No._______

IN THE SUPREME COURT OF THE UNITED STATES

GREGORIO GONZALEZ-LONGORIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held that the residual clause of the Armed Career Criminal Act's "violent felony" definition, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. The categorical inquiry required under the residual clause both denied fair notice to defendants and invited arbitrary enforcement by judges, because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." Johnson, 135 S. Ct. at 2557. The "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the statutory and United States Sentencing Guideline enhancement provisions of 8 U.S.C. § 1326(b)(2) and USSG § 2L1.2(b), likewise requires a categorical assessment of the degree of risk presented in the "ordinary case" of a crime.

The question presented is whether 18 U.S.C. § 16(b) violates the Constitution's prohibition of vague criminal laws by requiring application of an indeterminate risk standard to the "ordinary case" of an individual's prior conviction.

PARTIES TO THE PROCEEDINGS

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PRAYER

Petitioner Gregorio Gonzalez-Longoria respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on August 5, 2016.

OPINIONS BELOW

The initial panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 813 F.3d 225 (5th Cir. 2016), and reproduced in Appendix A to this petition. The opinion of the en banc Fifth Circuit is reported at ___F.3d___, No.15-40041, 2016 WL 4169127 (5th Cir. Aug. 5, 2016), and is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals, affirming Mr. Gonzalez-Longoria's sentence after rehearing en banc, was entered on August 5, 2016. This petition is filed within 90 days of that date and therefore is timely. See Sup. Ct. R. 13.1 and 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

1. U.S. Const. amend V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 8 U.S.C. § 1326 provides in pertinent part:

(a) In general

Subject to subsection (b) of this section, 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) of this section, in the case of any alien described in such subsection–

> **(1)** whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title

18, imprisoned not more than 10 years, or both;

(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;

*   *   *   *

3. USSG § 2L1.2 provides in pertinent part:

§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base offense level: **8**

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

*   *   *

(C) a conviction for an aggravated felony, increase by **8** levels;

*   *   *

Commentary

*   *   *

Application Notes:

*   *   *

3. *Application of Subsection (b)(1)(C).*—

(A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

*   *   *   *

4. 8 U.S.C. § 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * *

(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;

* * * *

5. 18 U.S.C. § 16 provides:

Crime of violence defined

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.

STATEMENT OF THE CASE

Petitioner Gregorio Gonzalez-Longoria, a citizen of Mexico, entered the United States at the age of 15, and was later granted lawful permanent resident status. He lost that status in 2008, after being convicted in Texas of assault causing bodily injury—a third-degree felony offense based on his prior misdemeanor conviction for an assault involving family violence. Upon his release, he was deported to Mexico.

In June of 2014, Mr. Gonzalez-Longoria returned to the United States without permission. He was found on June 28, 2014, and later pled guilty in the Brownsville Division of the Southern District of Texas to illegally reentering the United States, in violation of 8 U.S.C. § 1326.

After his plea to that offense, the United States Probation Office prepared a presentence report ("PSR") to assist the district court in sentencing Mr. Gonzalez-Longoria. Using the 2014 edition of the United States Sentencing Guidelines ("USSG"), the PSR recommended an eight-level enhancement applicable to individuals who were previously deported after an "aggravated felony" conviction, USSG § 2L1.2(b)(1)(C), based on Mr. Gonzalez-Longoria's 2008 Texas assault conviction. In addition to the Guidelines enhancement, the PSR further concluded that the assault conviction triggered the statutory sentencing enhancement provided in 8 U.S.C. § 1326(b)(2), which raises the maximum term of imprisonment from 10 to 20 years for individuals found unlawfully in the United States

after having been deported following a conviction for an "aggravated felony."[1]

As relevant here, Mr. Gonzalez-Longoria objected that these enhancements were improper because (1) his prior assault offense could only qualify as an "aggravated felony" under 18 U.S.C. § 16(b) (as incorporated into 8 U.S.C. § 1101(a)(43)(F)), but (2) § 16(b) is unconstitutionally vague. At sentencing, the district court overruled Mr. Gonzalez-Longoria's vagueness objection, and sentenced him to a 27-month term of imprisonment, to be followed by a three-year term of supervised release. The written judgment characterized his offense of conviction as "Alien Unlawfully Found in the United States After Deportation, Having Previously Been Convicted of an Aggravated Felony."

Mr. Gonzalez-Longoria timely appealed to the Fifth Circuit, arguing that the district court reversibly erred by classifying his prior Texas assault conviction as one for an "aggravated felony" because § 16(b)—the statutory provision that formed the basis for that classification—is unconstitutionally vague. On February 10, 2016, a divided panel vacated Mr. Gonzalez-Longoria's sentence and remanded for resentencing, holding that § 16(b) is

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[1] Both of these enhancement provisions incorporate the definition of "aggravated felony" provided in section 1101(a)(43) of the Immigration and Nationality Act. That definition includes a "crime of violence," as that term is defined in 18 U.S.C. § 16, "for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16, in turn, defines "crime of violence" as:

> (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.

18 U.S.C. § 16(a), (b).

unconstitutionally vague under the reasoning of Johnson v. United States, 135 S. Ct. 2551 (2015), "because, at bottom, § 16[(b)] requires courts both to imagine an ordinary/ archetypical case and then to judge that imagined case against [an] imprecise standard"—the two features of the residual clause of the Armed Career Criminal Act[2] that Johnson held violated due process. United States v. Gonzalez-Longoria, 813 F.3d 225, 235 (5th Cir. 2016) ("Gonzalez-Longoria I"); but see id. at 235-38 (Higginson, J., dissenting).

On February 26, 2016, on its own motion, the Fifth Circuit ordered rehearing en banc. See 815 F.3d 189 (5th Cir. 2016). On August 5, 2016, the en banc court affirmed Mr. Gonzalez-Longoria's sentence by an 11-4 vote. See United States v. Gonzalez-Longoria, ___F.3d___, 2016 WL 4169127, at *4 (5th Cir. Aug. 5, 2016) ("Gonzalez-Longoria II").[3] The majority determined that § 16(b) contained both of the features that Johnson identified as producing the residual clause's vagueness; but, pointing to two distinctions in § 16(b)'s text, held that "the concerns raised by th[is] Court in Johnson with respect to [ACCA]'s residual clause d[id] not cause the same problems in the context of 18 U.S.C. § 16(b)." Id. at *4. In dissent, Judge Jolly accepted that the distinctions drawn by the majority existed, but argued that even if they made § 16(b) "slightly less indeterminate" than the residual clause, "both [distinctions] 'are, ultimately, distinctions without a difference.'" Id. at *11 (Jolly, J., dissenting) (citation omitted).

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[2] 18 U.S.C. § 924(e)(2)(B)(ii).

[3] While his appeal was pending rehearing en banc, Mr. Gonzalez-Longoria completed his 27-month sentence and was released from federal custody.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's en banc decision has created a division in the circuits respecting whether, in light of Johnson v. United States, 135 S. Ct. 2551 (2015), the "crime of violence" definition provided in 18 U.S.C. § 16(b) is unconstitutionally vague where its application requires judges to categorically assess the risk presented in the "ordinary case" of an individual's prior conviction. Because the question whether § 16(b) comports with due process in these circumstances is of exceptional importance to the thousands of individuals within the geographic area of the Fifth Circuit now guaranteed to receive drastically disparate treatment in immigration-offense prosecutions and in removal proceedings, this Court should grant certiorari to resolve the division over that question.

A. The circuits are divided over whether 18 U.S.C. § 16(b) is unconstitutionally vague in light of *Johnson*.

The courts of appeals are split four-to-one over whether the "ordinary case" inquiry required to classify prior convictions under the "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's "aggravated felony" definition,[4] is void for vagueness because it shares the same two features that this Court held rendered the residual clause of the Armed Career Criminal Act unconstitutionally vague in Johnson v. United States, 135 S. Ct. 2551 (2015).

In Johnson, the Court made clear that the need to imagine the "ordinary case" of a crime was central to both features that "conspired" to make the residual clause inquiry unconstitutional. By "t[ying] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, [and] not to real-world facts or statutory elements," the residual clause created "grave uncertainty about how to estimate the risk posed by a crime." Johnson, 135

[4] 8 U.S.C. § 1101(a)(43)(F).

S. Ct. at 2557. At the same time, the residual clause created "uncertainty about how much risk" was enough to qualify a crime as a "violent felony," because while "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts[,] it is quite another to apply it to a judge-imagined abstraction." Id. at 2558. Critically, the problematic "ordinary case" inquiry stemmed from the need to apply the categorical approach, an unavoidable consequence of ACCA's focus on past "convictions." Id. at 2557, 2561-62 (citing Taylor v. United States, 495 U.S. 575, 599-602 (1990)).

Last Term, in Welch v. United States, 136 S. Ct. 1257 (2016), the Court reiterated that the need to imagine the "ordinary case" was dispositive of Johnson's vagueness analysis. "The vagueness of the residual clause rest[ed] in large part on its operation under the categorical approach," which required courts "to determine whether a crime involved a 'serious potential risk of physical injury' by considering not the defendant's actual conduct but an 'idealized ordinary case of the crime.'" Welch, 136 S. Ct. at 1262. Thus, "[t]he 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." Id.

The Court has addressed 18 U.S.C. § 16 only once, in Leocal v. Ashcroft, 543 U.S. 1 (2004). As relevant here, Leocal held that classifying prior convictions under § 16(a) and (b) likewise requires application of the categorical approach: courts must "look to the elements and the nature of the offense of conviction, rather than to the particular facts" of the predicate crime. Leocal, 543 U.S. at 7. Subsequently, borrowing from this Court's ACCA

jurisprudence, every court of appeals to address the question has held that § 16(b) requires judges to assess the risk that force might be used in the "ordinary case" of the conduct encompassed by the elements of the defendant's prior statue of conviction—the same mode of analysis required under the residual clause. E.g., United States v. Keelan, 786 F.3d 865, 871 (11th Cir. 2015) (collecting cases and adopting the "uniform rule" that "the 'ordinary case' standard established in James v. United States, 550 U.S. 192, 208 (2007), also applies to § 16(b)"). Accordingly, even before Johnson was decided, litigants recognized that if the Court found the residual clause's "ordinary case" inquiry unconstitutionally vague, its reasoning would extend to the "ordinary case" inquiry required under § 16(b).[5]

After Johnson, the courts of appeals have consistently reached the same conclusion. In the immigration context, the Sixth, Ninth, and Tenth Circuits have held that § 16(b) is unconstitutionally vague when relied upon to classify a prior conviction as an "aggravated felony" under the INA in removal proceedings. See Golicov v. Lynch, ___F.3d___, 2016 WL 4988012, at *3-*8 (10th Cir. Sept. 19, 2016); Shuti v. Lynch, 828 F.3d 440,446-51 (6th Cir. 2016); Garcia Dimaya v. Lynch, 803 F.3d 1110, 1114-20 (9th Cir. 2015). In the criminal context, the Seventh Circuit has applied Johnson's reasoning to hold § 16(b) void for vagueness when used to increase the statutory maximum punishment for illegally reentering the United States under 8 U.S.C. § 1326(b)(2), which in turn incorporates the INA's

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[5] See, e.g., Supplemental Brief for the United States, Johnson v. United States, 2015 WL 1284964, at *22-*23 (2015) (arguing that § 16(b) is "equally susceptible" to the central vagueness objection to the residual clause because "[l]ike the ACCA, Section 16[(b)] requires a court to identify the ordinary case of the commission of the offense and to make a commonsense judgment about the risk of confrontations and other violent encounters" (alterations added)).

"aggravated felony" definition. See United States v. Vivas-Ceja, 808 F.3d 719, 721-23 (7th Cir. 2015). And the Ninth Circuit extended its holding in Garcia Dimaya to the eight-level "aggravated felony" enhancement called for under the illegal-reentry Sentencing Guideline, USSG § 2L1.2(b)(1)(C), which also expressly incorporates § 16(b) through the INA.[6] See United States v. Hernandez-Lara, 817 F.3d 651, 653 (9th Cir. 2016). All four courts of appeals explained that their holdings followed from a straightforward reading of Johnson.

A divided panel of the Fifth Circuit initially followed suit, holding that the conclusion that § 16(b) is unconstitutionally vague was unavoidable in light of Johnson's reasoning. See United States v. Gonzalez-Longoria, 813 F.3d 225, 226-35 (5th Cir. 2016) ("Gonzalez-Longoria I"). On rehearing en banc, however, a divided court reversed course. See United States v. Gonzalez-Longoria, ___F.3d___, 2016 WL 4169127, at *1-*6 (5th Cir. Aug. 5, 2016) (en banc) ("Gonzalez-Longoria II"). The majority acknowledged that, like ACCA's residual clause, § 16(b) requires judges to make a categorical assessment of the "ordinary case" of a prior conviction, and that its "substantial risk" standard is indeterminate, id. at *3, but concluded that textual distinctions between the statutes' risk standards made § 16(b) "notably more narrow" and "more bounded" than the residual clause. Id. at *3-*4. Finding these distinctions dispositive of the vagueness inquiry, the majority held that assessing the risk involved in the "ordinary case" of an offense under §16(b) did not implicate the same due process concerns that plagued the residual clause. See id. at *4-*5.

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[6] See USSG § 2L1.2, comment. (n.3(A)).

Four judges dissented. They agreed that § 16(b) shared both features identified in Johnson, and that neither feature produced the same degree of indeterminacy in § 16(b), but argued that the distinctions drawn by the majority made § 16(b) at most "slightly less indeterminate" than the residual clause, and thus were "not salient enough to constitutionally matter." Id. at *11 (Jolly, J., dissenting). By magnifying trivial differences in the statutes' language, the dissenting judges believed the majority had drifted "into the miasma of the minutiae," id. at *11, and had erred "by losing track of the entirety: [both] statutes, in constitutional essence, say the same thing." Id. at *12.

The split created by the Fifth Circuit's decision is ripe for review. The Fifth Circuit's holding that § 16(b) is not unconstitutionally vague conflicts with those of the Sixth, Seventh, Ninth and Tenth Circuits. Further, the three circuits that adjudicate the greatest number of criminal and civil immigration proceedings—the Fifth, Ninth, and Tenth—have weighed in. And, irrespective of where the remaining circuits ultimately fall, the Fifth Circuit's en banc decision means that the split cannot be resolved absent this Court's intervention.

Moreover, before the Fifth Circuit issued its en banc opinion, the Government had already petitioned this Court to review the Ninth Circuit's decision in Garcia Dimaya, arguing that "[t]he exceptional importance of the question of Section 16(b)'s constitutionality alone warrants this Court's review." See Petition for Writ of Certiorari ("Garcia Dimaya Petition") at 11, Lynch v. Garcia Dimaya, No.15-1498 (U.S. June 10, 2016).The Fifth Circuit's decision has only exacerbated the need for this Court to decide the question.

B. The question presented warrants this Court's review, and this case is an excellent vehicle for deciding it.

This Court has twice granted certiorari to resolve circuit conflicts regarding Johnson's application outside of the context in which it was decided. See Welch v. United States, 136 S. Ct. 1257 (2016); Beckles v. United States, 136 S. Ct. 2510 (June 27, 2016). It should do so here as well.

1. The question presented is important.

Resolving the division over § 16(b)'s constitutionality now is exceptionally important, particularly because, if left intact, the Fifth Circuit's decision will result in drastically different outcomes for similarly-situated persons in the three circuits that span the entire United States border with Mexico and, consequently, adjudicate the largest proportion of criminal and civil immigration proceedings in the nation.

For noncitizens, like Mr. Gonzalez-Longoria, who are prosecuted for returning to the United States following a previous removal, the classification of a prior conviction as an "aggravated felony" has three important consequences. First, it raises the statutory maximum for the instant illegal-reentry offense from 10 to 20 years (without the necessity of a jury finding). See 8 U.S.C. § 1326(b)(2). Second, it renders the individual's instant illegal-reentry offense also an "aggravated felony" under the INA, see 8 U.S.C. § 1101(a)(43)(O), meaning that the reentry offense itself triggers a permanent admissibility bar, see id. § 1182(a)(9)(A), and is sufficient to raise the statutory maximum in any future illegal-reentry prosecution. Third, it triggers an eight-level enhancement of the defendant's advisory sentencing range

under the United States Sentencing Guidelines. See USSG § 2L1.2(b)(1)(C).[7]

For lawful permanent residents and other noncitizens not yet removed from the United States, the consequences of having a conviction classified as an "aggravated felony" are just as significant. As this Court has noted, "[d]eportation can be the equivalent of banishment or exile," Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947), and it "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." Bridges v. Wixon, 326 U.S. 135, 154 (1945). And deportation is the price for any noncitizen with an "aggravated felony" conviction—removal is "virtually inevitable" in such circumstances. See Padilla v. Kentucky, 559 U.S. 356, 360 (2010). "Aggravated felon" status further triggers expedited removal proceedings, see 8 U.S.C. § 1228, and renders noncitizens ineligible for all variations of discretionary relief from removal, see 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i) (asylum), 1229b(a)(3), (b)(1)(C) (cancellation of removal), 1229c(a)(1) (voluntary departure), 1231(b)(3)(B)(iv) (withholding of removal).

Leaving the Fifth Circuit's decision in place means that individuals in both classes described above with convictions for identical crimes will receive drastically different treatment in criminal and civil immigration proceedings, depending solely on where those

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[7] The Sentencing Commission has adopted an amendment to § 2L1.2 that conditions the severity of sentencing enhancements on the length of prison time imposed in the defendant's prior convictions, rather than their aggravated nature, and eliminates the eight-level enhancement under subsection (b)(1)(C). See 81 Fed. Reg. 27,262, 27,273 (May 5, 2016). Regardless, the INA's "aggravated felony" definition will remain critical in illegal-reentry cases where the defendant's Guidelines imprisonment range reaches terms in excess of ten years. See U.S.C. § 1326(b)(1). Under the ranges now achievable through application of the more serious enhancements in the amended version of § 2L1.2 taking effect in November, such a scenario, while highly improbable before, is now a realistic possibility.

proceedings are initiated. At this moment, a conviction only classifiable as an "aggravated felony" under §16(b) renders noncitizens located in the Fifth Circuit removable, ineligible for discretionary relief from removal, and subject to enhanced statutory and Guideline punishment ranges in illegal-reentry prosecutions. The same conviction, however, produces none of these consequences for noncitizens in the Sixth, Seventh, Ninth, and Tenth Circuits.

Not only is this result inequitable, but it imposes practical restrictions on mobility. Even lawfully present noncitizens convicted of a § 16(b)-type crime now face a much greater threat of removal if they live in, work in, or even visit Texas, Louisiana, or Mississippi. And because the Fifth, Ninth, and Tenth Circuits adjudicate an exponentially greater number of immigration prosecutions and removal proceedings than the rest of the country,[8] these divergent outcomes stand to affect numerous individuals. A scheme in which noncitizens become "aggravated felons" simply by stepping across state lines, or are automatically

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[8] In fiscal year 2013, 18,498 federal illegal-reentry cases were prosecuted in the United States, 40 percent of which involved offenders that had a predicate offense classified as an "aggravated felony." U.S. Sentencing Comm'n, Illegal Reentry Offenses, at 8, 9 (Apr. 2015). Of the top five districts adjudicating these cases, two were located in the Fifth Circuit—Southern Texas (3,853, or 20.8%) and Western Texas (3,200, or 17.3%)—two were located in the Ninth—Arizona (2,387, or 12.9%) and Southern California (1,460, or 7.9%)—and one was located in the Tenth—New Mexico (2,837, or 15.3%). Id. at 9. Combined, these five districts made up 74.2% of all illegal-reentry cases. Id.

In fiscal year 2015, the Department of Homeland Security initiated removal proceedings in 191,357 cases in immigration courts throughout the entire United States. Fifty-one percent of those proceedings took place in states within the Fifth (48,765) and Ninth (50,214) Circuits. Courts in Texas and California heard the most deportation proceedings based on criminal charges (7,307 out of 19,393, or 37%). Cases involving "aggravated felony" charges made up 19% of all criminally-based deportation proceedings in Texas (807 out of 4,252), and 33% of those proceedings in California (1,014 out of 3,055). Transactional Records Access Clearinghouse ("TRAC"), U.S. Deportation Proceedings in Immigration Courts, Fiscal year 2015, http://trac.syr.edu/phptools/immigration/charges/deport_filing _charge.php (accessed on Sept. 15, 2016).

subject to increased prison sentences based on where they happen to be discovered upon reentry, is untenable, and demands this Court's immediate intervention.

Resolution of the split is also important to the judges and attorneys charged with adjudicating and advising noncitizens in criminal and civil immigration proceedings. The Fifth Circuit concluded that defining and measuring the "ordinary case" of any predicate crime is "predictively more sound" under § 16(b), Gonzalez-Longoria II, 2016 WL 4169127, at *4, yet that court offered no guidance to lower courts respecting how exactly to isolate the "ordinary case" prior to measuring its riskiness. Thus, district judges in the Fifth Circuit are left with no ascertainable standard to guide their individual, subjective conception of a predicate crime's ordinary case. And, now that amendments to the Sentencing Guidelines raise the real prospect of sentencing ranges in excess of the 10-year cap applicable in the absence of an "aggravated felony" finding, see 8 U.S.C. § 1326(b)(1), district and magistrate judges conducting guilty-plea proceedings in the Fifth Circuit have no way to reliably advise defendants of the ***statutory*** range applicable to their reentry offenses.

Attorneys defending noncitizens in criminal and immigration matters need this Court to step in even more so. Defense counsel must advise clients as to the potential immigration consequences of the crimes they are charged with. See Padilla, 559 U.S. at 367-68. But the Fifth Circuit's decision leaves defense attorneys throughout the country in the position of advising their noncitizen clients that, if they travel within the borders of the Fifth Circuit, a conviction for an otherwise non-aggravated felony may (or may not) result in sentence enhancement, deportation, or ineligibility for discretionary relief, depending on the presiding

judge's subjective conception of the riskiness of the crime. Advising a noncitizen client regarding the probability that the elements of his or her conviction will be held to have required force, or match those of a generic crime, is difficult enough; but forecasting what conduct a particular immigration or district judge will view as the "ordinary case" of the crime, and whether that judge will find that conduct substantially risks the use of force, is impossible. See Johnson, 135 S. Ct. at 2557 ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" (quoting United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)).

2. This case is an excellent vehicle for addressing the question presented.

This case is an excellent vehicle for resolving the split over whether § 16(b) comports with due process when used to classify a noncitizen's pre-deportation conviction as one for an "aggravated felony." The question presented is squarely before the Court on de novo review, and was thoroughly aired in published panel and en banc opinions from the Fifth Circuit.

The fact that Mr. Gonzalez-Longoria has been released from custody during the pendency of this appeal does not render his case a less desirable vehicle. As the Fifth Circuit acknowledged below, the district court's determination that his prior offense qualified as an "aggravated felony" makes his present illegal-reentry conviction itself an "aggravated felony" under the INA, rendering him permanently inadmissible to the United States as a

matter of law. See Gonzalez-Longoria II, 2016 WL 4169127, at *1 n.2 (citing United States v. Villanueva-Diaz, 634 F.3d 844, 849 (5th Cir. 2011), and Alwan v. Ashcroft, 388 F.3d 507, 511 (5th Cir. 2004)); 8 U.S.C. §§ 1101(a)(43)(O), 1182(a)(9)(A)(i), (ii). This permanent admissibility bar represents a "'concrete' collateral consequence[]" flowing directly from Mr. Gonzalez-Longoria's instant conviction, Max-George v. Reno, 205 F.3d 194, 196 (5th Cir. 2000), vacated on other grounds sub nom., Max-George v. Ashcroft, 533 U.S. 945 (2001) (quoting Spencer v. Kemna, 523 U.S. 1, 8 (1998)), and this Court's resolution of the question presented in his favor would redress that injury. This case does not, therefore, contain a lurking mootness issue that could preclude the Court from reaching the question presented. Cf., e.g., Lopez v. Gonzales, 549 U.S. 47, 52 n.2 (2006); Fiswick v. United States, 329 U.S. 211, 221-22 (1946).

Finally, granting certiorari in this case would ensure that the question of § 16(b)'s constitutionality in the criminal context is fully resolved. Although the government's petition in Garcia Dimaya squarely presents the same question, it does so in the immigration context, and raises a preliminary issue—unique to that context—that could frustrate the Court's ability to fully resolve the circuit split over § 16(b)'s constitutionality.

In Garcia Dimaya, the Ninth Circuit rejected the government's threshold contention that the INA's civil removal provisions are immune to the vagueness doctrine. See Garcia Dimaya, 803 F.3d at 1113-14. In its petition for this Court's review, the government now argues that the INA's removal provisions "should be subject to a less exacting form of vagueness doctrine" than statutes "defining crimes or setting out criminal punishments."

Garcia Dimaya Petition, at 12. If the Court were to grant certiorari in Garcia Dimaya and conclude that the vagueness doctrine has less import in the civil-removal context, its review of § 16(b) under a "less exacting" vagueness standard necessarily would not control the disposition of the question presented here, which implicates the more demanding vagueness scrutiny applicable in criminal cases. An immigration case alone is, therefore, an imperfect vehicle for resolving the division in the circuits respecting § 16(b)'s constitutionality.

Mr. Gonzalez-Longoria therefore suggests that, given the gravity of the question presented and the possibility that granting certiorari in only the criminal or immigration context might not fully resolve the split over § 16(b)'s constitutionality, this Court should consider granting certiorari for full briefing and argument in his and Mr. Garcia Dimaya's case in tandem. See, e.g., Zadvydas v. Davis, 533 U.S. 678, 686 (2001).

C. The Fifth Circuit's decision is incorrect.

Although a petition for writ of certiorari is not primarily concerned with addressing the merits of the question presented, there are serious concerns with the result reached by the Fifth Circuit.

In rejecting Mr. Gonzalez-Longoria's vagueness challenge to § 16(b), the Fifth Circuit acknowledged that the statute combines the "ordinary case" abstraction with an indeterminate risk standard, and thus "shares" the same "two features" that Johnson deemed constitutionally deficient in ACCA's residual clause. Gonzalez-Longoria II, 2016 WL 4169127, at *3. The Fifth Circuit nevertheless found that two textual distinctions—§ 16(b)'s

focus on risk presented by conduct occurring "in the course of committing the offense," and the absence of a confusing list of enumerated offenses—made imagining the "ordinary case" under § 16(b) "notably more narrow" and "predictively more sound" than under the residual clause. Id. at *3-*4. Placing dispositive weight on these two distinctions, the court held "that the concerns raised by th[is] Court in Johnson with respect to [ACCA]'s residual clause do not cause the same problems in the context of 18 U.S.C. § 16(b)." Id. at *4. But, as the dissent aptly observed, the court's overemphasis on the distinctions in § 16(b)'s risk standard led it astray. See id. at *11.

To begin with, the Fifth Circuit's determination that these two distinctions add greater precision to the § 16(b) inquiry is dubious. As the Sixth and Ninth Circuits have pointed out, the lack of enumerated offenses arguably makes § 16(b) "a 'broad[er]' provision, as it 'cover[s] ***every*** offense that involved a substantial risk of the use of physical force against the person or property of another.'" Shuti, 828 F.3d at 448 (quoting Begay v. United States, 553 U.S. 137, 144 (2008)) (emphasis and alterations in original); see also Garcia Dimaya, 803 F.3d at 1118 n.13 ("[I]t could well be argued that, if anything, § 16(b) is more vague than the residual clause because of its lack of enumerated examples.").

Nor does the majority's conclusion that § 16(b) forbids "courts to consider conduct or events occurring after the crime is complete," Gonzalez-Longoria II, 2016 WL 4169127, at *3, necessarily follow from the phrase "in the course of committing the offense." The Ninth Circuit soundly rejected this reasoning in Garcia Dimaya, noting that it had, prior to Johnson, consistently held that California's burglary statute defined a crime of violence under

§ 16(b) “precisely because of the risk that violence will ensue after the defendant has committed the acts necessary to constitute the offense.” Garcia Dimaya, 803 F.3d at 1118. Indeed, Johnson cited burglary—the “classic” § 16(b) crime, Leocal, 543 U.S. at 10—as an example of a crime that requires courts to consider conduct beyond “the physical acts that make up the offense.” Johnson, 135 S. Ct. at 2557. This makes sense, as the Ninth Circuit has observed, because “[b]y the time the risk of physical force against an occupant arises,” a burglar “has frequently already satisfied the elements” of the applicable burglary statute. Garcia Dimaya, 803 F.3d at 1118 (citing Cal. Penal Code § 459).

In any event, the Fifth Circuit’s analysis should have ended with its conclusion that §16(b) shares the two features that combined to make the residual clause vague. Johnson squarely held that the need to imagine the “ordinary case” of the defendant’s predicate crime—an unavoidable consequence of coupling a qualitative risk standard with the categorical approach—was at the heart of ***both*** features, Johnson, 135 S. Ct. at 2557-58 (tying both features to the “ordinary case” requirement), and was thus the core constitutional defect in the residual clause. Nowhere did the Court suggest that a more precise risk standard could make imagining the “ordinary case” less arbitrary or more predictable. See Gonzalez-Longoria II, 2016 WL 4169127, at *12 (Jolly, J., dissenting) (noting that Johnson did not purport to draw a line signaling that any statute clearer than the residual clause is constitutional); Shuti, 828 F.3d at 448 (“[A] marginally narrower abstraction is an abstraction all the same.”). To the contrary, the Court made a clear distinction: applying the imprecise “serious potential risk” standard to “real-world facts” or “real-world conduct” would not

violate due process; but applying that same standard to the "idealized ordinary case" does. Johnson, 135 S. Ct. at 2558, 2561.

Johnson's stare decisis discussion provides further evidence that the residual clause's vagueness did not hinge on imprecisions unique to its "serious potential risk" standard. While "[t]he brief discussions of vagueness in James and Sykes homed in on the imprecision of the phrase 'serious potential risk,'" the Court explained, "neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime." Id. at 2563 (citing James, 550 U.S. at 210 n.6, and Sykes v. United States, 564 U.S. 1, 15-16 (2011)). And, the Court eliminated all reasonable doubt that the "ordinary case" inquiry was central to Johnson's vagueness holding in Welch: "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." Welch, 136 S. Ct. at 1262. The Court's authoritative explication of Johnson's reasoning in Welch was not even acknowledged by the en banc Fifth Circuit. Cf. Golicov, 2016 WL 4988012, at *7 (noting that Welch clarified any ambiguity respecting the basis of Johnson's reasoning).

Because applying § 16(b)'s "substantial risk" standard under the categorical approach also requires courts to assess the hypothetical risk posed by the abstract "ordinary case" of an individual's prior conviction, "rather than to the particular facts relating to the [individual's] crime," Leocal, 543 U.S. at 7, it directly and necessarily follows from Johnson's reasoning that "it too is unconstitutionally vague." Vivas-Ceja, 808 F.3d at 723;

see also Golicov, 2016 WL 4988012, at *6 (reaching this same conclusion); Shuti, 828 F.3d at 446-47 (same); Garcia Dimaya, 803 F.3d at 1115 (same). Tellingly, in rejecting this conclusion, the Fifth Circuit failed to mention Johnson's emphasis on the distinction between applying a qualitative risk standard to "real-world conduct" as opposed to the "idealized ordinary case," which both the majority, see Johnson, 135 S. Ct. at 2561-62, and the dissent, see id. at 2577 (Alito, J., dissenting), recognized as dispositive of the Court's vagueness analysis. ***That*** distinction (and not those cited by the Fifth Circuit) is also dispositive of § 16(b)'s vagueness.

In sum, in the context it was applied to Mr. Gonzalez-Longoria, 18 U.S.C. § 16(b) shares the fundamental due process concern Johnson isolated in ACCA's residual clause—the need to gauge the risk presented by a past conviction "by considering not the defendant's actual conduct but an 'idealized ordinary case of the crime.'" Welch, 136 S. Ct. at 1262 (quoting Johnson, 135 S. Ct. at 2561). In breaking from the circuits that have found § 16(b) equally susceptible to this reasoning, the Fifth Circuit pointed to no standard or guiding principle that makes defining the "ordinary case" of a crime under § 16(b) any less subjective; and it offered no limiting construction of the statute that would allow judges to reliably and consistently ascertain the "ordinary case" without resorting to imagination. The Fifth Circuit's holding thus leaves in place a rubric for increasing criminal sentences and ordering individuals removed from the United States that is too arbitrary and unpredictable for the Due Process Clause to tolerate. That error warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: September 23, 2016

Respectfully submitted,

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Cir.1989) (requiring resentencing for a prisoner sentenced to life without parole under a sentencing statute passed after he had committed his crimes). *Hicks* and *Burge* would be relevant if Plaintiffs argued their death sentences were unlawful, but these cases provide no support for Plaintiffs' challenge to the proposed method of execution. Plaintiffs were sentenced to death and it is a death sentence that Mississippi plans to impose.

III.

Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims because they have not established a liberty interest in the enforcement of § 99–19–51 and because they have not shown that Mississippi's alleged deviation § 99–1–51 would "shock the conscience." Therefore, the district court abused its discretion by granting an injunction.[5]

We VACATE the district court's injunction and REMAND to the district court for proceedings consistent with this opinion.

UNITED STATES of America, Plaintiff–Appellee

v.

Gregorio GONZALEZ–LONGORIA, Defendant–Appellant.

No. 15–40041.

United States Court of Appeals, Fifth Circuit.

Feb. 10, 2016.

Background: Defendant pled guilty in the United States District Court for the Southern District of Texas, Andrew S. Hanen, J., to being illegally present in the United States and was sentenced to 27 months in prison. Defendant appealed.

Holding: The Court of Appeals, E. Grady Jolly, Circuit Judge, held that, as a matter of first impression, sentencing statute's definition of "crime of violence" was unconstitutionally vague.

Vacated and remanded.

Stephen A. Higginson, Circuit Judge, filed dissenting opinion.

1. Constitutional Law ⚷4506

The government violates the Fifth Amendment's due process guarantee by

5. The district court, having found Plaintiffs were likely to succeed on the merits, concluded without analysis that they satisfied prongs three and four of the test for a preliminary injunction. The Supreme Court requires that, in addition to considering Plaintiffs interests in obtaining an injunction, we also consider the public's interest in the enforcement of state law and the validation of a jury verdict. *Hill*, 547 U.S. at 584, 126 S.Ct. 2096 ("[A] stay of execution is an equitable remedy. It is not available as a matter of right."); *See also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 765, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) ("[t]he serving of public rather than private ends is the normal course of the criminal law because criminal acts, 'besides the injury [they do] to individuals, ... strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.' " (quoting 4, William Blackstone, Commentaries *5)). Because we conclude Plaintiffs have not shown a likelihood of success on the merits, we need not determine whether the district court exceeded its equitable power by failing to consider the public interests at stake. *See Hill*, 547 U.S. at 584, 126 S.Ct. 2096 ("[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."); *Lewis v. Casey*, 518 U.S. 343, 386, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (Thomas, J., concurring) (emphasizing the state's sovereign interest in overseeing the state penal system).

taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement; these principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. U.S.C.A. Const.Amend. 5.

2. Constitutional Law ⚷963

Criminal Law ⚷1139

A facial vagueness challenge under the due process clause of Fifth Amendment presents a pure question of law that the Court of Appeals reviews de novo. U.S.C.A. Const.Amend. 5.

3. Constitutional Law ⚷3905

A statute can be void for vagueness under the Fifth Amendment's due process clause because of its inherent inability to produce evenhanded, predictable, or consistent applications. U.S.C.A. Const. Amend. 5.

4. Constitutional Law ⚷4709

Sentencing and Punishment ⚷658

Provision of sentencing statute that defined "crime of violence" as "any 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," which was incorporated by reference into Sentencing Guideline that enhanced sentence based on prior crimes of violence, was unconstitutionally vague in violation of Fifth Amendment due process; phrases "physical force" and "substantial risk" provided little to no guidance to courts, and statute lacked a clarifying list of examples. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 16; U.S.S.G. § 2L1.2(b)(1)(C), 18 U.S.C.A.

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Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINSON and COSTA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal, we address for the first time whether 18 U.S.C. § 16's statutory definition of "crime of violence" is unconstitutionally vague. We consider this question in the light of the Supreme Court's recent holding that a similar provision of the Armed Career Criminal Act (ACCA) is unconstitutionally vague. *Johnson v. United States,* ––– U.S. ––––, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). In *Johnson,* the Court held that the ACCA violated the constitutional prohibition against vague criminal statutes by defining "violent felony" as any 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.*" 18 U.S.C. § 924(e)(2)(B). Section 16 contains a similar definition: a "crime of violence" is "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 Seventh and Ninth Circuits have both held that this

language is sufficiently similar to the ACCA's language to suffer the same unconstitutional fate. *United States v. Vivas–Ceja*, 808 F.3d 719, 720 (7th Cir.2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). We agree, and accordingly hold § 16 unconstitutional.

I.

Gonzalez–Longoria pled guilty to and was sentenced for being illegally present in the United States in violation of 8 U.S.C. § 1326. During sentencing, the court determined that Gonzalez–Longoria had previously committed an "aggravated felony" under USSG § 2L1.2(b)(1)(C) and applied an eight-level sentencing enhancement. " '[A]ggravated felony' has the meaning given that term in 8 U.S.C. [§] 1101(a)(43)." Section 1101(a)(43), in turn, defines an "aggravated felony" as any of a list of offenses, including "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." Section 16 defines "crime of violence" as

> (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 does not contend that Gonzalez–Longoria's 2008 conviction qualified under § 16(a). Thus, Gonzalez–Longoria's past offense qualifies as an "aggravated felony" only if it qualifies as a § 16(b) "crime of violence," as the district court found.[1]

Gonzalez–Longoria argued that the § 16 definition of "crime of violence" is unconstitutionally vague. The district court disagreed and sentenced Gonzalez–Longoria to twenty-seven months of imprisonment and three years of supervised release. Gonzalez–Longoria appealed, challenging the facial constitutionality of § 16.

II.

As an initial matter, we consider whether Gonzalez–Longoria can validly challenge the constitutionality of § 16. Gonzalez–Longoria received a sentencing enhancement under USSG § 2L1.2(b)(1)(C). If Gonzalez–Longoria had challenged § 2L1.2 as unconstitutionally vague, we would have to determine whether guideline provisions are immune from vagueness challenges, as the Eleventh Circuit recently held.[2] We have not previously decided this issue in a published case, though unpublished cases have agreed with the approach adopted by the Eleventh Circuit. *See, e.g., United States v. Velasquez,* 2007 WL 2437961 (5th Cir.2007) ("[The defendant]'s unconstitutional vagueness argument is unfounded because it challenges a [s]entencing [g]uideline, not a criminal statute.").[3]

1. USSG § 2L1.2 separately defines "crime of violence." Gonzalez–Longoria's offense undisputedly did not satisfy the *§ 2L1.2* definition of "crime of violence"; the doubt is about the *§ 16* definition of "crime of violence," which is relevant to the § 2L1.2 definition of "aggravated felony."

2. *United States v. Matchett,* 802 F.3d 1185, 1195 (11th Cir.2015) ("Because there is no constitutional right to sentencing guidelines—or, more generally, to a less discretionary application of sentences than that permitted prior to the Guidelines—the limitations the Guidelines place on a judge's discretion cannot violate a defendant's right to due process by reason of being vague.") (quoting *United States v. Wivell,* 893 F.2d 156, 160 (8th Cir. 1990)).

Gonzalez–Longoria, however, does not challenge the constitutionality of § 2L1.2(b) but instead challenges § 16. Thus, we need not address the question of whether guideline provisions are subject to vagueness challenges, as both Gonzalez–Longoria and the government contend them to be. Instead, we limit our analysis to the situation before us: If § 16 is unconstitutional, it becomes a legal nullity, and can have no further effect. Accordingly, § 2L1.2(b) would not be able to incorporate that nullity by reference and Gonzalez–Longoria's sentence should not have been enhanced.

The government urges that focusing on § 16's incorporation by reference risks creating "an untenable distinction because it would treat differently a [g]uideline that reprints statutory language from a [g]uideline that, rather than copy the text, simply refers to a statute by number." Gov't letter br. at 2. This is true. One consequence of our holding is § 2L1.2 (which incorporates § 16 by reference) could be treated differently from § 4B1.2 (which mirrors the language held invalid in *Johnson*). To avoid this difficulty, the government argues that we should subject all guideline provisions to vagueness challenges. Perhaps this argument is correct. On the other hand, some reasons exist to treat incorporation by reference differently from copying the text: when the sentencing commission incorporates a statutory provision by reference, it ties the guideline to any future legislative or judicial changes to that statute, ensuring uniformity. Conversely, when the sentencing commission copies the text of a statute without incorporating the statute by reference, it fixes the meaning of the guideline to that text—future amendments of the statute would be irrelevant to the guideline. Arguably, this decision to incorporate by reference or to copy text should determine the availability of a vagueness challenge. In any event, however, we leave these questions for another day and hold only that, when a guideline incorporates a statute by reference, a defendant sentenced under that guideline may permissibly challenge the statute's constitutionality.[4] We turn, therefore, to the question of whether § 16 is unconstitutionally vague.

III.

[1, 2] *Johnson* sets the background for this inquiry:

> The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." ... [T]he [g]overnment violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice

3. *Velasquez* cites *United States v. Pearson,* 910 F.2d 221 (5th Cir.1990). *Pearson,* however, does not address whether the guidelines are subject to a vagueness challenge. It holds only that "[d]ue process does not mandate[ ] either notice, advice, or a probable prediction of where, within the statutory range, the guideline sentence will fall." *Id.* at 223. As Gonzalez–Longoria points out, notice is only one concern underlying the vagueness analysis; the vagueness doctrine also seeks to prevent arbitrary enforcement. *See Johnson,* 135 S.Ct. at 2558.

4. We therefore do not reach Gonzalez–Longoria's alternative argument that he may challenge § 16 because it raised the statutory maximum for his sentence from ten years to twenty years (Gonzalez–Longoria was sentenced to twenty-seven months of imprisonment). *See Vivas–Ceja,* 808 F.3d at 720 (reaching the constitutionality of § 16 because it increased the statutory maximum when the defendant was sentenced below any relevant statutory maximum).

of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).... These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States v. Batchelder,* 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

Johnson, 135 S.Ct. at 2556. A facial vagueness challenge "presents a pure question of law" and we therefore review it *de novo. United States v. Clark,* 582 F.3d 607, 612 (5th Cir.2009).

A.

[3] The government argues that we should not reach the merits of Gonzalez–Longoria's facial vagueness challenge because § 16 is not vague as applied to him in the circumstances of his sentence. The government correctly points out that a defendant cannot raise a vagueness challenge to a statute simply because some hypothetical *other* defendant's conduct might create a "vague application" of the statute. Gov't Supp. Br. 9. This restriction, however, does not mean that every defendant must first show that a statute is vague as applied to him as a predicate to any further argument of facial vagueness. Instead, the government's argument is best taken as illustrating the high bar for facial vagueness challenges. As the government acknowledges, a statute can be "void for vagueness because of its inherent inability to produce 'evenhanded, predictable, or consistent' applications." Gov't Supp. Br. at 9 (quoting *Johnson,* 135 S.Ct. at 2563). Gonzalez–Longoria argues that exactly this sort of "inherent inability" infects § 16. To determine whether he is correct, we turn to the Supreme Court's recent decision in *Johnson v. United States.*

B.

In 2007, Samuel Johnson was convicted of unlawfully possessing a short-barreled shotgun; in Johnson's subsequent prosecution for being a felon in possession of a firearm, the government argued that the 2007 crime met the ACCA's definition of "violent felony." The ACCA defined "violent felony" as any 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*"; the Court struck down this final clause, the residual clause, as unconstitutionally vague.

The Court held that the residual clause is vague because it contained "[t]wo features." It required (1) that courts imagine an "ordinary case" and (2) that courts then adjudicate that "ordinary case" under an "imprecise standard." Neither of these "features" is self-explanatory; we address each in turn.

First, however, a note concerning terms: the Court uses the term "ordinary case." As explained below, by "ordinary case" the Court refers to a hypothetical case based upon hypothetical facts, standard to the crime, instead of the defendant's actual criminal conduct. In other words, we understand the Court's use of "ordinary case" to refer to the *archetypical* conduct associated with the crime. Consequently, we will sometimes use the term "archetypical case" interchangeably with "ordinary case."

1. Archetypical-case analysis

Before we can turn to the question of what archetypical-case analysis is, we must start with a more basic question: What is usually the judge's role in applying a typical criminal statute to the defendant who committed the crime? That is, what does a judge do when a statute *does not* require archetypical-case analysis? The judge ap-

plies the law to the facts in the case before him. For example, if a law criminalizes "manufacturing a controlled substance" in a way that creates "substantial risk of harm to human life," [5] the judge determines whether the facts in this case showed that the defendant before him created a "substantial risk of harm to human life." This might be a hard question on factual grounds (which testimony is most credible?) or on legal grounds (what, exactly, is "substantial risk?"). But this question is exactly the sort of question that judges and juries ask and answer routinely.

And this question is exactly the sort of question that judges are *forbidden* from asking when they are called upon to apply an archetypical-case analysis. When charged with undertaking archetypical-case analysis, a judge must ignore the facts of the case before him; likewise, he must disregard the defendant's specific conduct.

This task raises an initial question: Why would a statute ever instruct a court to ignore the facts of the crime before it? In *Johnson,* the ACCA was written to avoid requiring a factual inquiry so that courts can sentence career offenders without delving into the specific conduct of their past offenses. Specifically, the district judge in *Johnson* did not need to inquire into the details of Johnson's 2007 state-court conviction for possessing a short-barreled shotgun. Instead, the sentencing judge applied the archetypical-case analysis.

So, finally, what exactly is archetypical-case analysis? This analysis asks the judge to examine the crime that the defendant was charged with (here, possessing a short-barreled shotgun). The judge is then to ignore facts of the defendant's conduct and imagine the hypothetical facts archetypically associated with that crime. In the Court's words, a judge must create "a judicially imagined 'ordinary case' of a crime" that is not tied "to real-world facts or statutory elements." *Id.* at 2557. The judge must then adjudicate that archetypical case by the standard provided in the same statute. In *Johnson,* the trial judge was required to ask whether the *archetypical* case of possessing a short-barreled shotgun "involves conduct that presents a serious potential risk of physical injury to another." This hypothetical application of this standard to the hypothetical facts of the imagined case forms the heart of the archetypical-case (or ordinary case) analysis.

2. Imprecise standard

Analyzing an archetypical case does not by itself render a statute unconstitutionally vague under *Johnson.* Only when the required archetypical-case analysis is paired with the second "feature" does the statute become impermissibly vague. That second feature is whether the statute judges the archetypical case against an "imprecise standard."

Under the ACCA, courts were asked to determine if the archetypical case of a crime met the following standard: does the archetypical crime "involve[ ] conduct that presents a serious potential risk of physical injury to another"? The Court noted that a "serious potential risk" standard is textually imprecise. After examining the textual imprecision, the Court identified three factors that could add or subtract precision from the text. First, the residual clause was not clarified by example, as the government argued; instead, a "confusing list of examples" made an already-imprecise standard worse. *Id.* at

5. *See* 21 U.S.C. § 858.

2561. Second, the residual clause did not apply to a narrow scope of conduct; instead, it applied broadly to subsequent effects of a criminal act.[6] *Id.* at 2551. Third and finally, federal courts had not agreed about how to interpret the residual clause; instead, they had experienced "pervasive disagreement" about the clause's proper meaning. *Id.* at 2560. Each of these factors reduced the precision of the ACCA's standard.

Based on the ACCA's text and these three factors, the Court held that the residual clause contained an impermissibly imprecise standard. The Court did not determine whether the textual imprecision alone or any combination of the factors, without the others, would have doomed the ACCA. "Each of the uncertainties in the residual clause may be tolerable in isolation, but 'their sum makes a task for us which at best could be only guess work.' " *Id.* (quoting *United States v. Evans,* 333 U.S. 483, 495, 68 S.Ct. 634, 92 L.Ed. 823 (1948)). Given that sum, the ACCA contained an imprecise standard; applying that imprecise standard with archetypical—case analysis rendered the ACCA unconstitutionally vague.

3. The Johnson test for vagueness

Thus, the *Johnson* test for vagueness requires that we ask two questions today, in our consideration of § 16. First, whether the statute requires the analysis of an imaginary, archetypical case to determine whether a crime is a "crime of violence." That is, whether applying the statute requires a court to set aside the actual facts before it, and to imagine the conduct that would be committed in an archetypical case of the crime under consideration. If not—if the court is free to look at the facts of the case before it—then *Johnson* does not apply.

If the statute *does* require that we perform an analysis of the archetypical case, we then turn to a second question: whether the archetypical case must be adjudicated under an "imprecise standard." To answer this question, we will look to the text of the statute and three non-exclusive factors: presence or absence of clarifying examples, whether the scope is limited or expansive, and judicial agreement or disagreement.

If the statute both calls for an analysis of the archetypical case *and* provides an "imprecise standard" by which the archetypical case must be judged, it follows that the statute is unconstitutionally vague.

IV.

We first raise the threshold question: whether interpreting § 16 requires an analysis of an archetypical case. The parties do not dispute that such an analysis is required,[7] and we agree. The only disputed question is whether § 16 includes an imprecise standard by which the archetypical case must be judged. Thus, accepting the first prong of *Johnson* as satisfied, we turn our full attention to the second consideration in the vagueness analysis.

A.

[4] We begin with the text. Section 16 defines a "crime of violence" as "any other

6. "[A] crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers." *Id.* at 2551.

7. Compare Gov't Supp. Br. at 3 ("[L]ike [interpreting the] ACCA, [interpreting] § 16(b) involves a risk-based analysis of the 'ordinary case' of a predicate offense.") with Gonzalez–Longoria Supp. Br. at 4 ("[Interpreting § 16(b)] requires a categorical inquiry that asks the sentencing court first to imagine the type of conduct constituting the 'ordinary case' of the crime . . . .").

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. This text closely resembles the ACCA's definition of "violent felony" as any crime that "is [one of the examples] or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The ACCA's standard, however, is arguably less precise, since the ACCA's *risk* is modified by both "serious" and "potential," while § 16's *risk* is modified only by "substantial." Further, "physical force" may be marginally clearer than "physical injury." These differences are slight, however, and the two statutes' text provide similarly imprecise guidance. We therefore turn to the factors identified in *Johnson.*

B.

The first factor that affects the precision of a standard is the presence or absence of clarifying examples. In *Johnson,* the government argued that the presence of examples clarified the meaning of the ACCA. *Johnson,* 135 S.Ct. at 2560–62. The Court rejected this argument, holding that the list of examples was "confusing." The Court focused specifically on "burglary" and "extortion":

> These offenses are far from clear in respect to the degree of risk each poses. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten them by mail with the revelation of embarrassing personal information?

Johnson, 135 S.Ct. at 2558.

Today, the government argues that § 16 is clearer than the ACCA because "it does not contain an introductory list of enumerated crimes followed by an 'otherwise' provision." Gov't Supp. Br. at 3. True enough. Section 16, however, also lacks *clarifying* examples. Arguably, having no examples is worse than having unclear examples. The confusing examples in *Johnson* "provide at least some guidance as to the sort of offenses Congress intended for the provision to cover. Section 16(b), by contrast, provide no such guidance at all." *Dimaya,* 803 F.3d at 1118 n. 13. *See also Vivas–Ceja,* 808 F.3d at 723 (holding that, without examples, the ACCA's standard would have been objectionably imprecise, and that "the enumeration of specific crimes did nothing to clarify" the ACCA's imprecise standard).

We could look beyond the text of § 16 for potentially clarifying examples in an attempt to save the statute. This search, however, leads to examples that, like the ACCA's examples, confuse rather than clarify. As the government notes, "In *Leocal* [*v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)], a unanimous Court ... identified one offense (burglary) as the 'classic example' of a § 16 qualifying offense." Gov't Supp. Br. at 6. Thus, § 16 arguably contains a judicially imposed example—the very one that proved most problematic in the ACCA. Just as the ACCA's "residual clause offers no reliable way to choose between ... competing accounts of what 'ordinary' attempted burglary involves," § 16 offers no principled way to determine how much physical force, if any, is risked in an ordinary burglary. *Johnson,* 135 S.Ct. at 2558. "Does the ordinary burglar invade an occupied home by night or an unoccupied home by day?" *Id.* The answer is no clearer when interpreting § 16 than when interpreting the ACCA.

"Burglary" is not the only arguable § 16 example. Section 16 only impacts Gonzalez–Longoria because it is incorporated

into the definition of "aggravated felony" as "a crime of violence (as defined in section 16 of Title 18, *but not including a purely political offense*)." 8 U.S.C. § 1101(a)(43)(F) (emphasis added). This qualifier suggests that at least some "purely political offense[s]" would *otherwise* be § 16 crimes of violence. Like burglary, however, the "purely political offense" example is confusing. Though we have never interpreted the meaning of "purely political offense," the Second Circuit contrasted " 'purely' political offenses against a government, such as treason, sedition[,] and espionage, [with] 'relative' political offenses, to wit, crimes against persons or property which are incidental to a war, revolution, rebellion or political uprising." *Matter of Mackin,* 668 F.2d 122, 124 (2d Cir.1981). If we were to adopt this view, it would be hard to conceive of a "purely" political offense that would otherwise qualify as a § 16 crime of violence. This factor adds further imprecision.

Section § 16 lacks a clarifying list of examples. It either contains no examples and thus lacks any source of clarification, or it contains a confusing list of examples. Neither alternative reduces the statute's imprecision.

C.

The second factor contributing to the ACCA's imprecision was the potential breadth of its scope. The Court noted that, to interpret the residual clause, courts must go beyond "evaluating the chances that the *physical acts that make up the crime* will injure someone" to consider injuries that might occur after those physical acts had been completed. *Johnson,* 135 S.Ct. at 2557 (emphasis added).

The government contends that, because § 16 "applies only when the risk of force occurs 'in the course of committing the offense,' " it is "significantly narrower" than the ACCA's residual clause. Gov't Supp. Br. at 5. This assertion, however, fails to contend with *Leocal* 's observation: Burglary is a "classic example" of a § 16 crime of violence. *Leocal,* 543 U.S. at 2, 125 S.Ct. 377.[8] In the ACCA:

> the inclusion of burglary [as an example] confirms that the court's task also goes beyond evaluating the chances that the *physical acts that make up the crime* will injure someone. The 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.

Johnson, 135 S.Ct. at 2557. Just as the risk of injury in burglary frequently occurs after the breaking and entering, so too does the risk of physical force. Thus, at least some extra-offense conduct must be part of our analysis, and we cannot accept the government's interpretation that § 16 "does not go beyond 'the physical acts that make up the crime.' " *Id.*[9]

8. *Leocal* 's strict holding was only that driving under the influence is not a crime of violence, and thus the discussion of burglary is arguably dicta. Nonetheless, the Court was emphatic—not only is burglary included under § 16, it is "the classic example" of a crime of violence under § 16; we would need strong reason to depart from such clear guidance from the Court.

9. One way to save the government's reading of the statute would be to interpret "in the course of committing the offense" strictly but to read "physical force against the person or property of another" so broadly that it includes picking a lock or opening a door. However, this would not decrease the imprecision of the statute but merely shift it—courts would then confront the question of what

The government further argues that *Leocal* limits § 16. *Leocal* states that " § 16 relates not to the [defendant's] general conduct or to the possibility that harm will result from a [defendant]'s conduct, but to the risk that the use of physical force against another might be *required* in committing a crime. The classic example is burglary." *Leocal,* 543 U.S. at 10, 125 S.Ct. 377 (emphasis added). What it means for the use of force to be "required" is not clear. It must mean something more than being part of "the physical acts that make up the crime" (or burglary would not count) but less than "the possibility that harm will result." In many ways, the Court's statement about the residual clause applies equally to § 16: "The inclusion of burglary ... suggests that a crime may qualify under [§ 16] even if the physical [force] is remote from the criminal act." *Johnson,* 135 S.Ct. at 2559. The Court goes on to ask, "[b]ut how remote is too remote?" *Id.* For § 16, we have a partial, unsatisfying answer—only so remote as to be "required" by the crime and definitely not so remote as the mere "possibility that harm will result." This provides little guidance.

D.

Lastly, we examine the degree of judicial agreement or disagreement about § 16. We begin by noting that this factor is the least important: Unlike the other factors, judicial disagreement does not *cause* imprecision. If a new law were passed, it would be exactly as imprecise before any courts had disagreed about it as it would be afterwards. Nonetheless, judicial disagreement provides evidence of imprecision, even if it does not create it.

At least at the Supreme Court level, § 16 has occasioned much less disagreement than did the ACCA— § 16 has been to the Court only once, in *Leocal,* a unanimous decision. The Supreme Court, however, has discretion over its docket and thus the absence of § 16 cases may speak minimally to the inherent imprecision of the statute. The evidence of disagreement from district and circuit courts is more mixed. Gonzalez–Longoria points out multiple cases that disagree about how to interpret § 16. *See* Gonzalez–Longoria Br. at 22–24. The government responds that much of this confusion was cleared up by *Leocal* and more by *Johnson;* of the remaining disagreements, many seem like the sort of "marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls" that do not provide much evidence of imprecision. Gov't Supp. Br. at 7 (quoting *Johnson,* 135 S.Ct. at 2560). Judicial disagreement provides some evidence of imprecision but less evidence than was present in *Johnson.*

V.

Having now examined the *Johnson* factors, we return to the central question: Whether the standard in § 16 is so imprecise that, in combination with the ordinary-case inquiry, § 16 becomes unconstitutionally vague. Section 16's standard is imprecise in all the ways that the ACCA's standard was imprecise; in each case, however, it is arguably at least slightly less imprecise. The ACCA's standard referenced a confusing list of examples; § 16's text references no examples at all. The ACCA's standard encompasses a broad scope, as it considers post-offense conduct; so does § 16's standard, though its scope may be at least slightly limited by *Leocal.* The ACCA had occasioned judicial disagreement; so has § 16, though less. Comparing § 16's standard to the ACCA's standard, all we can say with confidence is

meaning "physical force" could possibly have.

that § 16's standard is imprecise, although not quite as imprecise as the ACCA's standard.

Our course forward is clear, however, upon considering that *Johnson* was not a case at the very margins of vagueness and non-vagueness. *Johnson* did not hold that the ACCA's standard represents a minimum bar for precision; that is, *Johnson* did not hold that any standard slightly more precise than the ACCA's is acceptably precise. To the contrary, *Johnson* held that the ACCA's standard was so imprecise that the Court was justified in departing from *stare decisis.* Presumably, therefore, a marginally more precise standard could be problematically vague. Section 16's standard is that marginally more precise—yet still imprecise—standard.

Thus, considering each of the arguments and nuances brought to our attention, we hold that § 16 is unconstitutionally vague because, at bottom, § 16 requires courts both to imagine an ordinary/archetypical case and then to judge that imagined case against imprecise standard. Under *Johnson,* this means that § 16 is unconstitutionally vague, and we so hold.

We therefore VACATE Gonzalez–Longoria's sentence and REMAND to the district court for resentencing in a manner not inconsistent with this opinion.

VACATED and REMANDED.

STEPHEN A. HIGGINSON, Circuit Judge, dissenting:

"*It is the uncertainty that charms one. A mist makes things wonderful.*" Oscar Wilde, *The Picture of Dorian Gray.* Perhaps true for Oscar Wilde, but not in the criminal law, where too much uncertainty denies defendants fair notice and permits arbitrary enforcement of the laws. *See Kolender v. Lawson,* 461 U.S. 352, 357–58, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

As defined by 18 U.S.C. § 16(b), a "crime of violence" includes any offense that "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 question presented here is whether this formulation put Gonzalez–Longoria, a felon, on sufficient notice that his prior Texas felony conviction of Assault Causing Bodily Injury with Prior Conviction of Family Violence, in violation of Tex. Penal Code § 22.01, would trigger [1] an enhanced sentence upon conviction of his latest offense, Illegal Reentry after Deportation, in violation of 8 U.S.C. §§ 1326(a) & (b). The similarities—at least at first glance—between 18 U.S.C. § 16(b)'s definition of a "crime of violence" and the definition of an "aggravated felony" provided by the residual clause of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), which the Supreme Court recently invalidated as unconstitutionally vague, *see Johnson v. United States,* ––– U.S. ––––, 135 S.Ct. 2551, 2557, 192 L.Ed.2d 569 (2015), raise the question whether Section 16(b), too, must be struck as unconstitutionally vague.

ACCA defines "violent felonies" to include, among other things, "burglary, ar-

1. Section 2L1.2(b)(1)(C) of the United States Sentencing Guidelines provides for an eight-level enhancement to a defendant's base offense level if the defendant was deported following a conviction for an "aggravated felony." The application note to that provision of the guidelines provides that "aggravated felony" has "the meaning given that term in 8 U.S.C. 1101(a)(43)." U.S.S.G. § 2L1.2, cmt. n.3(A). That statutory provision, in turn, defines aggravated felonies to include, among other things, "crime[s] of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year." And that definition points us, at last, to the definition provided by 18 U.S.C. § 16(b), which is the one challenged here.

son, or extortion, [offenses] involv[ing] use of explosives, *or [offenses] otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another.*" 18 U.S.C. § 924(e)(2)(B)(ii). The italicized portion is known as the "residual clause." *Johnson,* 135 S.Ct. at 2556. In *Johnson,* the Court highlighted "two features" of the residual clause that "conspire" to make the clause unconstitutionally vague. *Id.* at 2557. First, the Court observed that "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime" in a "judicially imagined 'ordinary case.'" *Id.* Second, it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony" because of ACCA's "imprecise 'serious potential risk' standard." *Id.* at 2558.

The Court's first concern can be read broadly, as a rejection of the categorical approach whenever it is combined with any degree of risk assessment, or narrowly, as a long-considered ill-ease and eventual repudiation in *Johnson* of the categorical approach in the specific context of ACCA's residual clause. The narrower reading is more sound. Even though some mystery inheres in all language, it particularly does when we ask if a prior crime *is*—not *was*—violent. Thus, with the categorical approach, we talk a bit like the Sphynx, asking whether a crime *is* violent, ordinarily (or "archetypically"), but not whether it *was* violent, factually.[2] All agree this first level of indeterminacy exists in Section 16(b), just as it was identified in *Johnson* pertaining to the ACCA's residual clause. In *Johnson,* however, the Court perceived vagueness rising to a due process violation not because of the categorical approach alone, but because ACCA's residual clause further mystifies the mystery by requiring courts, in imagining the ordinary case, to further imagine whether the ordinary case would present a "serious *potential risk* of physical *injury.*" 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).

Although district courts applying either enhancement must first, similarly, classify a prior offense into a crime category, "judicially imagining" (often counterfactually) the ordinary case, ACCA's residual clause compounds the vaguery of crime classification with yet another vaguery, asking whether the crime category has the "potential risk" of resulting in "injury." Merriam–Webster's Collegiate Dictionary defines "potential" as "[e]xisting in possibility" or "capable of development into actuality." It defines "risk" as "possibility of loss or injury." Thus, to talk about "potential risk" is to talk about the possibility of a possibility—the chance of a chance. Adding one more dot to connect, ACCA's residual clause requires a guess about the potential risk of (necessarily *future*) injury, *cf. Paroline v. United States,* ––– U.S. ––––, 134 S.Ct. 1710, 1717, 1721, 188 L.Ed.2d 714 (2014) ("The full extent of this victim's suffering is hard to grasp."), rather than about the risk that "physical force ... may be used *in the*

2. As the Court summarized in *Johnson,* "good reasons" supported the adoption of the categorical approach with respect to ACCA:

> *Taylor* [*v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990),] explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S. at 600, 110 S.Ct. 2143. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid. Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.

135 S.Ct. at 2562.

course of committing [an] offense." 18 U.S.C. § 16(b) (emphasis added).

As the *Johnson* majority observed, the ACCA's residual clause's focus on potential injury requires courts to "imagine how the idealized ordinary case of the crime subsequently plays out." *Johnson,* 135 S.Ct. at 2557–58. In contrast, the analysis under 18 U.S.C. § 16(b) is more bounded; it requires courts to apply the well-settled test from *Leocal* and determine whether the offense category "naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft,* 543 U.S. 1, 10, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). While enhancement under ACCA requires a guess about the *future and potential risk of injury*—indeterminate for the myriad reasons described in *Johnson*—enhancement under Section 16(b) requires a straightforward assessment about the risk of use of force during commission of crimes. *Compare Paroline,* 134 S.Ct. at 1717–1722 (discussing proximate cause problems inherent in injury inquiry), *with United States v. Ramos,* 537 F.3d 439, 465 (5th Cir.2008) (assessment about the use of force as applied to victims who resort to self-defense), *Wilkins v. Gaddy,* 559 U.S. 34, 37–38, 130 S.Ct. 1175, 175 L.Ed.2d 995 (2010) (assessment about the use of force as applied to police officers who resort to force), 18 U.S.C. § 111 (use of force element of offense), *and* 18 U.S.C. § 1951(a) (use or threat of physical violence element of offense).[3]

The Court's second concern—uncertainty about *how much risk* it takes for a crime to qualify—is also less pressing in the context of 18 U.S.C. § 16(b) for another textual reason. As the Court highlighted in *Johnson,* ACCA's residual clause "force[d] courts to interpret 'serious potential risk' in light of . . . four enumerated crimes," the rhyme or reason of which no one could make out. *Johnson,* 135 S.Ct. at 2558 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The Court went on to note that, unlike ACCA, most similar laws did not "link[ ] a phrase such as 'substantial risk' to a confusing list of examples." *Id.* at 2561. In 18 U.S.C. § 16(b), the amount of risk required—"substantial risk"—is not linked to any examples.

These two statutory distinctions mean that the concerns raised by the Court in *Johnson* with respect to ACCA's residual clause are less concerning in the context of 18 U.S.C. § 16(b). Thus, with *Leocal* as precedent, we should not get ahead of the Supreme Court, invalidating duly enacted and longstanding legislation by implication. *See United States v. Nat'l Dairy Products Corp.,* 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963) (a "strong presumptive validity . . . attaches to an Act of Congress" and, when possible, courts should seek an interpretation that supports the constitutionality of legislation and avoid, when possible, invalidating a statute as vague). This is especially true because the Court in *Johnson* specifically identified the precedent it was overruling, *see Johnson,* 135 S.Ct. at 2563, yet intimated nothing negative about its earlier, unanimous *Leocal* decision. *See Dimaya v. Lynch,* 803 F.3d 1110, 1129 (9th Cir.2015) (Callahan, J., dissenting) ("The Supreme Court will be surprised to learn that its opinion in

3. Classifying crimes, as well as assessing risk of force and violence, is built into the criminal justice system. For example, 18 U.S.C. § 924(c), which provides for enhanced penalties for the use of a firearm in connection with a crime, contains the same definition of "crime of violence" as 18 U.S.C. § 16(b). *See* 18 U.S.C. § 924(c)(3)(B). Likewise, the Bail Reform Act contemplates presumptive imprisonment when a defendant is even charged with a "crime of violence." *See* 18 U.S.C. § 3142(f)(1)(A), (g)(1).

Johnson rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention *Leocal* and specifically concluded with the statement limiting its potential scope.").

Gonzalez–Longoria's most recent crime is Illegal Reentry after Deportation, and his relevant earlier crime was Assault Causing Bodily Injury with Prior Conviction of Family Violence. Due process requires that he be able to apprehend that he could face enhanced punishment because his prior offense naturally involves physical force. That is predictively straightforward and sensible, telling lawbreakers they face longer prison terms because society condemns physical force in criminality more, even as it also commiserates with potential injury and pain and suffering. Section 16(b)'s task, both as to notice (to felons) and in application (by judges), asks whether a perpetrator's commission of a crime involves a substantial risk of physical force, which is predictively more sound than imputing clairvoyance as to a victim's potential risk of injury, which the Court, after years of consideration, held to be unknowable in *Johnson.* Again, the Supreme Court invalidated ACCA's residual clause only after "[n]ine years' experience trying to derive meaning from the . . . clause," "repeated attempts and repeated failures to craft a principled and objective standard," and years of "pervasive disagreement" in the lower courts about how to conduct the categorical approach inquiry with respect to the clause, *Johnson,* 135 S.Ct. at 2558–60—a record of unworkability not present here.

In summary, we should not strike Congressional law, 18 U.S.C. § 16(b), because, first, the concerns raised by the Court in *Johnson* with respect to ACCA's residual clause are less implicated by Section 16(b); second, because *Leocal* is precedent only the Supreme Court should adjust; and, third, because Section 16(b) does not involve the interplay of interpretative method and statutory text causing the double indeterminacy that was the due process muddle rejected in *Johnson.* Gonzalez–Longoria was on sufficient notice that his prior crime of Assault Causing Bodily Injury with Prior Conviction of Family Violence is one society condemns as violent because it involves a substantial risk that, in the course of its commission, force will be used against another. I dissent.

LUVATA GRENADA, L.L.C., Plaintiff–Appellant Cross–Appellee

v.

DANFOSS INDUSTRIES S.A. DE C.V., Defendant–Appellee Cross–Appellant.

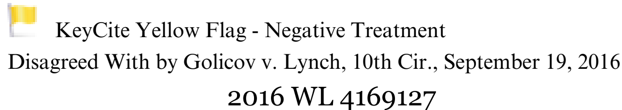
No. 15–60477
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 11, 2016.

Background: Plaintiff brought action against defendants alleging breach of contract, breach of warranties, negligent misrepresentation, and negligent design. The United States District Court for the Northern District of Mississippi, Sharion Aycock, Chief Judge, 2015 WL 3484679, dismissed claims against one defendant for lack of personal jurisdiction. Parties filed cross-appeals.

Holding: The Court of Appeals, Haynes, Circuit Judge, held that order dismissing claims against one defendant for lack of



2016 WL 4169127
Only the Westlaw citation is currently available.
United States Court of Appeals,
Fifth Circuit.

United States of America, Plaintiff-Appellee
v.
Gregorio Gonzalez-Longoria, Defendant-Appellant

No. 15-40041
|
August 5, 2016

Synopsis
Background: Alien pled guilty in the United States District Court for the Southern District of Texas, Andrew S. Hanen, J., to being illegally present in the United States, and he was sentenced to 27 months in prison. He appealed, challenging the constitutionally of statute on which the District Court had relied in enhancing his base offense level. The Court of Appeals, E. Grady Jolly, Circuit Judge, 813 F.3d 225, vacated and remanded.

Holdings: Following grant of rehearing en banc, the Court of Appeals, Stephen A. Higginson, Circuit Judge, held that:

[1] release of alien from federal custody for his illegal reentry offense did not moot his appeal;

[2] statutory definition of "crime of violence," a conviction of which will also constitute an "aggravated felony" and subject illegal reentry defendant to eight-level enhancement of his base offense level, was not unconstitutionally vague on its face; and

[3] definition was not unconstitutionally vague as applied to illegal reentry defendant previously convicted of domestic violence offense, the Texas state law crime of assault causing bodily injury with prior conviction of family violence.

Affirmed.

Jones, Circuit Judge, filed concurring opinion, in which Smith, Circuit Judge, joined.

E. Grady Jolly, Circuit Judge, filed dissenting opinion, in which Stewart, Chief Judge, and Dennis and Graves, Circuit Judges, joined.

West Codenotes

Recognized as Unconstitutional
18 U.S.C.A. § 924(e)(2)(B)(ii)

Appeal from the United States District Court for the Southern District of Texas.

Attorneys and Law Firms

John Patrick Taddei, Esq., U.S. Department of Justice, Washington, DC, Renata Ann Gowie, John A. Reed, U.S. Attorney's Office, Houston, TX, for Plaintiff-Appellee.

Marjorie A. Meyers, Michael Lance Herman, Evan Gray Howze, Margaret Christina Ling, Federal Public Defender's Office, Houston, TX, for Defendant-Appellant.

Before STEWART, Chief Judge, and JOLLY, DAVIS, JONES, SMITH, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, and COSTA, Circuit Judges.

Opinion

STEPHEN A. HIGGINSON, Circuit Judge, joined by DAVIS, JONES, SMITH, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES, and COSTA, Circuit Judges:

***1** This case presents the question whether the "crime of violence" definition provided by 18 U.S.C. § 16(b), when incorporated by reference into United States Sentencing Guidelines § 2L1.2(b)(1)(C), is unconstitutionally vague on its face in light of *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), in which the Court struck as unconstitutionally vague the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). We hold that 18 U.S.C. § 16(b) is not unconstitutionally vague.

I.

In January 2008, Dallas police responded to a disturbance in the street between Gonzalez-Longoria and his common-law wife, Debra Armstrong. According to Armstrong, the two had been fighting about money when Gonzalez-Longoria became upset, grabbed her by the collar, pushed her to the ground, and then, while she was on the ground, kicked her several times in the leg. For this incident, Gonzalez-Longoria was convicted of the misdemeanor offense Assault-Family Violence, in violation of Tex. Penal Code § 22.01(a)(1).

Three months later, in April 2008, Gonzalez-Longoria fought with Armstrong again, this time as she tried to board a bus. According to Armstrong, Gonzalez-Longoria struck Armstrong on the face, and she fell to the ground. For this incident, Gonzalez-Longoria was convicted of the felony offense Assault Causing Bodily Injury with a Prior Conviction of Family Violence, in violation of Tex. Penal Code § 22.01(b)(2). Thereafter, Gonzalez-Longoria, a Mexican citizen, was deported to Mexico.

Six years later, in June 2014, police officers in Combes, Texas, encountered Gonzalez-Longoria walking along the highway. He admitted that he was present in the United States illegally, and the officers arrested him. Thereafter, he pled guilty to being unlawfully present in the United States, in violation of 8 U.S.C. § 1326. During sentencing, the district court applied an eight-level sentencing enhancement on the ground that his prior Texas conviction for Assault Causing Bodily Injury with a Prior Conviction of Family Violence was a "crime of violence" and thus constituted an "aggravated felony" under United States Sentencing Guidelines § 2L1.2(b)(1)(C). That guidelines provision counts as aggravated felonies crimes that meet the "crime of violence" definition provided by 18 U.S.C. § 16(b). *See* U.S.S.G. § 2L1.2, cmt. n.3(A). At sentencing, Gonzalez-Longoria objected to the enhancement, arguing that 18 U.S.C. § 16(b) was unconstitutionally vague. The district court overruled that objection, and his others, and sentenced him to twenty-seven months' imprisonment and three years' supervised release. Gonzalez-Longoria appealed.

[1] While his appeal was pending, the Supreme Court issued *Johnson*, in which it held that the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), was unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. In supplemental briefing, Gonzalez-Longoria argued that the similarities between the Armed Career Criminal Act's residual clause and the "crime of violence" definition provided by 18 U.S.C. § 16(b) mean that § 16(b) must likewise be struck as unconstitutionally vague. The panel agreed, and issued an opinion vacating Gonzalez-Longoria's sentence on the ground that 18 U.S.C. § 16(b), which formed the basis of his eight-level aggravated-felony sentencing enhancement, is unconstitutionally vague in light of *Johnson*.[1] *United States v. Gonzalez–Longoria*, 813 F.3d 225 (5th Cir. 2016). The government petitioned for rehearing en banc, and we granted the petition.[2] *United States v. Gonzalez–Longoria*, 815 F.3d 189 (5th Cir. 2016).

1 Two other circuits had already invalidated 18 U.S.C. § 16(b), albeit in different contexts, under *Johnson*'s reasoning. *See United States v. Vivas–Ceja*, 808 F.3d 719, 723 (as incorporated into 8 U.S.C. § 1326(b)) (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015) (civil removal). Both the Second Circuit and Sixth Circuit had distinguished the reasoning in *Johnson* and held that 18 U.S.C. § 924(c)(3)(B), which both courts characterized as identical in all material respects to 18 U.S.C. § 16(b), is not vague. *See United States v. Taylor*, 814 F.3d 340, 379 (6th Cir. 2016); *United States v. Hill*, No. 14–3872, ––– F.3d ––––, ––––, 2016 WL 4129228, slip op. at 22 (2nd Cir. Aug. 3, 2016). Since the *Taylor* panel opinion was issued, the Sixth Circuit has invalidated 18 U.S.C. § 16(b) as unconstitutionally vague, distinguishing *Taylor* in part on the ground that, "[u]nlike [18 U.S.C. § 924(e)(2)(B)(ii)] and [18 U.S.C. § 16(b)], which require a categorical approach to stale predicate convictions, 18 U.S.C. § 924(c) is a criminal offense that requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding." *Shuti v. Lynch*, No. 15–3835, ––– F.3d ––––, ––––, 2016 WL 3632539, at *8 (6th Cir. July 7, 2016). However, the *Taylor* decision does not appear to distinguish 18 U.S.C. § 924(c) in this manner. *See Taylor*, 814 F.3d at 378 ("It is true that *Johnson* also relied in part on the fact that the [18 U.S.C. § 924(e)(2)(B)(ii)] residual clause, like § 924(c)(3)(B), requires the application of a categorical approach, which requires courts to look at the ordinary case of the predicate crime.").

2 During the time that Gonzalez-Longoria's case was pending en banc, Gonzalez-Longoria was released from federal custody. This development presents the question whether the conclusion of his time in custody renders this appeal moot. We conclude that it does not. The district court's determination that Gonzalez-Longoria's prior offense was an "aggravated felony" made his offense of conviction *itself* an "aggravated felony." 8 U.S.C. § 1101(a)(43)(O). The district court's "aggravated felony" determination therefore renders Gonzalez-Longoria permanently inadmissible to the United States (among other repercussions), *id.* § 1182(a)(9)(A)(i), (ii), a "collateral consequence" that Gonzalez-Longoria has a concrete and ongoing interest in avoiding. *Alwan v. Ashcroft*, 388 F.3d 507, 511 (5th Cir. 2004); *accord United States v. Villanueva–Diaz*, 634 F.3d 844, 848–49 (5th Cir. 2011).

II.

***2 [2] [3]** We review de novo a district court's application of the Sentencing Guidelines. *United States v. Coleman*, 609 F.3d 699, 708 (5th Cir. 2010). Whether a statute is unconstitutionally vague is a question of law, which we likewise review de novo. *Id.* at 706.

III.

A.

Gonzalez-Longoria challenges the sentencing enhancement that he received under section 2L1.2(b)(1)(C) of the Sentencing Guidelines, which provides for an eight-level enhancement to a defendant's base offense level if the defendant was deported following a conviction for an "aggravated felony." The application note to that section of the guidelines provides that "aggravated felony" has "the meaning given that term in 8 U.S.C. 1101(a)(43)." U.S.S.G. § 2L1.2, cmt. n.3(A). That statutory provision, in turn, defines aggravated felonies to include, among other things, "crime[s] of violence ... as defined in section 16 of Title 18 ... for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(F). As defined by 18 U.S.C. § 16(b), a "crime of violence" includes any 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." It is this definition that Gonzalez-Longoria argues is unconstitutionally vague.

B.

[4] [5] [6] [7] The Fifth Amendment's Due Process Clause protects against criminal convictions based on impermissibly vague statutes. "[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S.Ct. at 2556. "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." [3] *Id.* at 2557. When a provision is so vague that it specifies "no standard of conduct ... at all," then the provision "simply has no core," *Smith v. Goguen*, 415 U.S. 566, 578, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)), and will be vague as applied to anyone—that is, it will be facially vague.

3 Here, Gonzalez-Longoria challenges not a statute but a guidelines provision that incorporates by reference a portion of a criminal statute. Because we hold that Gonzalez-Longoria's vagueness challenge fails on the merits, we pretermit the question whether the guidelines are subject to vagueness challenges. *See United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990).

In *Johnson*, the Supreme Court faced a vagueness challenge to the Armed Career Criminal Act's definition of violent felonies. 135 S.Ct. at 2556. The Act includes a statutory sentencing enhancement for violators with three or more earlier convictions for a "violent felony." The Act defines violent felonies to include, among other things, "burglary, arson, or extortion, [offenses] involv[ing] use of explosives, *or [offenses] otherwise involv[ing] conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). The italicized portion is known as the "residual clause." *Johnson*, 135 S.Ct. at 2556.

***3 [8]** In *Johnson*, the Court highlighted two features of the Act's residual clause that together make the clause unconstitutionally vague. *Id.* at 2557. First, the Court observed that "the residual clause leaves grave uncertainty

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about how to estimate the risk posed by a crime" under the categorical approach required by *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).[4] *Id.* Second, the Court noted that the Act's "imprecise 'serious potential risk' standard" was difficult to apply. *Id.* at 2558.

4 "Under the categorical approach, a court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion' "—an inquiry known as "ordinary case" analysis. *Johnson*, 135 S.Ct. at 2557 (quoting *Begay v. United States*, 553 U.S. 137, 141, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008)). As the Court summarized in *Johnson*, "good reasons" supported the adoption of the categorical approach with respect to the Armed Career Criminal Act:

> *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S. at 600, 110 S.Ct. 2143. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid. Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.

Id. at 2562. *See also Mathis v. United States*, 579 U.S. ——, 136 S.Ct. 2243, 2254–57, —— L.Ed.2d —— (2016) (summarizing reasons supporting the use of the categorical approach in connection with the Armed Career Criminal Act).

Gonzalez-Longoria argues that the same two problems infect 18 U.S.C. § 16(b), because it too must be interpreted under the categorical approach, *see Perez–Munoz v. Keisler*, 507 F.3d 357, 361 (5th Cir. 2007), and it too contains an imprecise risk standard. These defects, he contends, make 18 U.S.C. § 16(b) unconstitutionally vague on its face. While Gonzalez-Longoria is correct that 18 U.S.C. § 16(b) shares these two features with the Armed Career Criminal Act's residual clause, neither feature causes the same level of indeterminacy in the context of 18 U.S.C. § 16(b).

The Court's first concern in *Johnson*, about the "grave uncertainty about how to estimate the risk posed by a crime," can be read broadly, as a rejection of the categorical approach whenever it is combined with any degree of risk assessment, or narrowly, as a long-considered ill-ease and eventual repudiation of the categorical approach in the specific context of the Armed Career Criminal Act's residual clause.[5] The narrower reading is more sound. Although both the Act's residual clause and 18 U.S.C. § 16(b) similarly require a risk assessment under the categorical approach, the inquiry that a court must conduct under 18 U.S.C. § 16(b) is notably more narrow. The Act's residual clause requires courts, in imagining the ordinary case, to decide whether the ordinary case would present a "serious potential risk of *physical injury*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). In contrast, 18 U.S.C. § 16(b) requires courts to decide whether the ordinary case "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) (emphasis added). Risk of physical force is more definite than risk of physical injury; further, by requiring that the risk of physical force arise "in the course of committing" the offense, 18 U.S.C. § 16(b) does not allow courts to consider conduct or events occurring after the crime is complete.

5 *Compare Vivas–Ceja*, 808 F.3d at 722 (holding that 18 U.S.C. § 16(b) is unconstitutionally vague as incorporated into 8 U.S.C. 1326(b) because it must be interpreted according to the same "two-step categorical approach" employed in connection with the Armed Career Criminal Act's residual clause), *Dimaya*, 803 F.3d at 1114, 1116 (holding that 18 U.S.C. § 16(b) is unconstitutionally vague in the civil-removal context because it is "subject to the categorical approach" and employs an "imprecise" risk standard), *and Shuti*, —— F.3d at ——, 2016 WL 3632539, at *5 (holding that 18 U.S.C. § 16(b) is unconstitutionally vague in the civil-removal context because "it compels a categorical approach to prior convictions and an imprecise analysis of possible risk"), *with Taylor*, 814 F.3d at 379 (distinguishing the reasoning in *Johnson* and holding that 18 U.S.C. § 924(c)(3)(B), which, as characterized by the court, is identical in all material respects to 18 U.S.C. § 16(b), is not vague), *and Hill*, No. 14–3872, —— F.3d at ——, 2016 WL 4129228, slip op. at 22 (same).

***4** As the *Johnson* majority observed, the focus on potential injury in the Armed Career Criminal Act's

residual clause requires courts to "imagine how the idealized ordinary case of the crime subsequently plays out." *Johnson*, 135 S.Ct. at 2557-58. This exercise requires courts to guess at the potential risk of possibly future injury. *See Johnson*, 135 S.Ct. at 2559 ("When deciding whether unlawful possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime? ... [H]ow remote is too remote?"); *cf. Paroline v. United States*, ––U.S. –––, 134 S.Ct. 1710, 1717, 1721, 188 L.Ed.2d 714 (2014) ("The full extent of this victim's suffering is hard to grasp."). The analysis under 18 U.S.C. § 16(b) is more bounded; it requires courts to apply the well-settled test from *Leocal* and determine whether the offense category "naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).[6] Thus, 18 U.S.C. § 16(b), which looks to whether a commission of a crime involves a substantial risk of physical force, is predictively more sound—both as to notice (to felons) and in application (by judges)—than imputing clairvoyance as to a potential risk of injury.[7]

6 Classifying crimes, especially by assessment of risk of force and violence, is built into the criminal justice system. For example, 18 U.S.C. § 924(c), which provides for enhanced penalties for the use of a firearm in connection with a crime, contains the same definition of "crime of violence" as 18 U.S.C. § 16(b). *See* 18 U.S.C. § 924(c)(3)(B). Likewise, the Bail Reform Act contemplates presumptive imprisonment when a defendant is even charged with a "crime of violence." *See* 18 U.S.C. § 3142(f)(1)(A), (g)(1). Indeed, the definition found in 18 U.S.C. § 16 applies to many provisions of Title 18. *See, e.g.*, 18 U.S.C. § 25(a)(1) (use of minor to commit a crime of violence); § 931(a)(1) (purchase of body armor by violent felons); § 1956(c)(7)(B)(ii) (money laundering); *see also* 18 U.S.C. § 842(p)(2) (facilitating use of explosives in connection with a crime of violence); § 929(a)(1) (use of armor-piercing ammunition in connection with a crime of violence); § 1952(a) (racketeering); § 2250(d) (failure to register as a sex offender); § 2261(a) (domestic violence); § 3559(f) (crime of violence against children).

7 *See also Leocal*, 543 U.S. at 10 n.7, 125 S.Ct. 377 ("Thus, § 16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct.").

The Court's second concern, uncertainty about *how much risk* it takes for a crime to qualify, is also less pressing in the context of 18 U.S.C. § 16(b). As the Court highlighted in *Johnson*, a significant reason that the necessary level of risk was so hard to parse in the context of the Armed Career Criminal Act was that the Act's residual clause "forces courts to interpret 'serious potential risk' in light of ... four enumerated crimes," the rhyme or reason of which no one could make out. *Johnson*, 135 S.Ct. at 2558 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The Court went on to note that, unlike the Armed Career Criminal Act, most similar laws did not "link[ ] a phrase such as 'substantial risk' to a confusing list of examples." *Id.* at 2561. In 18 U.S.C. § 16(b), the amount of risk required—"substantial risk"—is not linked to any examples. Instead, it is just like the "dozens of federal and state criminal laws" that employ terms such as "substantial risk," "grave risk," or "unreasonable risk," *see Johnson*, 135 S.Ct. at 2561, that state and federal judges interpret as a matter of routine.

These distinctions mean that the concerns raised by the Court in *Johnson* with respect to Armed Career Criminal Act's residual clause do not cause the same problems in the context of 18 U.S.C. § 16(b). While there might be specific situations in which 18 U.S.C. § 16(b) would be vague —although Gonzalez-Longoria does not suggest any in particular—it is certainly not a statute that "simply has no core." *Smith*, 415 U.S. at 578, 94 S.Ct. 1242. Thus, we hold that 18 U.S.C. § 16(b) is not unconstitutionally vague on its face.

C.

***5** **[9]** Likewise, 18 U.S.C. § 16(b) is plainly not vague as applied to Gonzalez-Longoria. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) ("We consider whether a statute is vague as applied to the particular facts at issue[.]"). Gonzalez-Longoria's most recent crime is Illegal Reentry after Deportation, and his relevant earlier crime was Assault Causing Bodily Injury with a Prior Conviction of Family Violence. Due process requires, first, that Gonzalez-Longoria be able to apprehend that he could face enhanced punishment because his prior

offense naturally involves physical force, and, second, that the provision under which he was sentenced not be so standardless as to invite arbitrary or discriminatory enforcement. Both requirements are satisfied.

The standard provided by 18 U.S.C. § 16(b) can be straightforwardly applied to Gonzalez-Longoria's prior offense, as is evidenced by this court's ease in applying the definition to other, similar offenses in the past. For example, in *United States v. Sanchez–Espinal*, 762 F.3d 425 (5th Cir. 2014), a panel of this court held that a New York felony conviction for aggravated criminal contempt qualifies as a "crime of violence" under 18 U.S.C. § 16(b) for purposes of the same eight-level guidelines enhancement at issue here. *Id.* at 431. A conviction for New York aggravated criminal contempt required a defendant to "cause physical injury to a victim for whose benefit an order of protection has been previously issued against the defendant." *Id.* The panel observed that protective orders were usually issued in domestic violence cases, and that a defendant would have to flout such an order to commit the crime. *Id.* at 431–32. The panel concluded: "These elements—a discordant history between the victim and the defendant leading to a court order of protection, which the defendant knowingly violates—underscore our conclusion that a violation of [the aggravated criminal contempt statute], by its nature, entails a high probability that physical force will be used." *Id.* at 432.

Here, Gonzalez-Longoria's crime of Assault Causing Bodily Injury with a Prior Conviction of Family Violence consisted of "intentionally, knowingly, or recklessly causes bodily injury to another," committed against a household or family member, or person in a dating relationship with the defendant, when the defendant had a previous conviction for an offense against a household or family member, or person in a dating relationship with the defendant. *See* Tex. Penal Code § 22.01(a)(1) & (b)(2). This describes a crime of domestic violence. Like the New York aggravated criminal contempt conviction held to be a "crime of violence" in *Sanchez–Espinal*, Tex. Penal Code § 22.01(b)(2) is in that category of crimes that "while capable of being committed without the use of physical force, always entail a substantial risk that physical force" will be used. *Sanchez–Espinal*, 762 F.3d at 432 (quoting *Rodriguez v. Holder*, 705 F.3d 207, 213 (5th Cir. 2013)); *see also Perez–Munoz*, 507 F.3d at 364 ("Being able to imagine unusual ways the crime could be committed without the use of physical force does not prevent it from qualifying as a crime of violence under 18 U.S.C. § 16(b)."). Thus, 18 U.S.C. § 16(b)'s standard for when a prior conviction should be counted as a crime of violence can be straightforwardly applied to Gonzalez-Longoria's prior crime of conviction. Gonzalez-Longoria was on sufficient notice that his earlier crime of Assault Causing Bodily Injury with a Prior Conviction of Family Violence is one society condemns as violent because it involves a substantial risk that, in the course of its commission, force will be used against another. We therefore conclude that 18 U.S.C. § 16(b) is not vague as applied to Gonzalez-Longoria.

D.

***6** We close by noting that the Supreme Court invalidated the Armed Career Criminal Act's residual clause only after "[n]ine years' experience trying to derive meaning from the ... clause," "repeated attempts and repeated failures to craft a principled and objective standard," and years of "pervasive disagreement" in the lower courts about how to conduct the categorical-approach inquiry with respect to the clause, *Johnson*, 135 S.Ct. at 2558–60—a record of unworkability not present here. Thus, we decline to get ahead of the Supreme Court, invalidating duly enacted and longstanding legislation by implication. *See United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963) (stating that a "strong presumptive validity ... attaches to an Act of Congress" and that, when possible, courts should seek an interpretation that supports the constitutionality of legislation and avoid invalidating a statute as vague); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). This is especially true because the Court in *Johnson* specifically identified the precedent it was overruling, *see Johnson*, 135 S.Ct. at 2563, yet intimated nothing negative about its earlier, unanimous *Leocal* decision. *See Dimaya v. Lynch*, 803 F.3d 1110, 1129 (9th Cir. 2015) (Callahan, J., dissenting) ("The Supreme Court will be surprised to learn that its opinion in *Johnson* rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention *Leocal* and specifically concluded with the statement limiting its potential scope."); *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 782 (5th Cir. 2012).

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IV.

The judgment of the district court is affirmed.

JONES, Circuit Judge, joined by SMITH, Circuit Judge, concurring:

Although I concur in the majority opinion holding that 18 U.S.C. § 16(b) is not unconstitutionally vague in the wake of *Johnson v. United States*, —U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), our disagreement over that proposition could have been obviated with a holding that neither the U.S. Sentencing Guidelines, nor extrinsic statutes cross-referenced in the Guidelines, are subject to challenges based on the Due Process Clause's prohibition of vague laws. This holding flows from the recognition of several principles. First, *Johnson* itself did not treat or address the Guidelines. Second, no other Supreme Court case has implied the propriety of vagueness challenges in the realm of Guidelines sentencing. Third, the Supreme Court's most recent sentencing cases are not to the contrary. Fourth, this court has repeatedly rebuffed vagueness challenges to Guidelines sentencing, and we remain bound by that line of case law. Fifth, as a matter of principle and logic, sentencing under the Guidelines remains discretionary with the district courts. Sixth, allowing vagueness challenges to the Guidelines would threaten both the Guidelines themselves and the federal law beyond the Guidelines. The following discussion will elaborate on each of these points. [1]

1 The Supreme Court will have this issue before it next term in *Beckles v. United States*, 616 Fed.Appx. 415 (11th Cir. 2015) (per curiam), *cert. granted*, — U.S. ——, 136 S.Ct. 2510, — L.Ed.2d —— (2016).

1. *Johnson* itself did not specifically treat or address the Guidelines. In *Johnson*, the Supreme Court recognized "statutes fixing sentences" as susceptible to vagueness challenges and declared the residual clause of the Armed Career Criminal Act (ACCA) unconstitutionally vague. *Id.* at 2557 (citing *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979)). ACCA is a statute fixing a punishment. Normally, by federal law, the maximum sentence a previously convicted felon faces for possessing a firearm—in violation of 18 U.S.C. § 922(g)—is 10 years. *See* 18 U.S.C. § 924(a)(2). Under ACCA, however, defendants with three or more previous convictions for violent felonies *must* be sentenced to at least 15 years. *See* 18 U.S.C. § 924(e)(1). Johnson's sentence thus went from a 10 year maximum to a 15 year minimum based on the residual clause. 135 S.Ct. at 2556. ACCA's residual clause is thus very much like a "crime" itself. Without notice or predictability about which of his prior felonies would qualify under ACCA, Johnson had no idea when he possessed a firearm in violation of ACCA whether his range of punishments would be 15 years to life, as opposed to zero to 10 years.

***7** The Court concluded that the use of a vague provision, like the residual clause, "to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 2560. ACCA itself mandated the increase in Johnson's sentence and thus denied him due process. *Id.* at 2557.

The Guidelines, in contrast, criminalize no conduct and fix no sentence. Contrasted with ACCA's mandated sentence minimum, the Guidelines merely advise the sentencing judge of a potentially reasonable sentence within the statutory range and then leave the actual sentence to the judge's discretion.

2. No other Supreme Court case has directly confronted a vagueness challenge to the Guidelines or implied the propriety of such a challenge. All of the Court's vagueness cases involving sentencing provisions have addressed statutes prescribing a minimum or maximum sentence for a particular offense. Besides *Johnson*, *United States v. Batchelder* involved a statute fixing a maximum sentence of five years for a gun crime. 442 U.S. at 123, 99 S.Ct. at 2204. *United States v. Evans* concerned the statutorily-fixed range of punishments for an immigration crime. 333 U.S. 483, 483–84, 68 S.Ct. 634, 92 L.Ed. 823 (1948). *Chapman v. United States* included a vagueness challenge to the statute fixing a mandatory minimum sentence based on drug weight. 500 U.S. 453, 467–68, 111 S.Ct. 1919, 1929, 114 L.Ed.2d 524 (1991).

The Supreme Court's most relevant cases have all held against the vagueness propositions discussed in *Johnson*—notice and arbitrary enforcement—from the standpoint of sentencing. Beginning with notice, in *Irizarry v. United States*, the Court held that a criminal defendant was not entitled to prior notice that the district court was considering sentencing him outside of the applicable Guidelines range. 553 U.S. 708, 712–13, 128 S.Ct.

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2198, 2201–02, 171 L.Ed.2d 28 (2008). Because the Guidelines are not mandatory and the district court had discretion to sentence the defendant anywhere within the statutory range, the Court held that the defendant had no "expectation subject to due process protection" of a Guidelines sentence. *Id.* at 713, 128 S.Ct. at 2202.

Batchelder concerned a defendant whose conduct violated two statutes. 442 U.S. at 116, 99 S.Ct. at 2200. The laws prohibited identical conduct, but one authorized a maximum sentence of two years and the other authorized a maximum sentence of five years. *Id.* at 116–17, 99 S.Ct. at 2200. A unanimous Supreme Court rejected Batchelder's argument that the laws were unconstitutionally vague because they did not give him fair notice whether the consequence of his crime would be a sentence of two years or five years. *Id.* at 123, 99 S.Ct. at 2204. The Court held the notice requirements of due process were satisfied so long as the statutes "clearly define[d] the conduct prohibited and the punishment authorized." *Id.*

The Supreme Court's concerns about arbitrary enforcement likewise imply nothing about the propriety of vagueness challenges under the Guidelines. *Johnson* said little about this aspect of vagueness in the sentencing context, merely remarking that the residual clause's indeterminacy "invite[d] arbitrary enforcement by judges" in fixing the 15 year minimum sentence. *See Johnson*, 135 S.Ct. at 2557. *Batchelder* didn't address the arbitrary enforcement aspect of vagueness at all, but did find that the sentencing scheme was not so arbitrary as to violate the Equal Protection Clause. 442 U.S. at 125 & n.9, 99 S.Ct. at 2204–05 & n.9. The defendant in *Chapman* asserted that his sentence violated the Due Process Clause because it was "arbitrary" and "the [due process] right to be free from deprivations of liberty as a result of arbitrary sentences is fundamental." 500 U.S. at 464, 111 S.Ct. at 1927. The Court soundly rejected this argument. Due process requires a conviction after a trial "in accordance with relevant constitutional guarantees." *Id.* at 465, 111 S.Ct. at 1927. But once convicted, due process has far less purchase: "[A] person who has been convicted [of a crime] is eligible for, and the court may impose, whatever punishment is *authorized by statute for his offense*, so long as that penalty is not cruel and unusual" and not based on a distinction which would violate the Equal Protection Clause as being without a rational basis. *Id.* (emphasis omitted and added).

***8** Concerns about widespread arbitrary enforcement are largely missing in the Guidelines setting. As is made clear by the context of *Kolender* and the cases it cites, the Court's fear was that the "policeman on his beat" and local prosecutors would use shapeless laws to harass disfavored persons and minority groups with arrest and conviction. 461 U.S. at 358, 103 S.Ct. at 1858 (citing, *e.g.*, *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 1247–48, 39 L.Ed.2d 605 (1974)). Those concerns are misplaced here. Convictions and sentences are not based on the Guidelines. Instead, they are based on "unambiguous" statutory statements of the "activity proscribed and the penalties available upon conviction." *Batchelder*, 442 U.S. at 123, 99 S.Ct. at 2204.

The combined lesson of the Supreme Court's vagueness cases which have addressed sentencing is this: Due process requires only notice and predictability in the statutory range of punishments following conviction. Because due process requires no more, vagueness challenges cannot stand against a discretionary scheme of sentencing within that range.

3. The Supreme Court's recent sentencing cases are not to the contrary. *Peugh v. United States* is the leading case cited by proponents of Guidelines vagueness challenges, [2] but the Ex Post Facto challenge in *Peugh* is quite different from the proposed vagueness challenge in this case. In *Peugh*, the Court allowed a defendant to challenge his sentence under the Ex Post Facto clause because it was based on a Guidelines calculation not in force on the date of his offense. ––– U.S. ––––, 133 S.Ct. 2072, 2085–88, 186 L.Ed.2d 84 (2013). *Peugh* did not declare that the Guidelines are subject to any and all constitutional challenges. Instead the Court explicitly rejected that notion: "[A]nalytically distinct" constitutional challenges should not be assumed to lie against the Guidelines. *Id.* at 2088. Ex Post Facto challenges are unique because of the Clause's history and interpretation. *Id.* at 2086. They require only a "significant risk" of a higher sentence to trigger the Clause's protections. *Id.* at 2088. In contrast, vagueness challenges are "analytically distinct" because all of the Supreme Court's precedents have made clear they only lie against those statutes that "fix" sentences. *See Johnson*, 135 S.Ct. at 2556. And *Peugh* itself reaffirmed the holding of *Irizarry* that a defendant has no due process interest in an expected Guidelines range. 133 S.Ct. at 2085 (plurality opinion).

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2 *See United States v. Pawlak*, 822 F.3d 902, 905–06 (6th Cir.2016) (published); *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015). The Eighth Circuit recently held that the Guidelines are susceptible to vagueness attacks based on the reasoning of *Johnson*, but as demonstrated above, *Johnson* did not treat the Guidelines and there are material differences between ACCA and the Guidelines. *United States v. Taylor*, 803 F.3d 931, 933 (8th Cir. 2015) (per curiam).

Nor does the Ex Post Facto clause rest on the same principles of fair notice and avoiding arbitrary enforcement that underlie due process. The Supreme Court has soundly rejected attempts to view the two as protecting identical interests. *See Rogers v. Tennessee*, 532 U.S. 451, 458–60, 121 S.Ct. 1693, 1698–1700, 149 L.Ed.2d 697 (2001). Ex Post Facto's primary concern is vindictive *legislative* action. *See, e.g.*, *Miller v. Florida*, 482 U.S. 423, 429, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (1987). Vagueness is principally worried about vindictive *enforcement* action. *See, e.g.*, *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858. The notice interest is also different between the two. Vagueness examines how much ambiguity and uncertainty are acceptable in the law. It looks to situations where the public is not able to determine what actions are prohibited by a certain law. Ex Post Facto is concerned with notice in the context of principles of reliance and "fundamental justice." *See, e.g.*, *Peugh*, 133 S.Ct. at 2085 (plurality opinion) (quoting *Carmell v. Texas*, 529 U.S. 513, 531, 120 S.Ct. 1620, 1631, 146 L.Ed.2d 577 (2000)). It concerns situations where the law is definite but retroactively punishes conduct or enhances previously prescribed punishment.

***9** Two other recent sentencing cases that rely on the anchoring effect of the Guidelines are also unavailing to Gonzalez-Longoria. In both *Molina–Martinez v. United States*, ––– U.S. ––––, 136 S.Ct. 1338, 1345, 194 L.Ed.2d 444 (2016), and *Freeman v. United States*, 564 U.S. 522, 529, 131 S.Ct. 2685, 2692, 180 L.Ed.2d 519 (2011) (plurality opinion), the Court evaluated whether the district court would have sentenced differently if it had considered a lower Guidelines range. These examine the practical effect of the Guidelines on sentencing questions, but are uninformative about the impact of the Due Process Clause on sentencing provisions. Instead, the Supreme Court has already stated that due process is satisfied by an unambiguous statement of the "the penalties *available* upon conviction." *Batchelder*, 442 U.S. at 123, 99 S.Ct. at 2204 (emphasis added).

4. Consistent with these principles, this court has repeatedly rebuffed vagueness challenges to Guidelines sentencing. We remain bound by that line of case law, which the instant en banc decision has not disturbed. In *United States v. Pearson*, the court considered a due process challenge by a defendant who claimed he was not on notice he would be sentenced as a career offender under the Guidelines. 910 F.2d 221, 222 (5th Cir. 1990). *Pearson* held that the defendant had notice of the correct statutory maximum and that is all the Constitution demands. "Due process does not mandate ... either notice, advice, or probable prediction of where, within the statutory range, the [G]uideline sentence will fall." *Id.* at 223 (citing *United States v. Jones*, 905 F.2d 867 (5th Cir. 1990)). Since 1990, we have relied on *Pearson* to reject vagueness challenges to the Guidelines in multiple unpublished opinions. [3]

3 *See, e.g.*, *United States v. Velazquez*, No. 06–41469, ––– F.3d ––––, 2007 WL 2437961, at *1 (5th Cir. Aug. 21, 2007) (per curiam) (unpublished); *United States v. Perez*, 32 Fed.Appx. 129, at *1 (5th Cir. 2002) (per curiam) (unpublished table decision); *United States v. Medina–Camposano*, 229 F.3d 1147, at *1 (5th Cir. 2000) (per curiam) (unpublished table decision); *United States v. Porras–Cano*, 172 F.3d 869, at *1 (5th Cir. 1999) (per curiam) (unpublished table decision); *see also United States v. Wilson*, 622 Fed.Appx. 393, 405 n.51 (5th Cir. 2015) (per curiam) (citing *Pearson* for the proposition that "[o]ur case law indicates that a defendant cannot bring a vagueness challenge against a Sentencing Guideline").

5. Sentencing under the Guidelines is ultimately discretionary with the district courts. *See United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 757, 160 L.Ed.2d 621 (2005). Federal sentencing begins with the correct calculation of the Guidelines range, but district courts are not permitted to "presum[e] that the Guidelines sentence should apply." *See Nelson v. United States*, 555 U.S. 350, 352, 129 S.Ct. 890, 892, 172 L.Ed.2d 719 (2009) (per curiam) (quoting *Rita v. United States*, 551 U.S. 338, 351, 127 S.Ct. 2456, 2465, 168 L.Ed.2d 203 (2007)). Instead the district court must consider the range in light of the Guidelines policy statements and the sentencing factors contained in 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49–50, 128 S.Ct. 586, 596–97, 169 L.Ed.2d 445 (2007). The district court may adjust the sentence up

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or down from the Guidelines range based on literally any other consideration related to the defendant,[4] including, for example, the district court's policy disagreements with the Guidelines.[5] Though the Guidelines must be given "respectful consideration" they do not dictate the defendant's ultimate sentence. *See Pepper v. United States*, 562 U.S. 476, 490, 131 S.Ct. 1229, 1241, 179 L.Ed.2d 196 (2011). In reality, for over half of federal defendants last year, the Guidelines didn't even provide a reliable indication of what that sentence might be because the district court, in some instances at the urging of the Department of Justice, adjusted the sentence outside of the Guidelines range.[6]

4 *Pepper v. United States*, 562 U.S. 476, 488–90, 131 S.Ct. 1229, 1240, 179 L.Ed.2d 196 (2011) (discussing 18 U.S.C. § 3661).

5 *Kimbrough v. United States*, 552 U.S. 85, 109–11, 128 S.Ct. 558, 575–76, 169 L.Ed.2d 481 (2007).

6 The U.S. Sentencing Commission reports that in 2015, only 47.3% of federal defendants received a sentence within their Guidelines range. *See* U.S. Sentencing Comm'n, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/TableN.pdf.

***10** Before the Guidelines, sentencing was entirely discretionary within the limits of the statutory maxima and minima. *See Mistretta v. United States*, 488 U.S. 361, 363, 109 S.Ct. 647, 650, 102 L.Ed.2d 714 (1989). Yet this regime was never impugned as creating constitutional vagueness problems. *See United States v. Matchett*, 802 F.3d 1185, 1195 (11th Cir. 2015) (citing *Lockett v. Ohio*, 438 U.S. 586, 602–04, 98 S.Ct. 2954, 2963–65, 57 L.Ed.2d 973 (1978)). It would be ironic if the Guidelines, which seek to channel (though not control) judges' discretion, could be described as more arbitrary and providing less notice than sentencing throughout this nation's history.

6. I close with four additional points. First, the original panel's distinction between a vagueness challenge to a statute incorporated into a Guideline and a vagueness challenge to the Guideline itself is untenable. It has no basis in common sense or precedent. Gonzalez-Longoria only asserts an interest in this case because § 16(b) was incorporated into the Guidelines applied to him. He has no freestanding ability to assert § 16(b) is vague and thus any vagueness challenge is necessarily against the Guideline incorporating it.

Second, I agree with the Eleventh Circuit that allowing such challenges has the potential to upend federal sentencing. *See Matchett*, 802 F.3d at 1196. For example, Guideline provisions dealing with relative culpability—such as "minor participant,"[7] "organizer or leader of a criminal activity,"[8] or "manager or supervisor (but not an organizer or leader)" of a criminal activity[9]—are all potentially vague. *See id.* But they serve an important and laudable role in encouraging district courts to reach some group level of uniformity and proportionality in assessing individual culpability and sentencing similarly situated defendants.

7 U.S.S.G. § 3B1.2(b).

8 U.S.S.G. § 3B1.1(a).

9 U.S.S.G. § 3B1.1(b).

Third, allowing vagueness challenges to statutes incorporated into the Guidelines would have far-reaching implications. As the majority opinion demonstrates, applications of § 16(b) are pervasive throughout the federal criminal and immigration laws. The Guidelines also incorporate numerous definitions from outside of the federal criminal law. They use statutory pieces from ERISA,[10] the Investment Advisors Act,[11] the Native American Graves Protection and Repatriation Act,[12] and the Higher Education Act of 1954,[13] just to name a few. Those definitions are, in turn, incorporated into other statutes and regulations throughout the federal law. Declaring a statutory definition void for vagueness would have wide-ranging effects because the Supreme Court holds that a successful vagueness challenge renders the law "incapable of any valid application." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5, 102 S.Ct. 1186, 1191 n.5, 71 L.Ed.2d 362 (1982). This is not a step we should invite through the discretionary world of the Guidelines.

10 U.S.S.G. § 2E5.1 cmt. n.3 (citing 29 U.S.C. § 1002(21)(A)).

11 U.S.S.G. § 2B1.1 cmt. n.15(A) (citing 15 U.S.C. § 80b–2(a)(11)).

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12 U.S.S.G. § 2B1.5 cmt. n.1(A)(iv) (citing 25 U.S.C. § 3001(3)).

13 U.S.S.G. § 2B1.1 n.8(D) (citing 20 U.S.C. § 1001).

Finally, we should not allow Gonzalez-Longoria to challenge for vagueness a statute that plainly applies to him. Where First Amendment freedoms are not at issue, a "vagueness claim must be evaluated as the statute is applied to the facts of [the] case." *See Chapman*, 500 U.S. at 467, 111 S.Ct. at 1929 (citing *United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 319, 46 L.Ed.2d 228 (1975)). This precept is "well established." *See Powell*, 423 U.S. at 92, 96 S.Ct. at 319 (quoting *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975)). As the majority opinion details, § 16(b) is not vague as applied to the facts of Gonzalez-Longoria's case.

***11** For the foregoing reasons, I would hold the Guidelines categorically immune from vagueness challenges.

E. GRADY JOLLY, Circuit Judge, joined by STEWART, Chief Judge, DENNIS, and GRAVES, Circuit Judges, dissenting:

I am in agreement with the majority's framework for deciding this case. Specifically, I agree that *Johnson* "highlighted two features of the [Armed Career Criminal] Act's residual clause that together make the clause unconstitutionally vague [and that] 18 U.S.C. § 16(b) shares these two features." I also agree that "neither feature causes *the same level* of indeterminacy in the context of 18 U.S.C. § 16(b)." The majority, however, drifts from reason—and into the miasma of the minutiae —when it determines that these vagaries suffice to distinguish § 16(b) from the residual clause. Accordingly, I respectfully dissent.

The majority offers two distinctions between the residual clause and § 16(b). I agree that both distinctions exist. Both distinctions, however, are much less analytically consequential than the majority suggests; both "are, ultimately, distinctions without a difference," as the Sixth Circuit recently held. *Shuti v. Lynch*, No. 15–3835, ––– F.3d ––––, ––––, 2016 WL 3632539, at *7 (6th Cir. July 7, 2016). Furthermore, the ACCA's residual clause was *clearly* unconstitutional and, even though § 16(b) may be slightly less indeterminate, it is nonetheless similar enough to the residual clause to be trapped by the same unconstitutional character.

Let's start with the majority's two distinctions between the residual clause and § 16(b). First, the majority points out that the residual clause's use of potential injury "requires courts to guess at the *potential risk of possibly future injury*." In contrast, § 16(b) asks only "whether a perpetrator's commission of a crime *involves a substantial risk of physical force*." The difference, when sliced very thinly, may indicate that § 16(b) is slightly less indeterminate because a reviewing court can more easily determine the physical force of a crime than the future injury resulting from a crime; nonetheless, nearly all uses of physical force "risk a possibility of future injury." Thus, virtually every criminal act that satisfies the § 16(b) test could also satisfy the residual clause's test; any distinction between the two statutes on this ground is of indeterminate ultimate consequence to § 16(b)' s unconstitutionality under *Johnson*.

Second, the majority points out that the residual clause was preceded by "a confusing list of examples." In particular, the *Johnson* Court was troubled by the inclusion of "burglary" as an example of a residual clause crime. *Johnson v. United States*, ––– U.S. ––––, 135 S.Ct. 2551, 2558, 192 L.Ed.2d 569 (2015). ("The inclusion of burglary ... among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers."). And, as the majority points out in "§ 16(b), the amount of risk required—'substantial risk'—is not linked to any examples" in the text.

Again, I can agree that this provides a shadow of difference, but hardly a constitutional sockdolager. This difference between the two statutes is particularly slight because, through judicial interpretation, § 16(b) not only contains an example, it contains *the very example that most troubled the* Johnson *Court*. Specifically, the Supreme Court has previously explained that burglary is the "classic example" of a § 16(b) crime. *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). And "burglary" was the most confusing of the residual clause's "confusing examples." If "burglary" is a confusing example in one statute, then it is just as confusing in the other. Certainly, § 16(b) offers no more guidance about how much physical force, if any, is risked in an

ordinary burglary than the residual clause offers regarding the risk of injury from an ordinary burglary. As a result, the (judicially created) example in § 16(b) is nearly as confusing as the textual examples in the residual clause; again, any distinction between the two statutes is not salient enough to constitutionally matter.

***12** In short, the differences identified by the majority may be distinctions, but are truly "distinctions without a difference," *Shuti*, —F.3d at ——, 2016 WL 3632539, at *7, and cannot account for different constitutional treatment of such otherwise similar statutes.

* * *

The majority's second error is that it assumes, without supporting reasoning, that even minor differences between the residual clause and § 16(b) justify treating the two statutes differently. The majority starts from the premise that § 16(b) is less indeterminate than the residual clause (I agree), and then concludes that § 16(b) is therefore constitutional (I disagree). This conclusion does not follow.

To reach this erroneous conclusion, the majority misreads *Johnson*. Specifically, the majority appears to read *Johnson* as, in effect, drawing a line in the sand at the residual clause and decreeing "anything clearer than this is constitutional; anything vaguer is not." And if this reading of *Johnson* were correct, then the majority could rightly point to even minor distinctions to argue that § 16(b) falls on the constitutional side of the line.

But the *Johnson* Court did not draw a line at the residual clause. Instead, the *Johnson* Court held that the residual clause was *so clearly unconstitutional* that the Court should overrule two past cases, setting aside the revered doctrine of stare decisis to do so. Of course, the Supreme Court is painfully reluctant to depart from the "vital rule of judicial self-government" embodied in stare decisis. *Johnson*, 135 S.Ct. at 2563. That it chose to override the principle of stare decisis in *Johnson* demonstrates that the residual clause had trespassed well over the constitutional line.

Thus, the proper inquiry is not whether there are *any* differences between § 16(b) and the residual clause; there assuredly are. Instead, the proper inquiry is whether the dissimilarities between the two statutes allow dissimilar resolutions to the fundamental question of their constitutionality.

In conducting this inquiry, I simply return to the text. Compare a crime "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" with an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." These statutes read extremely similarly. The majority of circuits to have considered the question have held that these two similar texts must suffer the same constitutional fate. *Compare Shuti*, — F.3d ——, 2016 WL 3632539, *and United States v. Vivas–Ceja*, 808 F.3d 719 (7th Cir. 2015), *and Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir 2015) (striking down § 16(b) or materially identical laws) *with United States v. Hill*, No. 14–3872, — F.3d ——, ——, 2016 WL 4129228, slip op. at 22 (2nd Cir. Aug. 3, 2016) (upholding such a law). The majority, engrossed by thinly sliced and meaningless distinctions, adopts the minority view and errs by losing track of the entirety: these statutes, in constitutional essence, say the same thing.

Accordingly, I respectfully dissent.

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