No. 16-978

In The
Supreme Court of the United States

JEFFERSON B. SESSIONS, III,
ATTORNEY GENERAL,

Petitioner,

v.

CARLTON BAPTISTE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL L. FOREMAN
Counsel of Record
PENN STATE LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16803
(814) 865-3832
mlf25@psu.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague.

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STATEMENT

Carlton Baptiste, a 78 year-old great-grandfather in declining health, has resided in the United States since 1965. He has been a lawful resident since 1972. Pet. for Writ of Cert., App. 53a (hereinafter Pet. App. at 53a). Although Mr. Baptiste was from Trinidad and Tobago, he has resided in the United States for over fifty years and has no ties to his former country. Pet. App. at 3a. Almost four decades ago, Mr. Baptiste was convicted of an assault and battery for which he received a suspended sentence of twelve months of imprisonment. Pet. App. at 3a.

Thirty-one years later, Mr. Baptiste pled guilty to second-degree aggravated assault. Pet. App. at 3a. As with his decades-old conviction, there is no indication from the administrative record as to the facts underlying Mr. Baptiste's 2009 guilty plea. Pet. App. at 3a. There is also no indication from the administrative record as to whether Mr. Baptiste pled guilty to attempting the crime or if he pled guilty to the completed crime. Pet. App. at 3a. After serving his sentence, Mr. Baptiste was detained by Immigration and Customs Enforcement. Pet. App. at 4a. Since then, Mr. Baptiste has been incarcerated an additional 3 years, 9 months, 17 days and counting in civil detention as of April 10, 2017, the date this reply is due.[1]

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[1] Mr. Baptiste appealed the Immigration Judge's (IJ) determination that a bond hearing pursuant to *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011), was not within the immigration court's jurisdiction. Decision of Board of Immigration Appeals dated March 23, 2017, *In re Carlton Baptiste* (File No. A 030 338

In June of 2013, the Department of Homeland Security (DHS) instituted removal proceedings against Mr. Baptiste claiming that, based on his 2009 guilty plea, Mr. Baptiste was removable as an alien convicted of a crime of violence pursuant to 18 U.S.C. § 16(b). Pet. App. at 4a. DHS further asserted that Mr. Baptiste was also removable, based upon his 1978 conviction and his 2009 guilty plea, as an alien convicted of "two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct" pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii). Pet. App. at 4a. On October 8, 2013, the IJ sustained both charges of removability. Pet. App. at 4a. In her decision, the IJ found that Mr. Baptiste was "personally a sympathetic person." Pet. App. at 67a. This observation about Mr. Baptiste was consistent with that of the sentencing judge for Mr. Baptiste's 2009 guilty plea who noted that (1) Mr. Baptiste had been law abiding "for a substantial period of time," (2) his criminal conduct resulted from circumstances that are unlikely to recur, and (3) imprisonment would cause an excessive hardship on Mr. Baptiste and his family. Vol. 2, Joint App. 0025-26, *Baptiste v. AG United States*, No. 14-4476 (3d Cir. Nov. 30, 2015).

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600). The court in *Diop* held that the IJ does have both the authority and, indeed, the obligation to hold bond hearings to determine whether continued detention is warranted. *Diop*, 656 F.3d at 223-35. On March 23, 2017, the Board of Immigration Appeals dismissed the appeal, despite the Third Circuit's guidance in *Chavez-Alvarez v. Warden York Cty. Prison*, 783 F.3d 469, 477, n.11 (3d Cir. 2015), recognizing an IJ's jurisdiction to grant a bond hearing without a writ of habeas corpus.

Mr. Baptiste appealed the IJ's determinations to the Board of Immigration Appeals (BIA). Pet. App. at 4a. The BIA agreed with the IJ's determination that the 2009 guilty plea was for a crime of violence and a crime involving moral turpitude. Pet. App. at 4a.

Mr. Baptiste, acting *pro se*, appealed his case to the United States Court of Appeals for the Third Circuit.[2] The Third Circuit granted Mr. Baptiste's appeal in part, denied it in part, and remanded to the BIA for further proceedings. Pet. App. at 43a. As to the issue before the Court, the Third Circuit found that § 16(b) is "unconstitutionally vague." Pet. App. at 2a. Applying the rationale in *Johnson*, the Third Circuit found, with regard to the definition of "crime of violence" in § 16(b), that "the two inquiries under the [ACCA's] residual clause that the Supreme Court found to be indeterminate – the ordinary case inquiry and the serious potential risk inquiry – are materially the same as the inquiries under [§] 16(b)." Pet. App. at 37a. The Third Circuit's holding mirrored the decisions from "[t]he Sixth, Seventh, Ninth, and Tenth Circuits." Pet. App. at 29a.[3]

[2] At that time, the Penn State Law Civil Rights Appellate Clinic was appointed as counsel by the Third Circuit to assist Mr. Baptiste.

[3] *See Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1113-14 (9th Cir. 2015); *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016), *petition for cert. pending* (filed Feb. 2, 2017).

ARGUMENT

I. BECAUSE THE CONSTITUTIONAL ISSUE PRESENTED IN *DIMAYA* – WHETHER THE CATEGORICAL APPROACH EMPLOYED BY 18 U.S.C. § 16(b) TO CLASSIFY CRIMES OF VIOLENCE IS VOID FOR VAGUENESS – ADDRESSES THE SAME ISSUE DECIDED BY THE THIRD CIRCUIT IN *BAPTISTE*, THE COURT SHOULD HOLD THIS CASE PENDING THE COURT'S ACTION IN *DIMAYA*.

As Respondent expressed in a letter to the Court dated February 15, 2017, we agree with the government that the Court's ruling in *Dimaya v. Lynch* will inform the analysis of the issue in Mr. Baptiste's case.

James Garcia Dimaya was convicted of a crime of violence, which under 8 U.S.C. § 1101(a)(43)(F) is considered an aggravated felony, rendering him deportable. *Dimaya v. Lynch*, 803 F.3d 1110, 1111 (9th Cir. 2015), *cert. granted*, No. 15-1498 (argued Jan. 17, 2017). 8 U.S.C. § 1101(a)(43)(F) incorporates by reference 18 U.S.C. § 16(b), which defines a crime of violence. The question before the Ninth Circuit was whether the categorical approach employed by 18 U.S.C. § 16(b) to classify crimes of violence was void for vagueness under the Due Process Clause of the Fifth Amendment. *Dimaya*, 803 F.3d at 1115-20. The Ninth Circuit found that the statute's failure to consider the particular facts of each case, combined with the vague definition of what a crime of violence is, rendered 18 U.S.C. § 16(b) void for vagueness.

As with Mr. Dimaya, Mr. Baptiste initially pled guilty to a crime of violence under 8 U.S.C. § 1101(a)(43)(F). The Third Circuit ruled that the statute was unconstitutionally vague because of the Court's decision in *Johnson v. United States.* In *Johnson*, the Court found the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii), was void for vagueness. *Johnson v. United States*, 135 S. Ct. 2551, 2557-62 (2015). The ACCA defined a violent felony as a felony that "involves conduct that presents a serious potential risk of physical injury to another." *Johnson*, 135 S. Ct. at 2554. The Court found two components of the law unconstitutionally vague: (1) the law failed to define how great the risk had to be in order to qualify as a violent felony; and (2) the law encouraged arbitrary judgments by binding judges to a judicially-imagined criminal case rather than the facts and elements of the crime. *Johnson*, 135 S. Ct. at 2557-62.

Consistent with the Ninth Circuit in *Dimaya*, the Third Circuit found that the *Johnson* decision compelled its holding in *Baptiste*. *Baptiste v. AG United States*, 841 F.3d 601, 616 (3d Cir. 2016). 18 U.S.C. § 16(b) defines a crime of violence as a felony that inherently "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Third Circuit found this definition semantically and substantively the same as the language in the ACCA and just as unconstitutionally vague, reasoning that

"§ 16(b) calls for the exact analysis that the Court implied was unconstitutionally vague – the application of the 'substantial risk' inquiry to the 'idealized ordinary case' of a crime." *Id.* at 621.

The Third Circuit concluded that "[b]ecause § 16(b) 'offers no reliable way to choose between . . . competing accounts of what' that 'judge-imagined abstraction' of the crime involves, the ordinary case inquiry is as indeterminate in the § 16(b) context as it was in the residual clause context." *Id*. at 617 (quoting *Johnson*, 135 S. Ct. at 2558) (internal citations omitted).

To the extent the Court in *Dimaya* addresses whether 18 U.S.C. § 16(b) is void for vagueness, the Court's decision would inform the correctness of the Third Circuit's decision in *Baptiste*. Accordingly, it would be appropriate to hold this case pending the outcome in *Dimaya*.

II. IF THE COURT IN *DIMAYA* DOES NOT DECIDE THE CONSTITUTIONAL QUESTION REGARDING 18 U.S.C. § 16(b), THEN THE COURT SHOULD DENY CERTIORARI.

If the Court does not address the merits of the constitutional issue in *Dimaya*, the Court should deny the government's petition for writ of certiorari because there is truly no defined circuit split on the precise issue presented here regarding whether 18 U.S.C. § 16(b) is void for vagueness. Given the importance of the issue presented and the lack of a defined circuit

split, the Court should wait until other circuits have addressed this issue.

The reasons for denying certiorari on the issue of 18 U.S.C. § 16(b) were discussed in detail in the respondent's opposition to certiorari in *Dimaya*. *See* Brief in Opposition, *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 2016 WL 323911 (U.S. Sept. 29, 2016) (No. 1598). Respondent recognizes that despite these arguments, the Court granted certiorari. However, since the grant of certiorari in *Dimaya*, further percolation in appellate courts show the Court should not weigh in on this case at this time. Indeed, now there is only a razor thin split.

Since the petition for writ of certiorari in *Dimaya* was filed, the Third and the Tenth Circuits have issued decisions determining that 18 U.S.C. § 16(b) was void for vagueness, including the instant decision the government is appealing. *See Baptiste*, 841 F.3d at 615-21; *Golicov*, 837 F.3d at 1068-74. Joining the Sixth, Seventh and Ninth Circuits, the Third Circuit and the Tenth Circuit, through well-reasoned opinions applying the Court's analysis in *Johnson*, found that § 16(b) was unconstitutionally vague. *See Shuti*, 828 F.3d at 440; *Vivas-Ceja*, 808 F.3d at 719; *Dimaya*, 803 F.3d at 1110; *Baptiste*, 841 F.3d at 615-21; *Golicov*, 837 F.3d at 1068-74.[4] The Fifth Circuit's split decision is the only

[4] The Second and the Eighth Circuits have determined language in another statute, 18 U.S.C. § 924(c)(3)(B), which has language similar to 18 U.S.C. § 16(b), to not be void for vagueness, but have not reached the § 16(b) issue. *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016); *United States v. Prickett*, 839 F.3d 697 (8th

decision to the contrary. *See United States v. Gonzalez-Longoria*, 831 F.3d 670, 678-79 (5th Cir. 2016). The move toward consensus among the federal circuits counsels against the Court weighing in regarding 18 U.S.C. § 16(b) at the present time.

Given the nature of the issue, the Court will have ample opportunity to address this issue with the benefit of full analysis from most, if not all, of the circuits. Indeed, the Solicitor General has noted that one factor that should be considered in determining whether the Court should reconsider a case or, as here, grant certiorari, is whether the issues presented "may freely recur in other cases." Petition for Rehearing at 4, *United States v. Texas*, 136 S. Ct. 2271, *petition denied* (2016). Respondent agrees with the Solicitor General on this point. There have been six circuit court decisions on the precise issue presented here in the last year and a half alone. Furthermore, the constitutionality of 18 U.S.C. § 16(b) is an issue that is still moving through other circuits.[5] If the Court does not reach the constitutional issue in *Dimaya*, then the Court should deny

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Cir. 2016). However, at least one circuit has distinguished between the two statutes as having substantive differences. This demonstrates that the Second and Eighth Circuit decisions are inapposite when considering if there is a split in the courts on whether 18 U.S.C. § 16(b) is void for vagueness. *See Baptiste*, 841 F.3d at 617, n.18 (discussing the Sixth Circuit's differentiation in *Shuti*, 828 F.3d at 449).

[5] For example, the Second Circuit stayed the proceedings in *Zeng v. Sessions*, No. 15-709 (2d Cir. 2016), pending the Court's decision in *Dimaya*. *See also In re Hubbard*, 825 F.3d 225, 233 (4th Cir. 2016) (finding merit in the argument that the Court's holding in *Johnson* applies with equal force to 18 U.S.C. § 16(b)); *Xiong v.*

certiorari in this case. Denying certiorari would afford the remaining circuits the opportunity to weigh in, and the Court could then analyze the issue at that time.

CONCLUSION

We respectfully ask the Court to hold Mr. Baptiste's case until the Court rules on the constitutionality of 18 U.S.C. § 16(b) in *Dimaya*. In the event the Court does not address this issue in *Dimaya*, we respectfully ask the Court to deny certiorari in Mr. Baptiste's case.

Respectfully submitted,

MICHAEL L. FOREMAN
Counsel of Record
PENN STATE LAW
CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16803
(814) 865-3832
mlf25@psu.edu

Lynch, 836 F.3d 948, 950-51 (8th Cir. 2016) (declining to rule on the constitutionality of 18 U.S.C. § 16(b) until after further proceedings by the BIA).