No. 15-1498

IN THE

Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,

Petitioner,

v.

JAMES GARCIA DIMAYA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Armed Career Criminal Act's (ACCA) "residual clause" defines 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). Last year, this Court held the ACCA residual clause 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. *Johnson v. United States*, 135 S. Ct. 2551, 2557-58 (2015). This case involves a separate criminal statute, 18 U.S.C. § 16, with a similar residual clause. Section 16's residual clause defines a "crime of violence" as an "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. § 16(b). Like the ACCA residual clause, the § 16 residual clause requires that courts construct a judicially imagined "ordinary case" of a given offense, and then determine whether the "risk" of physical force posed by that judicial abstraction is sufficiently "substantial."

The petition presents two questions:

1. 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.

2. If not, whether the residual clause contained in 18 U.S.C. § 16 is unconstitutionally vague under *Johnson*.

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INTRODUCTION

In *Johnson v. United States*, this Court invalidated the "residual clause" in the Armed Career Criminal Act, which defined a "violent felony" as one that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). Because that clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," this Court concluded that it "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." 135 S. Ct. 2551, 2557-58 (2015).

This case concerns the analogous residual clause in 18 U.S.C. § 16, which defines a "crime of violence" as a felony "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." There is no dispute that, like the ACCA's residual clause, the § 16 residual clause requires courts to assess the risk posed by a judicially imagined "ordinary case" of a crime. Accordingly, as the Sixth, Seventh, and Ninth Circuits have correctly held, the § 16 residual clause is also unconstitutionally vague under a straightforward application of *Johnson*.

Given how squarely *Johnson* controls that question, it is understandable that the government interposes a threshold question unrelated to the § 16 residual clause itself. The government argues that, because in this case the § 16 residual clause operates in the context of an immigration proceeding, the

Court of Appeals should have assessed the clause under a less stringent vagueness standard, and that under that watered-down standard, the § 16 residual clause should stand where the ACCA's residual clause failed. But the government asserts no circuit conflict on that question. And accepting the government's argument would require this Court to overrule a 65-year-old precedent applying the "established criteria of the 'void for vagueness' doctrine" to an immigration statute in light of the "grave nature of deportation." *Jordan v. De George*, 341 U.S. 223, 231 (1951).

To the extent the immigration context of this case is relevant at all, it is only that an immigration case is a poor vehicle for this Court to pass upon the constitutionality of the § 16 residual clause, a criminal statute. Unlike in a criminal case involving § 16, this Court would have to grapple with the government's threshold question presented before reaching the question on which the government asserts a circuit conflict over the § 16 residual clause's constitutionality.

When the government does address the merits of the vagueness question, it fastens onto two textual differences that, it claims, distinguish the § 16 residual clause from the ACCA's residual clause: The ACCA referred to a risk of "physical injury," whereas § 16 refers to the risk that "physical force" may be "used"; and the ACCA's residual clause was preceded by a list of four specific examples of "violent felon[ies]," whereas § 16 lacks any such examples. But, if anything, these distinctions merely compound the § 16 residual clause's indeterminacy, rendering its application even *more* arbitrary and

unpredictable, not less, than the ACCA provision. And neither feature was central to this Court's reasoning in *Johnson* in any event. As this Court recently reiterated in *Welch v. United States*, "[t]he [ACCA] residual clause failed … because applying [a 'serious potential risk'] standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. 1257, 1262 (2016). The same is true of § 16's residual clause.

Finally, review at this time would be premature. The government points (Pet. 26-27) to a decision of the Sixth Circuit concerning a different statute, but in the short time since the government filed its petition for certiorari, the Sixth Circuit has held that it agrees with the Seventh and Ninth Circuits insofar as § 16's residual clause is concerned. Meanwhile, the Fifth Circuit has since adopted the government's position on § 16. But with *Johnson* and *Welch* having been decided so recently, and with the Courts of Appeals actively considering their implications, further percolation is warranted.

The petition should be denied.

STATEMENT

1. 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. In 2007 and again in 2009, he was convicted of felony first-degree burglary in violation of California Penal Code § 459. Pet. App. 42a. The government began deportation proceedings against Dimaya in 2010. Pet. App. 42a.

The Immigration and Nationality Act provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony" is defined by reference to a long list of specified offenses. *See* 8 U.S.C. § 1101(a)(43). The definition includes "a theft offense … or burglary offense for which the term of imprisonment [is] at least one year." *Id*. § 1101(a)(43)(G).

A "crime of violence … for which the term of imprisonment [is] at least one year" is also an "aggravated felony." 8 U.S.C. § 1101(a)(43)(F). A "crime of violence" is defined, in turn, by a reference to a criminal statute, 18 U.S.C. § 16. That provision supplies the general definition of a "crime of violence" for the criminal code:

> (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.

The government alleged that Dimaya's California burglary convictions were aggravated felonies, because each was "an attempted theft or burglary offense" and a "crime of violence." Pet. App. 42a-43a. The government also alleged the convictions were "crimes of moral turpitude." Dimaya appeared pro se

before an immigration judge. Pet. App. 49a. The immigration judge found Dimaya removable, agreeing with the government on each point. Pet. App. 49a-55a. With respect to the "crime of violence classification," the immigration judge concluded that "the unlawful entry into a residence is by its very nature an offense where [there] is apt to be violence, whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon." Pet. App. 54a. To conclude that California burglary requires unlawful entry, the immigration judge relied upon *United States v. Becker*, 919 F.2d 568 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991), which held that California courts recognize an implicit element of unlawful entry even though the California statute does not expressly "require that the entry itself be illegal for a defendant to be convicted of burglary." *Id.* at 571 n.5; *see* Pet. App. 54a.

2. Dimaya filed a pro se appeal with the Board of Immigration Appeals. The Board dismissed Dimaya's appeal, finding him removable based on the "crime of violence" aspect of the definition of an "aggravated felony," and not reaching the immigration judge's alternative grounds. Pet. App. 46a-47a. The Board agreed with Dimaya that "[t]he California statute" under which he was convicted "does not require an unlawful entry necessary for generic burglary." Pet. App. 45a. The Board nevertheless observed that "[t]he charging document and the abstract of judgment … reference first degree residential burglary," and concluded that "[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force." Pet. App. 46a.

One Board member separately concurred in the result. She disagreed with the suggestion that a burglary offense could be considered a crime of violence even if it does not require an unlawful entry. "[A] burglary not involving an unlawful entry," she observed, "does not create a sufficient risk of the use of force to qualify as a crime of violence." Pet. App. 48a. She nevertheless concurred because she believed, based on the same Ninth Circuit precedent on which the immigration judge had relied, that "California law implicitly requires an unlawful entry as a prerequisite to a residential burglary conviction." Pet. App. 48a.

3. Still proceeding pro se, Dimaya filed a petition for review in the Ninth Circuit. Pet. App. 4a. Shortly afterwards, the court appointed counsel to represent him. Briefing before the Court of Appeals began shortly after this Court's decision in *Descamps v. United States*, which addressed whether the California burglary statute under which Dimaya was convicted was a "burglary" as that term is used in the definition of a "violent felony" in the ACCA. 133 S. Ct. 2276 (2013).

Descamps observed that California's burglary statute does not require proof of unlawful entry as an element, and concluded that "a conviction under that statute is never for generic burglary" under the ACCA. *Id.* at 2293. The first round of briefing before the Court of Appeals in this case, therefore, focused on *Descamps*'s impact on prior Ninth Circuit cases holding that California's burglary statute is a "crime of violence" under the § 16 residual clause. In that briefing, the government stressed that "the

'substantial risk' clause is not unique to § 16(b)," and observed that "a variant of the clause appears in the … Armed Career Criminal Act ('ACCA')." C.A. Government Brief at 26.[1] The government stated that "the ACCA … appl[ies] the same essential analysis as under section 16(b)," and that, as a result, "the Supreme Court's insight that 'the ACCA does not require metaphysical certainty and contains inherently probabilistic concepts,' applies equally to a section 16(b) case." *Id.* (quoting *James v. United States*, 550 U.S. 192, 207 (2007)).

In January 2015, this Court ordered supplemental briefing in *Johnson v. United States* on whether the ACCA's residual clause is unconstitutionally vague. 135 S. Ct. 939 (2015). As a result, the Court of Appeals held this case in abeyance pending this Court's decision in *Johnson*.

In June 2015, this Court then struck down the ACCA's residual clause in *Johnson*. ACCA defined a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year … 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*

[1] Documents preceded by "C.A." were filed in the court of appeals.

> *conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B) (emphasis added). The italicized language is the ACCA's "residual clause."

Johnson identified "[t]wo features of the residual clause [that] conspire to make it unconstitutionally vague." 135 S. Ct. at 2557. First, the residual clause yields "grave uncertainty about how to estimate the risk posed by a crime" because it requires courts to assess the risk posed by "a judicially imagined 'ordinary case' of a crime, not … real-world facts or statutory elements." *Id*. Second, the residual clause also leaves "uncertainty about how much risk it takes for a crime to qualify as a violent felony," because it compels courts to apply an "imprecise 'serious potential risk' standard" to a "judge-imagined abstraction." *Id*. at 2558. This Court concluded that "[b]y combining 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 violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id*.

4. Following supplemental briefing and oral argument, the Court of Appeals concluded that the § 16 residual clause "suffers from the same indeterminacy as ACCA's residual clause," and accordingly struck down the § 16 residual clause as unconstitutionally vague under *Johnson*. Pet. App. 2a. The court began by observing that the language of the § 16 residual clause is "similar" to the ACCA's residual clause, and that both provisions "are subject

to the same mode of analysis." Pet. App. 8a. Like the ACCA's residual clause, the § 16 residual clause requires courts to construct a judicially imagined "ordinary case" of a crime. And, much as the ACCA's residual clause required that courts subject that judicially imagined "ordinary case" to an imprecise "serious potential risk" standard, the § 16 residual clause compels courts to determine whether the risk that "physical force" may be "used" in the course committing an imagined ordinary offense is sufficiently "substantial." Pet. App. 8a, 12a-13a. "As with ACCA's residual clause," therefore, "§ 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). Accordingly, the Court of Appeals concluded that the § 16 residual clause is likewise unconstitutionally vague, and remanded the case to the Board to consider the immigration judge's alternative grounds for finding Dimaya removable. Pet. App. 2a n.1, 20a.

Judge Callahan dissented. She agreed that the § 16 residual clause, like the ACCA's residual clause, requires that courts assess the risk posed by a judicially imagined "ordinary case" of the offense. Pet. App. 35a. Judge Callahan noted, however, that the ACCA's residual clause was preceded by a list of four specific crimes, which she believed were crucial to this Court's determination in *Johnson* that the clause that followed them left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." Pet. App. 35a (quoting *Johnson*, 135 S. Ct. at 2557-58).

Judge Callahan also observed that the § 16 residual clause has not generated the same body of confusing case law before this Court that the ACCA's residual clause had before it was struck down. Pet. App. 39a-40a.

The government petitioned for rehearing en banc, raising many of the arguments for distinguishing *Johnson* presented in its petition for certiorari. The court of appeals denied the petition with no judge so much as calling for a vote. Pet. App. 56a.

REASONS TO DENY CERTIORARI

This Court should deny certiorari for three reasons. First, the court of appeals' decision embodies a correct and straightforward application of *Johnson* to a statute that has consistently been recognized—including by the government itself—as analogous to the ACCA residual clause. Second, neither of the arguments that the government offers in an effort to distinguish *Johnson* raises an issue warranting this Court's review. The government's principal argument—that deportation statutes should be assessed under a diluted form of vagueness review—would require that this Court overturn a 65-year-old precedent whose underpinnings this Court has consistently reaffirmed. That question does not merit this Court's review, and it only highlights that an immigration case is not a proper vehicle to consider the constitutionality of the § 16 residual clause, a criminal statute. The government's alternative argument—that the minor textual distinctions between the § 16 residual clause and the ACCA's residual clause dictate a different outcome under the

vagueness inquiry—fails because those distinctions merely compound the statute's vagueness, to the extent they are meaningful at all. Third, this Court's review would be premature, as demonstrated by the developments in the courts of appeals just since the government filed its petition.

In the short time since *Johnson*, this Court has already considered one sequel to that case and granted review in another. *See Welch v. United States*, 136 S. Ct. 1257 (2016); *Beckles v. United States*, No. 15-8544. It does not need a fourth installment, on a question on which the court of appeals correctly applied *Johnson*'s holding to a materially identical statute.

I. The Court Of Appeals' Decision Is Correct And Follows From A Straightforward Application Of *Johnson*.

In *Johnson*, this Court made clear that its decision to strike down the ACCA's residual clause hinged on "[t]wo features of the residual clause [that] conspire to make it unconstitutionally vague": (1) the uncertainty inherent in deciding "what kind of conduct the 'ordinary case' of a crime involves"; and (2) the "uncertainty about how much risk it takes for a crime to qualify as a violent felony." 135 S. Ct. at 2557-58.

The § 16 residual clause shares both of those features. Just like the ACCA's residual clause, the § 16 residual clause "requires [courts] to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [an

individual's] crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). The government concedes that the ACCA's residual clause and the § 16 residual clause are "similar to that extent." Pet. 20. And like the ACCA's residual clause, the § 16 residual clause demands that this judicially imagined "ordinary case" be evaluated according to an imprecise "risk" standard. This Court has consistently identified the two residual clauses as "very similar" because of these commonalities. *Johnson v. United States*, 559 U.S. 133, 140 (2010); *see, e.g.*, *Chambers v. United States*, 555 U.S. 122, 133 n.2 (2009) (Alito, J., concurring) ("18 U.S.C. § 16(b) ... closely resembles ACCA's residual clause"); *see also* C.A. Government Brief at 26 ("[T]he ACCA … appl[ies] the same essential analysis as under section 16(b)."); *United States v. Scudder*, 648 F.3d 630, 634 (8th Cir. 2011) (applying case law involving the ACCA's residual clause in a case involving the § 16 residual clause); *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 562 (7th Cir. 2008) (same).

The Court of Appeals' determination that the § 16 residual clause is unconstitutionally vague follows directly from *Johnson*. Indeed, the government recognized as much in litigating *Johnson* before this Court. The government argued that the § 16 residual clause "is equally susceptible to petitioner's central objection to the [ACCA] residual clause," because 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. Supplemental Brief for the United States at 22-23, *Johnson v. United States*, 135 S. Ct. 2551 (2015) (No. 13-7120). And although this Court in *Johnson* distinguished most of the examples that the

government cited of laws that "use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk'" (such as state reckless-endangerment laws), it did not distinguish § 16. *Johnson*, 135 S. Ct. at 2561. This Court distinguished the other examples because they merely "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct," whereas the ACCA's residual clause "requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime." *Id.* at 2561. But § 16's residual clause applies in the same way, as the government recognizes. Accordingly, the government has properly conceded away the only plausible basis for distinguishing the § 16 residual clause from the ACCA's residual clause.

To demonstrate the unpredictability of an analysis that ties a judicial assessment of risk to a judicially imagined "ordinary case" of a crime, *Johnson* pointed to attempted burglary. 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"? 135 S. Ct. at 2558 (quoting *James*, 550 U.S. at 211). 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 residual clause offers no reliable way to choose between these competing accounts of what 'ordinary' attempted burglary involves," it produces a

constitutionally impermissible level of unpredictability and arbitrariness. *Id*.

The same is true of the § 16 residual clause. Consider Dimaya's crime of conviction, California burglary. As this Court recognized in *Descamps*, California's burglary statute 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.*, a person's entering a dwelling with the intent to purchase items using a bad check, *People v. Nguyen*, 40 Cal. App. 4th 28, 30-35 (1995), or entering an open house and taking a real estate agent's wallet out of her purse, *People v. Little*, 206 Cal. App. 4th 1364, 1367-70 (2012). It even covers a customer legally entering a bank to withdraw money that he has fraudulently transferred to his account. *People v. Saint-Amans*, 131 Cal. App. 4th 1076, 1079-80 (2005); *see also* Pet. App. 11a n.7 (noting only 7% of burglaries involve incidents of violence). What the "ordinary case" of California burglary involves, and how much risk of force it poses, is anyone's guess.

The § 16 residual clause, like the ACCA's residual clause, offers no reliable way of resolving this question. Yet the consequences of the altogether rudderless inquiry that the statute calls for are profound. If a court determines that the "risk" of "physical force" posed by the "ordinary case" of California burglary is sufficiently "substantial," then *every defendant* with a California burglary conviction

will be regarded as having been convicted of a "crime of violence"—even if a particular defendant's real-world conduct bears no resemblance to the judicially imagined "ordinary case," and gave rise to no meaningful risk that physical force might actually be used.[2]

The § 16 residual clause, then, suffers from the same two infirmities that left the ACCA's residual clause unconstitutionally vague: It ties the assessment of an uncertain amount of risk to a judicially imagined "ordinary case" of a crime. In concluding that the § 16 residual clause is unconstitutionally vague, the Court of Appeals did nothing more than faithfully apply *Johnson*. The question presented therefore does not merit this Court's review.

II. The Government's Efforts To Distinguish *Johnson* Fail, And Only Highlight That An Immigration Case Is A Poor Vehicle To Review The Constitutionality Of The § 16 Residual Clause, A Criminal Statute.

The government's principal argument for certiorari emphasizes that, in this case, the § 16 residual clause operates in the context of an immigration proceeding. The government contends the Court of Appeals erred when it "applied the

[2] In contrast, the categorical approach as applied in all other contexts avoids this potential unfairness because it looks not to the hypothetical "ordinary case," but rather to "the minimum conduct criminalized by the state statute." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

vagueness standard appropriate for criminal laws" to the § 16 residual clause as it arose in that context, rather than applying some other vagueness standard, whose contours the government does not specify except to say that it is "less exacting" than the standard used in *Johnson*. Pet. 11-12. Only in the alternative does the government suggest that two textual distinctions between the § 16 residual clause and the ACCA's residual clause dictate a different outcome here, even if the same vagueness standard applies. Both arguments are flawed, and neither merits this Court's review.

A. The government's threshold question presented regarding the void-for-vagueness standard is not certworthy, is foreclosed by precedent, and could stand in the way of this Court's consideration of the *Johnson* question presented.

1. The government first argues that *Johnson* does not control here because its void-for-vagueness analysis of a criminal statute does not apply to an immigration case. Pet. 11-16. But 65 years ago, this Court held the opposite. In *Jordan v. De George*, this Court considered an early 20th-century precursor to the INA's provisions regarding convictions that may lead to deportation. 341 U.S. at 225. It held that, "in view of the grave nature of deportation," which it likened to "banishment or exile," the Court must "test this [immigration] statute under the *established criteria* of the 'void for vagueness' doctrine." *Id.* at 231 (emphasis added). The government's contention that "*Jordan* did not have occasion to decide whether the

same vagueness standards" apply to deportation statutes is flatly wrong. Pet. 14.

Indeed, as courts have consistently recognized, *Jordan* makes "clear that an alien may bring a vagueness challenge to a deportation statute." *Beslic v. INS*, 265 F.3d 568, 571 (7th Cir. 2001); *see also Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013). The government identifies no case in which this Court has receded from *Jordan*. Nor does the government identify any case in which lower courts have upheld deportation statutes under some framework other than the "established criteria of the 'void for vagueness' doctrine," or any case showing a split in authority whatsoever on the issue.

This Court, moreover, has repeatedly reaffirmed the premises underpinning its decision in *Jordan*. This Court has consistently recognized the "sever[ity]" of deportation as a form of "banishment," particularly for permanent residents like Dimaya. *Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012). And this Court has identified deportation as "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants" in criminal proceedings. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (citation omitted). Applying the "established" void-for-vagueness framework in the immigration context, in light of "the grave nature of deportation," therefore remains fully valid today. *Jordan*, 341 U.S. at 231. The government fails to offer any compelling reason why this Court should consider upending that precedent.

2. Even if this Court wished to reconsider *Jordan* and entertain the government's argument that deportation statutes are subject to a different vagueness standard than criminal statutes, this case presents a poor vehicle for doing so, because § 16 *is* a criminal statute. It is part of Title 18, the criminal code, and merely referenced by the INA.

Indeed, even as it is incorporated into the INA, § 16 has criminal applications: A noncitizen convicted under 8 U.S.C. § 1326(a) of illegally reentering the country may receive a substantially higher sentence if he was previously removed following "a conviction for an aggravated felony"—the INA term whose definition incorporates § 16. 8 U.S.C. § 1326(b)(2); *see id.* § 1101(a)(43)(F). It was in precisely that immigration-crime sentencing context that the Seventh Circuit held § 16's residual clause void for vagueness in *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015). "Because [this Court] must interpret the statute consistently" in "both [its] criminal and noncriminal applications," principles governing the criminal context, including the void-for-vagueness inquiry, must govern § 16 even "in the deportation context." *Leocal*, 543 U.S. at 11 n.8 (applying the rule of lenity to § 16 even as applied in the immigration context); *see also Clark v. Martinez*, 543 U.S. 371, 378 (2005) (giving the same statutory provision a different meaning in different applications "would be to invent a statute rather than interpret one").

Accordingly, because this case involves a criminal statute through-and-through, it offers no opportunity to address the government's argument that a lesser

vagueness standard applies to *immigration* statutes. *Jordan*, in contrast, addressed a pure immigration provision of the immigration statutes themselves. *See* 341 U.S. at 225. Any case revisiting *Jordan* would properly do the same.

3. By the same token, the government's interjection of the *Jordan* question makes this immigration case a poor vehicle to decide whether § 16's residual clause is unconstitutionally vague in its *criminal* applications under *Johnson*. The government identifies § 16's function as a criminal provision in arguing that the *Johnson* question presented is an important one: "Section 16 … applies to numerous provisions of Title 18, including provisions covering such areas as money laundering, racketeering, domestic violence, and crimes against children," and thus the Seventh and Ninth Circuits' decisions, which invalidated the § 16 residual clause, could "create[] a cloud of uncertainty over the lawfulness of criminal prosecutions and sentencing enhancements under those provisions." Pet. 29-30. But if the government were correct that a diluted void-for-vagueness standard should apply when § 16 operates in the context of an immigration proceeding, this Court's decision would do nothing to dissipate the cloud of uncertainty in criminal cases the government alleges. A reversal would establish only that the § 16 residual clause is not unconstitutionally vague when it operates in the immigration context. It would leave open the question whether the clause is nevertheless unconstitutional under *Johnson* when it operates in its primary function as a criminal law, in the context of a criminal prosecution or sentencing proceeding.

B. The minor textual differences between the ACCA's residual clause and the § 16 residual clause are immaterial and if anything compound the latter's vagueness.

As an alternative argument, the government seizes on two textual differences between the ACCA's residual clause and the § 16 residual clause. The government argues that these give the § 16 residual clause precision that the ACCA's residual clause lacked. But to the extent these purported distinctions are material at all, they only compound the § 16 residual clause's vagueness. Neither provides any basis for distinguishing this case from *Johnson*.

1. The government first observes that § 16 refers to the "risk that physical force … may be used in the course of committing the offense," whereas the ACCA referred to the "risk of physical injury to another." Pet. 17-18. The government suggests that, because it refers to "injury," the ACCA's residual clause "requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out" wholly apart from "the elements of the crime." Pet. 18. Accordingly, the government contends, § 16 is less vague because it requires assessing the risk of a harm *during* the commission of an offense rather than *after*. Pet. 18.

But the same is true of the § 16 residual clause. As the government notes, *Johnson* observed that "[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. So too with the "risk that physical force against the person or property of another may be used in the course of committing" a burglary: The risk largely arises *after* the entry has already occurred—especially under a statute like California's, which requires no unlawful entry at all, much less "breaking." Of necessity, the "elements of the crime" themselves will not entail any use of force, or else the offense would fit under § 16(a)'s elements clause and there would be no need to resort to the residual clause at all. As with the ACCA's residual clause, § 16's residual clause requires courts to look to a speculative harm that is "remote from the criminal act" itself. *Johnson*, 135 S. Ct. at 2559.

Furthermore, "physical force" is hardly a more precisely defined term than "physical injury," such that imagining how much the "ordinary case" involves would be any easier. On the contrary, this Court has repeatedly grappled with the meaning of "physical force," as used in other statutory provisions. Sometimes, "[p]hysical force" actually requires "violent force— … force capable of causing physical pain or injury to another person," which can be called a "substantial degree of force." *Johnson*, 559 U.S. at 140 (addressing 18 U.S.C. § 924(e)(2)(B)(i)). In other contexts, reference to "the use or attempted use of physical force" has its common law meaning and is "satisfied by even the slightest offensive touching." *United States v. Castleman*, 134 S. Ct. 1405, 1409-10 (2014) (addressing 18 U.S.C. § 922(g)(9)).

This Court has not addressed whether § 16's reference to "physical force" requires violent force, any offensive touching, or something else. The Courts of Appeals, however, have generally assumed that it requires violent force, as defined in the 2010 *Johnson* decision. *See Castleman*, 134 S. Ct. at 1411 n.4; *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015); *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013); *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003). If that is correct, then the § 16 residual clause adds another layer of imprecision to the two this Court deemed fatal to the ACCA's residual clause in *Johnson*. Courts would not only have to determine whether the "risk" of "physical force" posed by an imaginary "ordinary case" is sufficiently "substantial"; they would also have to determine whether that imagined physical force would be sufficiently "substantial" to constitute "violent force." Far from making the § 16 residual clause clearer, then, the clause's addition of a perplexing "physical force" standard to the vague "ordinary case" approach makes its application even more speculative than application of the ACCA residual clause's "physical injury" standard to that approach.

Moreover, what it means for "physical force" to "be used" is also not always clear in actual cases, let alone the hypothetical cases the residual clauses require dreaming up. The government notes that § 16's reference to "a substantial risk that physical force … *will be used*" means the statute will not sweep up "the risk of injuries resulting from 'accidental or negligent conduct,'" and that the § 16 residual clause is consequently "narrower … than the standard set

forth in the ACCA's residual clause." Pet. 19 (quoting *Leocal*, 543 U.S. at 11). But whether "use" extends to reckless (rather than intentional) conduct is a question this Court has left open three times, even as it has divided the circuits. *See Voisine v. United States*, 136 S. Ct. 2272, 2280 n.4 (2016); *Castleman*, 134 S. Ct. at 1414 n.8; *Leocal*, 543 U.S. at 13. *Compare United States v. Sanchez-Espinal*, 762 F.3d 425, 431 (5th Cir. 2014) (recklessly causing physical injury to individual in violation of a protection order comes within 18 U.S.C. § 16(b)), *and Aguilar v. Att'y Gen.*, 663 F.3d 692, 696 (3d Cir. 2011) (mens rea of recklessness suffices for an offense to be a "crime of violence" under the § 16 residual clause), *with United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008) (the definition is limited to intentional conduct), *Jimenez-Gonzalez*, 548 F.3d at 560 (same), *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) (same), and *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (same). If the Third and Fifth Circuits' position ultimately prevails, then the standard established by the clause will barely be "narrower … than the standard set forth in the ACCA's residual clause," as the government contends. Pet. 19. Rather, both would ultimately hinge on the risk that conduct—including non-intentional conduct—will cause a harm.

2. The second textual distinction between the residual clauses the government identifies likewise only compounds the § 16 residual clause's vagueness. The government points out that the ACCA's residual clause directly followed a reference to four specific crimes, which vary "in the degree of risk they pose" and thus added to that provision's indeterminacy.

Pet. 20; *see* 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony" to be a crime that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"). By contrast, the § 16 residual clause is not preceded by any specific offenses.

But it is hard to see why a definition that has *no* such parameters is *less* amorphous than a definition that at least has some guideposts, even if they are "confusing" ones. *Johnson*, 135 S. Ct. at 2561. The government has put it best: "The reference to the enumerated offenses … far from pointing towards vagueness, ma[de] the [ACCA] residual clause more concrete in application than other criminal statutes tied to risk." Supplemental Brief of the United States at 26, *Johnson v. United States*, 135 S. Ct. 2551 (2015). Yet even those references were not enough to save the ACCA's residual clause under a vagueness analysis.

In any event, *Johnson*'s holding did not hinge on the ACCA residual clause's four example offenses. The *Johnson* Court referred to them merely in the course of responding to an argument made by the government and the dissent. *Johnson*, 135 S. Ct. at 2561. The Court emphasized that "[m]ore important[]" to its holding was the problematic "application of the 'serious potential risk' standard to an idealized ordinary case of the crime"—the combination of features that § 16's residual clause shares. *Id.* at 2561 (second emphasis original).

This Court reiterated the point last Term in *Welch v. United States*, stressing that "[t]he vagueness of the [ACCA] residual clause rest[ed] in large part on its operation under the categorical approach.… The residual clause failed not because it adopted a 'serious potential risk' standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense." 136 S. Ct. at 1262. In explicating *Johnson*'s holding, the *Welch* Court did not even mention the four example offenses that the government now contends were essential to the outcome in *Johnson*.

C. Like the ACCA provision in *Johnson*, the § 16 residual clause has generated substantial confusion.

The government next contends that the Court of Appeals "erred in disregarding" the absence of a lengthy series of decisions of this Court addressing the § 16 residual clause, and that this lack of case law indicates that the § 16 residual clause cannot be unconstitutionally vague. Pet. 22. But *Johnson* said only that "the failure of persistent efforts ... to establish a standard can provide *evidence* of vagueness" and that its "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). This Court did not hold that there is a minimum number of residual clause "beasties" that must be added "to [this Court's] bestiary of … residual-clause standards" before a

residual clause will be struck down. *Derby v. United States*, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting from denial of certiorari). Nor did this Court suggest that inferences about the constitutionality of statutory enactments may be made on the basis of this Court's exercise of its "discretionary authority to manage [its] certiorari docket." *Lawrence v. Chater*, 516 U.S. 163, 175 (1996) (Stevens, J., concurring).

In any event, the § 16 residual clause has proven at least as perplexing as its ACCA counterpart. Circuit splits abound over whether particular offenses qualify under the provision. In the Fifth Circuit, unauthorized use of a motor vehicle is a crime of violence under the residual clause. *De La Paz Sanchez v. Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006) (per curiam), *cert. denied*, 552 U.S. 811 (2007). In the Tenth Circuit, it is not. *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007). In the Fifth Circuit, auto burglary qualifies under the residual clause. *Escudero-Arciniega v. Holder*, 702 F.3d 781, 784-85 (5th Cir. 2012). In the Seventh and Ninth Circuits, it does not. *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 (7th Cir. 2000); *Sareang Ye v. INS*, 214 F.3d 1128, 1133-34 (9th Cir. 2000). And so on. Thus, the leading immigration law treatise contains nine pages of small typeface text detailing the idiosyncratic and often conflicting conclusions that various courts have reached in applying § 16 to a range of state offenses. Ira J. *Kurzban, Immigration Law Sourcebook* 261-69 (15th ed. 2016).

In short, the § 16 residual clause is, if anything, even more imprecise than the ACCA's residual clause,

and neither the minor textual differences between the ACCA and § 16 nor this Court's decision to hear fewer § 16 cases provides a plausible basis for distinguishing this case from *Johnson*.

III. This Court's Review Would Be Premature Because The Courts Of Appeals Have Only Just Begun To Evaluate Other Provisions Under *Johnson*.

Certiorari is also unwarranted because the percolation actively under way in the Courts of Appeals should be permitted to continue, at least until an appropriate criminal case presents the question of the § 16 residual clause's constitutionality.

At the time the government filed its petition, there was no circuit split. The government cited (Pet. 26-27) the Sixth Circuit's decision in *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016), but that case upheld the constitutionality of a *different* statute, 18 U.S.C. § 924(c)(3)(B). Although § 924(c)(3)(B)'s terms are the same as those of the § 16 residual clause, that statute operates in a distinctly different context. And indeed, not even a month later, the Sixth Circuit distinguished *Taylor* and joined the Seventh Circuit and the Ninth Circuit (in the decision below) in holding the § 16 residual clause unconstitutionally vague under *Johnson*. *Shuti v. Lynch*, No. 15-3835, 2016 WL 3632539, at *1 (6th Cir. July 7, 2016).

Shuti observed that § 924(c)(3)(B) supplies the definition of a "crime of violence" for a federal criminal statute that imposes heightened penalties on "any

person who, during and in relation to any crime of violence ... for which the person may be prosecuted in a court of the United States, uses or carries a firearm." 18 U.S.C. § 924(c)(1)(A). Distinguishing the *Taylor* decision the petition cites, the Sixth Circuit explained that "[u]nlike the ACCA and [the § 16 residual clause as it operates in an immigration proceeding], which require a categorical approach to stale predicate convictions" under an abstract, "ordinary case" inquiry, § 924(c)(3)(B) outlines "an element of the crime," which "requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding," based on the case-specific facts before the court. *Shuti*, 2016 WL 3632539, at *8. That distinction, the Sixth Circuit concluded, "makes all the difference" for vagueness purposes. *Id*.

In contrast to § 924(c)(3)(B), "the wide-ranging inquiry required by" the ACCA's residual clause and the § 16 residual clause is "one and the same, and therefore" the § 16 residual clause "is likewise unconstitutionally vague." *Id.* at *1. Like the Ninth Circuit, the Sixth Circuit recognized that the § 16 residual clause "mandates a categorical mode of analysis that deals with 'an imaginary condition other than the facts,'" and is thus indistinguishable from the ACCA's residual clause and invalid under *Johnson*. *Shuti*, 2016 WL 3632539, at *7 (quoting *Johnson*, 135 S. Ct. at 2561). To the extent dicta in *Taylor* might support the government's alternative interpretation of *Johnson*, moreover, *Shuti* noted that *Taylor* was decided before this Court decided *Welch*, which made clear that "the ACCA's vagueness 'rests in large part on its operation under the categorical

approach.'" *Shuti*, 2016 WL 3632539, at *8 (quoting *Welch*, 136 S. Ct. at 1262). *Shuti* also rejected the government's efforts to distinguish the two statutes based on their minor textual differences or the comparative lack of decisions from this Court concerning the § 16 residual clause. *Shuti*, 2016 WL 3632539, at *7-8. And *Shuti* dismissed the government's contention that the established vagueness framework does not apply to § 16 when it operates in an immigration proceeding. *Shuti*, 2016 WL 3632539, at *4-5.

In the few weeks that have followed, two other circuits have weighed in on § 924(c)(3)(B), the statute not at issue in this case, agreeing with the Sixth Circuit in *Taylor*. *See United States v. Prickett*, No. 15-3486, 2016 WL 4010515, at *1 (8th Cir. July 27, 2016) (distinguishing *Johnson* on the ground that "§ 924(c)(3)(B)'s residual clause operates on 'real-world facts,' not '"an idealized ordinary case of the crime"'); *see also United States v. Hill*, No. 14-3872, 2016 WL 4120667, at *10-12 (2d Cir. Aug. 3, 2016) (dicta in a § 924(c)(3)(B) case agreeing with *Taylor* that § 924(c)(3)(B) is not unconstitutionally vague under *Johnson*). And in two cases involving § 924(c)(3)(B), the Ninth Circuit is currently considering whether to adopt this unanimous view that § 924(c)(3)(B) is constitutional by distinguishing the ruling in this case just as the Sixth Circuit distinguished *Taylor* in *Shuti*—which would leave those two circuits in alignment on both statutes. *See United States v. Begay*, No. 14-10080 (9th Cir.); *United States v. Gaytan*, Nos. 14-10167, -10226 (9th Cir.). Meanwhile, the Second Circuit will soon hear argument in a case concerning the § 16 residual

clause, and might distinguish its dicta in *Hill* regarding § 924(c)(3)(B) in the same way the Sixth Circuit did in *Shuti*. *See Ya Yi Zeng v. Lynch*, 15-709 (2d Cir.) (oral argument scheduled for Sept. 1, 2016).

Most recently, the Fifth Circuit sitting en banc held that the § 16 residual clause is not unconstitutional under *Johnson*, declining to follow the only other courts to have considered the question, and reversing its earlier decision that agreed with the decision below. *United States v. Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127 at 1 n.1, *4-5 (5th Cir. Aug. 5, 2016) (en banc), *rev'g United States v. Gonzalez-Longoria*, 813 F.3d 225, 235 (5th Cir. 2016). For the reasons aptly stated by Judge Jolly in dissent and outlined above, the Fifth Circuit majority erred: The two distinctions it drew between the ACCA and § 16 residual clauses do "exist," but "both 'are, ultimately, distinctions without a difference.'" *Id.* at 24 (Jolly, J., dissenting) (quoting *Shuti*, 2016 WL 3632539, at *7).

In light of the Fifth Circuit's very recent departure from both *Johnson* and the views of most circuits, a case upholding the § 16 residual clause may eventually warrant this Court's review. A criminal case such as *Gonzalez-Longoria* would not require this Court to address the government's threshold question regarding the applicable vagueness standard before being able to address the constitutionality of the § 16 residual clause under *Johnson*. For now, however, the proper course is to allow the Courts of Appeals to continue examining the relationship between *Johnson*, *Welch*, the § 16 residual clause, and § 924(c)(3)(B).

IV. The Government Overstates The Effect Of The Court Of Appeals' Decision.

Although it is a matter of consequence whenever a court declares an Act of Congress unconstitutional, the Court of Appeals' constitutional holding flowed from a direct application of this Court's recent decision in *Johnson* striking down a materially identical statute. Any presumption in favor of reviewing decisions invalidating Acts of Congress therefore does not apply.[3]

Moreover, the government significantly overstates the impact of the § 16 residual clause's invalidity. While it is true that "an alien's conviction for an 'aggravated felony' triggers numerous legal consequences," Pet. 27, a conviction for an "aggravated felony" is only one of the numerous ways in which a criminal conviction may render an immigrant deportable. Here, for instance, the question remains open on remand to the BIA whether Dimaya is still removable for having been convicted of

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[3] Indeed, when a Court of Appeals strikes down a statute that is substantially related to a statute this Court has recently invalidated, the government often will not seek certiorari in the first place. *See, e.g.*, *United States v. Swisher*, 811 F.3d 299, 303-04 (9th Cir. 2016) (en banc) (declaring unconstitutional 18 U.S.C. § 704(a), which criminalizes the unauthorized *wearing* of military medals, under *United States v. Alvarez*, 132 S. Ct. 2537 (2012), which invalidated a statute that prohibits anyone from *falsely stating* he was awarded military medals); *United States v. Swisher*, No. 15A1009 (U.S. Mar. 31, 2016) (extending the time for the government to seek certiorari before no petition was filed).

two "crime[s] involving moral turpitude" 8 U.S.C. § 1227(a)(2)(A)(ii).[4]

Even where an immigrant's removability does hinge on a conviction for an "aggravated felony," § 16 is relevant to only one of the 21 INA subsections that define an "aggravated felony." The Court of Appeals' decision does not undermine any of the other 20 ways in which the government can show a conviction for an "aggravated felony"—including, among other things, 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 an offense "relating to the demand for or receipt of ransom." 8 U.S.C. § 1101(a)(43)(A), (B), (C), (H). One of the many subsections that defines an "aggravated felony," for instance, refers to "a theft offense … or burglary offense for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(G). Here, the government is forced to resort to the "crime of violence" classification only because *Descamps* forecloses any argument that a conviction under California's burglary statute constitutes a conviction for generic burglary. That end-run around *Descamps* does not prove the urgency of preserving the § 16 residual clause, but rather highlights its indeterminacy. *See supra* § II.B.

The Court of Appeals' decision, moreover, casts no doubt on the constitutionality of the "elements clause" of the crime of violence provision, set forth in 18

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[4] *See, e.g.*, *In re Louissaint*, 24 I. & N. Dec. 754 (BIA 2009) (determining that a Florida conviction for burglary of an occupied building constitutes a crime involving moral turpitude).

U.S.C. § 16(a), which requires examination of actual elements of actual offenses, rather than hypothetical ordinary cases of non-element conduct. And the § 16(a) elements test is broader than the analogous elements test set forth in the ACCA: Whereas the latter encompasses offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," the former refers to the "use of physical force against the person *or property* of another." The breadth of § 16(a) underscores that in a great many cases the government will be able to establish that a given offense constitutes a "crime of violence" via the elements test, wholly apart from any resort to the § 16 residual clause. The Court of Appeals' decision will have no impact on those cases at all.

The § 16 residual clause operates only in marginal circumstances. It sweeps into the definition of a "crime of violence" offenses that do not require the "use, attempted use, or threatened use of physical force against the person or property of another." And it does so on the basis of pure judicial speculation about the risk that physical force might be used in the course of committing a judicially imagined offense. This Court in *Johnson* determined that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." 135 S. Ct. at 2560. The court below likewise determined that the government could not invoke so shapeless a provision to banish Dimaya from the country that has been his home for well over two decades, since the age of 13. The Court of Appeals correctly applied this Court's

recent precedent, and its ruling does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 12, 2016