Justice Gorsuch Breaks Supreme Court Tie in Favor of Immigrants: A Brief Overview of *Sessions v. Dimaya*

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On Tuesday, April 17, 2018, the Supreme Court ruled in *Sessions v. Dimaya* that a portion of the Immigration and Nationality Act ("INA") was unconstitutional.[1] Delivering the opinion of the Court, Justice Kagan explained that the result was dictated by *Johnson v. United States*.[2] The Court, in both cases, held that residual clauses defining criminal conduct were void for vagueness.[3]

Under the INA, when an alien is convicted of an aggravated felony, he becomes deportable[4] and "ineligible for cancellation of removal."[5] "Aggravated felony" is defined in the INA by a list of twenty-one different categories of crimes, which includes numerous cross-references to other criminal offenses.[6] One such cross-reference is found in subsection (F), which incorporates crimes of violence under Title 18 section 16 in the definition of "aggravated felony."[7] Section 16 categorizes "crimes of violence" under two clauses known as the elements clause[8] and the residual

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[1] Sessions v. Dimaya, No. 15-1498, slip op. at 1 (U.S. Apr. 17, 2018).

[2] *Id.* at 1, 3. *See* Johnson v. United States, 135 S. Ct. 2551 (2015).

[3] *Dimaya*, slip op. at 8–9, 24 (Justice Kagan explained that the residual clause of the Armed Career Criminal Act ("ACCA") "could not pass constitutional muster" because it created more uncertainty than is allowed by the Due Process Clause.).

[4] "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii) (2008).

[5] *Dimaya*, slip op. at 1 (citing 8 U.S.C. § 1229b(a)(3), (b)(1)(C)). "The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). "The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of an offense under . . . section 1227(a)(2) . . . ." 8 U.S.C. § 1229b(b)(1)(C).

[6] 8 U.S.C. § 1101(43)(A)–(U) (2014).

[7] 8 U.S.C. § 1101(43)(F) (2014).

[8] 8 U.S.C. § 16(a) ("The term 'crime of violence' means . . . an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . .").

clause (§16(b)).[9] The residual clause was the subsection at issue in *Sessions v. Dimaya*.[10]

James Dimaya, a Philippine native who had lived in the United States since 1992, was twice convicted of first-degree burglary in California.[11] The government initiated removal proceedings against Dimaya after his second conviction.[12] "Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a 'crime of violence' under §16(b)." [13] During the pendency of Dimaya's appeal, the Supreme Court decided *Johnson v. United States* (discussed below).[14] The Ninth Circuit then held that under *Johnson*, "§16(b) [the residual clause], as incorporated into the INA" was also void for vagueness.[15] The Sixth and Seventh Circuits[16] likewise held §16(b) void for vagueness, but the Fifth Circuit[17] held that §16(b) was valid.[18] The Supreme Court granted certiorari to resolve the circuit split.[19]

The text of the residual clause of §16(b) closely resembles the residual clause in the Armed Career Criminal Act ("ACCA") that the Court ruled void for vagueness in *Johnson v. United States*: 18 U.S.C. § 924(e)(2)(B)(ii).[20] ACCA §924(e) defines "violent felony" as a crime punishable by a year or more in prison (as well as certain acts of juveniles that would subject an adult to the same punishment) that also meets the requirements of either an elements clause[21] or a residual clause.[22] The §924(e) residual clause includes in the definition of violent felony any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ."[23] The §16(b) residual clause includes in the definition of aggravated felony "any other offense that . . . involves a substantial risk that physical force against

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[9] *Dimaya*, slip op. at 2. The residual clause of 8 U.S.C. § 16(b) is discussed in greater detail below.
[10] *Id.*
[11] *Id.* at 3.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Dimaya*, slip op. at 4.
[16] Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016); United States v. Vivas-Ceja, 808 F.3d 719 (7th Cir. 2015).
[17] United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016).
[18] *Dimaya*, slip op. at 4 n.2.
[19] *Id.* at 4.
[20] 18 U.S.C. § 924(e)(2)(B). *See Dimaya*, slip op. at 3–4.
[21] 18 U.S.C. § 924(e)(2)(B)(i) ("has as an element the use, attempted use, or threatened use of physical force against the person of another").
[22] 18 U.S.C. § 924(e)(2)(B)(ii).
[23] *Id.*

the person or property of another may be used in the course of committing the offense."[24]

Two aspects of ACCA's residual clause made it unconstitutionally vague: (1) it required judges to discern how risky certain crimes were in their "ordinary case," and (2) it failed to delineate the threshold of riskiness that would constitute a violent felony.[25] The second element alone would not have rendered the statute unconstitutionally vague, but the Court reasoned that "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[26] Similarly, §16(b) would (1) "call[] for a court to identify a crime's 'ordinary case'" while (2) creating "uncertainty about the level of risk that makes a crime 'violent.'"[27]

The Court in both cases noted the difficulty in defining a crime's "ordinary case" and deciding just how risky any crime's "ordinary case" could be, ultimately deciding that "the 'ordinary case' remains, as *Johnson* described it, an excessively 'speculative,' essentially inscrutable thing."[28] The government did not even attempt to argue that the second elements in the residual clauses were materially distinguishable, with one calling for a "serious potential risk"[29] and the other calling for a "substantial risk."[30] The crux of the issue for both statutes was the fact that a judge in either case would have to apply a non-qualitative standard to "a judge-imagined abstraction," rendering both provisions void for vagueness.[31]

Perhaps the most notable feature of *Sessions v. Dimaya* is the way the Court split: the more liberal justices made up the majority, joined by Justice Gorsuch.[32] Though this was Justice Gorsuch's first time to side with the liberal justices since he joined the Supreme Court, it represented a continuation of the late Justice Scalia's originalist interpretation and tendency to agree with the more liberal justices when presented with vague criminal statutes.[33] Given the Court's split and the fact that this decision came after

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[24] 18 U.S.C. § 16(b).
[25] *Dimaya*, slip op. at 3–4.
[26] *Johnson*, 135 S. Ct. at 2558.
[27] *Dimaya*, slip op. at 9–10.
[28] *Id.* at 10 (quoting *Johnson*, 135 S. Ct. at 2558).
[29] 18 U.S.C. § 924(e)(2)(B)(ii).
[30] 18 U.S.C. § 16(b); *Dimaya*, slip op. at 10.
[31] *Dimaya*, slip op. at 11 (quoting *Johnson*, 135 S. Ct. at 2558).
[32] Ariane de Vogue & Tal Kopan, *SCOTUS nixes part of law requiring deportation of immigrants convicted of some crimes*, CNN: POLITICS (Apr. 17, 2018), https://www.cnn.com/2018/04/17/politics/supreme-court-federal-law-deportation-immigrants/index.html.
[33] *Id.* Interestingly, Justice Scalia delivered the opinion in *Johnson v. United States*.

the Supreme Court reheard arguments in October 2017 (having heard arguments the first time in January 2017, when there were only eight justices on the Court), Justice Gorsuch was likely the swing vote and the Court may have reheard arguments in order to break a tie.[34] Considering (1) the recent ruling in *Jennings v. Rodriguez*, where the Court overturned the Ninth Circuit's ruling that Title 8 of the United States Code gave detained aliens the right to periodic bond hearings, and (2) the fact that Justice Gorsuch was appointed by President Donald Trump, who continues to take anti-immigration stances, this pro-immigrant decision is especially promising to the immigrant community.[35]

Johnson, 135 S. Ct. at 2555.

[34] *Id.*

[35] *See Jennings v. Rodriguez*, No. 15-1204, slip op. at 2 (U.S. Feb. 27, 2018).