No. 16-398

IN THE
Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
Petitioner,

v.

JUAN JOSE MIRANDA-GODINEZ,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

Respondent, a 67-year old citizen of Mexico, was admitted to the United States as a lawful permanent resident in 1978. Pet. App. 13a; A.R. 355. On June 15, 2012, he pleaded guilty to arson of property in violation of Cal. Penal Code 451(d) (West 2010), Pet. App. 4a; A.R. 210, which states in relevant part:

> A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.
>
> …
>
> (d) Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person's structure, forest land, or property.

Cal. Penal Code 451(d).

During the plea colloquy, the district attorney said that the State did not believe the offense warranted a period of incarceration. A.R. 222. The district attorney noted that Respondent was apparently trying to stay warm by setting fire to trash inside a structure, that he did not place any persons in immediate danger, and that he had previously suffered from mental health problems. A.R. 222. Respondent was granted a 36-month period

of probation. A.R. 221. The sentence was converted to a 16-month period of incarceration, however, after Respondent, an itinerant, failed to report to his probation officer. A.R. 242.

The Department of Homeland Security charged Respondent with deportability under 8 U.S.C. 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony "crime of violence" under 8 U.S.C. 1101(a)(43)(F). A.R. 355. According to the DHS, Respondent's conviction qualified as a crime of violence under 18 U.S.C. 16(b),[1] which applies to any 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."

Respondent denied the charge of deportability. A.R. 133. In an order issued on Aug. 9, 2013, the immigration judge found that Cal. Penal Code 451(d) was not a crime of violence under the categorical approach because the statute criminalizes setting fire to one's *own* property, as distinct from the property of another. A.R. 256 (citing *Miranda-Rosales v. Mukasey*, 260 Fed. Appx. 979 (9th Cir. 2007)). Without addressing whether the statute was divisible, the immigration judge applied the modified categorical approach and found that the record of conviction demonstrated that Respondent set fire to the property of another—*i.e.*, "John Doe." A.R. 256. On Nov. 4, 2013, the immigration judge issued an

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[1] Petitioner conceded below that Cal. Penal Code 451(d) is not a crime of violence under 18 U.S.C. 16(a) because it does not require the use of force against the person or property of *another*. Gov't C.A. Brief at 15 n.3.

oral decision formally sustaining the charge of deportability and ordering him removed to Mexico. Pet. App. 13a. Again, the immigration judge did not address whether Cal. Penal Code 451(d) was divisible, and applied the modified categorical approach simply because the statute was not a categorical crime of violence. Pet. App. 14a-15a.

Respondent filed a timely appeal with the Board of Immigration Appeals (Board) challenging the immigration judge's determination that he was convicted of a crime of violence under 18 U.S.C. 16(b). A.R. 86. Respondent submitted a brief in support of his appeal. A.R. 40. The DHS did not submit a brief opposing the appeal. The Board dismissed Respondent's appeal in an unpublished decision issued by a single member. Pet. App. 3a-12a.

Like the immigration judge, the Board recognized that Cal. Penal Code 451(d) was not a crime of violence under the categorical approach because the statute applies to the burning of a person's own property. Pet. App. 7a (citing *Miranda-Rosales*, 260 Fed. Appx. at 981; *People v. Jameson*, 177 Cal. App. 3d 658 (Cal. Ct. App. 1986)). The Board found that the statute was divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013), Pet. App. 8a-10a, and that the conviction records demonstrated that Respondent pleaded guilty to burning the property of another. *Id*. at 10a-11a. The Board thus dismissed Respondent's appeal.

Respondent filed a timely petition for review with the U.S. Court of Appeals for the Ninth Circuit. After the parties submitted their briefs, but before oral argument, this Court held in *Johnson v. United States*, 135 S. Ct. 2551 (2015), that the "residual

clause" of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B), was unconstitutionally vague.

On Oct. 19, 2016, the Ninth Circuit held that 18 U.S.C. 16(b) was unconstitutionally vague for the same reasons set forth in *Johnson*. *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015).[2] Petitioner filed a petition for rehearing en banc in *Dimaya*, which was denied on Jan. 25, 2016, after no judge on the full court requested a vote on the petition.

On Feb. 16, 2016, the Ninth Circuit directed Petitioner to file a letter brief within fourteen days addressing the impact of *Dimaya* on Respondent's case. Approximately six weeks later, Petitioner filed a letter brief acknowledging that *Dimaya* controlled the outcome of Respondent's case. Gov't Letter Br. at 2 (filed March 29, 2016).

On April 28, 2016, the Ninth Circuit granted the petition for review in light of *Dimaya*, vacated the order of removal against Respondent, and remanded the case to the Board to terminate proceedings. Pet. App. 1a-2a.

On June 10, 2016, Petitioner filed a petition for writ of certiorari in *Dimaya*. No. 15-1498, *Lynch v. Dimaya*. Three days later, Petitioner filed a petition for rehearing in this case contending that the Ninth Circuit should not have instructed the Board to terminate proceedings. Although Petitioner never

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[2] Three other circuits have also found 18 U.S.C. 16(b) unconstitutionally vague in light of *Johnson*. *Golicov v. Lynch*, __ F.3d __, 2016 U.S. App. LEXIS 17121 (10th Cir. Sept. 19, 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015).

sought a stay of the mandate in *Dimaya* under Fed. R. App. P. 41(d)(2)(A), Petitioner contended that termination of proceedings was unwarranted in light of the pending petition for writ of certiorari in *Dimaya*. Gov't Pet. for Rehearing at 6-7. Petitioner also argued that termination of proceedings was unwarranted because the DHS wished to lodge an additional charge of deportability on remand alleging that Respondent's conviction was an aggravated felony under 8 U.S.C. 1101(a)(43)(E)(i).[3] *Id.* at 2, 7-12. On June 28, 2016, the Ninth Circuit denied the petition for rehearing without comment.[4] Pet. App. 19a.

On Sept. 26, 2016, Petitioner filed a petition for writ of certiorari in this case. Petitioner asked the Court to hold the petition pending its disposition of the petition for writ of certiorari in *Lynch v. Dimaya*, No. 15-1498. On Sept. 29, 2016, this Court granted the petition for writ of certiorari in *Dimaya*.

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[3] In the Ninth Circuit, principles of *res judicata* forbid the DHS from lodging of any additional charge(s) of removability in a subsequent proceeding that could have been lodged in the original Notice to Appear. *Al Mutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1358 (9th Cir. 2007). Petitioner did not challenge those decisions in the petition for rehearing or in the petition for writ of certiorari.

[4] Notwithstanding the Ninth Circuit's order, DHS agents arrested Respondent on July 6, 2016, with a view toward removing him to Mexico. After learning of Respondent's arrest, undersigned counsel immediately notified the Department of Justice that the DHS was acting in violation of the Ninth Circuit's mandate. Respondent was released from DHS custody later on the day of his mistaken arrest.

ARGUMENT

In light of the granting of the petition for writ of certiorari in *Dimaya*, Respondent does not oppose Petitioner's request to hold the 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 the case to the Ninth Circuit to consider in the first instance whether Respondent's conviction qualifies as a crime of violence under 18 U.S.C. 16(b).

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.

October 2016

Respectfully submitted,

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