Casenote

Sessions v. Dimaya: An Unsurprising Majority Reaffirms the Vagueness Doctrine*

I. INTRODUCTION

The immigration debate and the endeavor for "law and order" pervade current American politics.[1] Recently proposed federal legislation addressing the grounds for deportation focuses extensively on criminal law and the definition of criminal offenses.[2] Statutes defining criminal offenses and the punishment for violating them should be formulated as to provide fair notice to the ordinary person and avoid the invitation of arbitrary and discriminatory enforcement.[3] Courts will decline to uphold vague[4] laws, which provide no fair notice or invite arbitrary

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1. *See, e.g.*, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (travel ban); Joe Tacopino, *Trump Calls for Immigration Reform in Wake of Mollie Tibbets Murder*, N.Y. POST (Aug. 22, 2018), https://nypost.com/2018/08/22/trump-calls-for-immigration-reform-in-wake-of-mollie-tibbetts-murder/ (reporting that President Trump used the death of an Iowa college student as justification for the separation of migrant families);
Stave Peoples, *Watch: Donald Trump Launches His 2016 Presidential Campaign*, PBS NEWSHOUR (June 16, 2015), https://www.pbs.org/newshour/politics/donald-trump (depicting presidential candidate Donald Trump labeling non-European immigrants as criminals, rapists, and drug traffickers and promising for the building of a southern border wall to be paid for by Mexico).

2. *See* H.R. 6691, 115th Cong. (2018).

3. Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018); Johnson v. United States, 135 S. Ct. 2551, 2556 (2015).

4. A term or phrase is vague if it conveys an "[u]ncertain breadth of meaning." *Vagueness*, BLACK'S LAW DICTIONARY (10th ed. 2014). The term *vagueness* should not be employed interchangeably with the term *ambiguity*. *Id.* Generally, *ambiguity* refers to a

enforcement.[5] Consequently, Congress should diligently articulate legislation to circumvent judicial nullification.[6]

Sessions v. Dimaya,[7] decided on April 17, 2018, by the Supreme Court of the United States, illustrates the Court striking down a law because of impermissible vagueness.[8] In *Dimaya*, the Court ruled that 18 U.S.C. § 16(b),[9] which is the residual clause defining "crime of violence," violates the Due Process Clause[10] and is void for vagueness.[11] Justices Breyer, Ginsburg, and Sotomayor joined in whole the plurality opinion of Justice Kagan.[12] The recently elevated Justice Gorsuch concurred in part with the plurality opinion and concurred in the judgment.[13] Justice Gorsuch acted as the deciding vote to create a 5–4 decision.[14] Many may find it surprising a justice nominated by President Donald Trump would join an opinion with Justices Kagan, Breyer, Ginsburg, and Sotomayor, which

term having multiple references. *Id.* For instance, the phrase *my cousin David* is ambiguous when the declarant has two cousins named David. *Id. Vagueness*, in contrast, denotes "unclarity resulting from abstract expression;" for example, "within a reasonable time." *Id.*

5. *Dimaya*, 138 S. Ct. at 1212; *Johnson*, 135 S. Ct. at 2256.

6. *Dimaya*, 138 S. Ct. at 1212; *Johnson*, 135 S. Ct. at 2256.

7. 138 S. Ct. 1204 (2018).

8. *Id.* at 1216.

9. 18 U.S.C. § 16(b) (1994), *invalidated by Dimaya*, 138 S. Ct. 1204.

10. U.S. CONST. amend. V.

11. *Dimaya*, 138 S. Ct. at 1216.

12. *Id.* at 1210.

13. *Id.* at 1223 (Gorsuch, J., concurring). The plurality opinion is organized into five parts and a few subparts. Part I introduces § 16, the surrounding context of immigration law, and the Court's decision in *Johnson*. *Id.* at 1210 (plurality opinion). Part II covers the vagueness doctrine and its application to deportation cases. *Id.* at 1212. Part III analyzes how *Dimaya* is a straightforward application of the Court's reasoning in *Johnson*. *Id.* at 1213. Part IV is divided into subpart (A) and subpart (B). Subpart (A) pertains to the use of the categorical approach with respect to § 16(b), and subpart (B) addresses counterarguments made by the Government and the dissent. *Id.* at 1216–23. Finally, Part V states the conclusion and holding. *See id.* at 1223. Justice Gorsuch concurred in the judgment but wrote a separate concurring opinion with respect to Parts II and IV(B). *See id.* at 1223–34 (Gorsuch, J., concurring). Since his elevation, Justice Gorsuch has become known for writing lengthy concurring opinions. Andrew Hamm, *Justice Gorsuch Writing Separately: Page Length More than Opinion Numbers (so Far)*, SCOTUSBLOG (June 1, 2018), http://www.scotusblog.com/2018/06/justice-gorsuch-writing-separately-page-length-more-than-opinion-numbers-so-far/; *see also* Daniel Epps, *SCOTUS Term: Where are the Opinions*, PRAWFSBLAWG (May 29, 2018), http://prawfsblawg.blogs.com/prawfsblawg/2018/05/scotus-term-where-are-the-opinions.html#more; Joan Biskupic, *Supreme Court Still Feeling the Impact of Antonin Scalia's Death*, CNNPOLITICS (Feb. 13, 2018), https://www.cnn.com/2018/02/13/politics/scalia-gorsuch-supreme-court/index.html.

14. Erwin Chemerinsky, *What* Sessions v. Dimaya *Means for Immigration Law*, ABA J. (May 3, 2018), http://www.abajournal.com/news/article/why_sessions_v._dimaya_matters.

had the effect of vacating the deportation of a noncitizen who committed criminal offenses in the U.S.[15] An in-depth analysis of the opinion will show, however, why Justice Gorsuch's vote is unsurprising and a reflection of Justice Scalia's legacy.[16]

II. FACTUAL BACKGROUND

In 1992, James Garcia Dimaya, age thirteen, moved from the Philippines to the United States where he became a legally permanent resident.[17] Dimaya attended high school in California, received a G.E.D., and thereafter attended a community college. He also worked as a cashier and store manager. In both 2007 and 2009, Dimaya was convicted of first-degree burglary in violation of California law.[18] For each conviction, Dimaya received a sentence of two years imprisonment.[19]

The Government commenced removal proceedings against Dimaya in 2010 after his second burglary conviction. The Government alleged Dimaya was deportable because, according to the Government, each of Dimaya's burglary convictions constituted a crime of violence under 18 U.S.C. § 16(b).[20] The immigration judge determined that burglary did constitute a crime of violence and approved for the Government to deport

15. Not only may Justice Gorsuch's vote be surprising for some, but some on the far right consider Gorsuch's vote to be "dangerous." *See, e.g.*, Daniel Horowitz, *Gorsuch's Dangerous Immigration Ruling Claims a Victim*, CONSERVATIVE REV. (Aug. 7, 2018), https://www.conservativereview.com/news/gorsuchs-dangerous-immigration-ruling-claims-a-victim/.

16. Chemerinsky, *supra* note 14.

17. *Legally permanent resident* denotes a noncitizen "lawfully admitted for permanent residence into the United States." 31 C.F.R. § 515.335 (1996).

18. *See* CAL. PENAL CODE §§ 459, 460(a) (Deering 1991).

19. Brief for Respondent at 5, *Dimaya*, 138 S. Ct. 1204 (No. 15-1498).

20. *Id.* at 6; *see* 8 U.S.C. § 1227(a)(2)(A)(iii) (2008) (making deportable noncitizens convicted of an aggravated felony); 8 U.S.C. § 1101(a)(43)(F) (2014) (stating that a crime of violence is an aggravated felony for which a noncitizen is deportable). Along with asserting that Dimaya should be deported because he committed a crime of violence, the Government argued that Dimaya may also be deported because (1) he was convicted of two crimes involving moral turpitude and (2) he committed burglary in the generic sense. Brief for Respondent, *supra* note 19, at 6; *see* 8 U.S.C. § 1227(a)(2)(A)(ii) (2008) (making deportable noncitizens convicted of two crimes involving moral turpitude); 8 U.S.C. § 1101(a)(43)(G) (2014) (stating that burglary carrying a prison sentence of one year or more is an aggravated felony for which a noncitizen is deportable). The immigration judge found that Dimaya's convictions were comprised of crimes involving moral turpitude as well as burglary in the generic sense. The Board of Immigration Appeals (BIA) disagreed with the immigration judge's finding that California's definition of burglary encompasses the generic definition of burglary. Since the BIA nevertheless found that Dimaya committed a crime of violence, it did not address whether Dimaya's convictions involved crimes of moral turpitude. Brief for Respondent, *supra* note 19, at 6–7.

Dimaya. The judge reasoned that residential burglary under California law, as charged in Dimaya's case, involves a risk of surprise to homeowners and is thus violent by its nature. The judge additionally relied on precedent from the United States Court of Appeals for the Ninth Circuit holding that burglary under California law constitutes a crime of violence.[21] The Board of Immigration Appeals (BIA) upheld Dimaya's deportation and agreed with the immigration judge that Dimaya's 2007 conviction constituted a crime of violence under Ninth Circuit precedent.[22]

The Ninth Circuit granted review of Dimaya's deportation case. Following the Supreme Court's decision in *Johnson v. United States*,[23] which held that a similarly worded statute was unconstitutionally vague, the Ninth Circuit ruled that 18 U.S.C. § 16(b)'s definition of crime of violence violated the void-for-vagueness doctrine.[24] The court emphasized that the vagueness doctrine should apply, not only to criminal cases, but also to deportation cases because of the grave nature of removal.[25] After the Ninth Circuit's decision, a 5–1 split among the circuits developed where five circuits held that the definition of crime of violence was unconstitutionally vague.[26] The Supreme Court thereafter granted the Government's petition for certiorari to decide whether § 16(b)'s definition of crime of violence, as incorporated within the Immigration and Nationality Act (INA),[27] violates the void-for-vagueness doctrine.[28]

III. LEGAL BACKGROUND

A. Crime of Violence and Deportable Offenses

The INA virtually guarantees that a noncitizen convicted of an aggravated felony will be deported.[29] Section 1101 of Title Eight of the United States Code[30] defines many offenses as aggravated felonies,

21. *See* United States v. Becker, 919 F.2d 568, 573 (9th Cir. 1990) (holding that first-degree burglary as defined by California law constitutes a crime of violence).

22. Brief for Respondent, *supra* note 19, at 6–7.

23. 135 S. Ct. 2551 (2015).

24. Dimaya v. Lynch, 803 F.3d 1110, 1111 (9th Cir. 2015), *aff'd*, *Dimaya*, 138 S. Ct. 1204.

25. *Id.* at 1113.

26. Brief for Respondent, *supra* note 19, at 7–8.

27. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 68 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

28. *Dimaya*, 138 S. Ct. at 1210.

29. *Id.* at 1210–11; *see* 8 U.S.C. § 1227(a)(2)(A)(iii).

30. 8 U.S.C. § 1101 (2014).

including but not limited to, murder, rape, sexual abuse of a minor, the trafficking of firearms or controlled substances, and crimes of violence.[31] Noncitizens convicted of aggravated felonies who are ordered to be deported may not have their deportation cancelled by the Attorney General.[32] Section 16 of 18 U.S.C.[33] provides the controlling definition of crime of violence:

> 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.[34]

Courts refer to subsection (a) as the "elements clause" and subsection (b) as the "residual clause."[35] The Court in *Dimaya* addressed the constitutionality of the residual clause of § 16.[36]

Fourteen years before deciding *Dimaya*, the Court had a chance in *Leocal v. Ashcroft*[37] to review a deportation order arising under § 16's definition of crime of violence.[38] The petitioner in *Leocal* was convicted of driving under the influence (DUI) and causing serious bodily injury in violation of Florida law. The Government deported the petitioner after an immigration judge, relying on precedent from the United States Court of Appeals for the Eleventh Circuit, determined that DUI under Florida law is a crime of violence.[39] On review, the Eleventh Circuit agreed.[40] The Supreme Court, nonetheless, granted review and concluded that DUI under Florida law is not a crime of violence.[41]

Two aspects of *Leocal* are important. First, the Court applied the categorical approach in determining whether the defendant was convicted of a crime of violence.[42] When applying the categorical approach, one does not consider the underlying facts of the case but the

31. *Id.*
32. 8 U.S.C. § 1229(b)(a)(3) (2008).
33. 18 U.S.C. § 16 (1994).
34. *Id.*
35. *Dimaya*, 138 S. Ct. at 1211.
36. *Id.*
37. 543 U.S. 1 (2004).
38. *Id.* at 4.
39. *See* Duran v. United States, 196 F.3d 1352, 1354 (11th Cir. 1999) (ruling that DUI under Florida law is a crime of violence).
40. *Leocal*, 543 U.S. at 3–4.
41. *Id.* at 4.
42. *See id.* at 11.

idealized conduct involved in an everyday instance of that crime.[43] Courts apply the categorical approach to determine the generic definition of a criminal offense and to decide whether a conviction under a specific state statute meets that generic definition.[44] For instance, if an individual is convicted of burglary as defined by a state's statute, the courts will then decide whether that individual has committed burglary in the generic sense.[45]

Considering whether the ordinary case of DUI involves a substantial risk that physical force will be used, the Court determined in *Leocal* that DUI is not a crime of violence, stating that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury."[46] Accordingly, the Court held that the categorical approach, in contrast to a fact-based approach, should be used for § 16(b) determinations.[47]

Secondly, the Court in *Leocal* avoided considering the constitutionality of the residual clause even though the Court subsequently contested the clause's constitutionality in *Dimaya*.[48] Since the Court did not address whether § 16(b) passed constitutional muster, the Government argued in *Dimaya* that *Leocal* established precedent that the residual clause comports with due process and has been applied and enforced for decades.[49] In *Dimaya*, the Court did not answer the Government's argument,[50] but perhaps the Court in *Leocal* applied the "avoidance doctrine," choosing not to determine a statute's constitutionality if the Court can avoid doing so.[51]

43. *Id.*

44. *See, e.g.*, Moncrieffe v. Holder, 569 U.S. 184, 190 (2013); Taylor v. United States, 495 U.S. 575, 598 (1990).

45. Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to* Duenes-Alvearez, 18 GEO. MASON L. REV. 625, 630 (2011).

46. *Leocal*, 543 U.S. at 11.

47. *See id.*

48. *See id.*

49. Brief for Petitioner at 11, *Dimaya*, 138 S. Ct. 1204 (No. 15-1498).

50. *See Dimaya*, 138 S. Ct. 1204.

51. *See Leocal*, 543 U.S. 1. "[W]e refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). In *Leocal*, the Court resolved the dispute in the petitioner's favor without addressing the constitutionality of § 16(b). 543 U.S. at 4. Some may argue that the Court in *Leocal* applied the avoidance doctrine. This seems counterintuitive, since the Court applied the statute in *Leocal*; surely the Court would refrain from applying a statute without considering the statute's constitutionality.

B. The Void-for-Vagueness Doctrine

Brief History of the Vagueness Doctrine

In the early development of the vagueness doctrine, the Supreme Court did not apply the doctrine as a constitutional protection of due process.[52] Relying instead on the general principles of separation of powers and fair notice, with no explicit reference to the Constitution, the Court considered the indefiniteness of several criminal statutes and economic regulations, striking some down.[53] As early as 1875, in *United States v. Reese*,[54] the Court struck down a law protecting against voting infringement for its impermissible vagueness.[55] The Court stated the following:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would . . . substitute the judicial for the legislative department of the government.[56]

In addition to reaffirming the separation of powers principle, the Court declared in *Reese* that criminal statutes should give the public fair notice of what standard of conduct is being established and prohibited.[57] The Court stated that "[i]f the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."[58] Soon after its decision in *Reese*, the Court stressed that individuals should expect some degree of vagueness in any criminal statute, even those for which the punishment is death.[59] The Court's decision in *Reese*, nonetheless,

52. Wayne R. LaFave, *Unconstitutional Uncertainty—The Void-for-Vagueness Doctrine*, *in* SUBSTANTIVE CRIMINAL LAW § 2.3 (3d ed. 2013); Christina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 263–64 (2010).

53. *See, e.g.*, Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221–24 (1914); United States v. Brewer, 139 U.S. 278, 288 (1891) ("Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."); United States v. Reese, 92 U.S. 214, 219–20 (1875).

54. 92 U.S. 214 (1875).

55. *Id.* at 220–21.

56. *Id.* at 221.

57. *Id.* at 220.

58. *Id.*

59. Nash v. United States, 229 U.S. 373, 377 (1913) ("[T]he law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree. If his

marked a precursor to the modern vagueness doctrine implicated by the Due Process Clause.[60]

Under the modern approach, the vagueness doctrine, implicit in the Due Process Clause, guarantees that the Government will not deprive one of life, liberty, or property under the authority of a statute that provides no fair notice or is so indefinite as to invite arbitrary enforcement.[61] The Court did not recognize the vagueness doctrine as a constitutional protection implicit in the Fifth Amendment[62] until its decision in *United States v. L. Cohen Grocery Co.*,[63] which was decided in 1921.[64] The established constitutional prohibition against vagueness remains, as Justice Scalia wrote in *Johnson v. United States*,[65] "a well-recognized requirement" to this day.[66]

Application to Deportation Cases

Early applications of the vagueness doctrine might suggest that courts apply it only to penal statutes; however, the Supreme Court has also extended the doctrine to deportation and removal cases.[67] In *Jordan v. De George*,[68] decided in 1951, the Court considered the question of whether tax fraud related to alcoholic beverages is a crime of moral turpitude.[69] The Court entertained, *sua sponte*, the question whether "crime of moral turpitude" is unconstitutionally vague.[70] To consider the statute's constitutionality, the Court first decided the threshold question: whether the vagueness doctrine may apply to a civil statute apprising a noncitizen of the consequences of a conviction.[71] The Court held that the

judgment is wrong, not only may he incur a fine or a short imprisonment . . . he may incur the penalty of death."). The degree of vagueness tolerable by the Court in *Nash*, prior to the connection between the vagueness doctrine and the Fifth Amendment, differs from that tolerable by the Court today.

60. Lockwood, *supra* note 52, at 268.

61. *Johnson*, 135 S. Ct. at 2556; *see also* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

62. U.S. CONST. amend. V.

63. 255 U.S. 81 (1921).

64. *Id.* at 87.

65. 135 S. Ct. 2551 (2015).

66. *Id.* at 2557; *see also* Smith v. Goguen, 415 U.S. 566, 572–73 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); United States v. Harriss, 347 U.S. 612, 617 (1954); Connally v. Gen. Const. Co., 269 U.S. 385, 393 (1926); A.B. Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239 (1925).

67. Jordan v. De George, 341 U.S. 223, 231 (1951).

68. 341 U.S. 223 (1951).

69. *Id.* at 223–24.

70. *Id.* at 229.

71. *Id.* at 231.

vagueness doctrine applies to civil statutes notifying noncitizens of the ramifications of a conviction because deportation is a serious and grave penalty akin to banishment or exile.[72] Despite considering the statute's constitutionality, the Court still concluded that "crime of moral turpitude" sufficiently defines prohibited conduct because courts have consistently applied the phrase to encompass tax fraud.[73] The Court in *De George*, thus, extended the vagueness doctrine to civil statutes notifying noncitizens of the consequences of convictions, and the Court indicated that the vagueness of a statute may depend partly on whether courts consistently apply the statute.[74]

Recent Decision in *Johnson v. United States*[75]

The Supreme Court's application of the vagueness doctrine in *Johnson* to the Armed Criminal Career Act's (ACCA)[76] residual definition of "violent felony" primarily determined the outcome in *Dimaya*.[77] The ACCA defines violent felony as any felony involving "conduct that presents a serious potential risk of physical injury to another."[78] In *Johnson*, the Court held that the residual clause of the ACCA is unconstitutionally vague and violative of due process.[79] Writing for the majority, Justice Scalia stated, "Two features of the residual clause conspire to make it unconstitutionally vague."[80] The first factor required courts to decide what kind of conduct the crime involves in "the ordinary case."[81] The second factor related to the threshold at which a crime's degree of risk would make it a violent felony.[82] As in *L. Cohen* and *De George*, the Court emphasized the statute's uncertainty by referring to splits among the circuits, which led the Court to conclude that the nine-year enterprise of trying to interpret the meaning of violent felony failed miserably.[83]

72. *Id.*

73. *Id.* at 232.

74. *Id.* at 231–32.

75. 135 S. Ct. 2551 (2015).

76. Armed Criminal Career Act of 1984, 98 Pub. L. No. 473, § 1801, 98 Stat. 2185.

77. *Dimaya*, 138 S. Ct. at 1213.

78. 18 U.S.C. § 924(e)(2)(B)(ii) (2006). The statute enhances punishment for the offense of possessing a firearm as a felon whenever the felon has been convicted of at least three prior violent felonies. *Id.*

79. *Johnson*, 135 S. Ct. at 2557.

80. *Id.*

81. *Id.*

82. *Id.* at 2558.

83. *Id.* at 2559–60.

According to the Court in *Johnson*, the continued failed effort to articulate a standard of prohibited conduct raises evidence for declaring a statute impermissibly vague.[84] From 2007 to 2015, the Court reviewed four cases regarding whether a crime constituted a violent felony under the ACCA.[85] In each case, the Court invoked a different test for determining whether a crime involved a serious potential risk of physical injury, resulting in unpredictability within the courts.[86] Furthermore, deciding whether physical injury would ensue and the risk of the activity to cause injury required speculation by judges.[87] For example, the defendant in *Johnson* argued that his prior conviction for unlawful possession of a short-barreled shotgun was not a violent felony.[88] The Court was uncertain whether it should consider the risks of an accidental discharge or the possibility of one using a short-barreled shotgun in a future crime.[89] Identifying the two factors making the ACCA's residual definition of "violent felony" vague along with indicating the unpredictability and speculation within the courts, the Court struck down the definition of "violent felony" as unconstitutionally vague.[90]

IV. THE COURT'S RATIONALE

In *Sessions v. Dimaya*,[91] the Supreme Court of the United States held that 18 U.S.C. § 16(b) violates the void-for-vagueness doctrine.[92] In so holding, the Court determined that § 16(b) provides no fair warning to the ordinary person of what a violent crime is, that courts arbitrarily enforce § 16(b), and that applications of the Statute by the judiciary violates the separation of powers principle.[93]

Reaffirming its holding in *Jordan v. De George*,[94] the Court ruled that the strictest vagueness standard, which is applied to criminal statutes, applies in removal cases.[95] The Government contended that a greater level of tolerance should be permitted in removal cases, since removal cases are civil matters. Thus, the Government claimed that a statute may

84. *Id.* at 2558.
85. *Id.* at 2558–59.
86. *Id.*
87. *Id.* at 2557–58.
88. *Id.* at 2559.
89. *Id.*
90. *Id.* at 2563.
91. 138 S. Ct. 1204 (2018).
92. *Id.* at 1216.
93. *Id.*
94. 341 U.S. 253 (1951).
95. *Dimaya*, 138 S. Ct. at 1213.

be impermissibly vague to be applied in a criminal case, but the same statute may be enforced in a civil matter, such as a deportation.[96]

The Court rejected the Government's argument that more vagueness is tolerable in deportation cases.[97] The Court stated that deportations are of a "grave nature" and are "a drastic measure, often amounting to lifelong 'banishment or exile.'"[98] The Court further stressed that an order forcing a noncitizen to be removed from the country may be more concerning for that individual than imprisonment.[99] Thus, the level of vagueness tolerable for a statute is to be determined, not by whether the case or statute is civil or criminal, but by the severity and quality of the resulting harm.[100]

Concurring with the plurality opinion, Justice Gorsuch went further and stated that the vagueness doctrine should apply to both civil cases and criminal cases.[101] Gorsuch argued that some precedent established that the vagueness doctrine applies to other civil cases besides deportation cases, such as vague statutes abridging First Amendment rights.[102] He additionally argued that violations of civil statutes also have serious consequences, and therefore, the vagueness doctrine should apply.[103] As examples, Gorsuch referenced punitive fines, civil commitment statutes, home forfeiture provisions, and the deprivation of professional licenses and livelihoods.[104] Notwithstanding Justice Gorsuch's concurrence, the Court within the plurality opinion relied on clear precedent establishing that the vagueness doctrine applies to deportation cases; since *Dimaya* was a deportation case, the Court did not expound on whether the vagueness doctrine should be expanded to encompass other types of civil cases.[105] Thus, Justice Kagan, writing for the plurality, took a narrower and more restrained approach than Justice Gorsuch.

After ruling that the vagueness doctrine applies to deportation cases, the Court then determined that the same two features making the statute in *Johnson* hopelessly indeterminate also made the definition of

96. *Id.* at 1212–13.
97. *Id.* at 1213.
98. *Id.* (citations omitted).
99. *Id.*
100. *See id.* at 1212–13.
101. *Id.* at 1231 (Gorsuch, J., concurring).
102. *Id.* at 1228–29.
103. *Id.* at 1231.
104. *Id.*
105. *Id.* at 1213 (plurality opinion).

"crime of violence" in § 16(b) impermissibly vague.[106] The first feature identified related to the difficulty in assessing the risk and danger of a crime whenever one must speculate about how that crime typically occurs in the "ordinary case."[107] Remarking on the challenging inquiry about what constitutes an ordinary case of a crime, the Court stated, "But how . . . should a court figure that out? By using a 'statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'"[108]

The crime of attempted burglary, according to the Court, exemplifies the difficulty in determining what conduct typically occurs in the everyday instance of a crime.[109] Some judges imagined that the ordinary case involves a police officer or security guard responding to the crime with risk of violence resulting. Other judges hypothesized that someone will call out to the potential burglar and the prospective burglar will just flee the scene.[110] Absent some expert evidence or statistical analysis, courts can only speculate what the ordinary occurrence of a crime involves.[111]

The second aspect of the statute in *Johnson* identified by the Court concerned the indefinite measurement of what makes a crime violent.[112] The Court acknowledged that statutes incorporating terms such as "serious potential risk" (as in the ACCA) or "substantive risk" (as in § 16(b)) to define a standard of conduct do not inherently violate the void-for-vagueness doctrine.[113] The Court asserted, however, that the combination of measuring an imprecise standard of risk and applying such an assessment to what one imagines to be the ordinary case of a crime creates an intolerable degree of uncertainty repugnant to due process.[114]

Following the Court's recapitulation of the two features present in the statute in *Johnson*, the Court concluded that § 16(b) contains the same features, thus making the section impermissibly vague.[115] The Court ruled that § 16(b), analogous to the statute in *Johnson*, entails that judges determine the conduct involved in the ordinary occurrence of a

106. *Id.*
107. *Id.*
108. *Id.* at 1214.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 1215.

crime.[116] Disagreeing with the dissenting opinion by Justice Thomas,[117] the plurality opinion described four reasons why the categorical approach applies to the residual clause's definition of "crime of violence."[118]

The Court first indicated that the Government expressly conceded that § 16(b) implicates the categorical approach.[119] The dissenting opinion in *Johnson*, which favored courts to consider the actual underlying facts of a defendant's conduct, clearly outlined an argument for the Government to have made in *Dimaya*, but the Government still chose not to take this approach.[120] Despite the Government's declination to argue for a fact-based approach, the Court provided additional reasons why § 16(b) demands the categorical approach.[121]

The Court also inferred that a fact-based approach would infringe on other constitutional rights.[122] The requirement that a judge reviewing the record of a trial to determine whether the underlying facts involved a crime of violence may violate a defendant's right to a jury trial. The judge would in effect be substituting his or her role for a role that is only within the province of the jury. Responding to the dissent, the Court stated that, although the right to a jury trial does not apply in a removal case, § 16(b) is a criminal statute and must be interpreted consistently regardless of the kind of case.[123]

116. *Id.*

117. Justice Thomas contended that, in order to read § 16(b) as constitutional, the Court should reject the categorical approach in favor of a fact-based approach. *Id.* at 1242 (Thomas, J., dissenting). Justice Thomas provided two reasons: (1) the text of § 16(b) demands a fact-based approach, and (2) the purpose for which the Court adopted the categorical approach is irrelevant in *Dimaya*. *Id.* at 1254–58. With respect to the textual approach, Thomas argued that the residual clause's use of the word "involves" implies a fact-based approach. *Id.* at 1255–56. Thomas indicated that courts apply a fact-based approach to other statutes using the word "involves." *Id.* With respect to the purpose of the categorical approach, Justice Thomas argued that it was adopted to avoid Sixth Amendment issues of persons not being guaranteed a right to a trial. *Id.* at 1256. According to Justice Thomas, the categorical approach should not apply in deportation cases because they are civil cases, and therefore, not protected by the Sixth Amendment. *Id.* Justice Gorsuch did not join Part IV(A) of the plurality opinion, which states the reasons for adopting the categorical approach as applied to § 16(b), because he agreed with Justice Thomas that precedent leaves open the question of how best to read the statute; however, Gorsuch concurred in the judgment because the Government did not challenge the categorical approach and because the Court should not attempt to rescue the Government's failure to do so. *Id.* at 1232–33 (Gorsuch, J., concurring).

118. *Id.* at 1217–18 (plurality opinion).

119. *Id.* at 1217.

120. *Id.*

121. *Id.* at 1217–18.

122. *Id.* at 1217.

123. *Id.*

Most persuasively, the Court asserted that the specific text of the residual clause demands courts to apply the categorical approach.[124] The section's incorporation of the phrase "by its nature" entails the categorical approach.[125] The Court emphasized the lexiconic definition of "nature": "the normal and characteristic quality."[126] Thus, courts should examine what conduct is "normally" or "ordinarily" involved in a crime, not what happened in one particular instance.[127]

Finally, the Court raised practical, judicial administrative concerns associated with the fact-based approach.[128] The Court reasoned that immigration judges—and any reviewing judge—should not be expected to be able to accurately understand the underlying facts of a case years after the events have passed.[129] Although an immigration judge may be better at overseeing a factfinding process than an appellate judge, the Court indicated that immigration judges have large dockets already.[130] Based on these four stated reasons, the Court held that the categorical approach applies to § 16(b).[131]

Not only does § 16(b) create the difficulty of deciding the ordinary case of a crime, but the residual clause contains similarly vague language as the statute in *Johnson*; that is, § 16(b) possesses "uncertainty about the level of risk that makes a crime 'violent.'"[132] Section 16's residual clause contains the phrase "substantial risk," and the Court concluded that "substantial risk" is no more precise than the standard of risk within the statute of *Johnson* ("serious potential risk").[133] The combined difficulty of determining the ordinary case of a crime as well as the threshold imposed for deciding when an ordinary case of a crime imposes a substantial risk led the Court to hold that § 16(b) is unconstitutionally vague in light of *Johnson*.[134]

The Court considered counterarguments by the Government, which were also embedded within Chief Justice Roberts's dissent, and discussed whether § 16(b) contains sufficient textual differences from the statute struck down in *Johnson* such that § 16(b) is easier to apply.[135] The Chief

124. *Id.*
125. *Id.* at 1217–18.
126. *Id.* at 1217 (citation omitted).
127. *Id.* at 1217–18.
128. *Id.* at 1218.
129. *Id.*
130. *Id.*
131. *See id.*
132. *Id.* at 1215.
133. *Id.* at 1215–16.
134. *Id.* at 1216.
135. *Id.* at 1218–23.

Justice and the Government indicated that § 16(b)'s inclusion of a temporal restriction demonstrates one textual variance from the ACCA's residual clause.[136] Section 16(b) requires that the requisite risk arise during "the course of committing the offense."[137] The Government argued that this temporal restriction allows for a more focused inquiry because judges cannot consider any risks following the commission of the crime whereas the ACCA's residual clause, according to the Government, allowed judges to consider indirect risks posed after the commission of a crime.[138] In response to the Government's argument, the Court reasoned that the "in the course of" language insignificantly narrows the risk inquiry because courts may consider the risks of the ongoing and continued crime.[139] Additionally, the Court noted that most courts applying the ACCA's residual clause considered the conduct during the commission of the crime; thus, courts applied both § 16(b) and the ACCA's residual clause in a similar way.[140]

The Government also advanced the argument that the risk inquiry under § 16(b) is manageable because § 16(b) concerns the risk of "physical force" instead of the risk of "physical injury" as in the ACCA's residual clause.[141] Answering the Government's challenge, the Court restated precedent that "'physical force' means 'force capable of causing physical pain or injury.'"[142] Thus, the Court rejected a statutory difference between "physical force" and "physical injury" in the context of determining a crime of violence.[143]

The Government persisted with one final argument and alleged that § 16(b)'s absence of a list of exemplar crimes preceding the residual clause makes it clearer than the residual clause within the ACCA.[144] The ACCA's definition of "violent felony" included specific criminal offenses, such as burglary and arson, followed by a residual clause; the Government claimed that the inclusion of the confusing list of specific crimes made it difficult to apply the ACCA's residual clause.[145] The Court rejected this argument, noting that, although the inclusion of exemplar violent felonies did not help judges in applying the definition of violent

136. *Id.* at 1218–19.
137. *Id.* at 1219.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1220.
142. *Id.* at 1220–21.
143. *Id.* at 1221.
144. *Id.*
145. *Id.*

felony under the residual clause, the listed offenses were not the cause of the statute's vagueness.[146] The Court, therefore, heard no compelling argument by the Government as to why the textual variances between the ACCA's residual clause and § 16(b) required the Court to treat § 16(b) differently.[147] Since the Court decided that the two factors present in ACCA's definition of "violent felony" were also present in § 16(b)'s definition of "crime of violence" with no meaningful narrowing language, the Court held that § 16(b) as incorporated within the INA is unconstitutionally vague.[148]

V. IMPLICATIONS

One direct implication of the Supreme Court's decision in *Sessions v. Dimaya*[149] involves a legislative response. On September 7, 2018, the House of Representatives passed House Bill 6691, the Community Safety and Security Act of 2018,[150] as a direct response to *Dimaya*.[151] The proposed law would amend the definition of crime of violence to exclude the residual clause.[152] Instead, crime of violence would include enumerated offenses.[153] To understand impacts of the Bill on immigration law, jurists need to determine how the enumerated offenses within the Bill add to or differ from deportable offenses already listed as aggravated felonies. For example, 8 U.S.C. § 1101(a)(43)(A)[154] includes murder as a deportable offense.[155] The Bill also includes murder as a violent crime.[156] Since murder is already an aggravated felony and a deportable offense, the Bill's inclusion of murder as a violent crime appears to have no effect on immigration law. The list of aggravated felonies and deportable offenses already outlined in 8 U.S.C. § 1101(a)(43)[157] is fairly extensive, so the Bill perhaps does not add many more offenses not already included under § 1101; if so, enacting the Bill will have a lessened impact on immigration law.[158]

146. *Id.*
147. *Id.* at 1218–23.
148. *Id.* at 1223.
149. 138 S. Ct. 1204 (2018).
150. *See* H.R. 6691, 115th Cong. (2018).
151. *Dimaya*, 138 S. Ct. at 1223.
152. *Id.*
153. *Id.*
154. 8 U.S.C. § 1101(a)(43)(A) (2014).
155. *Id.*
156. H.R. 6691.
157. 8 U.S.C. § 1101(a)(43) (2014).
158. *Compare* 8 U.S.C. § 1101(a)(43) *with* H.R. 6691.

The federal definition of crime of violence has a far-reaching impact beyond just immigration law.[159] Section 16's definition serves as the universal definition of crime of violence throughout Title 18.[160] Numerous federal offenses and procedural provisions incorporate § 16's definition of crime of violence, including, but not limited to, "provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives."[161] The Chief Justice expressed concerns that many convictions by the Government involving prosecutions of crimes of violence may be undermined by the Court's decision in *Dimaya*.[162] For example, 18 U.S.C. § 924(c)[163] setting forth mandatory minimums for possessing a firearm during the commission of a crime of violence may be unconstitutional to the extent that the residual clause of 18 U.S.C. § 16(b) is unconstitutional.[164] Since the elements clause of § 16's definition of crime of violence is still enforceable, however, many prosecutions may be able to fit under that classification.[165] Congress can also fix the problem by simply enumerating what specific offenses constitute a crime of violence.[166]

More broadly, the response by the House of Representatives to the Court's decision in *Dimaya* illustrates an application of the separation of powers principle.[167] In *Dimaya*, as with many cases involving a violation of the vagueness doctrine, the Court emphasized the troubling problem of judges attempting to imagine what constitutes the ordinary case of a crime.[168] The Court believed that Congress is in a better position to define with clarity what constitutes a crime of violence.[169] House Bill 6691 attempts to do just that.[170]

Beyond a direct legislative response, the decision in *Dimaya* exemplifies how Justice Gorsuch followed in the footsteps of Justice Scalia in the application of the vagueness doctrine.[171] Justice Scalia

159. *Dimaya*, 138 S. Ct. at 1241 (Roberts, C.J., dissenting).

160. *Id.*

161. *Id.*

162. *Id.*

163. 18 U.S.C. § 924(c) (2006).

164. *Dimaya*, 138 S. Ct. at 1241 (Roberts, C.J., dissenting).

165. *See id.* at 1216 (plurality opinion).

166. *See id.* at 1212.

167. *Id.*

168. *Id.* at 1214.

169. *Id.* at 1212.

170. *See* H.R. 6691.

171. *Compare Johnson*, 135 S. Ct. 2551 *with Dimaya*, 138 S. Ct. at 1223–34 (Gorsuch, J., concurring).

wrote the majority opinion in *Johnson*.[172] We should not find Gorsuch's concurrence in *Dimaya* to be all that surprising. Summarizing *Dimaya*, Chemerinsky stated the following:

> What should be made of Justice Gorsuch being the fifth vote for the majority? Does this suggest that he might not be as ideologically conservative as generally understood? I would caution against drawing such a conclusion from one case. In his first year on the [C]ourt, Justice Gorsuch consistently has been with Justices Thomas and Alito on the issues that are ideologically defined.[173]

Chemerinsky indicated that the distinction between Justice Gorsuch, Justice Thomas, and Justice Alito is narrowly limited to applications of the vagueness doctrine in this one case.[174] But this may not be fully accurate. From the decision in *Dimaya*, it appears that Justice Gorsuch differs with Justice Alito and Justice Thomas regarding the broadness of due process as it pertains to civil cases.[175] Justice Thomas and Justice Alito have narrow views of due process in civil cases, and therefore, a narrower view of the vagueness doctrine.[176] Justice Gorsuch has a broader view of due process as applied to civil cases, and thus, embraced a broader view of the vagueness doctrine in *Dimaya*.[177]

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172. *Johnson*, 135 S. Ct. at 2555.
173. Chemerinsky, *supra* note 14.
174. *Id.*
175. *See Dimaya*, 138 S. Ct. at 1231 (Gorsuch, J., concurring).
176. *See id.* at 1242–50 (Thomas, J., dissenting).
177. *Id.* at 1231 (Gorsuch, J., concurring).