No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

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

BRIEF FOR THE PETITIONER

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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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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2015. A petition for rehearing was denied on January 25, 2016 (Pet. App. 56a). On April 24, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 24, 2016. On May 16, 2016, Justice Kennedy further extended the time to June 10, 2016. The petition was filed on that date and was granted on September 29, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are reprinted in an appendix to this brief. See App., *infra*, 1a-6a.

STATEMENT

An immigration judge determined that respondent, an alien, is removable from the United States and is ineligible for the discretionary relief of cancellation of removal because his two state-court convictions for first-degree burglary each qualify as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Pet. App. 49a-55a. The Board of Immigration Appeals (Board) dismissed respondent's appeal. *Id.* at 41a-47a. The Ninth Circuit granted respondent's petition for review, holding that the relevant portion of the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. Pet. App. 1a-20a.

1. The INA specifies classes of aliens who are removable from the United States on the order of the Attorney General. 8 U.S.C. 1227(a). One such class includes any alien convicted of an "aggravated felony" after admission into the United States. 8 U.S.C. 1227(a)(2)(A)(iii). Although the Attorney General generally has discretionary authority (which has been delegated to immigration judges and the Board) to cancel the removal of certain lawful permanent residents (LPRs), see 8 U.S.C. 1229b(a); see also 8 C.F.R. 1003.1(a)(1), the INA prohibits the Attorney General from cancelling the removal of an LPR who has been convicted of an aggravated felony, 8 U.S.C. 1229b(a)(3); see *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010).

The INA defines "aggravated felony" to include certain categories of offenses. 8 U.S.C. 1101(a)(43). One category is any "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) (footnote omitted). Section 16 of Title 18, which was enacted in 1984, is the general definition of "crime of violence" in the federal criminal code. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, ch. 10, § 1001(a), 98 Stat. 2136. It provides:

> The term "crime of violence" means—
>
> > (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court held that, because Section 16 "directs [its] focus to the 'offense' of conviction," *id.* at 7, courts must employ the "categorical" approach to determine whether a particular predicate offense meets the statutory definition. See *ibid.* Under that approach, a court must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [the individual's] crime." *Ibid.* As particularly relevant here, the Court explained that Subsection (b), by referring to risks arising "in the course of committing the offense," covers offenses that by their nature entail a "risk that the use of physical force against

another might be required in committing [the] crime." *Id.* at 10 (citation omitted).

2. Respondent is a native of the Philippines who was admitted to the United States in 1992 as an LPR. Pet. App. 2a. In both 2007 and 2009, respondent was convicted of first-degree residential burglary in violation of California law. *Ibid.*; see Cal. Penal Code §§ 459, 460(a) (West 1999). Each time he was sentenced to two years in prison. Pet. App. 2a.

In 2010, the Department of Homeland Security (DHS) initiated a removal proceeding against respondent. Pet. App. 42a. DHS charged that respondent is removable because, *inter alia*, his two residential-burglary convictions each qualify as an "aggravated felony" under the INA. See *id.* at 42a-43a. DHS maintained that California first-degree burglary satisfies two alternative subsections of the INA's definition of "aggravated felony": the "crime of violence" provision discussed above, 8 U.S.C. 1101(a)(43)(F), and a provision defining "aggravated felony" to include "a theft offense * * * or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G) (footnote omitted).

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

The Board dismissed respondent's appeal. Pet. App. 41a-47a. The Board first concluded, contrary to

the immigration judge, that first-degree burglary under California law does not qualify as a "theft offense * * * or burglary offense" under 8 U.S.C. 1101(a)(43)(G). Pet. App. 45a. The Board stated that California burglary does not meet the definition of generic burglary (a requirement under Board precedent) because "[t]he California statute does not require an unlawful entry." *Ibid.*

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

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

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

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

a. While the petition for review was pending, this Court decided *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). *Johnson* held that one part of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), is unconstitutionally vague. Under the ACCA, a defendant convicted of being a felon in possession of a firearm, see 18 U.S.C. 922(g)(1), who has three or more convictions for a "violent felony" or "serious drug offense" is subject to a minimum sentence of 15 years of imprisonment. 18 U.S.C. 924(e)(1). The ACCA defines "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * that * * * is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court had previously construed the so-called "residual clause" of that definition (*i.e.*, the clause beginning with "otherwise") to require a court to determine whether the "ordinary case" of a given predicate offense presents the requisite risk of injury, as opposed to whether the defendant's particular conduct underlying his conviction entailed such a risk. *Johnson*, 135 S. Ct. at 2557.

Johnson held that the ACCA's residual clause violates the Due Process Clause's "prohibition of vagueness in criminal statutes" because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." 135 S. Ct. at 2556-2557. The Court concluded that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2557. First, the clause requires courts not only to discern the "ordinary case" of the

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

b. The Ninth Circuit ordered supplemental briefing in this case on the effect of *Johnson*. In a divided decision, the court then granted respondent's petition for review, holding that the definition of "crime of violence" in Section 16(b), as incorporated into the INA's definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. Pet. App. 1a-20a.

i. The court of appeals first concluded that "[a]though most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the crite-

ria for deportation." Pet. App. 5a; see *id.* at 5a-7a. In reaching that conclusion, the court relied on this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), which it interpreted to "explicitly reject[] the argument that the vagueness doctrine d[oes] not apply" to civil removal statutes. Pet. App. 6a.

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

The government had pointed to textual differences between Section 16(b) and the ACCA's residual clause, but the court found those differences immaterial. See Pet. App. 14a-19a. The government explained, for example, that Section 16(b) on its face requires the risk to arise "in the course of committing the offense," 18 U.S.C. 16(b), whereas the ACCA's residual clause requires courts to "go[] beyond evaluating the chances that the physical acts that make up the crime will injure someone" and ask whether a risk of physical injury might occur after the offense is committed, *Johnson*, 135 S. Ct. at 2557; see *id.* at 2557-2558. The Ninth Circuit questioned whether Section 16(b) is actually limited in that respect, but

also deemed any such difference irrelevant to *Johnson*'s holding. See Pet. App. 16a-17a. The government further explained that Section 16(b) does not contain "a confusing list of examples" like the four enumerated offenses in the ACCA's residual clause that magnified the uncertainty about the level of risk required. 135 S. Ct. at 2558, 2561. The court, however, was of the view that *Johnson*'s discussion of the four enumerated offenses was not necessary to its holding. Pet. App. 15a-16a. The court also dismissed the fact that, unlike the residual clause in *Johnson*, Section 16(b) has not generated widespread confusion among lower courts and has not been subject to "repeated attempts and repeated failures" by this Court "to craft a principled and objective standard" from the statutory text, *Johnson*, 135 S. Ct. at 2558. See Pet. App. 18a-19a.

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

iii. Judge Callahan dissented. Pet. App. 20a-40a. She concluded that Section 16(b), "as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of the[] shortcomings" that this Court identified in the text of the ACCA's residual clause. *Id.* at 21a; see *id.* at 37a-38a.

SUMMARY OF ARGUMENT

Section 16(b) of Title 18, as applied in civil-immigration proceedings through the INA's definition

of "aggravated felony," 8 U.S.C. 1101(a)(43)(F), is not unconstitutionally vague.

A. The Ninth Circuit erred in applying the Due Process Clause's "prohibition of vagueness in criminal statutes," *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015), to provisions applied in immigration removal proceedings. This Court has long held that "[t]he degree of vagueness that the Constitution tolerates * * * depends in part on the nature of the enactment," and it has accordingly "expressed greater tolerance of enactments with civil rather than criminal penalties." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982). That distinction makes particular sense in the immigration context, given the distinct nature and purpose of removal proceedings and the twin purposes of the vagueness doctrine: to ensure fair notice of what conduct is criminally prohibited and to prevent arbitrary or discriminatory enforcement of criminal laws. The Executive Branch has long been given broad authority in the administration of the immigration laws, in light of their integral connection to foreign relations and national security. Moreover, removal statutes, like other civil provisions, are not subject to the Ex Post Facto Clause, so an alien has no constitutionally grounded expectation of fair notice about a basis for removal. And the framework for the conduct of removal proceedings provides for centralized control over their institution and adjudication and for authoritative interpretations of statutory provisions by the Attorney General.

Although the Court has on occasion tested civil provisions for vagueness, it has struck down those provisions under the Due Process Clause because they

were so unintelligible as to effectively supply no standard at all. Whatever the potential interpretive difficulties that the text of Section 16(b) might raise, it is not unintelligible. And the fact that the text has criminal applications does not mean that the criminal-law vagueness standard governs its applications in removal proceedings. Federal statutes often define terms that are used in both civil and criminal provisions. Yet it has never been understood that parties to civil disputes can invoke the "Constitution's prohibition of vague criminal laws" to invalidate statutory definitions. *Johnson*, 135 S. Ct. at 2556.

B. Even under the vagueness standard applicable to criminal laws, Section 16(b) comports with due process. To the government's knowledge, before this Court's 2015 decision in *Johnson*, which declared the residual clause of the Armed Career Criminal Act unconstitutionally vague, no lower court or Justice of this Court had suggested that Section 16(b) raised constitutional vagueness concerns. To the contrary, this Court construed and applied that provision without evident difficulty in its unanimous decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), more than a decade ago. And this Court has not granted review in any other case involving the applicability of Section 16(b) to a particular offense in the more than three decades since the statute was enacted.

That stability in this area of the law is directly attributable to the more precise text of Section 16(b). It is true that Section 16(b), like the ACCA's residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense; that is a consequence of the categorical approach. But the similarity ends there. As *Leocal* explained, the Section 16(b)

risk analysis is expressly limited to risks that occur "in the course of committing the offense," 543 U.S. at 11 (citation omitted), whereas the ACCA's residual clause required an open-ended inquiry into conduct and results that may arise after the completion of the offense. See *Johnson*, 135 S. Ct. at 2557-2558. Section 16(b) focuses on a more sharply defined category of risk—the use of physical force against person or property in the course of committing the offense—while the ACCA's residual clause subsumed all physical injury that might bear a causal connection to the offense. And whereas this Court found that the ACCA's accompanying list of exemplar offenses exacerbated the text's imprecision because they each entail quite different levels of risk, see *id.* at 2558, Section 16(b) contains no such mystifying list.

Given those textual differences, and the absence of any comparable history of interpretive turmoil, no sound basis exists to invalidate an Act of Congress that supplies a critical definition for numerous immigration and criminal provisions—and that is materially identical to the definition of "crime of violence" in the oft-prosecuted offense set forth at 18 U.S.C. 924(c). Rather, this Court, based on the limits imposed by the plain text of the provision, should confirm that the statute has a comprehensible core that ensures that the commission of a clearly dangerous felony triggers removal under the immigration laws.

ARGUMENT

SECTION 16(b), AS INCORPORATED INTO THE IMMIGRATION AND NATIONALITY ACT, IS NOT UNCONSTITUTIONALLY VAGUE

A. Immigration Removal Laws Are Not Subject To The Standard Of Vagueness Applicable To Criminal Laws

The Ninth Circuit erred in holding that the Constitution's "prohibition of vagueness in *criminal* statutes," *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015) (emphasis added), applies to statutory provisions applied in immigration removal proceedings. "Removal is a civil, not criminal, matter." *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012). This Court has long held that the vagueness doctrine does not apply with the same force to statutes applied in civil proceedings. As the Court has explained, "[t]he degree of vagueness that the Constitution tolerates * * * depends in part on the nature of the enactment," and the Court has thus "expressed greater tolerance of enactments with civil rather than criminal penalties." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982); see *Winters* v. *New York*, 333 U.S. 507, 515 (1948); see also *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 290 (1982).

That distinction makes sense given that the constitutional objectives of the vagueness doctrine in criminal cases—to ensure fair notice of what conduct is proscribed and to prevent arbitrary and discriminatory enforcement by police officers, judges, and juries—have far less force in the civil context. That is especially so with respect to removal proceedings. Here, respondent suffered no deprivation of due process when the Board determined that his burglary convic-

tions qualify as aggravated felonies under the INA and therefore require his removal.

1. This Court has long drawn a firm distinction between criminal and civil statutes for vagueness purposes

This Court has long recognized that "[t]he standards of certainty in statutes punishing * * * offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters*, 333 U.S. at 515; see *Village of Hoffman Estates*, 455 U.S. at 498-499. The Court should reaffirm that bedrock distinction.[2]

a. The vagueness doctrine did not exist as a constitutional limitation on legislation at the time of the Founding. See *Johnson*, 135 S. Ct. at 2567 (Thomas, J., concurring in the judgment). "[C]ourts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law." *Ibid.* Thus, "rather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts—like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly." *Id.* at 2568. The Court first struck down a criminal statute under the vagueness doctrine in 1914, see *International Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 216, 223-224, holding that Kentucky antitrust laws that based criminal liability on a determination of the "real value" of an article

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[2] This Court has recognized "a more stringent vagueness test," *Village of Hoffman Estates*, 455 U.S. at 499, for statutes that "abut[] upon sensitive areas of basic First Amendment freedoms," *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972) (citation omitted). First Amendment activity is not at issue here.

"violated the fundamental principles of justice embraced in the conception of due process of law," *Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914). See *Johnson*, 135 S. Ct. at 2570 (Thomas, J., concurring in the judgment).

Since that time, this Court has repeatedly described the core due process vagueness principle as a limitation on criminal statutes. "As generally stated," the Court has explained, "the void-for-vagueness doctrine requires that a *penal statute* define the *criminal offense* with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) (emphases added); see *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994).[3] "The underlying principle is that no man shall be held *criminally responsible* for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954) (emphasis added). And in *Johnson* itself, the Court repeatedly described the vagueness doctrine as a due process limitation on criminal statutes. See 135 S. Ct. at 2555 ("Constitution's prohibition of vague criminal

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[3] See also, *e.g.*, *Colautti* v. *Franklin*, 439 U.S. 379, 390 (1979) ("[A]s a matter of due process, a *criminal* statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness.") (emphasis added) (internal citations and quotation marks omitted); see also, *e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 402-403 (2010); *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

laws"); *id.* at 2556 (same, twice); *id.* at 2556-2557 ("prohibition of vagueness in criminal statutes").

b. As the Court recognized in *Village of Hoffman Estates*, it has on occasion analyzed whether civil statutes are too vague to comport with due process. 455 U.S. at 498-499. Those decisions—including decisions analyzing immigration removal statutes—reflect the settled understanding that the vagueness doctrine permits "greater tolerance of enactments with civil rather than criminal penalties." *Ibid.*; see *Winters*, 333 U.S. at 515.

Significantly, for example, in *Mahler* v. *Eby*, 264 U.S. 32 (1924), the Court considered aliens' challenge to an immigration statute that vested the Secretary of Labor with authority to deport certain "undesirable residents of the United States." Act of May 10, 1920, c. 174, 41 Stat. 593. Writing for a unanimous Court, Chief Justice Taft rejected the aliens' argument that the statutory language was "vague" under the principles of *International Harvester*, *supra*, and another decision holding a criminal statute unconstitutionally vague, *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 86 (1921). 264 U.S. at 40-41. He explained that those "were both criminal cases," and "[t]he rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers." *Id.* at 41.

The following year, in *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925), this Court first held that a statute invoked in a civil proceeding was unconstitutionally vague. The Court had previously concluded in *L. Cohen Grocery* that a provision of federal law subjecting to criminal liability any person who made "any unjust or unreasonable rate or

charge in handling or dealing in or with any necessaries" was void for vagueness. 255 U.S. at 86 (quoting The Food Control and the District of Columbia Rents Act, ch. 80, Tit. I, § 2, 41 Stat. 298); see *id.* at 89-93. The Court had determined that the statutory language "le[ft] open * * * the *widest conceivable inquiry*" and "forb[ade] no specific or definite act." *Id.* at 89 (emphasis added). In *A.B. Small*, a defendant in a breach-of-contract action invoked the same provision to assert the defense that the relevant contracts were invalid, but the Court held that the provision could not be invoked in that context either. 267 U.S. at 235, 237-242. The Court explained that the holding of *L. Cohen Grocery*—that the statutory standard "was so vague and indefinite as really to be *no rule or standard at all*"—was not "applicable only to criminal prosecutions." *Id.* at 239 (emphasis added). "A prohibition so indefinite as to be *unintelligible*," the Court held, "is not a prohibition by which conduct can be governed." *Id.* at 240 (emphasis added; citation omitted). Given the essentially standardless—indeed, "unintelligible"—statute at issue in *A.B. Small*, the Court's invalidation of the statute is consistent with the principle that a less searching form of the vagueness doctrine applies in civil proceedings.

Similarly, in *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court held unconstitutionally vague a statute authorizing juries to impose court costs on acquitted defendants, and requiring the State to imprison acquitted defendants until they paid the assessed costs, without determining whether the statute should be classified as civil or penal. *Id.* at 402-405. The Court held that the statute was unconstitutional because it "contain[ed] *no standards at all*, nor d[id] it

place any conditions of any kind upon the jury's power to impose costs," and state-court interpretations of the statute had left jurors to apply "their own notions of what the law should be." *Id.* at 403 (emphasis added). Given the lack of any standard in the statute, that holding, like *A.B. Small*, is consistent with a more deferential vagueness limitation for civil statutes. See also *Old Dearborn Distrib. Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183, 185-186, 196-197 (1936) (concluding that phrase "fair and open competition" in Illinois statute regulating certain commodities contracts was sufficiently definite that "'a standard of some sort was afforded'") (quoting *L. Cohen Grocery*, 255 U.S. at 92).

The Court drew the distinction between criminal and civil laws particularly clearly in *City of Mesquite*, *supra*, a vagueness challenge to a city ordinance governing the licensing process for amusement establishments. 455 U.S. at 284-288. The Court ultimately upheld the provision on the ground that the assertedly vague provision, which directed authorities to consider the applicant's "connections with criminal elements," did not in fact supply the standard for licensing decisions. *Id.* at 290-291. But the Court made clear at the outset of its analysis that the vagueness standard applicable to civil licensing provisions is less searching than the criminal-law standard: "We may assume that the definition of 'connections with criminal elements' in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection," the Court stated, and "we may even assume, without deciding, that such a standard is also too vague to support the denial of an application for a license to operate an amusement center." *Id.* at 290. The import of that statement is that licensing qualifi-

cations are not subject to the same vagueness test as criminal provisions.

c. In applying the vagueness standard applicable in criminal proceedings, the Ninth Circuit relied principally on this Court's post-*Mahler* decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), which upheld a provision of federal immigration law as sufficiently definite. That reliance was misplaced. Not only is the result in *Jordan* consistent with this Court's pronouncements about the difference between civil and criminal laws for vagueness-doctrine purposes, but its analysis reinforces that distinction.

Jordan construed a statute providing for the deportation of an alien convicted more than once for "any crime involving moral turpitude." 341 U.S. at 225 (quoting 8 U.S.C. 155(a) (1940)). The Court held that the statute encompassed the offense of conspiracy to defraud the United States of taxes on distilled spirits. *Id.* at 223-224, 229. Responding to an argument raised by the dissent but not by the alien, the Court went on to consider whether "the phrase 'crime involving moral turpitude' lacks sufficiently definite standards to justify this deportation proceeding and [whether] the statute [at issue was] therefore unconstitutional for vagueness." *Id.* at 229. Importantly, the Court explained that "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the *criminal* consequences of their conduct," and it "emphasized that this statute does not declare certain conduct to be criminal." *Id.* at 230 (emphasis added; citation omitted).

The Court nevertheless elected to "examine the application of the vagueness doctrine to this case * * * in view of the grave nature of deportation." 341

U.S. at 231. And it proceeded to "test th[e] statute under the established criteria of the 'void for vagueness' doctrine." *Ibid.* But *Jordan* did not thereby hold—in a case where the issue was not briefed or argued—that the same standard of definiteness applies to civil removal statutes. It had no need to decide that issue, because the Court ultimately concluded that fraud crimes were encompassed by the phrase "crime involving moral turpitude." See *id.* at 231-232. The Court did not address whether the provision would necessarily have been invalid if it did not meet the criminal-law standard. Nor did it suggest that it was overruling *Mahler*.

Jordan therefore does not cast doubt on the proposition that the Constitution tolerates a lesser "degree of vagueness," *Village of Hoffman Estates*, 455 U.S. at 498, for criminal statutes than for laws with only civil consequences. Indeed, Justice Black, joined by Chief Justice Warren and Justice Douglas, later cited *Jordan* for the proposition that, "[f]or obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes." *Barenblatt* v. *United States*, 360 U.S. 109, 137 & n.2 (1959) (dissenting on other grounds).

2. Subjecting civil immigration statutes to a lesser standard of definiteness comports with the basic purposes of the vagueness doctrine

The Court's longstanding distinction between criminal and civil statutes makes particular sense in the immigration context. A removal proceeding "is a purely civil action to determine eligibility to remain in the country," not to punish the alien for past conduct. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). The proceeding "looks prospectively," and "[p]ast

conduct is relevant only insofar as it may shed light on the [alien's] right to remain." *Ibid.* Thus, even where removal is based on a past criminal conviction, removal is not a punishment or penalty for the crime. Rather, Congress has simply provided for expulsion of aliens who have demonstrated that "their continued presence here would not make for the safety or welfare of society." *Mahler*, 264 U.S. at 39; accord *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913) (Congress provided for "deportation of aliens whose presence in the country it deem[ed] hurtful").

Moreover, because of the distinctive nature and purpose of removal proceedings, the principal concerns of the vagueness doctrine have far less force in that context. As *Johnson* explained, the doctrine is designed to ensure that a criminal statute "give[s] ordinary people fair notice of the conduct it punishes" and is not "so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556 (citing *Kolender*, 461 U.S. at 357-358). Neither of those constitutional values is implicated to remotely the same extent by removal proceedings.

a. The fair-notice concern has little force in the removal context because, unlike criminal statutes, removal statutes are not subject to the Constitution's prohibition on ex post facto laws. Indeed, "[i]t always has been considered that that which [the Ex Post Facto Clause] forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment," and "[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); see *Marcello* v. *Bonds*, 349 U.S. 302, 314

(1955); *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954); *Mahler*, 264 U.S. at 39. Thus, for example, this Court in *Marcello* upheld the removal of an alien based on a conviction for an offense that "was not ground for deportation at the time he committed the offense." 349 U.S. at 314.

If Congress may, as in *Marcello*, retroactively subject an alien to removal based on a past criminal conviction, an alien has no constitutionally cognizable expectation that he will not be removed due to his criminal record or some other basis that was not identified in the law existing at the time. The fair-notice aspect of the vagueness doctrine therefore has little force in the civil immigration context.

This Court has held that the Sixth Amendment requires a criminal-defense attorney to "inform her client whether his plea carries a risk of deportation." *Padilla* v. *Kentucky*, 559 U.S. 356, 374 (2010). That holding, however, does not suggest that the Due Process Clause affords a criminal defendant a right to notice that he will or will not be subject to deportation. Rather, the *Padilla* rule rests on the conclusion that "when the deportation consequence [of a guilty plea] is truly clear" under existing law, a competent lawyer would advise his client about that consequence before the client pleads guilty. *Id.* at 369. But *Padilla* also recognized that in many cases "the law is not succinct and straightforward," in which case "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Ibid.* That reduced obligation even with respect to existing law underscores that aliens may lack clear

notice about the immigration consequences of criminal convictions.

b. The other major objective of the vagueness doctrine is to avoid "arbitrary enforcement" of criminal laws by ensuring that the "'legislature establish[es] minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 358 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974)). The concern is that when the legislature "abdicate[s] [its] responsibilities for setting the standards of the criminal law," it "allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith*, 415 U.S. at 575.

That aspect of the vagueness doctrine has less force, and the concern it reflects is far less pronounced, in the context of civil immigration proceedings. Immigration law and its enforcement are intrinsically bound up with the Nation's foreign relations and national security, in which the Constitution assigns the President a substantial role. Congress accordingly has long vested the Executive Branch with broad authority in the administration of the Nation's immigration laws, including in the removal of aliens from the United States. In doing so, it has often spoken in broad phrases, such as "undesirable residents," *Mahler*, 264 U.S. at 40, or "crime of moral turpitude," *Jordan*, 341 U.S. at 225, that inherently confer a degree of interpretive judgment on the Executive Branch. In this constitutional and statutory context, it would be particularly unwise to impose a rigid version of the vagueness doctrine.

That conclusion is reinforced by the framework under which the Executive Branch administers the INA, which has the salutary effect of reducing the potential for inconsistent interpretation and enforcement.

Institution of removal proceedings is under the unified control of the Secretary of Homeland Security. See 8 U.S.C. 1103(a)(1), (3), and (5). The Attorney General, in turn, is charged with conducting removal proceedings, 8 U.S.C. 1229a, and with rendering interpretations of the INA that are binding on the Executive Branch, see 8 U.S.C. 1103(a)(1). Although an immigration judge makes an initial determination on removal, 8 U.S.C. 1229a(a)(1), either the alien or DHS has a right to appeal an adverse decision to the Board, 8 C.F.R. 1003.3(a)(1). The provision for centralized review by the Board, on behalf of the Attorney General, promotes consistent interpretations across cases.

The Board's decisions are ultimately subject to judicial review by the regional courts of appeals, potentially leading to inconsistent rulings. See *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010). But that is an unremarkable feature of federal judicial administration, and its significance is mitigated by the courts' obligation to give *Chevron* deference to reasonable Board interpretations of immigration statutes. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (opinion of Kagan, J.); *id.* at 2214 (Roberts, C.J., concurring in the judgment); *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). And although courts do not afford *Chevron* deference to the Board's interpretation of a criminal provision incorporated by reference into the INA, see *Zivkovic* v. *Holder*, 724 F.3d 894, 897-898 (7th Cir. 2012), the Board's centralized initial review still serves to reduce the risk of disparate outcomes.

c. Accordingly, this Court's longstanding view that civil statutes are subject to a less searching standard

of definiteness than criminal statutes is particularly sound in the immigration context, in light of the special nature of removal proceedings and the basic purposes of the vagueness doctrine.

3. Under the vagueness standard appropriate for provisions applied in immigration removal proceedings, respondent was not denied due process

Under the vagueness standard appropriate for immigration removal proceedings, respondent was not denied due process when the Board concluded that he was removable under 8 U.S.C. 1227(a)(2)(A)(iii), and was ineligible for cancellation of removal under 8 U.S.C. 1229b(a)(3).

a. Although this Court has "expressed greater tolerance of enactments with civil rather than criminal penalties," *Village of Hoffman Estates*, 455 U.S. at 498-499, it has not previously announced a verbal formulation for when a provision applied in a civil proceeding is unconstitutionally vague. But the decisions in which the Court has applied the vagueness doctrine to strike down civil provisions suggest a general principle. In those cases, the Court determined that the statute was so "unintelligible" that it was essentially "not a rule at all." *A.B. Small*, 267 U.S. at 240 (citation omitted); see *Giaccio*, 382 U.S. at 403 ("no standards at all"); cf. *Johnson*, 135 S. Ct. at 2568 n.3 (Thomas, J., concurring in the judgment) (noting that "early American state courts * * * sometimes refused to apply a law they found completely unintelligible, even outside of the penal context").

That standard—unintelligibility—is meaningfully less stringent than the criminal standard, which asks whether "a criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it pun-

ishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. The latter formulation, though also very deferential to legislative draftsmanship, would be a poor fit in the context of this case, in which the Executive Branch has historically been afforded broad authority in the administration of the immigration laws, aliens do not have a constitutionally protected expectation of fair notice of the type of conduct that may be a basis for their removal, and centralized administration renders the arbitrary-enforcement concern less pronounced. At the same time, a test of unintelligibility would ensure that an alien is not subject to a proceeding governed by an incomprehensible legal standard. It would also ensure that immigration officials and courts are not obligated to enforce legal provisions from which it is impossible to discern any meaning, preserving the integrity of the immigration system.

b. In this Court, the basis for the removal of respondent turns on the INA's definition of "aggravated felony." That definition incorporates 18 U.S.C. 16, a definitional provision of the federal criminal code that has many criminal applications, and it is the text of Section 16(b) that the Ninth Circuit found to be unconstitutionally vague. In addition, the definition of "aggravated felony" itself, 8 U.S.C. 1101(a)(43), has criminal applications within the INA. See 8 U.S.C. 1326(b)(2), 1327. Respondent argued at the certiorari stage (Br. in Opp. 18) that because the assertedly vague language at issue here has criminal applications, the criminal-law vagueness standard should apply.

That contention is mistaken. Congress could have adopted precisely the same statutory regime by re-

producing the text of Section 16 verbatim in the provision rendering respondent removable. 8 U.S.C. 1227(a)(2)(A)(iii). That Congress chose the statutory shortcut of defining the term "aggravated felony" for the entire INA, and cross-referencing Section 16 as part of that definition, does not change the critical fact that the statutory language operates in this case as part of a civil removal provision, not as an element of a criminal offense or as a criminal-penalty provision. After all, many definitional provisions of federal statutes have both civil and criminal applications, but it has never been thought that parties to civil suits could challenge those provisions under the criminal-law vagueness standard.

Respondent also adverted (Br. in Opp. 18) to the principle that a court must interpret the same statute consistently across applications. See *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). That principle means, for example, that Section 16(b) could not be interpreted one way in an immigration case and another way in a criminal case. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). But it does not mean that, if the Court were to conclude that the statutory text were too indeterminate to support criminal liability, the Court would also be required to conclude that it is too vague to be applied in a civil removal proceeding. To hold that a statute is valid as applied in one setting but not in another is not to "give the[] same words a different meaning" in the two contexts, *Clark*, 543 U.S. at 378, but rather to recognize that the demand for textual clarity is greater when criminal liability is at stake.

c. Under a standard of basic intelligibility, respondent was not denied due process. The language of Section 16(b) that is incorporated into the INA

provisions at issue here is plainly intelligible. As explained in greater detail below, the language of Section 16(b) has been applied by lower courts for over three decades without producing pervasive circuit conflicts and without any significant suggestion that the statute raises vagueness concerns. See pp. 45-52, *infra*. In two pages of analysis, this Court unanimously construed the provision not to encompass drunk-driving offenses—a problem that vexed the Court in the ACCA context. See *Leocal*, 543 U.S. at 10-11. Whatever the potential interpretive difficulties raised by applying Section 16(b)'s general risk standard categorically, the statutory language is not so opaque as to effectively lack any standard at all and to bar its application as a basis for removal of an alien.[4]

B. Section 16(b) Is Not Unconstitutionally Vague Under The Standard Applicable To Criminal Laws

Even under the same vagueness standard applicable to criminal laws, Section 16(b) is not unconstitutionally vague. Section 16(b) has not produced a cacophony of interpretive confusion and conflicting decisions, as the ACCA's residual clause did. That is no accident. It is the direct product of the distinctive textual features of Section 16(b) that sharpen its focus

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[4] The definition of aggravated felony was applied here not only as a basis for respondent's removal, but also for determining that he is ineligible for discretionary relief from cancellation of removal. Pet. App. 46a-47a, 54a. Because discretionary relief from removal is not a "matter of right" but rather a "matter of grace," *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956), akin to "the President's [power] to pardon a convict," *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted), the Due Process Clause, including the vagueness doctrine, allows Congress especially broad latitude to confer discretion on the Executive in granting such relief.

and make its application more predictable. This Court should accordingly hold that the language of Section 16(b), which applies to many provisions of the INA and the federal criminal code, is not unconstitutionally vague.

1. Section 16(b) is drafted more precisely than the ACCA's residual clause

Johnson held that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, not only does the ACCA's residual clause require courts to conduct an "ordinary case" analysis to determine the risk posed by an offense, but, "[c]ritically, * * * assessing 'potential risk' seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-2558. Thus, "the court's task * * * goes beyond evaluating the chances that the physical acts that make up the crime will injure someone" and encompasses the question whether the ordinary offender "might engage in violence *after*" completing the offense. *Id.* at 2557. Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony," both because of the difficulty of "apply[ing] an imprecise 'serious potential risk' standard to * * * a judge-imagined abstraction," and because "the residual clause forces courts to interpret 'serious potential risk' in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Id.* at 2558. Those four crimes, the Court explained, "are far from clear in respect to the degree of risk each poses," and their inclusion thus obscures the degree of risk necessary for an unenumerated offense to qualify under the ACCA's residual clause. *Ibid.* (citation and

internal quotation marks omitted); see *id.* at 2559 ("[T]he enumerated crimes are not much more similar to one another in kind than in degree of risk posed.")

Section 16(b), like the ACCA's residual clause, requires courts to conduct an "ordinary case" analysis. The statute asks whether a given offense "by its nature" poses the requisite risk, indicating that the risk analysis must be conducted categorically rather than based on the specific facts of a felon's prior conviction. *Leocal*, 543 U.S. at 7. And given that "[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk," *James* v. *United States*, 550 U.S. 192, 208 (2007), the categorical question is whether the commission of the offense would *ordinarily* give rise to the risk, not whether it always would.

But although both Section 16(b) and the ACCA's residual clause require an "ordinary case" analysis, three textual features of Section 16(b) make that inquiry substantially more precise, predictable, and judicially administrable. First, Section 16(b) requires the risk to arise in "the course of committing the offense," and therefore excludes risks arising after the offense is completed—the aspect of the residual clause's risk analysis that *Johnson* characterized as "[c]ritical[]" to its vagueness holding, 135 S. Ct. at 2557. Second, Congress tailored the statutory standard to the risk that "physical *force*" against person or property will be "used" in the course of committing the offense, which describes a more concrete range of conduct than the ACCA's reference to any offense conduct that could result in physical injury. 18 U.S.C. 16(b) (emphasis added). Third, Congress did not include a confusing list of exemplar crimes, and so

freed courts from having to conduct the analysis by reconciling the different risks entailed in the listed offenses. Combined, those distinctive features of Section 16(b) render it consistent with the tenets of due process.

a. The requirement that the use of force occur "in the course of committing the offense" excludes attenuated risks

i. Unlike the ACCA's residual clause, Section 16(b) provides that the requisite risk must arise "in the course of committing the offense." For that reason, this Court held in *Leocal* that Section 16(b)'s risk analysis "relates *not* * * * 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*." 543 U.S. at 10 (second emphasis added).

That textual limitation serves in part as a temporal restriction on the scope of the risk analysis; unlike with the ACCA's residual clause, a court may not consider risks arising *after* the course of committing the offense is completed. But the limitation is also functional: The substantial risk that physical force will be used in committing the offense must stem from the nature of the acts that constitute the offense. By the statute's express terms, a more remote or attenuated potential use of force is not enough to bring a crime within Section 16(b). That requirement stands in contrast to the looser connection set out in the ACCA's residual clause, which asks only whether the crime entails "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). That standard could be satisfied by a risk of injury that had only an indirect connection to

the commission of the elements of the offense—such as the accidental injury of a pedestrian by a police cruiser during a high-speed pursuit. See *Sykes* v. *United States*, 564 U.S. 1, 8-9 (2011). Section 16(b), by contrast, captures only the risk that "the offender" himself will use force, and then only in the course of committing the crime.

By so limiting the risk inquiry, Section 16(b) ensures that the categorical "ordinary case" analysis is far more manageable and predictable than in the ACCA context. The ACCA's residual clause effectively called for a double act of imagination: A court was required *first* to imagine what events might take place after completion of the offense and *then* to ask whether those events might result in physical injury to another person. But Section 16(b) eliminates the first inquiry entirely (and, for reasons explained in the next subsection, transforms the second into a far more specific focus on offender conduct). Rather than imagining a hypothetical series of events that might ensue after the crime, a court need only consider the offense as defined—for example, entering or remaining in a structure unlawfully with the intent to commit a felony—and then determine whether there exists a substantial risk that an offender would use physical force against person or property in the course of committing the offense. That is a significantly more focused inquiry, because the conduct to which the risk analysis is applied is the product of statutory definition, not judicial imagination.

ii. In practice, the statutory limitation to risks arising "in the course of committing the offense" means that hard cases under the ACCA's residual clause are easier cases under Section 16(b). For example, the

offense at issue in *Johnson* itself was unlawful possession of a short-barreled shotgun. Whether that offense was covered had divided the lower courts. See U.S. Br. in Opp. at 11-20, *Johnson*, *supra* (No. 13-7120). As *Johnson* explained, that had proved to be a difficult question because it required courts to decide whether to "consider the possibility that the person possessing the shotgun will later use it to commit a crime," and thus whether "a crime may qualify under the residual clause even if the physical injury is remote from the criminal act." 135 S. Ct. at 2559. And indeed, that statutory question divided the three Justices who dissented from *Johnson*'s vagueness holding. Compare *id.* at 2564-2566 (Thomas, J., concurring in the judgment), with *id.* at 2582-2584 (Alito, J., dissenting).

But since *Leocal*, courts of appeals considering weapons-possession offenses under Section 16(b)—or under the materially identical definition of "crime of violence" in 18 U.S.C. 924(c), which subjects to criminal punishment anyone who uses, carries, or possesses a firearm with a specified connection to a crime of violence—have widely concluded that they do not qualify as crimes of violence. They have reached that conclusion precisely because an act of possession does not in itself give rise to a substantial risk that the offender will use physical force against another person in the course of committing the offense.[5] Those courts

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[5] See *United States* v. *Diaz-Diaz*, 327 F.3d 410, 413-414 (5th Cir.) ("[P]hysical force against the person or property of another need not be used to complete [that] crime. Instead, it is complete upon, *inter alia*, mere knowing possession of the weapon.") (brackets in original; internal citation and quotation marks omitted), cert. denied, 540 U.S. 889 (2003); see also *Evans* v. *Zych*, 644 F.3d 447,

have explained that "*Leocal* instructs us to focus not on whether possession will likely result in violence, but instead whether one possessing an unregistered weapon necessarily risks the need to employ force to commit possession." *United States* v. *Serafin*, 562 F.3d 1105, 1113 (10th Cir. 2009) (emphasis omitted); cf. *Torres* v. *Lynch*, 136 S. Ct. 1619, 1629-1630 (2016) (observing that 18 U.S.C. 16, as incorporated into the INA's aggravated-felony provision, "would not reach felon-in-possession laws and other [federal] firearms offenses"). That consensus illustrates how the distinctive textual features of Section 16(b) clarify and narrow the interpretive task.

iii. That conclusion is consistent with the legislative history of Section 16, in which the Senate Report stated that Section 16(b) would cover "offenses such as burglary * * * inasmuch as such an offense would involve the substantial risk of physical force [being used] against another person or against the property." S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983). Consistent with that statement, *Leocal* observed that "burglary" is the "classic example" of a Section 16(b) offense because "burglary, by its nature, involves a substantial risk that the burglar will use force against

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453 (6th Cir. 2011) (illegal possession and transfer of firearm regulated by National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.*); *United States* v. *Serafin*, 562 F.3d 1105, 1114 (10th Cir. 2009) (possession of unregistered firearm in violation of NFA); *United States* v. *Hull*, 456 F.3d 133, 137-141 (3d Cir. 2006) (possession of pipe bomb), cert. denied, 550 U.S. 970 (2007); cf. *United States* v. *Rogers*, 371 F.3d 1225, 1232 (10th Cir. 2004) (holding that 18 U.S.C. 922(g)(8) and (9)—prohibiting possession of a firearm by a person under a protective order or convicted of a misdemeanor crime of domestic violence—are crimes of violence under the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*).

a victim in completing the crime." 543 U.S. at 10. The conclusion that burglary risks the use of force makes sense. Generic burglary consists of the act of unlawful entry into, or remaining in, a building or structure, see *Taylor* v. *United States*, 495 U.S. 575, 599 (1990), and the act of entry or remaining will typically entail the risk that force will be used against persons or property in the course of committing the offense. Courts have no need to look beyond the conduct constituting the offense to identify that risk.

In *Johnson*, the Court described the risk of violence in burglary by emphasizing post-entry events, stating that "[t]he act of * * * breaking and entering into someone's home does not, in and of itself, normally cause physical injury" to a person, but instead the "risk of injury arises because * * * the burglar might confront a resident in the home *after* breaking and entering." 135 S. Ct. at 2557.[6] Consideration of subsequent conduct, the Court reasoned, launches courts on an indeterminate inquiry because it moves away from "the physical acts that make up the crime." *Ibid.* Section 16(b), unlike the ACCA's residual clause, is directed exclusively to risks arising "in the course of committing the offense," thus foreclosing inquiry into subsequent consequences.

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[6] *Johnson* expressed some doubt about the moment-of-entry risk to persons in burglary. The Court did not, however, expressly consider that the offense of generic burglary also includes remaining in a structure after entering. In any event, the Court did not question that "the physical acts that make up the crime" of burglary, 135 S. Ct. at 2557, will characteristically pose a substantial risk that physical force will be used against a person *or against property*. The latter is sufficient to bring an offense within Section 16(b), although not within the ACCA's residual clause.

b. The requirement of a risk that "physical force" "may be used" "against the person or property of another" further narrows the relevant inquiry

i. The second critical feature of Section 16(b) is that its text defines a more concrete *type* of risk. Whereas the ACCA's residual clause covers any offense posing a serious potential risk that "physical injury" will occur, 18 U.S.C. 924(e)(2)(B)(ii), Section 16(b) refers to a substantial risk that "physical *force* against the person or property of another may be *used*" in committing the offense. 18 U.S.C. 16(b) (emphases added). The "use" of "physical force" against the person or property of another is a significantly more specific and focused requirement than the ACCA's general risk-of-injury requirement. Section 16(b) trains solely on whether the defendant himself might engage in a certain type of behavior—using physical force—in the course of committing the offense, not whether his actions may produce physical injury in a more tangential or attenuated way. See *United States* v. *Taylor*, 814 F.3d 340, 376-377 (6th Cir. 2016) ("Risk of physical force against a victim is much more definite than risk of physical injury to a victim."), petition for cert. pending, No. 16-6392 (filed Oct. 12, 2016).

As a result, the "ordinary case" risk analysis is more targeted under Section 16(b) than under the ACCA. Although a court must determine the most likely ways in which a person would commit the offense, the court need not speculate about a chain of causation that could possibly result in a victim's injury. Rather, the court must determine only whether there exists a substantial risk that statutorily defined conduct—breaking into a home, for example, or resist-

ing arrest—would entail the use of physical force against property or another person. That inquiry does not call for the sort of speculation that the ACCA did.

ii. Like Section 16(b)'s limitation to risks arising in the course of committing the offense, the statute's exclusive focus on the use of physical force has produced easy cases for offenses that posed vexing problems under the ACCA's residual clause. For example, the question whether drunk-driving offenses fall under the ACCA's residual clause divided this Court three ways. See *Begay* v. *United States*, 553 U.S. 137 (2008). The majority in *Begay* concluded that the residual clause did not encompass drunk-driving offenses because they do not involve "purposeful, violent, and aggressive conduct" but rather are more akin to "crimes that impose strict liability"—an extratextual legal test that the Court later repudiated in large part. *Id.* at 145; see *Sykes*, 564 U.S. at 12-13. Both Justice Scalia's concurrence and the three-Justice dissent in *Begay* rejected the majority's approach but sharply disagreed over whether drunk driving posed the requisite risk. See 553 U.S. at 148-154 (Scalia, J., concurring in the judgment); *id.* at 155-163 (Alito, J., dissenting).

By contrast, this Court concluded in *Leocal* that drunk-driving offenses do not fall under Section 16(b) in two pages of a unanimous opinion that has never been called into question. See 543 U.S. at 10-11. The Court explained that because Section 16(b) requires a risk of "the use of physical force against the person or property of another," it "requir[es] a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11. Underscoring the

determinacy of the statutory language, the Court concluded that "[i]n no ordinary or natural sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Ibid.* (internal quotation marks omitted).

Section 16(b)'s distinctive language therefore made quick work of a broad category of offenses—those where the risk of injury arises from accidental or negligent conduct rather than active violence—that had engendered confusion and discord in the ACCA context. Indeed, the *Begay* majority expressed concern that without the extra-textual "purposeful, violent, and aggressive" limitation that it had fashioned, the ACCA's residual clause might have been read to apply to a host of other seemingly non-violent offenses, such as pollution and consumer-products offenses. See 553 U.S. at 146-147. The text of Section 16(b), by contrast, leaves no room for doubt about such offenses: *Leocal* unanimously construed Section 16(b)'s "emphasis on the use of physical force" to refer to "a category of violent, active crimes." 543 U.S. at 11. Pollution offenses and the like are plainly excluded.

c. Section 16(b) lacks a confusing list of exemplar crimes

Finally, Section 16(b) is not plagued by the same contradictory and opaque indications as the ACCA's residual clause on "how much risk" is necessary to satisfy the statute, because the phrase "substantial risk" is not preceded by a "confusing list of examples." *Johnson*, 135 S. Ct. at 2558, 2561. In illustrating the confusion generated by the residual clause's list of exemplar crimes, *Johnson* noted that "[t]he phrase 'shades of red,' standing alone, does not generate

confusion or unpredictability[,] but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *Id.* at 2561 (citation omitted). Section 16(b) is the equivalent of "shades of red," full stop.

That major textual difference avoids two of the central interpretive disputes spawned by the ACCA's residual clause. In this Court's first residual-clause case, *James*, the majority held that Florida's attempted-burglary offense qualified as a violent felony under the residual clause. 550 U.S. at 195. The majority reached that conclusion in part by comparing attempted burglary to its "closest analog" among the enumerated offense (burglary), *id.* at 203, and then determining that it "presents a risk that is comparable to the risk posed by the completed [burglary] offense," *id.* at 204. In his dissent for three Justices, Justice Scalia construed the residual clause to include only offenses at least as risky as what he viewed as the least risky enumerated offense (also burglary), *id.* at 224-225, and then determined that attempted burglary is categorically less risky than completed burglary, *id.* at 227. Those divergent approaches stemmed from the residual clause's ambiguity about the relationship between the risk posed by the exemplar crimes and the risk necessary to satisfy the residual clause.

The same ambiguity gave rise to another interpretive disagreement in *Begay*. The majority concluded that the residual clause's four enumerated offenses "illustrate the *kinds* of crimes that fall within the statute's scope," and it therefore construed the residual clause to cover only "crimes that are roughly similar, in *kind* as well as in degree of risk posed, to the

examples." 553 U.S. at 142-143 (emphases added). Justice Scalia and the dissenting Justices disagreed with that interpretation as well and would have focused exclusively on the risk levels posed by those offenses. See *id.* at 151 (Scalia, J., concurring in the judgment); *id.* at 158-159 (Alito, J., dissenting). The Court, moreover, later returned to a standard resting on "risk levels," effectively limiting the applicability of the *Begay* approach. *Sykes*, 564 U.S. at 13.

Section 16(b), by contrast, completely avoids the need to craft a legal test that takes account of "four examples [that] have little in common, most especially with respect to the level of risk of physical injury they pose." *James*, 550 U.S. at 229 (Scalia, J., dissenting). While Section 16(b) requires courts to apply a general risk standard categorically to the defined offense, it permits courts to apply a common understanding of what constitutes a "substantial risk" without having to interpret that phrase in an idiosyncratic way that accounts for the varying degrees of risk presented by exemplar crimes. And likewise, Section 16(b) does not require courts to determine any substantive similarities between a set of enumerated offenses and then compare those similarities to unenumerated offenses.

2. A statute is not unconstitutionally vague merely because it requires categorical consideration of a substantial risk of the use of force in the course of committing a defined offense

a. As discussed, Section 16(b), like the ACCA's residual clause, does require a court to apply a general risk standard to the ordinary case of an offense. But although the fact that the ACCA's residual clause called for an ordinary-case analysis was an important consideration in *Johnson*'s vagueness analysis, 135

S. Ct. at 2557-2558, it was not the only consideration. Rather, as discussed above, *Johnson* relied "[*c*]*ritically*" on the fact that the residual clause required "the judge to imagine how the idealized ordinary case of the crime *subsequently plays out*," *ibid.* (emphases added), and repeatedly underscored how the list of enumerated offenses engendered far greater uncertainty about the requisite level of risk than a general risk standard taken alone, see *id.* at 2558, 2559. As the Court carefully framed its holding, "[e]ach of the uncertainties in the residual clause may be tolerable in isolation"; it is "*their sum* [that] makes a task for us which at best could be only guesswork." *Id.* at 2560 (emphasis added; citation omitted). *Johnson* therefore does not suggest that any criminal statute requiring a categorical evaluation of the risk posed by an offense is unconstitutionally vague.

Nor would such a conclusion be consonant with first principles of due process. Although the fact that a statute has some clear applications at the extremes does not save it from facial invalidation for vagueness, see *Johnson*, 135 S. Ct. at 2560-2561, conversely a statute is not void for vagueness merely because "it may be difficult in some cases to determine whether [its] clear requirements have been met," or because it gives rise to close legal questions, *United States* v. *Williams*, 553 U.S. 285, 306 (2008). Rather, a criminal statute is unconstitutionally vague only if it "simply has *no* core." *Smith*, 415 U.S. at 578. Section 16(b) has a readily ascertainable core. Indeed, this Court has already unanimously identified burglary as the "classic example" of a Section 16(b) offense. *Leocal*, 543 U.S. at 10. And last Term in *Torres*, the majority and dissent each identified offenses falling under

Section 16, including some offenses that could only come under Section 16(b), indicating that the Court has not viewed the provision as "a black hole of confusion and uncertainty," *Johnson*, 135 S. Ct. at 2562. See *Torres*, 136 S. Ct. at 1629-1630 & n.10; *id.* at 1637 & n.1 (Sotomayor, J., dissenting). See also *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) (treating as self-evident that kidnapping is a crime of violence under the materially identical definition at 18 U.S.C. 924(c)(3)(B)). And lower courts have not struggled to identify offenses that clearly fall within its compass. See pp. 45-52, *infra*.

As *Johnson* itself recognized, terms like "substantial risk" are not unconstitutionally vague, for the "law is full of instances" in which liability depends upon "some matter of degree." 135 S. Ct. at 2561 (citation omitted). If it were otherwise, numerous longstanding provisions of federal and state criminal law would be unconstitutional. See *ibid.* (acknowledging that "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk'"); see also *id.* at 2577 (Alito, J., dissenting) ("There are scores of federal and state laws that employ similar standards. The Solicitor General's brief contains a 99–page appendix setting out some of these laws."). A statute that predicates criminal liability or punishment on a general risk standard thus cannot be said to lack an "ascertainable standard" for that reason alone.

Nor is there anything inherently unworkable or arbitrary about applying such a general risk standard to a statutorily defined offense rather than to case-specific conduct. All assessments of the risks posed by past conduct, whether categorical or case-specific,

necessarily require consideration of events or courses of conduct that might have resulted from specified actions. For example, when a jury considers a child-endangerment charge, it must determine whether the defendant "act[ed] in a manner *likely* to be injurious to the physical, mental or moral welfare of a child," N.Y. Penal Law § 260.10(1) (McKinney Supp. 2016) (emphasis added). That requires the jury to consider events that ordinarily might occur as a result of the defendant's actions—for example, whether a small child will ordinarily injure himself or suffer emotional harm if left alone for a long period of time. The same is true in predicting future risks. For example, in ruling on a motion for a preliminary injunction, a district court must decide whether the plaintiff is "*likely* to suffer irreparable harm in the absence of preliminary relief." *Winters* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). That necessarily requires the court to consider what sorts of injuries would ordinarily flow from the defendant's challenged conduct, including, for instance, predicting the behavior of third parties like customers and competitors. Accordingly, even case-specific risk assessments can require a factfinder to identify and evaluate the "ordinary case" of particular conduct.

Thus, whether a risk-focused statute is directed to case-specific conduct or a general category of behavior, it will necessarily require the decisionmaker to project and assess events or consequences that might flow from the specified conduct. Courts perform such risk assessments all the time, in an array of legal contexts. Nothing is fatally arbitrary or unprincipled, therefore, about the inquiry called for by Section 16(b): whether a given statutorily defined offense

"naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing [the] offense." *Leocal*, 543 U.S. at 10. And for the reasons discussed above, the distinctive textual limitations built into Section 16(b) ensure that it can be applied in a consistent and principled manner, unlike the far more open-ended and ill-defined standard set out in the ACCA's residual clause.

b. *Johnson* distinguished "apply[ing] an imprecise 'serious potential risk' standard to real-world facts" from the residual clause's demand to "apply [that standard] to a judge-imagined abstraction," 135 S. Ct. at 2558, thereby emphasizing that it was the combination of those two abstract elements that contributed to the residual clause's vagueness. It is clear that application of a general standard to a particular set of facts does not yield constitutional vagueness problems; to the contrary, application of a "qualitative standard" to "real-world conduct" is a typical feature of many statutes whose constitutionality *Johnson* "d[id] not doubt." *Id.* at 2561. But *Johnson*'s concerns about the residual clause must be understood in the context of the preceding discussion, where the Court explained that what made the residual clause so difficult to apply was that it "require[d] the judge to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-2558. The "judge-imagined abstraction" was the entire universe of possible events that might flow from the commission of an offense and would give rise to a risk of physical injury. Section 16(b), by contrast, circumscribes the analysis to conduct undertaken by the offender in the course of committing the offense. See pp. 31-35, *supra*.

Moreover, categorical risk assessments can readily safeguard the values of fair notice and consistent enforcement that undergird the vagueness doctrine. Whether a particular offense categorically satisfies a particular risk standard is a legal question, subject to de novo appellate review, that must be answered the same way for all defendants or aliens. And novel questions under statutes like Section 16(b) can be answered with some degree of certainty through review of controlling judicial precedent. A properly tailored categorical risk standard, as in Section 16(b), is therefore not unconstitutionally vague.

3. Section 16(b) has not produced any interpretive confusion comparable to the ACCA's residual clause

a. In holding that Section 16(b) is unconstitutionally vague under *Johnson*, the Ninth Circuit disregarded not only the material textual differences between Section 16(b) and the ACCA's residual clause, but also the other critical factor in *Johnson*'s holding: the "failure of 'persistent efforts . . . to establish a standard'" for applying the ACCA's residual clause, which "provide[d] evidence of vagueness." 135 S. Ct. at 2558 (quoting *L. Cohen Grocery*, 255 U.S. at 91); see *id.* at 2558-2560; cf. *id.* at 2562-2563. *Johnson* placed significant weight on this "Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause" over the course of five cases. *Id.* at 2558. And the Court emphasized lower courts' frustration in attempting to apply this Court's residual-clause precedents. *Id.* at 2559-2560.

Section 16(b) bears no resemblance to the ACCA's residual clause in that respect. Despite the fact that Section 16(b) has a range of criminal and immigration

applications, this Court has never "fail[ed]" in an effort to construe it. And while *Johnson* explained that the ACCA's residual clause had "created numerous splits among the lower federal courts, where it has proved nearly impossible to apply consistently," 135 S. Ct. at 2560 (citation and internal quotation marks omitted), no comparable difficulties have arisen under Section 16(b). Given that this Court typically grants certiorari to resolve conflicts among lower courts over important and recurring questions of statutory interpretation, see Sup. Ct. R. 10(a), the fact that this Court has taken only a single Section 16(b) case in over 30 years is powerful evidence that it has not produced pervasive conflicts.

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

That view is unfounded. In fact, this Court frequently grants certiorari to resolve circuit conflicts in immigration law; the Court heard four such cases in the last two Terms. See *Torres*, *supra*; *Mata* v. *Lynch*, 135 S. Ct. 2150 (2015); *Kerry* v. *Din*, 135 S. Ct. 2128 (2015); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015). In any event, the Ninth Circuit overlooked that Section 16(b) is the *federal criminal code's* definition of "crime of violence," and it applies to numerous federal criminal statutes. See p. 53, *infra*. If Section 16(b), when not applied under the INA through 8 U.S.C.

1101(a)(43)(F), had produced the same level of conflict and confusion as the ACCA's residual clause, this Court likely would have considered more than one case concerning that provision since its enactment in 1984, or at least since its incorporation into the INA in 1990, see Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 501(a)(3), 104 Stat. 5048. This Court likewise has not had occasion to resolve a disputed question about the meaning of 18 U.S.C. 924(c)(3)(B), a definition of "crime of violence" that is worded in a materially identical manner in an important criminal provision. The most likely explanation for this Court's review of only a single case involving the Section 16(b) language in more than 30 years is that the language of Section 16(b) is clearer than that of the ACCA's residual clause.

b. Lower courts have disagreed on some questions arising under Section 16(b). But critically for the vagueness analysis, much of the case law on Section 16(b) has nothing to do with the "ordinary case" risk analysis—the aspect of Section 16(b) that purportedly gives rise to the vagueness problem. See notes 7-9, *infra*. Rather, lower courts have grappled with questions that would arise even if Section 16(b) called for a noncategorical analysis of the risk posed by real-world facts. Such legal issues do not support the contention that Section 16(b) suffers from the same constitutional infirmity as the ACCA's residual clause.

For example, *Leocal* left open whether recklessness offenses can qualify under Section 16(b). Lower courts have disagreed about that issue. Compare, *e.g.*, *Jimenez-Gonzalez* v. *Mukasey*, 548 F.3d 557, 560 (7th Cir. 2008), with *Aguilar* v. *Attorney Gen. of the U.S.*, 663 F.3d 692, 696 (3d Cir. 2011). But this Court's

recent decision in *Voisine* v. *United States*, 136 S. Ct. 2272 (2016), clarified that, for purposes of a comparable statute, "reckless conduct indeed can constitute a crime of violence," *United States* v. *Benally*, No. 14-10452 (9th Cir. Nov. 7, 2016), slip op. 4—thus suggesting a resolution to that issue. And, more fundamentally, the question whether a recklessness offense could qualify would arise even if the statute focused on the particular facts of a defendant's offense rather than the ordinary case of the offense. It therefore does not amount to the sort of "evidence of vagueness" that *Johnson* found significant. 135 S. Ct. at 2558.

c. At the certiorari stage, respondent asserted (Br. in Opp. 26) that "[c]ircuit splits abound over whether particular offenses qualify under [Section 16(b)]." That assertion contradicts the assessment of courts of appeals that have considered whether the language of Section 16(b) is unconstitutionally vague. See *United States* v. *Hill*, 832 F.3d 135, 148 (2d Cir. 2016) ("[T]here is no such troubled interpretive history."); *United States* v. *Gonzalez-Longoria*, 831 F.3d 670, 678 (5th Cir. 2016) (en banc) (ACCA's residual clause had "a record of unworkability not present here"), petition for cert. pending, No. 16-6259 (filed Sept. 29, 2016).

Respondent's brief in opposition cited only two purported circuit conflicts. The first—supposedly over whether unauthorized use of a motor vehicle qualifies under Section 16(b)—does not exist. Respondent overlooked that the Fifth Circuit overruled its pre-*Leocal* precedent in 2009 and held that unauthorized use of a motor vehicle is not a crime of violence under Section 16(b). See *United States* v. *Armendariz-Moreno*, 571 F.3d 490, 491 (2009) (per curiam).

The second purported conflict concerns burglary of an automobile, which the Fifth Circuit has correctly held qualifies as a crime of violence because of the risk that physical force will be used against property. See *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 784-785 (2012) (per curiam). Respondent cited two pre-*Leocal* precedents of the Seventh and Ninth Circuits as conflicting with that holding. The Seventh Circuit decision, however, appeared to rely on a misunderstanding about when the modified-categorical approach should be employed, as it remanded to the Board of Immigration Appeals to determine whether the particular conduct alleged in the charging papers bore the requisite risk. See *Solorzano-Patlan* v. *INS*, 207 F.3d 869, 875 (2000); see also *Descamps* v. *United States*, 133 S. Ct. 2276, 2281-2282 (2013) ("[C]ourts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements."). The Ninth Circuit decision relied on the fact that California automobile burglary "does not require an unprivileged or unlawful entry into the vehicle"—an element of the New Mexico offense considered by the Fifth Circuit in *Escudero-Arciniega*. *Sareang Ye* v. *INS*, 214 F.3d 1128, 1133-1134 (9th Cir. 2000); see *Escudero-Arciniega*, 702 F.3d at 784-785 (relying on the fact that the New Mexico "statute requires that the criminal lack authorization to enter the vehicle—a requirement alone which will most often ensure some force is used"). Those decisions hardly reflect the sort of widespread circuit disarray and methodological disagreements that could support the conclusion that a statute is fatally vague.

Respondent also asserted at the certiorari stage that a "leading immigration law treatise contains nine pages of small typeface text detailing the idiosyncratic and often conflicting conclusions that various courts have reached in applying § 16 to a range of state offenses." Br. in Opp. 26 (citing Ira J. Kurzban, *Immigration Law Sourcebook*, at 261-269 (15th ed. 2016) (Kurzban)). The cited treatise does not, however, demonstrate pervasive circuit conflicts on a par with the ACCA's residual clause. Much of the section addresses other legal questions arising under Section 16, such as what the phrase "term of imprisonment" means (pp. 260-261), whether recklessness crimes qualify after *Leocal* (pp. 261-262), how to determine under Section 16*(a)* whether the use of force is an element of the offense (pp. 262-263), and the use of the modified categorical approach for divisible statutes (p. 264). The existence of such interpretive issues does not distinguish Section 16 from any oft-invoked criminal or immigration statute.

The part of the treatise summarizing judicial decisions holding that particular offenses are not crimes of violence under Section 16 (pp. 267-269), moreover, lists relatively few decisions even applying the Section 16(b) categorical risk analysis to a particular offense—the aspect of that provision that assertedly raises vagueness concerns. Many of the cited circuit decisions instead rested on the court's threshold legal conclusion that a risk of the reckless use of force is not the kind of risk encompassed by the statute (see pp. 47-48, *supra*).[7] Others involved an offense that the

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[7] See *Villanueva* v. *Holder*, 784 F.3d 51, 54 (1st Cir. 2015); *Jimenez-Gonzalez*, 548 F.3d at 559-562; *Penuliar* v. *Mukasey*, 528 F.3d 603, 608-611 (9th Cir. 2008); *United States* v. *Torres-*

court held not to be a "felony" within the meaning of Section 16(b).[8] And many of the other cited decisions involved only Section 16(a) or other legal provisions that do not contain the Section 16(b) language.[9] The fact that the lion's share of the treatise's cited cases have nothing to do with Section 16(b)'s risk standard

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Villalobos, 487 F.3d 607, 613-617 (8th Cir. 2007); *Garcia* v. *Gonzales*, 455 F.3d 465, 467-469 (4th Cir. 2006); *Oyebanji* v. *Gonzales*, 418 F.3d 260, 263-265 (3d Cir. 2005) (Alito, J.); *Tran* v. *Gonzales*, 414 F.3d 464, 469-473 (3d Cir. 2005); *Bejarano-Urrutia* v. *Gonzales*, 413 F.3d 444, 445-447 (4th Cir. 2005); *Jobson* v. *Ashcroft*, 326 F.3d 367, 372-376 (2d Cir. 2003); see also *Ramirez* v. *Lynch*, 810 F.3d 1127, 1133-1138 (9th Cir. 2016) (negligence offense); *Lara-Cazares* v. *Gonzales*, 408 F.3d 1217, 1219-1222 (9th Cir. 2005) (gross-negligence offense).

[8] *Ortega-Mendez* v. *Gonzales*, 450 F.3d 1010, 1014-1016 (9th Cir. 2006); *Popal* v. *Gonzales*, 416 F.3d 249, 254-255 (3d Cir. 2005).

[9] See *Whyte* v. *Lynch*, 807 F.3d 463, 466 (1st Cir. 2015); *United States* v. *Estrella*, 758 F.3d 1239, 1244 (11th Cir. 2014); *United States* v. *Gomez*, 757 F.3d 885, 902-903 (9th Cir. 2014); *United States* v. *Palomino Garcia*, 606 F.3d 1317, 1326 (11th Cir. 2010); *United States* v. *Becerril-Lopez*, 541 F.3d 881, 889-890 (9th Cir. 2008), cert. denied, 555 U.S. 1121 (2009); *Suazo Perez* v. *Mukasey*, 512 F.3d 1222, 1225 n.3 (9th Cir. 2008); *United States* v. *Narvaez-Gomez*, 489 F.3d 970, 975 (9th Cir. 2007); *United States* v. *Gomez-Guerra*, 485 F.3d 301, 303 (5th Cir.) (per curiam), cert. denied, 552 U.S. 865 (2007); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1125 n.6 (9th Cir. 2006) (en banc); *Singh* v. *Gonzales*, 432 F.3d 533, 538 (3d Cir. 2006); *United States* v. *Bonilla-Mungia*, 422 F.3d 316, 319-320 (5th Cir.), cert. denied, 546 U.S. 1070 (2005); *United States* v. *Alfaro*, 408 F.3d 204, 207-208 (5th Cir.), cert. denied, 546 U.S. 911 (2005); *Szucz-Toldy* v. *Gonzales*, 400 F.3d 978, 982 (7th Cir. 2005) (per curiam); *Singh* v. *Ashcroft*, 386 F.3d 1228, 1231 & n.3 (9th Cir. 2004); *United States* v. *Calderon-Pena*, 383 F.3d 254, 256 (5th Cir. 2004), cert. denied, 543 U.S. 1076 (2005); *Flores* v. *Ashcroft*, 350 F.3d 666, 669 (7th Cir. 2003); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 191 (2d Cir. 2003).

provides compelling evidence that lower courts have not struggled in applying the statute.

d. It may well be that some circuit conflicts exist or will eventually arise over particular offenses that present close cases under the Section 16(b) risk standard, even after applying the rule of lenity to resolve ambiguities in favor of a narrow construction. See *Leocal*, 543 U.S. at 11-12 n.8. But it is a "basic mistake" to conclude that "the mere fact that close cases can be envisioned renders a statute vague," because "[c]lose cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 305-306. The constitutional question is whether Section 16(b) supplies a discernible standard capable of principled application—whether it has a "core." *Smith*, 415 U.S. at 578. For the reasons discussed above, its distinctive textual features refine and focus the statute's application in a manner that satisfies the Due Process Clause.

C. Invalidating Section 16(b) Would Have Deleterious Consequences For The Immigration Laws And The Federal Criminal Code

Section 16(b) has been part of the federal criminal code for over 30 years and has been incorporated into the INA's definition of "aggravated felony" since 1990. As discussed (p. 33, *supra*), the same statutory language appears in the definition of "crime of violence" in 18 U.S.C. 924(c). 18 U.S.C. 924(c)(3)(B). This Court has never suggested that the provision may pose constitutional problems. To the contrary, the Court unanimously construed the provision in *Leocal* with no suggestion that its language might be constitutionally problematic. 543 U.S. at 10-11. The Executive Branch has naturally relied on the validity of the

language in Section 16(b) in numerous criminal prosecutions and removal proceedings.

Invalidating that language now would have deleterious consequences for both criminal justice and immigration enforcement. Section 16 supplies the definition of "crime of violence" for many provisions in the federal criminal code, including provisions covering such areas as money laundering, racketeering, domestic violence, and crimes against children.[10] In addition, Section 924(c)'s materially identical definition is also incorporated into other criminal provisions. See 18 U.S.C. 844(*o*), 1028(b)(3)(B), 4042(b)(3)(B).[11] Accordingly, should this Court hold that Section 16(b) is unconstitutionally vague, many prisoners with long-final convictions could conceivably be eligible for col-

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[10] See 18 U.S.C. 25(a)(1), 119(b)(3), 931(a)(1), 1956(c)(7)(B)(ii), 3181(b)(1), 3663A(c)(1)(A)(i) (provisions expressly incorporating Section 16); see also 18 U.S.C. 842(p)(2), 929(a)(1), 1039(e)(1), 1952(a), 1959(a)(4), 2250(d), 2261(a), 3142(f), 3559(f), 3561(b) (provisions using term "crime of violence"); 18 U.S.C. 2261 (2012 & Supp. II 2014) (same).

[11] If this Court were to hold that Section 16(b) is unconstitutional as applied through the INA's definition of "aggravated felony," Section 924(c) might be distinguished on the ground that conviction under that provision requires a specified nexus to the use, carrying, or possession of a firearm. That nexus requirement clarifies that certain predicate offenses that might present close questions under Section 16(b) could not support Section 924(c) liability because they could not be committed with the requisite nexus to a firearm. The nexus requirement therefore might serve to narrow the scope of the statute and eliminate vagueness concerns. For that reason, should this Court hold that Section 16(b) is unconstitutionally vague as applied in immigration proceedings through the INA's definition of "aggravated felony," it should reserve the question whether Section 924(c)(3)(B) is constitutionally invalid.

lateral relief, cf. *Welch* v. *United States*, 136 S. Ct. 1257 (2016), despite the fact that until *Johnson* was decided in 2015, no appellate court had even suggested that Section 16(b) is unconstitutionally vague.

Similarly, the invalidation of part of the INA's definition of "aggravated felony" would affect numerous provisions of the immigration laws. Under the INA's highly reticulated scheme, an alien's conviction for an "aggravated felony" triggers a series of legal consequences. Such a conviction renders an admitted alien deportable, 8 U.S.C. 1227(a)(2)(A)(iii); bars many forms of discretionary relief from removal, including asylum, cancellation of removal, and voluntary departure, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), 1229b(a)(3) and (b)(1)(C), 1229c(b)(1)(C)[12]; subjects an alien to mandatory detention during removal proceedings, see 8 U.S.C. 1226(c); authorizes an abbreviated removal procedure for non-LPRs, 8 U.S.C. 1228(b); and precludes some aliens from qualifying for naturalization, see 8 U.S.C. 1101(f)(8), 1427(a)(3). If Section 16(b) were held invalid, criminal aliens who have committed Section 16(b) crimes of violence could evade those congressionally mandated restrictions, which are designed to ensure that dangerous criminal aliens are removed from the United States.

Of particular concern, many of the predicate offenses that have been held to fall under that provision are quite serious. For example, the Ninth Circuit itself has held the offenses of lewd and lascivious acts on a child, sexual penetration by a foreign object, sexual battery, kidnapping, and false imprisonment qualify as aggravated felonies by virtue of Section

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[12] See note 4, *supra*.

16(b).[13] Congress made the sensible judgment that such aliens should be removed from the country straightaway and without the possibility of discretionary relief.

Further, invalidating Section 16(b) may reduce the reach of an important tool for removing domestic abusers from the United States. Under 8 U.S.C. 1227(a)(2)(E)(i), an alien who has committed a Section 16 "crime of violence" against a person who stands in a specified domestic relationship with the alien is removable, regardless of the length of the sentence for the offense. Holding Section 16(b) unconstitutionally vague as incorporated into the INA's definition of "aggravated felony" would throw into serious question whether DHS may invoke that provision where the predicate crime falls within Section 16(b).

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

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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

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

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

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

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

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[1] least one year;

* * * * *

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

Deportable aliens.

(a) Classes of deportable aliens

* * * * *

(2) Criminal offenses

(A) General crimes

* * * * *

(iii) Aggravated felony

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

* * * * *

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

(i) Domestic violence, stalking, and child abuse

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

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

* * * * *

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

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

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

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

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

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

5. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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

Penalties

* * * * *

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

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

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

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

* * * * *

(3) For the purposes of this subsection, the term "crime of violence" means an offense that is a felony and—

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

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

* * * * *

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

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

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