminancy." *Id.* at 2258.

The district court found *Johnson's* rationale inapplicable to § 924(c)(3)(B) for several distinct reasons. First, the district court noted that the Court in *Johnson* had been particularly troubled by the list of enumerated crimes in the ACCA, which added to the confusion in assessing what risk of injury was required given the wide disparity for potential harm between crimes on the list such as arson and extortion. *See Johnson*, 135 S. Ct. at 2558, 2559, 2561. The district court reasoned that the lack of such a confusing enumerated list in § 924(c)(3)(B) made the task of assessing whether a crime carried a substantial risk that physical force would be used much less difficult.

The district court also found the language around the risk itself much narrower in § 924(c) than in the ACCA, which refers broadly to the unqualified risk of "physical injury to another" as opposed to the more specific risk in § 924(c) that "physical force" would be used "*in the course of committing the offense*" (emphasis added)—a scope temporally limited to specific conduct by the offender at the time of the offense. *See Johnson*, 135 S. Ct. at 2259 (noting that the ACCA gives no indication of "how remote is too remote"). And unlike the ACCA's residual clause, which the Court noted had caused multiple splits in the lower

federal courts and defied the Court's own "repeated attempts . . . to craft a principled and objective standard," *id.* at 2258, § 924(c)(3)(B) has not proven difficult for courts to consistently apply. The district court acknowledged that the Ninth Circuit in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert granted*, 137 S. Ct. 31 (2016), had extended *Johnson's* rationale to the residual clause of 18 U.S.C. § 16(b), which is worded identically to § 924(c)(3)(B), but it found *Dimaya* neither binding nor persuasive. The court thus denied Jackson's motion for judgment of acquittal.

Over Jackson's objections at sentencing, the district court agreed with the recommendation in the presentence report that Jackson's offense level should be increased by two levels because he was a manager or supervisor in the offense, *see* U.S.S.G. § 3B1.1(c), and another two levels for obstructing justice because his testimony claiming ignorance of J.T.'s prostitution was false, *see* U.S.S.G. § 3C1.1. These adjustments, taken together with the sex trafficking counts, produced an advisory guideline range of 235 to 293 months' imprisonment, plus a mandatory 60-month sentence to run consecutively on the Section 924(c) count. The district court sentenced Jackson to 295 months' imprisonment, the minimum sentence under the advisory guideline range.

II.

On appeal, Jackson renews his contention that his conviction for possessing a firearm during a crime of violence, *see* 18 U.S.C. § 924(c)—i.e., sex trafficking of a minor, *see* 18 U.S.C. § 1591(a), must be vacated because § 924(c)(3)(B) is unconstitutionally vague. The Fifth Amendment's proscription against depriving an

individual of life, liberty, or property without due process of law supplies the rationale for the void-for-vagueness doctrine. Under it, the government may not impose sanctions "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Welch v. United States*, —U.S.—, 136 S. Ct. 1257, 1262 (2016) (quoting *Johnson*, 135 S. Ct. at 2556).

In determining whether an offense is a "crime of violence" under § 924(c), we employ the categorical approach, asking whether the minimum criminal conduct necessary for conviction under the applicable statute—as opposed to the specific underlying conduct at issue—amounts to a crime of violence as defined in subsection (A) or (B). *See*, *e.g.*, *Taylor v. United States*, 495 U.S. 575, 600 (1990); *see also Mathis v. United States*, —U.S.—, 136 S. Ct. 2243, 2248 (2016) (outlining categorical approach as applied to prior conviction under ACCA).

Here the government concedes that under the categorical approach, Jackson's underlying conviction for sex trafficking of a minor, *see* 18 U.S.C. § 1591(a), does not "*have as an element*" the use or attempted use of force, and therefore may not be upheld under § 924(c)(3)(A)—the elements clause. Specifically, sex trafficking of a minor may be proven without a finding that the defendant used or threatened his victim with force—for instance by luring an individual into sex trafficking by fraud, money, clothing, or other non-violent enticements. *See United States v. McMillian*, 777 F.3d 444, 447 (7th Cir. 2015)(minors enticed into prostitution primarily "by false promises of love and

money"); *see also United States v. Booker*, No. 11-1241, 447 Fed. Appx. 726 (7th Cir. Nov. 16, 2011) (victim was already a sex worker when defendant recruited her).

Given this, Jackson's conviction stands or falls under the residual or risk-of-force clause, which, recall, applies when the underlying crime "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." Jackson's task of persuading us on appeal that § 924(c)(3)(B) is unconstitutional in the wake of *Johnson* is now a fait accompli: as outlined below, in the time since the district court rejected Jackson's argument, we have extended *Johnson* to conclude that § 924(c)(3)(B) is unconstitutionally vague. *See United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that "the residual clause in 18 U.S.C. § 924(c)(3)(B) is . . . unconstitutionally vague").

In the wake of *Johnson (*and after the district court rejected Jackson's constitutional challenge to § 924(c)), we took up a challenge to the similarly worded residual clause in 18 U.S.C. § 16(b). *See United States v. Vivas-Ceja*, 808 F.3d 719 (2015), *(rehear'g en banc denied* March 14, 2016). In *Vivas-Ceja*, the defendant's maximum sentence for illegally reentering the United States, *see* 8 U.S.C. § 1326, was increased because he had a prior conviction for an "aggravated felony," defined as relevant here as a "crime of violence" under § 16(b), which is worded identically to § 924(c)(3)(B) to include any felony 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. § 16(b). Deem-

ing the residual clause in § 16(b) "materially indistinguishable" from the ACCA's residual clause, we concluded in *United States v. Vivas-Ceja* that the reasoning of *Johnson* likewise rendered the residual clause of § 16(b) unconstitutionally vague. 808 F.3d at 720. In so doing, we noted the Ninth Circuit's identical conclusion about § 16(b) (in the civil removal context). *See Vivas-Ceja*, 808 F.3d at 722 (citing *Dimaya* 803 F.3d at 1111 (holding that § 16(b) "suffers from the same indeterminancy" as the ACCA's residual clause)). In *Vivas-Ceja*, we also considered and rejected the potential grounds for distinguishing the residual clause in § 16(b) from the ACCA. Specifically, we rejected the government's claim that the confusion created by the ACCA's enumerated list of crimes as well as the difficulty lower courts and the Supreme Court itself had encountered applying the ACCA were critical factors to the Court's determination that the ACCA was unconstitutionally vague. *See Vivas-Ceja*, 808 F.3d at 723 (concluding that neither the confusing list of enumerated crimes in the ACCA nor the "pervasive disagreement" it created among lower courts were "necessary condition[s]" to the Court's vagueness determination in *Johnson*).

Although § 16(b) and § 924(c)(3)(B) are worded identically, the government maintains in its brief that the latter is distinguishable from § 16(b), which applies as a recidivist statute to prior convictions as opposed to a contemporaneous underlying federal crime. It also argues that *Vivas-Ceja* is wrong because § 16(b) (and, by extension § 924(c)(3)(B)) are materially distinguishable from the residual clause of the ACCA for largely the same reasons cited by the district court.

As for the government's suggestion that we reconsider our holding in *Vivas-Ceja*, "[w]e require a compelling reason to overturn circuit precedent." *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006) (quoting *McClain v. Retail Food Emp'rs Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005)). Stare decisis principles dictate that we give our prior decisions "considerable weight" unless and until other developments such as a decision of a higher court or a statutory overruling undermine them. *See id.*; *Bethesda Lutheran Homes & Servs., Inc. v. Born*, 238 F.3d 853, 858-59 (7th Cir. 2001) ("For the sake of law's stability, a court will not reexamine a recent decision . . . unless given a compelling reason to do so."). In the case of *Vivas-Ceja*, such a development is not entirely unlikely. Before oral argument, the Supreme Court granted certiorari in *Dimaya* to consider the continued viability of § 16(b) in the wake of *Johnson*. 137 S. Ct. 31 (U.S. Sept. 29, 2016) (granting cert in *Lynch v. Dimaya*, 803 F.3d 1110 (9th Cir. 2015)). Given the obvious parallels between § 16(b) and § 924(c)(3)(B), if the Court overruled *Dimaya*, our holding in *Vivas-Ceja* would likewise be undermined and its rationale inapplicable to § 924(c)(3)(B). Given that uncertainty, we held off issuing our opinion in anticipation of the Supreme Court's ruling in *Dimaya*. Recently, however, the Court restored *Dimaya* to the calendar for reargument in the fall term. *See* Supreme Court of the United States docket for *Sessions v. Dimaya*, No. 15-1498, *available at* https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-1498.htm (last visited July 27, 2017). And in the interim, we concluded in *Cardena* that our holding in *Vivas-Ceja* compelled the conclusion that

section 924(c) too was unconstitutionally vague. *Cardena*, 842 F.3d at 996.

Although *Cardena* reached its conclusion with little discussion, as discussed above, we had in *Vivas-Ceja* already rejected the arguments other courts have found persuasive in concluding that *Johnson's* rationale does not extend to either § 16(b) or § 924(c)(3)(B).

Given our recent holdings in *Cardena* and *Vivas-Ceja*, we reject the government's argument that the residual clause of § 924(c)(3) is sufficiently distinguishable from either the ACCA's residual clause held unconstitutional in *Johnson* or the identically worded clause in § 16(b). In so doing, we recognize that with the exception of the Ninth Circuit in *Dimaya*, most circuits to have considered the issue since have declined to extend *Johnson's* holding to invalidate either § 16(b) or § 924(c)(3)(B). For instance, the Second, Sixth, Eighth, and Eleventh Circuits have all concluded that the "crime of violence" defined in § 924(c)(3)(B) is not unconstitutionally vague because the text and application are sufficiently distinguishable from the "violent felony" defined in §§ 924(e)(2)(B) of the ACCA. *See Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017) (rejecting *United States v. Cardena*, collecting and analyzing cases and also noting that because ACCA's § 924(c) applies as a recidivist sentencing enhancement it has a "very different function" than § 924(c)(3)(B) and its offense of use of a firearm during commission of a contemporaneous underlying crime); *United States v. Prickett*, 839 F.3d 697, 699-700 (8th Cir. 2016) (stressing that "the ACCA residual clause is linked to a confusing set of examples that plagued the Supreme Court in coming up with a coherent way to apply the clause,

whereas there is no such weakness in § 924(c)(3)(B)"); *United States v. Hill*, 832 F.3d 135, 145-49 (2d Cir. 2016) (relying on fact that language in § 924(c)(3)(B) is narrower than the ACCA, is not linked to the confusing list of examples in the ACCA, and is temporally limited to a contemporaneous federal predicate crime); *United States v. Taylor*, 814 F.3d 340, 376-79 (6th Cir. 2016) (cataloguing "significant differences making the definition of 'crime of violence' in § 924(c)(3)(B) narrower than the definition of 'violent felony' in the ACCA residual clause"). We acknowledge that the case for distinguishing § 924(c)(3)(B) is not altogether unconvincing, but conclude 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. *See Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1066-67 (7th Cir. 2000) (Under doctrine of stare decisis, panel is bound by recent precedent with substantially similar facts when governing Supreme Court precedent has yet to address the matter). Accordingly, Jackson's § 924(c) conviction for possessing a firearm in relation to a crime of violence must be vacated.

Jackson also challenges the district court's sentencing findings. We evaluate the district court's factual findings under the Guidelines for clear error and its ultimate legal conclusions de novo. *E.g.*, *United States v. Cherry*, 855 F.3d 813, 815-16 (7th Cir. 2017).

The district court added two levels to Jackson's guidelines range under U.S.S.G. § 3B1.1(c). As relevant here, that section applies to any defendant who is "an organizer, leader, manager, or supervisor in any criminal activity." Here Jackson's objection to

§ 3B1.1 in the district court was limited to his frivolous claim that he neither supervised nor managed J.T. On appeal, however, he argues that § 3B1.1 is inapplicable because it applies to offenses committed by multiple participants and as a victim, J.T. could not be a "participant" in her own sex trafficking. Raised as it is for the first time on appeal, we review this argument only for plain error. Jackson must thus show (1) an error; (2) that was plain; (3) that affected his "substantial rights"; and (4) the court should exercise discretion to correct the error because it seriously affected the fairness or integrity of the judicial proceedings. *See*, *e.g.*, *United States v. Armand*, 856 F.3d 1142, 1144 (7th Cir. 2017) (citation omitted).

The application notes to § 3B1.1(c) explain that a defendant must organize or supervise at least "one or more other participants" to qualify for the adjustment, *see* U.S.S.G. § 3B1.1(c) cmt. n.2. Under the guidelines, a participant is defined as someone "criminally responsible for the commission of the offense," whether or not convicted." *Id.* cmt. n.1. The application notes further clarify that a "person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant." *Id.*

This clarification makes clear that the district court erred by applying § 3B1.1 to Jackson. Although it is apparent that he supervised and managed J.T.'s prostitution, Jackson maintains, and the government concedes, that a minor victim cannot be considered a "participant" in her own trafficking. In *United States v. Jarrett*, the Eighth Circuit considered a scenario indistinguishable from Jackson's and concluded that the

district court erred by applying § 3B1.1 because sex trafficking victims cannot be both victims and participants in their own trafficking, 956 F.2d 864 (8th Cir. 1992). As the court in *Jarrett* observed, "the fact that [victims] were transported does not make them participants. Neither does the fact that their conduct was a violation of some other law, for example, a state law against prostitution." *Id.* at 868. Other courts to consider the issue have approved, at least in dicta, of *Jarrett's* holding, concluding that a victim may only be considered a "participant" *if* she coerces or transports or otherwise oversees other victims. *See United States v. Smith*, 719 F.3d 1120, 1126 (9th Cir. 2013); *United States v. Scott*, 529 F.3d 1290, 1303 (10th Cir. 2008) (applying § 3B1.1 when victim had "done far more than undertake her own prostitution activities under [defendant's] supervision"); *see also United States v. Britton*, No. 11-2083, 567 Fed. Appx. 158, 161 (3d Cir. May 29, 2014).

The government concedes that as a victim of Jackson's sex trafficking, J.T. cannot be considered a "participant" such that the manager or supervisor adjustment under § 3B1.1 is applicable. We too conclude that the district court erred in applying § 3B1.1. Moreover, the error was plain and affected Jackson's substantial rights. The two level increase in Jackson's guideline range affected his sentence, and the government concedes that nothing in the record reveals whether the district court, which imposed the minimum sentence available under Jackson's incorrectly calculated guidelines' range, would impose the same sentence without the adjustment under § 3B1.1.

Finally, Jackson challenges the district court's conclusion that his trial testimony amounted to obstruction of justice under § 3C1.1. That section applies when a defendant perjures himself at trial. *See United States v. Dunnigan*, 507 U.S. 87, 96 (1993). Although a bare denial of guilt is insufficient to sustain the obstruction of justice adjustment, it is appropriate when a defendant takes the stand and tells the jury a false story on material matters. *United States v. Stenson*, 741 F.3d 827, 831 (7th Cir. 2014).

Jackson attempts to characterize his trial testimony as merely a general denial of guilt, but we have no difficulty concluding that the district court's careful factual findings to the contrary were not clearly erroneous. *Id.* (Noting that we review factual findings supporting application of § 3C1.1 for clear error). The district court noted that Jackson testified falsely about a "central issue" in the case by denying that the road trips to Atlanta, Louisville and Grand Rapids were to allow J.T. to engage in prostitution. It also characterized Jackson's insistence that he had no knowledge about J.T.'s provision of sexual services as false and material. Finally, the district court disbelieved Jackson's claim that he did not place any of the Backpage.com ads, finding J.T.'s contrary testimony that Jackson did place the ads more credible. None of these factual findings were clearly erroneous, and in light of these findings the district court certainly did not err by concluding that Jackson obstructed justice under § 3C1.1.

III.

In light of our holding that § 924(c)(3)(B) is unconstitutionally vague, we VACATE Jackson's conviction under § 924(c) for possessing a firearm in furtherance of a crime of violence. We also VACATE and REMAND for resentencing without the organizer or supervisor adjustment under § 3B1.1.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Cause No: 3:15-CR-006-RLM

UNITED STATES OF AMERICA

v.

DOUGLAS D. JACKSON

[Dec. 2, 2015]

OPINION AND ORDER

Defendant Douglas D. Jackson moved for a judgment of acquittal or dismissal as to Count 7 of the indictment against him. (Doc. No. 68). Three counts of the indictment charged Mr. Jackson with transportation of a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(a), and another three charged him with sex trafficking of a minor in violation of 18 U.S.C. § 1591(a). The final count, Count 7, charged Mr. Jackson with knowingly possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c), with the crime of violence in question being the § 1591(a) sex trafficking of a minor charged in the indictment.

Mr. Jackson went to trial and on July 1, 2015, the jury found him guilty on all seven counts. The court gave Mr. Jackson leave to file a belated motion to dis-

miss or for a judgment of acquittal, and he filed this motion on October 14. Mr. Jackson's motion doesn't challenge his conviction on the first six counts, but argues that the court lacks jurisdiction to sentence him on the seventh count because the definition of "crime of violence" in the residual clause of § 924(c) unconstitutionally vague. In the alternative, he argues that even if the statute isn't unconstitutionally vague, the sex trafficking charges of which he was convicted do not qualify as a crime of violence. For the reasons that follow, neither of these arguments is persuasive, and the court denies Mr. Jackson's motion.

I. CONSTITUTIONALITY OF § 924(C)(3)(B)

Mr. Jackson doesn't dispute that the jury had sufficient evidence from which to conclude that he possessed a firearm in furtherance of the sex trafficking crimes for which he was convicted. He argues instead that he can't be sentenced for that possession because his sex trafficking conviction can only qualify as a crime of violence under the "residual clause" of § 924(c),[1] and this residual clause is unconstitutionally vague.

In making this argument, Mr. Jackson faces a significant hurdle. Facial challenges such as the one he brings here are heavily disfavored. *See* Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008). A facial challenge "to a legislative Act is, of course, the most difficult challenge to

[1] Offenses may also qualify as a crime of violence for § 924(c) purposes if they have as an element the use, attempted use, or threatened use of physical force. 18 U.S.C. § 924(c)(3)(A). The parties agree that sex trafficking of a minor under § 1591(a) does not meet this standard.

mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Solerno, 481 U.S. 939, 745 (1987).

The residual clause at issue here defines "crime of violence" as:

> an offense that is a felony and—
>
> . . .
>
> (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.

18 U.S.C. § 924(c)(3). Mr. Jackson argues that this language is essentially indistinguishable from the similar residual clause in the Armed Career Criminal Act ("ACCA"), which the Supreme Court recently held unconstitutionally vague in Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). The ACCA sets a mandatory minimum 15-year sentence for one who possesses a firearm despite being a prohibited person, and who has at least three prior convictions for a "violent felony." The ACCA defines "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> . . .

> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C.A. § 924(e)(2)(B). The portion that reads "otherwise involves conduct that presents a serious potential risk of physical injury to another" is the ACCA's residual clause, the only portion at issue in Johnson.

In Johnson, the Supreme Court held that imposing an increased sentence under the ACCA's residual clause violates due process because it is too vague to adequately put potential offenders on notice of what conduct falls within the clause. The Court identified two basic features of the clause as problematic: it "leaves grave uncertainty about how to estimate the risk posed by a crime" because it asks courts to assess a hypothetical "ordinary case" of that crime, and it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." Johnson, 135 S. Ct. at 2557-2558.

Mr. Jackson argues that these same two features plague § 924(c)(3)(B); the phrase "by its nature" requires courts to imagine a hypothetical, idealized version of an offense, and the phrase "substantial risk" isn't materially narrower than the "serious potential risk" that the Johnson Court held unacceptably vague. While Mr. Jackson is correct that these two features that troubled the Johnson Court are also present to some degree in § 924(c), the Court didn't end its analysis there. Rather, it made clear that there were a variety of problems in interpreting the ACCA's residual clause, and that "[e]ach of the uncertainties in the

residual clause may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork." Johnson, 135 S. Ct. at 2560 (internal quotation omitted).

In fact, the Court noted that several other federal statutes include language similar to the ACCA's residual clause, and rejected any suggestion that the majority's holding in Johnson would put such statutes at risk because the other statutes don't include all of the problematic features of the ACCA. *See* id. at 2561 ("The Government and the dissent next point out that dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,' suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. Not at all.") (citations omitted).

Most of the factors that Johnson identified as undermining the constitutionality of the ACCA's residual clause aren't present in § 924(c). Because § 924(c)(3)(B) is materially distinguishable from the ACCA's residual clause and because the Supreme Court explicitly limited its holding in Johnson to the ACCA and declined to expand that holding to reach other similarly-worded federal laws, Mr. Jackson hasn't met his heavy burden of showing that § 924(c) is unconstitutional on its face.

A. Absence of Enumerated Clauses

The most significant difference between § 924(c)(3)(B) and the ACCA's residual clause is that the ACCA's clause immediately follows a list of four enumerated crimes: burglary, arson, extortion, and the use of explosives. The residual clause implicitly references these enumerated crimes by going on to include any additional crimes that "otherwise" involve a risk of serious

injury. The reader is thus implicitly told to determine what "substantial risk" means by comparing the risks posed by an unlisted offense with the risk posed by the enumerated crimes. But as the Johnson Court noted, the enumerated crimes involve a wide disparity in the risk of physical injury associated with them. *See* Johnson, 135 S. Ct. at 2558 ("These offenses are 'far from clear in respect to the degree of risk each poses.'") (quoting Begay v. United States, 553 U.S. 137, 128 S. Ct. 1581, 1582 (2008)); id. at 2559 ("the enumerated crimes are not much more similar to one another in kind than in degree of risk posed."). A reader is left wondering how to evaluate what a "serious potential risk" of physical injury means. The clearly high risk of injury one would associate with explosives or arson is so different from much lower risk of injury associated with a nonviolent offense like extortion that "serious risk" under the ACCA could encompass nearly anything.

By contrast, § 924(c) includes no enumerated offenses and so no confusing mandate to compare an offense to a grab-bag of crimes that have little in common with each other. Mr. Jackson suggests that "the absence of enumerated offenses actually cuts against the Government's argument" because the enumerated offenses in the ACCA provide at least some guidance in evaluating the degree of risk necessary, while § 924(c)(3)(B) "provides no benchmarks." (Reply, Doc. No. 70 at 5). This argument is squarely at odds with Johnson, which made clear that the presence of the enumerated crimes was a critical factor rendering the ACCA vague. The Court mentioned the problematic nature of the enumerated crimes more than a half dozen times throughout its opinion, and emphasized that the list of example offenses makes the phrase "serious risk" vague even

if it wouldn't be vague standing alone. *See* Johnson, 135 S. Ct. at 2561 ("The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so.") (emphasis in original) (quoting James v. United States, 550 U.S. 192, 231 n.7 (2007) (SCALIA, J., dissenting)). In fact, the Johnson Court explicitly distinguished other similarly worded statues —such as § 924(c)—from the ACCA on the grounds "[a]lmost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples." Johnson, 135 S. Ct. at 2561. Accordingly, § 924(c)(3)(B)'s lack of enumerated offenses removes much of the indeterminacy that troubled the Johnson court, and leaves it on much more solid constitutional footing.

B. Narrower Scope of Risk

A second significant difference between the ACCA's residual clause and § 924(c)(3)(B) is that the ACCA refers to the risk of "physical injury to another" that an offense involves, while § 924(c) refers to the risk "that physical force against the person or property of another may be used in the course of committing the offense." Section 924(c)'s formulation is much narrower: it limits a court's consideration of risk to the chance of particular conduct *by the offender* at the *time of the offense*. Under the ACCA's residual clause, the "physical injury" involved needn't be directly caused by the offender, and needn't necessarily occur during the course of the offense itself. The Johnson Court noted the interpretive problems caused by the ACCA's broad formulation of risk; even physical injury resulting from an offense but occurring through an attenuated chain

of causation far in the future might qualify, as the statute gives no indication "how remote is too remote." 135 S. Ct. at 2559. The enumerated clauses again make matters worse, as a crime like extortion is likely to cause physical injury—if at all—only after the offense is completed. *See* id. at 2557 (noting that scope of the risk involved in the ACCA is problematic because "the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone.").

Unlike the ACCA, § 924(c) doesn't go "beyond evaluating the chances that the physical acts that make up the crime injure someone" in evaluating risk. Id. A court must evaluate a risk that is closely tied to a defendant's conduct in the course of committing the offense, and so consider the scope of the risk subject to temporal and causative limitations not present in the ACCA. Moreover, as noted above, § 924(c) omits the confusing list of enumerated crimes which in the ACCA dramatically expand the scope of the risk to be considered. Mr. Jackson argues that the temporal scope of the two clauses don't differ meaningfully, but this argument is at odds with the weight of authority; even before Johnson, courts noted that these distinctions make the risk inquiries in § 924(c) and 18 U.S.C. § 16(b) (which use identical language) narrower than under the ACCA. *See* Leocal v. Ashcroft, 543 U.S. 1, 10 n.7 (2004) (comparing § 16(b) to a provision identical to the ACCA residual clause, and drawing the distinction that "§ 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct"); United States v. Serafin, 562 F.3d

1105, 1109 (10th Cir. 2009) (noting "the textual difference between § 16(b) and the Guidelines (and identical ACCA provision)" and concluding that "for an offense to qualify as a § 16(b) crime of violence, the risk of force must arise in the course of *committing* the crime and not merely as a *possible result*.") (emphasis in original).

The different nature of the risk considered—risk that the defendant will use force in committing the offense rather than risk of injury to another—materially narrows § 924(c)(3)(B) in comparison to the ACCA's residual clause. Because the risk inquiry is more circumscribed, § 924(c) poses fewer interpretive problems and better notifies potential defendants as to what conduct will fall within the statute.

C. Absence of Judicial Confusion

A third important distinction between the ACCA and § 924(c) with regard to vagueness is that courts at every level have struggled to apply the ACCA consistently, while § 924(c) hasn't engendered similar confusion.

The Supreme Court has lamented for years that the ACCA has caused "numerous splits among the lower federal courts" and has proven "nearly impossible to apply consistently." Chambers v. United States, 555 U.S. 122, 133 (2009) (ALITO, J., concurring in judgment). The Supreme Court noted in Johnson that its own "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy," and noted that the statute has similarly proven impossible for the lower courts to apply. 135 S. Ct. at 2558. Significantly, the confusion among the lower courts wasn't

simply disagreement about whether particular crimes do or don't fall within the ACCA's residual clause; courts couldn't even figure out what test they should be applying. Id. at 2551 (noting that the "most telling feature" of lower courts' interpretations of the ACCA is the "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.").

No comparable confusion exists in the case law interpreting § 924(c) and its analogue, § 16(b)—not surprising, given that these statutes lack enumerated offenses and an indeterminate temporal scope of risk, the ACCA's most confusing features. Only one Supreme Court case has had to interpret § 16(b) and none have interpreted § 924(c)(3)(B), in sharp contrast to the five that have now grappled with the ACCA. The one case interpreting § 16(b) was unanimous, suggesting that it lacks the frustrating indeterminacy that makes consistently applying the ACCA impossible. *See* Leocal v. Ashcroft, 543 U.S. 1 (2004). Similarly, there don't appear to be voluminous conflicting decisions among lower courts that could provide evidence of vagueness.

Mr. Jackson argues that the lack of conflicting precedent interpreting § 924(c) doesn't make it constitutional; it is either unworkably vague as written or not, and the government's argument that "a statute cannot be vague in the absence of conflicting Supreme Court precedent" would lead to absurd results. (Reply, Doc. No. 70 at 8). Mr. Jackson misunderstands the government's argument. Conflicting precedent doesn't make a statute vague, but it is evidence of vagueness. *See* United States v. L. Cohen Grocery Co., 255 U.S. 81,

91 (citing as evidence of vagueness "persistent efforts . . . to establish a standard"). The absence of such evidence supports an inference that the statute isn't unconstitutionally vague. Mr. Jackson's suggestion that the lack of judicial confusion surrounding § 924(c) deserves no weight is puzzling, given that the Johnson opinion discussed judicial confusion at length and concluded that it was powerful evidence that the ACCA was incurably vague. That no similar evidence exists regarding § 924(c)(3)(B) doesn't guarantee that it is constitutionally sound, but is certainly a factor arguing in favor of finding the statute not impermissibly vague.

D. Post-Johnson Case Law

That precisely this issue has been raised before a number of district courts across the country in the months since Johnson buttresses the conclusion that Johnson doesn't undercut § 924(c)(3)(B): to the best of the court's knowledge none of those courts have accepted the argument Mr. Jackson makes here. Most of the district courts faced with motions like Mr. Jackson's have avoided confronting the constitutional issue—usually, by declining to reach the residual clause and finding that the offense in question satisfies § 924(c)(3)(A)'s requirement that the crime have as an element the use or attempted use of force. *See, e.g.*, United States v. Mitchell, No. 15-CR-47, 2015 WL 7283132, at *1 (E.D. Wis. Nov. 17, 2015) (avoiding the question of whether § 924(c)(3)(B) remains good law because defendant's offense qualified as a crime of violence under § 924(c)(3)(A)); United States v. Anglin, No. 14-CR-3, 2015 WL 6828070, at *7 (E.D. Wis. Nov. 6, 2015) (same); United States v. Mills, No. 3:15-CR-00055-MOC, 2015 WL 6672537, at *2 (W.D.N.C. Oct. 30,

2015) (same); United States v. Brownlow, No. 1:15-CR-0034-SLB-SGC, 2015 WL 6452620, at *5 (N.D. Ala. Oct. 26, 2015) (same); United States v. Cruz-Rivera, No. 3:15-CR-00486 JAF, 2015 WL 6394416, at *3 (D.P.R. Oct. 21, 2015) (same); United States v. Evans, No. 5:15-CR-57-H, 2015 WL 6673182, at *8 (E.D.N.C. Oct. 20, 2015) (same); United States v. Redmond, No. 3:14-CR-00226-MOC, 2015 WL 5999317, at *2 (W.D.N.C. Oct. 13, 2015) (same); United States v. Standberry, No. 3:15CR102-HEH, 2015 WL 5920008, at *7 (E.D. Va. Oct. 9, 2015) (same).

The handful of district courts that have reached the issue appear to have uniformly held that the residual clause of § 924(c) remains constitutionally sound because it is distinguishable from the ACCA residual clause for the reasons already discussed. *See* United States v. McDaniels, No. 1:15-CR-171, 2015 WL 7455539, at *7 (E.D. Va. Nov. 23, 2015) (distinguishing the ACCA clause based on the absence of enumerated offenses in § 924(c) and the absence of interpretive confusion surrounding it); United States v. Hunter, No. 2:12CR124, 2015 WL 6443084, at *2-3 (E.D. Va. Oct. 23, 2015) (noting that the ACCA residual clause "faced significantly more confusion in the lower courts, was a much broader clause than § 924(c), and required courts to analyze conduct outside of that conduct required for the charged offense"); United States v. Prickett, No. 3:14-CR-30018, 2015 WL 5884904, at *2-3 (W.D. Ark. Oct. 8, 2015) (finding dispositive that § 924(c) looks to the conduct of the instant offense rather than past convictions, rendering it less hypothetical than the ACCA); United States v. Lusenhop, No. 1:14-CR-122, 2015 WL 5016514, at *3 (S.D. Ohio Aug. 25, 2015) (holding that the § 924(c)'s focus on the risk that phys-

ical force will be used results in less uncertainty than the ACCA's focus on the risk of physical injury).

Mr. Jackson relies heavily on a Ninth Circuit case that recently held 18 U.S.C. § 16(b) unconstitutional in light of Johnson. *See* Dimaya v. Lynch, 803 F.3d 1110, 1112 (9th Cir. 2015). The Dimaya court considered and rejected most of the arguments discussed here, concluding that the differences between the ACCA's residual clause and the § 16(b)/§ 924(c)(3)(B) formulation aren't sufficient to escape the reasoning in Johnson. While the Ninth Circuit's position is instructive and illustrates that reasonable jurists can differ on the application of Johnson to other federal statutes, Dimaya is neither binding nor persuasive.

Section 924(c)(3)(B) and the ACCA residual clause have similarities, but the differences already discussed bring § 924(c)(3)(B) outside the reasoning of Johnson. No precedent in this circuit empowers the court to strike down an act of Congress by extending Johnson to a statute that the Supreme Court didn't consider and which differs in important ways from the statute held unconstitutional.

II. APPLICABILITY OF § 924(C) TO SEX TRAFFICKING

Mr. Jackson also argues that even if § 924(c) isn't unconstitutionally vague, it is inapplicable to him because his conviction under 18 U.S.C. § 1591(a) doesn't qualify as a crime of violence. He relies on United States v. Fuertes, No. 13-4755, 2015 WL 4910113 (4th Cir. Aug. 18, 2015), in which the Fourth Circuit held that sex trafficking under § 1591(a) is not categorically a crime of violence under the residual clause of

§ 924(c).[2] The Fuertes court said that sex trafficking of an adult under the statute can be accomplished by nonviolent means such as "fraud," and so doesn't satisfy § 924(c)(3)(B)'s requirement that there be a substantial risk of physical force used in the commission of the offense. *See* Fuertes, 2015 WL 4910113 at *9.

Fuertes differs from our case in a critical respect: the victim in that case was an adult, while Mr. Jackson's victim was a minor. 18 U.S.C. § 1591(a) provides:

> (a) Whoever knowingly—
>
> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, *or that the person has not attained the age of 18 years* and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

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[2] Though Fuertes was decided after Johnson, the Fourth Circuit panel explicitly avoided deciding the constitutional question Mr. Jackson presents here. *See* United States v. Fuertes, 2015 WL 4910113, at *11 (4th Cir. Aug. 18, 2015) (citing principle of constitutional avoidance and declining to reach constitutionality of § 924(c) when defendant was entitled to relief on other grounds).

(emphasis added). Accordingly, there are two separate types of sex trafficking offenses criminalized by § 1591(a): sex trafficking of an adult in which force, threat, fraud, or coercion is used, and sex trafficking of a person under the age of 18 regardless of whether those factors present.

Mr. Jackson insists that "[a]lthough the case before [the Fuertes] court involved the sex trafficking of adults instead of minors, nothing about that difference changes the analysis." (Reply, Doc. No. 70 at 10). But he offers no argument as to why the minority of the victim shouldn't matter to the risk that physical force will be used. Adult victims of sex trafficking might be vulnerable, but child victims are helpless; the inherent imbalance in physical strength between a child and the adult that seeks to exploit her makes physical violence against the child a more effective means of control (from the offender's point of view) than it would be over an adult victim. Moreover, an adult victim is more capable of seeking help or escaping the physical control of her victimizer than is a child. A pimp therefore has a greater incentive to use fraud or psychological manipulation rather than violence to control an adult victim, while the surest method of securing a child's compliance is likely to be violent force. The risk of violence to a child victim of sex trafficking is accordingly greater than the corresponding risk to an adult, and this justifies treating violations of § 1591(a) that involve a child victim as crimes of violence even if violations that involve an adult victim do not satisfy § 924(c)'s residual clause.

Other courts to consider the question have recognized the fact that owing to their greater vulnerability,

sex trafficking of children inherently involves a substantial risk of physical violence. The Eleventh Circuit has held that enticing a minor to engage in sexual activity under 18 U.S.C. § 2422(b) is categorically a crime of violence,[3] emphasizing that "[i]n cases involving sex crimes against minors, . . . there is always a substantial risk that physical force will be used to ensure a child's compliance with an adult's sexual demands." United States v. Keelan, 786 F.3d 865, 871 (11th Cir. 2015) (citing United States v. Searcy, 418 F.3d 1193, 1197 (11th Cir. 2005)). Other circuits have recognized the same danger. *See* United States v. Weicks, 362 Fed. App'x. 844, 848-849 (9th Cir. 2010) (holding that transportation of minors with intent to engage in criminal sexual activity under 18 U.S.C. § 2423(a) is a crime of violence under § 924(c)(B)(3)). Mr. Jackson points out that these cases are distinguishable because they involved 18 U.S.C. § 2422(a) or

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[3] The Keelan court held trafficking of a minor to be a crime of violence under 18 U.S.C. § 16(b) rather than under the residual clause of § 924(c)(3)(B), but this distinction is irrelevant because the pertinent language in the two statutes is identical. *See* 18 U.S.C. § 16(b) defining "crime of violence" as a crime that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Moreover, other courts have held sex offenses against children to be categorically crimes of violence under § 924(c). *See* United States v. Rodriguez, 589 F. App'x 513, 514 (11th Cir. 2015) (upholding a defendant's conviction under § 924(c) where predicate offense was sex trafficking of a minor under § 1591(a)); United States v. Munro, 394 F.3d 865, 870-71 (10th Cir. 2005) (holding that attempted sexual abuse of a minor is a crime of violence under § 924(c)'s residual clause, because there is an inherent risk of violence whenever adults attempt to engage in sexual activity with children).

§ 2423 rather than § 1591(a) as predicate offenses, but he doesn't explain why violations of those two statutes should qualify as a violent crime while sex trafficking of a minor under § 1591(a) does not. Indeed, Mr. Jackson was charged and convicted under both § 1591(a) and § 2423(a) for the same underlying prostitution scheme. As Keelan makes clear, the relevant concern is the inherent risk of physical violence that is present whenever an adult induces a child to engage in sexual activity. That risk is as substantial in violations of § 1591(a) as in violations of §§ 2422 and 2423.

Further belying Mr. Jackson's argument that the victim's age doesn't change the analysis under Fuertes is the Fuertes court's recognition of the importance of precisely that factor: the court cited and distinguished Keelan's holding that the "ordinary case" of sex trafficking involves a substantial risk that the defendant will use physical force, noting that "[c]ritical to the [Keelan] court's determination that the offense did so qualify was the fact that the victim was a minor" and emphasizing that the case before it involved only adult victims. Fuertes, 2015 WL 4910113, at *11 n.6. Fuertes and Keelan are thus not in conflict; trafficking of an adult under the first prong of § 1591(a) is not categorically a crime of violence while trafficking of a child under the second prong is, due to the substantial risk of violence inherent when an adult induces a child to engage in prostitution. Mr. Jackson's conviction under § 1591(a) was a crime of violence as defined in § 924(c).

III. CONCLUSION

For the reasons stated above, Mr. Jackson's motion for a judgment of acquittal or to dismiss (Doc. No. 67) is DENIED.

SO ORDERED.

ENTERED: Dec. 2, 2015

/s/ Robert L. Miller, Jr.

Judge

United States District Court

APPENDIX C

1. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and 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.

2. 18 U.S.C. 924(c)(3) provides:

Penalties

(c)(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.