

No. 17-5767

IN THE SUPREME COURT OF THE UNITED STATES

XING LIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 7-22) that the lower courts erred in rejecting his claim that the definition of the term "crime of violence" in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague in light of Johnson v. United States, 135 S. Ct. 2551 (2015). He notes (Pet. 7-12) that a circuit conflict exists over whether Section 924(c)(3)(B) is constitutional and that this Court has granted review in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017), to decide whether the similarly worded definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's definition of the term

"aggravated felony," 8 U.S.C. 1101(a)(43), is unconstitutionally vague. Petitioner therefore suggests that the Court should hold his petition for a writ of certiorari pending the decision in Dimaya. The United States agrees that the petition should be held for Dimaya.

Petitioner was convicted of, among other things, using a firearm "in relation to any crime of violence," in violation of 18 U.S.C. 924(c)(1)(A) and (j). Pet. App. 3A. The predicate crime of violence underlying his Section 924(c) conviction was extortion in violation of the Hobbs Act, 18 U.S.C. 1951(a) and (b)(1). See Pet. App. 3A.

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). The court of appeals in this case rejected the argument that extortion in violation of the Hobbs Act is not a "crime of violence" under Section 924(c). Pet. App. 3A. The court, applying plain-error review in light of petitioner's forfeiture of the issue in the district court, found it "far from clear that the 'ordinary case' of Hobbs Act extortion would not entail a substantial risk of the use of physical force" for

purposes of Section 924(c)(3)(B). Id. at 3A-4A. The court also rejected petitioner's challenge to the constitutionality of Section 924(c)(3)(B), which he "assert[ed] for the first time on appeal." Id. at 4A n.1.

Because the proper disposition of the petition for a writ of certiorari in this case may be affected by the Court's resolution of Dimaya, the petition should be held pending the decision in that case and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

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* The government waives any further response to the petition unless this Court requests otherwise.