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Precision in immigration law is paramount

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Sessions v. Dimaya
Oral Argument: Oct. 2

At this moment of heightened deportation fervor, precision in our immigration laws is paramount.

This term, the U.S. Supreme Court will rehear argument in the case of James Garcia Dimaya. Briefed and argued in the 2016 term as *Lynch v. Dimaya*, the petitioner is now Attorney General Jeff Sessions, and the consequences of that name change may prove grave.

An immigration judge found Dimaya was ineligible to seek discretionary relief from deportation because he had been twice convicted in California court of first-degree burglary, which the judge found to be an "aggravated felony" under the Immigration and Nationality Act. As relevant to Dimaya's crimes, the INA defines an "aggravated felony" to include any "crime of violence" under 18 U.S.C. Section 16. Section 16, in turn, defines a "crime of violence" to include any felony 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." On appeal, Dimaya argued that this definition is so vague as to be unconstitutional. The 9th U.S. Circuit Court of Appeals agreed, finding that the Supreme Court's 2015 decision in *Johnson v. United States*, which invalidated nearly identical language in the Armed Career Criminal Act, controlled the outcome.

The Supreme Court ordered re-argument in the case at the close of its 2016 term, assumedly to allow for decision with a full complement of nine sitting justices. This suggests that the court was likely split four-to-four. While it is always difficult to know what is going on behind the scenes, we expect a conservative decision, in favor of the government.

Two concerns underlie the voidfor- vagueness doctrine, which is rooted in the Fifth Amendment's due process clause. First, laws must give ordinary people fair notice of the conduct they seek to regulate. Second, laws must be definite enough to limit executive discretion and thereby avoid arbitrary enforcement. According to Dimaya, the definition of "crime of violence" incorporated into the INA fails on both accounts.

If the Supreme Court were going to find the definition unconstitutionally vague, it likely could have done so with eight justices. A four-to-four split would have affirmed the 9th Circuit's ruling, even if wasn't precedential. The addition of Justice Neil Gorsuch to the mix likely weighs against a finding of unconstitutionality, though his predecessor, Justice Antonin Scalia was the author of the *Johnson* decision that lays the groundwork for Dimaya's theory.

In *Johnson*, the Supreme Court held unconstitutionally vague the "residual clause" definition of "crime of violence" in the ACCA. The language challenged by Dimaya is identical to the language in *Johnson* in every material respect. The *Johnson* court found the ACCA definition unconstitutional, because it asked judges to engage in two indeterminate inquiries: First, judges must assess the risk of injury involved in an imagined "usual" or "ordinary" violation of a given criminal statute, and second, judges must determine exactly how much risk it takes for the crime to qualify as a violent felony, i.e. how much risk is "substantial risk." The "grave uncertainty" resulting from the intersection of these two judicial guessing games made the clause void. The same concerns would seem to apply with equal force to Dimaya's case.

The government argues that immigration law is wholesale exempt from void-for-vagueness challenges and, in the alternative, that deportation is a civil process where less clarity is demanded by the Fifth Amendment. But vagueness principles traditionally apply even to crimes punishable by probation, whereas deportation is indefinite banishment, often from one's family and the only home one knows. The Supreme Court has repeatedly acknowledged that deportation is a consequence on par with incarceration or felony-status, such as in its 2010 decision in *Padilla v. Kentucky*, holding that counsel's failure to inform a criminal defendant of a guilty plea's immigration consequences could form the basis for a Sixth Amendment ineffective assistance of counsel claim.

The government's argument against vagueness ignores that the statute in question has criminal applications, not just civil. The statutory definition lives in Title 18, the federal criminal code, and it is incorporated into dozens of U.S. Code provisions. The INA itself criminalizes unauthorized reentry to the country after being removed subsequent to a conviction for an "aggravated felony," with reference to the same definition at issue in this case. Nonsensically, under the government's theory, Dimaya's removal pursuant to a vague statute is constitutional, but his future prosecution under the same vague statute would not be, per *Johnson*.

While the Supreme Court is unlikely to invalidate this poorly drafted clause, it should. The present need for protection of immigrants is plain. In January, President Donald Trump signed an order authorizing the hiring of thousands of new immigration agents and expanding the definition of which immigrants are to be considered "criminal" for purposes of setting deportation priorities. The administration is targeting even those with no criminal history, despite a staggering backlog in immigration courts. An immigrant is now "criminal" if he or she has "committed acts that constitute a chargeable criminal offense," which would include an undocumented border crossing. Just this month, the administration revoked the government's promise not to deport the Dreamers, young adults who had no choice in coming to the U.S. and who have known no other home.

The Trump administration has also expanded use of expedited and summary removals, and will be looking to utilize other process-light removal options. Among these options is the use of administrative removal proceedings, generally without the benefit of any immigration court process, for undocumented residents who have been convicted of an "aggravated felony," including as defined by the statute Dimaya challenges. These proceedings strip immigrants of due-process rights to seek asylum or other legal protections that might allow them to remain in the country. Whether a detained immigrant is afforded an appearance before an immigration judge or is simply removed without process therefore can turn on a field agent's interpretation of this same nebulous definition of "crime of violence."

At this moment of heightened deportation fervor, precision in our immigration laws is paramount. The Supreme Court has the opportunity to demand greater clarity before the executive branch can impose such severe consequences.

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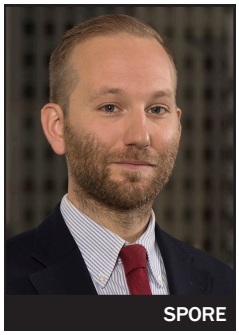
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