No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARCO HERNANDEZ-LARA

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 Sentencing Guidelines § 2L1.2(b)(1)(C) (2013), is unconstitutionally vague.

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

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 817 F.3d 651.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2016. A petition for rehearing was denied on August 9, 2016 (App., *infra*, 5a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent, a Mexican national, was removed from the United States to Mexico on September 15, 2010. On April 21, 2011, respondent was found in the United States after he returned to the country with-

out authorization. 1/29/13 Tr. (Tr.) 13-14. Respondent pleaded guilty in the United States District Court for the Northern District of California to one count of illegal reentry following deportation, in violation of 8 U.S.C. 1326. Tr. 14; see App., *infra*, 2a.

At the time of respondent's sentencing, Section 2L1.2(b)(1)(C) of the advisory Sentencing Guidelines provided for an eight-level enhancement in the defendant's base offense level for an unlawful-entry offense if the defendant was previously deported from this country after "a conviction for an aggravated felony." Sentencing Guidelines § 2L1.2(b)(1)(C) (2013). The official commentary to Section 2L1.2 provided that the term "aggravated felony" in that section had "the meaning given that term in [8 U.S.C. 1101(a)(43)]." Sentencing Guidelines § 2L1.2, comment. (n.3(A)) (2013). Section 1101(a)(43) provides, in pertinent part, that the term "aggravated felony" means "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense)" that is also a felony. 8 U.S.C. 1101(a)(43)(F). Section 16 of Title 18 in turn defines a "crime of violence" to include a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16(b).

At sentencing, the Probation Office recommended the eight-level enhancement under Section 2L1.2(b)(1)(C) based on respondent's prior conviction for burglary in California state court. C.A. E.R. 31-32; see Cal. Penal Code §§ 459, 460(a) (West 2010). The district court, however, held that respondent's burglary conviction did not qualify as a crime of violence under Section 16(b) and therefore did not qualify

as an aggravated felony under 8 U.S.C. 1101(a)(43)(F) and Section 2L1.2(b)(1)(C). App., *infra*, 3a. Accordingly, the court enhanced respondent's base offense level by only four, which yielded a sentencing range of 24 to 30 months of imprisonment. C.A. E.R. 16. Had the court applied the eight-level enhancement, the range would have been 37 to 46 months. Gov't C.A. Br. 7. The court sentenced respondent to 24 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 11, 16-17.

2. The government appealed the sentence, and the Ninth Circuit affirmed. App., *infra*, 1a-4a. The Ninth Circuit held that Section 16(b), as incorporated into Section 2L1.2(b)(1)(C) of the Guidelines (via 8 U.S.C. 1101(a)(43)(F)), is unconstitutionally vague. App., *infra*, 3a-4a. The Ninth Circuit relied on its previous decision in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), cert. granted, No. 15-1498 (Sept. 29, 2016), which held that the definition of "crime of violence" in 18 U.S.C. 16(b), as incorporated into 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. 803 F.3d at 1112-1120; see App., *infra*, 3a-4a. *Dimaya* based that conclusion on an extension of this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which held unconstitutionally vague part of the definition of the term "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B). In the decision below, the Ninth Circuit saw "no reason why *Dimaya* does not control this case." App., *infra*, 4a.

ARGUMENT

The decision below rested on the Ninth Circuit's holding in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), that 18 U.S.C. 16(b), as incorporated into 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*,

3a-4a. On September 29, 2016, this Court granted the Attorney General's petition for a writ of certiorari seeking review in *Dimaya* (No. 15-1498). This Court should accordingly hold this petition pending its final decision in *Dimaya* and then dispose of the petition as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Dimaya* v. *Lynch*, No. 15-1498, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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NOVEMBER 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-10637
D.C. No. 5:11-cr-00900-EJD-1

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARCO HERNANDEZ-LARA, DEFENDANT-APPELLEE

Submitted: Mar. 29, 2016[*]
Pasadena, California
Filed: Mar. 29, 2016

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

OPINION

Before: STEPHEN REINHARDT, FERDINAND F. FERNANDEZ, and RICHARD R. CLIFTON, Circuit Judges.

PER CURIAM:

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[*] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appellant United States of America appeals the sentence imposed on appellee Marco Hernandez-Lara following his conviction for illegal reentry under 8 U.S.C. § 1326. Specifically, the government contends that the district court miscalculated the United States Sentencing Guidelines range applicable to Hernandez because the district court concluded that Hernandez's 2009 burglary conviction under California Penal Code § 459 did not qualify as a "crime of violence" as defined in 18 U.S.C. § 16(b). After the government filed its appeal, however, we held in a different context that the definition of a crime of violence that appears in § 16(b) is unconstitutionally vague. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). Because we are bound by *Dimaya*'s holding, and because the government offers the same arguments in favor of § 16(b)'s constitutionality that we rejected in that decision, we hold that § 16(b), as incorporated in U.S.S.G. § 2L1.2(b)(1)(C), is void for vagueness.

1. U.S.S.G. § 2L1.2(b)(1)(C) imposes an 8-level enhancement on a defendant convicted of illegal reentry if "the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for an aggravated felony." Section 2L1.2 defines "aggravated felony" by reference to 8 U.S.C. § 1101(a)(43), which includes numerous offenses. U.S.S.G. § 2L1.2, cmt. 3(A). One of these offenses is a "crime of violence (as defined in section 16 of Title 18 . . .)." 8 U.S.C. § 1101(a)(43)(F). Here, the government argued to the district court that Hernandez's burglary conviction qualified as a "crime of violence" under § 16(b), which the statute defines 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). The district court disagreed, concluding that burglary under California Penal Code § 459 "is not a crime of violence under section 16(b)." It then sentenced the defendant to 24 months of incarceration, and the government appealed.

After the government appealed this decision, the United States Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held that language similar to § 16(b), the Armed Career Criminal Act's so-called "residual clause"[1] definition of a "violent felony," is unconstitutionally vague. 135 S. Ct. at 2557; *see also Dimaya*, 803 F.3d at 1115. We deferred submission pending this court's decision in *Dimaya* (which addressed *Johnson*'s impact on § 16(b)), and ordered supplemental briefing once *Dimaya* became final.

2. In *Dimaya*, we relied on *Johnson* to hold that § 16(b)—the exact same definition of a "crime of violence" at issue in this case—was void for vagueness. *Dimaya*, 803 F.3d at 1115. We stated that the "residual clause" declared unconstitutional in *Johnson* and § 16(b), although not identical, are both "subject to

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[1] 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).

the same constitutional defects." *Id.* Here, the government seeks to distinguish *Johnson* based on the insignificant differences between the "residual clause" and § 16(b)—arguments that we explicitly rejected in *Dimaya*, *id.* at 1117–19. Indeed the government admits as much, and offers no basis upon which to distinguish the application of § 16(b) in *Dimaya* and its application here. We, too, see no reason why *Dimaya* does not control this case. We therefore hold that § 16(b), as incorporated in U.S.S.G. § 2L1.2(b)(1)(C), is unconstitutionally vague, and affirm the sentence.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-10637
D.C. No. 5:11-cr-00900-EJD-1
Northern District of California, San Jose

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARCO HERNANDEZ-LARA, DEFENDANT-APPELLEE

[Filed: Aug. 9, 2016]

ORDER

Before: REINHARDT, FERNANDEZ, and CLIFTON, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing and stay.

Appellant's petition is therefore **DENIED**.