From: (b)(6); (b)(7)(C)
To: OPLA HQ Personnel; OPLA Field Personnel
Subject: Sessions v. Dimaya, 138 S. Ct. 1204 (2018)
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Disseminated on behalf of Adam V. Loiacono and Ken Padilla . . .

On April 17, 2018, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court held that 18 U.S.C. § 16(b), which formed half of the "crime of violence" definition, is unconstitutionally vague. Section 16(b) defined a 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." The Immigration and Nationality Act's (INA) "aggravated felony" definition at section 101(a)(43)(F) and the crime of domestic violence ground of deportability at section 237(a)(2)(E)(i) both relied, in part, on 18 U.S.C. § 16(b).

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, and joined in part by Justice Gorsuch, delivered the opinion of the Court. The Court concluded that the result in *Dimaya* directly followed from its decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson*, the Supreme Court struck down the Armed Career Criminal Act's (ACCA) "violent felony" definition (any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another") as unconstitutionally vague. Comparing § 16(b) to the ACCA "violent felony" definition, the Court found that § 16(b) suffers from the same two fatal defects that combine to make the provision unconstitutionally vague: (1) it requires the use of an "ordinary case" test, under which courts have to imagine the risk that force or violence will be used in the hypothetical "ordinary case" of a statute's violation; and (2) it presents a lack of clarity with respect to the threshold risk of force necessary to satisfy the statute. With respect to the "ordinary case" test, the Court explained that it "created 'grave uncertainty about how to estimate the risk posed by a crime' because it 'tie[d] the judicial assessment of risk' to a hypothesis about the crime's 'ordinary case.'" *Dimaya*, 138 S. Ct. at 1213-14 (explaining that under the "ordinary case" test, "a court focused on neither the 'real-world facts' nor the bare 'statutory elements' of an offense [but instead imagines] an 'idealized ordinary cases of the crime'" (internal citation omitted)). Repeating the questions it posed in *Johnson*, the Court asked how adjudicators are to go about identifying the "ordinary case": "Statistical analyses? Surveys? Experts? Google? Gut instinct?" *Id.* at 1215 (citing *Johnson*, 135 S. Ct. at 2557). Speaking to the uncertainty of the level of risk that makes a crime violent under § 16(b), the Court explained that using a qualitative standard, such as "substantial risk" or "foreseeable risk" is not alone problematic. *Id.* "The difficulty comes in § 16's residual clause just as in the ACCA's, from applying such standard to 'a judge-imagined abstraction'—*i.e.*, 'an idealized ordinary case of the crime.'" *Id.* at 1215-16 (citing *Johnson*, 135 S. Ct. at 2558, 2561)

One part of Justice Kagan's decision, joined by Justices Ginsburg, Breyer, and Sotomayor, explains that the prohibition on vagueness in criminal statutes is an essential part of due process, as it "guarantees that ordinary people have fair notice of the conduct a statute proscribes" and provides standards to govern the actions of law enforcement officers. *Id.* at 1212. In that part, the plurality declined to apply a less exacting vagueness standard merely because removal is a civil, as opposed to a criminal, matter. *See id.* at 1212-13.

Justice Gorsuch, who concurred in part and concurred in the judgment of the Court, penned a concurring opinion in which he discussed the constitutional underpinnings of the vagueness doctrine and concluded that § 16(b) is unconstitutionally vague. *See id.* at 1223-34. He also stated that, for purposes of this opinion, he presumed that § 16(b) required the application of the categorical

approach, but that he was open to alternative arguments about the proper interpretation of the statute. *See id.* at 1232-33.

Chief Justice Roberts, joined by Justices Kennedy, Thomas, and Alito, and Justice Thomas, joined by Justices Kennedy and Alito, issued dissenting opinions. Chief Justice Roberts, relying on textual differences between the ACCA's residual clause and § 16(b), concluded that § 16(b) is not unconstitutionally vague. *See id.* at 1234-41. Justice Thomas, in relevant part, opined that even assuming the vagueness doctrine applied, he would not invalidate § 16(b) because it is subject to a "reasonable alternative interpretation" that would avoid the constitutional issue—asking whether a defendant's actual conduct presented a substantial risk of physical force rather than whether the "ordinary case" presents such a risk. *See id.* 1250-59.

In light of *Dimaya*, OPLA attorneys should consider the following practice pointers:

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If you have questions about *Dimaya* or any of the above practice pointers, please feel free to contact ILPD (b)(7)(t@ice.dhs.gov or (b)(7)(E)@ice.dhs.gov).

Thanks,

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