No. 15-1498

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

JAMES GARCIA DIMAYA,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The Armed Career Criminal Act's (ACCA) "residual clause" defined a "violent felony" as a felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). In *Johnson v. United States*, this Court held that provision void for vagueness because it "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime," which yields unpredictable and arbitrary results. 135 S. Ct. 2551, 2557-58 (2015). This case involves another criminal statute, 18 U.S.C. § 16, with an almost identical residual clause presenting the same problems: It defines a "crime of violence" as a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Although the Government poses only one question explicitly, its brief presents two:

1. Whether the residual clause contained in 18 U.S.C. § 16 is unconstitutionally vague under *Johnson*.

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

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INTRODUCTION

In *Johnson v. United States*, the Government cautioned this Court that if it were to strike the ACCA residual clause as unconstitutionally vague, the § 16 residual clause would be "equally susceptible" to challenge. Supp. Br. for the United States at 22, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120) ("Gov't *Johnson* Br."). As the Government correctly explained then, "[l]ike the ACCA, Section 16 requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters." *Id.* at 22-23. This Court ultimately concluded that those "[t]wo features" were what "conspire[d] to make [the ACCA residual clause] unconstitutionally vague." *Johnson*, 135 S. Ct. at 2557. That means that the § 16 residual clause is invalid as well.

The Government now flips positions. It still acknowledges that the § 16 residual clause shares those two key features. It just seizes on a few trivial differences to argue that § 16's residual clause is not "equally susceptible" to *Johnson*'s holding after all. Those distinctions do not withstand scrutiny. If anything, they make this residual clause vaguer. Certainly, the lower courts find it no clearer: They are struggling to give meaning to § 16's residual clause every bit as much as they struggled with the ACCA's.

The Government also argues that even if the clauses are equally vague, the result should be different here because this is a deportation case rather than a criminal case. That argument contradicts nearly a

century of this Court's precedent holding that the vagueness standard from criminal cases applies to civil statutes imposing severe consequences—including deportation statutes. Due process requires fair notice of which crimes will trigger removal "in view of the grave nature of deportation." *Jordan v. De George*, 341 U.S. 223, 231 (1951). All the more so here, because § 16's consequences include virtually certain deportation, up to 20 years in prison for any attempt to reenter the country, and banishment *for life*—a fate far worse than many criminal penalties.

In the end, the Government seeks to deport a lawful permanent resident based on his conviction for California's extraordinarily broad "burglary" crime because an imagined "ordinary case" of that offense involves some high-enough risk of physical force. That analysis is far too arbitrary to permit the Government to exile him forever from the only country he has known since he was 13. The judgment should be affirmed.

STATUTORY PROVISIONS INVOLVED

The Government's statutory appendix omits certain statutory provisions important for context. Accordingly, we reproduce the relevant statutes in the appendix to this brief.

STATEMENT OF THE CASE

1. The Immigration and Nationality Act (INA) authorizes the Attorney General to remove several classes of "deportable" noncitizens. 8 U.S.C. § 1227(a). Those who have been convicted of "two or more crimes

involving moral turpitude," for example, are deportable, even if they are lawful permanent residents. § 1227(a)(2)(A)(ii). Lawful permanent residents in this class "may ask the Attorney General for certain forms of discretionary relief from removal, like asylum … and cancellation of removal." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013) (citing §§ 1158, 1229b).

This case involves another class, comprising noncitizens who are "convicted of an aggravated felony." § 1227(a)(2)(A)(iii). Noncitizens in this class, including lawful permanent residents, are generally ineligible for discretionary relief from removal. *See Moncrieffe*, 133 S. Ct. at 1682 (citing § 1158(b)(2)(A)(ii), (B)(i); § 1229b(a)(3), (b)(1)(C)). For them, deportation is "a virtual certainty." Pet. App. 6a (quotation marks omitted).

The "aggravated felony" designation also carries other harsh consequences. Whereas noncitizens who have been deported are ordinarily barred from the United States for 10 years, aggravated felons are banished for life. § 1182(a)(9)(A)(ii). And while individuals who reenter the country illegally after deportation can be imprisoned for up to two years, the penalty spikes tenfold—to 20 years—for anyone deported following an aggravated felony conviction. § 1326(a), (b)(2).

The INA supplies a long list of offenses that qualify as "aggravated felonies." § 1101(a)(43). It includes felonies as diverse as "theft," "burglary," "drug trafficking," "forgery," and "obstruction of justice." § 1101(a)(43)(B), (G), (R), (S). Central to this case is a

clause that defines "aggravated felony" to include "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F).

The definition of "aggravated felony" thus incorporates by reference 18 U.S.C. § 16, which supplies the federal criminal code's general definition of a "crime of violence." The definition has two parts. The so-called "elements clause" covers:

> (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.

The "residual clause" covers:

> (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.

This Court has prescribed a formal analytical protocol where, as here, a statute "asks what offense the noncitizen was 'convicted' of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed": Courts "employ a 'categorical approach' to determine whether [a] state offense," when "viewed in the abstract," fits within the "federal definition of a corresponding aggravated felony." *Moncrieffe*, 133 S. Ct. at 1684-85; *see Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (noting that "the 'offense' of conviction" under

the § 16 residual clause is examined under the categorical approach); *see also Descamps v. United States*, 133 S. Ct. 2276, 2287 (2013) (same under the ACCA). For catchall descriptions tied to a measure of "risk," like the § 16 residual clause, the categorical approach "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents" the requisite risk of harm. *Johnson*, 135 S. Ct. at 2557.

When the intertwined immigration and criminal statutes are combined, then, federal law dictates four penalties for a noncitizen who is "convicted of" a crime whose ordinary case "involves a substantial risk that physical force" will be used, 18 U.S.C. § 16(b): He "is deportable," 8 U.S.C. § 1227(a)(2)(A)(iii); ineligible for cancellation of removal or asylum, § 1158(b)(2)(A)(ii), (B)(i), § 1229b(a)(3), (b)(1)(C); barred from returning "at any time," § 1182(a)(9)(A)(ii); and subject to greatly enhanced punishment if he nevertheless returns, § 1326(b)(2).

2. James Garcia Dimaya was admitted to the United States as a lawful permanent resident in 1992, when he was 13 years old. Pet. App. 42a; Certified Administrative Record (C.A.R.) 161. He attended high school in California while living with family, obtained his G.E.D., and attended community college. C.A.R. 161, 169-70. Since then, he has worked in several positions, including as a cashier and a store manager. C.A.R. 170.

In 2007 and 2009, Dimaya pleaded no contest to charges of residential "burglary" under California Penal Code §§ 459 and 460(a). Pet. App. 42a. In 2010,

the Government placed him in removal proceedings. *Id.*

3. The Government alleged that Dimaya's convictions made him deportable because each was (1) a crime involving moral turpitude, (2) a generic "theft or burglary offense" within the meaning of § 1101(a)(43)(G), and (3) a "crime of violence" under § 16's residual clause. Pet. App. 42a-43a. An immigration judge held that Dimaya was deportable on all three independent grounds. Pet. App. 43a. As to the crime of violence determination, the judge emphasized that each conviction entailed the "unlawful entry into a residence," Pet. App. 54a, an act that would "risk[] surprise upon an inhabitant," C.A.R. 148. That finding was premised on factual allegations of "unlawful entry" in the charging documents in Dimaya's record of conviction. *See* Pet. App. 51a; C.A.R. 148. The immigration judge also relied on a Ninth Circuit decision holding that burglary under § 459 constitutes a crime of violence. Pet. App. 54a (citing *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990)).

The Board of Immigration Appeals denied Dimaya's appeal. Pet. App. 41a-48a. The Board first decided that Dimaya's California burglary offenses did not satisfy the federal definition of "burglary offense" because that unique statute lacks the element of unlawful entry, Pet. App. 45a, as this Court later held in *Descamps*, 133 S. Ct. at 2285-86. But the Board then concluded that the 2007 conviction was nonetheless an aggravated felony because, under *Becker*, it constituted a crime of violence under the § 16 residual clause. Pet. App. 45a-48a. The Board

therefore did not reach the question whether Dimaya's burglary convictions involved moral turpitude. *See* Pet. App. 47a.

4. Dimaya petitioned for review in the Ninth Circuit. While the case was pending, this Court ordered supplemental briefing in *Johnson* on whether the ACCA residual clause is unconstitutionally vague. In light of the similarity between the residual clauses in ACCA and § 16, the Court of Appeals held this case pending *Johnson*. This Court ultimately struck the ACCA residual clause as void for vagueness.

Following *Johnson*, the Court of Appeals concluded that the § 16 residual clause "suffers from the same indeterminacy as [the] ACCA's residual clause." Pet. App. 2a. The court therefore struck the § 16 residual clause as unconstitutionally vague as applied to the analysis of prior convictions in immigration proceedings. Pet. App. 2a, 20a n.17.

The Court of Appeals emphasized that the language of the § 16 residual clause is "similar" to the ACCA residual clause and compels "the same mode of analysis." Pet. App. 8a. Like the ACCA residual clause, the § 16 residual clause requires a court to measure the risk of a harm that is presented by the "ordinary case" of a crime. Pet. App. 9a. And the requisite degree of risk is no more precise: Where the ACCA residual clause required a "serious potential risk of physical injury," § 16 requires a "substantial risk" that "physical force" may be "used" in the course of committing the offense. Pet. App. 8a, 12a-13a.

The court therefore concluded that, like the ACCA residual clause, "§ 16(b)'s definition of a crime of violence[] combines 'indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as' a crime of violence." Pet. App. 13a-14a (quoting *Johnson*, 135 S. Ct. at 2558). The Court of Appeals also noted that, "'in view of the grave nature of deportation,'" this Court has applied the void-for-vagueness doctrine to deportation laws. Pet. App. 5a (quoting *Jordan*, 341 U.S. at 231). Accordingly, the court held that the § 16 residual clause is unconstitutionally vague under *Johnson*, and remanded the case so that the Board could consider the remaining question whether the convictions are crimes involving moral turpitude. Pet. App. 2a n.1, 20a.

Judge Callahan dissented, embracing several of the arguments the Government advances here. Pet. App. 20a-40a.

5. Unanimous panels of the Sixth, Seventh, and Tenth Circuits then joined the decision below in declaring the § 16 residual clause unconstitutionally vague under *Johnson*. *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015). Sitting en banc, a divided Fifth Circuit disagreed, over Judge Jolly's dissent (joined by three other judges) arguing that the ACCA and § 16 residual clauses, "in constitutional essence, say the same thing." *United States v. Gonzalez-Longoria*, 831 F.3d 670, 686 (5th Cir. 2016) (en banc) (Jolly, J., dissenting). After this Court granted certiorari in this case, the Third Circuit rejected the Fifth Circuit's

view, *Baptiste v. Attorney Gen.*, 841 F.3d 601 (3d Cir. 2016), for a 5-1 split in favor of finding the § 16 residual clause unconstitutionally vague.

SUMMARY OF ARGUMENT

I. A. *Johnson* invalidated the ACCA's residual clause because it combined "[t]wo features" that "conspire[d] to make it unconstitutionally vague." The § 16 residual clause shares both of these features, as the Government concedes. It too requires that courts examine prior convictions by conjuring up the "ordinary case" of an offense, rather than looking to the individual's actual conduct. And it too requires that courts assess whether that hypothetical offense poses an undefined risk of harm. Just as the ACCA residual clause failed to tell courts how to decide what the "ordinary case" of a crime involves or how to measure the risk it poses, the § 16 residual clause fails as well.

B. The Government nevertheless contends that a few minor differences between the two provisions should save the § 16 residual clause. But those distinctions do not mitigate the vagueness, and, if anything, make the § 16 residual clause vaguer. The Government says, for example, that the § 16 residual clause has a "temporal restriction" that avoids any need to consider risks arising *after* the completion of an imagined offense. But that is not how courts (or the Government itself) apply § 16, which is why inchoate offenses like solicitation and conspiracy, and certain firearms-possession offenses, have all been deemed crimes of violence. Indeed, the Ninth Circuit designated California burglary a crime of violence only by

considering events that might transpire after the offense itself—*entering* with intent to commit a crime—is complete.

Nor is it meaningful that the § 16 residual clause focuses on the risk of "force," whereas the ACCA residual clause addresses the risk of "injury." This Court uses those terms interchangeably. And there is no distinction between them that makes it easier to ascertain what amount of harm an "ordinary case" poses. If anything, "force" is *more* vague: This Court has repeatedly wrestled with what constitutes the "use of force," and it is hard to measure the *risk* of the use of force when it is hard to define "use of force" in the first place.

Similarly, § 16's lack of exemplar offenses only leaves the analysis more untethered than it was under the ACCA. The § 16 residual clause applies to an even more open-ended set of offenses.

C. The § 16 residual clause has sparked several conflicts among the courts of appeals. The statute is litigated less frequently than the ACCA residual clause was because it arises most commonly in immigration cases, where there are many more alternative grounds for deportation and where noncitizens have no right to appointed counsel. But when the lurking circuit splits on, for example, car burglary and evading arrest do reach this Court, the analysis will be just as mystifying as it was with the ACCA.

II. *Johnson*'s vagueness analysis applies here. As this Court recognized in *Jordan*, "the established criteria of the 'void for vagueness' doctrine" apply to

deportation statutes in "view of the grave nature of deportation." In the decades since, this Court has only further emphasized that deportation is a key part of the penalty for noncitizens convicted of crimes. And this Court has repeatedly held that the same concerns about fair notice and arbitrary enforcement apply to the immigration consequences of criminal convictions as well.

Jordan is thus consistent with this Court's cases demonstrating that contemporary vagueness standards in criminal cases apply to civil statutes that impose similarly severe consequences (unlike pure economic regulations). The established vagueness standard itself has evolved over time, and the old cases the Government cites reflect those changes. But throughout, this Court has repeatedly declined to draw a sharp line between civil and criminal statutes. It should not start now, and especially not here: The § 16 residual clause *is* a criminal statute, even as incorporated into the INA, because a prior "aggravated felony" conviction is an element of the INA's illegal-reentry offense that carries a sentence of up to 20 years.

III. The Government overstates the effect of invalidating the § 16 residual clause as it applies to past convictions. The Government cites several statutes that reference § 16 or use similar language. But most of them may never raise the vagueness question presented here, because those statutes characterize the offense for which a defendant is currently being prosecuted, not a prior conviction. Accordingly, several courts have declined to apply the categorical "ordinary case" approach—a critical component of the

ambiguity under *Johnson*—to such statutes. This Court need not resolve that threshold question here.

This case will also have a minimal impact on immigration enforcement. Section 16 is one of only 80 enumerated crimes that define an "aggravated felony." Still more crimes beyond those "aggravated" ones can lead to deportation. Striking the § 16 residual clause will therefore have a limited effect on the Government's ability to deport lawful permanent residents like Dimaya.

ARGUMENT

I. The § 16 Residual Clause Is Unconstitutionally Vague Under *Johnson*.

A. The § 16 residual clause shares the two features that led this Court to strike the ACCA residual clause.

In *Johnson*, this Court considered the ACCA's residual clause, which defined "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) (emphasis added). This Court concluded that "the indeterminacy of the wide-ranging inquiry required by the [ACCA's] residual clause both denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges." 135 S. Ct. at 2557.

"Two features" of the ACCA residual clause "conspire[d] to make it unconstitutionally vague." *Id.* First, the clause required an inherently uncertain determination under the categorical approach of "what kind of conduct the 'ordinary case' of a crime involves," rather than any analysis of "real-world facts." Second, that "judge-imagined abstraction" then had to be assessed under "an imprecise 'serious potential risk' standard." *Id.* at 2557-58; *see Welch v. United States*, 136 S. Ct. 1257, 1262 (2016).

These were the same two key features the Government noted in *Johnson* when it warned that the § 16 residual clause "is equally susceptible to petitioner's central objection to the [ACCA] residual clause": Both statutes require an assessment of "the risk of confrontations and other violent encounters" posed by a judicially imagined "ordinary case" of a given offense. Gov't *Johnson* Br. 22-23.

While the Government has changed its conclusion, it still does not dispute the premise. It concedes "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." Gov't Br. 11. "But," it now protests, "the similarity ends there." *Id.* That is like saying a federal ban on flag burning resembles an unconstitutional Texas one because it also suppresses expressive conduct, "but the similarity ends there." Sure, but the similarity need go no further. *See United States v. Eichman*, 496 U.S. 310, 315-19 (1990) (declining to distinguish *Texas v. Johnson*, 491 U.S. 397 (1989)). Because the § 16 residual clause likewise "combin[es] indeterminacy about how to measure the risk posed by a crime with indeterminacy about how

much risk it takes for the crime to qualify," it too "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Johnson*, 135 S. Ct. at 2558.

1. The § 16 residual clause makes no more clear what the "ordinary case" of a crime involves.

As to the ACCA residual clause's "ordinary case" inquiry, *Johnson* could find no answer to the question, "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves?" 135 S. Ct. at 2557. This Court used attempted burglary to illustrate the ambiguity: Does the "ordinary case" of attempted burglary involve circumstances where "[a]n armed would-be burglar [is] spotted by a police officer, a private security guard, or a participant in a neighborhood watch program"? *Id.* at 2558 (quoting *James v. United States*, 550 U.S. 192, 211 (2007)). Or does it involve circumstances where "a homeowner … give[s] chase, and a violent encounter … ensue[s]"? *Id.* (quoting *James*, 550 U.S. at 211). Or, alternatively, does it involve "nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away"? *Id.* (quoting *James*, 550 U.S. at 226 (Scalia, J., dissenting)). Because "[t]he [ACCA] residual clause offers no reliable way to choose between these competing accounts of what 'ordinary' attempted burglary involves," it was unconstitutionally vague. *Id.*

Those same questions are just as unanswerable under the § 16 residual clause. Dimaya's conviction illustrates the challenge. California's peculiar burglary

provision criminalizes simply "entering" certain structures "with intent to commit ... larceny or any felony." Cal. Penal Code § 459. As this Court recognized in *Descamps*, California burglary bears little resemblance to traditional burglary. "[B]urglary statutes generally demand breaking and entering or similar conduct," but California's does not. *Descamps*, 133 S. Ct. at 2282. Rather, the California statute "sweep[s] so widely" that it encompasses "a shoplifter['s] enter[ing] a store, like any customer, during normal business hours." *Id.*; *see, e.g.*, *People v. Saint-Amans*, 131 Cal. App. 4th 1076, 1079-80 (2005) (customer legally entering a bank to withdraw money that he has fraudulently transferred to his account).

Even first-degree residential burglary in California covers a wide range of conduct. It includes entering an open house and pilfering a real estate agent's wallet from her purse, *People v. Little*, 206 Cal. App. 4th 1364, 1367-70 (2012), and entering a client's home to sell him fraudulent securities, *People v. Salemme*, 2 Cal. App. 4th 775, 777-78 (1992) (applying Cal. Penal Code §§ 459, 460(a)); *see People v. Nguyen*, 40 Cal. App. 4th 28, 30-35 (1995) (similar).

In the pre-*Johnson* proceedings below, the Government contended that these examples are "outlier[s]" that can be ignored in an "inquiry [that] is not directed to conduct at the margins of the statute, but rather to a usual or ordinary violation." Gov't C.A. Br. 27, 29-30 (internal citations omitted). But the Government has never been able to articulate *how* a court is to go about determining which instances of an offense are "outliers" that can be ignored, and which

instead exemplify the "ordinary case." What the "ordinary case" of California burglary involves, and how much risk of force it poses, is anyone's guess.

It was precisely this search for the "usual or ordinary" instance of a particular offense that this Court found impossible in *Johnson*: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" 135 S. Ct. at 2557 (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)). That is what makes the "ordinary case" approach so vague. Unlike the traditional categorical approach, which looks simply to "the minimum conduct criminalized by the state statute," the residual-clause analysis requires pinpointing some median or modal version of the crime. *Moncrieffe*, 133 S. Ct. at 1684; *see Baptiste*, 841 F.3d at 610 n.10.

The Government discounts *Johnson*'s on-point analysis in favor of this Court's offhand description of generic burglary as the "classic example" of a crime of violence under the § 16 residual clause. *Leocal*, 543 U.S. at 10. That stray line came years before *Johnson*, where this Court recognized that the same unanswerable questions cannot be answered even for generic burglary: "Does the ordinary burglar invade an occupied home by night or an unoccupied home by day?" *Johnson*, 135 S. Ct. at 2558. *Leocal*'s description of generic burglary only confirms *Johnson*'s observation that "many" residual clause cases that at first seem "easy turn out not to be so easy after all." *Id.* at 2560.

But even if *Johnson* had not superseded *Leocal*'s comment about generic burglary, that characterization would not help the Government for two reasons. First, *Leocal*'s observation says little about statutes, like California's, that are "broader than generic burglary." *United States v. Fish*, 758 F.3d 1, 8 (1st Cir. 2014). Second, *Johnson* also refutes the lesson that the Government tries to draw from *Leocal*: that it is enough to show that a residual clause like this "has a readily ascertainable core." Gov't Br. 41. *Johnson* rejected "any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality." 135 S. Ct. at 2561.

Because the § 16 residual clause provides no greater clue how a court is supposed to identify the "ordinary case," it yields the same constitutionally impermissible level of arbitrariness and unpredictability as its ACCA counterpart.

2. The § 16 residual clause makes no more clear how to measure the "risk" a hypothetical offense poses.

Like the ACCA's residual clause, the § 16 residual clause compounds the indeterminacy by yoking the "ordinary case" inquiry to an imprecise "substantial risk" standard. The clause requires courts to ascertain whether the "risk" of "physical force" posed by a judicially imagined "ordinary case" of a particular offense is sufficiently "substantial." That question is as unanswerable for the § 16 residual clause as it was for the ACCA's.

Courts might try examining statistics about particular crimes to calculate the risk that force will be used, just as this Court did before *Johnson* in considering whether crimes satisfied the ACCA's "serious potential risk" standard. *Sykes v. United States*, 564 U.S. 1, 10-12 (2011); *Chambers v. United States*, 555 U.S. 122, 129-30 (2009). But *Johnson* rejected the statistical approach for reasons equally applicable here: There are "tens of thousands of federal and state crimes for which no [such] reports exist," and "even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves." 135 S. Ct. at 2559. The Government does not even try to explain why statistics would be any more available or edifying for the comparable "risk" inquiry under the § 16 residual clause.

This case illustrates the struggle with seeking solace in statistics. The Government has never mustered any data showing how often California "burglars" use physical force against the person or property of another. That information does not exist. The California Attorney General compiles various crime statistics, but not the degree of force or violence in the context of California burglary.[1] Meanwhile, the Bureau of Justice Statistics conducted a nationwide survey in 2010 that found an approximately 7% "victimization" rate nationwide connected with burglary, meaning

[1] Office of the Attorney General, California Department of Justice, *Crime in California* 10 (2015), http://tinyurl.com/zxphf2q.

that a household member was at home at the time of the burglary and became a victim of a violent crime as a result.[2] But that study sheds no light on whether the degree of risk posed by California's idiosyncratic version of burglary is sufficiently "substantial." If this Court were to remand, the Court of Appeals would have no basis to make this determination here.

That leaves courts with nothing more than gut instinct as to how much risk a particular offense poses. Here, for example, lifetime banishment and severe sentencing consequences would turn on a judge's estimate of the risk involved in entering a home to commit theft by day (or maybe securities fraud by night). But here, as in *Johnson*, "common sense" provides no meaningful guidance to courts in determining where to place the "ordinary case" of "thousands of unenumerated crimes" on a spectrum of riskiness. 135 S. Ct. at 2559. One court's common sense may lead it to think that burglary is the "classic example" of a crime that "involves a substantial risk that the burglar will use force against a victim in completing the crime," *Leocal*, 543 U.S. at 10, though that same court may think otherwise on further reflection, *see supra* at 16-17. But even going with the first impression, it would not help a court figure out what to think about California's oddball version of burglary. And other states' definitions of "burglary" have their own idiosyncrasies. *Taylor v. United States*, 495 U.S. 575, 591-93 (1990). So a court would have to apply

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[2] Shannan Catalano, Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglary* 1 (Sept. 2010), http://tinyurl.com/zer9dg6.

new "common sense" not only for each crime, but for each jurisdiction.

Just as this Court "failed to establish any generally applicable test that prevents the risk comparison required by the [ACCA] residual clause from devolving into guesswork and intuition," there is no workable solution for § 16's equivalent provision. *Johnson*, 135 S. Ct. at 2259.

B. The Government's revised position on the § 16 residual clause lacks merit.

For these reasons, the Government was right when it recognized in *Johnson* that the § 16 residual clause "is equally susceptible to petitioner's central objection to the [ACCA] residual clause." Gov't *Johnson* Br. 22-23. Evidently, this Court agreed in *Johnson*. The Government cited numerous examples of laws that "use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk,'" including standard reckless-endangerment laws. *Johnson*, 135 S. Ct. at 2561. The Court distinguished "*almost all*" of them—but not § 16. *Id.* (emphasis added). Specifically, the Court observed that "almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Id.* This Court explained that those other laws would not sink with the ACCA's residual clause because they merely "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Id.* What made the ACCA residual clause different was that it "requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Id.*; *see Welch*, 136 S. Ct. at

1262. The § 16 residual clause shares that same attribute—just as the Government had argued—which is what made it different from "almost all" the others as well.[3]

Without explaining (or even acknowledging) its prior position, the Government now argues the opposite. It latches onto three textual quiddities that, it says, make all the constitutional difference. This descent into "the miasma of the minutiae" is unavailing. *Gonzalez-Longoria*, 831 F.3d at 684-85 (Jolly, J., dissenting). Indeed, when this Court explained last Term in *Welch* why "[t]he residual clause failed" in *Johnson*, it did not even mention any of the attributes the Government now emphasizes. 136 S. Ct. at 1262. And certainly none of them makes the § 16 residual clause any "more predictable." Gov't Br. 29.

1. The phrase, "in the course of committing the offense," does not provide any more clarity.

The Government first notes that the § 16 residual clause contains the phrase "in the course of committing the offense," whereas the ACCA's does not. Br. 31. That textual distinction, the Government contends, imposes a "temporal restriction" by prohibiting courts from considering "risks arising *after* the course

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[3] The Government's analogy to child endangerment laws is misplaced here for the same reason. Br. 43 (citing N.Y. Penal Law § 260.10(1) (McKinney Supp. 2016)). Like "almost all" the laws the Government cited in *Johnson*, such laws require inferring a degree of risk from the specific defendant's actual conduct, not a hypothetical defendant's conduct in an imagined "ordinary case."

of committing the offense." *Id.* But the Government cites no authority for that "restriction." That is because courts—and the Government itself—have rejected it.

The Government has repeatedly persuaded courts that inchoate offenses, like solicitation and conspiracy, may be crimes of violence even though they may "be committed with the mere utterance of words and any actual force would not come until *sometime later*, *after* the … offense had been completed." *Prakash v. Holder*, 579 F.3d 1033, 1036-37 (9th Cir. 2009) (emphasis added). The § 16 residual clause "turns on the risk of physical force as a consequence of the criminal conduct at issue, not on the timing of the force." *Id.* at 1036. Hence a crime may fall within the clause "even if the actual violence may occur after the [crime] itself." *Id.*; *see Ng v. Attorney Gen.*, 436 F.3d 392, 397 (3d Cir. 2006) (solicitation offense is a crime of violence); *United States v. Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993) (attempt offense is a crime of violence). Courts thus speculate whether, as the future criminal plan is "*being played out*, physical force will be exerted against some person or some property," *Aragon*, 983 F.3d at 1313 (emphasis added), just as the ACCA residual clause "requires the judge to imagine how the idealized ordinary case of the crime *subsequently plays out*," *Johnson*, 135 S. Ct. at 2557-58 (emphasis added). The Government is just wrong in asserting that the § 16 residual clause "foreclose[es] inquiry into subsequent consequences." Br. 35.

Better yet, consider that erstwhile "classic example," burglary. *Leocal*, 543 U.S. at 10. The elements of generic burglary are satisfied upon unlawful entry

with bad intent. Yet, as *Johnson* explained, "[t]he act of ... breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises ... because the burglar might confront a resident in the home *after* breaking and entering." 135 S. Ct. at 2557. More specifically, and relevant here, when the Ninth Circuit held that California's version of burglary fits within the § 16 residual clause, it too focused on events that would occur *after* the act of "*enter*[*ing*] a dwelling with felonious or larcenous intent"—what the Government calls "post-entry events." Br. 35. Critical was the risk that a burglar "will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." *Lopez-Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir. 2011) (emphasis added) (quoting *Becker*, 919 F.2d at 571); *see* Pet. App. 16a-17a; *Baptiste*, 841 F.3d at 618 n.19. Those risks are just as "remote from the criminal act" as they were under the ACCA. *Johnson*, 135 S. Ct. at 2559.

The Third Circuit, too, has rejected the interpretation of the phrase "in the course of committing" that the Government now advocates. The court held that a statute prohibiting possession of a firearm with the intent to use it constitutes a crime of violence. *Henry v. Bureau of Immigration & Customs Enf't*, 493 F.3d 303, 309-10 (3d Cir. 2007). The court reached that conclusion even though "the offense is complete … at the moment [the defendant] possessed the weapon and had a thought of intending to use that weapon against another." *Id.* Addressing the phrase "in the course of committing," the court reasoned that "it is

irrelevant that the technical elements have already been accomplished." *Id*. at 310.

If this Court were to adopt the Government's current reading, it would cast doubt on all these cases, generating even greater confusion about the § 16 residual clause's scope.

Even if the § 16 residual clause did limit the inquiry to conduct committed before the crime is complete, however, that would not make the statute "more manageable and predictable than in the ACCA context." Gov't Br. 32. Courts would still have to imagine the "ordinary case" of a particular offense and then imagine which parts of that scenario would transpire before the offense is "complete." It would just be a different "double act of imagination." *Id.* Truncating the crime would thus do nothing to address *Johnson*'s holding that an "abstract inquiry offers significantly less predictability than one '[t]hat deals with the actual, not with an imaginary condition other than the facts.'" 135 S. Ct. at 2561. A truncated imaginary inquiry is no less imaginary.

The Government also suggests that the phrase "in the course of" provides a "functional" limitation, by providing that 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." Br. 31; *see* Br. 36-37 (same). That is impossible. The "acts that constitute the offense" are the elements of the offense. And the elements of the offense will *never* establish any use of physical force if the residual clause is at issue. Here is why: Like the

ACCA's residual clause, the § 16 residual clause follows a provision that defines qualifying offenses in terms of their elements. The ACCA residual clause applied only to crimes that did *not* have the elements of the generic enumerated offenses, § 924(e)(2)(B)(ii), and *neither* residual clause applies to an offense that already has "as an element the use, attempted use, or threatened use of physical force." § 16(a); § 924(e)(2)(B)(i). That is what makes them "residual." And that is what makes them both hopelessly vague—they entail a mode of analysis that is "detached from statutory elements." *Johnson*, 135 S. Ct. at 2557-58.

2. "Physical force" is at least as vague as "physical injury."

a. The Government next notes that the § 16 residual clause refers to the "risk that physical force against the person or property of another may be used," whereas the ACCA's residual clause referred to the "risk of physical injury to another." Br. 36. Thus, the Government contends, the "text defines a more concrete *type* of risk." *Id*. But this Court often equates "force" and "injury," treating them as interchangeable. This Court has defined "physical force" in related provisions, for example, to mean "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (addressing 18 U.S.C. § 924(e)(2)(B)(i)); *see Voisine v. United States*, 136 S. Ct. 2272, 2279 (2016) (observing that the reckless use of "physical force" creates a "substantial risk" of "causing injury"). That would mean "risk [of] physical force" *is* "risk of physical injury." So whatever vagueness infects one infects the other.

If anything, though, "risk [of] physical force" is *less* concrete and less precise than "risk of physical injury." After all, an "injury" necessarily leaves a wound (or other observable condition), whereas "force" may come and go without a trace. This Court has repeatedly grappled with the meaning of "physical force" as used in related provisions. Sometimes "[p]hysical force" requires "substantial" or "violent force." *Johnson*, 559 U.S. at 140 (addressing 18 U.S.C. § 924(e)(2)(B)(i)). Other times, "the use or attempted use of physical force" is "satisfied by even the slightest offensive touching." *United States v. Castleman*, 134 S. Ct. 1405, 1409-10 (2014) (quoting *Johnson*, 559 U.S. at 134) (addressing 18 U.S.C. § 922(g)(9)). Thus, the courts of appeals have split on what "physical force" means under § 16.[4]

Likewise, the circuits are split on what intent must accompany a "use of force." Some courts hold that the § 16 residual clause encompasses reckless conduct,[5] while others hold it applies only to crimes involving intentional conduct.[6] This Court has left

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[4] *Compare Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015) (§ 16 requires violent force); *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013) (same); *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (same); *and Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003) (same); *with Santana v. Holder*, 714 F.3d 140, 144 (2d Cir. 2013) (§ 16 extends to any "pressure directed against a person or thing").

[5] *United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014); *Aguilar v. Attorney Gen.*, 663 F.3d 692, 696 (3d Cir. 2011).

[6] *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560 (7th

that question open three times.[7] That uncertainty further heightens the difficulty of defining the "risk" that attends a concept like "use of force": "[M]ere possession of a pipe bomb," for example, "holds no risk of the *intentional* use of force," but the possibility that "a pipe bomb can unexpectedly explode" could mean that the offense would count if recklessness were the standard. *United States v. Hull*, 456 F.3d 133, 140 (3d Cir. 2006).

b. The Government is also mistaken in arguing that "hard cases under the ACCA residual clause are easier cases under Section 16(b)." Br. 32. To take the Government's lead example (at 37-38), the force/injury distinction did not make *Leocal* (involving § 16) an "easier" case than *Begay v. United States*, 553 U.S. 137 (2008) (involving the ACCA). To be clear, this Court reached the same conclusion in both cases: Neither clause encompasses "merely accidental or negligent conduct." *Leocal*, 543 U.S. at 9-11. And, even assuming it is appropriate to distinguish two identical holdings based on degree of difficulty, as if they were Olympic dives, the Government misdescribes the cases and their relative difficulty. *Leocal*

Cir. 2008); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006).

[7] The Government asserts (at 47-48) that "this Court's recent decision in *Voisine v. United States* … suggest[s] a resolution to that issue," but that is wrong: *Voisine*, which addressed a different statute, expressly "does not resolve whether § 16 includes reckless behavior." 136 S. Ct. at 2280 n.4; *see also Castleman*, 134 S. Ct. at 1414 n.8; *Leocal*, 543 U.S. at 13.

expressly declined to rest its holding solely on the statute's "use of physical force" language, looking instead to the statute's broader context. *See* 543 U.S. at 9-11. *Begay* then relied on *Leocal* and applied essentially the same analysis. 553 U.S. at 144-45. Plus, the question presented in *Leocal* had divided the circuits before this Court resolved it. 543 U.S. at 6. Far from demonstrating the § 16 residual clause's clarity, *Leocal* is just another example of how "courts might vary dramatically in their answer" to assessing risk under these provisions where "the text sets forth no criterion." *James*, 550 U.S. at 219 (Scalia, J., dissenting) (citing *Leocal*, 543 U.S. 1).

3. Section 16's lack of exemplar offenses makes it vaguer.

Speaking of text setting forth criteria, the Government's final textual distinction is exactly backward. The Government points out (at 38) that the ACCA's residual clause followed a list of four specific crimes—defining "violent felony" as a crime 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). In contrast, the § 16 residual clause is not preceded by any specific offenses. The Government argues that this lack of specific exemplar offenses avoids the "interpretive disputes" that this Court addressed in *James* and *Begay*. Br. 39.

Quite the opposite. In defending the ACCA's residual clause in *Johnson*, the Government argued that "the enumerated offenses … far from pointing towards vagueness, make the [ACCA] residual clause

more concrete in application than other criminal statutes tied to risk." Gov't *Johnson* Br. 26 (emphasis added); *id.* at 29-31. That is exactly what *James* and *Begay* tried to do—assessing specific exemplar offenses in the hope that they would *clarify* the ACCA's residual clause, consistent with ordinary principles of statutory interpretation. *James*, 550 U.S. at 203; *Begay*, 553 U.S. at 143.

Reversing positions once again, the Government invokes *Johnson*'s conclusion that the four enumerated offenses "did not succeed in bringing clarity to the meaning of the residual clause." 135 S. Ct. at 2559, 2561. But just because these concrete examples did not suffice to clarify the ACCA residual clause does not mean that a statute that lacks them is *less* vague. Rather, it is *more* vague, as it provides no concrete examples at all—not even "confusing" ones—to tether the analysis. Thus, "the INA's lack of an enumerated-crimes clause actually makes its residual clause a 'broad[er]' provision, as it 'cover[s] *every* offense that involved a substantial risk of the use of physical force against the person or property of another.'" *Shuti*, 828 F.3d at 448 (quoting *Begay*, 553 U.S. at 144) (some internal quotation marks omitted).

In any event, the § 16 residual clause does not stand in isolation. Rather, it follows § 16's elements clause, which encompasses offenses in which the use of force is an element of the crime. That structure confusingly limits the residual clause to offenses that do *not* require use of force, but nevertheless present some less-than-certain risk of force. So it is not like a statute that refers to "'shades of red,' full stop." Gov't Br. 39. It is like a statute that refers to "(a) any shade

of red, or (b) any *other* color that involves a substantial risk of appearing reddish."

In the end, though, whatever might be said of the ACCA's "confusing list of examples," we return to the overarching point discussed above (at 13): This Court emphasized in *Johnson* that the "[m]ore important[]" failing of the ACCA residual clause was that it "require[d] application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Johnson*, 135 S. Ct. at 2561; *see id.* at 2559. *Those* were the "[t]wo features" that "conspire[d] to make the ACCA residual clause unconstitutionally vague," *Johnson*, 135 S. Ct. at 2557; *see Welch*, 136 S. Ct. at 1262. The § 16 residual clause shares them both.

C. The § 16 residual clause has generated substantial confusion.

1. Like its ACCA counterpart, the § 16 residual clause "has 'created numerous splits among the lower federal courts', where it has proved 'nearly impossible to apply consistently.'" *Johnson*, 135 S. Ct. at 2560. We have already noted two unresolved issues: whether § 16 encompasses crimes with a mens rea of recklessness or applies only to intentional crimes, and whether § 16 requires "violent force" or may be satisfied by the risk of any physical touching. *Supra* at 26-27. Both splits involve fundamental questions about the types of risks that a predicate offense must present to satisfy the § 16 residual clause—issues that are sure to recur in cases involving a wide range of offenses.

Beyond that, conflicts abound in cases wrestling with whether specific offenses qualify as crimes of violence under the § 16 residual clause. *See* Nat'l Immigration Project Amicus Br. § I. Like the disagreements that led to this Court's ACCA residual clause cases, those disagreements arise because courts have different approaches to imagining what the hypothetical "ordinary case" of a given offense looks like. Consider a few examples:

Car burglary. In the Fifth and Eighth Circuits, burglary of a vehicle is a crime of violence under § 16, because the "statute requires that the criminal lack authorization to enter the vehicle," and that "requirement alone … will most often ensure some force is used." *Escudero-Arciniega v. Holder*, 702 F.3d 781, 784-85 (5th Cir. 2012); *see United States v. Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (per curiam). The Ninth Circuit disagrees. *Sareang Ye v. INS*, 214 F.3d 1128, 1130 (9th Cir. 2000). That disagreement is not, as the Government suggests, primarily based on the fact that "California automobile burglary 'does not require an unprivileged or unlawful entry into the vehicle.'" Br. 49 (quoting *id.* at 1133). It stems from how differently courts imagine "numerous ways a person can commit vehicle burglary short of using violent physical force," including opening an unlocked door, "enter[ing] a car through an open window, by means of a stolen key, or with the aid of a 'slim jim.'" *Sareang Ye*, 214 F.3d at 1133. The conflict, then, is rooted in how broadly different judges speculate about how the "ordinary case" of car burglary plays out.

Statutory rape. Three circuits have concluded that statutes criminalizing non-forcible sexual contact with a minor are crimes of violence under the § 16 residual clause, even though the statutes could criminalize contact between high school sweethearts. These circuits observe that, because a state law setting the age of consent deems people below that age categorically "unable to give consent," a violation of the statute "*inherently* involves a substantial risk that physical force may be used in the course of committing the offense." *Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir. 2003); *see Aguiar v. Gonzales*, 438 F.3d 86, 89-90 (1st Cir. 2006), *cert. denied*, 549 U.S. 1213 (2007); *United States v. Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996). Two other circuits, in contrast, have not imagined that the ordinary case of statutory rape involves such a risk. They have criticized the other courts' reasoning as "somewhat mechanical in equating a victim's legal incapacity to consent with an actual" lack of consent "and deriving therefrom a substantial risk that physical force may be used in committing the offense." *Valencia v. Gonzales*, 439 F.3d 1046, 1050 (9th Cir. 2006); *see Xiong v. INS*, 173 F.3d 601, 606-07 (7th Cir. 1999).

Evading arrest. The Eleventh Circuit has concluded that the offense of "aggravated fleeing" constitutes a "crime of violence." *Dixon v. Attorney Gen.*, 768 F.3d 1339, 1343, 1345 (11th Cir. 2014). "Aggravated fleeing" does not require intent to use physical force. Nevertheless, relying on *Sykes*, the court found it to be a crime of violence under the § 16 residual clause because "fleeing from police indicates that the individual fleeing is desperate" and "[a] desperate person is likelier to resort to physical force to

complete the objective of fleeing from police, which is evading arrest and prosecution." *Id.* at 1345. In contrast, the Ninth Circuit has held that a statute criminalizing "actually resisting an officer" does *not* constitute a "crime of violence" under the § 16 residual clause, even though it (unlike fleeing) actually requires contact with the police. *Flores-Lopez v. Holder*, 685 F.3d 857, 863-65 (9th Cir. 2012). A conviction under the statute could be established based on "*de minimis* force in resisting an officer," the court explained. *Id.* at 864. "The idea that resisting an officer will inevitably lead to the use of violent, physical force is too speculative to support a conclusion that [the statute] is categorically a crime of violence." *Id.*[8]

These conflicts demonstrate that what this Court said about the ACCA residual clause is equally true of § 16's: "The most telling feature of the lower courts' decisions is not division about whether the residual

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[8] Our brief in opposition identified another split, concerning whether the offense of unauthorized use of a motor vehicle falls within the § 16 residual clause. *See* BIO 26. As the Government correctly reports (at 48), the Fifth Circuit has since resolved that split by aligning itself with other circuits that all—at least for now—hold that the offense is not a crime of violence. The Government is incorrect, however, in suggesting that the Fifth Circuit overruled its precedent in light of *Leocal*. *See, e.g.*, *De La Paz Sanchez v. Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006) (per curiam) (continuing to deem the offense a crime of violence after *Leocal*), *cert. denied*, 552 U.S. 811 (2007). Rather, the Fifth Circuit reversed course only after this Court vacated and remanded a § 16 residual clause case for reconsideration in light of *Begay* and *Chambers*—two ACCA cases. *See United States v. Armendariz-Moreno*, 571 F.3d 490 (5th Cir. 2009). This only confirms the interchangeability of the two residual clauses. *See infra* at 36-37.

clause covers this or that crime," but "rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider." *Johnson*, 135 S. Ct. at 2560. That is why judges have decried the confusion and inconsistency that the § 16 residual clause has wrought. In one case, for instance, Judge Calabresi concurred separately "to note that the cases in this area are somewhat difficult to reconcile with each other" and that "[i]t might be desirable if the Supreme Court or Congress were to give the circuits additional guidance in this area." *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 176 (2d Cir. 2006) (Calabresi, J., concurring) (internal citations omitted); *see United States v. Serafin*, 562 F.3d 1105, 1111 (10th Cir. 2009) ("Other circuits have struggled with the definition of a crime of violence under" the § 16 residual clause).

More recently, the Third Circuit invalidated the § 16 residual clause only after laboring to decide whether "reckless second-degree aggravated assault" is a crime of violence: It found "little guidance as to how we should go about identifying [the typical] conduct," noting that "during oral argument, neither advocate was able to articulate the ordinary case" of the offense; and it identified no relevant "empirical analysis," so it was left to slog through a review of state cases to assess the conduct they involved. *Baptiste*, 841 F.3d at 611-15, 620-21. The court ultimately concluded that the "indeterminacy of the analysis" meant it could not be made "in a principled way." *Id.* at 620.

2. In light of all this, the Government is wrong to say that the § 16 residual clause "bears no resemblance to the ACCA's residual clause" with respect to the confusion it has generated in the federal courts. Br. 45. This, too, is a "cacophony of interpretive confusion." Br. 28. The chief basis for the Government's assertion is that *this* Court has taken fewer § 16 residual clause cases. Br. 46-47. But *Johnson* did not focus just on this Court's interpretive challenges; it took pains to document that "[t]his Court is not the only one that has had trouble making sense of the residual clause." 135 S. Ct. at 2559-60. And *Johnson* certainly did not suggest there is some minimum number of residual clause "beasties" that must be added "to [this Court's] bestiary of … residual-clause standards" before a residual clause will fall. *Derby v. United States*, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of certiorari).

This Court can predict with near certainty that these circuit splits—and many more to materialize—will all eventually require this Court's attention. When, for example, the evading-arrest issue makes it to this Court, there is every reason to expect it will be a *Sykes* redux. With the recent ACCA experience under its belt, this Court does not need to endure another "failed enterprise" before reaching the same conclusion here. *Johnson*, 135 S. Ct. at 2560.

The Government's simplistic tally of cases also ignores that § 16 is far less likely to lead to appeals than the ACCA. First, § 16 operates frequently in the immigration context, in which the noncitizen enjoys no right to court-appointed counsel to seek any appellate

review, much less to petition this Court.[9] Thus, in most of the cases cited above, certiorari was never sought.

Second, there are fewer § 16 residual clause cases overall because the Government is less dependent on it than it was on the ACCA's residual clause. Whereas the ACCA residual clause followed a list of only four offenses, the INA's "crime of violence" reference is just one of "21 subparagraphs enumerat[ing] some 80 different crimes" in the definition of "aggravated felony," *Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016).

The Government also forgets that this Court has treated its ACCA residual clause cases as clarifications of the § 16 residual clause as well. Thus, after interpreting the ACCA's residual clause, this Court regularly vacated and remanded lower court decisions involving the § 16 residual clause. *See Armendariz-Moreno v. United States*, 555 U.S. 1133 (2009) (in § 16 residual clause case, vacating and remanding for further consideration in light of *Begay* and *Chambers*); *Castillo-Lucio v. United States*, 555 U.S. 1133 (2009) (same); *Addo v. Mukasey*, 555 U.S. 1132 (2009) (vacating and remanding in light of *Chambers*); *Serna-Guerra v. Holder*, 556 U.S. 1279 (2009) (same); *Reyes-Figueroa v. United States*, 555 U.S. 1132 (2009) (same).

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[9] *See Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings New York Immigrant Representation Study Report: Part 1*, 33 Cardozo L. Rev. 357, 359 (2011).

This practice underscores an overarching point about this entire exercise: Courts have long treated the two provisions, and the interpretive quandaries they pose, as fundamentally analogous. *See Chambers*, 555 U.S. at 133 n.2 (Alito, J., concurring) ("18 U.S.C. § 16(b) ... closely resembles ACCA's residual clause"); *United States v. Mincks*, 409 F.3d 898, 900 (8th Cir. 2005) (applying several § 16 cases to an ACCA residual clause case); *United States v. Daye*, 571 F.3d 225, 233-34 (2d Cir. 2009) (same); *Jimenez-Gonzalez*, 548 F.3d at 562 (applying ACCA cases to a § 16 residual clause case). So have the Government's own immigration adjudicators. *See, e.g.*, *In re Francisco-Alonzo*, 26 I. & N. Dec. 594, 596-600 (BIA 2015).

Thus the interpretive confusion that the ACCA's residual clause generated has directly plagued the § 16 residual clause. The Ninth Circuit, for example, first held that fleeing the police was *not* a crime of violence. *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir. 2008). Later, in an ACCA case, the Ninth Circuit held that *Penuliar* "is no longer good law in light of the Supreme Court's decision in *Sykes*." *United States v. Martinez*, 771 F.3d 672, 677 (9th Cir. 2014). Then this Court vacated *that* decision in light of *Johnson*. *Martinez v. United States*, 135 S. Ct. 2939 (2015). If *Johnson* does not control here, who knows where that leaves the fleeing offense under the § 16 residual clause.

In any event, the case tally, even if lopsided, proves little. *Johnson* said only that "the failure of persistent efforts ... to establish a standard can provide *evidence* of vagueness," and that this Court's "repeated attempts and repeated failures to craft a

principled and objective standard out of the [ACCA] residual clause *confirm* its hopeless indeterminacy." 135 S. Ct. at 2558 (internal quotation marks, citations, and alterations omitted) (emphasis added). Unsurprisingly, this Court has invalidated laws as unconstitutionally vague even without ever having been called upon to interpret them. *See, e.g.*, *United States v. Evans*, 333 U.S. 483, 495 (1948).

II. *Johnson*'s Vagueness Analysis Applies Equally In The Deportation Context.

Because § 16's residual clause is unconstitutionally vague under *Johnson*, the Government may not invoke it to deport Dimaya for having been "convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). The Government insists, however, that *Johnson*'s vagueness analysis does not "appl[y] to statutory provisions applied in immigration removal proceedings." Br. 13. It proposes the least demanding vagueness standard imaginable—that it is fair to permanently banish a noncitizen from the country unless the basis is "so unintelligible that it [i]s essentially not a rule at all." Br. 25 (citation and internal quotation marks omitted). That is not the test.

This Court held 65 years ago that "the established criteria of the 'void for vagueness' doctrine" applied to an immigration statute governing deportation, in "view of the grave nature of deportation." *Jordan*, 341 U.S. at 231. Far from questioning this precedent, this Court has only reaffirmed the severity of deportation in the intervening decades. This Court should decline

the Government's invitation to overrule *Jordan*, particularly in a case about the interpretation of a *criminal* statute.

A. *Jordan* held that the standard vagueness analysis applies to deportation statutes.

Jordan addressed an immigration statute providing that noncitizens convicted of "crime[s] involving moral turpitude" are deportable. 341 U.S. at 224. This Court addressed whether that phrase was unconstitutionally vague. "Despite the fact that this is not a criminal statute," this Court applied "the established criteria of the 'void for vagueness' doctrine" because "deportation is a drastic measure and at times the equivalent of banishment or exile." *Id*. at 231 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). Under the standard "test" applied in criminal cases, this Court examined "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id*. at 231-32 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926)). Ultimately, the Court held that "this test has been satisfied" because "[t]he phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." *Id*. at 232.

The Government nevertheless contends that *Jordan* did not decide whether the full-strength void-for-vagueness standard applies in the immigration context. Br. 20. The Ninth and Tenth Circuits both dismissed this argument as "baffling." Pet. App. 6a;

Golicov, 837 F.3d at 1069. And for good reason. *Jordan* did not simply assume *arguendo* that the ordinary vagueness inquiry applies. Rather, this Court applied the "established" vagueness standard "*[d]espite the fact* that th[e Immigration Act] is not a criminal statute," because of "the grave nature of deportation," which is tantamount to "a penalty." *Jordan*, 341 U.S. at 231 (emphasis added). That the Court itself raised the issue does not make it any less a holding. This Court need not "always confine[] itself to the set of issues addressed by the parties," particularly with respect to threshold matters "easily subsumed within the question on which [the Court] granted certiorari"—including "the proper legal standards" governing an issue. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 540 (1999) (quotation marks omitted); *see, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 695 n.4 (1996).

Thus, in the 65 years since *Jordan*, the circuits have held that *Jordan* "made it clear that an alien may bring a vagueness challenge to a deportation statute" under the standard test. *Beslic v. INS*, 265 F.3d 568, 571-72 (7th Cir. 2001). Indeed, every circuit to address the § 16 question presented here in the immigration context found *Jordan* controlling. The Sixth Circuit explained that "[t]he criminal versus civil distinction is … 'ill suited' to evaluating a vagueness challenge regarding the 'specific risk of deportation.'" *Shuti*, 828 F.3d at 445 (citing *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010)). The Tenth Circuit observed that "*Jordan* recognized that a necessary component of a non-citizen's right to due process of law is the prohibition on vague deportation

statutes." *Golicov*, 837 F.3d at 1069 (internal quotation marks omitted). And, most recently, in the Third Circuit, the Government "wisely" did not even contest that *Jordan* controlled. *Baptiste*, 841 F.3d at 615 n.17.

B. This Court should not consider overruling *Jordan* in a case involving a statute with criminal applications.

Even if this Court were inclined to reconsider *Jordan*, this case presents an exceedingly poor context in which to do so. Unlike the "crime involving moral turpitude" provision in *Jordan*, § 16 *is* a criminal statute. It is part of Title 18, the criminal code, and has criminal applications as well.

Indeed, even as incorporated into the INA, § 16 retains criminal applications. The INA criminalizes reentering the country illegally after being removed "subsequent to a conviction for an aggravated felony"—the INA term whose definition incorporates § 16. 8 U.S.C. § 1326(b)(2). Indeed, it was in the context of such a prosecution that the Seventh Circuit endorsed the decision below and held § 16's residual clause void for vagueness. *See Vivas-Ceja*, 808 F.3d 719. At the certiorari stage, the Government pointed to *Vivas-Ceja* as a decision that is squarely aligned with the decision below and conflicts with other courts' opinions—*not* as a decision that is distinguishable because it involves a criminal rather than civil penalty. Pet. 26; Cert. Reply 2.

If the Government were correct that a skim-milk vagueness standard governed deportation statutes, then the § 16 residual clause could be valid as applied

in deportation proceedings, yet simultaneously invalid under *Johnson* as applied in an illegal-reentry prosecution. Thus Dimaya could be deported for having been "convicted of an aggravated felony," 8 U.S.C. § 1227(a)(2)(A)(iii), but if he then reentered the country illegally, he could *not* be prosecuted as someone "whose removal was subsequent to a conviction for commission of an aggravated felony," § 1326(b)(2). That makes no sense. Rather, a statute with "criminal applications … must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring); *see also* Nat'l Ass'n of Fed. Defenders Amicus Br. § I (describing similar anomalies under §§ 1326(d) & 1327).

Courts thus apply the same void-for-vagueness standard across contexts when interpreting statutes with both civil and criminal applications. In *A.B. Small*, for example, this Court held that a statute prohibiting "unjust or unreasonable" prices for food staples was void for vagueness in the civil context, adopting the reasoning of cases that found the same provision unconstitutionally vague in its criminal application. *A.B. Small Co. v. Am. Sugar Refin. Co.*, 267 U.S. 233, 238 (1925) (citing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921)). The case was thus recognized at the time as *eliminating* the distinction between civil and criminal vagueness standards.[10]

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[10] *See* Note, *Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process*, 38 Harv. L. Rev. 963, 964 n.1, 967 (1925) (observing that *A.B. Small* had "abandoned" the "distinction between criminal and civil

Paradoxically, the Government cites *A.B. Small* as the foundation of a distinct civil vagueness standard. Br. 16, 25. While the Court eventually held that less punitive civil statutes are subject to a less demanding vagueness standard, *A.B. Small* drew no distinction between criminal proceedings and the civil case before it. Rather, it demonstrates that a single statute with civil and criminal applications is either vague or not, across all contexts.

Similarly, this Court treats civil and criminal applications of a statute equally under a related doctrine, the rule of lenity. *Leocal* is a prime example. "Because [courts] must interpret [a] statute consistently, whether [they] encounter its application in a criminal or noncriminal context," this Court applied the rule of lenity to § 16 in *Leocal* even though it "deal[t] with § 16 in the deportation context". 543 U.S. at 11 n.8; *see Clark v. Martinez*, 543 U.S. 371, 380 (2005); *FCC v. Am. Broad. Corp.*, 347 U.S. 284, 296 (1954).

The Government argues that cases like *Clark* apply only to rules of construction, not to questions of constitutional validity. Br. 27. But the void-for-vagueness doctrine evolved directly from the rule of lenity, so the same due process concerns underlie both. *See Johnson*, 135 S. Ct. at 2567 (Thomas, J., concurring). They are "related manifestations of the fair warning requirement," and the rule of lenity is just a "junior

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standards," and that it was "extremely doubtful" whether the Court would apply a "less definite standard" in the civil context); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 69 n.16 (1960).

version of the vagueness doctrine." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

In short, because § 16's residual clause also operates as a criminal statute, the criminal void-for-vagueness standard described in *Johnson* would apply even if *Jordan* were overturned for statutes with purely civil consequences.

C. *Jordan* Was Correctly Decided.

Even if this Court were inclined to revisit *Jordan* here, it should adhere to *Jordan*'s application of the heightened vagueness test to deportation statutes. *Jordan*'s rule is rooted in the "well established" notion that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings," *Demore v. Kim*, 538 U.S. 510, 523 (2003) (internal quotation marks omitted), and it is consistent with this Court's many cases holding that a more robust vagueness standard applies to civil statutes with more severe consequences, like deportation.

1. Deportation laws are punitive and carry severe consequences.

Jordan recognized that deportation laws have the sorts of severe consequences and punitive characteristics that put them on a par with criminal statutes. Traditional vagueness principles apply to crimes punishable by even probation or short sentences. Surely, most of us would take those punishments over lifetime banishment from our family and the only home we have ever known.

The Government nevertheless insists that "removal is not a punishment or penalty for the crime." Br. 21. But, since the Founding, it has been understood that "if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison, *Madison's Report on the Virginia Resolutions (1800)*, 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 546, 555 (Jonathan Elliot ed., 1891). Nearly 70 years ago, this Court directly refuted the Government's argument, observing that, while "deportation is not technically a criminal punishment," *Fiswick v. United States*, 329 U.S. 211, 222 n.8 (1946), it is nonetheless "a penalty," *Fong Haw Tan*, 333 U.S. at 10. It "may visit great hardship on the alien" and "result in the loss of all that makes life worth living," *Fiswick*, 329 U.S. at 222 n.8 (internal quotation marks omitted).

This Court provided an equally direct refutation just a few years ago: "Although removal proceedings are civil in nature, deportation is … an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants" in criminal proceedings. *Padilla*, 559 U.S. at 364-65 (internal citation omitted). "Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century," making it "most difficult to divorce the penalty from the conviction." *Id.* at 365-66 (internal quotation marks omitted). Accordingly, *Jordan*'s conclusion that "the grave nature of deportation" warranted application of the "established" void-for-vagueness doctrine has only been fortified over the past 65 years. 341 U.S. at 231.

2. The ordinary vagueness analysis governs civil statutes imposing severe consequences.

All this authority supports a simple—and simply undeniable—proposition: If ever there was a civil penalty that is sufficiently severe as to warrant application of the traditional vagueness standard, deportation is it. The Government does not appear to dispute this proposition. It just argues that this "Court has long drawn a firm distinction between criminal and civil statutes," such that ordinary vagueness principles *never* apply to any penalty on the civil side. Br. 14. Even while describing this civil/criminal distinction as a "bedrock distinction," the Government acknowledges in a footnote that this Court does not follow it: Civil laws implicating "basic First Amendment freedoms" are subject to "a more stringent vagueness test." Br. 14 n.2 (citing *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 499 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

The First Amendment is not the only significant fissure in this purported "bedrock." This Court has repeatedly rejected any such sharp line. It has directed that vagueness standards are matters of "degree" that "should not … be mechanically applied." *Hoffman Estates*, 455 U.S. at 498. It has held that due process protections against vague laws are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). And in *A.B. Small*, the food pricing case mentioned above, this Court rejected the

same argument the Government makes here. Rebuffing an "attempt[] to distinguish" related vagueness cases that "were criminal prosecutions," this Court held that "that is not an adequate distinction." 267 U.S. at 239.

Instead, the distinction this Court has drawn is the one it articulated in *Hoffman Estates*: cases (civil or criminal) with "severe" consequences versus those where "the consequences of imprecision" are "qualitatively less severe." 455 U.S. at 498-99. The drug-paraphernalia ordinance in *Hoffman Estates*, for example, "nominally impose[d] only civil penalties" but was "quasi-criminal" given its "clear" "prohibitory and stigmatizing effect." *Id.* at 499-500 & n.16. So this Court applied a "relatively strict" vagueness standard. *Id.* at 499. Similarly severe, as the Government concedes, are civil laws implicating "basic First Amendment freedoms." Br. 14 n.2. In contrast, pure economic regulations are held to a less stringent standard because businesses may plan for them (and help shape them) in advance of enforcement. *Hoffman Estates*, 455 U.S. at 498-99.

The Government ignores this Court's pronouncement that the civil/criminal line "is not an adequate distinction," *A.B. Small*, 267 U.S. at 239, and this Court's analysis in *Hoffman Estates*. The Government supports its view mainly with quotes from *criminal* cases making statements like, "the void-for-vagueness doctrine requires that a *penal statute* define the *criminal offense* with sufficient definiteness." Br. 15 (emphasis the Government's) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). These statements

do not override *Hoffman Estates* and they do not suggest that the heightened vagueness standard cannot apply to a deportation case any more than they suggest that the same standard cannot apply to First Amendment cases.

In formulating its concededly new standard for all civil cases, the Government also relies on several cases predating *Hoffman Estates*. Br. 15-19, 25-26. Those cases are inapposite for that reason alone. Regardless, none of those cases adopts anything close to the Government's proposed rule that civil statutes must be upheld unless their language is utterly "unintelligible." Br. 25 (internal quotation marks omitted). Those cases actually *embraced* criminal vagueness standards for civil cases, while occasionally making derogatory comments about the statute before them. When *A.B. Small* found the civil pricing provision so "unintelligible" that it was essentially "not a rule at all," this Court simply borrowed the reasoning from *L. Cohen Grocery Co.*—a criminal case. 267 U.S. at 240. Likewise, when *Giaccio* rejected a law that contained "no standards at all," 382 U.S. at 403, this Court invoked a criminal case that, in nearly identical words, rejected a provision for being so "vague, indefinite and uncertain" that it "condemn[ed] no act or omission," *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939). And when *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), rejected a vagueness challenge to a civil statute regulating commodities contracts because "'a standard of some sort was afforded,'" this Court applied the reasoning from *L. Cohen Grocery* and *Connally*, both of which interpreted statutes imposing criminal penalties. *Id.* at 196.

None of these cases drew a strict line between civil and criminal vagueness standards or adopted lower standards for all civil cases. Rather, as cases like *Jordan* and *Hoffman Estates* later explained, punitive laws and those with otherwise severe consequences—including deportation laws and laws implicating First Amendment rights—are subject to the same vagueness scrutiny as criminal laws.

The other older cases the Government cites are also consistent with this Court's nuanced approach. *Winters v. New York* is a criminal case that, naturally, applied the traditional vagueness analysis. It noted in passing that "[t]he standards of certainty in statutes punishing … offenses is higher than in those depending primarily upon civil sanction for enforcement." 333 U.S. 507, 515 (1948). But *Hoffman Estates* later explained that this lower standard applies only where "the consequences of imprecision are qualitatively *less severe*." 455 U.S. at 499 & n.13 (emphasis added). The Government is therefore correct that "licensing qualifications are not subject to the same vagueness test as criminal provisions." Br. 18-19 (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)). But that is not because there is one exceedingly permissive vagueness standard for all civil cases. It is because the consequences of misunderstanding a licensing requirement are less severe—and certainly not nearly as severe as lifetime banishment.

Similarly, *Mahler v. Eby*, 264 U.S. 32 (1924), concerned an immigration statute that delegated authority to the Secretary of Labor to identify "undesirable residents" who may be expelled from the

country. *Id.* at 40. This Court applied a more relaxed vagueness standard, but not because of some categorical rule about civil cases. Rather, it held that "[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 (emphasis added); *see United States v. Matchett*, 837 F.3d 1118, 1126 (11th Cir. 2016) (W. Pryor, J., respecting the denial of rehearing en banc) (*Mahler* addressed the vagueness standard for "statutes that provide discretion to government actors"). *Mahler* does not apply here because there is no delegation question.

If *Mahler* had announced a bright-line rule distinguishing civil from criminal statutes, this Court would surely have understood that when it decided *A.B. Small*, the civil vagueness case argued shortly after *Mahler*. And it would never have rejected that very distinction in *A.B. Small* without comment. *Supra* at 42. Rather, *A.B. Small* followed a different rule from *Mahler* because it lacked the critical feature that drove the holding in *Mahler*—a delegation issue. *Jordan* therefore did not need to "suggest that it was overruling *Mahler*"—it wasn't. Gov't Br. 20. Regardless, the line of cases that led to *Jordan* expressly distinguished *Mahler* when interpreting the *substantive terms* of grounds for deportation, in view of the fact that "deportation may result in the loss 'of all that makes life worth living.'" *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

3. Deportation statutes implicate concerns about fair notice and arbitrary enforcement.

Deportation laws also raise the same concerns that underlie the void-for-vagueness doctrine in the criminal context: ensuring that laws give "ordinary people fair notice of the conduct" they target and avoiding "arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. "[F]airness" and "predictability" are just as essential in "the administration of immigration law." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

a. *Jordan* correctly held that deportation statutes must "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." 341 U.S. at 231-32. As this Court recently reaffirmed, noncitizen criminal defendants must be able to "anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (internal quotation marks omitted). Given the mandatory, permanent deportation that noncitizens convicted of aggravated felonies will suffer, fair notice as to which offenses will carry immigration consequences and "accurate legal advice for noncitizens accused of crimes has never been more important." *Padilla*, 559 U.S. at 364.[11]

[11] In this respect, deportation stands in contrast to the denial of admission to noncitizens seeking entry to the country.

The Government discounts this lesson from *Padilla*, because the Court did not require criminal defense attorneys to interpret immigration laws that are "not succinct and straightforward." Br. 22 (citing *Padilla*, 559 U.S. at 369). That misses the point. The point is not that we expect defense lawyers to work residual-clause interpretive magic that has eluded the courts. It is that immigration consequences are so central to criminal convictions that defendants' Sixth Amendment rights account for them. Why? Because lawyers are the ones best situated to give defendants clear notice of the immigration implications of a guilty plea or other conviction. Those immigration consequences are no less central when it comes to defendants' due process right to fair notice of their penalties. Here, as under the Sixth Amendment, "[d]eportation is … 'unique'" in how "'intimately related [it is] to the criminal process.'" *Chaidez v. United States*, 133 S. Ct. 1103, 1110 (2013) (quoting *Padilla*, 559 U.S. at 335).

That is not to say that every constitutional right necessarily applies equally to deportation. As the Government points out, the Court has allowed ex post

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In *Boutilier v. INS*, 387 U.S. 118 (1967), this Court rejected a vagueness challenge to a provision rendering inadmissible those "afflicted with psychopathic personality." *Id.* at 118-19. This Court emphasized that because the petitioner was inadmissible based on "characteristics he possessed *at the time of* his entry" and was "not being deported for conduct engaged in after his entry into the United States," the "constitutional requirement of fair warning has no applicability." *Id.* at 123 (emphasis added); *see Beslic*, 265 F.3d at 571. Like *Jordan*, this case concerns deportation, where "fair notice" is required.

facto laws in the immigration context. Br. 21-22 (citing *Marcello v. Bonds*, 349 U.S. 302 (1955); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); and *Galvan v. Press*, 347 U.S. 522 (1954)). But just because one constitutional right is inapplicable does not mean the rest fall like dominoes. That is especially so where this Court has since reflected that if it "were … writing on a clean slate," it might find "that the ex post facto Clause, even though applicable only to punitive legislation, *should be applied to deportation*" given that "the intrinsic consequences of deportation are so close to punishment for crime." *Galvan*, 347 U.S. at 531 (emphasis added).

Moreover, much of what this Court denied in those old ex post facto cases, it has made up for in recent cases denying retroactive effect to immigration statutes. *E.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479, 1490-92 (2012). Thus, in *INS v. St. Cyr*, 533 U.S. 289 (2001), this Court declined to apply a new law that would have denied a noncitizen relief from removal because of his prior conviction. The "potential for unfairness" in applying that law retroactively was "significant and manifest." *Id.* at 323. This Court held that the ordinary presumption against retroactivity was "buttressed" in deportation cases "by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

b. The "more important aspect of vagueness doctrine" is protecting against arbitrary enforcement. *Kolender*, 461 U.S. at 358. But the Government contends arbitrary enforcement should be less of a

concern for deportation statutes because the Constitution and Congress delegate authority to the Executive Branch to administer the nation's immigration laws, as if that delegation were an invitation to adopt standards that are impossible to understand. Br. 23-24. The Judiciary, of course, retains an essential role in ensuring that immigration enforcement remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). In the "high stakes" world of deportation, only the courts can guarantee that the political branches' "decisions [are not] made a sport of chance." *Judulang v. Holder*, 132 S. Ct. 476, 487 (2011) (internal quotation marks omitted).

The Government also argues that arbitrary enforcement is not a concern because the BIA conducts a centralized review of immigration cases. Br. 24. But, as the Government recognizes, courts do not defer to the Board's interpretations of criminal provisions incorporated into the INA, "potentially leading to inconsistent results." *Id.* (citing *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 571 (2010)). Moreover, the Board's decisions themselves are often hopelessly conflicting. *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 832 (7th Cir. 2005) (observing that the Board's decision "flew in the face" of its own precedent). In this case, for example, the Board agreed with the immigration judge that a California burglary conviction is a crime of violence under the § 16 residual clause. Pet. App. 46a-47a. Less than a year earlier, however, the Board had agreed with a different immigration judge who reached the opposite conclusion. *In re Edward*

Octavius Musman, 2010 WL 2224555 (BIA May 7, 2010) (unpublished).[12]

Moreover, the BIA is often cut out of the process altogether. The Government may *summarily* deport any nonpermanent resident it deems to be an aggravated felon "without a hearing before an immigration judge," and with only a fleeting window for judicial review. 8 C.F.R. § 238.1(b)(2)(i); *see* 8 U.S.C. § 1228(b). Thus the amount of process noncitizens receive in the first place can turn on how frontline immigration enforcement officers—who generally are not lawyers—interpret the residual clause. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. Cal. L. Rev. (forthcoming 2017), http://tinyurl.com/gv6utqt. The statute's failure to provide "minimal guidelines to govern law enforcement" officers invites arbitrary enforcement. *Kolender*, 461 U.S. at 358.

Against this backdrop, where "immigration law enforcement uses many of the same coercive tools of criminal law enforcement," yet "lacks many of the tools of accountability that typically accompany the criminal law enforcement process," *Jordan*'s constitutional protections against arbitrary enforcement are

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[12] *See also* David Hausman, *The Failure of Immigration Appeals*, 164 U. Pa. L. Rev. 1177, 1180 (2016) (demonstrating that "[d]isparities in immigration judges' removal decisions are more than three times larger than disparities in federal judges' decisions about whether to send a convicted criminal to prison" and "that the BIA and the federal courts of appeals do little to counteract these disparities").

as necessary as ever. Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 Wis. L. Rev. 1127, 1160.

III. The Government Overstates The Effect Of Invalidating The § 16 Residual Clause As It Applies To Prior Convictions.

The Government contends that a decision invalidating the § 16 residual clause will yield a host of adverse consequences. The Government made most of the same arguments in *Johnson*. They are no more persuasive here.

1. The Government first notes that § 16 "supplies the definition of 'crime of violence' for many provisions in the federal criminal code," and worries that invalidating its residual clause will have "deleterious consequences" for those other provisions. Br. 52-53. But practically every one of those other statutes applies the "crime of violence" definition to characterize the offense for which the defendant is *currently being charged*, rather than to classify a *prior conviction*, as under the INA and the ACCA. Take, for instance, the statute that enhances criminal penalties on "[a]ny person who … intentionally uses a minor to commit a crime of violence." 18 U.S.C. § 25(b). There is no predicate "conviction" at all in such statutes.

This difference could turn out to be critical. Section 16's application here, like the ACCA residual clause, cannot be "save[d] … from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged," rather than "the risk posed by the ordinary case of the defendant's

crime." *Johnson*, 135 S. Ct. at 2561-62. That is because "Congress predicated deportation 'on convictions, not conduct.'" *Mellouli*, 135 S. Ct. at 1986. And the term "conviction" is the "statutory hook" for the highly abstract categorical approach. *Moncrieffe*, 133 S. Ct. at 1685; *see Descamps*, 133 S. Ct. at 2287 ("ACCA increases the sentence of a defendant who has three 'previous convictions' for a violent felony—not a defendant who has thrice committed such a crime.").

But a statute could be "saved" if it (like the one quoted above) *does* focus on the "particular conduct in which the defendant engaged," for which he is currently being prosecuted, rather than place an "emphasis on *convictions*" incurred in some other, perhaps decades-old proceeding. *Johnson*, 135 S. Ct. at 2561-62 (emphasis added). Courts may ultimately decide that the categorical approach does not apply at all in those circumstances, and if so, the § 16 residual clause might be valid in those applications. *Johnson* itself saw a distinction between "apply[ing] an imprecise 'serious potential risk' standard to real-world facts" and "applying[ing] it to a judge-imagined abstraction." *Id.* at 2558; *see id.* at 2561. The decision below expressly reserved that question, Pet. App. 20a n.17, and this Court need not resolve it here.

The Government's invocation of 18 U.S.C. § 924(c) is equally premature because it depends upon the same threshold question. Section 924(c) criminalizes using a firearm in connection with a "crime of violence." Its definition of "crime of violence," 18 U.S.C. § 924(c)(3)(B), is "materially identical" to the § 16 residual clause's, Br. 47. But its context is not: § 924(c)

focuses on the offense in which the defendant used the firearm, not some distinct prior "conviction." Some courts have therefore held that, for that reason, the categorical "ordinary case" analysis does not apply to § 924(c)(3)(B).[13] Others have disagreed.[14] That threshold, statute-specific question will determine the impact of *Johnson* on § 924(c). But because it is not presented here, we agree that this Court may "reserve the question whether Section 924(c)(3)(B) is constitutionally invalid." Gov't Br. 53 n.11.

2. Next, the Government contends that "the invalidation of part of the INA's definition of 'aggravated felony'" would compromise the Government's ability to "ensure that dangerous criminal aliens are removed from the United States." Br. 54. But § 16 is relevant to only one of the 21 INA subsections, listing 80 crimes, that define an "aggravated felony." And the residual clause is only half of § 16; invalidating it would cast no doubt on the constitutionality of § 16(a)'s "elements clause," which looks to the actual

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[13] *See Shuti*, 828 F.3d at 449-50 (holding that the categorical approach does not apply to § 924(c)(3)(B), and thus § 924(c)(3)(B) is valid even though the § 16 residual clause is not); *United States v. McDaniels*, 147 F. Supp. 3d 427 (E.D. Va. 2015); *United States v. Enriques*, No. 8:08CR383, 2016 WL 4273187, at *9 (D. Neb. Aug. 12, 2016) (collecting cases).

[14] *See United States v. Hill*, 832 F.3d 135, 139 (2d Cir. 2016) (holding that the categorical approach applies); *United States v. Prickett*, 839 F.3d 697, 697 (8th Cir. 2016) (same); *see also United States v. Cardena*, Nos. 12-3680, 12-3683, 12-3747, 13-1374 & 13-2321, 2016 WL 6819696, at *25 (7th Cir. Nov. 18, 2016) (holding that § 924(c)(3)(B) is invalid under *Vivas-Ceja* because the same analysis applies).

elements of actual offenses, rather than the non-elemental conduct that a judge imagines is involved in the "ordinary case" of a particular offense.

Striking the residual clause thus would not undermine any of the other 79½ ways in which the Government can show a conviction for an "aggravated felony"—including a conviction for "murder, rape, or sexual abuse of a minor," "illicit trafficking in a controlled substance," "illicit trafficking in firearms or destructive devices," or, in most states, "burglary." 8 U.S.C. § 1101(a)(43)(A), (B), (C), (G).

And even if the § 16 residual clause were the only basis for treating a conviction as an "aggravated felony," there are many other ways in which a criminal conviction can render a noncitizen deportable. *See* 8 U.S.C. § 1227(a)(2). Here, for instance, the question remains open on remand to the BIA whether Dimaya is removable for having been convicted of two "crime[s] [involving] moral turpitude." Pet. App. 2a n.1. "Escaping aggravated felony treatment" therefore does not necessarily "mean escaping deportation." *Moncrieffe*, 133 S. Ct. at 1692. Rather, "[i]t means only avoiding mandatory removal." *Id.* The forms of relief from removal that might then be available are ultimately discretionary. "As a result, to the extent that" invaliding the § 16 residual clause "may have any practical effect on policing our Nation's borders, it is a limited one." *Id.* (internal quotation marks omitted).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

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8 U.S.C. § 1101. Definitions

(a) As used in this chapter—

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(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (*o*), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

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

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

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

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

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[6]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

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[6] So in original. Probably should be followed by a semicolon.

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

8 U.S.C. § 1158. Asylum

***

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

***

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

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(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

***

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

***

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

***

(9) Aliens previously removed

(A) Certain aliens previously removed

(i) Arriving aliens

Any alien who has been ordered removed under section 1225(b)(1) of this

title or at the end of proceedings under section 1229a of this title initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

***

8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

***

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

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

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

***

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or

regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

***

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

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.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

***

8 U.S.C. § 1228. Expedited removal of aliens convicted of committing aggravated felonies

***

(b) Removal of aliens who are not permanent residents

(1) The Attorney General may, in the case of an alien described in paragraph (2), determine the deportability of such alien under section 1227(a)(2)(A)(iii) of this title (relating to conviction of an aggravated felony) and issue an order of removal pursuant to the procedures set forth in this subsection or section 1229a of this title.

(2) An alien is described in this paragraph if the alien—

(A) was not lawfully admitted for permanent residence at the time at which proceedings under this section commenced; or

(B) had permanent resident status on a conditional basis (as described in section 1186a of this title) at the time that proceedings under this section commenced.

(3) The Attorney General may not execute any order described in paragraph (1) until 14 calendar days have passed from the date that such order was issued, unless waived by the alien, in order that the

alien has an opportunity to apply for judicial review under section 1252 of this title.

(4) Proceedings before the Attorney General under this subsection shall be in accordance with such regulations as the Attorney General shall prescribe. The Attorney General shall provide that—

(A) the alien is given reasonable notice of the charges and of the opportunity described in subparagraph (C);

(B) the alien shall have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as the alien shall choose;

(C) the alien has a reasonable opportunity to inspect the evidence and rebut the charges;

(D) a determination is made for the record that the individual upon whom the notice for the proceeding under this section is served (either in person or by mail) is, in fact, the alien named in such notice;

(E) a record is maintained for judicial review; and

(F) the final order of removal is not adjudicated by the same person who issues the charges.

(5) No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion.

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8 U.S.C. § 1229b. 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—

***

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

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

***

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

***

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

***

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

***

18 U.S.C. § 16. 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.

***

18 U.S.C. § 25. Use of minors in crimes of violence

(a) Definitions.—In this section, the following definitions shall apply:

(1) Crime of violence.—The term "crime of violence" has the meaning set forth in section 16.

(2) Minor.—The term "minor" means a person who has not reached 18 years of age.

(3) Uses.—The term "uses" means employs, hires, persuades, induces, entices, or coerces.

(b) Penalties.—Any person who is 18 years of age or older, who intentionally uses a minor to commit a crime of violence for which such person may be prosecuted in a court of the United States, or to assist in avoiding detection or apprehension for such an offense, shall—

(1) for the first conviction, be subject to twice the maximum term of imprisonment and twice the maximum fine that would otherwise be authorized for the offense; and

(2) for each subsequent conviction, be subject to 3 times the maximum term of imprisonment and 3 times the maximum fine that would otherwise be authorized for the offense.

***

18 U.S.C. § 924. Penalties

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(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 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;

***