No.

In the Supreme Court of the United States

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,
PETITIONER

v.

ALTIN BASHKIM SHUTI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH 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 Acting 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 Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 828 F.3d 440. The decision of the Board of Immigration Appeals (App., *infra*, 22a-30a) is unreported. The decision of the immigration judge (App., *infra*, 31a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2016. A petition for rehearing was denied on November 15, 2016 (App., *infra*, 44a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent is a native and citizen of Albania and a lawful permanent resident of the United States. App., *infra*, 2a, 31a. In 2014, respondent was convicted of unarmed robbery, in violation of Mich. Comp. Laws Ann. § 750.530 (West 2004), for which he was sentenced to two-and-a-half to ten years in prison. App., *infra*, 2a, 24a.

2. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may be deported if, *inter alia*, he is "convicted of an aggravated felony at any time after admission" into the United States. 8 U.S.C. 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to include a variety of federal and state offenses, including "crime[s] of violence" as defined in 18 U.S.C. 16. See 8 U.S.C. 1101(a)(43)(F). Section 16, in turn, defines a "crime of violence" as an offense that (a) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"; or (b) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16.

In 2014, the Department of Homeland Security initiated removal proceedings against respondent on the ground that his robbery conviction qualified as a crime of violence (and thus an aggravated felony) under 18 U.S.C. 16(b). App., *infra*, 4a, 32a. Respondent conceded that he was removable and filed an application for asylum, withholding of removal, and protection from removal under the Convention Against Torture (CAT). *Id.* at 4a, 35a. An immigration judge denied respondent's requests for asylum and withholding of removal because respondent's conviction for an aggra-

vated felony rendered him ineligible for those forms of relief. *Id.* at 32a, 39a-40a.[*] The immigration judge also denied respondent's request for relief under the CAT, finding "absolutely no evidence" that respondent would be tortured in Albania. *Id.* at 42a.

The Board of Immigration Appeals (Board) affirmed. App., *infra*, 22a-30a. While proceedings before the Board were pending, this Court held in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), that the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii), was unconstitutionally vague. Respondent contended that Section 16(b) suffered from the same constitutional infirmities as the ACCA's residual clause and thus his robbery conviction could not lawfully be deemed a "crime of violence" or an "aggravated felony." App., *infra*, 27a. Respondent further argued that his robbery conviction would not qualify as a "crime of violence" even if Section 16(b) were constitutional. *Id.* at 24a.

The Board concluded that respondent's robbery offense qualified as a crime of violence under Section 16(b) because the statute under which he was convicted requires that an individual use "force or violence,

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[*] An alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States" is ineligible for asylum or withholding of removal. 8 U.S.C. 1158(b)(2)(A)(ii) (asylum); see 8 U.S.C. 1231(b)(3)(B)(ii) (withholding of removal). Any aggravated felony qualifies as a "particularly serious crime" for purposes of asylum. 8 U.S.C. 1158(b)(2)(B)(i). An aggravated felony qualifies as a "particularly serious crime" for purposes of withholding of removal if it resulted in a sentence of at least five years of imprisonment or if the Attorney General concludes that the offense was particularly serious "notwithstanding the length of the sentence imposed." 8 U.S.C. 1231(b)(3)(B).

assault, or fear" to steal money or property from a victim who "is present" when the crime occurs. App., *infra*, 25a; see Mich. Comp. Laws Ann. § 750.530 (West 2004). That conduct, the Board held, "clearly involves a substantial risk that physical force will be used in the ordinary case" of the offense. App., *infra*, 25a (emphasis omitted). The Board rejected respondent's argument that Section 16(b) was unconstitutionally vague in light of *Johnson*, noting that *Johnson* involved a different statute and that the Board lacked authority to "address the constitutionality" of Section 16(b) in the first instance. *Id.* at 27a. The Board further noted that, in any event, *Johnson* addressed the validity of the ACCA's residual clause "in the criminal context" and did not suggest that similar language would necessarily be vague in "immigration proceedings," which "are civil in nature." *Ibid.* The Board also affirmed the immigration judge's decision denying respondent's requests for withholding of removal and protection under the CAT. *Id.* at 28a-30a.

3. The court of appeals granted respondent's petition for review, vacated the removal order, and remanded to the Board for further proceedings. App., *infra*, 1a-21a. The court concluded that immigration removal statutes are subject to the same vagueness standard as criminal laws. *Id.* at 10a. The court held that Section 16(b) is unconstitutional under that standard because, like the ACCA's residual clause, Section 16(b) "combine[s] indeterminacy about 'how to measure the risk posed by a crime' and 'how much risk it takes for the crime to qualify' as a crime of violence," *id.* at 13a (quoting *Johnson*, 135 S. Ct. at 2557-2558), and thus "falls squarely within *Johnson*'s core holding," *id.* at 14a. The court agreed with decisions of

"the Seventh and Ninth Circuits" that had reached the same conclusion. *Id.* at 11a; see *United States* v. *Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya* v. *Lynch*, 803 F.3d 1110, 1113-1114 (9th Cir. 2015), cert. granted, No. 15-1498 (argued Jan. 17, 2017).

ARGUMENT

The decision below rested on the Sixth Circuit's agreement with the Ninth Circuit's decision in *Dimaya* v. *Lynch*, 803 F.3d 1110 (2015), which held that 18 U.S.C. 16(b), as incorporated into the INA, see 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. App., *infra*, 29a-31a, 36a-37a. This Court has granted a petition for a writ of certiorari to review the Ninth Circuit's judgment in *Dimaya*. See *Sessions* v. *Dimaya*, No. 15-1498 (argued Jan. 17, 2017). The Court should accordingly hold this petition pending its 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 *Sessions* v. *Dimaya*, No. 15-1498 (argued Jan. 17, 2017), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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FEBRUARY 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-3835

ALTIN BASHKIM SHUTI, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,
RESPONDENT

Argued: Apr. 20, 2016
Decided and Filed: July 7, 2016

On Petition for Review from the
United States Board of Immigration Appeals
No. A060 254 668

OPINION

Before: COLE, Chief Judge; CLAY and GIBBONS, Circuit Judges

COLE, Chief Judge. In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court held the Armed Career Criminal Act's residual definition of "violent felony" void for vagueness. 18 U.S.C. § 924(e)(2)(B)(ii). In this case, we consider whether that pathmarking decision applies to the Immigration and Nationality Act's parallel definition of "crime of violence," a phrase that

encompasses any 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." 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b). We conclude that the wide-ranging inquiry required by these two statutory phrases are one and the same, and therefore hold that the immigration code's residual clause is likewise unconstitutionally vague.

I.

Petitioner Altin Bashkim Shuti, who hails from Albania, entered the United States as a lawful permanent resident in October 2008. He was 13 years old when his parents, who are now American citizens, decided to flee their home-country for fear of persecution at the hands of the Albanian Socialist Party.

Nearly six years later, in May 2014, Shuti and a few of his high-school cohorts allegedly committed a "larceny of marijuana" and "in the course of that conduct possessed a shotgun." Shuti pleaded guilty, for his part, to the lesser offense of felony unarmed robbery, defined under Michigan law as "larceny of any money or other property" accomplished by using "force or violence against any person who is present" or "assault[ing] or put[ting] the person in fear." Mich. Comp. Laws § 750.530. The state trial court sentenced Shuti to at least two and a half years in prison and, several months later, the Department of Homeland Security initiated removal proceedings against him.

Under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, the Attorney General may remove certain classes of non-citizens from this country—for instance, those who have been convicted of crimes in-

volving moral turpitude, firearms offenses, and various drug offenses. 8 U.S.C. § 1227(a)(2). In the ordinary course, a non-citizen may apply to immigration officials for discretionary relief from removal. *See, e.g.*, 8 U.S.C. §§ 1158 (asylum), 1229b (cancellation of removal), 1231(b)(3)(A) (withholding of removal). But aggravated felonies are different: if a non-citizen has been "convicted of an aggravated felony at any time after admission," 8 U.S.C. § 1227(a)(2)(A)(iii), he is ineligible for most forms of discretionary relief, 8 U.S.C. §§ 1158(b)(2)(B)(i), 1229b(a)(3), 1231(b)(3)(B)(iv). Removal is "virtually inevitable" in such cases. *See Padilla v. Kentucky*, 559 U.S. 356, 360 (2010).

The term "aggravated felony" is defined expansively under the INA. Among the numerous state and federal offenses that qualify, the immigration code lists "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 [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). This cross-reference, in turn, leads to the general criminal code, which defines a "crime of violence" as:

> (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.

18 U.S.C. § 16. We deal here with the provision's latter subsection.

In this case, the government alleged that Shuti's Michigan conviction was an aggravated felony. Shuti acquiesced to the charge, and opted to file an application for asylum, withholding of removal, and protection under the Convention Against Torture. He also maintained that his criminal attorney "never discussed" the immigration consequences of his state court plea. But in 2015, an immigration judge denied all discretionary relief and ordered Shuti removed to Albania.

The Board of Immigration Appeals ("BIA") affirmed. The BIA first determined that unarmed robbery was "categorically a crime of violence" as defined in 18 U.S.C. § 16(b). "[A]n individual who engages in robbery," the BIA opined, "clearly involves a substantial risk that physical force will be used in the ordinary case." For this proposition, the BIA relied on two analogous precedents: our decision in *United States v. Mekediak*, 510 F. App'x 348, 353-54 (6th Cir. 2013) (applying USSG § 4B1.2(a)(2)'s definition of crime of violence to Mich. Comp. Laws § 750.530), and the Seventh Circuit's decision in *United States v. Tirrell*, 120 F.3d 670, 681 (7th Cir. 1997) (applying 18 U.S.C. § 924(e)(2)(B)(ii)'s definition of violent felony to Mich. Comp. Laws § 750.530). Shuti responded that the BIA improperly comingled statutory definitions, but the agency skirted this minor "distinction." *Matter of Francisco-Alonzo*, 26 I. & N. Dec. 594, 597-98 (BIA 2015). That would have been the last word. But while the appeal was pending, the Supreme Court handed down *Johnson*. Shuti argued, through supplemental briefing, that the INA's definition of crime of violence was unconstitutionally vague in light of this intervening precedent. The BIA balked, declaring that it "do[es] not address the constitutionality of the laws [it] administer[s]." *Matter of G-K-*, 26 I. & N. Dec. 88, 96 (BIA 2013). Nevertheless,

the agency concluded that the void-for-vagueness doctrine simply does not apply to "civil" deportation proceedings.

We now grant Shuti's petition for review as to the "constitutional claim[]," 8 U.S.C. § 1252(a)(2)(D), and vacate the order of removal.[1]

II.

"No person," the Fifth Amendment says, "shall . . . be deprived of life, liberty, or property without due process of law." The Constitution's prohibition of vague laws springs from this well. *Collins v. Kentucky*, 234 U.S. 634, 638 (1914). A statute "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," *Johnson*, 135 S. Ct. at 2556, "violate[s] the fundamental principles of justice embraced in the conception of due process of law," *Collins*, 234 U.S. at 638. The Supreme

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[1] We consider Shuti's constitutional challenge despite his concession of removability. *See Hanna v. Holder*, 740 F.3d 379, 387 (6th Cir. 2014). And for good reason: "What suffices for waiver depends on the nature of the right at issue." *New York v. Hill*, 528 U.S. 110, 114 (2000); *see also Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (holding that prudential restrictions on appellate review are "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases"). Shuti's concession of removability under the INA says nothing of whether those statutory provisions are valid under the Constitution. Further, enforcing Shuti's concession in this instance would be inconsistent with an ordinary understanding of issue waiver. Several factors suggest that review is appropriate here: (1) Shuti's claim is a pure question of law; (2) *Johnson* was an intervening change in law; (3) Shuti actually raised his *Johnson* claim before the BIA; and (4) this Court has explicit jurisdiction to review constitutional claims, while the BIA lacks such authority. *See Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 615 (6th Cir. 2014).

Court has, for over a hundred years, reviewed legislation of all sorts on this basis. *See, e.g.*, *Johnson*, 135 S. Ct. at 2557 (sentencing enhancement); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (stop-and-identify statute); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972) (vagrancy ordinance); *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 221 (1914) (price-control statute). And, in case after case, the Court has deployed the void-for-vagueness doctrine to strike down laws that violate this "first essential of due process." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

Johnson applied these principles to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Under that statute, any person who violates the federal felon-in-possession laws, 18 U.S.C. § 922(g), and has at least three prior convictions for a "violent felony" is subject to an enhanced 15-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1). Congress defined violent felony, in relevant part, as any offense "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). This italicized portion of the definition is called the "residual clause," and the *Johnson* Court held it void for vagueness.

To arrive at that conclusion, the Court emphasized "[t]wo features" that "conspire" to make the residual clause hopelessly vague. *Johnson*, 135 S. Ct. at 2557. To begin with, the clause left uncertainty about "how to estimate the risk posed by a crime" because it tied violent felony analysis "to a judicially imagined 'ordinary case' of a crime" instead of "real-world facts or statutory ele-

ments." *Id.* And on top of that, the residual clause left uncertainty about "how much risk it takes for a crime to qualify as a violent felony" because it required application of an "imprecise 'serious potential risk' standard" to this "judge-imagined abstraction." *Id.* at 2558. These indeterminacies combined, the Court held, to foster "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.*

The Court recently explained this holding in *Welch v. United States*, 136 S. Ct. 1257 (2016). There, the Court clarified that the residual clause's vagueness "rests in large part on its operation under the categorical approach." *Id.* at 1262. The categorical approach is an abstract mode of analysis, mandated by Congress's focus on the historical fact of prior conviction. *Taylor v. United States*, 495 U.S. 575, 600 (1990). To determine whether an offense is a violent felony under the residual clause, courts must consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James v. United States*, 550 U.S. 192, 208 (2007). This entails looking at the offense categorically—"in terms of how the law defines the offense," not how the individual "committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008). At bottom, the Court said in *Welch*, the residual clause "failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *Welch*, 136 S. Ct. at 1262.

Johnson was no doubt a sea-change, with far-reaching precedential effects. For example, the Court has granted

certiorari, vacated the judgment, and remanded for reconsideration in various sentencing cases on direct appeal. *See, e.g.*, *Richardson v. United States*, 136 S. Ct. 1157 (2016) (mem.); *Holder v. United States*, 135 S. Ct. 2940 (2015) (mem.); *Ball v. United States*, 135 S. Ct. 2933 (2015) (mem.). And just this term, the Court held that *Johnson* has retroactive effect in cases on collateral review. *Welch*, 136 S. Ct. at 1265; *see also In re Watkins*, 810 F.3d 375, 379 (6th Cir. 2015). The courts of appeals have gotten on board as well, applying *Johnson* to analogous residual clauses. Take our recent decision in *United States v. Pawlak*, No. 15-3566, 2016 WL 2802723, at *8 (6th Cir. Mar. 13, 2016), where we concluded that the "rationale of *Johnson* applies equally" to the United States Sentencing Guidelines' residual definition of crime of violence. In addition, two other circuits have applied *Johnson* to immigration statutes that invoke the criminal code's parallel definition of crime of violence. *See, e.g.*, *United States v. Hernandez-Lara*, 817 F.3d 651, 652 (9th Cir. 2016) (per curiam); *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1111 (9th Cir. 2015); *see also United States v. Gonzalez-Longoria*, 813 F.3d 225, 235, *reh'g en banc granted*, 815 F.3d 189 (5th Cir. 2016). In *Dimaya*, for example, the Ninth Circuit concluded that *Johnson*'s "reasoning applies with equal force to the similar statutory language and identical mode of analysis" used in the INA's residual definition of crime of violence. 803 F.3d at 1115.

With this legal landscape in mind, we circle back to Shuti's constitutional challenge.

III.

Shuti maintains that the INA's residual clause suffers from the same defects as the statute at issue in *Johnson* and, so too, runs afoul of the Fifth Amendment's prohibition of vague laws. The government counsels caution. *Johnson*, the government tells us, was an opinion that in essence cannot be applied beyond the ACCA.

One constitutional question is presented here: is the INA's definition of "crime of violence," 8 U.S.C. § 1101(a)(43)(F), in combination with the criminal statute cross-referenced there, 18 U.S.C. § 16(b), unconstitutionally vague? Our review is *de novo*. *United States v. Hart*, 635 F.3d 850, 856 (6th Cir. 2011).

A.

As the Supreme Court has long recognized, the Fifth Amendment's prohibition of vague laws is "applicable to civil as well as criminal actions." *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (citing *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925)); *see also Johnson*, 135 S. Ct. at 2566-67 (Thomas, J., concurring in judgment). But the government suggests, as the BIA concluded, that the void-for-vagueness doctrine does not apply in deportation proceedings because they are "civil in nature."

That notion is misguided. If anything, it is "well established" that the Fifth Amendment "entitles" noncitizens to due process in removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993). This includes the constitutional requirements of "fair notice" and "even-handed administration of the law." *See Papachristou*, 405 U.S. at 162, 171; *cf. Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (recognizing the need to "promote efficiency, fair-

ness, and predictability in the administration of immigration law").

Jordan v. De George clinches the matter in that regard. 341 U.S. 223 (1951). There, the Court considered a vagueness challenge to 8 U.S.C. § 1227(a)(2)(A)(ii)'s early-twentieth-century predecessor, which authorized the removal of non-citizens who have been convicted of two or more crimes involving moral turpitude. *Id.* at 225. "Despite the fact" that the provision at issue was "not a criminal statute," the Court applied the "established criteria" of the void-for-vagueness doctrine "in view of the grave nature of deportation." *Id.* at 231; *see also Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012) (noting the "severity" of subjecting "permanent residents" to "potential banishment"); *U.S. ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.) (lamenting "the dreadful penalty of banishment, which is precisely what deportation means to one who had lived here since childhood"). The criminal versus civil distinction is thus "ill suited" to evaluating a vagueness challenge regarding the "specific risk of deportation." *Cf. Padilla*, 559 U.S. at 365-66 (describing how deportation proceedings are "intimately related" to, and "enmeshed" in, our criminal laws).

It should come as no surprise, then, that we have previously recognized the void-for-vagueness doctrine's applicability "beyond criminal laws to immigration statutes." *Mhaidli v. Holder*, 381 F. App'x 521, 525 (6th Cir. 2010). So too have other circuits. *See, e.g.*, *Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013); *Arriaga v. Mukasey*, 521 F.3d 219, 222 (2d Cir. 2008); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008). Our conclusion remains the same: because deportation strips a

non-citizen of his rights, statutes that impose this penalty are subject to vagueness challenges under the Fifth Amendment. *Boutilier*, 387 U.S. at 123; *Jordan*, 341 U.S. at 231.

B.

Like the Seventh and Ninth Circuits, we are convinced that *Johnson* is equally applicable to the INA's residual definition of crime of violence. 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b). The text of the immigration code at once compels a categorical approach to prior convictions and an imprecise analysis of possible risk. This "wide-ranging inquiry," as with the similar statutory language in the ACCA and Sentencing Guidelines, "denies fair notice to defendants and invites arbitrary enforcement by judges." *See Johnson*, 135 S. Ct. at 2557. The consistent comingling of residual-clause precedents interpreting the INA, ACCA, and Guidelines shores up our conclusion. *See Pawlak*, 2016 WL 2802723, at *8. Imposing the penalty of deportation under this nebulous provision, we conclude, denies due process of law.

1.

Begin with a comparison of the text. The INA provision at issue here defines a "crime of violence" as a felony that:

> by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b) (emphasis added). The ACCA 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).

While not a perfect match, these provisions undeniably bear a textual resemblance. *See, e.g.*, *Johnson v. United States*, 559 U.S. 133, 140 (2010) (noting that 18 U.S.C. § 16's definition of crime of violence is "very similar" to the ACCA's definition of violent felony); *Nijhawan v. Holder*, 557 U.S. 29, 37 (2009) (conceding that "the 'aggravated felony' statute . . . resembles [the] ACCA in certain respects"); *Chambers v. United States*, 555 U.S. 122, 133 n.2 (2009) (Alito, J., concurring in judgment) (recognizing that "18 U.S.C. § 16(b) . . . closely resembles ACCA's residual clause"). In both statutes, Congress has focused on the fact of prior "conviction," *compare* 8 U.S.C. § 1227(a)(2)(A)(iii), *with* 18 U.S.C. § 924(e)(1), and in both residual provisions Congress has asked whether the crime possibly "involves" too much "risk" of harm, *compare* 18 U.S.C. § 16(b), *with* 18 U.S.C. § 924(e)(2)(B)(ii).

An identical mode of analysis flows from this plain reading of the text. Both residual clauses require a categorical approach to prior convictions. To be sure, the categorical approach has "historically" been used to determine "whether a state conviction renders an alien removable under the immigration statute." *See Mellouli*, 135 S. Ct. at 1986-87; *see also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013); *Nijhawan*, 557 U.S. at 33-38; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-87 (2007). And the two residual provisions deploy the ordinary case method in precisely the same fashion. *Com-*

pare James, 550 U.S. at 209 (holding that attempted burglary "satisfies the requirements of [18 U.S.C.] § 924(e)(2)(B)(ii)'s residual provision" because it is an offense "that, *by its nature*, presents a serious potential risk of injury to another") (emphasis added), *with Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (holding that burglary "would be covered under [18 U.S.C.] § 16(b) . . . because [the offense], *by its nature*, involves a substantial risk that the burglar will use force against a victim") (emphasis added).

An imprecise analysis of the possible risk of harm posed by this abstraction ensues. *Compare Begay*, 553 U.S. at 143-45 (holding that driving under the influence of alcohol is not a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii) because the offense is not "roughly similar . . . in degree of risk posed" to crimes that "typically" involve "*purposeful, violent, and aggressive*" conduct) (emphasis added), *with Leocal*, 543 U.S. at 9-11 (holding that driving under the influence of alcohol is not a "crime of violence" because 18 U.S.C. § 16(b)'s risk standard "naturally suggests" more than the "merely *accidental or negligent* conduct") (emphasis added). Neither term—"substantial" in the INA or "serious" in the ACCA—"sets forth [objective] criterion" to determine how much risk it takes to qualify as a crime of violence or violent felony. *See James*, 550 U.S. at 219 (2007) (Scalia, J., dissenting) (using *Leocal* as an example of how "courts might vary dramatically in their answer").

In short, both provisions combine indeterminacy about "how to measure the risk posed by a crime" and "how much risk it takes for the crime to qualify" as a crime of violence or a violent felony. *See Johnson*, 135 S. Ct. at 2557-58. We cannot avoid the conclusion that the INA's

residual clause falls squarely within *Johnson*'s core holding.

2.

Confirmation comes readily. Consider the insidious comingling of precedents in this context: as Judge Kozinski of the Ninth Circuit has explained it, "[t]he interoperability of the [categorical approach] means that precedents can be mixed and matched, regardless of which statute was at issue in which case." *See United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc). In other words, INA cases can be applied to the ACCA, ACCA cases can be applied to the Guidelines, and Guidelines cases can be applied to the INA. *See id.*

That principle is on perfect display in cases where the BIA has applied ACCA precedents like *James* (now overruled) to the immigration code. *Matter of Francisco-Alonzo* is illustrative. 26 I. & N. Dec. at 597-98. In that decision, the BIA was tasked with deciding whether felony battery was a "crime of violence" and, therefore, an "aggravated felony" under the INA. *Id.* at 596. In conducting this analysis, the BIA concluded that it must employ the "*James* 'ordinary case' analysis," and further opined that the immigration code defines crime of violence in "terms similar to the [ACCA's] residual clause." *Id.* at 598, 600. And on that basis, the agency concluded it was proper to "appl[y] *James*"—and other circuit level precedents interpreting the ACCA and Sentencing Guidelines—for the proposition that felony battery "meets the 'risk of injury' requirement" in the immigration code. *Id.* at 599-601. We have leaned on ACCA and Guidelines precedents in like manner. *See, e.g.*, *United States v. Stout*, 706 F.3d 704, 708-09 (6th Cir. 2013); *Van Don*

Nguyen v. Holder, 571 F.3d 524, 529-30 (6th Cir. 2009); *Patel v. Ashcroft*, 401 F.3d 400, 408 (6th Cir. 2005).

For a case study in vagueness, look no further than the BIA's decision below. In this very case, the BIA invoked the INA's residual definition of crime of violence to query whether unarmed robbery "clearly involves a substantial risk that physical force will be used *in the ordinary case*." *James*, 550 U.S. at 208. Then, relying on our previous application of the Guidelines' residual clause to Michigan's offense of unarmed robbery, the agency concluded that its categorical abstraction "fit[] comfortably within the [residual definition] of 'crime of violence.'" *Mekediak*, 510 F. App'x at 354. We have, of course, held that exact provision void for vagueness. As we stated in *Pawlak*, "[g]iven our reliance on the ACCA for guidance in interpreting [USSG] § 4B1.2, it stretches credulity to say that we could apply the residual clause of the Guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA." *Pawlak*, 2016 WL 2802723, at *8 (quoting *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015)). So too with the INA.

C.

The government takes issue with our conclusion. It seeks refuge in a few textual differences between the INA and the ACCA that, in its view, foreclose application of *Johnson*. Failing that, the government attempts to narrowly characterize *Johnson*'s holding and precedential effect. These points are all well taken, though we think they are, ultimately, distinctions without a difference.

To start, the government suggests that the ACCA's enumerated-crimes clause was a decisive factor in *Johnson*. The INA's lack of a prefatory list should, in its view,

put an end to our inquiry. But the existence of a prefatory "list of examples," though surely confusing, was not determinative of the Court's vagueness analysis. *See Johnson*, 135 S. Ct. at 2558, 2561. Rather, the Court's "wide-ranging inquiry" holding was the "[m]ore important[]" aspect. *See id.* at 2557, 2561. At any rate, the INA's lack of an enumerated-crimes clause actually makes its residual clause a "broad[er]" provision, as it "cover[s] *every* offense that involved a substantial risk of the use of 'physical force against the person or property of another.'" *See Begay*, 553 U.S. at 144.

In a similar vein, the government argues that the INA's residual clause provides a sufficiently definite standard because its text focuses on the risk that "force" may be used in the ordinary case of "committing the offense." This distinction, the government claims, renders the risk analysis somehow less uncertain. *See Leocal*, 543 U.S. at 10 n.7, 11. We are hard pressed to accept these textual distinctions. Even though the INA refers to the risk that "force may be used," rather than the risk that potential "injury might occur," *Johnson* is equally applicable. The reason is simple: a marginally narrower abstraction is an abstraction all the same.

Take *Leocal*'s discussion of burglary as an example. There, the court held that burglary is a "classic example" of a crime of violence. *Id.* at 10. On one view, it is "[t]he fact that an offender enters a building . . . [that] creates the possibility of a violent confrontation between the [burglar] and an occupant." *See Taylor*, 495 U.S. at 588; *see also Leocal*, 543 U.S. at 10. But as the *Johnson* Court subsequently pointed out, assessing the level of risk posed by the ordinary case of burglary is an entirely speculative enterprise. One can just as easily imagine a run-of-the-

mill burglar who breaks into a seemingly empty home, hears the occupants stirring, and runs away without confrontation. *Cf. Johnson*, 135 S. Ct. at 2558; *James*, 550 U.S. at 211 (Scalia, J., dissenting). As with the ACCA, the INA's residual definition of crime of violence fails to provide a "reliable way to choose between these competing accounts," regardless of its focus on the risk that force may be used. *See Johnson*, 135 S. Ct. at 2558. And, as noted earlier, the theoretical distinction between these statutes has been erased in practice. *See Mayer*, 560 F.3d at 952 (Kozinski, J., dissenting from denial of rehearing en banc); *cf. Johnson*, 559 U.S. at 140 (equating 18 U.S.C. § 924(e)(2)(B)'s definition of "violent" with the "substantial force" standard used in the INA). The interoperability of the categorical approach in these cases may have been its virtue, but the taint of its indeterminacy is also its downfall.

The government does not endeavor to distinguish away *Johnson*'s core holding, nor can it. The application of an imprecise risk-based standard to a hypothetical ordinary case of the crime "does not comport with the Constitution's guarantee of due process." *See Johnson*, 135 S. Ct. at 2558, 2560. Recognizing as much, the government claims that *Johnson* was a narrow decision, one that specifically avoided calling other federal laws into question. "As a general matter," the Court said, "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." *Id.* at 2561. But our holding is plainly consistent with this disclaimer. The INA's residual clause, as described above, does not call for courts to "gaug[e] the riskiness of conduct in which an individual defendant engages *on a particular occasion*" or for the application of such a standard "*to real-world*

conduct." *See id.* (emphasis added). The immigration code, rather, mandates a categorical mode of analysis that deals with "an imaginary condition other than the facts." *See id.* (quoting *Int'l Harvester Co.*, 234 U.S. at 223); *see also Leocal*, 543 U.S. at 7, 11.

The government persists, however, arguing that our recent decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), forecloses Shuti's constitutional challenge to the INA's residual clause. To the contrary, we find *Taylor* wholly consistent with our conclusion. There, we held that 18 U.S.C. § 924(c)'s definition of crime of violence was not unconstitutionally vague. *Id.* at 375-76. That conclusion, we think, makes perfect sense because the statute at issue in *Taylor* is a criminal offense and "creation of risk is an element of the crime." *See Johnson*, 135 S. Ct. at 2557. As the *Johnson* Court determined, no doubt should be cast upon laws that apply a qualitative risk standard to "*real-world facts* or *statutory elements*." *See id.* at 2557, 2561 (emphasis added). Unlike the ACCA and INA, which require a categorical approach to stale predicate convictions, 18 U.S.C. § 924(c) is a criminal offense that requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding. This makes all the difference. And as district courts have engaged with 18 U.S.C. § 924(c) on the front lines, they have often "appl[ied] the substantial risk element . . . to the actual conduct in the present case." *See United States v. Checora*, No. 2:14cr457DAK, 2015 WL 9305672, at *9 (D. Utah Dec. 21, 2015); *see also United States v. Prickett*, No. 3:14-CR-30018, 2015 WL 5884904, at *2 (W.D. Ark. Oct. 8, 2015).

We understand *Taylor*, then, as applying *Johnson*'s real-world conduct exception to uphold the constitution-

ality of 18 U.S.C. § 924(c)(3)(B). *See Taylor*, 814 F.3d at 376 (noting that "[t]he *jury found* that Taylor murdered Luck in the course of committing two crimes of violence") (emphasis added). Besides, the government's reading of *Taylor* has been undercut by the Supreme Court's intervening decision in *Welch*. As the Court made clear this term, the ACCA's vagueness "rests in large part on its operation under the categorical approach." *Welch*, 136 S. Ct. at 1262. That residual clause did not fail for the reasons latched onto by the government. *See Taylor*, 814 F.3d at 376-78. Rather, it failed "because applying [the serious potential risk] standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." *See Welch*, 136 S. Ct. at 1262. *Taylor* did not have the benefit of the Court's guidance in this regard. Any dictum in that decision, purporting to address the constitutionality of the INA's residual clause, is simply that.

In a last ditch effort, the government suggests that the INA's definition of crime of violence has not generated widespread confusion or proven unworkable in practice. This is patently not the case. *See Padilla*, 559 U.S. at 378, 380 (Alito, J., concurring in judgment) (noting that the aggravated felony inquiry under the INA is "complicated by . . . significant variations" among "Immigration and Customs Enforcement, the [BIA], and [courts of appeals] and district courts considering immigration-law and criminal-law issues"). Even so, the government's argument ignores the realities of judicial review. We find it entirely unsurprising that the INA has generated less conflicting case law than the ACCA, as there are more criminal appeals than petitions for review of immigration orders. The Supreme Court's docket is almost entirely discretionary, *see Singleton v. Commissioner*,

439 U.S. 940, 942 (1978) (Stevens, J., opinion respecting denial of certiorari), and the courts of appeals have narrow jurisdiction over petitions for review of immigration orders, *compare* 28 U.S.C. § 1291, *with* 8 U.S.C. § 1252. At any rate, the government mistakes a correlation for causation; conflicting judicial interpretations only provide *ex post* "evidence of vagueness." *Johnson*, 135 S. Ct. at 2558; *see also Sykes v. United States*, 131 S. Ct. 2267, 2286 (2011) (Scalia, J., dissenting).

* * *

Determining whether a particular offense is an aggravated felony is already "quite complex." *See Padilla*, 559 U.S. at 377-78 (Alito, J., concurring in judgment). The INA's residual definition of "crime of violence" makes that inquiry hopelessly indeterminate. From a non-citizen's perspective, this provision substitutes guesswork and caprice for fair notice and predictability. If the residual clause cannot be applied in a "principled and objective" manner by judges, *see Johnson*, 135 S. Ct. at 2558, we fail to see how non-citizens and their counsel will be able to anticipate the immigration consequences of criminal convictions, *see Mellouli*, 135 S. Ct. at 1987; *Padilla*, 559 U.S. at 366.

Shuti is set to begin "a life sentence of exile from what has [been his] home" since age 13, deprived of his "established means of livelihood," and separated from "his family of American citizens." *See Jordan*, 341 U.S. at 243 (Jackson, J., dissenting). Before imposing this penalty, the Due Process Clause requires more definite standards. We therefore find the INA's residual definition of "crime of violence," 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b), void for vagueness.

IV.

The petition for review is granted, the order of removal is vacated, and the case is remanded to the BIA for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
Falls Church, Virginia 20530

File: A060 254 668—Detroit, MI

IN RE ALTIN BASHKIM SHUTI

Date: [July 24, 2015]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Marshal E. Hyman, Esquire

ON BEHALF OF DHS:

Jason A. Ritter
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) of the Act

APPLICATION:

Termination; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Albania, appeals from the decision of the Immigration Judge, dated March 26, 2015, finding him removable as charged and denying his application for withholding of removal and protection under the Convention Against Torture ("CAT").[1] *See* section 241(b)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(c). The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). The applicant filed his asylum application after May 11, 2005, and it is governed by the provisions of the REAL ID Act. *See Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009).

We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The respondent first argues that he should be allowed to withdraw his concession of removability as it was done in error by his previous attorney. In general, absent egregious circumstances, a distinct and formal concession made by counsel is binding on the alien. *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986). The respondent argues, however, that, under recent case law, his conviction is no longer for an aggravated felony (Resp. Supp. Br. at 1-2). As discussed herein, the recent cases concerning analysis of convictions for immigration purposes do not change the outcome of this proceeding.

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[1] The respondent has not challenged the Immigration Judge's finding that he is ineligible for asylum.

Although he may argue that his crime is not an aggravated felony, the respondent does not dispute that he has a conviction for unarmed robbery in violation of Mich. Comp. Law § 750.350 (Resp. Br. at 2; I.J. at 1-2; Tr. at 4; Exh. 4). This is categorically a crime of violence and the record presents clear and convincing evidence that the respondent has been convicted of an aggravated felony and is removable as charged.

Mich. Comp. Law § 750.350 provides:

> A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

The definition of crime of violence under section 101(a)(43)(F) of the Act relies on the definition found at 18 U.S.C. § 16. To qualify as a "crime of violence" under 18 U.S.C. § 16(a), the offense must have as an element the use, attempted use, or threatened use of physical force against the person or property of another; to qualify under § 16(b), it must be 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. *See generally Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Matter of Francisco-Alonzo*, 26 I&N Dec. 594 (BIA 2015).

The respondent was sentenced to 2 1/2 to 10 years in prison. As his conviction is for a felony, to be considered a crime of violence under § 16(b), it must, by its nature, involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. *See Matter of Francisco-*

Alonzo, *supra*. Robbery categorically falls within this definition. In *Leocal v. Ashcroft*, *supra*, the Supreme Court explained that 18 U.S.C. § 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. The reckless disregard in § 16(b) relates not to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime. 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. *Leocal*, *supra*, at 10. A burglar, upon entering a building, disregards the substantial risk that he will be required to intentionally use physical force against the building's lawful occupants.

Like burglary, but to a greater extent, an individual who engages in robbery presents a substantial risk that force will be used in completing the crime. Unlike burglary, where the perpetrator may be discovered which presents a substantial risk of force, during a robbery the victim is present and under Michigan law subjected to force or violence, assault, or fear. Mich. Comp. Law § 750.350. The respondent argues that there is a reasonable probability that assault under Michigan law may not involve active physical force (Resp. Br. at 8-9). However, assault in the furtherance of robbery clearly involves *a substantial risk that physical force will be used* in the ordinary case. *See Matter of Francisco-Alonzo*, *supra*. *See also United States v. Mekediak*. 510 Fed. Appx. 348, 353-54 (6th Cir. Mich. 2013) ("under the cate-

gorical approach, unarmed robbery fits comfortably within the [definition] of "'crime of violence'") (citing *United States v. Tirrell*, 120 F.3d 670, 681 (7th Cir. 1997) (robbery in some ways presents greater risk of violence than burglary because it "always occurs in the victim's presence")).

The respondent attempts to distinguish the analysis used in *United States v. Mekediak*, *supra*, arguing that it involved application of the definition of "a violent felony" under Armed Career Criminal Act ("ACCA").[2] He points out that ACCA uses the phrase "risk of *physical injury*," whereas, 18 U.S.C.§ 16(b) requires the risk of *physical force* (Resp. Br. at 8). *See Matter of U. Singh*, 25 I&N Dec. 670, 679 (BIA 2012); *Matter of Vargas*, 23 I&N Dec. 651, 653 (BIA 2004). This distinction does not change our conclusion that robbery presents a substantial risk of violent physical force. Additionally, the risk of use of physical force, required under section 16(b), is likely to ordinarily be a necessary precursor to any physical injury.

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[2] 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;

18 U.S.C. § 924(e)(2)(B).

In a second supplemental brief, the respondent cites a recent Supreme Court decision finding the language in the ACCA to be unconstitutionally vague (Resp. Supp. Br. II, at 1-2, *citing Johnson v. United States*, --- S. Ct. ----, 2015 WL 2473450 (U.S. June 26, 2015)). As noted, the ACCA uses language similar to that found in 18 U.S.C. § 16(b). In *Johnson*, the Supreme Court found the, so called, residual clause of the ACCA, which uses the phrase "involves conduct that presents a serious potential risk of physical injury to another," to be unconstitutionally vague. *Id.* The respondent urges that we apply the Court's reasoning to 18 U.S.C. § 16(b) and find that the application to the definition of a crime of violence, under section 101(a)(43)(F) of the Act, which relies on 18 U.S.C. § 16(b) is similarly unconstitutional.

We continue to apply the our case law previously interpreting the application of the definition of crime of violence under section 101(a)(43)(F) of the Act. We first observe that it is well settled we do not address the constitutionality of the laws we administer. *See Matter of G-K-*, 26 I&N Dec. 88 (BIA 2013); *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 n.3 (BIA 2012); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). Further, while the statute the Supreme Court was interpreting in *Johnson v. United States*, *supra*, is similar, it is not the one being applied in this case. Furthermore, the Supreme Court specifically noted that the residual clause of the ACCA was unconstitutionally vague in the criminal context, whereas immigration proceedings are civil in nature. *Id., slip op.*, at 7-8. The respondent's conviction is for a crime of violence and is an aggravated felony under section 101(a)(43)(F) of the Act. *See Leocal v. Ashcroft*, *supra*; *Matter of Francisco-Alonzo*, *supra*. The respondent has

not shown circumstances that warrant withdrawal of his concession of removability.

We further affirm the Immigration Judge's analysis concerning the respondent's application for withholding of removal and protection under the CAT. We first agree with the Immigration Judge that the respondent's crime is particularly serious. In judging the seriousness of a crime, we look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and whether the type and circumstances of the crime indicate that the alien will be a danger to the community. *Matter of G-G-S-*, 26 I&N Dec. 339, 341 (BIA 2014) (internal citations omitted). In this evaluation, the Immigration Judge is not limited to the record of convictions, but, rather, may consider all reliable evidence relevant to the nature of the crime. *See Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). The respondent's crime involved violence resulting in injury to the victim, as well as the theft of controlled substances (I.J. at 8-9; Exh. 4). We agree with the Immigration Judge's assessment that the respondent's crime is a particularly serious crime.[3]

We further agree that, even were we to find the respondent's crime not particularly serious and that he remained eligible for withholding of removal, he has failed

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[3] The respondent cites *Matter of V-X-*, 26 I&N Dec. 147, 153 (BIA 2013), for the proposition that the Immigration Judge should have relied on the categorical or modified categorical approach in reviewing the particularly serious nature of his crime (Resp. Br. at 13-14). We disagree. The offense in *Matter of V-X-*, *supra*, was a controlled substance violation involving marijuana. The Immigration Judge applied the correct standard in this case.

to meet his burden of proof. The respondent failed to demonstrate that it is more likely than not that he will face persecution in the future in Albania. The Immigration Judge found the respondent lacked credibility with respect to his claim of being threatened in Albania (I.J. at 6). In particular, the Immigration Judge observed that the respondent stated that he received threats until 2005, due to his family's association with the Democratic Party, whereas, his father testified that there were no threats after the year 2000 and that the respondent received no threats (I.J. at 5-6; Tr. at 65-66). This discrepancy is not addressed on appeal, and no clear error is apparent.

Furthermore, the respondent presented very little corroborating evidence (I.J. at 6-7). What has been submitted, as observed by the Immigration Judge, tends to show that the situation in Albania has improved (I.J. at 6-7). The Immigration Judge found that there have been significant changes in country conditions in Albania since the respondent's family suffered under Communist rule (I.J. at 9-11). The record contains evidence of this change and, we also observe, the respondent's father returned to Albania without incident for 10 days in 2009 (I.J. at 6). Although the respondent argues on appeal he should have been informed of what corroborating documents were required, there is no such requirement. *See Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). In addition, here, the Immigration Judge did not rely on a failure to produce specific evidence, but, rather, on the overall lack of support provided by the documents. Also, on appeal, the respondent has not indicated what evidence he was prevented from supplying.

Even were the respondent's crime found to not be particularly serious, he has failed to demonstrate a clear

probability of persecution and has not shown his eligibility for withholding of removal. *See* 8 C.F.R. § 1208.16; I*NS v. Stevic*, 467 U.S. 407 (1984).

Similarly, there is also insufficient evidence in the record to show that the respondent would "more likely than not" be tortured by or with the consent or acquiescence of a public official or other person acting in an official capacity upon removal to Albania. *See* 8 C.F.R. § 1208.16(c)(2); *Matter of J-B- & S-M-*, 24 I&N Dec. 208, 217 (BIA 2007); *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006). While recognizing the difference in eligibility criteria, the respondent has failed to establish eligibility for relief under the CAT. *See* 8 C.F.R. § 1208.16; *see also Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ JOAN B. GELLE
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File: A060-254-668

IN THE MATTER OF ALTIN BASHKIM SHUTI,
RESPONDENT

Mar. 26, 2015

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT:

JOHN HOCKING

ON BEHALF OF DHS:

JASON RITTER

CHARGE:

Violation of Section 237(a)(2)(A)(3).

APPLICATIONS:

Withholding of removal under the statute and under the Convention against Torture.

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a male native and citizen of Albania. The Department of Homeland Security initiated these removal proceedings against the respondent pursuant to

authority contained in Section 240 of the Immigration and Nationality Act. The proceedings were commenced with the Court by the filing of a Notice to Appear dated September 11, 2014, marked as Exhibit 1. At a hearing before the Court, respondent, with counsel, admitted the five factual allegations and conceded his removability under Section 237(a)(2)(A)(3). The Court, therefore, finds that the charges have been sustained by the requisite clear and convincing evidence required by Section 240(c)(3) of the Act. Respondent declined to designate a country to which removal would be directed and the Court directed Albania as the country of nativity and citizenship. By reason of respondent's conviction of an aggravated felony, he is not eligible for asylum, but he is eligible to be considered, at least initially, for withholding of removal under Section 241(b)(3) of the Act and alternatively for consideration under Article 3 of the Convention against Torture.

Prior to the admission of the application in this matter, the respondent was given the opportunity to make any changes necessary to make the document fully accurate. No changes were made either by counsel or by respondent and given the circumstances of respondent's incarceration, respondent verbally signed the application and the Court countersigned and proceedings continued.

The documentary evidence which the Court has considered includes the following. The Notice to Appear, of course, is the first exhibit. The conviction record for respondent's guilty plea to unarmed robbery with a sentence of two years and six months to 15 years was admitted as Exhibit 2. Exhibit 3 is respondent's application for withholding of removal under the statute and the Torture Convention. Exhibit 4 from the Government in-

cludes the police report concerning the underlying incident behind the conviction as well as the 2013 Country Reports for Albania issued in April of 2014 and being the most recent Department of State Country Reports for that country. Exhibit 5 received today and considered by the Court from respondent included another copy of the application as well as documents regarding persecution of the respondent's family, one from the chairman of the Democratic Party, two for relatives of respondent from the politically persecuted persons, another document from the archives of the interior ministry concerning the deportation camps and then an Albanian court decision detailing the persecution faced by the family in Albania. All of these were admitted with translations. All relate to periods essentially prior to 1990. Exhibit 6 was the witness list indicating that respondent and his father would testify. Both did.

Respondent's father testified to his experiences over the years growing up in Albania before he came to the United States on a relative petition by his brother. He testified to some of the political changes that had occurred in 1991 when the Democratic Party took over, in 1997 when the Socialist Party took over and then again in 2005 when the democrats once again took power in Albania. He also testified that he believes that in approximately 2013 or 2014 there was another change such that the Socialist Party is now in power. Then he testified to circumstances that occurred to his family principally back in the 1980s and 1990s and he essentially testified that there have been no threats since approximately the year 2000 despite the fact the socialists were in power from 1997 to 2005. He did testify that he believed that under socialist rule, democrats had no rights, but he did testify that they, of course, did have the right to vote. They did

have the right and the obligation to serve their compulsory military service. They had the right to employsment, although presumably not governmental sponsored employment, which apparently in Albania changes every time there is an election changing the party in power.

Respondent testified to his recollection of his time in Albania, including his specific recollection of threats of violence against respondent and his family because of their democratic party leanings. He specifically testified, as included in the statement A to his application, that from 1997 to 2005 while the Socialist Party ruled, during this time, my father and his family, which now included me, were threatened constantly by visits from local police who told my father, we are watching you and your family and will kill them if you try to assert any of your rights. This of course is directly contradicted by the father's statement of no threats after 2000.

Respondent testified to his fears of returning to Albania, his fear of torture, which he believes would include compulsory labor. He said his cousin experienced that before he fled from Albania to England with the help of his cousin's uncle. He also testified that he believes that he would not be permitted to have further education because education is denied to members of the Democratic Party. He finally testified that he has no family remaining in Albania and made the statement that there are essentially no democrats left in Albania. They have all fled since the 2013 elections restoring the socialists to power. That in a nutshell is the evidence which the Court has heard and considered.

Now we will talk about the evidentiary and legal principles governing the Court's decision. Respondent bears the evidentiary burdens of proof and persuasion in appli-

cations for withholding of removal. See Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000); see also 8 C.F.R. Sections 208.16(b), 1208.16(c)(2). An alien seeking withholding of removal from any country under INA Section 241(b)(3) must show through facts a clear probability that his life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Stevic, 467 U.S. 407, 413 (1984); Zoarab v. Mukasey, 524 F.3rd 777 (6th Cir. 2008); Mikhailevitch v. INS, 146 F.3rd 384, 391 (6th Cir. 1998), holding that in order to qualify for withholding of removal, the petitioner must demonstrate that there is a clear probability that he would be subject to persecution were he to return to his native country. Clear probability means that the respondent's facts must establish that it is more likely than not that he would be subject to persecution on one or more of the grounds specified.

Respondent has also requested consideration for withholding and deferral of removal under the United Nations Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment. See 8 C.F.R. Section 208.18(b)(1); also see 8 C.F.R. Sections 208.16 and 208.17. The applicant for withholding of removal or deferral under the Convention against Torture bears the burden of proving that it is more likely than not that he would be tortured if removed to the proposed country of removal. 8 C.F.R. Section 208.16(c)(2); Matter of S-V-, supra; see also Ali v. Reno, 237 F.3rd 591 (6th Cir. 2001).

Respondent's claim was filed with the Court after May 11, 2005. The claim must, therefore, be considered un-

der the provisions of the REAL ID Act of 2005, Public Law 109-13 119 Statutes 231, codified in scattered sections of 8 U.S.C. See Matter of S-B-, 24 I&N Dec. 42 (BIA 2006). Under the REAL ID Act, an applicant's testimony may be sufficient to sustain his burden but only if it is credible, detailed and persuasive. Section 208(b)(1)(B)(2) of the Act. If the Court finds that corroborative evidence should be provided, it must be provided unless it is not reasonably available. And with respect to the claim for withholding under the statute, respondent must establish that race, religion, nationality, membership in a particular social group or political opinion was or will be at least one central reason for persecuting the applicant. Section 208(b)(1)(B)(1) of the Act. The critical issue is whether a reasonable inference can be drawn from the evidence to find that the motivation for the conduct was or will be to persecute the applicant on account of one or more of the protected grounds. Matter of V-T-S-, 21 I&N Dec. 792 (BIA 1997). These are the principles that govern the Court's consideration. I will now turn to the application of these principles to the matter before the Court.

We begin with the issue of credibility. The Court accepts that both respondent and his father who testified are sincere and have testified with respect to what they know about the conditions in Albania past and present. Respondent has not been there since 2008 when he was of tender years. Respondent's father has not been there since 2009 when he went back briefly for ten days for a funeral. And respondent has not indicated that he has ~~can~~ kept in touch with people there. His father has indicated that he has very rarely kept in touch with people there other than a single friend who he called on to provide the documents found at Exhibit 5, tabs B through F.

With respect to respondent, he is a convicted felon. And his testimony about threats to himself prior to leaving Albania, prior to in fact about 2005 when power shifted in that country, is contradicted by his father's testimony that there were no threats or issues with the government since about the year 2000. So we do not have specific testimony which is credible in this matter. The Court finds that respondent is not credible both for the contradiction in the testimony and for the lack of fundamental substantive knowledge. And with respect to the father, I find that respondent's father's testimony is credible up to the period in 2008. But the father has not demonstrated a substantial amount of knowledge of the details of what is happening in his country since that time and his testimony about no rights and no documents being allowed from the socialist government is contradicted by Exhibit 5 which he got from a friend in 2015, a year during which the socialist government is apparently in power. So the Court finds that neither testimony is substantially credible with respect to what is presented to the Court.

This is not fatal. Corroboration can make up for the lack of credible detailed testimony. The corroboration in this file is in Exhibit 5, tabs B through F. This corroborates that the Shuti family, members of it, including respondent's father, suffered persecution up to about the year 1990 before the democrats took over in 1991. There is nothing in this record after that period of time that corroborates the problems to be suffered by members of the Democratic Party or to members of the Shuti family. And there is their own testimony as well as the Country Conditions Report at Exhibit 4, tab B, which tend to show that it is a parliamentary democracy which shifts between the democrats on the one side and the

socialists on the other depending on the results of the most recent elections. There was an election in 1997 that threw the democrats out and restored the socialists, there was another election in 2005 that threw the socialists out and restored the democrats and apparently there was an election in 2013 or 2014 that reversed the political fortunes once again. But there is nothing in this record that shows that this government today has any antipathy to members of the Democratic Party or to members of the Shuti family. There is no corroboration in that sense.

The Country Reports in fact at Exhibit 4, tab B contain several important provisions. On page 35 the law provides for nine years of free education and authorizes private schools. School attendance is mandatory through the ninth grade or until age 16, whichever occurs first, but many people leave because they cannot afford their school supplies. They are needed to support their families, particularly in rural areas. However, the testimony that at grade eight you are out is contradicted by the Country Report that says nine years of free education and that does not appear to show any limitation on political parties or family membership or anything else of that nature. With respect to political issues, this appears to be a rough and tumble country. But at Exhibit 4, tab B, page 1, unlike years past, there were no reports of politically motivated disappearances. And with respect to torture, the teaching of the Country Conditions Report is not that there are substantial incidents of torture in Albania. So the corroboration in this record is not in support of respondent's position that he is likely to be tortured if he returns to Albania and that he is somehow likely to be deprived of education.

Now let us turn then to the withholding claim and with respect to withholding an applicant is subject to mandatory denial of withholding of removal under the Act and under the Torture Convention if he has been convicted of a particularly serious crime and is thus a danger to the community. And then in considering this, the Court should look at factors such as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed. Matter of Frentescu. The Court does not look to whether respondent would be a danger to the community, that is N-A-M, 24 I&N Dec. 336 (BIA 2007), and crimes against persons are more likely to be considered particularly serious crimes than crimes against property.

In analyzing this matter there has been no testimony essentially from respondent concerning the facts of the crime. What we have in the record are Exhibit 2, the conviction record from the Court, and then we have at Exhibit 4, tab A, the extensive police report concerning the criminal activity. We note from Exhibit 2 that the conviction occurred on a guilty plea to robbery, unarmed, and the record shows that respondent was charged with armed robbery, conspiracy to commit armed robbery, breaking and entering with intent, larceny in a building, controlled substance delivery and manufacture and then felony firearm and robbery, unarmed. His guilty plea in this case was to one count out of multiple counts and in fact to essentially the least serious count that was there and ~~it~~he was represented by counsel, Mr. Khalid Sheikh, who I do not know. And I understand that this conviction may be challenged for ineffective assistance of counsel grounds and other grounds, but as of this time, as all agree, this is a valid conviction before the Court.

With respect to the circumstances, the police report is voluminous, but particularly in terms of respondent's participation, at page 18 of the police report, reviewing one of the cell phone data contents, there were texts involving respondent which indicate that he was participating in this activity. There were implications from others. But more importantly on page 23 of the report respondent is indicated to have denied any involvement in the robbery, although he admitted to knowing several of the individuals who were involved. But then after being booked in the jail and after being read his Miranda warnings, respondent admitted his involvement in the robbery. He went to a house with several of the other defendants. One had gotten an individual's white Jeep Wrangler to use as their vehicle. Shuti stated that as they were doing the robbery, a woman confronted them. She hit him with bolt cutters and one of the other defendants yelled to another defendant to put the woman down. Respondent observed the individual with the shotgun hit the woman in the head. It knocked her down. Respondent then took several bags of marijuana and ran back to the jeep and then they left to cut up their shares. This information together with the conviction record convinces the Court that this was a crime of violence. It is a particularly serious crime because it was a crime involving not only property, but persons and injury occurred. Therefore, as a particularly serious crime, it bars respondent from consideration for withholding under both the statute and the Torture Convention and the Court rules that it does bar.

If that is not correct, if for some reason this is not considered to be a particularly serious crime, the Court would note that respondent in order to prevail would need to show that it is more likely than not that he would

be persecuted on account of, in this case his political opinion or his family relationship if he is returned to Albania. And as the Court has described the evidence up until this point, this record is bereft of any evidence of current conditions in Albania. Now the Court would note that since about 2006 or a little bit after that, the Sixth Circuit Court of Appeals has regularly and consistently indicated that there have been changed country conditions in Albania such that these old claims about Communist Party equals Socialist Party equals persecution can no longer be considered appropriate and there is nothing in this record which would disturb that finding. In fact, Exhibit 4, tab B tends to show that it is a parliamentary democracy and that while it is not exactly a genteel party democracy, it is a party democracy where both sides contest, one side wins and takes the spoils for a while and then the other side wins and takes the spoils for a while. But it does not indicate that those who are not in the prevailing party are persecuted because of that situation. That would not have been the case if we were talking about the 1980s or 1990s, but now we are talking about 2015 and on this record there is nothing to show that in 2015 respondent would be persecuted if he returns to his country. Now his last statement essentially was that he was threatened when he was eight years old by the socialists and now he is afraid to come back. That statement is contradicted by the father's statement about the lack of threats since about the year 2000. Moreover, it is not corroborated by any current country conditions materials in this record. Respondent has utterly failed to meet his burden of proof and the withholding claim is denied both for particular serious crime and for the failure to meet the burden of proof.

With respect to the Torture Convention, which respondent is entitled to pursue even with the particularly serious crime, he must show that it is more likely than not that he would be tortured if he returned to Albania either by the government or by those with whom the government acquiesces or to whom they turn a willful blind eye. His argument to the Court is that the government, the Socialist Party, the ruling party, will torture him. This record has absolutely no evidence that that would occur in 2015. Again, if we were talking about 1985, 1990, this would be a different story. This was a different country at that time under a much more authoritarian rule from a hard line Communist government. That does not appear to be the case in 2015 and there is no evidence in this record that it is the case. Since there is nothing in this record to corroborate any claim of torture, the Court finds that respondent has failed to meet his burden to show that he would be singled out for torture if he returned to Albania and, consequently, that Torture Convention claim is denied whether it is withholding or deferral under the Torture Convention.

ORDER

Because respondent has failed to meet his burden to show his eligibility for either of the forms of relief he has sought before the Court and because respondent is definitely removable on the charges in the Notice to Appear, the Court denies all applications for relief and orders the respondent removed to Albania on the charges in the Notice to Appear.

Please see the next page for electronic signature

DAVID H. PARUCH
Immigration Judge

//s//

Immigration Judge DAVID H. PARUCH

paruchd on Apr. 23, 2015 at 9:02 PM GMT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-3835

ALTIN BASHKIM SHUTI, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL,
RESPONDENT

Filed: Nov. 15, 2016

ORDER

Before: COLE, Chief Judge; CLAY and GIBBONS, Circuit Judges

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ **DEBORAH S. HUNT**
DEBORAH S. HUNT, Clerk