No. 16-_____

In the Supreme Court of the United States

ADRIAN GOMEZ-UREABA AND SILVANO GARCIA-IBARRA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioners request leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioners were both represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court for the Northern District of Texas and on appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted on July 17, 2017.

____
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ADRIAN GOMEZ-UREABA AND SILVANO GARCIA-IBARRA,
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UNITED STATES OF AMERICA,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1

Is 18 U.S.C. § 16(b) unconstitutionally vague?

2

Is evading arrest with a motor vehicle a “crime of violence” for purposes of 18 U.S.C. § 16(b)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Adrian Gomez-Ureaba and Silvano Garcia-Ibarra seek a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit in their consolidated appeal.

OPINIONS BELOW

The Fifth Circuit's opinion is unreported but reprinted at pages 1a–2a of the Appendix. The district court entered no written opinion.

JURISDICTION

The Fifth Circuit issued its written judgments on April 18, 2017. Pet. App. 3a–4a. This Court has jurisdiction to review the judgments under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the void-for-vagueness doctrine, which arises from the due process clause:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. V.

This case also involves the federal criminal code's general definition of "crime of violence" found at 18 U.S.C. § 16:

> 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.

This statutory definition is incorporated into the Immigration and National Act's definition of "aggravated felony":

> (43) The term "aggravated felony" means . . . (F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year . . .

8 U.S.C.A. § 1101(a)(43)(F). That definition, in turn, is incorporated into the penalty for aggravated illegal reentry after deportation:

> (a) In general
>
> Subject to subsection (b), 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), in the case of any alien described in such subsection . . . (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;

8 U.S.C. § 1326(a),(b)(2). Finally, the case involves the application of these federal statutes to the Texas crime of evading arrest. At the time Petitioners committed that offense,[1] it was defined as follows:

> (a) A person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.
>
> (b) An offense under this section is a Class B misdemeanor, except that the offense is:
>
>> (1) a state jail felony if the actor uses a vehicle while the actor is in flight and the actor has not been previously convicted under this section;
>>
>> (2) a felony of the third degree if:
>>
>>> (A) the actor uses a vehicle while the actor is in flight and the actor has been previously convicted under this section; or
>>>
>>> (B) another suffers serious bodily injury as a direct result of an attempt by the officer from whom the actor is fleeing to apprehend the actor while the actor is in flight; or
>>
>> (3) a felony of the second degree if another suffers death as a direct result of an attempt by the officer from whom the actor is fleeing to apprehend the actor while the actor is in flight.
>
> (c) In this section, "vehicle" has the meaning assigned by Section 541.201, Transportation Code.
>
> (d) A person who is subject to prosecution under both this section and another law may be prosecuted under either or both this section and the other law.

[1] The state-court judgments, which were filed under seal, reveal that Mr. Garcia-Ibarra committed the evading arrest offense on March 12, 2007. 5th Cir. (Sealed) R. 15-10870.143. Mr. Gomez-Ureaba committed the offense on March 1, 2006. 5th Cir. (Sealed) R. 15-10670.108. Both were convicted of the "state jail felony" version of the offense.

Texas Penal Code § 38.04 (Vernon 2006).

STATEMENT OF THE CASE

Petitioners each pleaded guilty to illegally reentering this country after deportation, in violation of 8 U.S.C. § 1326(a). In both cases, the lower courts concluded that Petitioners' prior convictions for evading arrest with a motor vehicle were "aggravated felonies" under 8 U.S.C. § 1101(a)(43)(F). This finding raised Petitioners' maximum possible prison sentence to 20 years. *See* 8 U.S.C. § 1326(b)(2), The finding also lead to an increase in the advisory guideline range, and—if left undisturbed—will carry significant immigration consequences should either ever try to return to the United States.

In a consolidated appeal, Petitioners argued that Texas evading arrest was *not* a crime of violence under 18 U.S.C. § 16 and therefore not an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). They conceded that the Fifth Circuit held the offense to be categorically violent under § 16(b) in *United States v. Sanchez-Ledezma*, 630 F.3d 447 (5th Cir. 2011). They urged the Fifth Circuit to hold that § 16(b) was unconstitutionally vague on its face or as applied to them. Alternatively, they argued that merely refusing to stop upon a police officer's demand should not be considered categorically violent. The Fifth Circuit rejected these arguments. Pet. App. 1a–2a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE 18 U.S.C. § 16(B) IS UNCONSTITUTIONALLY VAGUE.

Every circuit to consider the issue—other than the Fifth Circuit—has held that 18 U.S.C. § 16(b) is unconstitutionally vague. *See Golicov v. Lynch*, 837 F.3d 1065,

1072 (10th Cir. 2016) ("Having carefully considered these principles and precedents, we agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. § 16(b) is not meaningfully distinguishable from the ACCA's residual clause and that, as a result, § 16(b), and by extension 8 U.S.C. § 1101(a)(43)(F), must be deemed unconstitutionally vague[.]") (applying the logic of *Johnson v. United States*, 135 S. Ct. 2551 (2015)).

This Court granted certiorari to resolve the circuit split over § 16(b)'s constitutionality in *Dimaya v. Sessions*, No. 15-1498), and that issue will surely be settled after reargument next term. If, for some reason, that question remains open at the time this petition is considered, Petitioners ask the Court to grant the petition and hold that § 16(b) is unconstitutionally vague for the same reasons *Johnson* struck down the nearly identical provision in the Armed Career Criminal Act. Alternatively, they ask that the Court hold that the statute is at least unconstitutionally vague *as applied* to their prior offense of evading arrest by vehicle.

II. Alternatively, This Court Should Grant the Petition And Hold That "Simple" Evading By Vehicle Is Not A Crime Of Violence.

Assuming that 18 U.S.C. 16(b) survives *Dimaya,* the next question is whether the Texas offense of simple evading arrest with a motor vehicle remains a "crime of violence" under that provision. It is hard to imagine how § 16(b) could be any narrower than ACCA's residual clause and yet still include the quintessential "residual clause" offense of evading arrest.

A. **Looking to the elements alone, the Texas offense is committed whenever someone fails to comply with a request to pull over.**

Simple fleeing does not involve either injury or force. The elements of evading by vehicle are: "(1) a person, (2) intentionally flees, (3) from a peace officer, (4) with knowledge he or she is a peace officer, (5) the peace officer is attempting to arrest or detain the person, (6) the attempted arrest or detention is lawful, and (7) the person uses a vehicle while . . . in flight." *United States v. Harrimon*, 568 F.3d 531, 533 (5th Cir. 2009) (quoting *Powell v. State*, 206 S.W.3d 142, 143 (Tex. App. 2006)). "'[F]leeing' is anything less than prompt compliance with an officer's direction to stop." *Horne v. State,* 228 S.W.3d 442, 446 (Tex. App. 2007). "The statute does not require high-speed fleeing, or even effectual fleeing. It requires only an attempt to get away from a known officer of the law." *Mayfield v. State,* 219 S.W.3d 538, 541 (Tex. App. 2007). Texas courts have consistently held that a suspect commits this offense *even if* he does not drive at high speed. *See*, e.g., *King v. State*, No. 13-09-00194-CR, 2010 WL 2697165 (Tex. App. July 8, 2010); *Sartain v. State,* No. 03-09-00066-CR, 2010 WL 2010838 (Tex. App May 19, 2010); *Small v. State,* No. 05-02-1328-CR, 2003 WL 22092275 (Tex. App. Sept. 10, 2003).

On the contrary, a defendant who *does* flee in a reckless manner—such that that the vehicle was "capable of causing death or serious bodily injury" in the manner that it was used—would receive an affirmative "deadly weapon" finding, which enhances the punishment. *Drichas v. State*, 175 S.W.3d 795, 797 (Tex. Crim. App.

2005) (quoting Texas Penal Code § 12.35(c)). Here, the state courts found that the "deadly weapon" enhancement did not apply in either case.[2]

In other words, looking solely to the elements of Petitioners' convictions, the judgments established only that they failed to stop or pull over once notified that a police officer had made that request. It can further be presumed that the defendants did not flee in a reckless manner or in a way likely to result in death or serious bodily injury.

B. The "crime of violence" designation arose from judicial speculation about the risks posed in the "ordinary case" of simple fleeing.

Even though the offense is broadly defined to include non-violent indifference to an officer's command, the Fifth Circuit held that the offense was categorically violent under ACCA's residual clause in *Harrimon*. Critically, this was *not* based upon the conduct of the crime itself, but on the appellate judges' beliefs or speculation about what might often accompany or follow that conduct:

> Fleeing by vehicle requires disregarding an officer's lawful order, which is a clear challenge to the officer's authority and *typically initiates pursuit*. . . . Fleeing by vehicle is also violent: the use of a vehicle, *usually a car*, to evade arrest or detention *typically involves violent force which the arresting officer must in some way overcome*. Further, fleeing by vehicle "*will typically lead to a confrontation with the officer being disobeyed*," a confrontation fraught with risk of violence. . . .
>
> . . . *To our minds*, an offender's willingness to use a vehicle to flout an officer's lawful order to stop shows "an increased likelihood" that the offender would, if armed and faced with capture, "deliberately point the gun and pull the trigger."

[2] 5th Cir. Sealed R. 15-106670.108 & 15-10870.143.

Harrimon, 568 F.3d at 534–535 (emphasis added). The Fifth Circuit also expressed its "'*intuitive belief*' that fleeing by vehicle involves a serious potential risk of physical injury to others." *Id.* at 537 (emphasis added). The ultimate focus was not on the *conduct* of fleeing itself, but on the "marked likelihood of pursuit and confrontation" which, the Court inferred, would often *follow* that conduct. That made fleeing into a categorically "violent" crime. *Id.* at 536.

The same "logic" compelled the Fifth Circuit to hold that vehicle fleeing was a crime of violence under 18 U.S.C. § 16(b). *See Sanchez-Ledezma*, 630 F.3d at 448, 451. *Sanchez-Ledezma* simply adopted *Harrimon*'s speculation about the *typical* eluder, the *typical* law enforcement response, and the hypothesized or intuitive risk of violent confrontation. *Id.* at 451. This Court later reached the same conclusion, under ACCA, regarding Indiana's fleeing offense. *See Sykes v. United States*, 564 U.S. 1 (2011).

C. ***Johnson* unequivocally overruled the reasoning and logic of *Sykes*, *Harrimon* and *Sanchez-Ledezma*.**

In *Johnson*, this Court thoroughly rejected the reasoning underlying these opinions:

> Our most recent case, *Sykes*, also relied on statistics, though only to "confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." But common sense is a much less useful criterion than it sounds—as *Sykes* itself illustrates. The Indiana statute involved in that case covered everything from provoking a high-speed car chase to merely failing to stop immediately after seeing a police officer's signal. How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum? Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes.

Johnson, 135 S. Ct. at 2559 (citations omitted). Justice Kagan's opinion eviscerated the rationale utilized in *Harrimon* and *Sanchez-Ledezma*.

This Court also rejected the notion that a crime could be deemed violent based on *others' response*. *See Johnson*, 135 S. Ct. at 2557–2558 ("Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing 'potential risk' *seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out*.") (emphasis added). In *James v. United States*, 550 U.S. 192 (2007), this Court had held that attempted burglary was categorically violent based on how *others might respond* to the crime:

> The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate. That is, the risk arises not from the completion of the burglary, but from the possibility that an innocent person might appear while the crime is in progress.
>
> Attempted burglary poses the same kind of risk. Interrupting an intruder at the doorstep while the would-be burglar is attempting a break-in creates a risk of violent confrontation comparable to that posed by finding him inside the structure itself.

James, 550 U.S. 192, 203–204 (2007). The Fifth Circuit relied on this passage from *James* when it held that fleeing was a violent felony. *See Harrimon*, 568 F.3d at 535 (quoting *James*, 550 U.S. at 203). *Johnson* also repudiates this reasoning:

> Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: *"An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a*

> *neighborhood watch program. Or a homeowner . . . may give chase, and a violent encounter may ensue*." 550 U.S., at 211, 127 S.Ct. 1586. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

Johnson, 135 S. Ct. at 2557–2558 (emphasis added, citations omitted).

D. Simple Evading Cannot Satisfy A Narrowed Construction of § 16(b).

Given this Court's complete repudiation of the reasoning used to classify running-away as violent, there is now considerable doubt about whether evading offenses should count as "violent" under whatever remains of § 16(b). In *Dimaya*, the Government has suggested that evading offenses might be analyzed differently under § 16(b) because that statute demand a more direct connection between the offender's conduct and the risk of violence. *See* U.S. Br. 32–33, *Dimaya v. Sessions*, No. 15-1498 (citing *Sykes*); *see also* Tr. of Oral Arg. 14–15, *ibid.* (suggesting that the classification of evading arrest offenses might depend upon the "gradations" of the state offense, with more aggravated versions demonstrating a "particular risk" of violence not present in unenhanced form).

Whatever the outcome of *Dimaya*, the lower courts are no longer at liberty to rely upon intuitive beliefs about the "typical" case when an offender declines to pull over, or about how others will respond to that flight. *Johnson* has rejected that reasoning for constitutional reasons. As a result, even if *some* crimes continue to qualify as "violent" under § 16(b), that set should exclude cases of simple fleeing such as those at issue here.

CONCLUSION

For all the foregoing reasons, the Petition for a writ of certiorari should be granted. Petitioners ask that this Court either vacate the decision below in light of the anticipated decision in *Dimaya* or else set the case for oral argument.

Respectfully submitted,

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