

In The
Supreme Court of the United States

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JEFFERSON B. SESSIONS, III,
ATTORNEY GENERAL,

Petitioner,

v.

CONSTANTINE FEDOR GOLICOV,

Respondent.

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**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

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**BRIEF IN RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI**

—◆—
SKYLER ANDERSON
Counsel of Record
ANDERSON & BENSON, PLLC
5675 S. Redwood Road, Unit #10
Taylorsville, UT 84123
(385) 388-4337
skyer@andersonandbenenson.com

Counsel for Respondent

STATEMENT

Respondent is a native and citizen of Moldova, who has been a lawful permanent resident of the United States since August 15, 2001. Pet. App. 2a. On November 9, 2010, he was convicted for the offense of failing to stop at the command of a police officer in violation of Utah Code Ann. § 41-6A-210, Pet. App. 27a, which states in relevant part:

“An operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not:

- (i) operate the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or
- (ii) attempt to flee or elude a peace officer by vehicle or other means.”

Utah Code Ann. § 41-6A-210.

On December 4, 2012, the Department of Homeland Security (DHS) filed a Notice to Appear, charging that this offense is a “crime of violence,” as defined under 18 U.S.C. § 16(b),¹ subjecting him to removal as an alleged aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii). Pet. App. 3a. Respondent denied

¹ DHS does not argue that Respondent’s offense is a “crime of violence” under 18 U.S.C. § 16(a), nor has it challenged the express holdings that it is not. Pet. App. 39a, 50a, 58a; A.R. 36-41, 235-47, 284-86, 391-98.

the charge of removability and moved to terminate proceedings. Pet. App. 4a.

The parties made oral and written arguments before the immigration judge, including the relevance of case law interpreting the residual clause to the definition of a “violent felony” in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii). A.R. 332-39, 353-90, 396-98. The immigration judge granted Respondent’s motion to terminate proceedings after rejecting the DHS argument that ACCA case law should apply to Section 16(b), and upon finding Respondent’s offense could be committed with negligent conduct. Pet. App. 51a-68a.

On appeal, the Board of Immigration Appeals (BIA) found Respondent’s offense met the definition of a “crime of violence” under Section 16(b) in the “ordinary case,” based almost exclusively on ACCA residual clause case law which the BIA found to be “instructive.” Pet. App. 36a-46a. Accordingly, BIA sustained the DHS’s appeal, and remanded the case to the immigration judge for further proceedings. *See id.* at 46a.

On June 26, 2015, this Court held that the ACCA’s residual clause, requiring an “ordinary case” analysis, is unconstitutionally vague. *Johnson v. United States*, 135 S.Ct. 2551 (2015). Subsequent to this decision and subsequent to the BIA’s remand to the immigration judge, Respondent filed a second motion to terminate proceedings. Pet. App. at 28a. Respondent argued that Section 16(b) suffered from the same constitutional infirmities that this Court found rendered the residual

clause unconstitutionally vague in *Johnson. Id.*; A.R. 98-104. Respondent also argued that *Johnson* overruled or invalidated the analyses in every decision the BIA relied upon in making its original decision. A.R. 104-08. Finally, Respondent argued that even if Section 16(b) survived *Johnson*, the “ordinary case” analysis did not, and that Respondent’s offense is not a “crime of violence” under a traditional categorical analysis of only the elements of the offense, as articulated by this Court in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013). A.R. 108-14.

In response to Respondent’s motion, an immigration judge issued a written decision finding the vagueness doctrine applies in immigration proceedings, but holding that *Johnson* did not invalidate Section 16(b). Pet. App. 28a, 32a-34a. In so finding, the immigration judge upheld the BIA’s decision that Respondent’s conviction constituted an aggravated felony, and issued an order denying Respondent’s motion to terminate proceedings, and ordering him removed. *Id.* at 34a-35a.

Respondent appealed to the BIA, making the same post-*Johnson* arguments he made before the immigration judge. Pet. App. 22a; A.R. 9-32. The DHS filed a brief in opposition, but did not challenge Respondent’s argument or the immigration judge’s finding that the vagueness doctrine applies in immigration proceedings. A.R. 35-41. The BIA affirmed the immigration judge’s decision based on textual and other differences between the ACCA’s residual clause and Section 16(b). Pet. App. 20a-25a. However, the BIA did not withdraw

from its prior reliance on residual clause case law now overruled by *Johnson*. *See id.*

Respondent filed a timely petition for review with the Tenth Circuit Court of Appeals, making the same post-*Johnson* arguments he made before the immigration judge and the BIA. Pet. App. 5a; Resp. C.A. Brief. In response, the government continued to argue that Section 16(b) is distinguishable from the ACCA's residual clause. Gov't C.A. Brief at 16-32. The government also argued for the first time that the vagueness standard in *Johnson* does not apply to immigration statutes. *Id.* at 13-15. The court of appeals rejected the government's new argument on the applicability of the vagueness doctrine, and held that *Johnson* rendered Section 16(b) unconstitutionally vague. Pet. App. 1a-19a. In so doing, the court of appeals had no cause to reach Respondent's alternative arguments on appeal. *Id.* On November 4, 2016, the court of appeals denied the government's petition for rehearing. *Id.* at 69a.

On February 2, 2017, Petitioner filed a petition for writ of certiorari in this case, asking this Court to hold the petition pending final disposition of the petition for writ of certiorari in *Boente v. Dimaya*, No. 15-1498 (argued Jan. 17, 2017), which case will presumably resolve whether Section 16(b) is unconstitutionally vague under *Johnson*.



ARGUMENT

Respondent does not oppose Petitioner's request to hold this petition pending the final disposition of *Dimaya* and then dispose of the petition as appropriate in light of that disposition. If this Court affirms the Ninth Circuit's decision in *Dimaya*, it should dismiss the petition for writ of certiorari. If this Court reverses the Ninth Circuit's decision in *Dimaya*, it should remand this case to the Tenth Circuit to consider in the first instance whether Respondent's conviction qualifies as a crime of violence under 18 U.S.C. § 16(b), in addition to all other issues Respondent raised and preserved below.



CONCLUSION

The Court should hold the petition for writ of certiorari pending the Court's final disposition in *Dimaya* and then dispose of the petition as appropriate in light of that disposition.

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Respectfully submitted,

SKYLER ANDERSON

Counsel of Record

ANDERSON & BENSON, PLLC

5675 S. Redwood Road, Unit #10

Taylorsville, UT 84123

(385) 388-4337

skyler@andersonandbenenson.com