No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL,
PETITIONER,
v.
JAMES GARCIA DIMAYA

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

BRIEF OF RETIRED ARTICLE III JUDGES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF RETIRED ARTICLE III JUDGES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Amici respectfully submit this brief to the Court in support of the respondent, Mr. James Garcia Dimaya.[1]

INTEREST OF AMICI CURIAE

Amici are retired Article III judges:

- The Honorable Rosemary Barkett, United States Circuit Judge for the Eleventh Circuit Court of Appeals from 1994 to 2013

[1] All parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

- The Honorable David Coar, United States District Judge for the Northern District of Illinois from 1994 to 2010
- The Honorable William Royal Furgeson Jr., United States District Judge for the Western District of Texas from 1994 to 2008, and United States District Judge for the Northern District of Texas from 2008 to 2013
- The Honorable Nancy Gertner, United States District Judge for the District of Massachusetts from 1994 to 2011
- The Honorable David Hagen, United States District Judge for the District of Nevada from 1993 to 2005
- The Honorable John Martin, United States District Judge for the Southern District of New York from 1990 to 2003
- The Honorable Shira A. Scheindlin, United States District Judge for the Southern District of New York from 1994 to 2016

Though amici are of different backgrounds and judicial philosophies, they are of one mind that a cornerstone of the federal judicial system is the principle that federal criminal statutes should be applied predictably and consistently across factually similar cases and to similarly situated defendants.

Amici's interest in this case arises from their concern that 18 U.S.C. 16(b), like the statutory provision that this Court struck down in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), creates an intolerably high risk of unpredictable and inconsistent results, both in sentencing and, as here, removal determinations.

This infirmity is inherent in the language of 18 U.S.C. 16(b) (Section 16's residual clause), and familiar principles of statutory construction cannot ameliorate it.

Amici respectfully submit that, as former and retired Article III judges, they can lend this Court a unique perspective on the question of whether Section 16's residual clause, including as incorporated into the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(F), complies with the requirements of the Due Process Clause of the Constitution of the United States.

INTRODUCTION AND SUMMARY

This case presents the question whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's (INA) provisions governing an alien's removal from the United States, is unconstitutionally vague. Section 16 of Title 18 provides the generic definition of a "crime of violence" for the federal criminal code. Subsection (b), the statute's "residual clause," defines a "crime of violence" to include "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."

The language of Section 16(b) directs federal judges to analyze whether a state criminal offense "by its nature" meets this definition. This Court has held that the statutory text calls for the court to hypothesize the risk that physical force will be used in the "ordinary case" of the offense, rather than to assess the risk presented by the actual offense conduct of the defendant. The statutory text provides judges with no more guidance than that.

In *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), this Court considered an analogous challenge to a substantially similar provision in the federal criminal code, the residual clause of the Armed Career Criminal Act (ACCA). The ACCA residual clause at issue in *Johnson* defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year [*i.e.*, a felony] * * * that * * * involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court concluded that the provision violated the Due Process Clause's "prohibition of vagueness in criminal statutes" because "the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557.

In the opinion below in this case, the Ninth Circuit extended *Johnson*'s holding to the similar language found in the definition of a "crime of violence" in Section 16's residual clause. Pet. App. 8a-9a. The panel majority reasoned that the two features of the ACCA residual clause that this Court held "conspired to make it unconstitutionally vague" applied with equal force to Section 16(b). Pet. App. 9a (quoting *Johnson*, 135 S. Ct. at 2557). The court concluded that, like the ACCA's residual clause, Section 16's residual clause contains no method for determining what the "ordinary case" looks like, or whether the "ordinary case" crosses the threshold of "substantial risk" of physical force. *Id.* at 9a-12a.

Amici share the concern of the court below that Section 16(b) forces federal judges to guess at how any particular state criminal offense is committed in the "ordinary case" and whether that "ordinary case" presents a "substantial risk" that physical force may be

used. Judges must resort to hypothetical abstractions, without either concrete legal elements or specific factual findings to guide them. This inherently indeterminate form of analysis—which more closely resembles the issuance of an advisory opinion than resolution of an actual case or controversy—defies the consistency and predictability that the Due Process Clause requires.

ARGUMENT

I. The Text Of Section 16(b) Requires Judges To Make Abstract Inquiries Into Enigmatic Features Of State Criminal Offenses

Section 16's residual clause defines a "crime of violence" to include any felony offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." This Court has held that the statute's plain language dictates that, in determining whether the defendant's offense of conviction satisfies this definition, courts must apply a so-called "ordinary case" approach.

Under the "ordinary case" approach, the question a court ultimately must answer is not whether the defendant's actual offense conduct carried a substantial risk of physical force, but whether the prototypical version of the offense of conviction presents such a risk. See *Johnson* v. *United States*, 135 S. Ct. 2551, 2557

(2015).[2] Evaluating the degree of risk of physical force that the "ordinary case" of a particular offense presents is the ultimate question that Section 16's residual clause always will present the judge. The ambiguity and uncertainty inherent in that evaluation is irreducible, regardless of how much additional guidance this Court offers with respect to the meaning of the statute's discrete terms. See *James* v. *United States*, 550 U.S. 192, 208-209 (2007) (indicating the equivalence of the "by its nature" language and the "ordinary case" approach), overruled on other grounds by *Johnson*, 135 S. Ct. 2551.

Echoing Justice Holmes's time-tested wisdom, this Court in *Johnson* remarked that "the life of the law is experience." 135 S. Ct. at 2560. Section 16's residual clause, however, forces federal judges to make enormously consequential statutory determinations that are neither based on actual, concrete facts presented by the case at hand *nor* within the judge's own direct personal experience. Many statutes require a court to make difficult judgment calls, and it is well-established that "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). But Section 16's residual clause does much more than that. It calls

[2] This Court first described the "ordinary case" approach in *James* v. *United States*, 550 U.S. 192, 208 (2007), overruled on other grounds by *Johnson*, 135 S. Ct. 2551. In *James*, the Court held that the ACCA's residual clause requires a court to determine "whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." 550 U.S. at 208 (emphasis added). The United States' brief (at 20) acknowledges that Section 16(b) likewise "requires a court to assess the risk posed by the ordinary case of a particular offense."

on federal judges to issue something akin to an advisory opinion about a peculiar aspect of a particular state's criminal law without the benefit of a deep—or even a shallow—well of relevant expertise upon which to draw.

Take James Dimaya's case, for example. Had Dimaya committed an offense that has as an essential element the use or threatened use of force, the question of whether Dimaya committed a "crime of violence" would not have been hypothetical, and it would have been easily resolved against Dimaya under Section 16(a). See 18 U.S.C. 16(a) (including as a "crime of violence" "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). Because Dimaya's offense of conviction *did not* include such an element, however, a board of federal administrative judges and, subsequently, a panel of Ninth Circuit judges were forced to answer the hypothetical question of whether violations of California Penal Code Section 459 "ordinarily" are committed in a manner that poses a "substantial risk" of physical force.

It is exceedingly unlikely that any of the administrative or Ninth Circuit judges hearing Dimaya's case had any significant experience—either judicial or otherwise—with violations of California Penal Code Section 459 that could serve as their guide in answering this question. To paraphrase Judge Kozinski's frustrations with Section 16's residual clause, how were the judges in Dimaya's case "supposed to figure out" whether violations of California Penal Code Section 459 ordinarily involve the substantial risk of the use of force: "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"

United States v. *Mayer*, 560 F.3d 948, 952 (9th Cir.) (Kozinski, C.J., dissenting from denial of rehearing en banc), cert. denied, 558 U.S. 860 (2009).

The common denominator of each of the modes of analysis described above is that they call on the judge not to assess a definite set of facts actually before the court, but rather to hypothesize what the average or prototypical version of the defendant's offense of conviction looks like. This is dramatically different from what Article III judges typically are expected to do and are good at, which is to apply federal statutes to concrete facts that are actually before the court. Indeed, as the First Circuit has put it, the inquiry required in applying Section 16's residual clause "seems a better fit for Congress or an administrative agency." *United States* v. *Fish*, 758 F.3d 1, 18 (2014).

II. The Indeterminacy Of The Analysis Called For By Section 16's Residual Clause Prevents The Consistent And Predictable Application Of The Statute That The Rule Of Law Requires

Implicit in Judge Kozinski's frustration with the indeterminacy of Section 16's residual clause is the concern of inconsistent application of the statute. Under the "ordinary case" approach, two federal judges sitting in different circuits might reach diametrically opposed, yet equally defensible, conclusions under Section 16(b) with respect to identical real offense conduct. And this could occur not because the judges disagree on the meaning of the provision's discrete terms or the basic analytical approach that the provision requires, but rather because the judges, relying on little more than imagination, simply have different conceptions of

what constitutes the "ordinary" version of the state law statutory offense of which the defendant was convicted.

The intractable constitutional problem with Section 16's residual clause, then, is not that a federal judge is incapable of reaching a logically defensible determination of whether a given offense "ordinarily" presents a substantial risk of the use of physical force. Rather, the problem is that Section 16(b), like the provision this Court struck down in *Johnson* v. *United States*, "offers no reliable way [for a judge] to choose between" competing conclusions. 135 S. Ct. 2551, 2558 (2015). As this Court recognized in *Johnson*, a statute that forces a judge to resort to "guesswork and intuition" offends due process where the consequences of the judge's decision are so severe, *id.* at 2559, including substantially enhanced mandatory minima and prison sentences in criminal cases and potential deportation in immigration cases. As the Tenth Circuit has stated, "It 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." *Golicov* v. *Lynch*, 837 F.3d 1065, 1070 (2016) (quoting *Johnson*, 135 S. Ct. at 2558, and holding 18 U.S.C. 16(b) void for vagueness).

Unsurprisingly, application of Section 16's residual clause has not resulted in the level of predictability, consistency, and uniformity that is so imperative to the rule of law. Take, for example, treatment of state laws criminalizing the unauthorized use of a motor vehicle. The Fifth and Tenth Circuits, hypothesizing about whether the unauthorized use of a vehicle involves a substantial risk of physical harm in the ordinary case, reached opposite conclusions. Compare *United States* v. *Sanchez-Garcia*, 501 F.3d 1208, 1213 (10th Cir. 2007), with *United States* v. *Galvan-Rodriguez*, 169 F.3d 217,

219-220 (5th Cir.) (per curiam), cert. denied, 528 U.S. 837 (1999). These courts differed not because one panel was wrong and the other was right. That the Fifth Circuit ten years later reversed course on the motor vehicle offense, see *United States* v. *Armendariz-Moreno*, 571 F.3d 490 (2009) (per curiam), is not proof of Section 16(b)'s constitutionality, but rather reinforces that its "shapeless" text virtually guarantees an irreducible level of "unpredictability and arbitrariness" that the Due Process Clause forbids, *Johnson*, 135 S. Ct. at 2558, 2560.

Similar confusion attends the treatment of laws criminalizing statutory rape. Some courts have deemed statutory rape convictions categorical crimes of violence. In the Second Circuit, for example, the offense is categorically a crime of violence under Section 16(b). See *Chery* v. *Ashcroft*, 347 F.3d 404, 408-409 (2003). So too in the Eighth Circuit and Fifth Circuit. See *United States* v. *Alas-Castro*, 184 F.3d 812, 813 (8th Cir. 1999) (per curiam); *United States* v. *Velazquez-Overa*, 100 F.3d 418, 422-423 (5th Cir. 1996), cert. denied, 520 U.S. 1133 (1997). The Ninth Circuit and Seventh Circuit, however, have reached the opposite conclusion. See *Valencia* v. *Gonzales*, 439 F.3d 1046, 1049, 1053 (9th Cir. 2006); *Xiong* v. *INS*, 173 F.3d 601, 605-607 (7th Cir. 1999). Once again, the critical point is not that one conclusion is right and the other is wrong. Rather, the critical point is that a criminal statute that carries such profound consequences should not place a federal judge in the position of having to hypothesize whether the "ordinary" version of a state law crime presents the requisite risk of physical force, when the judge's only guideposts to answering the question are "other judicial decisions that can lay no better claim to making

sense of the indeterminacy of the analysis in a principled way." *Baptiste* v. *Attorney General*, 841 F.3d 601, 620 (3d Cir. 2016) (holding 18 U.S.C. 16(b) void for vagueness).

The Solicitor General may be correct in asserting that Section 16(b), as applied to particular types of offenses, has engendered fewer circuit splits than the ACCA's residual clause did in the years before *Johnson*. See U.S. Br. 46 (arguing that Section 16(b) has "not produced pervasive conflicts" in the lower courts). But a statute's constitutionality does not turn upon whether each subsequent court to address a particular question follows the answer supplied by the first court to address it. Instead, the question is whether the statute's language supplies the necessary guidance to the court that is forced to resolve the question *res nova*. Section 16(b) irreparably fails in this regard. As one district judge recently commented in attempting to ascertain whether burglary under Nevada state law was a crime of violence under Section 16(b), "the analysis that the Government asks the Court to perform in the instant case is impossible to do in a way that comports with due process. * * * [T]o make that decision as a matter of first impression, the Court would have to use an unconstitutionally vague standard." *United States* v. *Cortez-Ruiz*, No. 15-CR-00114-LHK, 2016 WL 7034057, at *10 (N.D. Cal. Dec. 2, 2016) (Koh, J.) (dismissing indictment charging illegal reentry under 8 U.S.C. 1326).

As another court has noted in an analogous context, "[i]n a sensible world, Congress and/or the Sentencing Commission would have made a list of state and federal laws deemed to be crimes of violence that warranted the desired penalties and sentencing enhancements."

United States v. *Tavares*, --- F.3d ---, No. 14-2319, 2016 WL 7011523, at *15 (1st Cir. Dec. 1, 2016) (applying similar residual clause of U.S.S.G. § 4B1.2(a)(2)). Because they have not, "[t]he result is a Rube Goldberg jurisprudence of abstractions piled on top of one another in a manner that renders doubtful anyone's confidence in predicting what will pop out at the end." *Ibid.*

This Court cannot cure the infirmities of Section 16's residual clause by resolving whatever circuit splits presently exist or may arise with respect to particular offenses. Nor can this Court provide a cure by promulgating its own definitive list of state offenses that qualify as crimes of violence under Section 16(b). This Court's approach to the honest services fraud statute in *Skilling* v. *United States*, 561 U.S. 358 (2010), is instructive. In *Skilling*, this Court recognized that the plain language of the honest services statute lacked the precision necessary to punish, consistent with the Due Process Clause, a fiduciary's undisclosed self-dealing. *Id.* at 411 n.44. The Court was able to save the honest services statute from invalidation only because, using accepted tools of statutory construction, the Court was able to conclude that "there is no doubt that Congress intended [the statute] to reach *at least* bribes and kickbacks." *Id.* at 408-409. With respect to Section 16's residual clause, by contrast, neither the statute's text nor its enactment history clearly indicates which criminal offenses Congress had in mind when it drafted the provision. Thus, even assuming that there may be some state law offenses that (though not satisfying Section 16(a)'s definition of "crime of violence") virtually every federal judge would conclude fit within Section 16(b), this does not point the way to a limiting construction that could salvage the provision. Instead, the provision

suffers from a more fundamental problem: the application of a federal criminal statute should not depend upon the outcome of a judge's abstract hypothesis of what the prototypical version of the defendant's offense of conviction looks like.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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