No. 15-1496

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

MANUEL JESUS LOPEZ-ISLAVA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Armed Career Criminal Act's (ACCA) "residual clause" defines a "violent felony" as a felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Last year, this Court held the ACCA residual clause void for vagueness because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," which yields unpredictable and arbitrary results. *Johnson v. United States*, 135 S. Ct. 2551, 2557-58 (2015). This case involves a separate criminal statute, 18 U.S.C. § 16, with a similar residual clause. Section 16's residual clause 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). Like the ACCA residual clause, the § 16 residual clause requires that courts construct a judicially imagined "ordinary case" of a given offense, and then determine whether the "risk" of physical force posed by that judicial abstraction is sufficiently "substantial."

The petition presents two questions:

1. Whether *Jordan v. De George*, 341 U.S. 223 (1951), should be overruled, such that *Johnson*'s void-for-vagueness analysis would not apply to 18 U.S.C. § 16 in this immigration case.

2. If not, whether the residual clause contained in 18 U.S.C. § 16 is unconstitutionally vague under *Johnson*.

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STATEMENT

Manuel Jesus Lopez-Islava was brought legally from Mexico to the United States in 1981 when he was a one-year-old child. Pet. App. 4a; Administrative Record (A.R.) 150; 361. He became a lawful permanent resident nine years later. A.R. 150. In 2011, Lopez pleaded guilty to second-degree burglary in violation of Ariz. Rev. Stat. § 13-1507. Pet. App. 4a; A.R. 171. The government began removal proceedings against him shortly afterwards. Pet. App. 13a.

The immigration judge determined that Lopez was removable under 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an "aggravated felony" in the form of a "crime of violence," as that term is defined by 18 U.S.C. § 16, *see* 8 U.S.C. § 1101(a)(43)(F). The immigration judge observed that "second degree burglary under Arizona law does not include 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" Pet. App. 32a (quoting 18 U.S.C. § 16(a)). Accordingly, whether Lopez's second-degree burglary conviction constituted a "crime of violence" hinged on the § 16 residual clause, which encompasses any offense that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). Citing *United States v. Becker*, 919 F.2d 568, 569 (9th Cir. 1990), the immigration judge noted that "the Ninth Circuit has held that residential burglary under California law is a crime of violence within the meaning of" the § 16 residual clause, based on the premise that "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." Pet. App. 32a-33a. The immigration judge concluded that the "same logic applies" to Arizona's second-degree burglary statute. Accordingly, the immigration judge determined that Lopez was removable.

Lopez appealed to the Board of Immigration Appeals (BIA). Pet. App. 4a. The BIA acknowledged that, while the Arizona second-degree burglary statute "[o]n its face … appears to be indistinguishable from the generic contemporary definition of burglary adopted by the United States Supreme Court in *Taylor v. United States*, 495 U.S. 575, 599 (1990)[,] … Arizona's courts [have] broadened the definition of burglary from the generic definition." Pet. App. 5a-6a. In particular, "the Arizona courts have expanded the statute beyond generic burglary because they have interpreted the statute to allow a conviction even if the intent to commit the crime was formed after entering the structure and/or the entry was privileged." *United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997). Again relying on the Ninth Circuit's decision in *United States v. Becker*, however, the BIA determined that, despite the expanded scope of Arizona's burglary statute, "a substantial risk of the use of physical force is inherent in the offense committed by the respondent." Pet. App. 10a. Consequently, the BIA dismissed Lopez's appeal. Pet. App. 11a.

Lopez filed a petition for review in the Ninth Circuit. The Court of Appeals concluded that its

decision in *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), controlled the case with respect to the crime of violence question. Pet. App. 2a. Because that case invalidated on constitutional vagueness grounds the § 16 residual clause on which the BIA relied, the court determined that the BIA's conclusion that Lopez was removable was not supported. Pet. App. 2a. The court remanded the case to the BIA for consideration of other possible grounds for removal. Pet. App. 2a.

REASONS TO DENY CERTIORARI

In its petition for certiorari, the government requests that this Court hold this petition pending its disposition of the government's petition in *Lynch v. Dimaya*, No. 15-1498, in which the government has sought review of the Ninth Circuit opinion on which the decision below rested. The government identifies no independent reasons why certiorari is warranted in this case.

For the reasons stated in the brief in opposition to the government's petition for certiorari in *Dimaya*, the questions presented in that case do not warrant this Court's review. Because the questions presented in this case are identical, the arguments asserted in Dimaya's brief in opposition apply with equal force here. This petition, therefore, should be denied as well.

In the event the Court grants the petition in *Dimaya*, Respondent agrees with the government that this petition should be held pending the Court's final disposition in that case and then disposed of as appropriate in light of that disposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 12, 2016