No. 15-1498

# In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

*v.*

JAMES GARCIA DIMAYA

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

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## PETITION FOR A WRIT OF CERTIORARI

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

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 803 F.3d 1110. The opinion of the Board of Immigration Appeals (App., *infra*, 41a-48a) and the order of the immigration judge (App., *infra*, 49a-55a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on October 19, 2015. A petition for rehearing was denied on January 25, 2016 (App., *infra*, 56a). On April 24, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 24, 2016. On May 16, 2016, Justice

Kennedy further extended the time to June 10, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. See App., *infra*, 57a-62a.

## STATEMENT

An immigration judge determined that respondent, an alien, is removable from the United States and is ineligible for the discretionary relief of cancellation of removal because his two state-court convictions for first-degree burglary each qualify as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* App., *infra*, 49a-55a. The Board of Immigration Appeals (Board) dismissed respondent's appeal. *Id.* at 41a-48a. The Ninth Circuit granted respondent's petition for review on the ground that the relevant portion of the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*, 1a-40a. The Ninth Circuit remanded the case to the Board for further consideration of respondent's request for cancellation of removal. *Id.* at 20a.

1. The INA specifies classes of aliens who are removable from the United States on the order of the Attorney General. 8 U.S.C. 1227(a). One such class comprises any alien convicted of an "aggravated felony" after admission into the United States. 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines "aggravated felony" to include certain categories of offenses. 8 U.S.C. 1101(a)(43). As particularly relevant here, one category includes any "crime of violence (as defined in sec-

tion 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F) (footnote omitted).

Section 16 of Title 18 is the general definition of "crime of violence" for the federal criminal code. As relevant here, Subsection (b) defines "crime of violence" to include "any * * * 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." In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court held that, because Section 16 "directs [its] focus to the 'offense' of conviction," *id.* at 7, courts must employ the familiar "categorical" approach to determine whether a particular offense meets the statutory definition. See *ibid.* Under that approach, a court must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the individual's] crime." *Ibid.* *Leocal* construed Section 16(b) to encompass offenses that "naturally involve a person acting in disregard of the risk that physical force might be used against another in committing [the] offense." *Id.* at 10.

The Attorney General may cancel removal for certain lawful permanent residents (LPRs). 8 U.S.C. 1229b(a). That discretionary authority has been delegated to the Board. 8 C.F.R. 1003.1(a)(1). The INA, however, prohibits the Attorney General from cancelling the removal of an LPR who has been convicted of an aggravated felony. 8 U.S.C. 1229b(a)(3); see *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010).

2. Respondent is a native of the Philippines who was admitted to the United States in 1992 as an LPR.

App, *infra*, 2a. In both 2007 and 2009, respondent was convicted of first-degree residential burglary in violation of California law. *Ibid.*; see Cal. Penal Code §§ 459, 460(a) (West 1999). Each time he was sentenced to two years in prison. App., *infra*, 2a.

In 2010, the Department of Homeland Security (DHS) initiated a removal proceeding against respondent. App., *infra*, 42a. DHS charged that respondent is removable because, in addition to other reasons not relevant here, his two residential-burglary convictions each qualify as an "aggravated felony" under the INA. See *id.* at 42a-43a. DHS maintained that California first-degree burglary satisfies two alternative subsections of the INA's definition of "aggravated felony": the "crime of violence" provision discussed above, 8 U.S.C. 1101(a)(43)(F), and a provision defining "aggravated felony" to include "a theft offense * * * or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (footnote omitted).

An immigration judge sustained DHS's charge of removability and ordered that respondent be removed from the United States. App., *infra*, 49a-55a. The judge concluded that respondent's burglary convictions qualify as "aggravated felon[ies]" under both subsections cited by DHS and thus render respondent removable and ineligible for cancellation of removal. See *id.* at 53a-54a.

The Board dismissed respondent's appeal. App., *infra*, 41a-48a. The Board first concluded, contrary to the ruling of the immigration judge, that first-degree burglary under California law does not qualify as a "theft offense * * * or burglary offense" under 8 U.S.C. 1101(a)(43)(G). App., *infra*, 45a. The Board

stated that California burglary does not meet the definition of generic burglary (a requirement under Board precedent), because "[t]he California statute does not require an unlawful entry." *Ibid.*

The Board determined, however, that first-degree burglary under California law does qualify as a "crime of violence" under Section 16(b) and therefore as an "aggravated felony" under the INA. App., *infra*, 45a-46a. Relying on *United States* v. *Becker*, 919 F.2d 568 (9th Cir. 1990), cert. denied, 499 U.S. 911 (1991), the Board explained that first-degree burglary "is an offense that by its nature carries a substantial risk of the use of force." App., *infra*, 46a. The Board therefore agreed with the immigration judge that respondent is removable and is ineligible for cancellation of removal. *Id.* at 46a-47a.

Board Member Wendtland concurred in the result. App., *infra*, 47a-48a. She believed that a burglary offense that does not require an unlawful entry does not meet Section 16(b)'s definition of "crime of violence" because it "does not create a sufficient risk of the use of force." *Id.* at 48a. But she interpreted *Becker* to hold that California first-degree burglary does require an unlawful entry. *Ibid.*[1]

3. Respondent filed a petition for review of the Board's order in the Ninth Circuit.

a. While the petition for review was pending, this Court decided *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). *Johnson* held that one part of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), is unconstitu-

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[1] This Court later concluded that "generic unlawful entry is not an element" of the California burglary statute at issue here. *Descamps* v. *United States*, 133 S. Ct. 2276, 2293 (2013).

tionally vague. Under the ACCA, a defendant convicted of being a felon in possession of a firearm, see 18 U.S.C. 922(g)(1), who has three or more convictions for a "violent felony" or "serious drug offense" is subject to a minimum sentence of 15 years of imprisonment. The ACCA defines "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * 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." 18 U.S.C. 924(e)(2)(B)(ii). This Court had previously construed the so-called "residual clause" of that definition (*i.e.*, the clause beginning with "otherwise") to require a court to determine whether the "ordinary case" of a given predicate offense presents the requisite risk of injury, as opposed to whether the defendant's particular conduct underlying his conviction entailed such a risk. See *Johnson*, 135 S. Ct. at 2557.

*Johnson* held that the ACCA's residual clause violates the Due Process Clause's "prohibition of vagueness in criminal statutes" because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2556-2557. The Court concluded that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Ibid.* First, the clause requires courts not only to discern the "ordinary case" of the offense and determine whether the "physical acts that make up the crime will injure someone," but also to evaluate the risk that injury might occur *after* the commission of the offense—a "speculative" inquiry that is "detached from statutory elements," *id.* at

2557-2558, and could encompass injury "remote from the criminal act," *id.* at 2559. Second, the Court explained, the residual clause is unclear about what level of risk qualifies as a "serious potential risk," especially because the word "otherwise" indicates that the level of risk must be interpreted in light of the four preceding enumerated offenses, which are "far from clear in respect to the degree of risk each poses." *Id.* at 2558 (citation and internal quotation marks omitted). The Court then "confirm[ed] [the residual clause's] hopeless indeterminacy" by pointing to its own "repeated attempts and repeated failures to craft a principled and objective standard" over the course of five cases, *id.* at 2558, and the "numerous splits among the lower federal courts, where [the clause] has proved nearly impossible to apply consistently," *id.* at 2560 (citation and internal quotation marks omitted).

b. The Ninth Circuit ordered supplemental briefing in this case on the effect of *Johnson*. In a divided decision, the court then granted respondent's petition for review, holding that the definition of "crime of violence" in Section 16(b), as incorporated into the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*, 1a-40a.

i. The majority opinion, authored by Judge Reinhardt and joined by Judge Wardlaw, first concluded that "[a]though most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the criteria for deportation." App., *infra*, 5a; see *id.* at 5a-7a. In reaching that conclusion, the court relied on this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), which it interpreted to "explicitly reject[]

the argument that the vagueness doctrine d[oes] not apply" to civil removal statutes. App., *infra*, 6a.

ii. The Ninth Circuit then held that, in light of this Court's analysis of the ACCA's residual clause in *Johnson*, Section 16(b) is unconstitutionally vague. App., *infra*, 8a-19a. The court explained that both Section 16(b) and the ACCA's residual clause require a court to determine whether a certain degree of risk is posed by the "ordinary case" of the commission of a predicate offense. *Id.* at 8a-9a. On that basis, the court concluded that Section 16(b) suffers from "the same combination of indeterminate inquiries" as the ACCA's residual clause: *i.e.*, uncertainty about how to gauge the risk posed by an offense and uncertainty about how much risk is necessary for an offense to meet the statutory definition. *Id.* at 10a; see *id.* at 11a-14a.

The government had pointed to textual differences between Section 16(b) and the ACCA's residual clause, but the Ninth Circuit found those differences immaterial. See App., *infra*, 14a-19a. The government explained, for example, that Section 16(b) on its face requires the risk to arise "in the course of committing the offense," 18 U.S.C. 16(b), whereas the ACCA's residual clause requires courts to "go[] beyond evaluating the chances that the physical acts that make up the crime will injure someone" and ask whether a risk of physical injury might occur after the offense is committed, *Johnson*, 133 S. Ct. at 2557; see *id.* at 2257-2558. The Ninth Circuit deemed that difference irrelevant to *Johnson*'s holding, see App., *infra*, at 17a, and also expressed doubt that Section 16(b) is limited to risks that occur in the course of

committing the acts that constitute the offense, despite its text, *id.* at 16a.

The government further explained that *Johnson* had found that the uncertainty as to the level of risk required under the ACCA's residual clause was magnified by the inclusion of the four preceding enumerated offenses, see 135 S. Ct. at 2558, but Section 16(b) does not contain such "a confusing list of examples," *id.* at 2561 (internal quotation marks omitted). The Ninth Circuit, however, was of the view that *Johnson*'s discussion of the four enumerated offenses was not necessary to its holding. App., *infra*, 15a-16a.

Finally, the Ninth Circuit dismissed the fact that, unlike the residual clause in *Johnson*, Section 16(b) has not generated widespread confusion among lower courts and has not been subject to "repeated attempts and repeated failures" by this Court "to craft a principled and objective standard" from the statutory text, *Johnson*, 135 S. Ct. at 2558. See App., *infra*, 18a-19a. The Ninth Circuit declined to attach significance to the Court's failure to grant review in cases under Section 16(b), noting that this Court has granted review in more criminal cases than immigration cases in recent years. See *id.* at 18a-19a & n.16.

Accordingly, the Ninth Circuit held that Section 16(b), as incorporated into the INA's definition of "aggravated felony," is unconstitutionally vague. App., *infra*, 20a. The court added that its decision did "not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F)." *Id.* at 20a n.17. The Ninth Circuit remanded the case to the Board for further proceedings consistent with its opinion. *Id.* at 20a.

iii. Judge Callahan dissented. App., *infra*, 20a-40a. She concluded that Section 16(b), "as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of th[e] shortcomings" that this Court identified in the text of ACCA's residual clause. *Id.* at 21a; see *id.* at 37a-38a. She noted in particular that this Court has already found Section 16(b) amenable to statutory construction in *Leocal*, *supra*, in which the Court concluded that burglary is "'the classic example' of a crime covered by [Section] 16(b)." App., *infra*, 37a (quoting *Leocal*, 543 U.S. at 10). "The Supreme Court," she wrote, "will be surprised to learn that its opinion in *Johnson* rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention *Leocal*," and she anticipated that "the Supreme Court will have to intervene to return us to our proper orbit." *Id.* at 39a-40a.

**REASONS FOR GRANTING THE PETITION**

The Ninth Circuit's divided decision held unconstitutional, as impermissibly vague, a portion of the federal criminal code's definition of "crime of violence" as applied to removal proceedings through the Immigration and Nationality Act's definition of "aggravated felony." That definition of "crime of violence" has been in place for over thirty years and is incorporated into numerous provisions of the INA and criminal statutes. The Ninth Circuit reached its holding only by declaring immaterial the fact that 18 U.S.C. 16(b) lacks particular textual features that this Court found critical to its conclusion in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), that the ACCA's residual clause is unconstitutionally vague. The Ninth Circuit further disregarded the fact that, because of those textual differences, Section 16(b) has not gener-

ated the widespread confusion and interpretive failures that led this Court to invalidate the ACCA's residual clause.

The exceptional importance of the question of Section 16(b)'s constitutionality alone warrants this Court's review. Moreover, the Ninth Circuit's decision conflicts with the Sixth Circuit's decision in *United States* v. *Taylor*, 814 F.3d 340 (2016), which upheld against a vagueness challenge a definitional provision located at 18 U.S.C. 924(c)(3)(B) that is worded in a materially identical manner. Accordingly, this Court's review is warranted.

### A. The Ninth Circuit Erred In Holding That Section 16(b), As Applied Through The Removal Provisions Of The Immigration And Nationality Act, Is Unconstitutionally Vague

The Ninth Circuit erred in concluding that this Court's decision in *Johnson* compels the conclusion that Section 16(b), as applied to removal proceedings under the INA through 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague.

1. As an initial matter, the Ninth Circuit mistakenly applied the vagueness standard appropriate for criminal laws to civil statutes governing removal.

a. The Ninth Circuit applied what it understood to be *Johnson*'s vagueness analysis to provisions of the INA governing whether respondent is removable from the United States and whether he is eligible for certain forms of discretionary relief from removal. 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3); see 8 U.S.C. 1101(a)(43)(F). But *Johnson*'s holding rested on the constitutional "prohibition of vagueness in *criminal statutes*," 135 S. Ct. at 2556-2557 (emphasis added), whereas removal "has been consistently classified as a

civil rather than a criminal procedure," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). In its vagueness precedents, this Court has long drawn a firm distinction between criminal and civil provisions. As the Court has explained, "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). This Court has "expressed greater tolerance of enactments with civil rather than criminal penalties" in addressing vagueness challenges, at least where the civil consequences do not threaten "the right of free speech or of association" or another substantive constitutional guarantee. *Id.* at 498-499.

Thus, provisions of the INA governing removal should be subject to a less exacting form of vagueness doctrine than the sentencing statute at issue in *Johnson*, just as removal proceedings are not subject to the panoply of procedural requirements that attend criminal trials. The Ninth Circuit's contrary approach is irreconcilable with the basic character of federal immigration law. In keeping with the constitutionally central role of the Executive on questions of foreign relations and immigration, Congress has vested the Executive Branch with substantial interpretive authority and discretion to make case-by-case judgments. See, *e.g.*, *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). Statutes governing removal determinations therefore are not subject to the same vagueness standard as statutes defining crimes or setting out criminal punishments.

Moreover, the twin concerns that undergird the vagueness doctrine—"giv[ing] ordinary people fair notice of the conduct" that is the subject of the law and avoiding "arbitrary enforcement," *Johnson*, 135 S. Ct. at 2556 (citation omitted)—are implicated to a far lesser degree by civil removal proceedings than by criminal prosecutions. Unlike criminal statutes, removal statutes are not subject to the constitutional prohibition on *ex post facto* laws. *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955); *Harisiades*, 342 U.S. at 594-595. Thus, for example, this Court has upheld the removal of an alien based on a conviction for an offense that "was not ground for deportation at the time he committed the offense." *Marcello*, 349 U.S. at 314. In addition, the Board of Immigration Appeals, on behalf of the Attorney General, can render authoritative interpretations of provisions of the INA concerning removability and eligibility for relief from removal to govern administrative enforcement. See *Aguirre-Aguirre*, 526 U.S. at 424-425; see also 8 U.S.C. 1103(a)(1). And because removal decisions by immigration judges also often entail case-by-case exercises of discretion, such as in the granting of relief from removal, immigration law necessarily tolerates more potential for disuniformity in that respect than would be permissible when courts adjudicate the meaning of a criminal statute.

b. In concluding that the same vagueness analysis applies to both criminal statutes and civil removal statutes, the Ninth Circuit relied principally on this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951). *Jordan* construed a statute providing for the deportation of an alien sentenced more than once to a term of imprisonment of at least one year for "any

crime involving moral turpitude." *Id.* at 225 (quoting 8 U.S.C. 155(a) (1940)); see App., *infra*, 5a-7a. The Court held that the statute encompassed the offense of conspiracy to defraud the United States of taxes on distilled spirits. 341 U.S. at 223-224, 229. Responding to an argument raised by the dissent but not argued by the parties, the Court went on to consider whether "the phrase 'crime involving moral turpitude' lacks sufficiently definite standards to justify this deportation proceeding and [whether] the statute [at issue was] therefore unconstitutional for vagueness." *Id.* at 229. The Court noted that "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct" and "emphasized that this statute does not declare certain conduct to be criminal," but it elected to "examine the application of vagueness doctrine to this case * * * in view of the grave nature of deportation." *Id.* at 230-231 (citations omitted). The Court ultimately concluded that the phrase "crime involving moral turpitude" was sufficiently definite in that context to satisfy due process. *Id.* at 232.

*Jordan* did not have occasion to decide whether the same vagueness standard that governs criminal statutes also governs statutes applied in civil removal proceedings. Rather, the Court's brief discussion of the vagueness question merely held that the deportation statute at issue was constitutional without extensively analyzing doctrinal questions that had not been briefed. *Jordan* therefore does not cast doubt on the proposition that the Constitution tolerates a lesser "degree of vagueness," *Village of Hoffman Estates*, 455 U.S. at 498, for criminal statutes than for laws with only civil consequences.

The Ninth Circuit also asserted that "[s]everal" other circuits had "entertained" challenges to immigration statutes on vagueness grounds, citing two published opinions from other circuits and one nonprecedential opinion. App., *infra*, 7a-8a n.4. One of the precedential opinions merely recited *Jordan*'s holding that the phrase "crime involving moral turpitude" is not unconstitutionally vague, see *Garcia-Meza* v. *Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008), while the other recognized that "[t]he 'void for vagueness' doctrine is chiefly applied to criminal legislation," and that "[l]aws with civil consequences receive less exacting vagueness scrutiny," *Arriaga* v. *Mukasey*, 521 F.3d 219, 222-223 (2d Cir. 2008); cf. *ibid.* (reserving question whether INA provision rendering removable any alien convicted of stalking, 8 U.S.C. 1227(a)(2)(E)(i), "should be assessed as a civil or criminal statute"). Neither decision supports the view that a vagueness challenge to a civil statute enacted by Congress to provide for the removal of aliens from the United States should be analyzed the same way as a vagueness challenge to a criminal provision.

c. The civil removal statutes at issue here incorporate 18 U.S.C. 16, a definitional provision of the federal criminal code, and it is the text of Section 16(b) that the Ninth Circuit found to be unconstitutionally vague. That does not mean, however, that the vagueness standard appropriate for criminal statutes applies here. Congress could have adopted precisely the same statutory regime by reproducing the text of Section 16 verbatim in the INA's definition of "aggravated felony." The fact that Congress chose the statutory shortcut of cross-referencing Section 16 rather than reproducing its text does not change the fact that

in this context the statutory language operates as a civil provision, not as the definition of a criminal offense or as a criminal-penalty provision.[2]

d. Accordingly, even if the Ninth Circuit were correct that Section 16(b) suffers from the same infirmities as the ACCA's residual clause (but see pp. 17-26, *infra*), the court was incorrect to hold that the section would be unconstitutional as applied through the INA's civil provisions governing removal. The Ninth Circuit should have instead deferred to Congress's authority to draft broadly worded immigration provisions that recognize the substantial, constitutionally grounded role and discretion of the Executive Branch in that area. To be sure, it may be that a provision governing removability could be so opaque that it approaches the outer limits of what due process would permit, even in the special context of immigration. But Section 16(b) is not close to that line. The ACCA's residual clause, after all, presented a close vagueness question under the standard appropriate for criminal statutes, because this Court had twice rejected vagueness challenges to the residual clause and was divided on the question in *Johnson*. See 135 S. Ct. at 2562. It necessarily follows that Section 16(b) is not unconstitutionally vague under the standard appropriate for civil provisions enacted pursuant to Congress's plenary power over immigration.

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[2] The INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43), itself has criminal applications. See 8 U.S.C. 1326(b)(2). But Section 1101(a)(43) operates primarily as part of civil immigration law and is applied here in the removal context, and so should not be subject here to the vagueness standard appropriate for criminal laws.

2. Even if the same vagueness standard that governs criminal statutes applied here, Section 16(b) would not be unconstitutionally vague. Section 16(b) lacks the textual features that *Johnson* identified as critical to the conclusion that the ACCA's residual clause is unconstitutionally vague. And because of its very different text, Section 16(b) has not suffered from the same history of confusion and interpretive failures as the ACCA's residual clause.

a. *Johnson* held that the ACCA's residual clause is too indeterminate to be fairly applied because of the combination of two flaws in the statute: (i) "grave uncertainty about how to estimate the risk posed by a crime" and (ii) "uncertainty about how much risk" is required to meet the statutory standard. 135 S. Ct. at 2557-2558. Neither problem is present to remotely the same degree in Section 16(b).

i. The Ninth Circuit interpreted *Johnson* to hold that the ACCA's residual clause left "grave uncertainty" about how to determine the risk posed by a given offense solely because the residual clause, like Section 16(b), requires an "ordinary case" analysis. That was error.

It is true that *Johnson* identified the "ordinary case" analysis as part of what contributed to the uncertainty about how to conduct the ACCA risk assessment. 135 S. Ct. at 2557. But *Johnson*'s holding further rested on the fact that the ACCA "ordinary case" analysis "goes beyond evaluating the chances that the physical acts that make up the crime will injure someone" and requires a court to determine whether a "risk of injury arises because the [offender] might engage in violence *after*" completing the offense, *ibid.*, and thus encompasses physical injury

"remote from the criminal act," *id.* at 2559. "Critically," the Court stated, "picturing the criminal's behavior is not enough" under the ACCA's residual clause, because "assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out"—a "speculative" inquiry "detached from statutory elements." *Id.* at 2557-2558. Thus, as the Sixth Circuit has explained, the fact that the residual clause's "language * * * did not limit a court's inquiry to the elements of the crime" was a feature of the statute that "made a difference in *Johnson*." *Taylor*, 814 F.3d at 377.

Section 16(b), by contrast, expressly requires courts to focus on the "risk that physical force * * * may be used *in the course of committing the offense*." 18 U.S.C. 16(b) (emphasis added). And in authoritatively construing Section 16(b) in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court stated that the statute refers to "the risk that physical force might be used against another *in committing an offense*." *Id.* at 10 (emphasis added).[3] Section 16(b) thus lacks the textual feature that *Johnson* deemed "[c]ritical[]" to its conclusion that the ACCA's residual clause leaves "grave uncertainty" about how to measure the risk posed by a particular offense, 135 S. Ct. at 2557.

The Ninth Circuit, moreover, ignored another feature of Section 16(b) that further narrows the risk inquiry. While the ACCA's residual clause refers the "risk of physical *injury* to another," 18 U.S.C. 924(e)(2)(B)(ii) (emphasis added), Section 16(b) refers

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[3] Section 16(b) encompasses any felony that by its nature involves a substantial risk that physical force will be used against the "property of another" as well as against the person of another.

to the "risk that physical *force* against the person or property of another may be *used*," 18 U.S.C. 16(b) (emphases added). In holding that drunk-driving offenses do not fall under Section 16(b), *Leocal* construed Section 16(b) to focus exclusively on the risk that the offender might resort to force in completing the offense and therefore to exclude the risk of injuries resulting from "accidental or negligent conduct." 543 U.S. at 10-11. And the Court expressly noted that Section 16(b) is narrower in that respect than the standard set forth in the ACCA's residual clause. See *id.* at 10 n.7 (discussing sentencing guideline modeled on the ACCA definition). That distinctive feature of Section 16(b) serves to further refine the "ordinary case" analysis in this context.

Those textual differences have real consequences for the clarity of interpreting Section 16(b). For example, the question whether drunk-driving offenses fall under the ACCA's residual clause divided this Court three ways, see *Begay* v. *United States*, 553 U.S. 137 (2008), and led to the adoption of a legal test that the Court later substantially narrowed, see *Johnson*, 135 S. Ct. at 2559 (discussing *Sykes* v. *United States*, 564 U.S. 1, 12-13 (2011)). By contrast, this Court concluded in *Leocal* that drunk-driving offenses do not fall under Section 16(b) in two pages of a unanimous opinion that has never been called into question. See 543 U.S. at 10-11. And that decision rested on the particular language of Section 16(b)—the "use[]" of "physical force" in "the course of committing the offense"—that is not present in the ACCA.

ii. The second textual feature of the ACCA's residual clause that *Johnson* found to contribute to its indeterminacy was "uncertainty about how much risk"

is required to meet the statutory standard of a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). 135 S. Ct. at 2557-2558. *Johnson* first noted that the ACCA's residual clause differs from many other criminal statutes that include a general risk standard because the ordinary-case analysis requires a court to apply the risk standard to an understanding of a typical case, not "real-world facts." *Id.* at 2558. Section 16(b) is similar to that extent. But *Johnson* further explained that "[b]y asking whether the crime '*otherwise* involves conduct that presents a serious potential risk,' * * * the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Ibid.* Because those offenses are each so different in the degree of risk they pose, the Court concluded that the residual clause entails too much "indeterminacy about how much risk it takes for the crime to qualify as a violent felony." *Ibid.*; see *id.* at 2561.

Section 16(b), however, "does not complicate the level-of-risk inquiry by linking the 'substantial risk' standard, through the word otherwise, 'to a confusing list of examples.'" *Taylor*, 814 F.3d at 377 (quoting *Johnson*, 135 S. Ct. at 2561). Consequently, Section 16(b) "does not require analogizing the level of risk involved in a defendant's conduct to burglary, arson, extortion, or the use of explosives," *ibid.*—a facet of the ACCA risk analysis that this Court had struggled with since its first residual-clause decision. See *Johnson*, 135 S. Ct. at 2558 (discussing *James* v. *United States*, 550 U.S. 192 (2007)).

The Ninth Circuit dismissed the significance of that distinction between Section 16(b) and the ACCA's residual clause only by misreading *Johnson*. App., *infra*, 15a-16a. The Ninth Circuit incorrectly stated that *Johnson* "cited" the residual clause's four enumerated crimes "after the Court set forth its holding," and only "in responding to the government's argument that the Court's holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term 'serious potential risk.'" *Id.* at 15a (quoting *Johnson*, 135 S. Ct. at 2561). In actuality, *Johnson* extensively discussed the four enumerated crimes as a feature contributing to the residual clause's vagueness from the outset of its analysis, not only in responding to the government's argument about other criminal statutes. See 135 S. Ct. at 2557-2558.

iii. As Judge Callahan suggested in dissent, the Ninth Circuit majority's textual analysis essentially rested on the proposition that any risk-based statute that requires an "ordinary case" analysis is *ipso facto* unconstitutional. See App., *infra*, 21a. But *Johnson* did not articulate such a blanket rule. Instead, *Johnson* engaged in a close analysis of multiple textual features of the ACCA's residual clause. And the Court ultimately concluded that although "[e]ach of the uncertainties in the residual clause may be tolerable in isolation," it was "'*their sum* [that made] a task for us which at best could be only guesswork.'" 135 S. Ct. at 2560 (quoting *United States* v. *Evans*, 333 U.S. 483, 495 (1948)) (emphasis added); see *Taylor*, 814 F.3d at 378 ("*Johnson* did not invalidate the ACCA residual clause because the clause employed an ordinary case analysis, but rather because of a greater

sum of several uncertainties."). Given that many of the features that *Johnson* found problematic are not present in Section 16(b)—with the effect of narrowing and clarifying the inquiry called for by that statute—the Ninth Circuit erred in holding that Section 16(b) "suffers from the same indeterminacy as ACCA's residual clause," App., *infra*, 2a.

b. The Ninth Circuit further erred in disregarding the other critical factor in *Johnson*'s holding: the "failure of 'persistent efforts . . . to establish a standard'" for applying the ACCA's residual clause, which "provide[d] evidence of vagueness." 135 S. Ct. at 2558 (quoting *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921)); see *id.* at 2558-2560; cf. *id.* at 2562-2563. *Johnson* placed significant weight on this "Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause" over the course of five cases. *Id.* at 2558. And it emphasized that "[t]he clause has created numerous splits among the lower federal courts, where it has proved nearly impossible to apply consistently." *Id.* at 2560 (internal quotation marks omitted).

Section 16(b) has not suffered from any comparable history of confusion and abortive interpretive efforts. This Court has heard one case on Section 16(b)—and it was unanimous. See *Leocal*, *supra*. That is likely because predicate offenses that produced circuit conflicts in the ACCA context—such as possession of a short-barreled shotgun (the offense in *Johnson* itself) or similar offenses—have not produced similarly pervasive conflicts in the Section 16(b) context. Rather, courts have had little trouble concluding that such offenses do not fall under Section 16(b), especially in

the wake of this Court's decision in *Leocal*. See *Evans* v. *Zych*, 644 F.3d 447, 452-453 (6th Cir. 2011); see also *United States* v. *Serafin*, 562 F.3d 1105, 1115-1116 (10th Cir. 2009); *United States* v. *Diaz-Diaz*, 327 F.3d 410, 413-414 (5th Cir.), cert. denied, 540 U.S. 889 (2003).

That is no coincidence. Rather, it is the direct result of the distinct textual features of Section 16(b) that make the judicial task substantially simpler and clearer than the inquiry under the ACCA's residual clause. For example, the difficult statutory question posed in *Johnson* was "how remote" the possible physical injury could be from the basic act of possession of a short-barreled shotgun—*i.e.*, whether a court should consider "the possibility that the person possessing the shotgun will later use it to commit a crime." *Johnson*, 135 S. Ct. at 2559; compare *id.* at 2565-2566 (Thomas, J., concurring in the judgment); with *id.* at 2582-2584 (Alito, J., dissenting). No such inquiry is required under Section 16(b), which turns on the risk that "the use of physical force * * * might be required in committing [the] crime." *Leocal*, 543 U.S. at 10. It is not likely that the use of physical force against another person or another person's property would be required in committing the offense of simple possession of a short-barreled shotgun. And unsurprisingly, every court of appeals to consider the question since *Leocal* has held that possession of a short-barreled shotgun and similar offenses are not "crimes of violence" under Section 16(b) or materially identical statutory language. See pp. 22-23, *supra*; cf. *Torres* v. *Lynch*, No. 14-1096 (May 19, 2016), slip op. 13 (observing that 18 U.S.C. 16, as incorporated into the INA's aggravated-felony provision, "would not

reach felon-in-possession laws and other [federal] firearms offenses").

The Ninth Circuit gave no weight to the fact that Section 16(b) has not produced anything close to the same cacophony of conflicting judicial decisions as the ACCA's residual clause and thus has not prompted this Court to grant certiorari to resolve a conflict except in *Leocal*. Instead, the Ninth Circuit attributed the dearth of decisions to this Court's asserted preference for criminal cases over immigration cases. See App., *infra* at 16a-17a & n.14.

There is no merit to that view. In fact, this Court does frequently grant certiorari to resolve circuit conflicts in the area of immigration law; the Court heard four such cases in the last two Terms. See *Torres*, *supra*; *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015); *Kerry* v. *Din*, 135 S. Ct. 2128 (2015); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015). And in any event, the Ninth Circuit overlooked that Section 16(b) is the *federal criminal code's* definition of "crime of violence," and it applies to numerous federal criminal statutes. See p. 29, *infra*. If Section 16(b), when not applied under the INA through 8 U.S.C. 1101(a)(43)(F), had produced the same level of conflict and confusion as the ACCA's residual clause, this Court likely would have considered more than one case concerning that provision since its enactment in 1984, see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1001(a), 98 Stat. 2136, or at least since its incorporation into the INA in 1990, see Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 5048. Moreover, this Court has not had occasion to resolve a disputed question about the meaning of 18 U.S.C. 924(c)(3)(B), a definition of

"crime of violence" that is worded in a materially identical manner in an important criminal provision, even though this Court has on many occasions considered other questions arising under that provision. See, *e.g.*, *Rosemond* v. *United States*, 134 S. Ct. 1240 (2014); *Abbott* v. *United States*, 562 U.S. 8 (2010); *United States* v. *O'Brien*, 560 U.S. 218 (2010); *Watson* v. *United States*, 552 U.S. 74 (2007).

The far more likely explanation for the fact that this Court has granted review in only one Section 16(b) case in more than thirty years is that Section 16(b) is clearer than the ACCA's residual clause. To be sure, lower courts have disagreed about certain issues, such as whether Section 16(b) covers offenses with a mens rea of recklessness. Compare *Jimenez-Gonzalez* v. *Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008), with *Aguilar* v. *Attorney Gen.*, 663 F.3d 692, 696 (3d Cir. 2011). But similar questions have arisen in many statutory contexts. See, *e.g.*, *Voisine* v. *United States*, No. 14-10154 (argued Feb. 29, 2016) (whether offense with mens rea of recklessness can qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9)). Those narrow areas of disagreement have not approached the degree of conflict and confusion that the ACCA's residual clause generated. And such disagreements do not render a statute unconstitutionally vague, for "even clear laws produce close cases," *Johnson*, 135 S. Ct. at 2560.

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In short, the Ninth Circuit stretched this Court's decision in *Johnson* far beyond its scope to invalidate an important federal definitional provision that applies through numerous provisions of the INA, as well as in numerous criminal provisions. *Johnson* express-

ly relied on the confluence of multiple textual features of the ACCA's residual clause, as well as its checkered history in the courts, to hold that it was impermissibly vague. The most problematic of those features are not present in Section 16(b), and it is thus readily capable of judicial construction.

**B. The Question Presented Warrants This Court's Review**

The question whether Section 16(b), as applied to the INA's civil removal provisions through 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague warrants this Court's review. The divided Ninth Circuit panel declared a longstanding Act of Congress unconstitutional, which alone justifies review by this Court. That decision, moreover, also conflicts with a decision of the Sixth Circuit and will have profound practical implications for the administration of the INA and federal criminal law.

1. The question presented implicates a conflict of authority among the circuits that this Court should resolve. The Seventh Circuit has joined the Ninth Circuit in holding that Section 16(b), as incorporated into the INA's "aggravated felony" definition, is unconstitutionally vague under *Johnson*. See *United States* v. *Vivas-Ceja*, 808 F.3d 719 (2015).[4] Those

[4] *Vivas-Ceja*, which involved a challenge to a sentence by an alien convicted of illegally reentering the United States, became moot shortly before en banc review was denied because the challenged term of imprisonment expired. A divided panel of the Fifth Circuit also held earlier this year that Section 16(b) is unconstitutionally vague, but the Fifth Circuit has granted rehearing en banc. See *United States* v. *Gonzalez-Longoria*, 813 F.3d 225 (2016), reh'g en banc granted, 815 F.3d 189 (argued May 24, 2016); cf. *In re Hubbard*, No. 15-276, 2016 WL 3181417, at *3-*6 (4th Cir. June 8, 2016) (holding that a federal prisoner had made out a

decisions conflict with the Sixth Circuit's decision in *Taylor*, *supra*, which upheld against a vagueness challenge the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which is worded in a materially identical manner. For many of the reasons discussed above (see pp. 17-26, *supra*), the Sixth Circuit determined that Section 924(c)(3)(B) "is considerably narrower" than the ACCA's residual clause and that therefore "much of *Johnson's* analysis does not apply" to the language of that provision. *Taylor*, 814 F.3d at 375-376. The court acknowledged that its decision conflicted with the decision below and *Vivas-Ceja* because "§ 16(b) appears identical to § 924(c)(3)(B) in all material respects," but it determined that "neither decision changes our conclusion." *Id.* at 379.[5]

2. Even apart from the holding of unconstitutionality and the need to resolve the circuit conflict, the question presented has exceptional importance for both immigration and criminal proceedings that calls for this Court's review.

a. The Ninth Circuit's invalidation of part of the INA's definition of "aggravated felony" will disrupt the enforcement of immigration laws against criminal aliens in the Nation's busiest judicial circuit for immigration enforcement. Under the INA's highly reticulated scheme, an alien's conviction for an "aggravated felony" triggers numerous legal consequences. Such a

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prima facie claim that Section 16(b) is unconstitutionally vague and granting motion to file a successive motion under 18 U.S.C. 2255).

[5] Section 924(c) contains a structural feature that distinguishes it from Section 16(b), as incorporated into 8 U.S.C. 1101(a)(43)(F): Section 924(c) requires that the defendant committed the offense with a specified nexus to a firearm. But the Sixth Circuit did not rely on that additional feature.

conviction renders an alien removable, 8 U.S.C. 1227(a)(2)(A)(iii); bars most forms of discretionary relief from removal, including cancellation of removal, asylum, and voluntary departure, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(C); subjects an alien to mandatory detention during the pendency of the removal proceeding, see 8 U.S.C. 1226(c); authorizes an abbreviated removal procedure for non-LPRs, 8 U.S.C. 1228(b); and precludes some aliens from becoming citizens, see 8 U.S.C. 1101(f)(8), 1427(a)(3). As a result of the decision below, however, criminal aliens who have committed Section 16(b) crimes of violence may evade these congressionally mandated restrictions, which are designed to ensure that dangerous aliens are removed from the United States. And of particular concern, many of the predicate offenses that have been held to fall under that provision are quite serious. For example, the Ninth Circuit has held the offenses of lewd and lascivious acts on a child, sexual penetration by a foreign object, sexual battery, kidnapping, and false imprisonment qualify as aggravated felonies by virtue of Section 16(b).[6]

In addition, the decision below may reduce the reach of an important tool for removing domestic abusers from the United States. Under 8 U.S.C. 1227(a)(2)(E)(i), an alien who has committed a Section

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[6] See *Rodriguez-Castellon* v. *Holder*, 733 F.3d 847, 856 (2013), cert. denied, 135 S. Ct. 355 (2014); *United States* v. *Sandoval-Orellana*, 714 F.3d 1174, 1177 (2013); *Lisbey* v. *Gonzales*, 420 F.3d 930, 931-934 (2005), cert. denied, 549 U.S. 868 (2006); *Delgado-Hernandez* v. *Holder*, 697 F.3d 1125, 1126 (2012); *Barragan-Lopez* v. *Holder*, 705 F.3d 1112, 1114-1116 (2013).

16 "crime of violence" against a person who stands in a specified domestic relationship with the alien is removable, regardless of the length of the sentence for the offense. The Ninth Circuit's declaration that Section 16(b) is unconstitutionally vague as incorporated into the INA's definition of "aggravated felony" throws into serious question whether DHS may invoke that provision where the predicate crime falls within Section 16(b).

Finally, the Ninth Circuit's holding threatens the government's ability to prosecute criminal aliens convicted of crimes of violence who illegally reenter the United States. See 8 U.S.C. 1326. Under Ninth Circuit precedent, an alien may defeat a prosecution for illegal reentry by showing that the finding of removability was legally invalid. See, *e.g.*, *United States* v. *Aguilera-Rios*, 769 F.3d 626 (2014); *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (2004). The Ninth Circuit's invalidation of Section 16(b), as incorporated into the aggravated-felony definition, will thus inevitably invite a host of new challenges to illegal-reentry prosecutions.

b. The holdings of the Seventh and Ninth Circuits also threaten to impede non-INA criminal prosecutions in those circuits. As discussed, Section 16 supplies a general definition of "crime of violence" for the United States Criminal Code. For that reason, the definition applies to numerous provisions of Title 18, including provisions covering such areas as money laundering, racketeering, domestic violence, and crimes against children.[7] In addition, the frequently

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[7] See 18 U.S.C. 25(a)(1), 119(b)(3), 931(a)(1), 1956(c)(7)(B)(ii), 3181(b)(1), 3663A(c)(1)(A)(i) (provisions expressly incorporating Section 16); see also 18 U.S.C. 842(p)(2), 929(a)(1), 1039(e)(1),

prosecuted offense set out in 18 U.S.C. 924(c)—using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a crime of violence or drug-trafficking offense—employs a definition of "crime of violence" that is materially identical in wording. 18 U.S.C. 924(c)(3)(B); see 18 U.S.C. 844(*o*), 1028(b)(3)(B), 4042(b)(3)(B) (provisions incorporating Section 924(c)(3)'s definition).

The decisions of the Seventh and Ninth Circuits have created a cloud of uncertainty over the lawfulness of criminal prosecutions and sentencing enhancements under those provisions. Although the Ninth Circuit majority stated that its decision did not reach any application of Section 16(b) other than its incorporation into the INA's definition of "aggravated felony," see App., *infra*, 20a n.17, the Ninth Circuit has already applied its decision to Sentencing Guidelines provisions that refer to the aggravated-felony definition. See *United States* v. *Hernandez-Lara*, 817 F.3d 651, 652-653 (Mar. 29, 2016) (per curiam). The decision has also engendered considerable uncertainty about the constitutionality of criminal provisions sharing Section 16(b)'s language. Indeed, the decision below prompted a district court in the Ninth Circuit to vacate five convictions under Section 924(c), including one for death caused by use of a firearm during a crime of violence. See *United States* v. *Lattanaphom*, CR No. 99-433, 2016 WL 393545, at *3-*6 (E.D. Cal. Feb. 2, 2016) (government's notice of appeal filed Feb. 22, 2016).[8]

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1952(a), 1959(a)(4), 2250(d), 2261(a), 3142(f), 3559(f), 3561(b) (provisions using term "crime of violence").

[8] The question whether Section 924(c)(3)(B) is unconstitutionally vague is currently pending in the Ninth Circuit. See, *e.g.*, *United*

* * * * *

The Ninth Circuit's divided decision held unconstitutional on its face an important definitional provision in an Act of Congress that applies to many immigration and criminal provisions. It did so even though this Court has already authoritatively construed Section 16(b) and even though Section 16(b) shares few of the textual features and none of the tortured interpretive history that this Court found constitutionally fatal in *Johnson* with respect to the ACCA's residual clause. This Court's review is warranted.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2016

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*States* v. *Gaytan*, No. 14-10167 (oral argument scheduled for June 15, 2016); *United States* v. *Andrade*, No. 14-10226 (same).

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 11-71307

JAMES GARCIA DIMAYA, PETITIONER

*v.*

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

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Argued and Submitted: Sept. 1, 2015
Filed: Oct. 19, 2015

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**OPINION**

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Before: STEPHEN REINHARDT, KIM MCLANE WARDLAW, and CONSUELO M. CALLAHAN, Circuit Judges.

REINHARDT, Circuit Judge:

Petitioner James Garcia Dimaya seeks review of the Board of Immigration Appeals' (BIA) determination that a conviction for burglary under California Penal Code Section 459 is categorically a "crime of violence" as defined by 8 U.S.C. § 1101(a)(43)(F), a determination which rendered petitioner removable for having been convicted of an aggravated felony. During the pendency of petitioner's appeal, the United States Supreme Court decided *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which held that the Armed Career

Criminal Act's ("ACCA") so-called "residual clause" definition of a "violent felony" is unconstitutionally vague. In this case, we consider whether language similar to ACCA's residual clause that is incorporated into § 1101(a)(43)(F)'s definition of a crime of violence is also void for vagueness. We hold that it suffers from the same indeterminacy as ACCA's residual clause and, accordingly, grant the petition for review.

**I**

Petitioner, a native and citizen of the Philippines, was admitted to the United States in 1992 as a lawful permanent resident. In both 2007 and 2009, petitioner was convicted of first-degree residential burglary under California Penal Code section 459 and sentenced each time to two years in prison. If a non-citizen is convicted of an aggravated felony, he is subject to removal. 8 U.S.C. § 1227(a)(2)(A)(iii). Citing petitioner's two first-degree burglary convictions, the Department of Homeland Security ("DHS") charged that petitioner was removable because he had been convicted of a "crime of violence . . . for which the term of imprisonment [was] at least one year"—an aggravated felony under 8 U.S.C. § 1101(a)(43)(F).[1] That statute defines a "crime of vio-

[1] DHS also charged that petitioner was removable for having committed two crimes of moral turpitude, *see* 8 U.S.C. § 1227(a)(2)(A)(ii), and for having committed a "theft offense . . . or burglary offense for which the term of imprisonment [was] at least one year"—an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). Although the Immigration Judge (IJ) agreed with DHS that petitioner was removable on either of these two grounds, the Board of Immigration Appeals (BIA) dismissed petitioner's appeal on the sole ground that he was removable for having committed a crime of violence under 8 U.S.C. § 1101(a)(43)(F).

lence" by reference to 18 U.S.C. § 16, which provides the following definition:

> (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.

The Immigration Judge (IJ) agreed with DHS that first-degree burglary in California is a crime of violence. Citing § 16(b) and *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990), the IJ explained that "unlawful entry into a residence is by its very nature an offense where is apt to be violence [sic], whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon." Because the charging documents for each conviction alleged an unlawful entry, and because the term of imprisonment for each conviction was greater than one year, the IJ determined that these convictions were crimes of violence. On the basis of this conclusion, the IJ held that petitioner was removable and ineligible for any relief. The BIA dismissed petitioner's appeal on the same ground. Citing § 16(b) and *Becker*, the BIA concluded that "[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force," and therefore affirmed the IJ's

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Therefore, whether the relevant definition of a "crime of violence" is constitutional is the only issue we reach.

holding that petitioner was convicted of a crime of violence.[2]

Petitioner filed a timely petition with this Court for review of the BIA's decision. After the parties argued this case, the United States Supreme Court decided *Johnson* and, because the definition of a crime of violence that the BIA relied on in this case is similar to the unconstitutional language in ACCA's residual clause,[3] we ordered supplemental briefing and held a supplemental oral argument regarding whether § 16(b), as incorporated into the INA, is also unconstitutionally vague. We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review questions of law, including whether language in the immigration statutes is void for vagueness. *See Alphonsus v. Holder*, 705 F.3d 1031, 1036-37 (9th Cir. 2013). That question, as a pure question of law, receives *de novo* review from this Court. *Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 (9th Cir. 2010).

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[2] Notwithstanding the fact that the BIA appeared to consider only the petitioner's 2007 conviction, the government argues in this case that both of petitioner's first-degree burglary convictions are crimes of violence under 18 U.S.C. § 16(b). This discrepancy is immaterial, as the same analysis applies to both convictions.

[3] The subsection of ACCA that includes the residual clause defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . 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.*" 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). As the Court noted in *Johnson*, the italicized words of this definition are known as the residual clause. 135 S. Ct. at 2555-56.

## II

The Fifth Amendment's Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Alphonsus*, 705 F.3d at 1042 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). Although most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the criteria for deportation. *Jordan v. De George*, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951) ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation."); *see also A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239, 45 S. Ct. 295, 69 L. Ed. 589 (1925) ("The defendant attempts to distinguish [prior vagueness] cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.").

Previously, we have recognized the vagueness doctrine's applicability in the context of withholding of removal "because of the harsh consequences attached to . . . denial of withholding of removal." *Alphonsus*, 705 F.3d at 1042 (citing *Jordan*, 341 U.S. at 230-31, 71 S. Ct. 703). In this case, Petitioner challenges a statute as unconstitutionally vague in the context of denial of cancellation of removal.

For due process purposes, this context is highly analogous to denial of withholding of removal because both

pose the harsh consequence of almost certain deportation. Under withholding of removal, a non-citizen who is otherwise removable cannot be deported to his home country if he establishes that his "life or freedom would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Under cancellation of removal, immigration authorities may cancel the removal of a lawful permanent resident who satisfies certain criteria based on length of residency, good behavior, and exceptional hardship. *Id.* § 1229b(b)(1). Non-citizens who commit certain criminal offenses are ineligible for these forms of relief. *See id.* §§ 1231(b)(3)(B)(ii), 1229b(b)(1)(C). As with denial of withholding of removal, then, denial of cancellation of removal renders an alien ineligible for relief, making deportation "a virtual certainty." *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011).

The government argues that our circuit's reliance on *Jordan* "is misguided as *Jordan* did not authorize vagueness challenges to deportation statutes." We find this suggestion baffling. *Jordan* considered whether the term "crime involving moral turpitude" in section 19(a) of the Immigration Act of 1917, a type of offense that allowed for a non-citizen to "be taken into custody and *deported*," was void for vagueness. 341 U.S. at 225-31, 71 S. Ct. 703 (emphasis added). In considering this challenge, the Court explicitly rejected the argument that the vagueness doctrine did not apply. *Id.* at 231, 71 S. Ct. 703. The government also argues that subsequent Supreme Court decisions rejected due process challenges to various immigration statutes. *See Marcello v. Bonds*, 349 U.S. 302, 314, 75 S. Ct. 757, 99 L. Ed. 1107 (1955); *Galvan v. Press*, 347 U.S. 522, 530-31, 74 S. Ct. 737, 98

L. Ed. 911 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-91, 72 S. Ct. 512, 96 L. Ed. 586 (1952). None of these cases, however, suggests that the Due Process Clause does not apply to deportation proceedings. Nor could they, for it "is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003) (internal quotation marks omitted).

As the Supreme Court recognized in *Jordan*, a necessary component of a non-citizen's right to due process of law is the prohibition on vague deportation statutes. Recently, the Supreme Court noted the need for "efficiency, fairness, and predictability in the administration of immigration law." *Mellouli v. Lynch*, — U.S. —, 135 S. Ct. 1980, 1987, 192 L. Ed. 2d 60 (2015). Vague immigration statutes significantly undermine these interests by impairing non-citizens' ability to "anticipate the immigration consequences of guilty pleas in criminal court." *Id.* (internal quotation marks omitted); *see also Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) ("[A]ccurate legal advice for noncitizens accused of crimes has never been more important" because "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)). For these reasons, we reaffirm that petitioner may bring a void for vagueness challenge to the definition of a "crime of violence" in the INA.[4]

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[4] Several other Circuit Courts of Appeals have also entertained void for vagueness challenges to immigration statutes. *See*

**III**

To understand *Johnson*'s effect on this case, it is helpful to view § 16(b), as incorporated into the INA, alongside the residual clause at issue in *Johnson*. The INA provides for the removal of non-citizens who have been "convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Its definition of an aggravated felony includes numerous offenses, including "a crime of violence (as defined in section 16 of Title 18 . . . )." 8 U.S.C. § 1101(a)(43)(F). The subsection of 18 U.S.C. § 16 that the BIA relied on in this case defines a crime of violence as an "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." 18 U.S.C. § 16(b). Had Congress written out the relevant definition in full instead of relying on cross-referencing, a lawful permanent resident would be removable if "convicted of an 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" (emphasis added). The language in ACCA that *Johnson* held unconstitutional is similar. The ACCA provision defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year [i.e., a felony] . . . that . . . *involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). Importantly, both the provision at issue here and ACCA's residual clause are subject to the same mode of analysis.

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*Mhaidli v. Holder*, 381 Fed. Appx. 521, 525-26 (6th Cir. 2010) (unpublished); *Arriaga v. Mukasey*, 521 F.3d 219, 222 (2d Cir. 2008); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008).

Both are subject to the categorical approach, which demands that courts "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime."[5] *Leocal v. Ashcroft*, 543 U.S. 1, 7, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). Specifically, courts considering both § 16(b) and the residual clause must decide what a "'usual or ordinary' violation" of the statute entails and then determine how great a risk of injury that "ordinary case" presents. *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 854 (9th Cir. 2013) (quoting *United States v. Ramos-Medina*, 706 F.3d 932, 938 (9th Cir. 2013)).

In *Johnson*, the Supreme Court recognized two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." 135 S. Ct. at 2557. First,

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[5] Although it is largely irrelevant for the purposes of this case, the dissent's characterization of the categorical approach is incorrect. The dissent correctly explains that categorical approach cases such as *Descamps v. United States*, — U.S. —, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), and *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990) hold that a state conviction must include all elements of the equivalent federal generic offense to qualify as a violent felony. The dissent then goes on to assert, incorrectly, that those cases, which deal with ACCA, shed light on how to interpret § 16(a). *Taylor*, *Shepard*, and *Descamps* tell us nothing about § 16(a), however, because they do not interpret § 924(e)(2)(B)(i)—the subsection of ACCA with language identical to § 16(a). Instead, those cases consider a different subsection—the list of *enumerated felonies* that appears in § 924(e)(2)(B)(ii), of which burglary is one. *See Descamps*, 133 S. Ct. at 2281; *Shepard*, 544 U.S. at 16-17, 125 S. Ct. 1254; *Taylor*, 495 U.S. at 581-82, 110 S. Ct. 2143. Because § 16 does not include any enumerated felonies in either subsection (a) or (b), those cases are inapplicable.

the Court explained, the clause left "grave uncertainty" about "deciding what kind of conduct the 'ordinary case' of a crime involves." *Id.* That is, the provision "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges" because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, the Court stated, ACCA's residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. By combining these two indeterminate inquiries, the Court held, "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[6] *Id.* On that ground it held the residual clause void for vagueness. The Court's reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA. The result is that because of the same combination of indeterminate inquiries, § 16(b) is subject to identical unpredictability and arbitrariness as ACCA's residual clause. In sum, a careful analysis of the two

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[6] The dissent essentially agrees with this reading except that it argues that *Johnson* "only prohibits uses [of § 16(b)] that leave uncertain both how to estimate the risk and amount of risk necessary to qualify as a violent crime." Nothing in *Johnson*, however, suggests that the Court considered the constitutionality of ACCA's residual clause in reference to the crime Johnson actually committed. To the contrary, the Court never discussed Johnson's predicate offense—unlawful possession of a short-barreled shotgun—but instead held in absolute terms that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson*, 135 S. Ct. at 2563. *Johnson* therefore clearly holds that the residual clause is unconstitutionally vague in all instances, not just for some subset of crimes.

sections, the one at issue here and the one at issue in *Johnson*, shows that they are subject to the same constitutional defects and that *Johnson* dictates that § 16(b) be held void for vagueness.

**A**

In *Johnson*, the Supreme Court condemned ACCA's residual clause for asking judges "to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-58. To illustrate its point, the Court asked rhetorically whether the "ordinary instance" of witness tampering involved "offering a witness a bribe" or instead "threatening a witness with violence." *Id.* at 2557; *see also id.* at 2558 (It is just as likely that "a violent encounter may ensue" during an attempted burglary as it is that "any confrontation that occurs . . . 'consist[s] of nothing more than the occupant's yelling "Who's there?" from his window, and the burglar's running away.'" (quoting *James v. United States*, 550 U.S. 192, 211, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007), and *id.* at 226, 127 S. Ct. 1586 (Scalia, J., dissenting))).[7]

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[7] "Does the ordinary burglar invade an occupied home by night or an unoccupied home by day?" *Johnson*, 135 S. Ct. at 2558. It seems that one arrives at a different answer about what the "ordinary case" of burglary involves whether one uses "[g]ut instinct" or "statistical analysis." *Id.* at 2557 (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)). Although many people surely imagine the possibility of a violent encounter when they picture burglary, recent government statistics show that only about seven percent of burglaries nationwide involved incidents of violence. Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglaries* 1 (Sept. 2010), http://www.bjs.gov/content/pub/pdf/vdhb.pdf. Such statistics only high-

As with ACCA's residual clause, the INA's crime of violence provision requires courts to "inquire whether 'the conduct encompassed by the elements of the offense, in the ordinary case, presents'" a substantial risk of force. *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1128 (9th Cir. 2012) (quoting *James*, 550 U.S. at 208, 127 S. Ct. 1586); *see also Rodriguez-Castellon*, 733 F.3d at 854. We see no reason why this aspect of *Johnson* would not apply here, and indeed the government concedes that it does. As with the residual clause, the INA's definition of a crime of violence at issue in this case offers "no reliable way to choose between these competing accounts" of what a crime looks like in the ordinary case. *Johnson*, 135 S. Ct. at 2558.

**B**

In many circumstances, of course, statutes require judges to apply standards that measure various degrees of risk. *See* Supplemental Brief for Respondent at 1a, *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (No. 13-7120) (cataloguing federal statutes). The vast majority of those statutes pose no vagueness problems because they "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."[8] *Johnson*, 135 S. Ct. at 2561. The sta-

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light the arbitrary nature of this inquiry, even in the seemingly easy case of burglary.

[8] The dissent argues that any "person intent on committing a burglary inherently contemplates the risk of using force should his nefarious scheme be detected" and then asks "Is this not what the Supreme Court was referring to when it noted 'we do not doubt the constitutionality of laws that call for application of a qualitative standard such as "substantial risk" to real-world conduct?'" Dissent at 1126 (quoting *Johnson*, 135 S. Ct. at 2561). Plainly not. As the dissent's use of the word "inherently" proves, the dissent's

tute at issue in *Johnson* was not one of those statutes, however. Nor is the provision at issue here. If the uncertainty involved in describing the "ordinary case" of a crime was not enough, its combination with the uncertainty in determining the degree of risk was. ACCA's violent felony definition requires judges to apply "an imprecise 'serious potential risk'[9] standard . . . to [the] judge-imagined abstraction" of a crime in the ordinary case. *Id.* at 2558. The same is equally true of the INA's definition of a crime of violence at issue here. Section 16(b) gives judges no more guidance than does the ACCA provision as to what constitutes a substantial enough risk of force to satisfy the statute. Accordingly, *Johnson*'s holding with respect to the imprecision of the serious potential risk standard is also clearly applicable to § 16(b). As with ACCA's residual clause, § 16(b)'s definition of a crime of violence, combines "indeterminacy about how to measure the risk posed by a crime with indeterminacy

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argument does not rest on the facts of an actual burglary but instead on the dissent's conception of burglary in the ordinary case. A statute that allowed courts to evaluate the record to determine whether a defendant actually engaged in violence would fall within the language the dissent cites. However, as the Supreme Court has repeatedly made clear, when applying the categorical approach that ACCA and § 16(b) demand, courts must consider "what offense the noncitizen was 'convicted of' . . . not what acts he committed." *Moncrieffe*, 133 S. Ct. at 1678.

[9] ACCA's residual clause required courts to evaluate whether an offense posed "a serious potential risk" while the relevant INA definition asks whether an offense poses "a substantial risk." *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with id.* § 16(b). Measuring whether an offense poses a "substantial" risk, however, is no less arbitrary than measuring whether it poses a "serious potential" one, and the government offers no suggestion to the contrary.

about how much risk it takes for the crime to qualify as" a crime of violence.[10] 135 S. Ct. at 2558.

**C**

Notwithstanding the undeniable identity of the constitutional defects in the two statutory provisions, the government and dissent offer several unpersuasive ar-

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[10] At the supplemental oral argument, the government argued that two recent decisions from other circuit courts of appeals conflict with our holding in this case. *See Ortiz v. Lynch*, 796 F.3d 932 (8th Cir. 2015); *United States v. Fuertes*, No. 13-4755, 805 F.3d 485, 2015 WL 4910113 (4th Cir. Aug. 18, 2015). Neither case, however, is of any help to the government. The Eighth Circuit noted that *Ortiz* "does not implicate the analysis in" *Johnson* because, in *Ortiz*, the government argued that the petitioner's conviction qualified as a crime of violence under § 16(a), a completely different statutory definition. *Ortiz*, 796 F.3d at 935-36 & n.2. Indeed § 16(a) is highly similar to analogous language in ACCA, 18 U.S.C. § 924(e)(2)(B)(i), that *Johnson* left untouched. 135 S. Ct. at 2563 ("Today's decision does not call into question . . . the remainder of the Act's definition of a violent felony."). *Fuertes* is of even less help, if possible. There, the Fourth Circuit held that it did not need to reach the question whether *Johnson* applied to language similar to § 16(b) that appears in 18 U.S.C. § 924(c)(3)(B) because, in any case, the defendant's offense did not satisfy the statutory language in question. *See Fuertes*, 805 F.3d at 499-501 & 499 n.5, 2015 WL 4910113 at *9-10 & 9 n.5. Finally, the dissent cites *In re Gieswein*, No. 15-6138, 802 F.3d 1143, 2015 WL 5534388 (10th Cir. Sept. 21, 2015), in which the Tenth Circuit noted that the "definition [that survived *Johnson* ] of 'violent felony' under the ACCA includes a felony conviction for 'burglary.'" *Id.* at 491 n.2, 2015 WL 4910113 at *2 n.2. Yes, but only because the portion of ACCA that survived includes a list of four enumerated felonies, of which burglary is one. That, after *Johnson*, ACCA continues to cover burglary through one of its enumerated offenses says nothing about whether § 16(b) can be constitutionally applied to burglary or any other offense.

guments in an attempt to save the INA provision at issue in this case. First, the government and dissent argue that the Supreme Court found ACCA's standard to be arbitrary in part because the residual clause "force[d] courts to interpret 'serious potential risk' in light of the four enumerated crimes" in the provision,[11] crimes which are "far from clear in respect to the degree of risk each poses." *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 143, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008) (internal quotation marks omitted)). It is true that, after the Court set forth its holding in *Johnson*, it cited the provision's four enumerated offenses in responding to the government's argument that the Court's holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term "serious potential risk." *Id.* at 2561. In doing so, however, it stated that while the listed offenses added to the uncertainty, the fundamental reason for the Court's holding was the residual clause's "application of the 'serious potential risk' standard to an idealized ordinary case of the crime."[12] *Id.* In short, this response clearly reiterated that what distinguishes

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[11] The relevant provision of ACCA defined a "violent felony" as any 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." 18 U.S.C. § 924(e)(2)(B)(ii). As noted above in footnote 3, the "residual clause" is defined as the portion of provision that follows "explosives."

[12] The Solicitor General's brief in *Johnson* also recognized that because section 16(b), as applied in the INA, "requires a court to identify the ordinary case of the commission of the offense," it is "equally susceptible to [Johnson's] central objection to the residual clause." Supplemental Brief for Respondent at 22-23, *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (No. 13-7120).

ACCA's residual clause from many other provisions in criminal statutes was, consistent with its fundamental holding, the use of the "ordinary case" analysis. *Johnson* therefore made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses.[13]

Next, the government argues that ACCA's residual clause requires courts to consider the risk that would arise after completion of the offense, *see Johnson*, 135 S. Ct. at 2557, and that § 16(b) applies only to violence occurring "in the course of committing the offense," 18 U.S.C. § 16(b). First, we doubt that this phrase actually creates a distinction between the two clauses. For example, we have consistently held that California's burglary statute (the very statute at issue in this case) is a crime of violence for the purposes of the INA precisely because of the risk that violence will ensue after the defendant has committed the acts necessary to constitute the offense. *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (describing the risk that a burglar "will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension" (quoting

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[13] Although *Johnson* concluded that the enumerated offenses added to the residual clause's indeterminacy, it could well be argued that, if anything, § 16(b) is more vague than the residual clause because of its lack of enumerated examples. To be sure, ACCA's enumerated examples are "far from clear in respect to the degree of risk each poses." *Johnson*, 135 S. Ct. at 2558. However, they provide at least *some* guidance as to the sort of offenses Congress intended for the provision to cover. Section 16(b), by contrast, provide no such guidance at all.

*Becker*, 919 F.2d at 571)).[14] By the time the risk of physical force against an occupant arises, however, the defendant has frequently already satisfied the elements of the offense of burglary under California law. *See* Cal. Penal Code § 459 (defining burglary as "enter[ing] any house, room, apartment, [etc.] . . . with intent to commit grand or petit larceny or any felony"). More important, even if such a distinction did exist, it would not save the INA's definition of a crime of violence from unconstitutionality. The Court, in *Johnson*, held ACCA's residual clause to be unconstitutionally vague because it combined the indeterminate inquiry of "how to measure the risk posed by a crime" in the ordinary case with "indeterminacy about how much risk it takes for the crime to qualify as a violent felony." 135 S. Ct. at 2558. This reasoning applies equally whether the inquiry considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense.[15]

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[14] In holding that burglary under California law constituted a crime of violence in *Lopez-Cardona*, we were not asked to consider the question of § 16(b)'s constitutionality; nor did we do so. For the same reason, the dissent's lengthy discussion of this court's prior holdings regarding burglary and § 16(b) is irrelevant. Here, we do not consider what offenses fall within § 16(b) but instead whether the provision may be constitutionally applied. That latter question is answered here and, as a result, all of our prior cases relating to which offenses fall within the scope of that provision are to that extent of no further force or effect.

[15] The government also suggested at the supplemental oral argument that our decision in this case would require holding that *Johnson* overruled *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004), which stated in dicta that burglary is the

The government also argues that § 16(b) has not generated the same degree of confusion among courts that ACCA's residual clause generated. It notes that, in contrast to the five residual clause cases that the Supreme Court has decided in addition to *Johnson*, the Court has decided only a single case interpreting section 16(b). *See Leocal*, 543 U.S. at 10-11, 125 S. Ct. 377. That the Supreme Court has decided more residual clause cases than § 16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application. We can discern very little regarding the merits of an issue from the composition of the Supreme Court's docket. The Court has

> repeatedly indicated that a denial of certiorari means only that, for one reason or another which is

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"classic example" of an offense that would satisfy § 16(b). *Id.* at 10, 125 S. Ct. 377. The dissent now adopts a related argument: that this statement from *Leocal* proves that "there is no unconstitutional vagueness in this case." Dissent at 1129. In deciding whether the offense of "driving under the influence of alcohol . . . and causing serious bodily injury" qualified as a crime of violence, however, *Leocal* said nothing about whether the statutory language in § 16(b) is void for vagueness. Moreover, *Johnson* casts doubt on the notion that burglary could easily be characterized as a crime that involves a substantial risk of violence under § 16(b). *See* 135 S. Ct. at 2557 ("The act of . . . breaking and entering into someone's home does not, in and of itself, normally cause physical injury."). Finally, even if there were some "straightforward cases" or categories of cases under § 16(b), *Johnson* squarely rejected the argument that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp," *id.* at 2561-62, and clearly stated that the residual clause was void for vagueness in all applications, *id.* at 2563. There is therefore no need in this opinion to consider the continued validity of the statement in *Leocal* cited by the government and dissent.

> seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.

*Daniels v. Allen*, 344 U.S. 443, 492, 73 S. Ct. 437, 97 L. Ed. 469 (1953); *see also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973) (describing the "well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits"). Moreover, the Supreme Court in recent years has decided substantially more federal criminal appeals than immigration appeals. The Court's history of deciding ACCA residual clause cases in greater numbers than INA crime of violence cases is thus consistent with its greater interest in federal criminal cases than in immigration cases. In fact, over this period the ratio of federal criminal cases to immigration cases significantly exceeds the ratio of ACCA residual clause cases to INA crime of violence cases on which the government relies.[16]

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[16] During the nine terms preceding the 2015 term, the Supreme Court decided a total of 85 federal criminal appeals versus only 12 immigration appeals. These statistics come from the Harvard Law Review, which compiles statistics each year after the completion of the Supreme Court term. Every version of "The Statistics" includes a table that records the number of cases decided each year by "subject matter." They are available at http://harvardlawreview.org/category/statistics/.

## IV

In *Johnson*, the Supreme Court held that ACCA's residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates" by "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." 135 S. Ct. at 2558. Although the government can point to a couple of minor distinctions between the text of the residual clause and that of the INA's definition of a crime of violence, none undermines the applicability of *Johnson*'s fundamental holding to this case. As with ACCA, section 16(b) (as incorporated in 8 U.S.C. § 1101(a)(43)(F)) 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. Together, under *Johnson*, these uncertainties render the INA provision unconstitutionally vague.[17]

We **GRANT** the petition for review and **REMAND** to the BIA for further proceedings consistent with this opinion.

CALLAHAN, Circuit Judge, dissenting:

Contrary to the majority's perspective, the Supreme Court's opinion in *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), does not infect 18 U.S.C. § 16(b)—or other statutes—with unconstitutional

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[17] Our decision does not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence.

vagueness. Rather, the Supreme Court carefully explained that the statute there in issue, a provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague for two specific reasons: the clause (1) "leaves grave uncertainty about how to estimate the risk posed by a crime"; and (2) "leaves uncertainty about how much risk it takes for a crime to qualify as a violent crime." *Id.* at 2557-58. In contrast, § 16(b), as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of these shortcomings. The majority's contrary conclusion fails to appreciate the purpose of § 16(b), elevates the Supreme Court's reference to "ordinary cases" from an example to a rule, and ignores the Court's statement that it was not calling other statutes into question (which explains why the Court did not even mention *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)). Accordingly, I dissent.

Our criminal and immigration laws are not as simple as the majority opinion implies. Accordingly, I first describe the purpose of § 16 and how courts have interpreted the statute, before reviewing the Supreme Court's decision in *Johnson*, and concluding that the twin concerns expressed by the Supreme Court in *Johnson* do not infect § 16(b).

**I.**

Title 18 U.S.C. § 16 contains two distinct definitions of "crime of violence," with distinct purposes, effects, and judicial pedigrees. Subsection (a) defines "crime of violence" as "an offense that has as an *element* the use, attempted use, or threatened use of physical force against the person or property of another." (emphasis added). Subsection (b) sets forth a distinct definition that covers offenses that are not within subsection (a)'s definition. It

states that "crime of violence" means "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." It follows that an offense that is a "crime of violence" under subsection (a) also meets the criteria in subsection (b), but that subsection (b) covers offenses that do not meet the criteria in subsection (a). These subsections serve different functions with different consequences.

An appreciation of the differences between the subsections and their roles informs my understanding of the Supreme Court's opinions in *Descamps v. United States*, — U.S. —, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), and *Moncrieffe v. Holder*, — U.S. —, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013). Although the terms "crime of violence," "violent felony," and "aggravated felonies" may appear to be synonymous to a lay person, courts have recognized that, as used in their statutory contexts, they are distinct terms of art covering distinct acts with different legal consequences.

**A.**

In *Descamps*, the Government sought an enhancement of Descamps' sentence under the ACCA, 18 U.S.C. § 924(e), on the basis that his California conviction for burglary was a "violent felony."[1] *Descamps*, 133 S. Ct. at

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[1] The statute, 18 U.S.C. § 924(e)(2)(B), reads, in relevant part:

> the term "violent felony" means 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—(i)

2281-82. In *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the Supreme Court had established a "rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses." *Descamps*, 133 S. Ct. at 2283. In other words, *Taylor* focused on whether the state crime and the enumerated federal predicate offense had the same elements. In *Taylor*, the Court first determined the federal definition of burglary, and then considered how courts were to determine whether a state conviction met that definition.[2] The Court, concerned with the substantive and practical problems of determining that the state conviction met the criteria for a federal offense, set forth a "categorical approach" instructing sentencing courts to look at the statutory definitions and not to the particular facts underlying a conviction.[3] *Des-*

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has as an element the use, attempted use, or threatened use of physical force against the person of another; or (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.

[2] In *Taylor*, the Court stated: "[w]e conclude that a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. at 599, 110 S. Ct. 2143.

[3] In *Taylor*, the Supreme Court noted:

> Our present concern is only to determine what offenses should count as "burglaries" for enhancement purposes. The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" under § 924(e)(2)(B)(ii).

*camps*, 133 S. Ct. at 2283 (citing *Taylor*, 495 U.S. at 600, 110 S. Ct. 2143).

In *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), the Court had established the "modified categorical approach," which allows a sentencing court to scrutinize a restricted set of materials to determine whether a state conviction matches the generic federal offense. The Supreme Court later explained in *Descamps* that the modified categorical approach was a tool "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense."[4] 133 S. Ct. at 2285. The Court reiterated that its "elements-centric" approach was based on three grounds: (1) "it comports with ACCA's test and history"; (2) "it avoids the Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries"; and (3) "it averts

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495 U.S. at 600 n.9, 110 S. Ct. 2143.

[4] The Supreme Court explained:

> The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different . . . crimes." *Nijhawan* [*v. Holder*], 557 U.S. [29] 41 [129 S. Ct. 2294, 174 L. Ed. 2d 22 (2009)]. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of.

*Descamps*, 133 S. Ct. at 2285.

the practical difficulties and potential unfairness of a factual approach." *Id.* at 2287 (internal citation omitted).

Similar concerns with fairness underlie the Supreme Court's opinion in *Moncrieffe*, 133 S. Ct. 1678. The Court stated that it granted certiorari "to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both [21 U.S.C.] § 841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that 'proscribes conduct punishable as a felony under' the CSA [Controlled Substance Act]." *Id.* at 1684. This, in turn, required a determination of whether the state conviction qualified as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*[5] *Id.* The Court, accordingly, applied the categorical approach "to determine whether the state offense is comparable to an offense listed in the INA." *Id.* It explained that in order to satisfy the categorical approach, the state drug offense "must 'necessarily' proscribe conduct that is an offense under the CSA, and the CSA must 'necessarily' prescribe felony punishment for that offense." *Id.* at 1685. The Court concluded that Moncrieffe's state conviction failed to meet this standard, and accordingly, he was not convicted of an aggravated felony. *Id.* at 1687.

In both *Descamps* and *Moncrieffe*, the critical inquiry was whether the underlying state criminal conviction fit

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[5] The INA provides that an alien "convicted of an aggravated felony" is removable, § 1227; is not eligible for asylum, § 1158(b)(2)(a)(ii); and is not eligible for cancellation of removal or adjustment of status, § 1229b(a)(3).

within a generic federal definition of a crime so that a defendant could be expected to have asserted all relevant defenses in his state trial. The underlying concerns had been set forth by the Supreme Court in *Shepard*:

> Developments in the law since *Taylor*, and since the First Circuit's decision in [*United States v.*] *Harris* [964 F.2d 1234 (1st Cir. 1992)], provide a further reason to adhere to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction "necessarily" involved (and a prior plea necessarily admitted) facts equating to generic burglary. The *Taylor* Court, indeed, was prescient in its discussion of problems that would follow from allowing a broader evidentiary enquiry. "If the sentencing court were to conclude, from its own review of the record, that the defendant [who was convicted under a nongeneric burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?" 495 U.S. at 601, 110 S. Ct. 2143. The Court thus anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant. *Jones v. United States*, 526 U.S. 227, 243, n.6 [119 S. Ct. 1215, 143 L. Ed. 2d 311] (1999); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 [120 S. Ct. 2348, 147 L. Ed. 2d 435] (2000).

544 U.S. at 24, 125 S. Ct. 1254 (alteration in original). Thus, for purposes such as sentencing under the ACCA, a state conviction is only an aggravated felony under § 16(a)

if the court can fairly conclude that the conviction included all the elements of a federal offense.

**B.**

While 18 U.S.C. § 16(a) looks to whether the state conviction contained the elements of a federal offense, the Supreme Court and the circuit courts have recognized that § 16(b) asks a different question with different parameters and consequences. In *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377, a unanimous Court held that a Florida conviction for driving under the influence of alcohol was not a crime of violence under § 16(a) or § 16(b). *Id.* at 4, 125 S. Ct. 377. The opinion describes § 16(b) as follows:

> Section 16(b) sweeps more broadly than § 16(a), defining a crime of violence as including "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." But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. . . . The classic example is burglary. A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

543 U.S. at 10, 125 S. Ct. 377 (footnote omitted). Thus, when applying § 16(b), courts do not ask whether the state

conviction contained the elements of a federal offense, but whether there was a "risk that the use of physical force against another might be required in committing" the state crime. 18 U.S.C. § 16(b).

We most recently recognized this distinct treatment of § 16(b) in *Rodriguez-Castellon v. Holder*, 733 F.3d 847 (9th Cir. 2013). In this opinion, rendered after the Supreme Court issued its decision in *Descamps*, we explained:

> Under 18 U.S.C. § 16, the phrase "crime of violence" has two meanings. First, under § 16(a), a state crime of conviction is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." . . . Second, even if the state crime does not include one of the elements listed in § 16(a), it is a "crime of violence" under § 16(b) if it is: (i) a felony; and (ii) "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). The Supreme Court has explained that § 16(b) criminalizes conduct that "naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004).

733 F.3d at 853-54.

Our holding in *Rodriguez-Castellon* is consistent with our prior opinions recognizing that first-degree burglary under California Penal Code § 459 remains an "aggravated felony" under § 16(b) even if the state crime did not include an element of the federal crime and thus

was not an "aggravated felony" under § 16(a). *See United States v. Ramos-Medina*, 706 F.3d 932, 937-38 (9th Cir. 2013).

In *Chuen Piu Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011), we explained:

> The question for decision, then, is whether Kwong's [burglary] offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of [its commission]." 18 U.S.C. § 16(b).
>
> We answered that question in the affirmative some time ago in *United States v. Becker*, 919 F.2d 568, 573 (9th Cir. 1990), where we held that "first-degree burglary under California law is a 'crime of violence'" as defined by 18 U.S.C. § 16(b). *See also United States v. Park*, 649 F.3d 1175, 1178-79 (9th Cir. 2011). We pointed out in *Becker* that "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." 919 F.2d at 571 (footnote omitted).[6]

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[6] In response to Kwong's argument that California's definition of first-degree burglary is broader than the generic federal definition, the Ninth Circuit held:

> These arguments are foreclosed, however, by our recent decision in *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011). *Lopez-Cardona* flatly held that, under *Becker*, first-degree burglary in violation of California Penal Code § 459 was a crime of violence within the meaning of 18 U.S.C. § 16(b). *Id.* at 1113. It also held that *Aguila-Montes* had

*Id.* at 878.

Similarly, in *United States v. Avila*, 770 F.3d 1100, 1105 (4th Cir. 2014), the Fourth Circuit concluded that "California first-degree burglary qualifies as a crime of violence under the residual clause of 18 U.S.C. § 16(b)." It held that it need look no further than the Supreme Court's opinion in *Leocal*, 543 U.S. at 10, 125 S. Ct. 377, in concluding that burglary was the classic example of an offense covered by § 16(b).

Thus, the Supreme Court, our prior decisions, and the Fourth Circuit, all recognize that the inquiries under § 16(a) and § 16(b) are distinct, and that even though a state conviction for burglary may not include an element of a generic federal offense, as required to come within § 16(a), a burglary conviction nonetheless involves a substantial risk of physical force, and thus is covered by § 16(b).

**II.**

Having set forth the scope of § 16(b) and the courts' treatment of the section, I turn to the Supreme Court's opinion in *Johnson*.

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no effect on that conclusion because *Aguila-Montes* was based on a different definition of "crime of violence"; *Aguila-Montes* held only that a conviction under California Penal Code § 459 did not constitute a conviction for generic burglary. *Lopez-Cardona*, 662 F.3d at 1113. *Aguila-Montes* accordingly did not contradict or affect Becker's holding that first-degree burglary under § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense. *Id.* at 1111-12.

671 F.3d at 877-78.

**A.**

The Supreme Court held that the residual clause of the Armed Career Criminal Act of 1984 violates the Constitution's guarantee of due process.[7] The Court concluded "that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557. The Court concluded that two features of the residual clause "conspire to make it unconstitutional." *Id.* at 2557. "In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

> By asking whether the crime "otherwise involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay* [*v. United States*], 553 U.S. [137] 143 [128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008) ]. . . . By combining indeterminacy about how to measure the risk posed by

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[7] The residual clause of the ACCA increased the prison term of a defendant who had been convicted of "any crime punishable by imprisonment for a term exceeding one year" 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." 18 U.S.C. § 924(e)(2)(B).

> a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

*Id.* at 2558.

The Court then reviewed its prior efforts to establish a standard and concluded that "*James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition."[8] *Id.* at 2559. The Court further noted that in the lower courts, the residual clause has created numerous splits and the clause has proved nearly impossible to apply consistently.[9] *Id.* at 2560. The Court concluded that "[n]ine years' experience trying to derive meaning from the residual clause convinces us that we have embarked on a failed enterprise." *Id.*

The Court stated, in rejecting the argument that because there may be straightforward cases under the residual clause, the clause is not constitutionally vague:

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[8] *James v. United States*, 550 U.S. 192, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007); *Chambers v. United States*, 555 U.S. 122, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009); and *Sykes v. United States*, 564 U.S. 1, 131 S. Ct. 2267, 180 L. Ed. 2d 60 (2011).

[9] The Court commented:

> The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.

*Id.* at 2560.

> 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. *See post*, at 2558-2559. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "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." *James*, 550 U.S., at 230, n.7, 127 S. Ct. 1586, (Scalia, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree," *Nash v. United States*, 229 U.S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *Int. Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223, 34 S. Ct. 853, 58 L. Ed. 1284 (1914).

*Id.* at 2561.

The Court also declined the dissent's invitation "to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime." *Id.* at 2562. It explained:

> In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who . . . has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S. at 600, 110 S. Ct. 2143. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.* *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.

*Id.* at 2562.

Finally, the opinion's penultimate paragraph reads:

> We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question ap-

> plication of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

*Id.* at 2563.

**B.**

I read *Johnson* as setting forth a two-part test: whether the statute in issue (1) "leaves grave uncertainty about how to estimate the risk posed by the crime"; and (2) "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. Applying this test, the Court faulted the residual clause for requiring potential risk to be determined in light of "four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives . . . [which] are far from clear in respect to the degree of risk each poses." *Id.* at 2558 (internal citation omitted). The Court's concern was clarified by its reference to a prior dissent by Justice Scalia: "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." *Id.* at 2561.

The Court also faulted the residual clause for tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 2557. However, the Court specifically stated that it was not abandoning the categorical approach, which, as noted, looks to the "ordinary case." *See Descamps*, 133 S. Ct. at 2285 (holding the categorical approach's central feature is "a focus on the elements, rather than the facts, of a crime"). It is true that *Descamps*, like § 16(a), looks to the elements of a crime, not to the potential risk from the crime. None-

theless, in declining the dissent's suggestion that it "jettison for the residual clause . . . the categorical approach," the Court recognized that there were "good reasons to adopt the categorical approach," one of which is "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Johnson*, 135 S. Ct. at 2562. Thus, *Johnson* does not prohibit all use of the "ordinary case." It only prohibits uses that leave uncertain both how to estimate the risk and amount of risk necessary to qualify as a violent crime.

Indeed, such an interpretation seems compelled in light of the fact that *Johnson* did not even mention *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377. In *Leocal*, the Supreme Court recognized the breadth of § 16(b) and noted that it "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing the offense." *Id.* at 10, 125 S. Ct. 377.

Finally, I note that perhaps in an attempt to foreclose approaches such as that offered by today's majority in this appeal, the Supreme Court concluded by stating that its decision "does not call into question application of the Act to the four enumerated offenses [which include burglary] or the remainder of the Act's definition of a violent felony." *Johnson*, 135 S. Ct. at 2563.

**III.**

After such an esoteric discussion, it would be easy to lose sight of what is at issue in this case. Dimaya, a native and citizen of the Philippines, was twice convicted of first-degree residential burglary under California Penal Code § 459 and sentenced each time to two years in

prison. The Department of Homeland Security charged Dimaya with being removable because he had been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which is a "crime of violence . . . for which the term of imprisonment [was] at least one year." That statute in turn defines "crime of violence" by reference to 18 U.S.C. § 16. Thus, we are asked whether the statutory scheme is somehow so vague or ambiguous as to preclude the BIA from concluding that Dimaya's two first-degree burglaries under California law are "crimes of violence" under § 16(b). Supreme Court precedent and our case law answer the question in the negative.

There is no uncertainty as to how to estimate the risk posed by Dimaya's burglary crimes. The Supreme Court held in *Leocal* that § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S. Ct. 377. The court emphasized that burglary as "the classic example" of a crime covered by 16(b) because "burglary, by its nature involves a substantial risk that the burglar will use force against a victim in completing the crime."[10] *Id.* *See also Taylor*, 495 U.S. at 599, 110 S. Ct. 2143 (a person has been convicted of a crime for sentencing enhancement "if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unpriv-

[10] This statement from *Leocal* forecloses, for purposes of § 16(b), attempts to distinguish burglary convictions based on statutes that cover structures other than dwellings or do not require unlawful entry. Neither of these distinctions change the "nature" of the offense nor ameliorates the "substantial risk that the burglar will use force against a victim in completing the crime."

ileged entry into, or remaining in, a building or structure, with intent to commit a crime").

We have consistently followed this line of reasoning. *See United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990) ("Any time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension."); *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113 (9th Cir. 2011) (noting that "*Becker* itself recognized that the California crime of burglary might not be a 'crime of violence' under a federal statute defining the term by reference to the generic crime, even though it is a 'crime of violence' under the risk-focused text of § 16(b)"); *Chuen Piu Kwong*, 671 F.3d at 877 (reaffirming that "first-degree burglary under [Cal. Penal Code] § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense.").

Nor is there any uncertainty as to "how much risk it takes for a crime to qualify as a violent felony," *Johnson*, 135 S. Ct. at 2558, when burglary is at issue. Section 16(b) itself requires a "substantial risk" of the use of physical force. As noted, neither the Supreme Court nor the Ninth Circuit has had any trouble in applying this standard. *See Leocal*, 543 U.S. at 10, 125 S. Ct. 377; *Chuen Piu Kwong*, 671 F.3d at 877; *Becker*, 919 F.2d at 571. Any person intent on committing a burglary inherently contemplates the risk of using force should his nefarious scheme be detected. Is this not what the Supreme Court was referring to when it noted "we do not doubt the constitutionality of laws that call for the appli-

cation of a qualitative standard such as 'substantial risk' to real-world conduct"? *Johnson*, 135 S. Ct. at 2561.[11]

**IV.**

In *Johnson*, after nine years of trying to derive meaning from the residual clause, the Supreme Court held that it was unconstitutionally vague. Section 16(b) is not the ACCA's residual clause; nor has its standard proven to be unworkably vague. Over a decade ago, the Supreme Court in *Leocal* held that § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S. Ct. 377. Moreover, as the Supreme Court recognized, the statute sets forth the test of a "substantial risk that physical force against the person or property of any may be used in the course of committing the offense." 18 U.S.C. § 16(b). Certainly, there is no unconstitutional vagueness in this case, which involves the hallmark "crime of violence," burglary. *See Leocal*, 543 U.S. at 10, 125 S. Ct. 377. The Supreme Court will be surprised to learn that its opinion in *Johnson* rendered § 16(b) uncon-

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[11] I am not alone in questioning the application of *Johnson* beyond the ACCA's residual clause. Although the opinion has only been on the books for a little over three months, the Eighth Circuit in *Ortiz v. Lynch*, 796 F.3d 932, 935 n.2 (8th Cir. 2015), noted that *Johnson* "does not implicate the analysis in this case where the analogous language comes not from the residual clause, but the first definition of 'violent felony' in ACAA." Similarly, in *In re Gieswein*, 802 F.3d 1143, No. 15-6138, 2015 WL 5534388 (10th Cir. Sept. 21, 2015), the Tenth Circuit noted that the holding in *Johnson* applies only to the residual-clause definition of violent felony. Although it did not reach the merits of the issue, the court noted that the "surviving definition of 'violent felony' under the ACCA includes a felony conviction for 'burglary.'" *Id.* at n.2.

stitutionally vague, particularly as its opinion did not even mention *Leocal* and specifically concluded with the statement limiting its potential scope.[12] I fear that we have again ventured where no court has gone before and that the Supreme Court will have to intervene to return us to our proper orbit. Accordingly, I dissent.

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[12] There can be no doubt as to the majority's intent. Footnote 14 of the majority opinion asserts that "all of our prior cases relating to which offenses fall within the scope of [§ 16(b)] are to that extent of no further force or effect."

**APPENDIX B**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 22041

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File: A043 888 256—El Centro, CA

IN RE JAMES GARCIA DIMAYA

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Date: [Apr. 22, 2011]

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**IN REMOVAL PROCEEDINGS**

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APPEAL

ON BEHALF OF RESPONDENT:
Pro se

ON BEHALF OF DHS:
John D. Holliday
Assistant Chief Counsel

CHARGE:

| | | |
|---|---|---|
| Notice: | Sec. | 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(F)) (withdrawn) |
| Lodged: | Sec. | 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of |

aggravated felony (as defined in section 101(a)(43)(F))

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(G), (U))

APPLICATION:

Termination of proceedings, cancellation of removal

The respondent's appeal of the Immigration Judge's November 1, 2010, decision finding him removable and pretermitting his application for relief from removal will be dismissed. The fee waiver request is granted.

The respondent is a 31-year-old native and citizen of the Philippines who was admitted as a lawful permanent resident on or about December 24, 1992. He was convicted on June 8, 2007, in the California Superior Court, Alameda County, of felony first degree burglary in violation of California Penal Code § 459 (CPC) and sentenced, after a probation violation, to 2 years in prison. Exhs. 1 and 3. On July 24, 2009, he was convicted again in the same court of first degree felony burglary in violation of CPC § 459. Exh. 2. The June 8, 2010, Notice to Appear charged the respondent with being removable as an alien convicted of an aggravated felony. (Exh. 1). The lodged charges accused him of being removable for having committed two crimes involving moral turpitude (CIMT), and of being removable as an aggravated felon because he was convicted of an attempted theft or burglary offense for

which the term of imprisonment is at least 1 year, and because he was convicted of a crime of violence. Exh. 4. Sections 237(a)(2)(A)(ii), 237(a)(2)(A)(iii) and 101(a)(43)(G), (U) and (F) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), and 1101(a)(43)(G), (U) and (F). Removability must be shown by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3). The Board may reverse a finding of fact only if it is clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).

The Immigration Judge found the respondent removable as one convicted of an aggravated felony involving an attempted theft offense in 2009, and of two crimes involving moral turpitude, and, that the charging documents for both offenses showed the respondent was convicted of a crime of violence by reason of his unlawful entry to a residence. Therefore, because he was convicted of an aggravated felony, the respondent was ineligible for cancellation of removal. *See* sections 237(a)(2)(A)(iii) and 240A(a)(3) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1229b(a)(3). The respondent argues that his burglary convictions do not qualify as aggravated felonies, because the record does not demonstrate he committed generic burglary or theft, and that neither burglary was a crime of moral turpitude. He notes that the burglary statute does not require a finding that he entered unlawfully as required for generic burglary, or that the location was a residence, so he was not convicted of a crime of violence. He also points out that the statute only requires intent to commit any felony, and that the information for the first conviction only alleged intent to commit any felony, which may not be a crime involving moral turpitude. He maintains it was error to rely on the facts set out in the probation reports.

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has concluded that in cases wherein the statute of conviction reaches both conduct that would constitute an aggravated felony and conduct that would not, a modified categorical approach is followed involving a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that an alien was convicted of the elements of the generically defined crime. *See Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002); *see also Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) (noting that "charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment may suffice to document the elements of conviction" under the modified categorical approach). On the other hand, if the statute of conviction is lacking an element of the generic offense, the modified categorical approach may not be used to find that missing element. *Aguilar-Turcios v. Holder*, 582 F.3d 1093 (9th Cir. 2009); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (*en banc*). In addition, under the modified categorical approach, a presentence report alone is not sufficient to demonstrate the elements of the crime of which the respondent was convicted. *Penuliar v. Mukasey*, 528 F.3d 603, 611 (9th Cir. 2008); *see*, *e.g.*, *United States v. Vidal*, 504 F.3d 1072, 1087 n.25 (9th Cir. 2007) (*en banc*) (*citing United States v. Franklin*, 235 F.3d 1165, 1171 (9th Cir. 2000) (explaining that a pre-sentence report, even when considered in conjunction with charging papers, is insufficient to establish what facts a defendant admitted in his plea); *see also United States v. Pimentel-Flores*, 339 F.3d 959 (9th Cir.

2003); *Huerta-Guevara v. Ashcroft*, *supra*, at 888 judicial admission not sufficient).

CPC § 459 states that: "[e]very person who enters any house, room, . . . shop, warehouse, store, mill, barn, . . . tent, vessel, . . . railroad car, . . . or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary . . . ." The statute does not define a generic burglary offense and is broader than the definition of a crime involving moral turpitude or a crime of violence. According to the abstracts of judgment for both convictions, the respondent pled guilty to first degree residential burglary in violation of CPC § 459.

Generic burglary requires that a state statute contain, at minimum, the elements of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, *supra*. The California statute does not require an unlawful entry necessary for generic burglary. *See United States v. Vidal*, *supra*, at 1088-89. We cannot look to the modified categorical approach to supply a missing element of the crime for purposes of finding generic burglary, an aggravated felony. *Aguilar-Turcios v. Holder*, *supra*.

On the other hand, the modified categorical approach may be used to narrow the application of the statute in a particular case for purposes of finding the respondent was convicted of an aggravated felony crime of violence. *See Young v. Holder*, — F.3d —, 2011 WL 257898 at 5 n.14 (9th Cir. 2011). Under 18 U.S.C. § 16(b), a crime of violence is: "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." The charging document and the abstract of judgment in the first case reference first degree residential burglary. The information charges that the respondent: "did unlawfully enter an inhabited dwelling house and trailer coach and inhabited portion of a building . . . with the intent to commit any felony." Entering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force. *See United States v. Becker*, 919 F.2d 568, 571 n.5 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991) (first degree burglary implies entry with intent to act against the person or property of another); *see also United States v. Smith*, 390 F.3d 661 (9th Cir. 2004), *amended by*, 405 F.3d 726 (9th Cir. 2005) (no contest plea conviction to burglary in California qualified as a prior violent felony conviction under the Armed Career Criminal Act). As noted in *United States v. Becker*, *supra*, at 571, "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension," *United States v. M C.E.*, 232 F.3d 1252, 1256 (9th Cir. 2000) (residential burglary is a crime of violence under 18 U.S.C. § 5032, which is "virtually identical" to 18 U.S.C. § 16, because of the substantial risk that physical force may be used in committing the offense); *see also James v. United States*, 550 U.S. 192 (2007).

Therefore, we find that the Immigration Judge correctly held that the Department of Homeland Security (the "DHS") sustained its burden in establishing that respondent is removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony as

that term is defined under section 101(a)(43)(F) of the Act.

If the respondent is applying for relief from removal, the burden is on the respondent to prove every element required under the statute including that his conviction was not an aggravated felony. *Matter of Almanza-Arenas*, 24 I&N Dec. 771, 775-76 (BIA 2009). The record of conviction, as noted above, demonstrates he was convicted of an aggravated felony which would bar him from cancellation of removal. *See* sections 237(a)(2)(A)(iii) and 240A(a)(3) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1229b(a)(3).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

Board Member Linda S. Wendtland concurs in the result, but respectfully dissents from the majority opinion to the extent that it holds either that (1) even if unlawful entry was not an element of the respondent's residential burglary offense, the modified categorical approach may be used to ascertain that the offense in fact involved an unlawful entry and therefore was a crime of violence, or that (2) a crime of violence exists even without an unlawful entry. The former proposition does not comport with the law of the United States Court of Appeals for the Ninth Circuit, under which the modified categorical approach may not be used when the crime of conviction is missing an element of the generic crime. See Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc); 18 U.S.C. section 16(b) (where use, attempted use, or threatened use of physical force is not

an element of the offense of conviction, the offense must, inter alia, "by its nature" involve a substantial risk that physical force may be used). The latter proposition is incorrect because, in my view, a burglary not involving an unlawful entry does not create a sufficient risk of the use of force to qualify as a crime of violence. Nevertheless, I concur with the majority's ultimate conclusion that the respondent's residential burglary offense is a crime of violence and thus an aggravated felony (given the sentence to at least 1 year of imprisonment), in view of the Ninth Circuit's determinations in United States v. Becker, 919 F.2d 568, 571 n.5 (9th Cir. 1990), that California law implicitly requires an unlawful entry as a prerequisite to a residential burglary conviction, and that in view of this and other factors, such a conviction under California Penal Code sec. 459 constitutes a crime of violence. That is, the Ninth Circuit has opined at least in Becker that unlawful entry is an implicit—rather than a missing —element of an offense under the California statute at issue.

**APPENDIX C**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
El Centro, California

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File A 43 888 256

IN THE MATTER OF JAMES GARCIA DIMAYA, RESPONDENT

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Filed: Nov. 1, 2010

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**IN REMOVAL PROCEEDINGS**

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CHARGE:

Sections 237(a)(2)(A)(iii) (aggravated felony crime of violence), Immigration and Nationality Act (INA); lodged charges, Section 237(a)(2)(A)(ii) (two crimes of moral turpitude) INA; 237(a)(2)(A)(iii) (attempted thief offense, aggravated felony) INA; 237(a)(2)(A)(iii) (crime of violence, aggravated felony) INA

APPLICATION:

Termination

APPEARANCES:

ON BEHALF OF RESPONDENT:

Pro Se

ON BEHALF OF THE DEPARTMENT OF HOME LAND SECURITY:

John Holliday, Esquire
1115 No. Imperial Avenue
El Centro, California 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a thirty-one-year old man who is a native and citizen of the Philippines and who has been a legal permanent resident of the United States since December of 1992. The Immigration authorities began removal proceedings by filing a Notice to Appear on July 12, 2010, with this Court. The Government alleged that the Respondent was removable because he had been convicted of an aggravated felony which is a crime of violence. The Notice to Appear was properly served. Exhibit 1. The Notice to Appear described the offense as a first degree burglary for which the Respondent was sentenced to two years. A conviction was said to have occurred on June 8, 2007.

On October 14, the matter came on for hearing. The Respondent was not represented. I explained to him the rights to which he is entitled and the allegations and the charge against him. The Respondent said he understood the rights, allegations and charge. He chose to represent himself. I called on him then to admit or deny the allegations. The Respondent admitted all the allegations. The Government corroborated his admissions with some conviction documents.

Exhibit #2 shows the Respondent was convicted of first degree residential burglary on July 24, 2009. That particular conviction is not the conviction which was alleged in the Notice to Appear. However, that convic-

tion does show that the Respondent was convicted of a first degree residential burglary and sentenced to two years, and he was convicted of count one. Count one in the attached warrant says that the Respondent did unlawfully enter an inhabited dwelling with intent to commit larceny and any felony.

Exhibit 3 shows that the Respondent was convicted of first degree residential burglary, also committed in 2007. He was sentenced to two years after a revocation of probation. This appears to be the offense that was actually described in the Notice to Appear.

The attached complaint, however, shows that the Respondent did unlawfully enter an inhabited dwelling house with the intent to commit any felony. Specifically, the language larceny and any felony was struck and then by interlineation the information had been amended to say any felony.

Although I had initially sustained the Government's charge, the Government asked ~~me~~ to lodge additional charges and in effect to clean up the problems that they detected.

On November 1, 2010, the matter came on again for hearing. Again, the Respondent was not represented. He waived his opportunity to be represented and chose to proceed. The Government lodged additional allegations and charges. Exhibit 4. The Respondent was served in open court on that very day. However, he declined any further continuance to prepare a defense. He elected once again to represent himself. I called on him then to admit or to deny the allegations which were filed in lieu of the original charges and allegations.

Respondent admitted all the allegations. The new allegations and charges, however, were more extensive than those originally charged. The Respondent admitted that he had been convicted in 2007 of a first degree burglary and he admitted that he had been convicted of first degree burglary in 2009. The new allegations, however, allege that the Respondent was convicted of two crimes of moral turpitude not arising in the same scheme of criminal misconduct. Not all burglaries, however, are involving moral turpitude. The issue came to the fore because the Respondent's conviction in 2007 specifically removed larceny as the purpose for entry.

In determining whether a crime is one involving moral turpitude, the Court has historically been limited to the offense definition and then the documents associated with the conviction. However, in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) the Attorney General specifically expanded the collection of sources that the Court might use in reaching its conclusion. The Attorney General determined that since moral turpitude is not an element of any particular crime, that the Court can resort to information outside the usual documents and applied in modified categorical searches of the past. At the Government's invitation then I considered the probation officer's report which was attached to the Exhibit #3. Specifically, the portion of the report which is found on page nine of Exhibit #3. I inquired of the Respondent as to that particular recitation which is found in the section entitled "evaluation," whether it was true that he had entered the victim's home through a bathroom window and burglarized the victim's home twice and had taken several items from the home which he sold. The Re-

spondent agreed that that was the reality of the offense connected to this offense. Consequently, I find that this offense is a crime of moral turpitude. He entered clearly with intent to commit theft and did commit a theft and thereafter a sale of the taken property.

Exhibit #2 is less directly problematic because it uses language which is the conjunctive. That is, it is alleged that he did enter with intent to commit larceny "and" any felony. I find that that language makes it clear that at least part of the reason for his entry was to commit a larceny as well as some other felony. Thus, his offense is a crime of moral turpitude. Since he testified that these crimes were not planned at the same time, that they were not involving the same victim, and that they did not occur on the same day, I find that they did not arise in the same scheme of criminal misconduct. Consequently, he is removable because he was convicted of two or more crimes of moral turpitude not arising from the same scheme of criminal misconduct.

I next considered whether the Respondent was removable because he had been convicted of an aggravated felony relating to an attempted theft offense. I find the modified categorical approach that the Respondent's 2009 conviction is first of all an attempted theft offense with a sentence of a year or more. His entry into the dwelling house was with the intent to commit larceny and any felony. Since again the intent was to commit some larceny, then his entry was an attempt to commit a theft. Since the sentence is more than a year it is an aggravated felony.

I also considered both of the convictions to be crimes of violence under 18 U.S.C. 16(b). Each of

these is a felony offense. Moreover, the unlawful entry into a residence is by its very nature an offense where is apt to be violence, whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon. Therefore, since the sentence was more than a year, I find that this is an aggravated felony because it is a crime of violence. For that, I also rely upon the case U.S. v. Becker, 919 F.2d 568, 573 (9th Circuit 1990).

Based on the Respondent's admissions and all the evidence and the testimony of record, I find that the allegations are true. Respondent is therefore removable as charged. He designated the Philippines as the country of removal. He said he had no fear of torture or persecution there. I accept this designation.

The Respondent's convictions for an aggravated felony makes him ineligible for any relief even though he has been a legal resident for nearly 18 years. He is ineligible for cancellation of removal as a legal permanent resident. See Section 240A(a) INA; ineligible for voluntary departure under Section 240B(a)&(b); ineligible to adjust his status through any citizen family member or legal resident family member because he has convictions for burglary are crimes of moral turpitude requiring a waiver under Section 212(h). Section 212(h) is unavailable to an alien who is a legal resident and who has been convicted of an aggravated felony. I am unaware of any relief which is available under circumstances such as these. Therefore, after having considered all the evidence of record I must make the following orders.

ORDERS

IT IS THEREFORE ORDERED that the Respondent be removed from the United States to the Philippines based on the allegations and charges in the lodge charge.

/s/ JACK STATON
JACK STATON
Immigration Judge

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 11-71307
Agency No. A043-888-256

JAMES GARCIA DIMAYA, PETITIONER

*v.*

LORETTA E. LYNCH, ATTORNEY GENERAL, RESPONDENT

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Filed: [Jan. 25, 2016]

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**ORDER**

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Before: REINHARDT, WARDLAW, and CALLAHAN, Circuit Judges.

Judge Reinhardt and Judge Wardlaw voted to deny Respondent's petition for rehearing en banc, while Judge Callahan voted to grant the petition.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition. *See* Fed. R. App. P. 35.

Respondent's petition for rehearing en banc, filed November 18, 2015, is **DENIED**.

## APPENDIX E

1. U.S. Const. Amend V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. 1101 provides in pertinent part:

**Definitions**

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[5] least one year;

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[5] So in original. Probably should be preceded by "is".

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[5] least one year;

* * * * *

3. 8 U.S.C. 1227 provides in pertinent part:

**Deportable aliens.**

**(a) Classes of deportable aliens**

* * * * *

**(2) Criminal offenses**

**(A) General crimes**

* * * * *

**(iii) Aggravated felony**

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * * * *

**(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and**

**(i) Domestic violence, stalking, and child abuse**

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the

term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

* * * * *

4. 8 U.S.C. 1229b(a) provides:

**Cancellation of removal; adjustment of status**

**(a) Cancellation of removal for certain permanent residents**

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. 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.

6. 18 U.S.C. 924 provides in pertinent part:

**Penalties**

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

* * * * *

(3) For the 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.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means 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—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(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; and

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