Volume 62 | Issue 3 Article 2

9-1-2017

Cloudy With a Chance of Conviction: The Third Circuit Cuts Through the Fog of What Conduct Qualifies as an Aggravated Felony Under the INA by Holding § 16(b) Unconstitutionally Vague in Baptiste v. Attorney General

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2017]

CLOUDY WITH A CHANCE OF CONVICTION: THE THIRD CIRCUIT CUTS THROUGH THE FOG OF WHAT CONDUCT QUALIFIES AS AN AGGRAVATED FELONY UNDER THE INA BY HOLDING § 16(B) UNCONSTITUTIONALLY VAGUE IN *BAPTISTE v. ATTORNEY GENERAL*

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"These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important."[1]

I. THE FORECAST: CRIMES OF VIOLENCE AND THEIR ROLE IN IMMIGRATION LAW

Imagine the following scenario: a client walks into your office and tells you they have been charged with a felony in the third degree for failing to stop their vehicle as directed by a police officer.[2] The client is a lawful permanent resident, but not a United States citizen.[3] The client wants legal advice on whether, under a guilty plea, this conduct will constitute a crime of violence.[4] A "crime of violence" makes a noncitizen deportable under the Immigration and Nationality Act (INA).[5] Currently, the answer to that question varies depending on the United States Circuit Court of Appeals that the case is before.[6] A crime of violence under 18

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1. Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (discussing immigration law reform's increase of number of immigrants subject to removal and stressing importance of noncitizens understanding impact of committing any crimes).

2. *See* Golicov v. Lynch, 837 F.3d 1065, 1067 (10th Cir. 2016) (describing plaintiff, Golicov, who was charged with third degree felony and later charged as removable for committing crime of violence under the Immigration and Nationality Act (INA)). The facts of the hypothetical scenario posed in the text accompanying this footnote are based on the factual background of *Golicov*.

3. *See Golicov*, 837 F.3d at 1067 (explaining immigration status of plaintiff).

4. *See generally Padilla*, 559 U.S. at 364 (illustrating intricacies of providing accurate legal advice to immigrant clients).

5. *See* 8 U.S.C.A. § 1101(a)(43)(F) (West 2014) (listing "crime of violence" as offense that makes noncitizen subject to removal).

6. *Compare* United States v. Coronado-Cura, 713 F.3d 597, 600 (11th Cir. 2013) (holding fleeing from police officer was crime of violence), *with* Penuliar v. Mukasey, 528 F.3d 603, 609–10 (9th Cir. 2008) (holding fleeing confrontation with police officer was not crime of violence).

U.S.C. § 16(b) (§ 16(b)) is defined as a crime that "involves a substantial risk that physical force . . . may be used in the course of committing the offense."[7] The Ninth Circuit has held that intentionally fleeing a police officer is not a crime of violence because there is not a substantial risk of violence in driving away in a car.[8] The Eleventh Circuit, however, has held that failing to stop a car after receiving a police officer's orders is a crime of violence because when an individual flees in a vehicle, it creates the substantial risk of a car crash and, therefore, injury.[9] Given this information, how would you advise your client as to whether the conduct committed constitutes a crime of violence?[10]

This is just one example of the uncertainty that has resulted in the federal circuit courts over what conduct qualifies as a crime of violence.[11] This confusion not only highlights the deepening split in the federal circuit courts over whether § 16(b) is unconstitutionally vague, but also demonstrates the difficulty practitioners face in advising clients about the

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7. *See* 18 U.S.C. § 16 (2012) (defining crime of violence). Congress expanded conduct for which noncitizens could be deported with an amendment to the INA in 1988. *See, e.g.*, Jennifer H. Healey, Note, *Sobering Consequences for Aliens Convicted of Felony DUI: Is Drunk Driving a Crime of Violence Under 18 U.S.C. § 16(b)?*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 97, 100 n.23 (2003) (citing Anti-Drug Abuse Act of 1988). These new offenses included aggravated felonies. *See id.* at 100. The definition of an aggravated felony was amended in 1990 by the Immigration Act of 1990 and the phrase crime of violence was added. *See id.*

8. *See Penuliar*, 528 F.3d at 609–10 (determining evading police officer via car was not "willful or wanton" conduct constituting crime of violence).

9. *See Coronado-Cura*, 713 F.3d at 600 (holding fleeing confrontation with police officer creates risk of car crash and resulting injury).

10. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (recognizing importance of "accurate legal advice" for those who face severe consequences such as deportation); *see also* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301–03 (2011) (stressing importance that immigrants understand the impact of conviction that could subject them to deportation); Sejal Zota, *How* Johnson v. United States *May Help Your Crime of Violence Case*, NAT'L IMMIGR. PROJECT NAT'L LAWS. GUILD (July 6, 2015), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2015_06Jul_johnson-cov.pdf [https://perma.cc/3SW9-CFWT] (discussing difficulty attorneys experience when counseling clients about immigration consequences of certain crimes and "thereby leaving their clients unable to make knowing and intelligent pleas").

11. *See supra* notes 2–3 and accompanying text for a hypothetical scenario based on the factual background of *Golicov* that presents challenges for counsel. *See also* Brief of National Immigration Project of the National Lawyers Guild, Immigrant Defense Project, American Immigration Lawyers Association, and National Immigrant Justice Center as Amici Curiae in Support of Respondent at 5–18, Lynch v. Dimaya, 137 S. Ct. 31 (2016) (No. 15-1498), 2016 WL 7664491 [hereinafter Brief of National Immigration Project of the National Lawyers Guild] (describing several examples where circuit courts have arrived at different conclusions about whether similar conduct constitutes crime of violence). Further instances of disagreement among the courts include: "residential trespass, unauthorized use of a vehicle, fleeing from an officer, unlawful imprisonment, stalking, reckless offenses, and firearms possession. The only predictable outcomes are continued disagreements among the courts and continued harms to immigrants." *See id.* at 6–7.

immigration consequences of particular crimes.[12] The Third Circuit, in *Baptiste v. Attorney General*,[13] recently provided clarity and validity to this controversial and previously unclear definition of "crime of violence."[14] This Casebrief suggests that the Third Circuit's holding in *Baptiste* correctly determined that § 16(b) is unconstitutionally vague, thereby eliminating a criminal provision that produced non-uniform and unpredictable results in an area of law already rife with confusion.[15]

Part II of this Casebrief will discuss the Supreme Court's decision in *Johnson v. United States*,[16] which held a statute similar to § 16(b) unconstitutionally vague and opened the door for challenges to crime of violence statutes.[17] Part II will also discuss the circuit split that has occurred over whether § 16(b) is unconstitutionally vague.[18] Part III will examine the facts, procedure, and analysis by the Third Circuit in *Baptiste*, as well as compare the Third Circuit's rationale to that of other circuits that have addressed the same issue.[19] Part IV concludes that the Third Circuit gave clarity to a vague immigration law and opened the door for immigrants to be eligible for certain forms of relief that they previously had been barred from.[20] Finally, Part V briefly discusses the impact of the *Baptiste* decision

12. *See, e.g.*, Laura Murray-Tjan, *Immigration Law: Raise Your Hand If You Understand*, HUFFINGTON POST (Apr. 14, 2014), http://www.huffingtonpost.com/laura-murraytjan/immigration-law-raise-you_b_4766726.html [https://perma.cc/396N-BE27] (explaining widespread confusion over immigration laws and describing immigration laws as "dizzying" (quoting *Padilla*, 559 U.S. at 378)).

13. 841 F.3d 601 (3d Cir. 2016), *petition for cert. filed*, Sessions v. Baptiste, No. 16-978 (Feb. 6, 2017).

14. *See Baptiste*, 841 F.3d at 616–17 (holding crime of violence unconstitutionally vague); *see also* Gerald Seipp, *Third Circuit Joins Sister Circuits in Finding 18 USCA § 16(b)'s "Crime of Violence" Language, Incorporated into INA § 101(a)(43)(F), Is Void for Vagueness*, 93 INTERPRETER RELEASES ART., no. 45, Nov. 21, 2016, at 13 (describing *Baptiste* decision to join four other circuit courts in finding crime of violence unconstitutional in immigration context); Kevin Penton, *Federal 'Crime of Violence' Standard Vague, 3rd Circ. Says*, LAW360 (Nov. 8, 2016, 8:22 PM), https://www.law360.com/articles/860779/federal-crime-of-violence-standard-vague-3rd-circ-says [https://perma.cc/FMA4-UYVL] (commenting on Third Circuit's ruling in context of circuit split on issue and Supreme Court's grant of certiorari to similar case).

15. *See Baptiste*, 841 F.3d at 623 (stating crime of violence provision produced too much unpredictability); *see also* Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1128 (2016) (explaining confusion that surrounds area of immigration law).

16. 135 S. Ct. 2551 (2015).

17. For a discussion of § 16(b) and the Supreme Court's decision in *Johnson*, see *infra* notes 22–53 and accompanying text.

18. For a discussion of the different circuit court decisions and their reasoning on whether § 16(b) is unconstitutionally vague, see *infra* notes 54–79 and accompanying text.

19. For a discussion of *Baptiste*, how the Third Circuit arrived at its decision, and the importance of the holding, see *infra* notes 80–128 and accompanying text.

20. For a discussion of how the Third Circuit's decision will impact practitioners and those within the Third Circuit, see *infra* notes 129–59 and accompanying text.

within the Third Circuit, and the possible future of § 16(b) as the statute heads to the Supreme Court for a decision on its constitutionality.[21]

II. STORM'S A BREWIN': THE APPLICATION OF CRIMES OF VIOLENCE TO IMMIGRATION

The crime of violence definition under § 16(b) is a term incorporated into many statutes, including the INA.[22] But in 2015, in *Johnson v. United States*,[23] the Supreme Court issued a ruling that called into question the constitutionality of the crime of violence definition.[24] This ruling held the definition unconstitutionally vague as it was incorporated into the Armed Career Criminal Act's (ACCA) residual clause.[25] A stream of litigation ensued surrounding the constitutionality of similar statutes, like the INA, that included the definition.[26] Significantly, not all circuit courts that have addressed the constitutionality of § 16(b) as incorporated under the INA have interpreted *Johnson* in the same way, which has lead to confusion over what crimes constitute a "crime of violence."[27]

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21. For a discussion of the importance of the *Baptiste* decision within the Third Circuit, and the future of § 16(b) as it heads to the Supreme Court in 2017, see *infra* notes 161–67 and accompanying text.

22. *See, e.g.*, 8 U.S.C.A. § 1101(a)(43)(F) (West 2014) (describing all crimes including "crime of violence" which constitute an aggravated felony under INA and make a noncitizen subject to removal); *see* Steven Kalar, *Case o' the Week: Welcome Clarity on Vagueness*—Dimaya *and Extension of* Johnson *to the Immigration (Civil) Context*, NINTH CIRCUIT BLOG (Oct. 25, 2015), http://circuit9.blogspot.com/2015/10/case-o-week-welcome-clarity-on.html [https://perma.cc/PC7K-T43T] (listing statutes that use "crime of violence" and similar definitions); *see also* Zota, *supra* note 10 (explaining how *Johnson* can help with other statutes that include "crime of violence" definitions).

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

24. *See id.* at 2558 (2015) (holding crime of violence definition under residual clause of Armed Career Criminal Act (ACCA) unconstitutionally vague).

25. *See id.* (determining crime of violence provision created too much "unpredictability" for it to withstand scrutiny under Due Process Clause). *See generally* 18 U.S.C. § 924(c)(3) (2012) (defining crime of violence).

26. *See, e.g.*, Carissa Hessick, *Assessing the Impact of* Johnson v. United States *on the Void-for-Vagueness Doctrine*, CASETEXT (Oct. 24, 2016), https://casetext.com/posts/assessing-the-impact-of-johnson-v-united-states-on-the-void-for-vagueness-doctrine [https://perma.cc/H33H-U7MK] (commenting on large number of cases in wake of *Johnson* ruling); Allissa Wickham, *Supreme Court Case May Reduce Deportation Uncertainty*, LAW360 (Sept. 29, 2016, 10:10 PM), https://www.law360.com/articles/846476/supreme-court-case-may-reduce-deportation-uncertainty [https://perma.cc/N7FK-EEQE] ("The deluge of crime of violence rulings came in light of the Supreme Court's 2015 decision in Johnson v. U.S.").

27. *See* Bradley Henry, Dimaya*: Does* Johnson *Apply to the Immigration Code?*, HENRY LAW FIRM PLLC (Oct. 5, 2016), http://www.henrylawny.com/dimaya-johnson-apply-immigration-code/ [https://perma.cc/AJU5-TW74] (commenting on circuit split over constitutionality of 18 U.S.C. § 16(b)); *see also* Wickham, *supra* note 26 (explaining how Ninth, Sixth, Seventh, and Tenth Circuits have disagreed with Fifth Circuit on whether § 16(b) is unconstitutionally vague).

A. *Significance of § 16(b) and* Johnson*'s Impact on Statutes Involving the Phrase "Crime of Violence"*

In 1952, the INA was signed into law.[28] The INA governs the immigration laws of the United States.[29] One provision of the INA specifically states that non-citizens can be removed from the United States if they are convicted of aggravated felonies.[30] An aggravated felony under the INA includes all crimes of violence for which an individual has been jailed for "at least one year."[31] A crime of violence is defined as either: (a) an offense where the perpetrator uses, attempts, or threatens to use force to commit the crime or, (b) any offense that presents a "substantial risk" of the use of force during the commission of the crime and for which the offender is jailed for a year or more.[32] Part (b) of this definition has come under much scrutiny both on its own and for its incorporation in the INA.[33]

The crime of violence definition is used throughout several federal laws.[34] However, the Supreme Court has declared the term void for vagueness in at least one of those other areas.[35] In *Johnson*, the Supreme

28. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (1953)); *see also Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/laws/immigration-and-nationality-act [https://perma.cc/C4P4-NEYE] (last updated Sept. 10, 2013) (providing brief overview of Immigration and Nationality Act).

29. *See* 8 U.S.C. §§ 1101–1537; *see also Developments in the Law Immigration and Nationality*, 66 HARV. L. REV. 643, 646–47 (1953) (describing creation and intended purpose of Act).

30. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). A noncitizen convicted of an aggravated felony makes them not only removable, but the conviction also makes them an ineligible for various forms of relief to stop their deportation. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 25 n.21 (listing forms of relief not available to immigrants convicted of aggravated felonies); *see also* Torres v. Lynch, 136 S. Ct. 1619, 1635 (2016) (Sotomayor, J., dissenting) (explaining consequences of aggravated felony conviction (citing 8 U.S.C. § 1229b(a)(3))).

31. *See* 8 U.S.C.A. § 1101(a)(43)(F) (West 2014) (listing crime of violence as qualifying aggravated felony offense).

32. *See* 18 U.S.C. § 16(b) (2012) (defining crime of violence).

33. *See, e.g.*, Sejal Zota, *Practice Advisory: Crimes of Violence*, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD (Apr. 10, 2012), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2012_10Apr_crimes-violence.pdf [https://perma.cc/B8GK-83Y6] (explaining confusion surrounding crime of violence definition and subsequent litigation).

34. *See* 18 U.S.C. § 3142(f)(1)(A) (2008) (using term crime of violence in Bail Reform Act); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2016) (providing crime of violence definition for Career Offenders and Criminal Livelihood sentencing guidelines); *see also* Kalar, *supra* note 22 (listing other statutes with crime of violence provisions).

35. *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) (holding residual clause void for vagueness); *see also* 18 U.S.C. § 924(c)(3)(B) (defining "crime of violence" in federal sentencing statute as "an offense that is a felony

Court looked at whether § 16(b) was unconstitutional as incorporated under the ACCA's catchall provision, otherwise known as the "residual clause," which included all other conduct that may present the risk of injury but was not been expressly listed in the statute.[36] Under the ACCA, anyone who has previously been convicted of three violent felonies automatically receives a harsher sentence.[37] The ACCA defines a "violent felony" by listing four specific crimes and includes a catchall provision to encompass "conduct that presents a serious potential risk of physical injury to another."[38] In *Johnson*, the Supreme Court asked the parties to specifically address whether this catchall residual clause was impermissibly vague.[39] A statute is unconstitutionally vague if it is so unclear that it causes people have to speculate its meaning and results in arbitrary application.[40]

In *Johnson*, the Supreme Court held the residual clause to be unconstitutionally vague.[41] The Court determined that courts must apply a "cat-

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and . . . involves a substantial risk that physical force against the person or property of another may be used in the court of committing the offense"); 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony" term in federal sentencing statute as felony that "involves conduct that presents a serious potential risk of physical injury to another").

36. *See Johnson*, 135 S. Ct. at 2556 (explaining that what crimes fall under residual clause has been continual issue for courts). The petitioner, Johnson, had already been convicted of three prior violent felonies when he pled guilty to a fourth felony. *See id.* Johnson was given an enhanced sentence due to his prior convictions and he appealed arguing that one of previous felonies should not have been classified as a "violent" felony. *See id.*; *see also* Katherine Brady, *Some Felonies Should No Longer Be "Crimes of Violence" for Immigration Purposes, Under* Johnson v. United States, IMMIGRANT LEGAL RESOURCE CTR. 1 (Aug. 2015), https://www.ilrc.org/sites/default/files/resources/johnson_v_us_ilrc_adv_8_2015_pdf_0.pdf [https://perma.cc/38Y8-A9RN] (discussing *Johnson* decision, its effect on § 16(b), and INA provision regarding crime of violence).

37. *See* Armed Career Criminal Act (ACCA) § 1802, 18 U.S.C. § 924(e)(1) (2012); *see also* Jaime M. Nies, Annotation, *Retroactive Effect of* Johnson v. U.S.*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), Holding That "Residual Clause" of Armed Career Criminal Act (ACCA) Is Unconstitutional*, 13 A.L.R. FED. 3D ART. 3, at II(A) (2016) (explaining residual clause of Armed Career Criminal Act).

38. *See* 18 U.S.C. § 924(e)(2)(B)(ii); *see also Johnson*, 135 S. Ct. at 2555–56 (reiterating definition of ACCA's residual clause).

39. *See Johnson*, 135 S. Ct. at 2556 (discussing procedural history); *see also* Katherine Menendez, Johnson v. United States*: Don't Go Away*, 31 CRIM. JUST. 12, 15 (2016) (explaining court initially agreed to hear case but asked parties to reargue case to address whether residual clause was unconstitutionally vague).

40. *See Johnson*, 135 S. Ct. at 2556–57 (stating laws violate Due Process and are void for vagueness when they do not provide fair notice of the type of conduct prohibited under the law); *see also* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (establishing vagueness standard for when court can determine law unconstitutionally vague).

41. *See Johnson*, 135 S. Ct. at 2563 (holding). *See generally Armed Career Criminal Act—Residual Clause*—Johnson v. United States, 129 HARV. L. REV. 301 (2015) (summarizing *Johnson*). The Supreme Court held in a subsequent case that *Johnson*'s ruling applied retroactively. *See* Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

egorical approach" to analyze whether the statute was void for vagueness.[42] The categorical approach is a method that requires a court to look at the general type of conduct a statute meant to include—an "ordinary case"—and then to determine whether the conduct at issue fits within the imagined conduct the statute intended to protect.[43]

Looking at the statute through this lens, the Court held that the statute was unconstitutionally vague for two reasons.[44] First, the crime of violence definition left unclear how judges should determine the risk a crime presents.[45] The Court held that the provision forced judges to determine the risk of the crime based on an "ordinary case" and not based upon the real-life facts of the case at issue.[46] The Court questioned how a judge was supposed to determine what constituted an "ordinary case" and held this inquiry too speculative to be fair.[47]

Second, the Court held that the words "serious potential risk" left judges to guess at "how *much* risk" of physical injury a crime needed to

42. *See Johnson*, 135 S. Ct. at 2557 (citing Taylor v. United States, 495 U.S. 575, 600 (1990)) (acknowledging requirement for courts to undertake categorical approach to analysis of ACCA residual clause); *see also Armed Career Criminal Act—Residual Clause*—Johnson v. United States, *supra* note 41, at 303 (explaining Court's rationale for adopting categorical approach).

43. *See Johnson*, 135 S. Ct. at 2557 ("[A] court assesses whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" (quoting Begay v. United States, 553 U.S. 137, 141 (2008))). *See generally* Simon Azar-Farr, *Untangling Categorical and Modified Approaches in Immigration Law*, 15–12 IMMIGR. BRIEFINGS 1 Dec. 2015, at 2–3 (recounting background of categorical approach and how it is applied).

44. *See Johnson*, 135 S. Ct. at 2557–58 (analyzing case under categorical approach and using two question inquiry to determine statute's constitutionality); *see also Armed Career Criminal Act—Residual Clause*—Johnson v. United States, *supra* note 41, at 303 (describing Court's two-prong reasoning for holding ACCA residual clause void for vagueness).

45. *See Johnson*, 135 S. Ct. at 2557–58 (questioning how judges should apply "imagined" ordinary case to "real-world facts"); *see also* Koh, *supra* note 15, at 1149–50 (describing *Johnson* Court's reasoning in holding statute provided lack of guidance to judges).

46. *See Johnson*, 135 S. Ct. at 2558 (holding residual clause provided "no reliable way" of determining what the "ordinary case" of crime was); *see also* Koh, *supra* note 15, at 1147–48 (reiterating Court's hesitance to define "ordinary case" for every crime). To explain the fundamental problem in deciding what constituted an "ordinary case" of a crime, the Supreme Court provided examples. *See Johnson*, 135 S. Ct. at 2557–58. For instance, the Court pondered what the typical case of witness tampering involved. *See id.* at 2557. Did it include threatening behavior? *See id.* Or did it include simply a bribe? *See id.* The Court held there were so many ways a crime could take place that a judge would have to engage in a guessing game to determine whether the crime fit the statute. *See id.* at 2557–58.

47. *See Johnson*, 135 S. Ct. at 2557 ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" (quoting United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting))); *see also* Zota, *supra* note 10 (recounting court's speculation over "lack of connection" between imagined case and elements of case at issue).

present to be classified as a violent felony; what the Court called a "serious risk inquiry."[48] Further adding to the confusion was the fact that the residual clause followed an enumerated list of other crimes, including burglary and arson, which courts were to consider crimes of violence.[49] The Court held each of these crimes involved a different amount of risk and, therefore, the list made the necessary amount of risk for an offense to qualify as a crime of violence "far from clear."[50] Taken together, these factors demonstrated that the ACCA's residual clause created a level of unpredictability in interpretation that made the statute unconstitutionally vague.[51] Nevertheless, the Court acknowledged that not all crimes that include "serious potential risk" or similar terms were unconstitutional per se.[52] The ACCA's residual clause was unique "because the elements necessary to determine the imaginary ideal are uncertain . . . [and therefore] this abstract inquiry offers significantly less predictability than one that deals with the actual . . . facts."[53]

B. *How Different Circuits Have Interpreted* Johnson, *Resulting in a Circuit Split*

The decision in *Johnson* opened the door to challenges of other, similar statutes, specifically the aforementioned § 16(b).[54] Four circuits that

48. *See Johnson*, 135 S. Ct. at 2558 (emphasis added) (noting degree of risk hard to apply to imagined "ordinary case" crime); *see also* Azar-Farr, *supra* note 43 (explaining Supreme Court's aversion to having judges assess possibly "attenuated" risk involved in imagined crimes).

49. *See* 18 U.S.C. § 924(e)(2)(B) (2012) ("[T]he term 'violent felony' means any crime . . . that . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ."); *Johnson*, 135 S. Ct. at 2558 (noting residual clause asks for risk involved in crime of violence to be evaluated "in light of" other crimes listed in ACCA statute); *see also* Koh, *supra* note 15, at 1151–52 (commenting list of crimes in statute supported court's determination statute was unconstitutionally vague, but was not "dispositive" reason and court overall "anchored its concerns in the instability inherent in the 'ordinary case' approach").

50. *See Johnson*, 135 S. Ct. at 2558; *see also Armed Career Criminal Act—Residual Clause*—Johnson v. United States, *supra* note 41, at 304 (acknowledging how *Johnson* Court found ACCA confusing because it suggested risk involved in crime of violence be compared to risk involved with other listed crimes).

51. *See Johnson*, 135 S. Ct. at 2558 (explaining why ACCA is unconstitutionally vague); *see also Armed Career Criminal Act—Residual Clause*—Johnson v. United States, *supra* note 41, at 304 (recognizing Justice Scalia's statement that disagreement in circuit courts over statute was itself evidence of confusion and inconsistent application).

52. *See Johnson*, 135 S. Ct. at 2560–61 (disagreeing with dissent's statement that holding residual clause unconstitutional means all statutes with terms "substantial risk," "grave risk," and "unreasonable risk" are also unconstitutional).

53. *See Johnson*, 135 S. Ct. at 2561 (explaining reason why residual clause was different from other statutes with similar textual language (alteration in original) (internal quotation marks and alterations omitted) (quoting Int'l Harvester Co. of Amer. v. Kentucky, 234 U.S. 216, 223 (1914))).

54. *See* Wickham, *supra* note 26 (noting "deluge" of cases about crime of violence statutes after ruling in *Johnson*).

addressed the issue have held § 16(b) void for vagueness.[55] However, one circuit, the Fifth Circuit, has held that § 16(b) is constitutional.[56]

The first circuit to address the constitutionality of § 16(b) was the Ninth Circuit in *Dimaya v. Lynch*,[57] which held the statute impermissibly vague.[58] In that case, the Department of Homeland Security sought to deport the defendant on the grounds that he had committed an aggravated felony, a crime of violence under § 16(b).[59]

The Ninth Circuit compared § 16(b) to the statute held unconstitutional in *Johnson* and found the language in both to be incredibly similar.[60] Due to the similarities between the statutes, the Ninth Circuit found that § 16(b) must be analyzed under the same categorical approach as the statute in *Johnson*.[61] Further, the court found that § 16(b) was subject to the "same constitutional defects" that plagued the statute in *Johnson*.[62] The Ninth Circuit reiterated the reasons, namely: a lack of guidance on how to determine the level of risk a crime presents, and a lack of guidance

55. *See* Golicov v. Lynch, 837 F.3d 1065, 1072 (10th Cir. 2016) (holding § 16(b) void for vagueness); Shuti v. Lynch, 828 F.3d 440, 447 (6th Cir. 2016) (same); United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015) (same); Dimaya v. Lynch, 803 F.3d 1110, 1120 (9th Cir. 2015) (same).

56. *See* United States v. Gonzalez-Longoria, 831 F.3d 670, 672 (5th Cir. 2016) (en banc) (holding § 16(b) was not unconstitutionally vague).

57. 803 F.3d 1110 (9th Cir. 2015).

58. *See id.* at 1120 (determining § 16(b) was unconstitutionally vague); *see also "Violent Felony" and "Crime of Violence": What* Johnson v. United States *Can Mean For Other Federal Criminal Statutes Involving Violent Crimes*, BURNHAM & GOROKHOV, PLLC: LEGAL BLOG (June 29, 2016), http://www.burnhamgorokhov.com/violent-felony-crime-violence-johnson-v-united-states-can-mean-federal-criminal-statutes-involving-violent-crimes/ [https://perma.cc/G8Q4-AGL5] (stating Ninth Circuit was first appellate court to rule on validity of § 16(b) after *Johnson*).

59. *See Dimaya*, 803 F.3d at 1111–12 (citing 8 U.S.C. § 1227(a)(2)(A)(iii) (2012)) (explaining Dimaya was non-citizen and conviction for aggravated felony makes non-citizen subject to removal). Petitioner, Dimaya, had been a lawful permanent resident of the United States since 1992. *See id.* at 1112. In 2007 and again in 2009, Dimaya was convicted of first degree residential burglary and received two years of jail time for each conviction. *See id.* Dimaya challenged the finding that his first-degree burglary conviction constituted a crime of violence. *See id.*

60. *See Dimaya*, 803 F.3d at 1114–19 (contrasting definition at issue in *Johnson* to definition of crime of violence under § 16(b) and concluding both states were "similar" with only minor differences). The Ninth Circuit highlighted the Supreme Court's statement that immigration laws need to have "efficiency, fairness, and predictability." *See id.* at 1114 (citation omitted). The Ninth Circuit also emphasized that vague immigration statutes hinder the ability of noncitizens to understand the consequences of pleading guilty to a crime. *See id.*

61. *See id.* at 1114–15 (stating both provisions must be analyzed under same method of inquiry). The categorical approach was first established in *Taylor v. United States*. 495 U.S. 575 (1990). *Taylor's* approach requires a court to examine the elements of the "generic" offense or ordinary case, and not undertake a fact-specific inquiry of the case at hand. *See Taylor*, 495 U.S. at 600–02.

62. *See Dimaya*, 803 F.3d at 1115 (comparing § 16(b) to *Johnson*'s residual clause and finding § 16(b) also failed *Johnson*'s two-prong analysis); *see also* Brady, *supra* note 36 (arguing same features that made residual clause vague also made § 16(b) vague).

on how to assess the amount of risk a crime must have to qualify as a crime of violence.[63]

The Ninth Circuit rejected the government's argument that § 16(b) was unlike the ACCA's residual clause because the residual clause included an enumerated list of crimes that added to the confusion of the statute.[64] The court stated that while an enumerated list may have added to the confusion, the central reason the Supreme Court found the residual clause unconstitutional was the risk of arbitrary application of the "serious potential risk" standard when applied to the imagined ordinary case.[65] The Ninth Circuit also rejected the government's argument that § 16(b) was unlike the ACCA's residual clause because the residual clause required a determination of risk after the crime occurred; whereas § 16(b) required a determination of risk during the commission of the offense.[66] The court rejected this argument as well and stated that, while it doubted that a distinction existed, the same reasoning would apply in either case.[67]

The Sixth, Seventh, and Tenth Circuits followed the Ninth Circuit's holding in *Dimaya*, each finding § 16(b) to be unconstitutionally vague.[68] In each case, the circuit courts held that although the language of § 16(b) and the statute in *Johnson* were not identical, they were "substantially equivalent."[69] Significantly, the Tenth Circuit noted (and the Sixth Cir-

63. *See Dimaya*, 803 F.3d at 1116 ("The Court's reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA.").

64. *See Dimaya*, 803 F.3d at 1117 (disagreeing with government's and, consequently, dissent's opinions that unlike *Johnson*'s residual clause, § 16(b) was not arbitrary because it did not require judges to evaluate risk of crime of violence in context of other crimes).

65. *See id.* at 1117 (recognizing differences between § 16(b) and residual clause).

66. *See id.* at 1118–19 (explaining government's argument that timing of risk assessment during, rather than after, commission of crime is significant).

67. *See id.* (holding categorical approach applies regardless of whether looking at conduct before, during, or after commission of crime).

68. *See* Golicov v. Lynch, 837 F.3d 1065, 1072 (10th Cir. 2016) (holding § 16(b) void for vagueness in wake of *Dimaya*); Shuti v. Lynch, 828 F.3d 440, 447 (6th Cir. 2016) (same); United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015) (same); *see also* Sarah Flinn, *Definition of Crime of Violence for Illegal Reentry Sentencing Is Unconstitutionally Vague*, CRIMMIGATION (Feb. 4, 2016, 4:00 AM), http://crimmigration.com/2016/02/04/definition-of-crime-of-violence-for-illegal-reentry-sentencing-is-unconstitutionally-vague/ [https://perma.cc/Y2EH-JT7F] (noting Ninth Circuit was first court to address constitutionality of § 16(b) after *Johnson*); Wickham, *supra* note 26 (explaining other circuit courts finding *Dimaya* persuasive).

69. *See Golicov*, 837 F.3d at 1072–73 ("[S]ection 16(b) is materially indistinguishable from the ACCA's residual clause . . . ." (quoting *Vivas-Ceja*, 808 F.3d at 720)); *Shuti*, 828 F.3d at 446 ("While not a perfect match, these provisions undeniably bear a textual resemblance." (citations omitted)); *Vivas-Ceja*, 808 F.3d at 722 (concluding text of Armed Career Criminal Act's residual clause near identical to § 16(b)).

cuit reiterated) "[§ 16(b)] substitutes guesswork and caprice for fair notice and predictability."[70]

The Fifth Circuit, in *United States v. Gonzalez-Longoria*,[71] is the only circuit to have addressed the constitutionality of § 16(b) and not find it to be void for vagueness.[72] Following the categorical approach, the court in *Gonzalez-Longoria* held, due to § 16(b)'s narrower definition, the statute was significantly different from the statute at issue in *Johnson* and, therefore, was not as confusing to apply.[73] The residual clause addressed in *Johnson* instructed courts to determine whether a crime presented a "serious potential risk of *physical injury*."[74] Section 16(b), the court reasoned, more narrowly requires a court to determine the risk of *physical force* during the *commission* of a crime.[75] The *Gonzalez-Longoria* court stated that § 16(b) was narrowed even further because § 16(b) limits the risk inquiry to the time when the crime took place, instead of before or after it occurred.[76] Therefore, the Fifth Circuit found that § 16(b) provided more "notice" to criminals and more guidance to judges as to what conduct

70. *Golicov*, 837 F.3d at 1075 (quoting *Shuti*, 828 F.3d at 450).

71. 831 F.3d 670 (5th Cir. 2016).

72. *See id.* at 678–79 (holding § 16(b) not unconstitutionally vague). In *Gonzalez-Longoria*, the defendant, Gonzalez-Longoria, was convicted of two domestic violence crimes, a misdemeanor assault, and a felony assault, in 2008. *See id.* at 672–73. "Gonzalez-Longoria, a Mexican citizen, was deported to Mexico." *Id.* at 673. In 2014, Gonzalez-Longoria was found present in the United States and convicted of being in the United States illegally under 8 U.S.C. § 1326. *See id.* at 673. During the sentencing phase for his 2014 conviction, Gonzalez-Longoria received an enhanced sentence because his previous crimes were considered crimes of violence under § 16(b). *See id.* Under the United States Sentencing Guidelines section 2L1.2(b)(1)(c), committing an aggravated felony, the definition of which includes a crime of violence, makes a felon eligible for an increased sentence. *See id.*; U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(c), cmt. n.3(A) (U.S. SENTENCING COMM'N 2016).

73. *See Gonzalez-Longoria*, 831 F.3d at 675–76 (acknowledging § 16(b) and residual clause share similar features but holding § 16(b) more narrow and provided more guidance than residual clause); *see also* Koh, *supra* note 15, at 1174 (highlighting distinctions *Gonzalez-Longoria* court found between § 16(b) and residual clause).

74. *See* 18 U.S.C. § 924(e)(B)(ii) (20012) (emphasis added); *see also Gonzalez-Longoria*, 831 F.3d at 676 (quoting 18 U.S.C § 924(e)(2)(B)(ii) and discussing ACCA's requirements).

75. *See* 18 U.S.C. § 16(b) (2012) ("The term 'crime of violence' means . . . any other offense that . . . by its nature, involves a substantial risk that physical force against the person or property of another may be used . . . ." (emphasis added)); *see also Gonzalez-Longoria*, 831 F.3d at 676 (discussing language of § 16(b) and emphasizing textual dissimilarities between provision and ACCA, including use of word "force" in § 16(b) was more "definite" than "injury" as used in residual clause).

76. *See Gonzalez-Longoria*, 831 F.3d at 676 (concluding specific time frame pointedly forces courts to focus only on events occurring before or after crime takes place); *see also* Koh, *supra* note 15, at 1174 (reiterating that court's narrower time frame makes statute "predictively more sound" (internal quotation omitted)).

would be prohibited.[77] The Fifth Circuit also held that the lack of enumerated crimes in § 16(b) prevented this statute from suffering from the same confusion as the residual clause in *Johnson*.[78] Unlike the other circuit courts, the Fifth Circuit concluded that the fundamental reason the Supreme Court considered the residual clause as being too confusing was because it was accompanied by "a confusing list of examples."[79]

III. A RAY OF SUNSHINE: THIRD CIRCUIT'S RULING PROVIDES CLARITY ON THE CONSTITUTIONALITY OF § 16(B)

Following *Johnson*, there was confusion over whether a noncitizen could be convicted of a crime of violence under the INA in the Third Circuit.[80] But by ruling in *Baptiste* that § 16(b) was "unconstitutionally vague," the Third Circuit joined the Sixth, Seventh, Ninth, and Tenth Circuits.[81] The Third Circuit's holding focused on the two features of the ACCA's residual clause that the *Johnson* court determined made the clause unconstitutional.[82] The Third Circuit compared § 16(b) to the residual clause and, finding them similar, held that § 16(b) suffered from the same defects.[83]

A. *Facts of the Case*

The petitioner, Carlton Baptiste, was originally from Trinidad and Tobago but became a lawful permanent resident of the United States in

77. *See Gonzalez-Longoria*, 831 F.3d at 677 ("Thus, 18 U.S.C. § 16(b), which looks to whether a commission of a crime involves a substantial risk of physical force, is predictively more sound—both as to notice (to felons) and in application (by judges)—than imputing clairvoyance as to potential risk of injury." (footnote omitted)).

78. *See Gonzalez-Longoria*, 831 F.3d at 677 (holding § 16(b) was "just like" many other laws that use terms like "substantial risk" and do not list other crimes for context).

79. *See id.* (concluding different verbiage, including lack of examples, used in § 16(b) "do not cause the same problems" as *Johnson* found existed in residual clause (quoting Johnson v. United States, 135 S. Ct. 2551, 2561 (2015))); *see also* Cody Davis, *Just Another Burglary*, CAMPBELL L. OBSERVER (Nov. 28, 2016), http://campbelllawobserver.com/just-another-ordinary-burglary/ [https://perma.cc/H45B-Z7P5] (commenting that Fifth Circuit created circuit split by breaking with holdings of other circuit courts regarding § 16(b)).

80. *See* Baptiste v. Att'y Gen., 841 F.3d 601, 616–17 (3d Cir. 2016) (citing other circuit courts that have addressed unconstitutionality of § 16(b) and Third Circuit would now "enter the fray").

81. *See id.* at 616 (stating "[t]he Sixth, Seventh, Ninth, and Tenth Circuits have considered the question and concluded that *Johnson* does render § 16(b) void for vagueness." (citations omitted)); *id.* at 621 ("§ 16(b) is unconstitutionally vaugue").

82. *See* Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015) (analyzing case under ordinary case and serious risk inquiries); *see also Baptiste*, 841 F.3d at 617 (applying ordinary case and serious risk inquiries to crime of violence and finding them "indeterminate").

83. *See Baptiste*, 841 F.3d at 621 (reiterating two inquiries of *Johnson* produced same "unpredictability" in context of § 16(b)).

1972.[84] He was convicted of aggravated assault in 1978 and again in 2009.[85] The Department of Homeland Security (DHS) instituted removal proceedings against Baptiste in 2013 because his 2009 conviction constituted a crime of violence, which made him deportable.[86] DHS also later claimed Baptiste was subject to removal for committing two crimes involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(ii).[87] In October of 2013, an immigration judge determined Baptiste was removable under the INA for both reasons.[88] Baptiste appealed to the Board of Immigration Appeals (BIA), but the BIA agreed with the immigration judge's decision and dismissed the appeal.[89] Baptiste subsequently appealed to the Third Circuit.[90]

B. *The Third Circuit's Analysis*

Before deciding whether § 16(b) was unconstitutionally vague, the Third Circuit addressed whether Baptiste's conduct constituted a crime of violence under the statute.[91] The court began by examining the definition of a crime of violence.[92] The court found that a crime of violence must include a "substantial risk that force will be 'actively employed' 'in furtherance of the offense'" or that force will be intentionally used when committing the crime.[93] Having determined the requirements for estab-

84. *See id.* at 604 (describing facts of case). The specific facts underlying Baptiste's assault convictions were not known to the court, however. *See id.*

85. *See id.* (examining petitioner's criminal background). Baptiste received one year in prison as punishment for the 1978 assault and five years in prison for his 2009 conviction. *See id.*

86. *See* 8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 20014) (allowing deportation for defendants convicted of aggravated felony); *see also Baptiste*, 841 F.3d at 604 (explaining procedural history).

87. *See Baptiste*, 841 F.3d at 604 (reiterating DHS's assertion two assaults constituted two crimes involving moral turpitude); *see also* 8 U.S.C. § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of misconduct . . . is deportable."). Although not defined by federal law, a crime involving moral turpitude is generally considered a crime involving conduct "contrary to the accepted rules of" morality in society. *See What Is a Crime Involving Moral Turpitude?*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://my.uscis.gov/helpcenter/article/what-is-a-crime-involving-moral-turpitude [https://perma.cc/999E-2USV] (last visited Jan. 31, 2017).

88. *See Baptiste,* 841 F.3d at 604–05 (explaining all charges asserted against Baptiste sustained at trial level).

89. *See id.* at 605 (describing Board of Immigration Appeals' decision and reasoning).

90. *See id.* (recognizing how case arrived at Third Circuit).

91. *See Baptiste*, 841 F.3d at 606 ("[I]n order to determine whether Baptiste's 2009 Conviction was for an aggravated felony, we must first examine the definition of a 'crime of violence' in 18 U.S.C. § 16." (citation omitted)).

92. *See id.* at 606–07(defining "crime of violence" as used in INA).

93. *See id.* (quoting Tran v. Gonzales, 414 F.3d 464, 471 (3d Cir. 2005) (emphasizing need for intentional, not accidental, use of force to qualify as crime of violence).

lishing a crime of violence, the court then addressed whether the ordinary case inquiry was the appropriate form of analysis under such circumstances.[94] The court relied on the language of § 16(b) itself, which states in part that a crime is a crime of violence if "by its nature" it includes a substantial risk of force.[95] The court held this language was consistent with the ordinary case approach that instructs courts to also look at whether an offense poses risk "by its nature."[96] However, when the court attempted to apply the ordinary case approach to Baptiste's conviction for second-degree aggravated assault, it had difficulty ascertaining what the "ordinary" case would be.[97] The court held § 16(b) provided "little guidance."[98] Thus, the court found that there was a full spectrum of conduct that could constitute second-degree aggravated assault, from conduct where the perpetrator intentionally harms another to conduct where the perpetrator has no intent to harm another.[99] The Third Circuit held that "common sense" dictated that the ordinary case of second degree aggravated assault likely fell in the middle of this spectrum.[100] Therefore, Baptiste's conduct likely included a substantial risk of force and constituted a crime of violence under the INA.[101] However, the court noted

94. *See Baptiste*, 841 F.3d at 607–08 (asserting categorical, or "ordinary case," approach required by Supreme Court to evaluate whether conviction is in sync with statute).

95. *See* 18 U.S.C. § 16(b) (2017) ("The term 'crime of violence' means . . . any other offense that . . . *by its nature*, involves a substantial risk . . . ." (emphasis added)); *see also Baptiste*, 841 F.3d at 608–10 (weighing government's argument to use ordinary case approach against Baptiste's argument to use "least culpable conduct" approach). The least culpable conduct approach asks a court to look at the least blameworthy conduct for which a person could be convicted under the statute. *See id.* at 608.

96. *See id.* at 610 (comparing exact language of crime of violence definition under § 16(b) to Supreme Court's ordinary case inquiry in *Johnson*).

97. *See Baptiste*, 841 F.3d at 611 (stating neither government nor Baptiste was able articulate version of ordinary case for court to use and proceeding with its own analysis of "ordinary case" of second-degree aggravated assault).

98. *See id.* (using New Jersey law to ascertain conduct typically associated with ordinary case of assault and noting lack of other available sources). The court asked: "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *See id.* (quoting United States v. Mayer, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinkski, C.J., dissenting)).

99. *See Baptiste*, 841 F.3d at 611 (grouping potential conduct into three categories: "intentional use of force," "substantial risk of intentional use of force," and "no risk of intentional use of force").

100. *See id.* at 614 (finding ordinary case impossible to decipher and relying on "common sense and judicial experience"). The Third Circuit did not explain how common sense led them to believe an ordinary case would involve conduct that falls in the middle of the spectrum between intentional force and no risk of force. *See id.* at 611, 614.

101. *See id.* at 615 (applying conduct associated with ordinary case to § 16(b) and holding § 16(b) encompasses such conduct).

that its struggle to determine the ordinary case factored into its determination later in the decision that § 16(b) was unconstitutionally vague.[102]

After deciding Baptiste had committed a crime of violence, the court questioned whether § 16(b)'s definition of crime of violence was constitutional.[103] The court undertook an analysis similar to that of the other circuits that addressed § 16(b)'s constitutionality.[104] The Third Circuit highlighted the Supreme Court's decision in *Johnson* and the two features in *Johnson* that made the ACCA's residual clause unconstitutional: the ordinary case inquiry and the serious risk inquiry.[105] The Third Circuit used the *Johnson* categorical approach to analyze § 16(b) and attempted to compare an "ordinary case" to the facts in *Baptiste*.[106] However, the Third Circuit held § 16(b) failed to provide judges with any guidance as to what constitutes an ordinary case and ultimately contributed to the "indeterminate nature" of § 16(b).[107]

The Third Circuit also held § 16(b) failed to give any indication of how much risk is required to constitute "substantial" risk.[108] The Third Circuit reasoned that the term "substantial risk" under § 16(b) was as vague as the term "serious risk" in the ACCA's residual clause.[109] Un-

102. *See id.* at 611 ("[T]the indeterminate nature of the ordinary case inquiry contributes to § 16(b)'s unconstitutionality.").

103. *See Baptiste*, 841 F.3d at 615 (addressing Baptiste's argument on appeal that § 16(b) unconstitutionally vague).

104. *Compare id.* at 615–16 (analyzing § 16(b) by same standards *Johnson* court analyzed ACCA's residual clause), *with* Golicov v. Lynch, 837 F.3d 1065, 1072 (10th Cir. 2016) (holding § 16(b) unconstitutionally vague after applying two factors that made *Johnson* statute unconstitutional to § 16(b)), Shuti v. Lynch, 828 F.3d 440, 447 (6th Cir. 2016) (same), United States v. Vivas-Ceja, 808 F.3d 719, 720 (7th Cir. 2015) (same), *and* Dimaya v. Lynch, 803 F.3d 1110, 1120 (9th Cir. 2015) (same).

105. *See Baptiste*, 841 F.3d at 617 (stating ordinary and serious risk inquiries applied to § 16(b) and residual clause because materially same statute).

106. *See id.* at 616 (stating categorical approach used to evaluate ACCA's residual clause and should be used for § 16(b) and adopting ordinary case inquiry after evaluating other circuit court interpretations of *Johnson*). All of the circuit courts that have addressed the issue, including the Third Circuit, agreed that the categorical approach governs the analysis of § 16(b) and also applied the ordinary case inquiry. *See Golicov*, 837 F.3d at 1072 (holding *Johnson*'s use of categorical approach dictated categorical approach apply to § 16(b)); *see also* United States v. Gonzalez-Longoria, 831 F.3d 670, 676 (en banc) (5th Cir. 2016) (determining § 16(b) and residual clause both require analysis under categorical approach); *Shuti*, 828 F.3d at 446 ("The text of the immigration code at once compels a categorical approach to prior convictions"); *Vivas-Ceja*, 808 F.3d at 722 (determining categorical approach appropriate analysis for § 16(b)); *Dimaya*, 803 F.3d at 1114–15 (stating § 16(b) must be analyzed under same method of inquiry as residual clause).

107. *See Baptiste*, 841 F.3d at 610–11 (stating court must guess at ordinary case in this instance).

108. *See id.* at 617 (holding substantial risk inquiry too indeterminate).

109. *See Baptiste*, 841 F.3d at 617 ("A serious risk is equally as vague as a substantial risk." (internal quotation marks omitted) (citing *Golicov*, 837 F.3d at 1073)).

like the Fifth Circuit, which held that the focus on the risk of "use of force" under § 16(b) significantly distinguished the statute from the ACCA's focus on the risk of "physical injury," the Third Circuit stated that neither phrase was integral to deciding whether § 16(b) was unconstitutional.[110] The Third Circuit made clear that the statute was vague because of the serious risk inquiry.[111] This question of how much risk is needed for a crime to qualify as a crime of violence was not made by adding a "modifier" of force or injury.[112] The Third Circuit also determined that the lack of enumerated crimes in the § 16(b) crime of violence definition did not make the statute any more determinate.[113] The Third Circuit was also not persuaded by the argument that § 16(b) was less vague than the ACCA's residual clause because it did not include a list of other crimes.[114] While the list added to the confusion, it was not ultimately why the statute was held unconstitutional.[115]

The Third Circuit held § 16(b) to be void for vagueness for all of the same reasons the previous circuit courts had.[116] Notably, the court indicated that had the substantial risk inquiry been applied to real-world facts and not to a hypothesized ordinary case, the statute might have been upheld.[117] Ultimately, however, the court held Baptiste could not be convicted under an unconstitutionally vague statute and he was, therefore, not guilty of an aggravated felony under § 16(b).[118] The Third Circuit held Baptiste could still be removable under the INA for committing two crimes involving moral turpitude and remanded the case to allow Baptiste to pursue any forms of relief previously unavailable to him because of his crime of violence conviction.[119]

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110. *Compare id.* at 618 (acknowledging risk of injury term may encompass more conduct but holding serious risk inquiry did not even address injury provision), *with Gonzalez-Longoria*, 831 F.3d at 676 (holding use of force more narrow term than injury).

111. *See Baptiste*, 841 F.3d at 618 (determining ACCA's residual clause, and now § 16(b), failed because vagueness as to how much risk required, not type of risk required).

112. *See id.* (explaining difference between force and injury was "distinction without a difference").

113. *See id.* at 620 (emphasizing lack of clarity).

114. *Compare Baptiste*, 841 F.3d at 620 (finding no language in *Johnson* to support idea that list of enumerated crimes was important to *Johnson* court's analysis), *with Gonzalez-Longoria*, 831 F.3d at 677 (holding list of enumerated crimes key reason residual clause unconstitutionally vague).

115. *See Baptiste*, 841 F.3d at 620 (holding § 16(b) unconstitutionally vague with or without enumerated crimes).

116. For a discussion of reasons why the Third, Sixth, Seventh, Ninth, and Tenth Circuits held § 16(b) unconstitutionally vague, see *supra* notes 52–69 and accompanying text.

117. *See Baptiste*, 841 F.3d at 620–21 (asserting laws including substantial risk inquiries constitutional when applied to real-world facts).

118. *See id.* at 621–23 (holding invalidity of § 16(b) meant Baptiste did not commit aggravated felony per se).

119. *See id.* at 623 (providing conclusion of decision).

C. *The Importance of the Decision*

The Third Circuit was correct in holding § 16(b) unconstitutionally vague because it eliminated a criminal provision that produced non-uniform and unpredictable results in an area of law already rife with confusion.[120] The Third Circuit emphasized that determining whether a suspected criminal's behavior falls under the crime of violence definition forces judges to speculate about an abstract offense and how much risk this abstract offense might require to qualify as a crime of violence.[121] As the court emphasized, this inquiry breeds unpredictability.[122] Even the Third Circuit's own careful analysis of whether Baptiste's conduct constituted a crime of violence did not yield a clear answer.[123] Furthermore, any law that causes an ordinary individual to guess at what conduct falls under that law is impermissibly vague.[124] This maxim is especially true when the penalty for misconduct is as harsh as deportation.[125] For noncitizens, a criminal conviction almost certainly means deportation.[126] Therefore, the Third Circuit correctly decided to hold § 16(b) unconstitutionally vague, because it eliminated a clause that baffled both ordinary people and courts as to what conduct was prohibited.[127] Immigrants and their attorneys in the Third Circuit will now have fair notice as to what conduct is prohibited by law.[128]

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120. *See id.* at 621 (asserting crime of violence created more arbitrariness than was permissible under Constitution); *see also* Koh, *supra* note 15, at 1128 (highlighting terms used to describe confusing area of immigration law).

121. *See Baptiste*, 841 F.3d at 614 (stating lack of guidance forced court to rely on "common sense and judicial experience" instead of uniform rules).

122. *See id.* at 621 (reiterating that ordinary case and serious potential risk inquiries create erratic results).

123. *See id.* at 607–15 (attempting to determine ordinary case of second degree aggravated assault and assign amount of risk required for that assault to qualify as crime of violence).

124. *See* Johnson v. United Sates, 135 S. Ct. 2551, 2556 (asserting laws violate Due Process Clause when lacking fair notice of conduct prohibited by law); *see also* Koh, *supra* note 15, at 1130 (stating intent of vagueness doctrine is to eradicate laws which create inconsistent applications).

125. *See* Koh, *supra* note 15, at 1130 (describing deportation as harsher than criminal sanctions); *see also* Markowitz, *supra* note 10, at 1301–02 (explaining grave consequences of deportation for many noncitizens and their families).

126. *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (describing deportation as "inevitable" for immigrants with criminal convictions); *see also* Koh, *supra* note 15, at 1172 (explaining severe consequences of criminal conviction on noncitizen).

127. *See Baptiste*, 841 F.3d at, 621 (holding § 16(b) could not survive under Due Process Clause scrutiny, which requires individuals receive fair notice of behavior punished by law).

128. *See* Koh, *supra* note 15, at 1175 (stating holding § 16(b) unconstitutionally vague implicates broader concerns about necessity of notice). *See generally Johnson*, 135 S. Ct. at 2556–67 (explaining that Due Process Clause requires would-be criminals to be on notice of what constitutes crime).

IV. BLUE SKIES AHEAD: IMPACT OF *BAPTISTE* IN THE THIRD CIRCUIT

The Third Circuit's holding limits the conduct that qualifies as an aggravated felony and avails litigants of new forms of relief from immigration removal proceedings.[129] This decision provides clarity regarding what conduct constitutes an aggravated felony under the INA and allows immigrants to be eligible for certain forms of relief from which they had previously been barred due to their crime of violence conviction.[130] What remains uncertain, however, is whether this holding will apply retroactively.[131]

A. *Clarity on Conduct Constituting an Aggravated Felony*

The Third Circuit's elimination of § 16(b) as unconstitutionally vague narrows the conduct considered an aggravated felony.[132] Under the INA, an aggravated felony is defined by a list of crimes, such as rape, murder, child pornography, and trafficking, in addition to a crime of violence.[133] Prior to *Baptiste*, the crime of violence provision essentially functioned as a catchall within this list.[134] Without this catchall provision in the Third Circuit, attorneys for the government will have to charge an immigrant with one of the other, more specific aggravated felonies named in the statute in order to subject the immigrant to removal.[135] For practitioners representing noncitizens, this decision provides more guidance regarding

129. *See Baptiste*, 841 F.3d at 623 (invalidating crime of violence as legitimate crime under aggravated felony definition of INA); *see also* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (stating voidance of § 16(b) allows those formerly convicted of crime of violence to pursue new forms of relief).

130. *See* Kalar, *supra* note 22 (explaining confusion caused by crime of violence statute); *see also* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (stating options for relief available to those without crime of violence convictions).

131. *Cf. Baptiste*, 841 F.3d 601 (lacking any statement about whether holding applies retroactively). *See generally* Welch v. United States, 136 S. Ct. 1257, 1268 (2016) (applying *Johnson* retroactively).

132. *See* Wickham, *supra* note 26 (finding voidance of § 16(b) removes individuals convicted of crimes of violence from INA statute conduct that can make noncitizens eligible for deportation); *see also Challenging the Use of 18 U.S.C. § 16(b) in Deportation Proceedings*, WILSON LAW GROUP: BLOG (Feb. 16, 2016), https://wilsonlg.com/immigration/blog/when-conviction-crime-violence-evolving-interpretation-18-usc-section-16 [https://perma.cc/QSG4-4462] (recognizing that now fewer offenses considered crime of violence).

133. *See generally* 8 U.S.C.A. § 1101(a)(43) (West 2014) (defining aggravated felony under INA).

134. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 24 (asserting § 16(b) serves as "catchall" for aggravated felony definition).

135. *See id.* at 25 (explaining removal of § 16(b) as crime does not prevent government from prosecuting individual based on other crimes listed in aggravated felony definition); *see also* Brief for Respondent at 58–59, Lynch v. Dimaya, 137 S. Ct. 31 (2016) (No. 15-1498), 2016 WL 7321783 (stating government still able bring aggravated felony charges on other grounds).

precisely what conduct is included within the felony definition.[136] For instance, if noncitizen clients are charged with crimes and need to know whether they should plead guilty, lawyers are now in a better position to advise their clients on the effects these pleas will have on their immigration statuses.[137]

B. *New Forms of Relief Are Available*

The Third Circuit's decision also means immigrants are now eligible for relief from which they had been previously been barred due to their crime of violence convictions.[138] Noncitizens who had been convicted specifically of crimes of violence under the INA were ineligible for certain forms of relief from deportation.[139] Under 8 U.S.C. § 1229b, individuals placed in removal proceedings can have their proceedings cancelled by the United States Attorney General if they have resided in the United States for more than ten years, they have "good moral character," and if returning to their country of origin would result in "exceptional and extremely unusual hardship."[140] The statute, however, expressly carves out an exception which states that if an individual is convicted of a crime of violence, they are not eligible for cancellation of their removal proceedings; thus, prior to the Third Circuit's decision in *Baptiste*, immigrants convicted under § 16(b) were not eligible for this form of relief.[141]

After *Baptiste*, noncitizens in the Third Circuit are now eligible for forms of relief to that were previously not available to them.[142] Practitioners representing immigrants may now have more options available to help

136. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 5–18 (listing crimes where no clear answer regarding whether each is considered crime of violence); *see also* Kelly Knaub, *10th Cir. Finds INA Definition of 'Crime of Violence' Vague*, LAW360 (Sept. 19, 2016, 5:31 PM), https://www.law360.com/articles/841550/10th-circ-finds-ina-definition-of-crime-of-violence-vague [https://perma.cc/6Q3R-2BRV] (explaining confusion over § 16(b) for both noncitizens charged and judges deciding on cases).

137. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 6–7 (describing difficulty of noncitizens to understand consequences of possible guilty plea to crime).

138. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (explaining possible forms of relief previously unavailable to noncitizens with crime of violence conviction).

139. *See id.* at 25 n.21 (describing forms of relief those convicted of crime of violence not entitled to use).

140. *See* 8 U.S.C. § 1229b(b)(1), (2) (2012) (listing criteria for cancellation of removal); *see also* Dimaya v. Lynch, 803 F.3d 1110, 1113 (9th Cir. 2015) (reiterating elements noncitizen must meet to be eligible for cancellation of removal).

141. *See* 8 U.S.C. § 1229b(b)(1)(C) (stating individuals convicted of aggravated felonies barred from cancellation of removal relief).

142. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (explaining invalidation of § 16(b) means noncitizens not automatically barred from certain forms of relief).

their clients terminate their removal proceedings.[143] For DHS attorneys, these new forms of relief are not a guarantee that the Attorney General will find that a noncitizen meets the criteria for cancellation of removal.[144] So, while the *Baptiste* ruling on § 16(b) allows immigrants to seek cancellation of removal, it does not guarantee that individuals will receive cancellation.[145] The cancellation of removal remains up to the Attorney General.[146]

C. *Does* Baptiste *Apply Retroactively?*

One question that remains for practitioners and their clients is whether the *Baptiste* ruling will apply retroactively.[147] Neither the Third Circuit nor any of the other circuits addressing the constitutionality of § 16(b) have addressed whether voiding the statute will affect prior cases.[148] However, there might be guidance on this issue stemming from the *Johnson* decision.[149] The decision in *Johnson* was determined to apply retroactively by the Supreme Court in *Welch v. United States*.[150] In *Welch*, the Supreme Court held that a ruling that substantively changes the conduct or the people punishable by the statute at issue must be retroactive.[151] Given the Third Circuit's heavy reliance on *Johnson* and statement

143. *See* Koh, *supra* note 15, at 1183 (recognizing invalidation of § 16(b) as opportunity to challenge deportation statutes); *see also Challenging the Use of 18 U.S.C. § 16(b) in Deportation Proceedings*, *supra* note 132 (describing voidance of § 16(b) as beneficial for those fighting deportation proceedings).

144. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (acknowledging Attorney General has ultimate control over whether noncitizen receives cancellation).

145. *See generally* 8 U.S.C.A. § 1229b (West 2008) (stating aggravated felony can bar individuals from cancellation of removal eligibility and listing circumstances that allow immigrants to receive, or prevent them from receiving, cancellation of removal proceedings); *see also* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 ("Thus, to the extent that § 16(b)'s invalidation may have an impact on the government's ability to deport noncitizens, it is a limited one." (internal quotation marks omitted) (quoting Moncrieffe v. Holder, 133 S. Ct. 1678, 1692 (2013))).

146. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (reiterating cancellation decided by Attorney General).

147. *See generally* Baptiste v. Att'y Gen., 841 F.3d 601 (3d Cir. 2016) (holding § 16(b) unconstitutionally vague but not commenting on whether holding retroactive).

148. *See generally id.* (remaining silent on possible retroactive application); *see also generally* Golicov v. Lynch, 837 F.3d 1065, 1073–74 (10th Cir. 2016) (same); United States v. Gonzalez-Longoria, 831 F.3d 670 (5th Cir. 2016) (en banc) (same); Shuti v. Lynch, 828 F.3d 440, 448 (6th Cir. 2016) (same); United States v. Vivas-Ceja, 808 F.3d 719, 722–23 (7th Cir. 2015) (same); Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015) (same).

149. *See generally* Welch v. United States, 136 S. Ct. 1257 (2016) (holding decision in *Johnson* applied retroactively).

150. 136 S. Ct. 1257 (2016); *see id.* at 1265 (determining unconstitutionally vague statutes dealing with substantive rules apply retroactively).

151. *See id.* (describing effect of *Johnson* as altering reach of ACCA, as well as altering people and conduct regulated by ACCA).

that the ACCA's residual clause and § 16(b) are essentially the same, it would seem likely that *Baptiste* would also apply retroactively.[152] Additionally, the Third Circuit's § 16(b) ruling that affects conduct for which a noncitizen can be deported falls directly under the *Welch* proposition that a statute that changes punishable conduct applies retroactively.[153]

For practitioners representing clients currently in deportation proceedings who were convicted of a crime of violence, a retroactive application would be beneficial.[154] These clients could have their previous convictions vacated and be able to seek forms of relief previously unavailable to them.[155] Additionally, a retroactive holding would be helpful to those immigrants who have already been removed from the United States due to a crime of violence conviction but wish to reenter the country.[156] As it stands now, immigrants previously removed from the country for aggravated felonies are not allowed to reenter for at least twenty years, if not more.[157] However, if convictions for crimes of violence were vacated retroactively, these individuals could be immediately eligible to return.[158] For government attorneys, this could mean relitigating old cases or finding new grounds for a noncitizen's removability.[159]

V. CONCLUSION

In *Padilla v. Kentucky*,[160] the Supreme Court noted, "[d]eportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."[161] However, the Third Circuit's recent decision in *Baptiste* provides clarity to noncitizens and their attorneys regarding what conduct is subject to punishment under the INA's aggravated felony provi-

152. *See Baptiste*, 841 F.3d at 621 (holding § 16(b) unconstitutionally vague because it was materially same as ACCA's residual clause and failed same two-prong analysis as residual clause).

153. *See Welch*, 136 S. Ct. at 1264–65 (explaining that change to any substantive rule has retroactive effect).

154. *See generally* Wickham, *supra* note 26 (describing crime of violence conviction as "death knell" in deportation decision).

155. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (explaining benefits of removal of crime of violence conviction).

156. *See* 8 U.S.C. § 1182(a)(2)(B) (2012) (listing individuals not allowed into United States, including those with "multiple criminal convictions").

157. *See* 8 U.S.C. § 1182 (a)(9)(A) (stating limits to reentry for any noncitizen who committed crime of violence and was removed from United States).

158. *See id.* (stating five-year reentry ban for noncitizen previously removed and did not previously commit crime in United States).

159. *See* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (explaining without crime of violence, government still retains many grounds for removing noncitizen).

160. 559 U.S. 356 (2010).

161. *See id.* at 360 (describing harsh consequences of deportations).

sion.[162] The *Baptiste* court limits the crimes that could qualify as an aggravated felony and opens up new forms of relief for individuals who previously were ineligible.[163] The Third Circuit rendered its decision at a pivotal time, as the question of § 16(b)'s constitutionality is currently pending before the Supreme Court.[164] In the fall of 2016, the Supreme Court granted certiorari to review the Ninth Circuit's ruling in the *Dimaya* case.[165] Until the *Dimaya* case is decided, § 16(b) remains unconstitutional in the Third Circuit.[166] In the meantime, practitioners in the Third Circuit now have a better understanding of what conduct subjects a noncitizen to removal and are better able to advise their clients of the immigration consequences of certain criminal offenses than they were before *Baptiste*.[167]

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162. *See, e.g.*, *Challenging the Use of 18 U.S.C. § 16(b) in Deportation Proceedings*, *supra* note 132 (stating fewer crimes now constitute aggravated felony); *see also supra* notes 120–28 and accompanying text for analysis of effect of *Baptiste* decision.

163. *See supra* notes 91–119 and accompanying text for analysis of *Baptiste*; *see also* Brief of National Immigration Project of the National Lawyers Guild, *supra* note 11, at 28 (finding voidance of § 16(b) means individuals not barred from some forms of relief).

164. *See generally* Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016).

165. *See generally id.* (granting certiorari in September of 2016 to hear *Dimaya*).

166. *See* Hessick, *supra* note 26 (explaining that *Johnson* was decided before Justice Gorsuch was confirmed for vacant Supreme Court seat and that *Johnson* decision garnered six-vote majority).

167. *See* Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (emphasizing importance of attorneys to provide accurate advice to clients facing criminal convictions).