NO. 16-8058

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO **ALVARO-VELASCO**, ARTURO MONTES **BENAVIDES**,
JUAN **CASTRO-CASTRO**, JOSE PRUDENCIO **CANALES-BONILLA**,
EDWIN **GARRIDO**, DANIEL **GONZALEZ-BAUTISTA**,
JOSE **LARA-GARCIA**, JUAN **MORALES-LEON**,
JESUS **MORALES-SANCHEZ**, CARLOS ALBERTO **PEREZ-DE LEON**,
ELDER ROCAEL **TZACIR-GARCIA**, and HELBER **VALDEZ**,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITIONERS' REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600

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 enhancement provision of 8 U.S.C. § 1326(b)(2), 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.

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PETITIONERS' REPLY TO THE
MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners argue that the "crime of violence" definition in 18 U.S.C. § 16(b), as incorporated into the statutory-enhancement provision of 8 U.S.C. § 1326(b)(2), is unconstitutionally vague. Pet. 16-21. They ask that their petition for a writ of certiorari be held until this Court renders its decision in Sessions v. Garcia Dimaya, No. 15-1498 (reargument scheduled for October 2, 2017). Pet. 8.

In response, the government argues that the petition should simply be denied because "petitioners were sentenced below the [10-year] statutory maximum that would have applied [under 8 U.S.C. § 1326(b)(1)] if their prior offenses were classified as ordinary felonies rather than aggravated ones, and because the application of the Sentencing Guidelines in these cases is not susceptible to a constitutional vagueness challenge[.]" U.S. Mem. Opp. 4. The government's argument is not persuasive.

It is true that (as the government argues) that petitioners' prison sentences all fall within the statutory parameters for an offense under § 1326(b)(1). U.S. Mem. Opp. 2-3. However, the written judgment entered by the district court in each case reflects conviction and sentencing under § 1326(b)(2), signifying application of the statutory "aggravated felony" enhancement. Pet. 6.

As a purely statutory matter, there is a greater stigma to being convicted and sentenced under § 1326(b)(2) than under § 1326(b)(1). See Apprendi v. New Jersey, 530 U.S. 466, 495 (2000) (referring to "the heightened stigma associated with an offense the

legislature has selected as worthy of greater punishment"); see also id. at 484 (where defendant faces a greater potential maximum sentence, "the stigma attaching to the offense [is] heightened"). And it is not merely a question of stigma: an offense under § 1326(b)(2) is ***itself*** considered an "aggravated felony." See 8 U.S.C. § 1101(a)(43)(O). Therefore, the very characterization of the offense as being one under § 1326(b)(2) could have immigration and other consequences. See, e.g., United States v. Gamboa-Garcia, 620 F.3d 546, 549 (5th Cir. 2010) (relying on prior judgment reflecting conviction and sentencing under § 1326(b)(2) to preclude attack on "aggravated felony" enhancement); United States v. Piedra-Morales, 843 F.3d 623, 624 (5th Cir. 2016) (same).[1] Indeed, the Fifth Circuit has, with some frequency, remanded cases for the purpose of correcting the judgment to reflect conviction and sentencing under 8 U.S.C. § 1326(b)(1), rather than 8 U.S.C. § 1326(b)(2).[2]

For these reasons, the government is incorrect in arguing that there is "no reason" to hold this petition for the decision in Garcia Dimaya, and that the petition should instead be denied. U.S. Mem. Opp. 4.

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[1] The district court's "aggravated felony" determination renders the petitioners permanently inadmissible to the United States, see 8 U.S.C. § 1182(a)(9)(A)(i)-(ii), a collateral consequence that they have a concrete and ongoing interest in avoiding. See United States v. Gonzalez-Longoria, 831 F.3d 670, 674 n. 2 (5th Cir. 2016) (en banc).

[2] See, e.g., United States v. Oliveros Mejia, 589 Fed. Appx. 296, 297 (5th Cir. 2015) (unpublished); United States v. Jimenez-Laines, 342 Fed. Appx. 978, 979 (5th Cir. 2009) (unpublished); United States v. Gutierrez-Garrido, 75 Fed. Appx. 231, 231-32 (5th Cir. 2003) (unpublished).

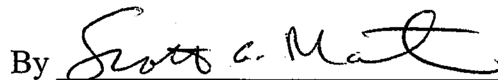
CONCLUSION

For the foregoing reasons, as well as those set forth in the original petition for writ of certiorari, the petition for writ of certiorari should be held pending this Court's decision in Sessions v. Garcia Dimaya, No. 15-1498, and then disposed of as appropriate in light of that decision. In the event that Garcia Dimaya does not resolve the question presented here, the petition for a writ of certiorari should be granted.

Date: July 27, 2017

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

By 
SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1669
Telephone: (713) 718-4600