NO. 16-7373

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PRICKETT, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

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

REPLY BRIEF FOR THE PETITIONER

Respectfully submitted,

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ARGUMENT

I. This Court should hold this case in abeyance pending this Court's decision in *Sessions v. Dimaya*, No. 15-1498, which will determine whether 18 U.S.C. § 16(b), a statute that is virtually identical to 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague.

This Court has granted certiorari in *Sessions v. Dimaya*, No. 15-1498, which presents the question of "[w]hether 18 U.S.C. § 16(b) . . . is unconstitutionally vague." *Sessions v. Dimaya*, Petition for Writ of Certiorari, at I, 2016 WL 3254180 (June 10, 2016). 18 U.S.C. § 16(b) defines a "crime of violence" as a 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." Section 16(b) defines a "crime of violence" using exactly the same language as 18 U.S.C. § 924(c)(3)'s residual clause.

When this Court decides *Dimaya*, it will review the Ninth Circuit's decision invalidating § 16(b)'s residual clause. *See Dimaya v. Lynch*, 803 F.3d 1110, 1115 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31, 195 (U.S. Sept. 29, 2016). The Government concedes that § 16(b) is identical to § 924(c)(3)(B), and that the Court's decision in *Dimaya* will "resolve any doubt concerning the constitutionality of Section 924(c)(3)(B)." *See* Brief for the United States in Opposition, p. 10. Indeed, § 924(c)(3)(B) operates like § 16(b) by using the categorical approach to identify an offense's ordinary case to determine if it qualifies as a crime of violence.

If this Court affirms the Ninth Circuit's ruling that § 16(b) is unconstitutionally vague, such a decision would make it appropriate to grant certiorari in this case, vacate the judgment below, and remand Mr. Prickett's case for

reconsideration (GVR). It would therefore constitute an "'intervening development[]' giving rise to a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 (2001) (quoting *Lawrence v. Chater,* 516 U.S. 163, 167 (1996) (*per curiam*). Accordingly, the Court should hold petitioner's case in abeyance pending its decision in *Dimaya* since that decision may make a GVR appropriate in the instant case.

II. Conflicting decisions among the circuits reveal that the precise bounds of *Johnson* are far from clear and make this case ripe for review.

Alternatively, if this Court does not hold this case in abeyance pending its decision in *Dimaya*, this Court should grant review to resolve a conflict among lower courts to determine whether § 924(c)(3)(B) is unconstitutional in light of this Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (granting certiorari in light of a circuit split on whether a 42 U.S.C. § 1983 excessive force claim must satisfy the subjective or objective standard).

Mr. Prickett maintains that the definition of a "crime of violence" in § 924(c)(3)(B) is unconstitutionally vague after *Johnson* because "[s]ubsection (B) is virtually indistinguishable from the clause in Johnson that was found to be unconstitutionally vague." *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016). Whereas § 924(c)(3)(B) defines a "crime of violence" as a felony "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," the Armed Career

Criminal Act ("ACCA") residual clause defines a "violent felony" as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B)(ii). In other words, § 16(b) defines a "crime of violence" using exactly the same language as § 924(c)(3)'s residual clause.

The Government argues that only the Seventh Circuit has found that § 924(c) is unconstitutionally void, whereas the other Circuits to address the issue—the Second, Sixth, and Eighth—have held that it is constitutionally sound. *Compare, e.g., United States v. Hill*, 832 F.3d 135, 149-50 (2nd Cir. 2016) (holding § 924(c)(3)(B) not unconstitutionally vague), and *United States v. Taylor*, 814 F.3d 340, 375-76 (6th Cir. 2016) (same), with *Cardena*, 842 F.3d 959 (finding the residual clause in § 924(c) to be unconstitutionally vague). Therefore, the Government contends that because the circuit conflict is not entrenched, this case is not ripe for review. However, contrary to the Government's assertion, the Seventh Circuit does not stand alone on this issue. The Third, Sixth, Seventh, Ninth, and Tenth Circuits have found that the identically worded residual clause in § 16(b) is unconstitutionally vague. *See Baptiste v. Attorney Gen.*, 841 F.3d 601, 608 (3d Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas–Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S.Ct. 31, 195 (U.S. Sept. 29, 2016); *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016).[1]

The Ninth Circuit in *Dimaya* held that the identically worded residual clause of § 16(b) is unconstitutionally vague because, like the ACCA residual clause, it

[1] By contrast, the en banc Fifth Circuit has concluded that § 16(b) is not unconstitutionally vague after *Johnson*. *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 678-79 (5th Cir. 2016).

"requires courts to (1) measure the risk by an indeterminate standard of a judicially imagined ordinary case, not by real-world facts or statutory elements and (2) determine by vague and uncertain standards when a risk is sufficiently substantial." 803 F.3d at 1120 (internal quotation marks omitted). The Seventh Circuit has reached the same conclusion. *Vivas–Ceja*, 808 F.3d at 723. Indeed, the Third Circuit reasoned that the

> Supreme Court made clear, the vagueness was the product of '[t]wo features of the residual clause'—the ordinary case inquiry and the risk inquiry—which, as we explained above, are present in the § 16(b) analysis as well. *Johnson*, 135 S. Ct. at 2557.

Baptiste, 841 F.3d at 620. Because § 924(c)(3)'s residual clause requires the same categorical approach as § 16(b), and consists of the same language, this analysis applies here.

Here, the district court decided that it was not required to employ a categorical approach and it relied heavily upon "the underlying offense conduct in applying § 924(c)(3)(B)." App. B. The district court concluded that this Court in *Johnson* found there was not a "risk that statutes other than the ACCA residual clause would be affected," as it did it did not "doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Id.* (citing Johnson, 135 S. Ct. at 2561). The Eighth Circuit subsequently erred in affirming the district court's order denying his motion to dismiss count two of the indictment.

However, conflicting decisions in the Second, Third, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits reveal the precise bounds of *Johnson* are far from clear.

The Government offers no meaningful distinction between § 16(b) and § 924(c)(3)(B). Mr. Prickett encourages this Court to adopt the reasoning and conclusion of the Seventh Circuit, which is supported by the Third, Sixth, Seventh, Ninth, and Tenth Circuits' decisions regarding the identically worded text found in § 16(b). A grant of Mr. Prickett's petition for writ of certiorari is necessary to clarify the extent of *Johnson*'s holding to a "crime of violence" under § 924(c), as this causes a disparity in sentencing as defendants will obtain different results depending upon the circuit in which they are convicted.

III. The categorical approach applies to § 924(c).

The Government contends that the categorical approach may not be the appropriate vehicle to address § 924(c) despite its contention in the petition for rehearing that the categorical approach does apply. *See* Government's Petition for Panel Rehearing, p. 1. However, with the exception of the Sixth Circuit, circuit courts addressing the issue have found that the categorical approach does apply. *See United States v. Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (to determine whether an offense qualifies as a "crime of violence" under § 924(c)(3), courts apply the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990)). *See also United States v. Piccolo*, 441 F.3d 1084, 1086–87 (9th Cir. 2006) ("In the context of crime of violence determinations under section 924(c), our categorical approach applies regardless of whether we review a current or prior crime."); *Vivas–Ceja*, 808 F.3d 719 (same). Therefore, Mr. Prickett asserts that § 924(c)(3) must be analyzed using the categorical approach.

IV. The lower courts did not address whether Mr. Prickett's offense constituted a "crime of violence" under the force clause, and *Castleman* does not definitively reveal that 18 U.S.C. § 113(a) is a qualifying offense under the force clause.

The Government contends that Mr. Prickett's offense also qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(A)—the force clause. However, neither the district court nor the Eighth Circuit addressed whether his offense qualified under § 924(c)(3)(A). Instead, the lower courts solely based their findings on the residual clause. The lower courts' lack of analysis concerning the force clause shows that Mr. Prickett's case was debatable, leading the district court to decide the crime of violence question under the residual clause alone. Thus, whether 18 U.S.C. § 113(a) is a crime of violence under the force clause is properly considered by the district court when the case is remanded.

Even if the Court found it appropriate to address the force-clause question, *Castleman* does not definitively reveal that Mr. Prickett's offense qualifies under the force clause. Thus, contrary to the Government's contention, Mr. Prickett's argument is not rendered void by this Court's holding in *Castleman*. 134 S. Ct. 1405 (2014). Unlike the case at bar, *Castleman* considered crimes of violence involving *misdemeanor* domestic violence. *Id.* at 1408. *Castleman* held that in the context of misdemeanor domestic violence, "physical force" must be defined more broadly, to encompass not just "violent force" but also the common-law meaning of "force"—a meaning that included "even the slightest offensive touching." *Id.* at 1410-13.

It is possible to violate § 113(a) without using violent force because the force clause under §924(c) requires the use of force, not merely the causation of physical

injury. "[A predicate offense] does not qualify as a 'crime of violence' . . . unless proof of the use, attempted use, or threatened use of physical force is part of the statutory definition of the offense." *United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (in the context of U.S.S.G. § 2L1.2). Thus, even offenses with elements requiring serious physical injury, or even death, do not always require violent force. This is true because physical injury can be committed without the use of strong physical force, such as through poisoning, laying a trap, exposing someone to hazardous chemicals, standing guard while a confederate injures another, locking someone in car on a hot day, starving someone to death, neglecting a child, or leaving an unconscious person in the middle of the road.

Indeed, several circuit courts have determined that *Castleman* does not stand for the proposition that sustaining physical injury always entails the use of violent force. For example, in *Whyte v. Lynch*, the First Circuit recognized that the federal statute at issue in *Castleman* was the Domestic Violence Gun Offender Ban, which did not necessarily constitute violence in a nondomestic context. 807 F.3d 463, 470-71 (1st Cir. 2015), *reh'g denied*, 815 F.3d 92 (1st Cir. 2015) (citing *Castleman*, 134 S. Ct. 1405, 1411 & n. 4). "Physical force" within the meaning of the Domestic Violence Gun Offender Ban can thus be satisfied by a "mere offensive touching"—a standard that casts a far wider net in the sea of state crime predicates than does *Johnson*'s requirement of "violent force." *Id.* The Fourth Circuit was not persuaded by the Government's arguments regarding the use of force and the causation of injury. *United States v. McNeal*, 818 F.3d 141, 156 n.10 (4th Cir.), *cert. denied*, 137 S. Ct.

164 (2016), and *cert. denied sub nom. Stoddard v. United States*, 137 S. Ct. 164 (2016) ("Writing for the *Castleman* majority, Justice Sotomayor expressly reserved the question of whether causation of bodily injury 'necessarily entails violent force.'"). Further, in *United States v. Rico-Mejia*, the Fifth Circuit determined that *Castleman*'s analysis is applicable only to crimes categorized as domestic violence, which import the broader common law meaning of physical force. No. 16-50022, 2017 WL 568331, at *3 (5th Cir. Feb. 10, 2017). Therefore, "*Castleman* is not applicable to the physical force requirement for a crime of violence, which 'suggests a category of violent, active crimes' that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context." *Id.* (citing 134 S. Ct. at 1411 n.4).

Mr. Prickett contends that whether his offense qualified as a "crime of violence" under the force clause is not before this Court because the lower courts did not decide that issue. Nonetheless, *Castleman*'s holding does not support a finding that a violation of § 113(a) categorically falls under the force clause.

CONCLUSION

For all of the foregoing reasons, Petitioner John Prickett, Jr. respectfully requests that this Court hold his case in abeyance pending its decision in *Dimaya*. Alternatively, Mr. Prickett submits that his case is ripe for review.

DATED: this 12th day of April, 2017.

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CERTIFICATE OF SERVICE

I, Anna M. Williams, do swear or declare that on this date, April 12, 2017, as required by Supreme Court Rule 29, I have served the enclosed REPLY BRIEF FOR THE PETITIONER on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 12, 2017.

Anna M. Williams

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