DACA Takes Center Stage in Budget and Immigration Reform Negotiation

By Jared Leung

2018 has begun with both promises and alarms in immigration reform. As expected when the Trump administration announced its cancellation in September 2017, The Deferred Action for Childhood Arrivals Program (DACA) is at the forefront.

DACA Injunction

On Tuesday, January 9, 2018, Judge William Alsup, a U.S. District Court Judge for the Northern District of California, issued a nationwide injunction against the “September 5, 2017” rescission of DACA by the White House. The injunction prevented the termination of the DACA program scheduled to take place on March 5, 2018 and instructed the Department of Homeland Security (DHS) to resume accepting renewal applications.

On Saturday, January 13, 2018, the United States Citizenship and Immigration Services (USCIS) cited the Court’s decision and resumed accepting DACA application under the same terms in place before the “September 5, 2017” rescission with two major exceptions:

- USCIS does not accept applications from individuals who have never had DACA. USCIS only accepts renewal applications. Individuals who failed to renew because of the rescission announcement may now submit their renewal applications.
- USCIS does not accept initial or renewal applications for the “advance parole” travel document, which allows DACA recipients to travel outside of and return to the U.S. in case of an emergency.

USCIS’ announcement can be viewed at https://goo.gl/E5bVxD.

Government Shutdown

The fight over DACA then played a part in the shutdown of the U.S. Government, which began on 12:01 am on Saturday, January 20. There were many reasons for the shutdown, such as funding for defense, the border wall, CHIP (Children’s Health Insurance Program), etc., but inability of Senate Republicans and Democrats to find common ground on DACA was a major barrier to reaching an agreement that would have avoided the shutdown. Just three days later, the shutdown ended for the immediate future through an agreement to fund the government through February 8th. The agreement was based on a pledge by Senator Mitch McConnell h to allow an immigration vote before February 8 to decide the fate of DACA.

White House Immigration Framework

Just four days later, on January 24, 2018, the White House announced the “Framework on Immigration Reform and Border Security”, which cited the following principles:
• Border Security – $25 billion for the border wall, hire more personnel and tools, stop catch-and-release policy, increase efficiency of removal systems, etc.

• DACA legalization – 10 to 12-year path to citizenship with requirements for work, education and clean criminal backgrounds for 1.8 million individuals. This will include eligible individuals who have not applied for DACA because there are approximately only 750,000 current DACA recipients.

• Protect the Nuclear Family: Allow US citizens and permanent residents to sponsor only spouse and children under 21 years old. The current system allows permanent residents to petition for their adult and single children over 21 years old, and US citizens to petition for adult and married children over 21 years old, and siblings. The White House believes that this will stop what they call “chain migration.”

• Eliminate Lottery and Repurpose Visas: Terminate the green card lottery program and use the numbers to alleviate family and skilled workers backlog.

See: https://goo.gl/QMCXWF.

Not surprisingly, leaders from the Democratic Party and immigrant advocacy groups strongly criticized the framework. Congresswoman Pelosi and Senator Schumer accused the White House of using DACA as a bargaining chip to enact “a hateful agenda” of immigration and bolster the Administration’s effort to “make America white again”. See https://goo.gl/2Bg3pE.

Planning Ahead

How should we prepare for this?

First, anything can happen. Expect the un-expected. If we can do something based on a court decision or temporary policy shift, we should act on it quickly, because we do not know how long that window of opportunity will be opened.

Second, DACA recipients and their employers should act ASAP. The Justice Department is seeking SCOTUS’ review of the District Court decision on DACA, so we know that the Administration wants to cancel DACA in its current form by overturning the injunction issued by Judge Alsup. We do not know how long the DACA legal injunction will last. For those who are eligible for DACA but have never applied, they are unfortunately out of luck. But for everyone else, they should immediately apply to renew DACA benefits if eligible. At the very least, they can extend their employment work authorization for two more years. Employers with DACA employees will feel the most repercussions if DACA completely disappears. They will collectively lose 750,000 workers who are reliable and eager to work. As such, we recommend that employers identify their DACA employees and encourage them to apply for renewal of their status and work permit if applicable. Also, if you are an employer and value the work currently done by a DACA employee, you should contact Congress and let them know how you feel.

Third, U.S. citizens and permanent residents should consider submitting petitions for their eligible sons, daughters, and siblings under the current system. It is clear that the long-standing principle of family
unity in U.S. immigration is under attack. “Chain migration” is such a derogatory and misleading term of
our current immigration system, and it completely disregards the quota allocations that are already in
place to ensure proper administration of the number of immigrants permitted each year based on family
petitions. Nonetheless, because “anything can happen”, we suggest filing a family petition if needed to
safeguard the options for any affected individual.

Fourth, more than ever, visitors and immigrants must clearly stay on the right side of the law. This
seems obvious. However, in my law practice, I have seen people who make mistakes and wrong choices
regardless of their immigration status. (Don’t we all?). Visitors and intending immigrants who make
simple mistakes may find themselves becoming deportable or removable from the U.S.

More will unfold in the next two weeks. The fate of DACA will send ripple effects across the nation and
in all areas of employment and legal matters. It is my sincere hope that our leaders can cast aside
political differences and work together to ensure a resolution that encompasses both justice and
compassion.
Buy American Hire American Executive Order and Effects on Business Immigration

On April 18, 2017, President Trump issued the “Buy American and Hire American” Executive Order (hereinafter “BAHA Order”). The BAHA Order directs federal agencies to buy American products made in the United States. The BAHA Order specifically mentions the iron and steel industries, and its manufacturing processes, “from the initial melting stage through the application of coatings”. The “Buy American” part of the BAHA Order aims to benefit the iron and steel workers and the industry.

The “Hire American” part of the BAHA Order singles out the “H-1B” visa program and the enforcement of section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)), which governs the labor certification process. Particularly, the BAHA Order wants to protect U.S. workers against the “fraud and abuse” of the current immigration systems and “ensures that the H1B visas are awarded to the most-skilled and highest paid petition beneficiaries.”

This author supports the proper and legal administration of the H-1B work visa program and the rest of the immigration system. However, the BAHA Order has a significant and negative impact on business immigration, going far beyond the H-1B visa program and Section 212(a)(15) of the INA.

The H-1B work visa program is reserved for positions that require at least a bachelor’s degree in a specific field of education. It requires employers to pay the “prevailing wage” as determined by the Department of Labor (“DOL”). An employer cannot hire H-1B workers to counter the effects of a strike, and must put up bulletin board postings listing position and wage information in two separate areas within the place the H-1B worker will be employed, so that U.S. workers are informed of the H-1B hire. Most companies are in full compliance of the H-1B visa program, following the law, and only bringing in H-1B visa workers to meet specific need of the companies. Bringing in an H-1B visa worker is an expensive process for employers because the employer is required to pay for the costs associated with the H-1B process. The government filing fees alone are approximately $2500 and are separate from any additional legal fees incurred from hiring an attorney to handle the complicated process.

Despite these legal safeguards ensuring that the H-1B visa program does not harm U.S. workers, the H-1B visa program remains subject to criticism and is often labeled as a program to bring in “cheap labor.” One example can be found in last year’s news headlines concerning Disney’s alleged replacement of U.S. workers with H-1B workers. This type of news along with other news of H-1B abuses and fraud easily and frequently catch the attention of the media. Disney was eventually exonerated in court, but such an outcome does little to counter the negative impact of the initial reports of H-1B “abuse.”

Without directly commenting on the merits of the Disney case, the author concedes that it would be naïve to think that there are no abusers of the H-1B program. There are always bad apples. However, for the most part, the H-1B program is working as intended. The author is proud to say that he has assisted only companies who fill badly needed openings with H-1B workers in positions such as teachers, doctors, engineers, and critical hires in U.S. start-up companies. These companies pay the fair wage to the H-1B worker and continue to recruit U.S. employees as often as they can.
However, the BAHA Order has gravely affected these law-abiding employers. Under the BAHA Order, USCIS (“U.S. Citizenship and Immigration Services”) issued over 85,000 “requests for evidence,” commonly known as “RFE” between January 1 and August 31 this year, with most of these RFEs directed at H-1B applications. Many of these RFEs attack the merit of the H-1B position, questioning whether certain jobs actually require degrees. The author has heard from a colleague that USCIS has gone so far as to deny an H-1B petition for a civil engineer, arguing that a civil engineer does not require a bachelor’s degree.

Most of these RFEs raise the wage argument. Particularly, USCIS claims that the wage level paid to the H-1B workers is inappropriate. H-1B workers must be paid the prevailing wage, and the DOL has four levels of wages for a given H-1B position. An employer pays the H-1B worker a wage ranging from level 1 to level 4, depending on the complexity and seniority of the position. The level 1 wage for a junior position is perfectly appropriate and in full compliance of the law. Unfortunately, USCIS appears to have totally disregarded the validity of the level 1 wage. It repeatedly argues that level 1 wage is not appropriate for an H-1B position, concluding that if the H-1B position truly is complex, it requires more than a level 1 wage. In doing so, USCIS ignores the fact that the DOL has instituted a wage system for H-1B workers, which starts with level 1. Instead of ensuring that H-1B employers pay a fair wage, USCIS has inflated the wage level, harming U.S. employers and even creating reverse discrimination against U.S. workers in some cases because requiring a level 2 or above wage pushes the H-1B wages to a level higher than the normal wage paid to U.S. workers.

A couple of examples illustrate the fallacy of the positions taken by USCIS. In one example, an employer appropriately selected a level 1 wage for the base pay in a new doctor’s H-1B petition. The employer used the level 1 wage because the doctor was new and relatively inexperienced. Despite the fact that the employer was actually paying the doctor significantly more than the level 1 wage, USCIS challenged the employer’s use of a level 1 wage based on a conclusion that an H-1B position requires more than a level 1 wage.

In another example, an H-1B position for a public school teacher is challenged because the teacher is paid a level 1 wage. USCIS claims that the teacher must be paid at least a level 2 wage because the position requires a teacher’s certificate. However, a public school teacher must have a teacher’s certificate to teach even at the entry level, so the challenge from USCIS fails to consider that even newly graduated teachers with zero independent experience must have a certificate to teach.

These are the challenges that legitimate U.S. businesses are facing. They negatively impact businesses by delaying new hire start dates and forcing changes to operational timelines. Rather than spending time and energy to deliver goods and services to U.S. consumers, the businesses are having to divert precious resources to respond to these RFEs. One of author’s clients received an RFE on every single one of its H-1B cases. Just a year ago, these H-1B cases would have been approved. However, this year, clients are interrupting their work flow, spending time of production managers and executive officers to produce evidence of what is already clear to the employer – it complies with the H-1B rules and is paying a fair and prevailing wage. The same stories are repeated thousands of times across the U.S.
all industries. The collective waste of U.S. employers’ time and money has to be in the billions of dollars.

The BAHA Order’s worst impact on legitimate business immigration is the introduction of the element of “why don’t you hire an American” into the visa process across the board and beyond the H-1B program. For example, many E-2 visa applicants are negatively impacted. E-2 visas are reserved for entrepreneurs looking to invest money into the U.S. economy and anecdotal evidence shows that these investors are having difficulty getting their visas because the U.S. consulate officers question why they don’t hire Americans in the U.S. These are foreign investors who are investing in the U.S. by putting money and opening up businesses. They are benefiting the U.S. and they will hire U.S. workers if their businesses take off. The law does not require them to immediately put U.S. workers on their payroll, because the law contemplates that these investors are starting their businesses in the U.S. and may not immediately have the capacity to hire U.S. workers. The law wants to encourage them to invest in the U.S. Any business that is successful in the U.S. will eventually need to hire U.S. workers to sustain the business. The legislation understands that. However, the BAHA Order injects the political element of “BAHA” when the law otherwise provides flexibility and considers a different time table.

The author is not disputing that hiring Americans and buying American products are bad. In fact, the author supports it fully. However, the BAHA Order has gone too far and caused unintended consequences on the very U.S. businesses that it seeks to protect. It is balking down legal and legitimate immigration and work visa processes. American business is suffering, rather than, benefiting from this Order.
Effect of Buy American Hire American Executive Order on Immigration Enforcement at the Worksite

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Background Considerations

[1] Introduction - The Political Landscape

In the year since the 2016 presidential election, the Administration of President Donald Trump has announced several shifts – some gradual and some seismic – in U.S. immigration policy. The Trump Administration’s immigration policies, as they relate to the employer community, center around the theme of the President’s “Buy American, Hire American” (“BAHA”) Executive Order of April 18, 2017. An integral aspect of the BAHA Executive Order is “to create higher wages and employment rates for workers in the United States, and to protect their economic interests[].” To achieve this objective, “it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad . . . .” 1

On October 8, 2017, President Trump sent a 70-point Immigration Principles and Policies to Congressional leaders, setting a marker of what this Administration will demand in return for a legislative solution to the Deferred Action for Childhood Arrivals (DACA) program, which the Administration will discontinue after March 5, 2018. Among the 70 points is the mandatory use of E-Verify, an electronic employment eligibility tool which the Department of Homeland Security administers, and an “[expanded] definition of unlawful employment discrimination to include replacement of U.S. citizen workers by nonimmigrant workers or the preferential hiring of such foreign workers over U.S. citizen workers.” Finally, the plan calls for “[strengthening] laws prohibiting document fraud related to employment or to any other immigration benefit.” 2

Executive branch agencies throughout the past year have implemented their own initiatives to support the BAHA agenda. On April 3, 2017, at the start of the first H-1B visa filing season under the Trump Administration, 3 the Department of Justice Civil Rights Division’s Immigrant and Employee Rights (IER) Section “cautioned employers petitioning for H-1B visas not to discriminate against U.S. workers.” IER further said that “U.S. workers should not be placed in a disfavored status, and the department is wholeheartedly committed to investigating and vigorously prosecuting these claims.” 4

1 Executive Order 13788 § 2(b). 82 Federal Register 18837 (Apr. 21, 2017).
3 Employers may begin the H-1B visa petition process as early as April 1 of each year for the purpose of bringing a foreign professional onboard by October 1 (start of the federal government’s following fiscal year) of the same year.
4 Justice Department Cautions Employers Seeking H-1B Visas Not to Discriminate against U.S. Workers. Department of Justice, Department of Justice, Apr. 3, 2017, available at
same component of the Civil Rights Division aggressively investigated employers for allegations of disparate treatment of non-U.S. citizen workers.

To complement the DOJ’s efforts, on April 4, 2017, the Department of Labor announced plans “to protect American workers from H-1B program discrimination.” Such plans include greater coordination with the Departments of Justice and Homeland Security, more transparency to the government and U.S. workers on how an employer uses the H-1B program, and creation of a “tip” line for aggrieved U.S. workers to lodge complaints.\(^5\)

In an effort to curb the unauthorized employment that may disadvantage U.S. workers, U.S. Immigration and Customs Enforcement (ICE) Acting Director Thomas Homan said on October 24, 2017, that his agency would increase audits of employers on their employment eligibility verification compliance by “four or five times” in fiscal year 2018.\(^6\) This is consistent with the Administration’s prior budget request to hire an additional 10,000 immigration enforcement agents.\(^7\) The theory behind ICE’s policy is that unscrupulous employers seek an unfair market advantage by hiring unauthorized workers, and there are willing and able U.S. workers to take these positions.

Finally, U.S. Citizenship and Immigration Services (USCIS), the Homeland Security agency that administers immigration benefits, announced on December 27, 2017, that it is “working on a combination of rulemaking, policy memoranda, and operational changes to implement the Buy American and Hire American Executive Order and is “creating and carrying out these initiatives to protect the economic interests of U.S. workers and prevent fraud and abuse within the immigration system.”\(^8\)

This chapter focuses on enforcement of immigration laws at the worksite under the Trump Administration, and specifically, how the Departments of Homeland Security and Justice are leveraging regulations on employment eligibility verification and immigration-related employment discrimination to support the Administration’s BAHA agenda.

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\(^7\) See Immigration Principles and Policies, at § D(i).

[2] Discussion

[a] Duty to Verify Employment Eligibility.

[i] Employers’ regulatory obligations.

Prior to 1986, interior enforcement consisted of “area sweeps” – operations where immigration officials targeted worksites that were likely to have high concentrations of unauthorized workers. The consequence of a raid was deportation for the unauthorized worker but without any penalty against the employer.

In 1978, the Select Commission on Immigration and Refugee Policy, led by Notre Dame University president Theodore Hesburgh, examined the question of interior immigration enforcement and the effect of cutting off demand for unauthorized labor by punishing the employer.9 In 1986, Congress enacted the Immigration Reform and Control Act (IRCA). IRCA introduced, for the first time, civil and criminal penalties against employers who hire unauthorized workers.10 IRCA requires employers to verify the employment eligibility of each of their employees in the United States. This is commonly called the “Form I-9 process” as employers must record the verification on Form I-9.11

The employee must provide information about herself/himself in section 1 of the Form I-9 after an offer of employment has been accepted and no later than the employee’s first day of work. Although only the employee may complete section 1, the employer can be penalized if section 1 is not completed properly. Section 2 of the Form I-9, which contains the employer’s attestation that the employer verified the employee’s identity and eligibility to work in the United States, must be completed by the employer within three business days after the date of hire. Reverification of expiring temporary employment authorization must be completed in section 3 no later than the expiration of the current employment authorization.12

Employees are required to appear in person to present original documents that prove their identity and authorization to work in the United States. Data from the documents presented must be recorded in section 2 of the Form I-9 by an authorized representative of the employer who can attest under penalty of perjury that he or she examined the documents, and determined in good faith using a reasonableness standard that the documents are legitimate and in fact related to the employee. The government has always interpreted this to mean that the employee appears in person and that the documents presented are originals. I-9 forms must be retained by the employer for three years from the date of hire or one year from the date of termination, whichever is later.13

[ii] The enforcement trends and penalty scheme

11 8 C.F.R. § 274a(a)(2).
12 8 C.F.R § 274a(b)(1).
13 Id. at § 274a(b)(2).
Priorities of past administrations

In the three decades following the enactment of IRCA, enforcement efforts varied in intensity, scope and direction depending on the political trend at any given time. Immediately after IRCA became law, immigrant rights advocates alleged that worksite raids unnecessarily instilled fear in and “traumatized” lawful immigrant workers. Organized labor, which had supported worksite enforcement, reversed its position in 2000, claiming that employers used worksite enforcement as leverage in exploiting workers.\(^{14}\) Employers complained that raids and inspections caused disruptions even when they did not employ illegal workers.\(^{15}\) The combination of political pressure and a lack of resources resulted in immigration authorities redirecting their priority from worksite raids to examining paperwork, which ironically punishes employers who at least attempted to comply with the Form I-9 requirements while the unscrupulous who hire “off the books” have no forms for the immigration agents to scrutinize.

Immigration enforcement under the George W. Bush administration was shaped mainly by the tragedy of September 11, 2001. For several years following the creation of the Department of Homeland Security (DHS) in 2003, U.S. Immigration and Customs Enforcement (ICE), DHS’s enforcement arm, focused its attention almost exclusively on “critical infrastructure protection.” Initiatives such as Operation Tarmac and Operation Glow Worm, which involved immigration inspections at airports and power plants respectively, reflected the agency’s national security priority.\(^{16}\) This shift away from purely immigration enforcement unrelated to national security and infrastructure led to a decline in overall enforcement statistics. For example, the amount of administrative fine collected fell from $3,337,472 in 2000 to zero (0) in 2006. By the end of the Bush Administration in 2008, there was a rise in that figure to $675,209 along with 6,287 immigration-related worksite arrests (civil and criminal), up from 517 arrests in 2003. The rise in arrests was due to the Bush Administration's focus on arresting unauthorized workers, especially those who were suspected of committing document or identity fraud, not increased enforcement against employers.\(^{17}\)

On April 30, 2009, Homeland Security Secretary Janet Napolitano announced that ICE would redirect enforcement of immigration law away from the unauthorized workers and toward employers. This shift in enforcement priority resulted in a sharp increase in civil monetary penalties for employers (reaching an all-time high of $16,275,821 in 2014) while the number of arrests of unauthorized workers decreased substantially (903 in 2014).\(^{18}\)

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\(^{16}\) Brownell, *The Declining Enforcement of Employer Sanctions*.


\(^{18}\) *Id.*
Figure 1 below illustrates ICE’s inspection process:

![Figure 1: ICE inspection process](image)

**Consequences of noncompliance**

Depending on the nature and extent of the violation, employers who do not comply with the employment eligibility verification requirements or who hire unauthorized workers may face civil or criminal sanctions, and may be barred from receiving federal contracts. Civil monetary penalties are divided generally into two categories: penalties for paperwork errors (on the Form I-9) and for knowingly hiring unauthorized workers. Figure 2 below diagrams the possible consequences.

![Figure 2: Possible consequences of immigration violation at the worksite](image)

The most common type of penalty is the “paperwork” error on the Form I-9 itself. Employers can be penalized even absent any evidence of unauthorized employment. Paperwork errors fall into two categories: technical or substantive. A substantive error is defined as one which could lead to the hiring of an unauthorized worker. A technical violation is one that is
procedural in nature. According to a 1996 amendment introduced by the late U.S. Representative Sonny Bono (R-CA), the employer has a 10-day window to correct technical errors after an ICE audit without penalty.

For substantive or uncorrected technical errors, ICE can assess penalties between $220 and $2,191 for each violation. ICE also may impose civil monetary penalties for knowingly hiring, or continuing to hire, workers who are not authorized to work, or those whose work authorization expires during the period of employment. The range of penalty is between $548 to $21,916 per violation. Knowledge can be actual or “constructive.”

One area where ICE and federal prosecutors have focused is Social Security number mismatch. On August 15, 2007, DHS issued a final rule setting forth an employer’s obligations to follow up upon being notified that the Social Security information pertaining to an employee or employees in its records did not match the records of the Social Security Administration (SSA). The new rule was relatively short-lived as the Obama Administration rescinded the regulation on October 7, 2009, at the behest of organized labor and immigrant rights advocates.

While the Obama Administration rescinded the guidance for employers on how to resolve Social Security data discrepancies, it continued to use an employer’s failure to resolve a discrepancy as basis for imputing knowledge of violation. Employers may discover Social Security mismatches through a variety of means, including notices from the SSA, federal or state revenue agencies, and retirement fund and benefits managers. In fact, many employers became aware of mismatches because of the Affordable Care Act’s reporting requirements. At the same time, employers who do try to take adverse employment action because of a Social Security mismatch have been prevented from doing so by the courts and federal agencies.

Figure 3 and 4 below contain respectively the civil monetary fine schedule for knowingly hiring unauthorized workers and for paperwork errors on the Form I-9.

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20 8 U.S.C. § 1324a(b)(6).
22 Id.
23 8 C.F.R § 274a.1(l)(1).
26 *See Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TIN*. IRS Publication 1586 (Rev. Feb. 2016) at 12.
27 See., e.g., *Aramark Facility Services v. SEIU*, 530 F.3d 817 (9th Cir. 2008); *Matter of Aramark Educational Services and United Here Local 26*, 355 NLRB No. 11, 2010 WL 768841 (NLRB 2010).
ICE may apply five mitigating or aggravating factors to decrease or increase the total amount of fines by as much as 25%. These factors are: (i) the size of the business of the employer being charged; (ii) the good faith of the employer; (iii) the seriousness of the violation; (iv) whether or not the individual was an unauthorized worker; and, (v) the history of previous violations of the employer.\(^\text{28}\) Figure 5 is a matrix with these factors and their impact on the final assessment of the monetary penalty.

\(^{28}\) 8 U.S.C. § 274a.10(b)(2).
Federal law also includes criminal sanctions for hiring unauthorized workers. An employer who engages in a pattern or practice of knowingly hiring or continuing to employ unauthorized workers “shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.”

Additionally, the government has prosecuted employers and responsible individuals under the alien smuggling and harboring law, which carries significantly greater penalties. For harboring, the maximum term of imprisonment is five years. However, if the harboring offense was committed for commercial advantage or private financial gain, the statutory maximum increases to 10 years. The statutory maximum for smuggling is also 10 years as is the penalty for conspiring to violate these laws.

Incorporating Technology

The Hesburgh Commission examined the use of an electronic verification system to enhance an employee’s ability to verify eligibility to work, but Congress did not authorize a pilot program for such a system until 1996. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) created the “basic pilot,” which the U.S. Citizenship and Immigration Services (USCIS) rebranded as “E-Verify.” E-Verify confirms employment eligibility by cross-checking information with the SSA and DHS databases. Participation is voluntary unless otherwise required by law or by agreement with the government, though as

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29 8 USC § 1324a(f).
30 8 USC § 1324(a).
31 8 U.S.C. § 1324(a). This statute includes other offenses related to aliens, including domestic transportation of unauthorized aliens, encouraging or inducing unauthorized aliens to enter the United States, and engaging in a conspiracy or aiding and abetting any of the preceding acts.
discussed below, various federal and state laws make participation effectively mandatory for many employers today.

The program has experienced tremendous improvement in recent years. According to a 2005 GAO study, about 15% of all queries were later to be determined unreliable.\textsuperscript{33} Today, USCIS reports that 0.15% of queries resulted in an inaccurate result.\textsuperscript{34} E-Verify participation also has undergone substantial growth in the last decade. GAO reported in 2005 that only 2,300 employers in the United States enrolled in E-Verify. The latest available figures from FY 2016 show 678,533 participants.

This growth in participation is due in part to the employer community’s confidence in the system, but also to federal and state laws that require employers to enroll in an otherwise “voluntary” system. In September of 2009, after a lengthy review, the Obama Administration implemented a regulation promulgated during the Bush Administration that requires most federal contractors and their subcontractors to use E-Verify.\textsuperscript{35} Moreover, employers who use E-Verify may extend the period of “optional practical training,” the period after graduating from a U.S. institution of higher education during which a foreign student may work in the United States without a visa, from 12 months to 24 months.\textsuperscript{36} Furthermore, 23 states currently have E-Verify-related laws,\textsuperscript{37} with additional states considering similar legislation.

At the federal level, in nearly every legislative session, there have been bills introduced to mandate E-Verify participation nationwide. In light of considerable discussions since Trump’s inauguration regarding possible immigration legislative reform, employers should prepare for a possible E-Verify mandate in 2018.\textsuperscript{38}

[b] Immigration-related employment discrimination

When Congress imposed the employment eligibility verification requirements in IRCA, there was concern among some members that the I-9 obligations would cause employers to become overzealous and not hire applicants who may look or sound foreign, or who are not U.S. citizens but otherwise eligible to work in the United States.\textsuperscript{39} IRCA therefore included an enforcement scheme for the so-called “immigration-related unfair employment practices” cases, and established an Office of Special Counsel for Immigration-Related Unfair Employment

\textsuperscript{34} Date retrieved from \url{www.uscis.gov/e-verify/about-program/performance}.
\textsuperscript{36} 82 Fed Reg. 13040, 13117 (Mar. 11, 2016).
\textsuperscript{38} Immigration Principles and Policies at § F(i).
\textsuperscript{39} 8 U.S.C. § 1324b.
Practices (OSC) to enforce these statutes. OSC was later renamed IER on January 18, 2017, two days before President Trump’s inauguration.

[i] Prohibited Practices and Protected Persons

National origin discrimination

The statute prohibits employment discrimination based on place of birth, country of origin, ancestry, native language, accent, or because individuals are perceived to be "foreign." It applies only to employers with four to 14 employees. The intent was to complement the jurisdiction of the Equal Opportunity Employment Commission (EEOC) over larger employers. EEOC and IER have a memorandum of understanding and refer cases to each other and treat a timely filed charge with one agency as timely for the other.

Citizenship status discrimination

Only specifically protected persons have standing to allege citizenship (immigration) status discrimination. They are U.S. citizens, lawful permanent residents who applied for naturalization within six months of eligibility, asylees and refugees, and beneficiaries of IRCA’s legalization programs. Unless mandated by law, employers may not limit hiring to applicants of certain immigration status (e.g., "U.S. citizen only") to the exclusion of other protected workers. Employers also cannot prefer to hire, inter alia, temporary visa holders or unauthorized workers over another worker in a protected class.

Document abuse

During the employment eligibility verification (Form I-9 completion) process, an employer may not demand more or different documents from the employee so long as the employee presents documents that are accepted by law. The Lists of Acceptable Documents are attached to the Form I-9 itself. The employee may present one document from List A, which demonstrates identity and work authorization (e.g., U.S. passport or a green card), or a combination of a List B (identity only such as a driver's license) plus a List C (work

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40 Id. at § 1324b(2)(c), (d).
41 81 Fed Reg. 91768, 91789 (Dec. 19, 2016). For convenience, the term IER is used throughout this article to describe the office that enforces IRCA’s anti-discrimination provisions for all points in history.
42 Id. at § 1324b(a)(1)(A).
45 8 USC § 1324b(a)(3).
authorization such as U.S. birth certificate or unrestricted Social Security card) documents. Demanding a DHS-issued document because the employee is not a citizen is an example of document abuse.

A 1996 amendment added "intent" as an element to document abuse. As such, when an employer asks for additional documents, there is no liability if there is no intent to discriminate. However, the 2017 regulation amended the definition of "discriminate" to mean "act of intentionally treating an individual differently from other individuals because of national origin or citizenship status, regardless of the explanation for the differential treatment, and regardless of whether such treatment is because of animus or hostility." In fact, the preamble to the new regulations even states that "the definition of "discriminate" would "actually apply to employers who intentionally treat individuals differently even if [the employers] want to help [the employees] through the employment eligibility process." Effectively, the new regulations have created a "strict liability" standard for "discrimination" notwithstanding a lack of intent to discriminate.

Finally, the question of who has standing to assert a document abuse charge is not yet a settled issue. IER’s position has been that all work authorized persons are protected against document abuse. However, a 2017 administrative decision, U.S. v. Mar-Jac, held to the contrary that only those protected against “citizenship status discrimination” – namely U.S. citizens, most permanent residents, refugees and asylees, have standing to raise document abuse. The Justice Department has not said whether Mar-Jac will be designated an agency precedent.

Retaliation and intimidation

IRCA prohibits retaliation, intimidation, coercion or threat against a person who asserts his or her rights under IRCA's anti-discrimination provisions. This protection extends to “any individual,” not only employees and not only protected persons.

[ii] IER’s Investigative Process

IER may initiate an investigation based on: 1) a charge by an individual party or an organization representing workers interests; 2) a referral from another government agency, such as EEOC or USCIS; and 3) an “independent investigation” on its own initiative or as a follow-

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46 8 USC § 1324b(a)(1), (6).
48 81 Fed Reg. at 91772, 91789.
51 Id. at § 1324b(a)(5).
up to a previous individual charge.\textsuperscript{53} Usually, the independent investigations target “pattern or practice” of discrimination.

[iii] Penalties and other consequences

The civil monetary penalty for intentional discrimination ranges from $452 to $18,107 “per individual discriminated against.” The penalty for document abuse is between $181 and $1,811 per individual discriminated against.\textsuperscript{54} There is no criminal penalty for a violation of IRCA’s antidiscrimination laws.

In addition to monetary penalties, employers also may be liable for back wages and other non-monetary remedies, such as mandatory training and reporting. For many employers, the reputational harm from disparaging press statements that the Justice Department issues with every successful complaint or even settlement.\textsuperscript{55}

Key areas of recent IER enforcement focus

Improper citizenship requirement (including “reverse” discrimination against U.S. workers)

Historically, IER has enforced IRCA’s prohibition against citizenship status discrimination against employers who unnecessarily restrict hiring to U.S. citizens to the exclusion of other protected persons. This situation arises often in the “export control” context where the employer believes in error that the International Traffic in Arms Regulations (ITAR)\textsuperscript{56} limits hiring to U.S. citizens only, but in fact “U.S. worker” as defined for, inter alia, purposes of ITAR is the same as IRCA’s definition for “protected individual.”\textsuperscript{57}

\textsuperscript{53} 8 U.S.C. § 1324b(d)(1) (“The Special Counsel shall investigate each charge received and, within 120 days of the date of the receipt of the charge, determine whether or not there is reasonable cause to believe that the charge is true and whether or not to bring a complaint with respect to the charge before an administrative law judge.”); \textit{id.} at (d)(2) (“If the Special Counsel, after receiving such a charge…, has not filed a complaint…within such 120-day period, the Special Counsel shall notify the person making the charge…and the person making the charge may…file a complaint directly….”). \textit{See also} 28 C.F.R. § 44.303.

\textsuperscript{54} 82 Fed Reg. 9131, 9134 (Feb. 3, 2017).


\textsuperscript{56} 22 C.F.R § 120 et seq.

Conversely, IER has made “citizenship status discrimination” claims against employers, during the past several administrations, for improperly favoring temporary visa holders.\textsuperscript{58} Enforcement of such reverse discrimination claim can come from a charge filed by an individual aggrieved U.S. worker. Often, IER would identify a series of job postings with language suggesting a preference for visa holders to support an “independent investigation” for pattern or practice. IER also has investigated several companies that outsource certain information and technology (IT) functions to a consulting firm that hires nonimmigrant workers. In the latter scenario, IER has alleged that the companies are using a third party – the contractor - to do what it may not do by itself. On this basis, the current Justice Department is leveraging IRCA to support the BAHA agenda.

\textit{Over-documentation at the time of initial verification}

Over-documentation at the time of initial verification occurs most often when the employer mistakenly believes that a non-citizen employee must produce a DHS-issued immigration document, such as a green card or an employment authorization document. IER often looks at a disproportionately high percentage of noncitizens producing DHS-issued documents to complete the Form I-9 as evidence of a discriminatory pattern. Indeed, recent precedent held that discriminatory intent may be inferred by statistics.\textsuperscript{59}

Pre-employment screening

IER has initiated some investigations based on employers’ screening of job applicants’ need for visa sponsorship. IER has done so notwithstanding its longstanding position that the law cannot compel employers to sponsor job applicants for visas\textsuperscript{60} and, by definition, individuals who need visa sponsorship are not protected by IRCA’s prohibition against citizenship status discrimination.\textsuperscript{61}

IER acknowledges that employers may ask job applicants about their need for visa sponsorship. In 1998, it provided public guidance on how to ask the questions. These questions are: 1) Are you legally authorized to work in the United States, and 2) will you now or in the future require sponsorship for employment visa status.\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{58} See, e.g., Press Release. iGate Mastech, Inc. to Pay $45,000 to Settle Discrimination Claim (May 1, 2008), available at https://www.justice.gov/archive/opa/pr/2008/May/08-crt-369.html; \textit{U.S. v. Estopy}, 11 OCAHO no. 1252 (OCAHO 2015).
\item \textsuperscript{59} United States v. Life Generations Healthcare, LLC., 11 OCAHO no. 1227 (OCAHO 2014).
\item \textsuperscript{60} See, e.g., Technical Assistance Letter from Deputy Special Counsel Alberto Ruisanchez to Angelo Paparelli (April 30, 2014) (“communicating to an unsuccessful applicant that the employer's unwillingness to sponsor the applicant was the basis for the non-hire decision is not likely to lead to a determination by [IER] that an employer has committed unlawful citizenship status discrimination”), available at https://www.justice.gov/sites/default/files/crt/legacy/2014/05/06/180.pdf.
\item \textsuperscript{61} 8 U.S.C. § 1324b(a)(3).
\end{itemize}
However, employers discovered over time that these questions are insufficient. Many have expanded these questions to inquire about whether the applicants have indefinite work authorization by enumerating the classes of protected persons under IRCA. Such questions became the standard industry practice until 2016, when IER, without any legal explanation, said that the expanded questions “implicate[s] several parts of the anti-discrimination provision,” and that IER “discourage[d] asking the proposed questions . . . to avoid generating confusion among applicants or human resources personnel about the need for this information.”63

Because the applicants who need sponsorship – and who lack indefinite right to work – are not covered by the citizenship status discrimination provisions, IER’s only theory for enforcement against the employers who ask the expanded questions is “document abuse,” meaning that the employer is being investigated for rejecting current, valid work authorization, and not for refusing to sponsor for a visa in the future.

**Unnecessary reverification**

Some employers confuse the concept of expiring document with expiring work authorization and ask permanent residents to update their I-9 forms when a green card expires - even though they are authorized to work indefinitely. IER considers this to be intentional discrimination or disparate treatment based on citizenship status if U.S. citizens are not also asked to update the I-9 when their passports expire.64

IER often receives data of such improper (or unnecessary) reverification from E-Verify data and uses this information to conduct independent investigations. The basis or the discrimination charge can be either document abuse because the employer is unnecessarily examining documents, or citizenship status discrimination because the employer is creating hurdles to employment for noncitizens but not for citizens.

**Best practices recommendations**

The key to avoiding liability for either eligibility verification noncompliance or discrimination is to create a robust compliance program, conduct a thorough review of the company’s records and policies, take remedial steps where necessary, and train the appropriate staff to ensure future compliance. Specifically, employers should do the following:

1. **Employment eligibility verification compliance**
   
   a. Conduct an internal Form I-9 audit.

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Form I-9 enforcement is “form over substance,” and it is critical to follow the regulations and agency guidance strictly. Even without a single unauthorized employee, given the civil penalties for paperwork violations provided above, an employer can accumulate a sizable penalty. Moreover, many of the purely paperwork violations can be remedied before ICE finds them through an audit. However, its practice is to not give credit for any corrections made after an audit commences.

[b] Create a comprehensive verification and reverification policy along with a training plan for the human resources staff.

A robust and legally sound employment eligibility verification policy is important for two reasons. First, it provides adequate guidance to the human resources staff who are responsible for completing the Form I-9 properly and for ensuring that each employee’s work authorization information is up-to-date. The second reason is that having a solid policy demonstrates the company’s good faith commitment to compliance, and that will play a significant role where ICE has discretionary authority when assessing a penalty. Part of having a sound policy includes having a strong training regimen for the staff responsible for verifying and updating employment eligibility. The training regimen should account for turnover of staff in human resources positions.

[c] Hold contractors to a high standard of compliance.

The general rule is that a company is not responsible for verifying the employees of its contractors, even if the contractors’ employees work on the company’s premises. However, there is precedent for law enforcement piercing the veil and impute knowledge of illegal employment to the customer. Moreover, even if the company is not liable ultimately under immigration law, there is still the risk of major disruption to productivity and reputation if a significant number of contract employees are arrested and removed.

[d] Beware of State Law.

As more and more states have enacted their own employment verification laws, it is not enough to be compliant with only federal requirements. It is especially critical for employers to understand the requirements in each state. Many states require E-Verify enrollment as a condition to receiving a business license. The exposure to employers, therefore, can be much more severe than simply paying federal civil monetary penalties.

[2] Avoiding immigration-related employment discrimination

[a] Document nondiscriminatory reasons for employment and outsourcing decision.

Employers may have many legitimate reasons for making personnel decisions that are unrelated to immigration status. A well-documented memorandum for the employer's action
may be sufficient to rebut an allegation of discrimination. At a minimum, it will shift the burden back to the IER to prove discriminatory intent.\(^65\)

Given IER’s focus on the use of H-1B visas by consulting firms and the scrutiny of outsourcing agreements, it is critical to document clearly that citizenship (visa) status of a service provider’s workforce is not among criteria for selecting that service provider. A related concern is that the service agreement and any internal guidance must clearly reflect that the agreement with the service provider is to outsource a function, and not to obtain individual employees to replace the company’s laid-off workers.

\[b\] Have a clear policy and training protocol in place to refute allegation of company-wide discriminatory policy or practice.

The penalty for a singular violation may not be significant, but IER always looks deeper into a company's practices to identify a broader pattern of practice which would result in much more costly penalties. If the employer has a clear policy of nondiscrimination and keeps records on staff training, IER will find it more difficult to establish an institutional intent to discriminate.

\[c\] Establish a protocol to review job opening announcements.

In recent years, several American companies with workforces that consist overwhelmingly of U.S. workers settled charges of preferential hiring in favor of foreign visa holders over protected workers. Quite often, an investigation into the circumstances showed that the problem was not discriminatory hiring, but poor choice of words in the recruitment process. Employers must draft their job opening announcements carefully, and avoid language that could be misconstrued as such improper preference. Any advertisement to fill open positions should be reviewed by the employer's in-house or external counsel to avoid such costly misunderstanding.

\[d\] Understand Form I-9 verification and reverification rules.

Though IER has broadened the application of IRCA’s anti-discrimination provisions in recent years, the majority of discrimination claims still arise from an employer’s alleged improper actions during the employment eligibility verification (Form I-9) process. As such, employers can minimize the risk of an IRCA discrimination charge by becoming familiar and complying with IRCA’s verification requirements.

Specifically, employers should be familiar with what documents are acceptable for Form I-9 purposes, which employees have indefinite right to work and which need reverification. Do not reject documents that appear genuine and valid on their face, and do not deviate from these rules because of the actual or perceived immigration status of the employees.

\[\S 6.03\] Conclusion

The Trump Administration has made immigration enforcement a critical component of its BAHA initiative. Employment eligibility verification and citizenship status discrimination has become and will remain two key areas of focus for the Administration in this effort. Employers

can prepare for the increased enforcement by 1) ensuring that all relevant internal policies and best practices are accurate and complete; 2) training its human resources personnel on the key compliance issues regarding immigration-related employment discrimination and employment eligibility verification; and 3) conducting a self-audit of their Form I-9 records and make necessary corrections before ICE audits the records.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

SESSIOINS, ATTORNEY GENERAL v. DIMAYA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15–1498. Argued January 17, 2017—Reargued October 2, 2017—Decided April 17, 2018

The Immigration and Nationality Act (INA) virtually guarantees that any alien convicted of an “aggravated felony” after entering the United States will be deported. See 8 U. S. C. §§1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C). An aggravated felony includes “a crime of violence (as defined in [18 U. S. C. §16] . . . ) for which the term of imprisonment [is] at least one year.” §1101(a)(43)(F). Section 16’s definition of a crime of violence is divided into two clauses—often referred to as the elements clause, §16(a), and the residual clause, §16(b). The residual clause, the provision at issue here, defines a “crime of violence” as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” To decide whether a person’s conviction falls within the scope of that clause, courts apply the categorical approach. This approach has courts ask not whether “the particular facts” underlying a conviction created a substantial risk, Leocal v. Ashcroft, 543 U. S. 1, 7, nor whether the statutory elements of a crime require the creation of such a risk in each and every case, but whether “the ordinary case” of an offense poses the requisite risk, James v. United States, 550 U. S. 192, 208.

Respondent James Dimaya is a lawful permanent resident of the United States with two convictions for first-degree burglary under California law. After his second offense, the Government sought to deport him as an aggravated felon. An Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a “crime of violence” under §16(b). While Dimaya’s appeal was pending in the Ninth Circuit, this Court held that a similar re-
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Sidual clause in the Armed Career Criminal Act (ACCA)—defining "violent felony" as any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U. S. C. §924(e)(2)(B)—was unconstitutionally "void for vagueness" under the Fifth Amendment's Due Process Clause. Johnson v. United States, 576 U. S. ___ Relying on Johnson, the Ninth Circuit held that §16(b), as incorporated into the INA, was also unconstitutionally vague.

Held: The judgment is affirmed.

803 F. 3d 1110, affirmed.

Justice Kagan delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, concluding that §16's residual clause is unconstitutionally vague. Pp. 6–11, 16–25.

(a) A straightforward application of Johnson effectively resolves this case. Section 16(b) has the same two features as ACCA's residual clause—an ordinary-case requirement and an ill-defined risk threshold—combined in the same constitutionally problematic way. To begin, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a speculative hypothesis about the crime's "ordinary case," but provided no guidance on how to figure out what that ordinary case was. 576 U. S., at ___. Compounding that uncertainty, ACCA's residual clause layered an imprecise "serious potential risk" standard on top of the requisite "ordinary case" inquiry. The combination of "indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony," id., at ___, resulted in "more unpredictability and arbitrariness than the Due Process Clause tolerates," id., at ___. Section 16(b) suffers from those same two flaws. Like ACCA's residual clause, §16(b) calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk but "offers no reliable way" to discern what the ordinary version of any offense looks like. Id., at ___. And its "substantial risk" threshold is no more determinate than ACCA's "serious potential risk" standard. Thus, the same "[t]wo features" that "conspire[d] to make" ACCA's residual clause unconstitutionally vague also exist in §16(b), with the same result. Id., at ___. Pp. 6–11.

(b) The Government identifies three textual discrepancies between ACCA's residual clause and §16(b) that it claims make §16(b) easier to apply and thus cure the constitutional infirmity. None, however, relates to the pair of features that Johnson found to produce impermissible vagueness or otherwise makes the statutory inquiry more determinate. Pp. 16–24.

(i) First, the Government argues that §16(b)'s express require-
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ment (absent from ACCA) that the risk arise from acts taken “in the course of committing the offense,” serves as a “temporal restriction”—in other words, a court applying §16(b) may not “consider risks arising after” the offense’s commission is over. Brief for Petitioner 31. But this is not a meaningful limitation: In the ordinary case of any offense, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without the temporal language, a court applying the ordinary case approach, whether in §16’s or ACCA’s residual clause, would do the same thing—ask what usually happens when a crime is committed. The phrase “in the course of” makes no difference as to either outcome or clarity and cannot cure the statutory indeterminacy Johnson described.

Second, the Government says that the §16(b) inquiry, which focuses on the risk of “physical force,” “trains solely” on the conduct typically involved in a crime. Brief for Petitioner 36. In contrast, ACCA’s residual clause asked about the risk of “physical injury,” requiring a second inquiry into a speculative “chain of causation that could possibly result in a victim’s injury.” Ibid. However, this Court has made clear that “physical force” means “force capable of causing physical pain or injury.” Johnson v. United States, 559 U. S. 133, 140. So under §16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Thus, the force/injury distinction does not clarify a court’s analysis of whether a crime qualifies as violent.

Third, the Government notes that §16(b) avoids the vagueness of ACCA’s residual clause because it is not preceded by a “confusing list of exemplar crimes.” Brief for Petitioner 38. Those enumerated crimes were in fact too varied to assist this Court in giving ACCA’s residual clause meaning. But to say that they failed to resolve the clause’s vagueness is hardly to say they caused the problem. Pp. 16–21.

(2) The Government also relies on judicial experience with §16(b), arguing that because it has divided lower courts less often and resulted in only one certiorari grant, it must be clearer than its ACCA counterpart. But in fact, a host of issues respecting §16(b)’s application to specific crimes divide the federal appellate courts. And while this Court has only heard oral arguments in two §16(b) cases, this Court vacated the judgments in a number of other §16(b) cases, remanding them for further consideration in light of ACCA decisions. Pp. 21–24.

Justice Kagan, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, concluded in Parts II and IV–A:

(a) The Government argues that a more permissive form of the void-for-vagueness doctrine applies than the one Johnson employed
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because the removal of an alien is a civil matter rather than a criminal case. This Court’s precedent forecloses that argument. In Jordan v. De George, 341 U. S. 223, the Court considered what vagueness standard applied in removal cases and concluded that, “in view of the grave nature of deportation,” the most exacting vagueness standard must apply. Id., at 231. Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien than “any potential jail sentence.” Jae Lee v. United States, 582 U. S. ___. Pp. 4–6.

(b) Section 16(b) demands a categorical, ordinary-case approach. For reasons expressed in Johnson, that approach cannot be abandoned in favor of a conduct-based approach, which asks about the specific way in which a defendant committed a crime. To begin, the Government once again “has not asked [the Court] to abandon [the Court] to abandon the categorical approach in residual-clause cases,” suggesting the fact-based approach is an untenable interpretation of §16(b). 576 U. S., at ___. Moreover, a fact-based approach would generate constitutional questions. In any event, §16(b)’s text demands a categorical approach. This Court’s decisions have consistently understood language in the residual clauses of both ACCA and §16 to refer to “the statute of conviction, not to the facts of each defendant’s conduct.” Taylor v. United States, 495 U. S. 575, 601. And the words “by its nature” in §16(b) even more clearly compel an inquiry into an offense’s normal and characteristic quality—that is, what the offense ordinarily entails. Finally, given the daunting difficulties of accurately “reconstruct[ing],” often many years later, “the conduct underlying [a] conviction,” the conduct-based approach’s “utter impracticability”—and associated inequities—is as great in §16(b) as in ACCA. Johnson, 576 U. S., at ___. Pp. 12–15.

JUSTICE GORSUCH, agreeing that the Immigration and Nationality Act provision at hand is unconstitutionally vague for the reasons identified in Johnson v. United States, 576 U. S. ___, concluded that the void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution. The Government’s argument that a less-than-fair-notice standard should apply where (as here) a person faces only civil, not criminal, consequences from a statute’s operation is unavailing. In the criminal context, the law generally must afford “ordinary people . . . fair notice of the conduct it punishes,” id., at ___, and it is hard to see how the Due Process Clause might often require any less than that in the civil context. Nor is there any good reason to single out civil deportation for assessment under the fair notice standard
Syllabus

because of the special gravity of its penalty when so many civil laws impose so many similarly severe sanctions. Alternative approaches that do not concede the propriety of the categorical ordinary case analysis are more properly addressed in another case, involving either the Immigration and Nationality Act or another statute, where the parties have a chance to be heard. Pp. 1–19.

KAGAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, in which GINSBURG, BREYER, SOTOMAYOR, and GORSUCH, JJ., joined, and an opinion with respect to Parts II and IV–A, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed an opinion concurring in part and concurring in the judgment. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined as to Parts I–C–2, II–A–1, and II–B.
Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER v. JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

JUSTICE KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV–B, and V, and an opinion with respect to Parts II and IV–A, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

Three Terms ago, in Johnson v. United States, this Court held that part of a federal law’s definition of “violent felony” was impermissibly vague. See 576 U. S. ____ (2015). The question in this case is whether a similarly worded clause in a statute’s definition of “crime of violence” suffers from the same constitutional defect. Adhering to our analysis in Johnson, we hold that it does.

I

The Immigration and Nationality Act (INA) renders deportable any alien convicted of an “aggravated felony” after entering the United States. 8 U. S. C. §1227(a)(2)(A)(iii). Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country. See §§1229b(a)(3), (b)(1)(C). Accordingly, removal is a virtual certainty for an alien found to have an aggravated
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felony conviction, no matter how long he has previously resided here.

The INA defines "aggravated felony" by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. §1101(a)(43); see Luna Torres v. Lynch, 578 U. S. __, ___ (2016) (slip op., at 2). According to one item on that long list, an aggravated felony includes "a crime of violence (as defined in section 16 of title 18 . . . ) for which the term of imprisonment [is] at least one year." §1101(a)(43)(F). The specified statute, 18 U. S. C. §16, provides the federal criminal code's definition of "crime of violence." Its two parts, often known as the elements clause and the residual clause, cover:

“(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

Section 16(b), the residual clause, is the part of the statute at issue in this case.

To decide whether a person's conviction "falls within the ambit" of that clause, courts use a distinctive form of what we have called the categorical approach. Leocal v. Ashcroft, 543 U. S. 1, 7 (2004). The question, we have explained, is not whether "the particular facts" underlying a conviction posed the substantial risk that §16(b) demands. Ibid. Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in each case that the crime covers.1 The §16(b) in-

1The analysis thus differs from the form of categorical approach used to determine whether a prior conviction is for a particular listed offense (say, murder or arson). In that context, courts ask what the elements of a given crime always require—in effect, what is legally necessary for a
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quiry instead turns on the “nature of the offense” generally speaking. *Ibid.* (referring to §16(b)’s “by its nature” language). More precisely, §16(b) requires a court to ask whether “the ordinary case” of an offense poses the requisite risk. *James v. United States*, 550 U. S. 192, 208 (2007); see *infra*, at 7.

In the case before us, Immigration Judges employed that analysis to conclude that respondent James Dimaya is deportable as an aggravated felon. A native of the Philippines, Dimaya has resided lawfully in the United States since 1992. But he has not always acted lawfully during that time. Twice, Dimaya was convicted of first-degree burglary under California law. See Cal. Penal Code Ann. §§459, 460(a). Following his second offense, the Government initiated a removal proceeding against him. Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a “crime of violence” under §16(b). “[B]y its nature,” the Board reasoned, the offense “carries a substantial risk of the use of force.” App. to Pet. for Cert. 46a. Dimaya sought review in the Court of Appeals for the Ninth Circuit.

While his appeal was pending, this Court held unconstitutional part of the definition of “violent felony” in the Armed Career Criminal Act (ACCA), 18 U. S. C. §924(e). ACCA prescribes a 15-year mandatory minimum sentence if a person convicted of being a felon in possession of a firearm has three prior convictions for a “violent felony.” §924(e)(1). The definition of that statutory term goes as follows:

“any crime punishable by imprisonment for a term exceeding one year . . . that—

“(i) has as an element the use, attempted use, or
threatened use of physical force against the person of another; or

“(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” §924(e)(2)(B) (emphasis added).

The italicized portion of that definition (like the similar language of §16(b)) came to be known as the statute’s residual clause. In Johnson v. United States, the Court declared that clause “void for vagueness” under the Fifth Amendment’s Due Process Clause. 576 U. S., at ___—___ (slip op., at 13–14).

Relying on Johnson, the Ninth Circuit held that §16(b), as incorporated into the INA, was also unconstitutionally vague, and accordingly ruled in Dimaya’s favor. See Dimaya v. Lynch, 803 F. 3d 1110, 1120 (2015). Two other Circuits reached the same conclusion, but a third distinguished ACCA’s residual clause from §16’s.\(^2\) We granted certiorari to resolve the conflict. Lynch v. Dimaya, 579 U. S. ___ (2016).

II

“The prohibition of vagueness in criminal statutes,” our decision in Johnson explained, is an “essential” of due process, required by both “ordinary notions of fair play and the settled rules of law.” 576 U. S., at ___ (slip op., at 4) (quoting Connally v. General Constr. Co., 269 U. S. 385, 391 (1926)). The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have “fair notice” of the conduct a statute proscribes. Papachristou v. Jacksonville, 405 U. S. 156, 162 (1972). And the doctrine

\(^2\)Compare Shuti v. Lynch, 828 F. 3d 440 (CA6 2016) (finding §16(b) unconstitutionally vague); United States v. Vivas-Ceja, 808 F. 3d 719 (CA7 2015) (same), with United States v. Gonzalez-Longoria, 831 F. 3d 670 (CA5 2016) (en banc) (upholding §16(b)).
guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. See Kolender v. Lawson, 461 U. S. 352, 357–358 (1983). In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Cf. id., at 358, n. 7 (“[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department” (internal quotation marks omitted)).

The Government argues that a less searching form of the void-for-vagueness doctrine applies here than in Johnson because this is not a criminal case. See Brief for Petitioner 13–15. As the Government notes, this Court has stated that “[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment”: In particular, the Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U. S. 489, 498–499 (1982). The removal of an alien is a civil matter. See Arizona v. United States, 567 U. S. 387, 396 (2012). Hence, the Government claims, the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order. See Brief for Petitioner 25–26.

But this Court’s precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. In Jordan v. De George, we considered whether a provision of immigration law making an alien deportable if convicted of a “crime involving moral turpitude” was “sufficiently defi-
nate.” 341 U. S. 223, 229 (1951). That provision, we noted, “is not a criminal statute” (as §16(b) actually is). Id., at 231; supra, at 1–2. Still, we chose to test (and ultimately uphold) it “under the established criteria of the ‘void for vagueness’ doctrine” applicable to criminal laws. 341 U.S., at 231. That approach was demanded, we explained, “in view of the grave nature of deportation,” ibid.—a “drastic measure,” often amounting to lifelong “banishment or exile,” ibid. (quoting Fong Haw Tan v. Phelan, 333 U. S. 6, 10 (1948)).

Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien than “any potential jail sentence.” Jae Lee v. United States, 582 U. S. __, ___ (2017) (slip op., at 11) (quoting Padilla v. Kentucky, 559 U. S. 356, 365, 368 (2010)). And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more “intimately related to the criminal process.” Chaidez v. United States, 568 U. S. 342, 352 (2013) (quoting Padilla, 559 U. S., at 365). What follows, as Jordan recognized, is the use of the same standard in the two settings.

For that reason, the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one Johnson employed. To salvage §16’s residual clause, even for use in immigration hearings, the Government must instead persuade us that it is materially clearer than its now-invalidated ACCA counterpart. That is the issue we next address, as guided by Johnson’s analysis.

III

Johnson is a straightforward decision, with equally straightforward application here. Its principal section
begins as follows: “Two features of [ACCA’s] residual clause conspire to make it unconstitutionally vague.” 576 U. S., at __ (slip op., at 5). The opinion then identifies each of those features and explains how their joinder produced “hopeless indeterminacy,” inconsistent with due process. Id., at __ (slip op., at 7). And with that reasoning, Johnson effectively resolved the case now before us. For §16’s residual clause has the same two features as ACCA’s, combined in the same constitutionally problematic way. Consider those two, just as Johnson described them:

“In the first place,” Johnson explained, ACCA’s residual clause 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.” Id., at __ (slip op., at 5). Under the clause, a court focused on neither the “real-world facts” nor the bare “statutory elements” of an offense. Ibid. Instead, a court was supposed to “imagine” an “idealized ordinary case of the crime”—or otherwise put, the court had to identify the “kind of conduct the ‘ordinary case’ of a crime involves.” Ibid. But how, Johnson asked, should a court figure that out? By using a “statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” Ibid. (internal quotation marks omitted).

ACCA provided no guidance, rendering judicial accounts of the “ordinary case” wholly “speculative.” Ibid. Johnson gave as its prime example the crime of attempted burglary. One judge, contemplating the “ordinary case,” would imagine the “violent encounter” apt to ensue when a “would-be burglar [was] spotted by a police officer [or] private security guard.” Id., at __—__ (slip op., at 5–6). Another judge would conclude that “any confrontation” was more “likely to consist of [an observer’s] yelling ‘Who’s there?’ . . . and the burglar’s running away.” Id., at __ (slip op., at 6). But how could either judge really know?
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“The residual clause,” Johnson summarized, “offer[ed] no reliable way” to discern what the ordinary version of any offense looked like. Ibid. And without that, no one could tell how much risk the offense generally posed.

Compounding that first uncertainty, Johnson continued, was a second: ACCA’s residual clause left unclear what threshold level of risk made any given crime a “violent felony.” See ibid. The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like “serious potential risk” (as in ACCA’s residual clause) or “substantial risk” (as in §16’s). The problem came from layering such a standard on top of the requisite “ordinary case” inquiry. As the Court explained:

“[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct; the law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree[.] The residual clause, however, requires application of the ‘serious potential risk’ standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual . . . facts.” Id., at ___ (slip op., at 12) (some internal quotation marks, citations, and alterations omitted).

So much less predictability, in fact, that ACCA’s residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: “By 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” violates the guarantee of due process. Id.,
at ___ (slip op., at 6).\(^3\)

Section 16’s residual clause violates that promise in just the same way. To begin where Johnson did, §16(b) also calls for a court to identify a crime’s “ordinary case” in order to measure the crime’s risk. The Government explicitly acknowledges that point here. See Brief for Petitioner 11 (“Section 16(b), like [ACCA’s] residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense”). And indeed, the Government’s briefing in Johnson warned us about that likeness, observing that §16(b) would be “equally susceptible to [an] objection” that focused on the problems of positing a crime’s ordinary case. Supp. Brief for Respondent, O. T. 2014, No. 13–7120, pp. 22–23. Nothing in §16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in Johnson: How does one go about divining the conduct entailed in a crime’s ordinary case? Statistical analyses? Surveys? Experts? Google? Gut instinct? See Johnson, 576 U. S., at ___ (slip op., at 5); supra, at 7; post, at 16–17 (GORSUCH, J., concurring in ___

\(^3\)Johnson also anticipated and rejected a significant aspect of JUSTICE THOMAS’s dissent in this case. According to JUSTICE THOMAS, a court may not invalidate a statute for vagueness if it is clear in any of its applications—as he thinks is true of completed burglary, which is the offense Dimaya committed. See post, at 16–20. But as an initial matter, Johnson explained that supposedly easy applications of the residual clause might not be “so easy after all.” 576 U. S., at ___ (slip op., at 10–11). The crime of completed burglary at issue here illustrates that point forcefully. See id., at ___ (slip op., at 6) (asking whether “an ordinary burglar invade[s] an occupied home by night or an unoccupied home by day”); Dimaya v. Lynch, 803 F. 3d 1110, 1116, n. 7 (CA9 2015) (noting that only about seven percent of burglaries actually involve violence); Cal. Penal Code Ann. §§459, 460 (West 2010) (sweeping so broadly as to cover even dishonest door-to-door salesmen). And still more fundamentally, Johnson made clear that our decisions “squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” 576 U. S., at ___ (slip op., at 11).
part and concurring in judgment). And we can as well reiterate Johnson’s example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See post, at 16 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the “ordinary case” remains, as Johnson described it, an excessively “speculative,” essentially inscrutable thing. 576 U.S., at ___ (slip op., at 5); accord post, at 27 (THOMAS, J., dissenting).4

And §16(b) also possesses the second fatal feature of ACCA’s residual clause: uncertainty about the level of risk that makes a crime “violent.” In ACCA, that threshold was “serious potential risk”; in §16(b), it is “substantial risk.” See supra, at 2, 4. But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason. As THE CHIEF JUSTICE’s valiant attempt to do so shows, that would be slicing the baloney mighty thin. See post, at 5–6 (dissenting opinion). And indeed, Johnson as much as equated the two phrases: Return to the block quote above, and note how Johnson—as though anticipating this case—refers to them interchangeably, as alike examples of imprecise “qualitative standard[s].” See supra, at 8; 576 U.S., at ___ (slip op., at 12). Once again, the point is not that such a non-numeric standard is alone problematic: In Johnson’s words, “we do not doubt” the constitutionality of applying

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4The Chief Justice’s dissent makes light of the difficulty of identifying a crime’s ordinary case. In a single footnote, The Chief Justice portrays that task as no big deal: Just eliminate the “atypical” cases, and (presto!) the crime’s nature and risk are revealed. See post, at 5, n. 1. That rosy view—at complete odds with Johnson—underlies his whole dissent (and especially, his analysis of how §16(b) applies to particular offenses, see post, at 7–10). In effect, The Chief Justice is able to conclude that §16(b) can survive Johnson only by refusing to acknowledge one of the two core insights of that decision.
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§16(b)’s “substantial risk [standard] to real-world conduct.” Id., at ___ (slip op., at 12) (internal quotation marks omitted). The difficulty comes, in §16’s residual clause just as in ACCA’s, from applying such a standard to “a judge-imagined abstraction”—i.e., “an idealized ordinary case of the crime.” Id., at ___, ___. (slip op., at 6, 12). It is then that the standard ceases to work in a way consistent with due process.

In sum, §16(b) has the same “[t]wo features” that “conspire[d] to make [ACCA’s residual clause] unconstitutionally vague.” Id., at ___ (slip op., at 5). It too “requires a court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents” some not-well-specified-yet-sufficiently-large degree of risk. Id., at ___ (slip op., at 4). The result is that §16(b) produces, just as ACCA’s residual clause did, “more unpredictability and arbitrariness than the Due Process Clause tolerates.” Id., at ___ (slip op., at 6).

IV

The Government and dissents offer two fundamentally different accounts of how §16(b) can escape unscathed from our decision in Johnson. JUSTICE THOMAS accepts that the ordinary-case inquiry makes §16(b) “impossible to apply.” Post, at 27. His solution is to overthrow our historic understanding of the statute: We should now read §16(b), he says, to ask about the risk posed by a particular defendant’s particular conduct. In contrast, the Government, joined by THE CHIEF JUSTICE, accepts that §16(b), as long interpreted, demands a categorical approach, rather than a case-specific one. They argue only that “distinctive textual features” of §16’s residual clause make applying it “more predictable” than its ACCA counterpart. Brief for Petitioner 28, 29. We disagree with both arguments.
The essentials of JUSTICE THOMAS’s position go as follows. Section 16(b), he says, cannot have one meaning, but could have one of two others. See post, at 27. The provision cannot demand an inquiry merely into the elements of a crime, because that is the province of §16(a). See supra, at 2 (setting out §16(a)’s text). But that still leaves a pair of options: the categorical, ordinary-case approach and the “underlying-conduct approach,” which asks about the specific way in which a defendant committed a crime. Post, at 25. According to JUSTICE THOMAS, each option is textually viable (although he gives a slight nod to the latter based on §16(b)’s use of the word “involves”). See post, at 24–26. What tips the scales is that only one—the conduct approach—is at all “workable.” Post, at 27. The difficulties of the ordinary-case inquiry, JUSTICE THOMAS rightly observes, underlie this Court’s view that §16(b) is too vague. So abandon that inquiry, JUSTICE THOMAS urges. After all, he reasons, it is the Court’s “plain duty,” under the constitutional avoidance canon, to adopt any reasonable construction of a statute that escapes constitutional problems. Post, at 28–29 (quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 407 (1909)).

For anyone who has read Johnson, that argument will ring a bell. The dissent there issued the same invitation, based on much the same reasoning, to jettison the categorical approach in residual-clause cases. 576 U. S., at ___–___ (slip op., at 9–13) (opinion of ALITO, J.). The Court declined to do so. It first noted that the Government had not asked us to switch to a fact-based inquiry. It then observed that the Court “had good reasons” for originally adopting the categorical approach, based partly on ACCA’s text (which, by the way, uses the word “involves” identically) and partly on the “utter impracticability” of the alternative. Id., at ___ (slip op., at 13) (majority opinion). “The
only plausible interpretation” of ACCA’s residual clause, we concluded, “requires use of the categorical approach”—even if that approach could not in the end satisfy constitutional standards.  Ibid. (internal quotation marks and alteration omitted).

The same is true here—except more so. To begin where Johnson did, the Government once again “has not asked us to abandon the categorical approach in residual-clause cases.” Ibid. To the contrary, and as already noted, the Government has conceded at every step the correctness of that statutory construction. See supra, at 9. And this time, the Government’s decision is even more noteworthy than before—precisely because the Johnson dissent laid out the opposite view, presenting it in prepackaged form for the Government to take off the shelf and use in the §16(b) context. Of course, we are not foreclosed from going down JUSTICE THOMAS’s path just because the Government has not done so. But we find it significant that the Government cannot bring itself to say that the fact-based approach JUSTICE THOMAS proposes is a tenable interpretation of §16’s residual clause.

Perhaps one reason for the Government’s reluctance is that such an approach would generate its own constitutional questions. As JUSTICE THOMAS relates, post, at 22, 28, this Court adopted the categorical approach in part to “avoid[,] the Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries.” Descamps v. United States, 570 U. S. 254, 267 (2013). JUSTICE THOMAS thinks that issue need not detain us here because “the right of trial by jury ha[s] no application in a removal proceeding.” Post, at 28 (internal quotation marks omitted). But although this particular case involves removal, §16(b) is a criminal statute, with criminal sentencing consequences. See supra, at 2. And this Court has held (it could hardly have done otherwise) that “we must interpret the statute con-
sistent, whether we encounter its application in a criminal or noncriminal context.” Leocal, 543 U. S., at 12, n. 8. So JUSTICE THOMAS’s suggestion would merely ping-pong us from one constitutional issue to another. And that means the avoidance canon cannot serve, as he would like, as the interpretive tie breaker.

In any event, §16(b)’s text creates no draw: Best read, it demands a categorical approach. Our decisions have consistently understood language in the residual clauses of both ACCA and §16 to refer to “the statute of conviction, not to the facts of each defendant’s conduct.” Taylor v. United States, 495 U. S. 575, 601 (1990); see Leocal, 543 U. S., at 7 (Section 16 “directs our focus to the ‘offense’ of conviction . . . rather than to the particular facts”). Simple references to a “conviction,” “felony,” or “offense,” we have stated, are “read naturally” to denote the “crime as generally committed.” Nijhawan v. Holder, 557 U. S. 29, 34 (2009); see Leocal, 543 U. S., at 7; Johnson, 576 U. S., at ___ (slip op., at 13). And the words “by its nature” in §16(b) make that meaning all the clearer. The statute, recall, directs courts to consider whether an offense, by its nature, poses the requisite risk of force. An offense’s “nature” means its “normal and characteristic quality.” Webster’s Third New International Dictionary 1507 (2002). So §16(b) tells courts to figure out what an offense normally—or, as we have repeatedly said, “ordinarily”—entails, not what happened to occur on one occasion. And the same conclusion follows if we pay attention to language that is missing from §16(b). As we have observed in the ACCA context, the absence of terms alluding to a crime’s circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit. See Descamps, 570 U. S., at 267. If Congress had wanted judges to look into a felon’s actual conduct, “it presumably would have said so; other statutes, in other contexts, speak in just that
way." *Id.*, at 267–268. The upshot of all this textual evidence is that §16’s residual clause—like ACCA’s, except still more plainly—has no “plausible” fact-based reading. *Johnson*, 576 U. S., at ___ (slip op., at 13).

And finally, the “utter impracticability”—and associated inequities—of such an interpretation is as great in the one statute as in the other. *Ibid.* This Court has often described the daunting difficulties of accurately “reconstruct[ing],” often many years later, “the conduct underlying [a] conviction.” *Ibid.; Descamps*, 570 U. S., at 270; *Taylor*, 495 U. S., at 601–602. According to JUSTICE THOMAS, we need not worry here because immigration judges have some special factfinding talent, or at least experience, that would mitigate the risk of error attaching to that endeavor in federal courts. See *post*, at 30. But we cannot see putting so much weight on the superior factfinding prowess of (notoriously overburdened) immigration judges. And as we have said before, §16(b) is a criminal statute with applications outside the immigration context. See *supra*, at 2, 13. Once again, then, we have no ground for discovering a novel interpretation of §16(b) that would remove us from the dictates of *Johnson*.

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8 For example, in *United States v. Hayes*, 555 U. S. 415 (2009), this Court held that a firearms statute referring to former crimes as “committed by” specified persons requires courts to consider underlying facts. *Id.*, at 421. And in *Nijhawan v. Holder*, 557 U. S. 29 (2009), the Court similarly adopted a non-categorical interpretation of one of the aggravated felonies listed in the INA because of the phrase, appended to the named offense, “in which the loss to the victim or victims exceeds $10,000.” *Id.*, at 34, 36 (emphasis deleted). JUSTICE THOMAS suggests that *Nijhawan* rejected the relevance of our ACCA precedents in interpreting the INA’s aggravated-felony list—including its incorporation of §16(b). *Post*, at 29–30. But that misreads the decision. In *Nijhawan*, we considered an item on the INA’s list that looks nothing like ACCA, and we concluded—no surprise here—that our ACCA decisions did not offer a useful guide. As to items on the INA’s list that do mirror ACCA, the opposite conclusion of course follows.
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B

Agreeing that is so, the Government (joined by THE CHIEF JUSTICE) takes a narrower path to the same desired result. It points to three textual discrepancies between ACCA's residual clause and §16(b), and argues that they make §16(b) significantly easier to apply. But each turns out to be the proverbial distinction without a difference. None relates to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that Johnson found to produce impermissible vagueness. And none otherwise affects the determinacy of the statutory inquiry into whether a prior conviction is for a violent crime. That is why, contrary to the Government's final argument, the experience of applying both statutes has generated confusion and division among lower courts.

The Government first—and foremost—relies on §16(b)'s express requirement (absent from ACCA) that the risk arise from acts taken “in the course of committing the offense.” Brief for Petitioner 31. (THE CHIEF JUSTICE's dissent echoes much of this argument. See post, at 6–7.) Because of that “temporal restriction,” a court applying §16(b) may not “consider risks arising after” the offense's commission is over. Ibid. In the Government's view, §16(b)'s text thereby demands a “significantly more focused inquiry” than did ACCA's residual clause. Id., at 32.

To assess that claim, start with the meaning of §16(b)'s “in the course of” language. That phrase, understood in the normal way, includes the conduct occurring throughout a crime's commission—not just the conduct sufficient to satisfy the offense's formal elements. The Government agrees with that construction, explaining that the words “in the course of” sweep in everything that happens while a crime continues. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017) (illustrating that idea with reference to conspiracy,
burglary, kidnapping, and escape from prison). So, for example, conspiracy may be a crime of violence under §16(b) because of the risk of force while the conspiracy is ongoing (i.e., “in the course of” the conspiracy); it is irrelevant that conspiracy’s elements are met as soon as the participants have made an agreement. See ibid.; United States v. Doe, 49 F. 3d 859, 866 (CA2 1995). Similarly, and closer to home, burglary may be a crime of violence under §16(b) because of the prospects of an encounter while the burglar remains in a building (i.e., “in the course of” the burglary); it does not matter that the elements of the crime are met at the precise moment of his entry. See Tr. of Oral Arg. 57–58 (Oct. 2, 2017); James, 550 U. S., at 203. In other words, a court applying §16(b) gets to consider everything that is likely to take place for as long as a crime is being committed.

Because that is so, §16(b)’s “in the course of” language does little to narrow or focus the statutory inquiry. All that the phrase excludes is a court’s ability to consider the risk that force will be used after the crime has entirely concluded—so, for example, after the conspiracy has dissolved or the burglar has left the building. We can construct law-school-type hypotheticals fitting that fact pattern—say, a burglar who constructs a booby trap that later knocks out the homeowner. But such imaginative forays cannot realistically affect a court’s view of the ordinary case of a crime, which is all that matters under the statute. See supra, at 2–3, 7. In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without §16(b)’s explicit temporal language, a court applying the section would do the same thing—ask what usually happens when a crime goes down.

And that is just what courts did when applying ACCA’s residual clause—and for the same reason. True, that clause lacked an express temporal limit. But not a single
one of this Court’s ACCA decisions turned on conduct that might occur after a crime’s commission; instead, each hinged on the risk arising from events that could happen while the crime was ongoing. See, e.g., Sykes v. United States, 564 U. S. 1, 10 (2011) (assessing the risks attached to the “confrontations that initiate and terminate” vehicle flight, along with “intervening” events); Chambers v. United States, 555 U. S. 122, 128 (2009) (rejecting the Government’s argument that violent incidents “occur[ring] long after” a person unlawfully failed to report to prison rendered that crime a violent felony). Nor could those decisions have done otherwise, given the statute’s concern with the ordinary (rather than the outlandish) case. Once again, the riskiness of a crime in the ordinary case depends on the acts taken during—not after—its commission. Thus, the analyses under ACCA’s residual clause and §16(b) coincide.

The upshot is that the phrase “in the course of” makes no difference as to either outcome or clarity. Every offense that could have fallen within ACCA’s residual clause might equally fall within §16(b). And the difficulty of deciding whether it does so remains just as intractable. Indeed, we cannot think of a single federal crime whose treatment becomes more obvious under §16(b) than under ACCA because of the words “in the course of.”

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6 In response to repeated questioning at two oral arguments, the Government proposed one (and only one) such crime—but we disagree that §16(b)’s temporal language would aid in its analysis. According to the Government, possession of a short-barreled shotgun could count as violent under ACCA but not under §16(b) because shooting the gun is “not in the course of committing the crime of possession.” Tr. of Oral Arg. 59–60 (Oct. 2, 2017); see Tr. of Oral Arg. 6–7 (Jan. 17, 2017); Brief for Petitioner 32–34. That is just wrong: When a criminal shoots a gun, he does so while (“in the course of”) possessing it (except perhaps in some physics-defying fantasy world). What makes the offense difficult to classify as violent is something different: that while some people use the short-barreled shotguns they possess to commit murder, others
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phrase, then, cannot cure the statutory indeterminacy Johnson described.

Second, the Government (and again, THE CHIEF JUSTICE’s dissent, see post, at 6) observes that §16(b) focuses on the risk of “physical force” whereas ACCA’s residual clause asked about the risk of “physical injury.” The §16(b) inquiry, the Government says, “trains solely” on the conduct typically involved in a crime. Brief for Petitioner 36. By contrast, the Government continues, ACCA’s residual clause required a second inquiry: After describing the ordinary criminal’s conduct, a court had to “speculate about a chain of causation that could possibly result in a victim’s injury.” Ibid. The Government’s conclusion is that the §16(b) inquiry is “more specific.” Ibid.

But once more, we struggle to see how that statutory distinction would matter. To begin with, the first of the Government’s two steps—defining the conduct in the ordinary case—is almost always the difficult part. Once that is accomplished, the assessment of consequences tends to follow as a matter of course. So, for example, if a crime is likely enough to lead to a shooting, it will also be likely enough to lead to an injury. And still more important, §16(b) involves two steps as well—and essentially the same ones. In interpreting statutes like §16(b), this Court has made clear that “physical force” means “force

merely store them in a nearby firearms cabinet—and it is hard to settle which is the more likely scenario. Compare Johnson, 576 U. S., at ___—___ (slip op., at 19–20) (ALITO, J., dissenting) (“It is fanciful to assume that a person who [unlawfully possesses] a notoriously dangerous weapon is unlikely to use that weapon in violent ways”), with id., at ___ (slip op., at 4) (THOMAS, J., concurring) (Unlawful possession of a short-barreled shotgun “takes place in a variety of ways . . . many, perhaps most, of which do not involve likely accompanying violence” (internal quotation marks omitted)). But contrary to THE CHIEF JUSTICE’s suggestion, see post, at 7–8 (which, again, is tied to his disregard of the ordinary-case inquiry, see supra, at 10, n. 4), that issue must be settled no less under §16(b) than under ACCA.
capable of causing physical pain or injury.” Johnson v. United States, 559 U. S. 133, 140 (2010) (defining the term for purposes of deciding what counts as a “violent” crime). So under §16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Or said a bit differently, evaluating the risk of “physical force” itself entails considering the risk of “physical injury.” For those reasons, the force/injury distinction is unlikely to affect a court’s analysis of whether a crime qualifies as violent. All the same crimes might—or, then again, might not—satisfy both requirements. Accordingly, this variance in wording cannot make ACCA’s residual clause vague and §16(b) not.

Third, the Government briefly notes that §16(b), unlike ACCA’s residual clause, is not preceded by a “confusing list of exemplar crimes.” Brief for Petitioner 38. (THE CHIEF JUSTICE’s dissent reiterates this argument, with some additional references to our caselaw. See post, at 10–12.) Here, the Government is referring to the offenses ACCA designated as violent felonies independently of the residual clause (i.e., burglary, arson, extortion, and use of explosives). See supra, at 4. According to the Government, those crimes provided “contradictory and opaque indications” of what non-specified offenses should also count as violent. Brief for Petitioner 38. Because §16(b) lacks any such enumerated crimes, the Government concludes, it avoids the vagueness of ACCA’s residual clause.

We readily accept a part of that argument. This Court for several years looked to ACCA’s listed crimes for help in giving the residual clause meaning. See, e.g., Begay v. United States, 553 U. S. 137, 142 (2008); James, 550 U. S., at 203. But to no avail. As the Government relates (and Johnson explained), the enumerated crimes were themselves too varied to provide such assistance. See Brief for Petitioner 38–40; 576 U. S., at ___ (slip op., at 12). Trying to reconcile them with each other, and then compare them
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to whatever unlisted crime was at issue, drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to the residual clause’s application. See Brief for Petitioner 38–40.

But the Government’s conclusion does not follow. To say that ACCA’s listed crimes failed to resolve the residual clause’s vagueness is hardly to say they caused the problem. Had they done so, Johnson would not have needed to strike down the clause. It could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses. (Contrary to THE CHIEF JUSTICE’s suggestion, see post, at 12, discarding an interpretive tool once it is found not to actually aid in interpretation hardly “expand[s]” the scope of a statute.) That Johnson went so much further—in invalidating a statutory provision rather than construing it independently of another—demonstrates that the list of crimes was not the culprit. And indeed, Johnson explicitly said as much. As described earlier, Johnson found the residual clause’s vagueness to reside in just “two” of its features: the ordinary-case requirement and a fuzzy risk standard. See 576 U. S., at ___–___ (slip op., at 5–6); supra, at 7–8. Strip away the enumerated crimes—as Congress did in §16(b)—and those dual flaws yet remain. And ditto the textual indeterminacy that flows from them.

2

Faced with the two clauses’ linguistic similarity, the Government relies significantly on an argument rooted in judicial experience. Our opinion in Johnson, the Government notes, spoke of the longstanding “trouble” that this Court and others had in “making sense of [ACCA’s] residual clause.” 576 U. S., at ___ (slip op., at 9); see Brief for Petitioner 45. According to the Government, §16(b) has not produced “comparable difficulties.” Id., at 46. Lower courts, the Government claims, have divided less often
about the provision’s meaning, and as a result this Court
granted certiorari on “only a single Section 16(b) case”
before this one. *Ibid.* “The most likely explanation,” the
Government concludes, is that “Section 16(b) is clearer”
than its ACCA counterpart. *Id.*, at 47.

But in fact, a host of issues respecting §16(b)’s applica-
tion to specific crimes divide the federal appellate courts.
Does car burglary qualify as a violent felony under §16(b)?
Some courts say yes, another says no. What of statutory
rape? Once again, the Circuits part ways. How about
evading arrest? The decisions point in different direc-
tions. Residential trespass? The same is true. Those
examples do not exhaust the current catalogue of Circuit
conflicts concerning §16(b)’s application. See Brief for

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7And, THE CHIEF JUSTICE emphasizes, we decided that one unani-
mously! See post, at 3 (discussing *Local v. Ashcroft*, 543 U.S. 1
(2004)). But one simple application does not a clear statute make. As
we put the point in *Johnson*: Our decisions “squarely contradict the
theory that a vague provision is constitutional merely because there is
some conduct that clearly falls within the provision’s grasp.” 576 U.S.,
at __ (slip op., at 11); see supra, at 9, n. 4.

8Compare *Escudero-Arciniega v. Holder*, 702 F. 3d 781, 784–785
(CA5 2012) (per curiam) (yes, it does), and *United States v. Guzman-
Landeros*, 207 F. 3d 1034, 1035 (CA8 2000) (per curiam) (same), with
*Sareang Ye v. INS*, 214 F. 3d 1128, 1133–1134 (CA9 2000) (no, it does
not).

9Compare *Aguilar v. Gonzales*, 438 F. 3d 86, 89–90 (CA1 2006) (statu-
tory rape involves a substantial risk of force); *Chery v. Ashcroft*, 347
F. 3d 404, 408–409 (CA2 2003) (same); and *United States v. Velazquez-
Owera*, 100 F. 3d 418, 422 (CA5 1996) (same), with *Valencia v. Gonzales*,
439 F. 3d 1046, 1052 (CA9 2006) (statutory rape does not involve
such a risk).

10Compare *Dixon v. Attorney Gen.*, 768 F. 3d 1339, 1343–1346 (CA11
2014) (holding that one such statute falls under §16(b)), with *Flores-
Lopez v. Holder*, 685 F. 3d 857, 863–865 (CA9 2012) (holding that
another does not).

11Compare *United States v. Venegas-Ornelas*, 348 F. 3d 1273, 1277–
1278 (CA10 2003) (residential trespass is a crime of violence), with
*Zivkovic v. Holder*, 724 F. 3d 894, 906 (CA7 2013) (it is not).
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National Immigration Project of the National Lawyers Guild et al. as Amici Curiae 7–18 (citing divided appellate decisions as to the unauthorized use of a vehicle, firearms possession, and abduction). And that roster would just expand with time, mainly because, as Johnson explained, precious few crimes (of the thousands that fill the statute books) have an obvious, non-speculative—and therefore undisputed—“ordinary case.” See 576 U. S., at ___–___ (slip op., at 5–6).

Nor does this Court’s prior handling of §16(b) cases support the Government’s argument. To be sure, we have heard oral argument in only two cases arising from §16(b) (including this one), as compared with five involving ACCA’s residual clause (including Johnson).

But while some of those ACCA suits were pending before us, we received a number of petitions for certiorari presenting related issues in the §16(b) context. And after issuing the relevant ACCA decisions, we vacated the judgments in those §16(b) cases and remanded them for further consideration. That we disposed of the ACCA and §16(b) peti-

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12 From all we can tell—and all the Government has told us, see Brief for Petitioner 45–52—lower courts have also decided many fewer cases involving §16(b) than ACCA’s residual clause. That disparity likely reflects the Government’s lesser need to rely on §16(b). That provision is mainly employed (as here) in the immigration context, to establish an “aggravated felony” requiring deportation. See supra, at 2. But immigration law offers many other ways to achieve that result. The INA lists 80 or so crimes that count as aggravated felonies; only if a conviction is not for one of those specified offenses need the Government resort to §16(b) (or another catch-all provision). See Luna Torres v. Lynch, 578 U. S. ___ (2016) (slip op., at 2). By contrast, ACCA enumerates only four crimes as a basis for enhancing sentences; the Government therefore had reason to use the statute’s residual clause more often.

tions in that order, rather than its opposite, provides no reason to disregard the indeterminacy that §16(b) shares with ACCA’s residual clause.

And of course, this Court’s experience in deciding ACCA cases only supports the conclusion that §16(b) is too vague. For that record reveals that a statute with all the same hallmarks as §16(b) could not be applied with the predictability the Constitution demands. See id., at ___—___ (slip op., at 6–9); supra, at 6–9. The Government would condemn us to repeat the past—to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? “Insanity,” Justice Scalia wrote in the last ACCA residual clause case before Johnson, “is doing the same thing over and over again, but expecting different results.” Sykes, 564 U. S., at 28 (dissenting opinion). We abandoned that lunatic practice in Johnson and see no reason to start it again.

V

Johnson tells us how to resolve this case. That decision held that “[t]wo features of [ACCA’s] residual clause conspire[d] to make it unconstitutionally vague.” 576 U. S., at ___ (slip op., at 5). Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily “devolv[ed] into guesswork and intuition,” invited arbitrary enforcement, and failed to provide fair notice. Id., at ___ (slip op., at 8). Section 16(b) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes any real difference. So just like ACCA’s residual clause, §16(b) “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” Id., at ___ (slip op., at 6). We

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accordingly affirm the judgment of the Court of Appeals.

*It is so ordered.*
Opinion of GORSUCH, J.

SUPREME COURT OF THE UNITED STATES

No. 15–1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER v. JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

JUSTICE GORSUCH, concurring in part and concurring in the judgment.

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capa-
ciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown’s abuse of “pretended” crimes like this as one of their reasons for revolution. See Declaration of Independence ¶21. Today’s vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien’s crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law’s silence
leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

*

I begin with a foundational question. Writing for the Court in *Johnson v. United States*, 576 U. S. ___ (2015), Justice Scalia held the residual clause of the Armed Career Criminal Act void for vagueness because it invited “more unpredictability and arbitrariness” than the Constitution allows. *Id.*, at ___ (slip op., at 6). Because the residual clause in the statute now before us uses almost exactly the same language as the residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.

But first in *Johnson* and now again today JUSTICE THOMAS has questioned whether our vagueness doctrine can fairly claim roots in the Constitution as originally understood. See, e.g., *post*, at 2–6 (dissenting opinion); *Johnson*, supra, at ___ (opinion concurring in judgment) (slip op., at 6–18). For its part, the Court has yet to offer a reply. I believe our colleague’s challenge is a serious and thoughtful one that merits careful attention. At day’s end, though, it is a challenge to which I find myself unable to subscribe. Respectfully, I am persuaded instead that void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution.

Consider first the doctrine’s due process underpinnings. The Fifth and Fourteenth Amendments guarantee that “life, liberty, or property” may not be taken “without due process of law.” That means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those “customary procedures to which freemen were entitled by the old law of England.”
Pacific Mut. Life Ins. Co. v. Haslip, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment) (internal quotation marks omitted). Admittedly, some have suggested that the Due Process Clause does less work than this, allowing the government to deprive people of their liberty through whatever procedures (or lack of them) the government’s current laws may tolerate. Post, at 3, n. 1 (opinion of THOMAS, J.) (collecting authorities). But in my view the weight of the historical evidence shows that the clause sought to ensure that the people’s rights are never any less secure against governmental invasion than they were at common law. Lord Coke took this view of the English due process guarantee. 1 E. Coke, The Second Part of the Institutes of the Laws of England 50 (1797). John Rutledge, our second Chief Justice, explained that Coke’s teachings were carefully studied and widely adopted by the framers, becoming “almost the foundations of our law.” Klopfer v. North Carolina, 386 U. S. 213, 225 (1967). And many more students of the Constitution besides—from Justice Story to Justice Scalia—have agreed that this view best represents the original understanding of our own Due Process Clause. See, e.g., Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 277 (1856); 3 J. Story, Commentaries on the Constitution of the United States §1783, p. 661 (1833); Pacific Mut., supra, at 28–29 (opinion of Scalia, J.); Eberle, Procedural Due Process: The Original Understanding, 4 Const. Comment. 339, 341 (1987).

Perhaps the most basic of due process’s customary protections is the demand of fair notice. See Connally v. General Constr. Co., 269 U. S. 385, 391 (1926); see also Note, Textualism as Fair Notice, 123 Harv. L. Rev. 542, 543 (2009) (“From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law”). Criminal indictments at common law had to provide “precise and sufficient certainty” about the charges
involved. 4 W. Blackstone, Commentaries on the Laws of England 301 (1769) (Blackstone). Unless an “offence [was] set forth with clearness and certainty,” the indictment risked being held void in court. *Id.*, at 302 (emphasis deleted); 2 W. Hawkins, Pleas of the Crown, ch. 25, §§99, 100, pp. 244–245 (2d ed. 1726) (“[I]t seems to have been ancently the common practice, where an indictment appeared to be [in]sufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it”).

The same held true in civil cases affecting a person’s life, liberty, or property. A civil suit began by obtaining a writ—a detailed and specific form of action asking for particular relief. Bellia, Article III and the Cause of Action, 89 Iowa L. Rev. 777, 784–786 (2004); Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 914–915 (1987). Because the various civil writs were clearly defined, English subjects served with one would know with particularity what legal requirement they were alleged to have violated and, accordingly, what would be at issue in court. *Id.*, at 917; Moffitt, Pleadings in the Age of Settlement, 80 Ind. L. J. 727, 731 (2005). And a writ risked being held defective if it didn’t provide fair notice. *Goldington v. Bassingburn*, Y. B. Trin. 3 Edw. II, f. 27b (1310) (explaining that it was “the law of the land” that “no one [could] be taken by surprise” by having to “answer in court for what [one] has not been warned to answer”).

The requirement of fair notice applied to statutes too. Blackstone illustrated the point with a case involving a statute that made “stealing sheep, or other cattle” a felony. 1 Blackstone 88 (emphasis deleted). Because the term “cattle” embraced a good deal more than it does now (including wild animals, no less), the court held the statute failed to provide adequate notice about what it did and
did not cover—and so the court treated the term “cattle” as a nullity. *Ibid.* All of which, Blackstone added, had the salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to “bulls, cows, oxen,” and more “by name.” *Ibid.*

This tradition of courts refusing to apply vague statutes finds parallels in early American practice as well. In *The Enterprise*, 8 F. Cas. 732 (No. 4,499) (CC NY 1810), for example, Justice Livingston found that a statute setting the circumstances in which a ship may enter a port during an embargo was too vague to be applied, concluding that “the court had better pass” the statutory terms by “as unintelligible and useless” rather than “put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed.” *Id.*, at 735. In *United States v. Sharp*, 27 F. Cas. 1041 (No. 16,264) (CC Pa. 1815), Justice Washington confronted a statute which prohibited seamen from making a “revolt.” *Id.*, at 1043. But he was unable to determine the meaning of this provision “by any authority . . . either in the common, admiralty, or civil law.” *Ibid.* As a result, he declined to “recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be.” *Ibid.*

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1 Many state courts also held vague laws ineffectual. See, e.g., *State v. Mann*, 2 Ore. 238, 240–241 (1867) (holding statute that prohibited “gambling devices” was “void” because “the term has no settled and definite meaning”); *Drake v. Drake*, 15 N. C. 110, 115 (1833) (explaining that “if the terms in which [a statute] is couched be so vague as to convey no definite meaning to those whose duty it is to execute it . . . it is necessarily inoperative”); *McConvill v. Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 44 (1876) (holding that an ordinance was “bad for vagueness and uncertainty in the thing forbidden”); *State v. Boon*, 1 N. C. 103, 105 (1801) (refusing to apply a statute because “no punishment whatever can be inflicted; without using a discretion and indulging a latitude, which in criminal cases ought never to be allowed a
Nor was the concern with vague laws confined to the most serious offenses like capital crimes. Courts refused to apply vague laws in criminal cases involving relatively modest penalties. See, e.g., *McJunkins v. State*, 10 Ind. 140, 145 (1858). They applied the doctrine in civil cases too. See, e.g., *Drake v. Drake*, 15 N. C. 110, 115 (1833); *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842). As one court put it, “all laws” “ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate.” *McConvill v. Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 42 (1876). “It is impossible . . . to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.” *Id.*, at 42–43.

These early cases, admittedly, often spoke in terms of construing vague laws strictly rather than declaring them void. See, e.g., *post*, at 4–5 (opinion of THOMAS, J.); *Johnson*, 576 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 8–10). But in substance void the law is often exactly

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*Judge*); *Ex parte Jackson*, 45 Ark. 158, 164 (1885) (declaring a statutory prohibition on acts “injurious to the public morals” to be “vague” and “simply null” (emphasis deleted)); *McJunkins v. State*, 10 Ind. 140, 145 (1858) (“It would therefore appear that the term public indecency has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense”); *Jennings v. State*, 16 Ind. 335, 336 (1861) (“We are of opinion that for want of a proper definition, no act is made criminal by the terms ‘public indecency,’ employed in the statute”); *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842) (holding “the language of [shareholder election] legislation so devoid of certainty” that “no valid election [could have] been held, and that none can be held without further legislation”); *Cheezem v. State*, 2 Ind. 149, 150 (1850) (finding statute to “contai[n] no prohibition of any kind whatever” and thus declaring it “a nullity”); see also *Note, Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process*, 38 Harv. L. Rev. 963, 964, n. 4 (1925) (collecting cases).
what these courts did: rather than try to construe or interpret the statute before them, judges frequently held the law simply too vague to apply. Blackstone, for example, did not suggest the court in his illustration should have given a narrowing construction to the term “cattle,” but argued against giving it any effect at all. 1 Blackstone 88; see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 582 (1989) (“I doubt . . . that any modern court would go to the lengths described by Blackstone in its application of the rule that penal statutes are to be strictly construed”); Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, n. 3 (1931) (explaining that “since strict construction, in effect, nullified ambiguous provisions, it was but a short step to declaring them void ab initio’’); supra, at 5, n. 1 (state courts holding vague statutory terms “void” or “null”).

What history suggests, the structure of the Constitution confirms. Many of the Constitution’s other provisions presuppose and depend on the existence of reasonably clear laws. Take the Fourth Amendment’s requirement that arrest warrants must be supported by probable cause, and consider what would be left of that requirement if the alleged crime had no meaningful boundaries. Or take the Sixth Amendment’s mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn’t tell what he’s alleged to have done and what sort of witnesses he might need to rebut that charge. Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a “parchment barrier” against arbitrary power. The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison).

Although today’s vagueness doctrine owes much to the
guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine’s equal debt to the separation of powers. The Constitution assigns “[a]ll legislative Powers” in our federal government to Congress. Art. I, §1. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. See The Federalist No. 78, at 465 (A. Hamilton) (“The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated”). Meanwhile, the Constitution assigns to judges the “judicial Power” to decide “Cases” and “Controversies.” Art. III, §2. That power does not license judges to craft new laws to govern future conduct, but only to “discer[n] the course prescribed by law” as it currently exists and to “follow it” in resolving disputes between the people over past events. Osborn v. Bank of United States, 9 Wheat. 738, 866 (1824).

From this division of duties, it comes clear that legislators may not “abdicate their responsibilities for setting the standards of the criminal law,” Smith v. Goguen, 415 U. S. 566, 575 (1974), by leaving to judges the power to decide “the various crimes includable in [a] vague phrase,” Jordan v. De George, 341 U. S. 223, 242 (1951) (Jackson, J., dissenting). For “if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,] [t]his would, to some extent, substitute the judicial for the legislative department of government.” Kolender v. Lawson, 461 U. S. 352, 358, n. 7 (1983) (internal quotation marks omitted). Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute’s contours through their enforcement decisions. See Grayned v. City of Rockford, 408 U. S. 104, 108–109 (1972)
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("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis").

These structural worries are more than just formal ones. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmakers substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to "condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it." *Jordan, supra*, at 242 (Jackson, J., dissenting). Nor do judges and prosecutors act in the open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies. See, e.g., A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 151 (1962) ("A vague statute delegates to administrators, prosecutors, juries, and judges the authority of *ad hoc* decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact"). For just these reasons, Hamilton warned, while "liberty can have nothing to fear from the judiciary alone," it has "every thing to fear from" the union of the judicial and legislative powers. The Federalist No. 78, at 466. No doubt, too, for reasons like these this Court has held "that the *more important* aspect of vagueness doctrine 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement'" and keep the separate branches within their proper spheres. *Kolender, supra*, at 358 (quoting *Goguen, supra*, at 575 (emphasis added)).

*Persuaded that vagueness doctrine enjoys a secure*
footing in the original understanding of the Constitution, the next question I confront concerns the standard of review. What degree of imprecision should this Court tolerate in a statute before declaring it unconstitutionally vague? For its part, the government argues that where (as here) a person faces only civil, not criminal, consequences from a statute’s operation, we should declare the law unconstitutional only if it is “unintelligible.” But in the criminal context this Court has generally insisted that the law must afford “ordinary people . . . fair notice of the conduct it punishes.” Johnson, 576 U. S., at ___ (slip op., at 3). And I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law’s demands, as we’ve seen, is “the first essential of due process.” Connally, 269 U. S., at 391. And as we’ve seen, too, the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law. See supra, at 2–7.

First principles aside, the government suggests that at least this Court’s precedents support adopting a less-than-fair-notice standard for civil cases. But even that much I do not see. This Court has already expressly held that a “stringent vagueness test” should apply to at least some civil laws—those abridging basic First Amendment freedoms. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U. S. 489, 499 (1982). This Court has made clear, too, that due process protections against vague laws are “not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.” Giaccio v. Pennsylvania, 382 U. S. 399, 402 (1966). So the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive. To be sure, this Court has also said that what qualifies as fair notice depends “in part on the nature of the enactment.” Hoffman Estates, 455 U. S., at
498. And the Court has sometimes “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Id.*, at 498–499. But to acknowledge these truisms does nothing to prove that civil laws must always be subject to the government’s emaciated form of review.

In fact, if the severity of the consequences counts when deciding the standard of review, shouldn’t we also take account of the fact that today’s civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today’s “civil” penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are “punitive civil sanctions . . . rapidly expanding,” they are “sometimes more severely punitive than the parallel criminal sanctions for the same conduct.” Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L. J. 1795, 1798 (1992) (emphasis added). Given all this, any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set *above* our precedent’s current threshold than to suggest the civil standard should be buried *below* it.

Retreating to a more modest line of argument, the government emphasizes that this case arises in the immigration context and so implicates matters of foreign relations where the Executive enjoys considerable constitutional authority. But to acknowledge that the *President* has
broad authority to act in this general area supplies no justification for allowing judges to give content to an impermissibly vague law.

Alternatively still, JUSTICE THOMAS suggests that, at least at the time of the founding, aliens present in this country may not have been understood as possessing any rights under the Due Process Clause. For support, he points to the Alien Friends Act of 1798. An Act Concerning Aliens §1, 1 Stat. 571; post, at 6–12 (opinion of THOMAS, J.). But the Alien Friends Act—better known as the “Alien” part of the Alien and Sedition Acts—is one of the most notorious laws in our country’s history. It was understood as a temporary war measure, not one that the legislature would endorse in a time of tranquility. See, e.g., Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int’l L. 63, 70–71 (2002). Yet even then it was widely condemned as unconstitutional by Madison and many others. It also went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment. With this fuller view, it seems doubtful the Act tells us a great deal about aliens’ due process rights at the founding.2

2See, e.g., Virginia Resolutions in 4 Debates on the Federal Constitution 528 (J. Elliot ed. 1836) (explaining that the Act, “by uniting legislative and judicial powers to those of executive, subverts . . . the particular organization, and positive provisions of the federal constitution”); Madison’s Report on the Virginia Resolutions (Jan. 7, 1800) in 17 Papers of James Madison 318 (D. Mattern ed. 1991) (Madison’s Report) (contending that the Act violated “the only preventive justice known to American jurisprudence,” because “[t]he ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone”); L. Canfield & H. Wilder, The Making of Modern America 158 (H. Anderson et al. eds. 1962) (“People all over the country protested against the Alien and Sedition Acts”); M. Baseler, “Asylum for Mankind”: America, 1607–1800, p. 287 (1998) (“The election of 1800 was a referendum on—and a repudiation of—the Federalist ‘doctrines’ enunciated in the debates” over, among other things, the Alien Friends Act); Moore, Aliens and the Constitution, 88 N. Y. U. L. Rev. 801, 865, n. 300
Besides, none of this much matters. Whether Madison or his adversaries had the better of the debate over the constitutionality of the Alien Friends Act, Congress is surely free to extend existing forms of liberty to new classes of persons—liberty that the government may then take only after affording due process. See, e.g., Sandin v. Conner, 515 U.S. 472, 477–478 (1995); Easterbrook, Substance and Due Process, 1982 S. Ct. Rev. 85, 88 (“If . . . the constitution, statute, or regulation creates a liberty or property interest, then the second step—determining ‘what process is due’—comes into play”). Madison made this very point, suggesting an alien’s admission in this country could in some circumstances be analogous to “the grant of land to an individual,” which “may be of favor not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away.” Madison’s Report 319. And, of course, that’s exactly what Congress eventually chose to do here. Decades ago, it enacted a law affording Mr. Dimaya lawful permanent residency in this country, extending to him a statutory liberty interest others traditionally have enjoyed.

to remain in and move about the country free from physical imprisonment and restraint. See Dimaya v. Lynch, 803 F. 3d 1110, 1111 (CA9 2015); 8 U. S. C. §§1101(20), 1255. No one suggests Congress had to enact statutes of this sort. And exactly what processes must attend the deprivation of a statutorily afforded liberty interest like this may pose serious and debatable questions. Cf. Murray’s Lessee, 18 How., at 277 (approving summary procedures in another context). But however summary those procedures might be, it’s hard to fathom why fair notice of the law—the most venerable of due process’s requirements—would not be among them. Connally, 269 U. S., at 391.3

3This Court already and long ago held that due process requires affording aliens the “opportunity, at some time, to be heard” before some lawful authority in advance of removal—and it’s unclear how that opportunity might be meaningful without fair notice of the law’s demands. The Japanese Immigrant Case, 189 U. S. 86, 101 (1903). Nor do the cases Justice Thomas cites hold that a statutory right to lawful permanent residency in this country can be withdrawn without due process. Post, at 11 (dissenting opinion). Rather, each merely holds that the particular statutory removal procedures under attack comported with due process. See Harisiades v. Shaughnessy, 342 U. S. 580, 584–585 (1952) (rejecting argument that an “alien is entitled to constitutional [due process] protection . . . to the same extent as the citizen” before removal (emphasis added)); United States ex rel. Turner v. Williams, 194 U. S. 279, 289–290 (1904) (deporting an alien found to be in violation of a constitutionally valid law doesn’t violate due process); Fong Yue Ting v. United States, 149 U. S. 698, 730 (1893) (deporting an alien who hasn’t “complied with the conditions” required to stay in the country doesn’t violate due process). Even when it came to judicially unenforceable privileges in the past, “executive officials had to respect statutory privileges that had been granted to private individuals and that Congress had not authorized the officials to abrogate.” Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 581 (2007) (emphasis deleted). So in a case like ours it would’ve been incumbent on any executive official to determine that the alien committed a qualifying crime and statutory vagueness could pose a disabling problem even there.
Today, a plurality of the Court agrees that we should reject the government’s plea for a feeble standard of review, but for a different reason. *Ante,* at 5–6. My colleagues suggest the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we would single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family’s living, or confiscate his home? I can think of no good answer.

* 

With the fair notice standard now in hand, all that remains is to ask how it applies to the case before us. And here at least the answer comes readily for me: to the extent it requires an “ordinary case” analysis, the portion of the Immigration and Nationality Act before us fails the fair notice test for the reasons Justice Scalia identified in *Johnson* and the Court recounts today.

Just like the statute in *Johnson,* the statute here instructs courts to impose special penalties on individuals previously “convicted of” a “crime of violence.” 8 U. S. C. §§1227(a)(2)(A)(iii), 1101(a)(43)(F). Just like the statute in *Johnson,* the statute here fails to specify which crimes qualify for that label. Instead, and again like the statute in *Johnson,* the statute here seems to require a judge to guess about the ordinary case of the crime of conviction and then guess whether a “substantial risk” of “physical force” attends its commission. 18 U. S. C. §16(b); *Johnson,* 576 U. S., at ___–___ (slip op., at 4–5). *Johnson* held that a law that asks so much of courts while offering them so
little by way of guidance is unconstitutionally vague. And I do not see how we might reach a different judgment here.

Any lingering doubt is resolved for me by taking account of just some of the questions judges trying to apply the statute using an ordinary case analysis would have to confront. Does a conviction for witness tampering ordinarily involve a threat to the kneecaps or just the promise of a bribe? Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare? These questions do not suggest obvious answers. Is the court supposed to hold evidentiary hearings to sort them out, entertaining experts with competing narratives and statistics, before deciding what the ordinary case of a given crime looks like and how much risk of violence it poses? What is the judge to do if there aren’t any reliable statistics available? Should (or must) the judge predict the effects of new technology on what qualifies as the ordinary case? After all, surely the risk of injury calculus for crimes like larceny can be expected to change as more thefts are committed by computer rather than by gunpoint. Or instead of requiring real evidence, does the statute mean to just leave it all to a judicial hunch? And on top of all that may be the most difficult question yet: at what level of generality is the inquiry supposed to take place? Is a court supposed to pass on the ordinary case of burglary in the relevant neighborhood or county, or should it focus on statewide or even national experience? How is a judge to know? How are the people to know?

The implacable fact is that this isn’t your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute’s
text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power. The statute doesn't even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.

*

Having said this much, it is important to acknowledge some limits on today's holding too. I have proceeded on the premise that the Immigration and Nationality Act, as it incorporates §16(b) of the criminal code, commands courts to determine the risk of violence attending the ordinary case of conviction for a particular crime. I have done so because no party before us has argued for a different way to read these statutes in combination; because our precedent seemingly requires this approach; and because the government itself has conceded (repeatedly) that the law compels it. Johnson, supra, at ___ (slip op., at 13); Taylor v. United States, 495 U. S. 575, 600 (1990); Brief for Petitioner 11, 30, 32, 36, 40, 47 (conceding that an ordinary case analysis is required).

But any more than that I would not venture. In response to the problems engendered by the ordinary case analysis, JUSTICE THOMAS suggests that we should overlook the government's concession about the propriety of that approach; reconsider our precedents endorsing it; and read the statute as requiring us to focus on the facts of the alien's crime as committed rather than as the facts appear in the ordinary case of conviction. Post, at 20–32. But normally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government. And normally, too, the crucible of adversarial testing is crucial to sound judicial decisionmaking. We rely on it to "yield insights (or reveal pitfalls) we cannot muster guided only

While sometimes we may or even must forgo the adversarial process, I do not see the case for doing so today. Maybe especially because I am not sure JUSTICE THOMAS’s is the only available alternative reading of the statute we would have to consider, even if we did reject the government’s concession and wipe the precedential slate clean. We might also have to consider an interpretation that would have courts ask not whether the alien’s crime of conviction ordinarily involves a risk of physical force, or whether the defendant’s particular crime involved such a risk, but whether the defendant’s crime of conviction always does so. After all, the language before us requires a conviction for an “offense . . . that, by its nature, involves a substantial risk of physical force.” 18 U. S. C. §16(b) (emphasis added). Plausibly, anyway, the word “nature” might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. See 10 Oxford English Dictionary 247 (2d ed. 1989). While I remain open to different arguments about our precedent and the proper reading of language like this, I would address them in another case, whether involving the INA or a different statute, where the parties have a chance to be heard and we might benefit from their learning.

It’s important to note the narrowness of our decision today in another respect too. Vagueness doctrine represents a procedural, not a substantive, demand. It does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office. Our history surely bears examples of the judicial misuse of the so-called “substantive component” of due
process to dictate policy on matters that belonged to the
people to decide. But concerns with substantive due pro-
cess should not lead us to react by withdrawing an ancient
procedural protection compelled by the original meaning of
the Constitution.

Today’s decision sweeps narrowly in yet one more way.
By any fair estimate, Congress has largely satisfied the
procedural demand of fair notice even in the INA provision
before us. The statute lists a number of specific crimes
that can lead to a lawful resident’s removal—for example,
We address only the statute’s “residual clause” where
Congress ended its own list and asked us to begin writing
our own. Just as Blackstone’s legislature passed a revised
statute clarifying that “cattle” covers bulls and oxen,
Congress remains free at any time to add more crimes to
its list. It remains free, as well, to write a new residual
clause that affords the fair notice lacking here. Congress
might, for example, say that a conviction for any felony
carrying a prison sentence of a specified length opens an
alien to removal. Congress has done almost exactly this in
other laws. See, e.g., 18 U. S. C. §922(g). What was done
there could be done here.

But those laws are not this law. And while the statute
before us doesn’t rise to the level of threatening death for
“pretended offences” of treason, no one should be surprised
that the Constitution looks unkindly on any law so vague
that reasonable people cannot understand its terms and
judges do not know where to begin in applying it. A gov-
ernment of laws and not of men can never tolerate that
arbitrary power. And, in my judgment, that foundational
principle dictates today’s result. Because I understand
them to be consistent with what I have said here, I join
Parts I, III, IV–B, and V of the Court’s opinion and concur
in the judgment.
ROBERTS, C. J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 15–1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
PETITIONER v. JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

In Johnson v. United States, we concluded that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, given the “indeterminacy of the wide-ranging inquiry” it required. 576 U. S. ___ (2015) (slip op., at 5). Today, the Court relies wholly on Johnson—but only some of Johnson—to strike down another provision, 18 U. S. C. §16(b). Because §16(b) does not give rise to the concerns that drove the Court’s decision in Johnson, I respectfully dissent.

I

The term “crime of violence” appears repeatedly throughout the Federal Criminal Code. Section 16 of Title 18 defines it to mean:

“(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

“(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

This definition of “crime of violence” is also incorporated in
the definition of “aggravated felony” in the Immigration and Nationality Act. 8 U.S.C. §1101(a)(43)(F) (“aggravated felony” includes “a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year” (footnote omitted)). A conviction for an aggravated felony carries serious consequences under the immigration laws. It can serve as the basis for an alien’s removal from the United States, and can preclude cancellation of removal by the Attorney General. §§1227(a)(2)(A)(iii), 1229b(a)(3).

Those consequences came to pass in respondent James Dimaya’s case. An Immigration Judge and the Board of Immigration Appeals interpreted §16(b) to cover Dimaya’s two prior convictions for first-degree residential burglary under California law, subjecting him to removal. To stave off that result, Dimaya argued that the language of §16(b) was void for vagueness under the Due Process Clause of the Fifth Amendment.

The parties begin by disputing whether a criminal or more relaxed civil vagueness standard should apply in resolving Dimaya’s challenge. A plurality of the Court rejects the Government’s argument in favor of a civil standard, because of the “grave nature of deportation,” Jordan v. De George, 341 U.S. 223, 231 (1951); see ante, at 6 (plurality opinion); JUSTICE GORSUCH does so for broader reasons, see ante, at 10–15 (GORSUCH, J., concurring in part and concurring in judgment). I see no need to resolve which standard applies, because I would hold that §16(b) is not unconstitutionally vague even under the standard applicable to criminal laws.

II

This is not our first encounter with §16(b). In Leocal v. Ashcroft, 543 U.S. 1 (2004), we were asked to decide whether either subsection of §16 covers a particular cate-
gory of state crimes, specifically DUI offenses involving no more than negligent conduct. 543 U.S., at 6. Far from finding §16(b) “hopeless[ly] indetermi[ne],” Johnson, 576 U.S., at ___ (slip op., at 7), we considered the provision clear and unremarkable: “While §16(b) is broader than §16(a) in the sense that physical force need not actually be applied,” the provision “simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense,” Leocal, 543 U.S., at 10–11. Applying that standard to the state offense at issue, we concluded—unanimously—that §16(b) “cannot be read to include [a] conviction for DUI causing serious bodily injury under Florida law.” Id., at 11.

Leocal thus provides a model for how courts should assess whether a particular crime “by its nature” involves a risk of the use of physical force. At the outset, our opinion set forth the elements of the Florida DUI statute, which made it a felony “for a person to operate a vehicle while under the influence and, by reason of such operation, caus[e] . . . [s]erious bodily injury to another.”” 543 U.S., at 7. Our §16(b) analysis, in turn, focused on those specific elements in concluding that a Florida offender’s acts would not naturally give rise to the requisite risk of force “in the course of committing the offense.” Id., at 11. “In no ‘ordinary or natural’ sense,” we explained, “can it be said that a person risks having to ‘use’ physical force against another person in the course of operating a vehicle while intoxicated and causing injury.” Ibid.

The Court holds that the same provision we had no trouble applying in Leocal is in fact incapable of reasoned application. The sole justification for this turnabout is the resemblance between the language of §16(b) and the language of the residual clause of the Armed Career Criminal Act (ACCA) that was at issue in Johnson. The latter provision defined a “violent felony” to include “any crime
punishable by imprisonment for a term exceeding one year . . . 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.” 18 U. S. C. §924(e)(2)(B)(ii) (emphasis added).

In *Johnson*, we concluded that the ACCA residual clause (the “or otherwise” language) gave rise to two forms of intractable uncertainty, which “conspire[d]” to render the provision unconstitutionally vague. 576 U. S., at ___ (slip op., at 5). First, the residual clause asked courts to gauge the “potential risk” of “physical injury” posed by the conduct involved in the crime. *Ibid.* That inquiry, we determined, entailed not only an evaluation of the “criminal’s behavior,” but also required courts to consider “how the idealized ordinary case of the crime subsequently plays out.” *Ibid.* Second, the residual clause obligated courts to compare that risk to an indeterminate standard—one that was inextricably linked to the provision’s four enumerated crimes, which presented differing kinds and degrees of risk. *Id.*, at ___ (slip op., at 6). This murky confluence of features, each of which “may [have been] tolerable in isolation,” together “ma[de] a task for us which at best could be only guesswork.” *Id.*, at ___ (slip op., at 10).

Section 16(b) does not present the same ambiguities. The two provisions do correspond to some extent. Under our decisions, both ask the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk. And, relevant to both statutes, we have explained that in deciding whether statutory elements inherently produce a risk, a court must take into account how those elements will ordinarily be fulfilled. See *James v. United States*, 550 U. S. 192, 208 (2007) (this categorical inquiry asks “whether the conduct encompassed by the elements of the
offense, in the ordinary case, presents” the requisite risk).\footnote{1} In the Court’s view, that effectively resolves this case. But the Court too readily dismisses the significant textual distinctions between §16(b) and the ACCA residual clause. See also ante, at 2 (opinion of GORSUCH, J.). Those differences undermine the conclusion that §16(b) shares each of the “dual flaws” of that clause. Ante, at 21 (majority opinion).

To begin, §16(b) yields far less uncertainty “about how to estimate the risk posed by a crime.” Johnson, 576 U. S., at ___ (slip op., at 5). There are three material differences between §16(b) and the ACCA residual clause in this respect. First, the ACCA clause directed the reader to consider whether the offender’s conduct presented a “potential risk” of injury. Forced to give meaning to that befuddling choice of phrase—which layered one indeterminate term on top of another—we understood the word “potential” to signify that “Congress intended to encompass possibilities even more contingent or remote than “a simple ‘risk.’” James, 550 U. S., at 207–208. As we explained in Johnson, that made for a “speculative” inquiry “detached from statutory elements.” 576 U. S., at ___ (slip op., at 5). In other words, the offense elements could not constrain the risk inquiry in the manner they do here. See

\footnote{1} All this “ordinary case” caveat means is that while “[c]ourts can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk,” courts should exclude those atypical cases in assessing whether the offense qualifies. James, 550 U. S., at 208. As we have explained, under that approach, it is not the case that “every conceivable factual offense covered by a statute” must pose the requisite risk “before the offense can be deemed” a crime of violence. Ibid. But the same is true of the categorical approach generally. See ibid. (using the terms just quoted to characterize both the ordinary case approach and the categorical approach for enumerated offenses set forth in Taylor v. United States, 495 U. S. 575 (1990); Moncrieffe v. Holder, 569 U. S. 184, 191 (2013); Gonzales v. Duenas-Alvarez, 549 U. S. 183, 193 (2007).
ROBERTS, C. J., dissenting

*Locals*, 543 U. S., at 11. The “serious potential risk” standard also forced courts to assess in an expansive way the “collateral consequences” of the perpetrator’s acts. For example, courts had to take into account the concern that others might cause injury in attempting to apprehend the offender. See *Sykes v. United States*, 564 U. S. 1, 8–9 (2011). Section 16(b), on the other hand, asks about “risk” alone, a familiar concept of everyday life. It therefore calls for a commonsense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.

Second, §16(b) focuses exclusively on the risk that the offender will “use[ ]” “physical force” “against” another person or another person’s property. Thus, unlike the ACCA residual clause, “§16(b) plainly does not encompass all offenses which create a ‘substantial risk’ that injury will result from a person’s conduct.” *Locals*, 543 U. S., at 10, n. 7 (emphasis added). The point is not that an inquiry into the risk of “physical force” is markedly more determinate than an inquiry into the risk of “physical injury.” But see ante, at 19–20. The difference is that §16(b) asks about the risk that the offender himself will actively employ force against person or property. That language does not sweep in all instances in which the offender’s acts, or another person’s reaction, might result in unintended or negligent harm.

Third, §16(b) has a temporal limit that the ACCA residual clause lacked: The “substantial risk” of force must arise “in the course of committing the offense.” Properly interpreted, this means the statute requires a substantial risk that the perpetrator will use force while carrying out the crime. See *Locals*, 543 U. S., at 10 (“The reckless disregard in §16 relates... to the risk that the use of physical force against another might be required in committing a crime.”). The provision thereby excludes more attenuated harms that might arise following the comple-
tion of the crime. The ACCA residual clause, by contrast, contained no similar language restricting its scope. And the absence of such a limit, coupled with the reference to “potential” risks, gave courts free rein to classify an offense as a violent felony based on injuries that might occur after the offense was over and done. See, e.g., United States v. Benton, 639 F.3d 723, 732 (CA6 2011) (finding that “solicitation to commit aggravated assault” qualified under the ACCA residual clause on the theory that the solicited individual might subsequently carry out the requested act).

Why does any of this matter? Because it mattered in Johnson. More precisely, the expansive language in the ACCA residual clause contributed to our determination that the clause gave rise to “grave uncertainty about how to estimate the risk posed by a crime.” 576 U. S., at ___ (slip op., at 5). “Critically,” we said—a word that tends to mean something—“picturing the criminal’s behavior is not enough.” Ibid. (emphasis added). Instead, measuring “potential risk” “seemingly require[d] the judge to imagine how the idealized ordinary case of the crime subsequently plays out.” Ibid. (emphasis added). Not so here. In applying §16(b), considering “the criminal’s behavior” is enough.

Those three distinctions—the unadorned reference to “risk,” the focus on the offender’s own active employment of force, and the “in the course of committing” limitation—also mean that many hard cases under ACCA are easier under §16(b). Take the firearm possession crime from Johnson itself, which had as its constituent elements (1) unlawfully (2) possessing (3) a short-barreled shotgun. None of those elements, “by its nature,” carries “a substantial risk” that the possessor will use force against another “in the course of committing the offense.” Nothing inherent in the act of firearm possession, even when it is unlawful, gives rise to a substantial risk that the owner will then shoot someone. See United States v. Serafin, 562
F. 3d 1105, 1113 (CA10 2009) (recognizing that "Leocal instructs [a court] to focus not on whether possession will likely result in violence, but instead whether one possessing an unregistered weapon necessarily risks the need to employ force to commit possession"). Yet short-barreled shotgun possession presented a closer question under the ACCA residual clause, because the "serious potential risk" language seemingly directed us to consider "the circumstances and conduct that ordinarily attend the offense," in addition to the offense itself. Johnson, 576 U. S., at __ (ALITO, J., dissenting) (slip op., at 17); see id., at __-__ (slip op., at 19–20) (reasoning that the crime must qualify because "a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is [likely] to use that weapon in violent ways").

Failure to report to a penal institution, the subject of Chambers v. United States, 555 U. S. 122 (2009), is another crime "whose treatment becomes more obvious under §16(b) than under ACCA," ante, at 18. In Chambers, the

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2The Court protests that this straightforward analysis fails to take account of the crime's ordinary case. Ante, at 18–19, n. 6. But the fact that the element of "possession" may "take[ ] place in a variety of ways"—for instance, one may possess a firearm "in a closet, in a store-room, in a car, in a pocket," "unloaded, disassembled, or locked away," Johnson, 576 U. S., at ___ (THOMAS, J., concurring in judgment) (slip op., at 4)—matters very little. That is because none of the alternative ways of satisfying that element produce a substantial risk that the possessor will use physical force against the person or property of another. And no one would say that a person "possesses" a gun by firing it or threatening someone with it. Cf. id., at __ (opinion of THOMAS, J.) (slip op., at 5) ("[T]he risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it."). The Court's insistence that this offense is nonetheless "difficult to classify" under §16(b), ante, at 18, n. 6, is surprising in light of our assessment, just two Terms ago, that §16 does not cover "felon-in-possession laws and other firearms offenses," Luna Torres v. Lynch, 578 U. S. ___ (2016) (slip op., at 13).
ROBERTS, C. J., dissenting

Government argued that the requisite risk of injury arises not necessarily at the time the offender fails to report to prison, but instead later, when an officer attempts to recapture the fugitive. 555 U. S., at 128. The majority is correct that we ultimately “reject[ed]” the Government’s contention. Ante, at 18. But we did so after “assum[ing] for argument’s sake” its premise—that is, “the relevance of violence that may occur long after an offender fails to report.” 555 U. S., at 128; see id., at 129 (looking at 160 cases of “failure to report” and observing that “none at all involved violence . . . during the commission of the offense itself, [nor] during the offender’s later apprehension”). The “in the course of committing the offense” language in §16(b) helpfully forecloses that debate.

DUI offenses are yet another example. Because §16(b) asks about the risk that the offender will “use[]” “physical force,” we readily concluded in Leocal that the subsection does not cover offenses where the danger arises from the offender’s negligent or accidental conduct, including drunk driving. 543 U. S., at 11. Applying the ACCA residual clause proved more trying. When asked to decide whether the clause covered drunk driving offenses, a majority of the Court concluded that the answer was no. Begay v. United States, 553 U. S. 137 (2008). Our decision was based, however, on the inference that the clause must cover only “purposeful, ‘violent,’ and ‘aggressive’ conduct”—a test derived not from the “conduct that presents a serious potential risk of physical injury” language, but instead by reference to (what we guessed to be) the unifying characteristics of the enumerated offenses. Id., at 144–145. Four Members of the Court criticized that test, see id., at 150–153 (Scalia, J., concurring in judgment); id., at 158–160, 162–163 (ALITO, J., dissenting), though they themselves disagreed about whether DUls were covered, see id., at 153–154 (opinion of Scalia, J.); id., at 156–158 (opinion of ALITO, J.). And the Court distanced
itself from the *Begay* requirement only a few years later when confronting the crime of vehicular flight. See *Sykes*, 564 U. S., at 12–13; *Johnson*, 576 U. S., at ___–___ (slip op., at 8–9).

Which brings me to the second part of the Court’s analysis: its objection that §16(b), like the ACCA residual clause, leaves “uncertainty about the level of risk that makes a crime ‘violent.’” *Ante*, at 10. The “substantial risk” standard in §16(b) is significantly less confusing because it is not tied to a disjointed list of paradigm offenses. Recall that the ACCA provision defined a “violent felony” to include a 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.” 18 U. S. C. §924(e)(2)(B)(ii) (emphasis added). As our Court recognized early on, that “otherwise” told the reader to understand the “serious potential risk of physical injury” standard by way of the four enumerated crimes. *James*, 550 U. S., at 203. But how, exactly? That question dogged our residual clause cases for years, until we said *no más* in *Johnson*.

In our first foray, *James*, we resolved the case by asking whether the risk posed by the crime of attempted burglary was “comparable to that posed by its closest analog among the enumerated offenses,” which was completed burglary. 550 U. S., at 203. While that rule “[took] care of attempted burglary,” it “offer[ed] no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes.” *Johnson*, 576 U. S., at ___ (slip op., at 7). The *James* dissent, for its part, would have determined the requisite degree of risk from the least dangerous of the enumerated crimes, and compared the offense to that. 550 U. S., at 218–219 (opinion of Scalia, J.). But that approach also proved to be harder than it sounded. See *id.*, at 219–227.

After *James* came *Begay*, in which we concluded that
the enumerated offenses served as an independent limitation on the kind of crime that could qualify. 553 U. S., at 142; see Chambers, 555 U. S., at 128 (applying the Begay standard). As discussed, that test was short lived (though we did not purport to wholly repudiate it). See Sykes, 564 U. S., at 13. Finally, in Sykes—our penultimate residual clause case—we acknowledged the prior use of the closest-analog test in James, but instead focused on whether the risk posed by vehicular flight was “similar in degree of danger” to the listed offenses of arson and burglary. 564 U. S., at 8–10. As a result, Justice Scalia’s dissent characterized the Sykes majority as applying the test from his prior dissent in James, not James itself. See 564 U. S., at 29–30, 33. This series of precedents laid bare our “repeated inability to craft a principled test out of the statutory text,” id., at 34 (opinion of Scalia, J.), as the Court ultimately acknowledged in Johnson, 576 U. S., at ___ (slip op., at 7).

The enumerated offenses, and our Court’s failed attempts to make sense of them, were essential to Johnson’s conclusion that the residual clause “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” Id., at __ (slip op., at 6). As Johnson explained, the issue was not that the statute employed a fuzzy standard. That kind of thing appears in the statute books all the time. Id., at ___–___ (slip op., at 6, 12). In the majority’s retelling today, the difficulty inhere merely in the fact that the statute paired such a standard with the ordinary case inquiry. See ante, at 8, 10–11, 21. But that account sidesteps much of Johnson’s reasoning. See 576 U. S., at ___–___, ___–___, ___–___, ___–___ (slip op., at 4–5, 6, 7–9, 12). Our opinion emphasized that the word “otherwise” “force[d]” courts to interpret the amorphous standard “in light of” the four enumerated crimes, which are “not much more similar to one another in kind than in degree of risk posed.” Id., at ___–___ (slip op., at 6, 8). Or,
as Johnson put it more vividly, “[t]he phrase ‘shades of red,’ standing alone, does not generate confusion or unpredictability; but the phrase ‘fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red’ assuredly does so.” Id., at ___ (slip op., at 12). Indeed, the author of Johnson had previously, and repeatedly, described this feature of the residual clause as the “crucial . . . respect” in which the law was problematic. See James, 550 U. S., at 230, n. 7 (opinion of Scalia, J.); Sykes, 564 U. S., at 35 (opinion of Scalia, J.).

With §16(b), by contrast, a court need simply consider the meaning of the word “substantial”—a word our Court has interpreted and applied innumerable times across a wide variety of contexts. The court does not need to give that familiar word content by reference to four different offenses with varying amounts and kinds of risk.

In its effort to recast a considerable portion of Johnson as dicta, the majority speculates that if the enumerated offenses had truly mattered to the outcome, the Court would have told lower courts to “give up on trying to interpret the clause by reference to” those offenses, rather than striking down the provision entirely. Ante, at 21. No litigant in Johnson suggested that solution, which is not surprising. Such judicial redrafting could have expanded the reach of the criminal provision—surely a job for Con-

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gress alone.

In any event, I doubt the majority’s proposal would have done the trick. And that is because the result in Johnson did not follow from the presence of one frustrating textual feature or another. Quite the opposite: The decision emphasized that it was the “sum” of the “uncertainties” in the ACCA residual clause, confirmed by years of experience, that “convince[d]” us the provision was beyond salvage. Johnson, 576 U. S., at ___ (slip op., at 10). Those failings do not characterize the provision at issue here.

III

The more constrained inquiry required under §16(b)—which asks only whether the offense elements naturally carry with them a risk that the offender will use force in committing the offense—does not itself engender “grave uncertainty about how to estimate the risk posed by a crime.” And the provision’s use of a commonplace substantial risk standard—one not tied to a list of crimes that lack a unifying feature—does not give rise to intolerable “uncertainty about how much risk it takes for a crime to qualify.” That should be enough to reject Dimaya’s facial vagueness challenge. ⁴

Because I would rely on those distinctions to uphold

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⁴The Court also finds it probative that “a host of issues” respecting §16(b) “divide” the lower courts. Ante, at 22. Yet the Court does little to explain how those alleged conflicts vindicate its particular concern about the provision (namely, the ordinary case inquiry). And as the Government illustrates, many of those divergent results likely can be chalked up to material differences in the state offense statutes at issue. Compare Escudero-Arciniega v. Holder, 702 F. 3d 781, 783–785 (CA5 2012) (per curiam) (reasoning that New Mexico car burglary “requires that the criminal lack authorization to enter the vehicle—a requirement alone which will most often ensure some force [against property] is used”), with Sareang Ye v. INS, 214 F. 3d 1128, 1134 (CA9 2000) (finding it relevant that California car burglary does not require unlawful or unprivileged entry); see Reply Brief 17–20, and nn. 5–6.
§16(b), the Court reproaches me for not giving sufficient weight to a “core insight” of Johnson. Ante, at 10, n. 4; see ante, at 15 (opinion of GORSUCH, J.) (arguing that §16(b) runs afoul of Johnson “to the extent [§16(b)] requires an ‘ordinary case’ analysis”). But the fact that the ACCA residual clause required the ordinary case approach was not itself sufficient to doom the law. We instead took pains to clarify that our opinion should not be read to impart such an absolute rule. See Johnson, 576 U. S., at ___ (slip op., at 10). I would adhere to that careful holding and not reflexively extend the decision to a different statute whose reach is, on the whole, far more clear.

The Court does the opposite, and the ramifications of that decision are significant. First, of course, today’s holding invalidates a provision of the Immigration and Nationality Act—part of the definition of “aggravated felony”—on which the Government relies to “ensure that dangerous criminal aliens are removed from the United States.” Brief for United States 54. Contrary to the Court’s back-of-the-envelope assessment, see ante, at 23, n. 12, the Government explains that the definition is “critical” for “numerous” immigration provisions. Brief for United States 12.

In addition, §16 serves as the universal definition of “crime of violence” for all of Title 18 of the United States Code. Its language is incorporated into many procedural and substantive provisions of criminal law, including provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives. See 18 U. S. C. §§25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a)(4), 2261(a), 3561(b). Of special concern, §16 is replicated in the definition of “crime of violence” applicable to §924(c), which prohibits using or carrying a firearm “during and in relation to any crime of violence,” or possessing a firearm “in furtherance of any
such crime.” §§924(c)(1)(A), (c)(3). Though I express no view on whether §924(c) can be distinguished from the provision we consider here, the Court’s holding calls into question convictions under what the Government warns us is an “oft-prosecuted offense.” Brief for United States 12.

Because Johnson does not compel today’s result, I respectfully dissent.
THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 15–1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
PETITIONER v. JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

JUSTICE THOMAS, with whom JUSTICE KENNEDY and JUSTICE ALITO join as to Parts I–C–2, II–A–1, and II–B, dissenting.

I agree with THE CHIEF JUSTICE that 18 U. S. C. §16(b), as incorporated by the Immigration and Nationality Act (INA), is not unconstitutionally vague. Section 16(b) lacks many of the features that caused this Court to invalidate the residual clause of the Armed Career Criminal Act (ACCA) in Johnson v. United States, 576 U. S. ___ (2015). ACCA’s residual clause—a provision that this Court had applied four times before Johnson—was not unconstitutionally vague either. See id., at ___ (THOMAS, J., concurring in judgment) (slip op., at 1); id., at ___–___ (ALITO, J., dissenting) (slip op., at 13–17). But if the Court insists on adhering to Johnson, it should at least take Johnson at its word that the residual clause was vague due to the “‘sum’” of its specific features. Id., at ___ (majority opinion) (slip op., at 10). By ignoring this limitation, the Court jettisons Johnson’s assurance that its holding would not jeopardize “dozens of federal and state criminal laws.” Id., at ___ (slip op., at 12).

While THE CHIEF JUSTICE persuasively explains why respondent cannot prevail under our precedents, I write separately to make two additional points. First, I continue to doubt that our practice of striking down statutes as
unconstitutionally vague is consistent with the original meaning of the Due Process Clause. See id., at ___–___ (opinion of THOMAS, J.) (slip op., at 7–18). Second, if the Court thinks that §16(b) is unconstitutionally vague because of the “categorical approach,” see ante, at 6–11, then the Court should abandon that approach—not insist on reading it into statutes and then strike them down. Accordingly, I respectfully dissent.

I

I continue to harbor doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause—and those doubts are only amplified in the removal context. I am also skeptical that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context. But I need not resolve these questions because, if the vagueness doctrine has any basis in the Due Process Clause, it must be limited to cases in which the statute is unconstitutionally vague as applied to the person challenging it. That is not the case for respondent, whose prior convictions for first-degree residential burglary in California fall comfortably within the scope of §16(b).

A

The Fifth Amendment’s Due Process Clause provides that no person shall be “deprived of life, liberty, or property, without due process of law.” Section 16(b), as incorporated by the INA, cannot violate this Clause unless the following propositions are true: The Due Process Clause requires federal statutes to provide certain minimal procedures, the vagueness doctrine is one of those procedures, and the vagueness doctrine applies to statutes governing the removal of aliens. Although I need not resolve any of these propositions today, each one is questionable. I will address them in turn.
First, the vagueness doctrine is not legitimate unless the “law of the land” view of due process is incorrect. Under that view, due process “require[s] only that our Government . . . proceed . . . according to written constitutional and statutory provision[s] before depriving someone of life, liberty, or property.” Nelson v. Colorado, 581 U. S. ___, ___, n. 1 (2017) (THOMAS, J., dissenting) (slip op., at 2, n. 1) (internal quotation marks omitted). More than a half century after the founding, the Court rejected this view of due process in Murray’s Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856). See id., at 276 (holding that the Due Process Clause “is a restraint on the legislative as well as on the executive and judicial powers of the government”). But the textual and historical support for the law-of-the-land view is not insubstantial.  

Even under Murray’s Lessee, the vagueness doctrine is legitimate only if it is a “settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors.” Id., at 277. That proposition is dubious. Until the end of the 19th century, “there is little indication that anyone . . . believed that courts had the power under the Due Process Claus[e] to nullify statutes on [vagueness] ground[s].” Johnson, supra, at ___ (opinion of THOMAS, J.) (slip op., at

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11). That is not because Americans were unfamiliar with vague laws. Rather, early American courts, like their English predecessors, addressed vague laws through statutory construction instead of constitutional law. See Note, Void for Vagueness: An Escape From Statutory Interpretation, 23 Ind. L. J. 272, 274–279 (1948). They invoked the rule of lenity and declined to apply vague penal statutes on a case-by-case basis. See Johnson, 576 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 7–10); e.g., ante, at 5–6, and n. 1 (GORSUCH, J., concurring in part and concurring in judgment) (collecting cases).² The modern vagueness doctrine, which claims the judicial authority to “strike down” vague legislation on its face, did not emerge until the turn of the 20th century. See Johnson, 576 U. S., at ___–___ (opinion of THOMAS, J.) (slip op., at 11–13).

The difference between the traditional rule of lenity and

²Before the 19th century, when virtually all felonies were punishable by death, English courts would sometimes go to extremes to find a reason to invoke the rule of lenity. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 751 (1935); e.g., ante, at 4–7 (GORSUCH, J., concurring in part and concurring in judgment) (citing Blackstone’s discussion of a case about “cattle”). As the death penalty became less common, courts on this side of the Atlantic tempered the rule of lenity, clarifying that the rule requires an “ambiguity” in the text and cannot be used “to defeat the obvious intention of the legislature.” United States v. Wilberger, 5 Wheat. 76 (1820) (Marshall, C. J.).

Early American courts also declined to apply nonpenal statutes that were “unintelligible.” Johnson v. United States, 576 U. S. ___–___, n. 3 (2014) (THOMAS, J., concurring in judgment) (slip op., at 10, n. 3); e.g., ante, at 5–6, and n. 1 (opinion of GORSUCH, J.) (collecting cases). Like lenity, however, this practice reflected a principle of statutory construction that was much narrower than the modern constitutional vagueness doctrine. Unintelligible statutes were considered inoperative because they were impossible to apply to individual cases, not because they were unconstitutional for failing to provide “fair notice.” See Johnson, 576 U. S., at ___, n. 3 (opinion of THOMAS, J.) (slip op., at 10, n. 3).
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the modern vagueness doctrine is not merely semantic. Most obviously, lenity is a tool of statutory construction, which means States can abrogate it—and many have. Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 752–754 (1935); see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1989) (“Arizona, by the way, seems to have preserved a fair and free society without adopting the rule that criminal statutes are to be strictly construed” (citing Ariz. Rev. Stat. §1-211C (1989))). The vagueness doctrine, by contrast, is a rule of constitutional law that States cannot alter or abolish. Lenity, moreover, applies only to “penal” statutes, 1 Blackstone, Commentaries on the Laws of England 88 (1765), but the vagueness doctrine extends to all regulations of individual conduct, both penal and nonpenal, Johnson, 576 U.S., at ___ (opinion of THOMAS, J.) (slip op., at 6); see also Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, 163 (1931) (explaining that the modern vagueness doctrine was not merely an “extension of the rule of strict construction of penal statutes” because it “expressly include[s] civil statutes within its scope,” reflecting a “regrettable disregard” for legislatures). In short, early American courts were not applying the modern vagueness doctrine by another name. They were engaged in a fundamentally different enterprise.

Tellingly, the modern vagueness doctrine emerged at a time when this Court was actively interpreting the Due

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3This distinction between penal and nonpenal statutes would be decisive here because, traditionally, civil deportation laws were not considered penal. See Bajajewitz v. Adams, 228 U.S. 585, 591 (1913); Fong Yue Ting v. United States, 149 U.S. 698, 709, 730 (1893). Although this Court has applied a kind of strict construction to civil deportation laws, that practice did not emerge until the mid-20th century. See Fong Haw Tan v. Phelan, 333 U. S. 6, 10 (1948).
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Process Clause to strike down democratically enacted laws—first in the name of the “liberty of contract,” then in the name of the “right to privacy.” See Johnson, 576 U. S., at __–__ (opinion of THOMAS, J.) (slip op., at 13–16). That the vagueness doctrine “develop[ed] on the federal level concurrently with the growth of the tool of substantive due process” does not seem like a coincidence. Note, 23 Ind. L. J., at 278. Like substantive due process, the vagueness doctrine provides courts with “open-ended authority to oversee [legislative] choices.” Kolender v. Lawson, 461 U. S. 352, 374 (1983) (White, J., dissenting). This Court, for example, has used the vagueness doctrine to invalidate anti-loitering laws, even though those laws predate the Declaration of Independence. See Johnson, supra, at ___ (opinion of THOMAS, J.) (slip op., at 7) (discussing Chicago v. Morales, 527 U. S. 41 (1999)).

This Court also has a bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process. See, e.g., Williams v. Pennsylvania, 579 U. S. ___ (2016); BMW of North America, Inc. v. Gore, 517 U. S. 559 (1996); Fouche v. Louisiana, 504 U. S. 71 (1992); cf. Montgomery v. Louisiana, 577 U. S. ___ (2016). If vagueness is another example of this practice, then that is all the more reason to doubt its legitimacy.

3

Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens. Cf. Johnson, 576 U. S., at __, n. 7 (opinion of THOMAS, J.) (slip op., at 17, n. 7) (stressing the need for specificity when assessing alleged due process rights). The Founders were familiar with English law, where “the only question that ha[d] ever been made in regard to the power to expel aliens [was] whether it could be exercised by the King without the consent of Parlia-
ment.” Demore v. Kim, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in judgment) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893)). And, in this country, the notion that the Due Process Clause governed the removal of aliens was not announced until the 20th century.

Less than a decade after the ratification of the Bill of Rights, the founding generation had an extensive debate about the relationship between the Constitution and federal removal statutes. In 1798, the Fifth Congress enacted the Alien Acts. One of those Acts, the Alien Friends Act, gave the President unfettered discretion to expel any aliens “he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof.” An Act Concerning Aliens §1, 1 Stat. 571. This statute was modeled after the Aliens Act 1793 in England, which similarly gave the King unfettered discretion to expel aliens as he “shall think necessary for the publick Security.” 33 Geo. III, ch. 4, §18, in 39 Eng. Stat. at Large 16. Both the Fifth Congress and the States thoroughly debated the Alien Friends Act. Virginia and Kentucky enacted resolutions (anonymously drafted by Madison and Jefferson) opposing the Act, while 10 States enacted counter-resolutions condemning the views of Virginia and Kentucky. See Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 85, 103 (2002).

The Jeffersonian Democratic-Republicans, who viewed the Alien Friends Act as a threat to their party and the institution of slavery,4 raised a number of constitutional

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4The Jeffersonian Democratic-Republicans who opposed the Alien Friends Act primarily represented slave States, and their party's
objections. Some of the Jeffersonians argued that the Alien Friends Act violated the Fifth Amendment’s Due Process Clause. They complained that the Act failed to provide aliens with all the accouterments of a criminal trial. See, e.g., Kentucky Resolutions ¶6, in 4 The Debates in the Several Conventions on the Adoption of the Federal Constitution 541–542 (J. Elliot ed. 1836) (Elliott’s Debates); 8 Annals of Cong. 1982–1983 (1798) (statement of Rep. Gallatin); Madison’s Report on the Virginia Resolutions (Jan. 7, 1800), in 6 Writings of James Madison 361–362 (G. Hunt ed. 1906) (Madison’s Report).5

The Federalists gave two primary responses to this due process argument. First, the Federalists argued that the rights of aliens were governed by the law of nations, not the Constitution. See, e.g., Randolph, Debate on Virginia Resolutions, in The Virginia Report of 1799–1800, pp. 34–35 (1850) (Virginia Debates) (statement of George K. Taylor) (arguing that aliens “were not a party to the [Constitution]” and that “cases between the government and

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5The Jeffersonians also argued that the Alien Friends Act violated due process because, if aliens disobeyed the President’s orders to leave the country, they could be convicted of a crime and imprisoned without a trial. See, e.g., Kentucky Resolutions ¶6, 4 Elliot’s Debates 541. That charge was false. The Alien Friends Act gave federal courts jurisdiction over alleged violations of the President’s orders. See ¶4, 1 Stat. 571.
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aliens . . . arise under the law of nations’); id., at 100 (statement of William Cowan) (identifying the source of rights “as to citizens, the Constitution; as to aliens, the law of nations”); A. Addison, A Charge to the Grand Juries of the County Courts of the Fifth Circuit of the State of Pennsylvania 18 (1799) (Charge to the Grand Juries) (“[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations”); Answer to the Resolutions of the State of Kentucky, Oct. 29, 1799, in 4 Records of the Governor and Council of the State of Vermont 528 (1876) (denying “that aliens had any rights among us, except what they derived from the law of nations, and rights of hospitality”). The law of nations imposed no enforceable limits on a nation’s power to remove aliens. See, e.g., 1 E. de Vattel, Law of Nations, §§230–231, pp. 108–109 (J. Chitty et al. transl. and ed. 1883).

Second, the Federalists responded that the expulsion of aliens “did not touch life, liberty, or property.” Virginia Debates 34. The founding generation understood the phrase “life, liberty, or property” to refer to a relatively narrow set of core private rights that did not depend on the will of the government. See Wellness Int’l Network, Ltd. v. Sharif, 575 U. S. ___, ___ (2015) (THOMAS, J., dissenting) (slip op., at 9–10); Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 566–568 (2007) (Nelson). Quasi-private rights—“privileges” or “franchises” bestowed by the government on individuals—did not qualify and could be taken away without judicial process. See B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U. S. ___, ___ (2015) (THOMAS, J., dissenting) (slip op., at 12); Nelson 567–569. The Federalists argued that an alien’s right to reside in this country was one such privilege. See, e.g., Virginia Debates 34 (arguing that “ordering away an alien . . . was not a matter of right, but of favour,” which did not require a jury trial); Report of the
Select Committee of the House of Representatives, Made to the House of Representatives on Feb. 21, 1799, 9 Annals of Cong. 2987 (1799) (stating that aliens “remain in the country . . . merely as matter of favor and permission” and can be removed at any time without a criminal trial); Charge to the Grand Juries 11–13 (similar). According to the Minority Address of the Virginia Legislature (anonymously drafted by John Marshall), “[T]he right of remaining in our country is vested in no alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn” without judicial process. Address of the Minority in the Virginia Legislature to the People of that State 9–10 (1799) (Virginia Minority Address). Unlike “a grant of land,” the “[a]dmission of an alien to residence . . . is revocable, like a permission.” A. Addison, Analysis of the Report of the Committee of the Virginia Assembly 23 (1800). Removing a resident alien from the country did not affect “life, liberty, or property,” the Federalists argued, until the alien became a naturalized citizen. See id., at 23–24; Charge to the Grand Juries 11–13. That the alien’s permanent residence was conferred by statute would not have made a difference. See Nelson 571, 580–582; Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc., 574 U. S. ____ , ____ , n. 2 (2015) (THOMAS, J., dissenting) (slip op., at 9, n. 2).

After the Alien Friends Act lapsed in 1800, Congress did not enact another removal statute for nearly a century. The States enacted their own removal statutes during this period, see G. Neuman, Strangers to the Constitution 19–43 (1996), and I am aware of no decision questioning the legality of these statutes under State due-process or law-of-the-land provisions. Beginning in the late 19th century, the Federal Government reinserted itself into the regulation of immigration. When this Court was presented with constitutional challenges to Congress’ removal laws, it initially rejected them for many of the same reasons that
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Marshall and the Federalists had cited in defense of the Alien Friends Act. Although the Court rejected the Federalists' argument that resident aliens do not enjoy constitutional rights, see Wong Wing v. United States, 163 U. S. 228, 238 (1896), it agreed that civil deportation statutes do not implicate “life, liberty, or property,” see, e.g., Harisiades v. Shaughnessy, 342 U. S. 580, 584–585 (1952) (“[T]hat admission for permanent residence confers a ‘vested right’ on the alien [is] not founded in precedents of this Court’); United States ex rel. Turner v. Williams, 194 U. S. 279, 290 (1904) (“[T]he deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law’); Fong Yue Ting, 149 U. S., at 730 (“[Deportation] is but a method of enforcing the return to his own country of an alien who has not complied with [statutory] conditions . . . . He has not, therefore, been deprived of life, liberty, or property without due process of law’); id., at 713–715 (similar). Consistent with this understanding, “federal immigration laws from 1891 until 1952 made no express provision for judicial review.” Demore, 538 U. S., at 538 (opinion of O’Connor, J.).

It was not until the 20th century that this Court held that nonpenal removal statutes could violate the Due Process Clause. See Wong Yang Sung v. McGrath, 339 U. S. 33, 49 (1950). That ruling opened the door for the Court to apply the then-nascent vagueness doctrine to immigration statutes. But the Court upheld vague standards in immigration laws that it likely would not have tolerated in criminal statutes. See, e.g., Boutilier v. INS, 387 U. S. 118, 122 (1967) (“psychopathic personality”); Jordan v. De George, 341 U. S. 223, 232 (1951) (“crime involving moral turpitude”); cf. Mahler, supra, at 40 (“undesirable residents’). Until today, this Court has never held that an immigration statute is unconstitutionally vague.

Thus, for more than a century after the founding, it was,
at best, unclear whether federal removal statutes could violate the Due Process Clause. And until today, this Court had never deemed a federal removal statute void for vagueness. Given this history, it is difficult to conclude that a ban on vague removal statutes is a “settled usage[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors” protected by the Fifth Amendment’s Due Process Clause. Murray’s Lessee, 18 How., at 277.

B

Instead of a longstanding procedure under Murray’s Lessee, perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1806 (2012) (“Vague statutes have the effect of delegating lawmaking authority to the executive”). Madison raised a similar objection to the Alien Friends Act, arguing that its expansive language effectively allowed the President to exercise legislative (and judicial) power. See Madison’s Report 369–371. And this Court’s precedents have occasionally described the vagueness doctrine in terms of nondelegation. See, e.g., Grayned v. City of Rockford, 408 U. S. 104, 108–109 (1972) (“A vague law impermissibly delegates basic policy matters”). But they have not been consistent on this front. See, e.g., Aptheker v. Secretary of State, 378 U. S. 500, 516 (1964) (“The objectionable quality of vagueness . . . does not depend upon . . . unchanneled delegation of legislative powers”); Maynard v. Cartwright, 486 U. S. 356, 361 (1988) (“Objections to vagueness under the Due Process Clause rest on the lack of notice”).

I agree that the Constitution prohibits Congress from delegating core legislative power to another branch. See Department of Transportation v. Association of American Railroads, 575 U. S. ___, ___ (2015) (AAR) (THOMAS, J.,
concurring in judgment) (slip op., at 3) (“Congress improperly ‘delegates’ legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power’); accord, \textit{Whitman v. American Trucking Assns., Inc.}, 531 U. S. 457, 487 (2001) (THOMAS, J., concurring). But I locate that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause. \textit{AAR, supra}, at ____—____ (opinion of THOMAS, J.) (slip op., at 2–3); see also \textit{Hampton v. Mow Sun Wong}, 426 U. S. 88, 123 (1976) (Rehnquist, J., dissenting) (“[T]hat there was an improper delegation of authority . . . has not previously been thought to depend upon the procedural requirements of the Due Process Clause”). In my view, impermissible delegations of legislative power violate this principle, not just delegations that deprive individuals of “life, liberty, or property,” Amdt. 5.

Respondent does not argue that §16(b), as incorporated by the INA, is an impermissible delegation of power. See Brief for Respondent 50 (stating that “there is no delegation question” in this case). I would not reach that question here, because this case can be resolved on narrower grounds. See Part I–C, \textit{infra}. But at first blush, it is not at all obvious that the nondelegation doctrine would justify wholesale invalidation of §16(b).

If §16(b) delegates power in this context, it delegates power primarily to the Executive Branch entities that administer the INA—namely, the Attorney General, immigration judges, and the Board of Immigration Appeals (BIA). But Congress does not “delegate” when it merely authorizes the Executive Branch to exercise a power that it already has. See \textit{AAR, supra}, at ____ (opinion of THOMAS, J.) (slip op., at 3). And there is some founding-era evidence that “the executive Power,” Art. II, §1, includes the power to deport aliens.

Blackstone—one of the political philosophers whose
writings on executive power were “most familiar to the Framers,” Prakash & Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L.J. 231, 253 (2001)—described the power to deport aliens as executive and located it with the King. Alien friends, Blackstone explained, are “liable to be sent home whenever the king sees occasion.” 1 Commentaries on the Laws of England 252 (1765). When our Constitution was ratified, moreover, “[e]minent English judges, sitting in the Judicial Committee of the Privy Council, ha[d] gone very far in supporting the . . . expulsion, by the executive authority of a colony, of aliens.” Demore, 538 U.S., at 538 (opinion of O’Connor, J.) (quoting Fong Yue Ting, 149 U.S., at 709). Some of the Federalists defending the Alien Friends Act similarly argued that the President had the power to remove aliens. See, e.g., Virginia Debates 35 (statement of George K. Taylor) (arguing that the power to remove aliens is “most properly entrusted” with the President, since “[h]e, by the Constitution, was bound to execute the laws” and is “the executive officer, with whom all persons and bodies whatever were accustomed to communicate”); Virginia Minority Address 9 (arguing that the removal of aliens “is a measure of general safety, in its nature political and not forensic, the execution of which is properly trusted to the department which represents the nation in all its interior relations”); Charge to the Grand Juries 29–30 (“As a measure of national defence, this discretion, of expulsion or indulgence, seems properly vested in the branch of the government peculiarly charged with the direction of the executive powers, and of our foreign relations. There is in it a mixture of external policy, and of the law of nations, that justifies this disposition”). More recently, this Court recognized that “[r]emoval decisions” implicate “our customary policy of deference to the President in matters of foreign affairs” because they touch on “our relations with foreign powers and require consideration of changing
political and economic circumstances.” *Jama v. Immigration and Customs Enforcement*, 543 U. S. 335, 348 (2005) (internal quotation marks omitted). Taken together, this evidence makes it difficult to confidently conclude that the INA, through §16(b), delegates core legislative power to the Executive.

Instead of the Executive, perhaps §16(b) impermissibly delegates power to the Judiciary, since the Courts of Appeals often review the BIA’s application of §16(b). I assume that, at some point, a statute could be so devoid of content that a court tasked with interpreting it “would simply be making up a law—that is, exercising legislative power.” Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 339 (2002); see *id.*, at 339–340 (providing examples such as a gibberish-filled statute or a statute that requires “goodness and niceness”). But I am not confident that our modern vagueness doctrine—which focuses on whether regulations of individual conduct provide “fair warning,” are “clearly defined,” and do not encourage “arbitrary and discriminatory enforcement,” *Grayned*, 408 U. S., at 108; *Kolender*, 461 U. S., at 357—accurately demarcates the line between legislative and judicial power. The Founders understood that the interpretation of legal texts, even vague ones, remained an exercise of core judicial power. See *Perez v. Mortgage Bankers Assn.*, 575 U. S. ___, ___ (2015) (THOMAS, J., concurring in judgment) (slip op., at 8–9); Hamburger, The Constitution’s Accommodation of Social Change, 88 Mich. L. Rev. 239, 303–310 (1989). Courts were expected to clarify the meaning of such texts over time as they applied their terms to specific cases. See *id.*, at 309–310; Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 526 (2003). Although early American courts declined to apply vague or unintelligible statutes as appropriate in individual cases, they did not wholesale invalidate them as unconstitutional delegations of legislative
power. See Johnson, 576 U. S., at __–__, and n. 3 (opinion of THOMAS, J.) (slip op., at 10–11, and n. 3).

C

I need not resolve these historical questions today, as this case can be decided on narrower grounds. If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. That is what early American courts did when they applied the rule of lenity. See id., at __ (slip op., at 10). And that is how early American courts addressed constitutional challenges to statutes more generally. See ibid. ("[T]here is good evidence that [antebellum] courts . . . understood judicial review to consist ‘of a refusal to give a statute effect as operative law in resolving a case,’ a notion quite distinct from our modern practice of ‘striking down’ legislation" (quoting Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010)).

2

This Court’s precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him. See Holder v. Humanitarian Law Project, 561 U. S. 1, 18–19 (2010); United States v. Williams, 553 U. S. 285, 304 (2008); Maynard, 486 U. S., at 361; Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U. S. 489, 495, and n. 7 (1982) (collecting cases). Johnson did not overrule these precedents. While Johnson weakened the principle that a facial challenge requires a statute to be vague "in all applications," 576 U. S., at __ (slip op., at 11) (emphasis added), it did not address whether a statute must be vague as applied to the person challenging it. That question did not arise because the Court concluded that ACCA’s residual
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The clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun. See id., at ___ (slip op., at 9).

In my view, §16(b) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was “sufficiently forewarned . . . that the statutory consequence . . . is deportation.” *De George*, 341 U.S., at 232. At the time, courts had “unanimous[ly]” concluded that residential burglary is a crime of violence, and not “a single opinion . . . ha[d] held that [it] is not.” *United States v. M. C. E.*, 232 F. 3d 1252, 1255–1256 (CA9 2000); see also *United States v. Davis*, 881 F. 2d 973, 976 (CA11 1989) (explaining that treating residential burglary as a crime of violence was “[i]n accord with common law tradition and the settled law of the federal circuits”). Residential burglary “ha[d] been considered a violent offense for hundreds of years . . . because of the potential for mayhem if burglar encounters resident.” *United States v. Pinto*, 875 F. 2d 143, 144 (CA7 1989). The Model Penal Code had recognized that risk, see ALI, Model Penal Code §211.1, Comment 3(c), p. 75 (1980); the Sentencing Commission had recognized that risk; see United States Sentencing Commission, Guidelines Manual §4B1.2(a)(2) (Nov. 2006); and this Court had repeatedly recognized that risk, see, e.g., *James v. United States*, 550 U. S. 192, 203 (2007); *Taylor v. United States*, 495 U. S. 575, 588 (1990). In *Leocal v. Ashcroft*, 543 U. S. 1 (2004), this Court unanimously agreed that burglary is the “classic example” of a crime of violence under §16(b), because it “involves a substantial risk that the burglar will use force against a victim in completing the crime.” Id., at 10.

That same risk is present with respect to respondent’s statute of conviction—first-degree residential burglary, Cal. Penal Code Ann. §§459, 460(a) (West 1999). The California Supreme Court has explained that the State’s burglary laws recognize “the dangers to personal safety
created by the usual burglary situation.” *People v. Davis*, 18 Cal. 4th 712, 721, 958 P. 2d 1083, 1089 (1998) (emphasis added). “[T]he fact that a building is used as a home . . . increases such danger,” which is why California elevates residential burglary to a first-degree offense. *People v. Rodriguez*, 122 Cal. App. 4th 121, 133, 18 Cal. Rptr. 3d 550, 558 (2004); see also *People v. Wilson*, 208 Cal. App. 3d 611, 615, 256 Cal. Rptr. 422, 425 (1989) (“[T]he higher degree . . . is intended to prevent those situations which are most dangerous, most likely to cause personal injury” (emphasis deleted)). Although unlawful entry is not an element of the offense, courts “unanimous[ly]” agree that the offense still involves a substantial risk of physical force. *United States v. Avila*, 770 F. 3d 1100, 1106 (CA4 2014); accord, *United States v. Maldonado*, 696 F. 3d 1095, 1102, 1104 (CA10 2012); *United States v. Scanlan*, 667 F. 3d 896, 900 (CA7 2012); *United States v. Echeverria-Gomez*, 627 F. 3d 971, 976 (CA5 2010); *United States v. Becker*, 919 F. 2d 568, 573 (CA9 1990). First-degree residential burglary requires entry into an inhabited dwelling, with the intent to commit a felony, against the will of the homeowner—the key elements that create the risk of violence. See *United States v. Park*, 649 F. 3d 1175, 1178–1180 (CA9 2011); *Avila, supra*, at 1106–1107; *Becker, supra*, at 571, n. 5. As this Court has explained, “[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another’s property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party.” *James, supra*, at 203.

Drawing on *Johnson* and the decision below, the Court suggests that residential burglary might not be a crime of violence because “only about seven percent of burglaries actually involve violence.” *Ante*, at 9, n. 3 (citing *Dimaya v. Lynch*, 803 F. 3d 1110, 1116, n. 7 (CA9 2015)); see Bureau of Justice Statistics, S. Catalano, National Crime
Vicimization Survey: Vicimization During Household Burglary 1 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/vdhb.pdf (as last visited Apr. 13, 2018). But this statistic—which measures actual violence against a member of the household, see id., at 1, 12—is woefully underinclusive. It excludes other potential victims besides household members—for example, “a police officer, or a bystande[r] who comes to investigate,” James, supra, at 203. And §16(b) requires only a risk of physical force, not actual physical force, and that risk would seem to be present whenever someone is home during the burglary. Further, Johnson is not conclusive because, unlike ACCA’s residual clause, §16(b) covers offenses that involve a substantial risk of physical force “against the person or property of another.” (Emphasis added.) Surely the ordinary case of residential burglary involves at least one of these risks. According to the statistics referenced by the Court, most burglaries involve either a forcible entry (e.g., breaking a window or slashing a door screen), an attempted forcible entry, or an unlawful entry when someone is home. See Bureau of Justice Statistics, supra, at 2 (Table 1). Thus, under any metric, respondent’s convictions for first-degree residential burglary are crimes of violence under §16(b).

Finally, if facial vagueness challenges are ever appropriate, I adhere to my view that a law is not facially vague “[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law.” Morales, 527 U. S., at 112 (THOMAS, J., dissenting) (quoting Kolender, 461 U. S., at 370–371 (White, J., dissenting)). The residual clause of ACCA had such a core. See Johnson, 576 U. S., at ___ (slip op., at 10); id., at ___–___ (ALITO, J., dissenting) (slip
op., at 14–15). And §16(b) has an even wider core, as THE CHIEF JUSTICE explains. Thus, the Court should not have invalidated §16(b), either on its face or as applied to respondent.

II

Even taking the vagueness doctrine and Johnson at face value, I disagree with the Court’s decision to invalidate §16(b). The sole reason that the Court deems §16(b) unconstitutionally vague is because it reads the statute as incorporating the categorical approach—specifically, the “ordinary case” approach from ACCA’s residual clause. Although the Court mentions “[t]wo features” of §16(b) that make it vague—the ordinary-case approach and an imprecise risk standard—the Court admits that the second feature is problematic only in combination with the first. Ante, at 8. Without the ordinary-case approach, the Court “do[es] not doubt” the constitutionality of §16(b). Ante, at 10.

But if the categorical approach renders §16(b) unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that interpretation. And a reasonable alternative interpretation is available: Instead of asking whether the ordinary case of an alien’s offense presents a substantial risk of physical force, courts should ask whether the alien’s actual underlying conduct presents a substantial risk of physical force. I will briefly discuss the origins of the categorical approach and then explain why the Court should abandon it for §16(b).

A

1

The categorical approach originated with Justice Blackmun’s opinion for the Court in Taylor v. United States, 495 U. S. 575 (1990). The question in Taylor was whether ACCA’s reference to “burglary” meant burglary
as defined by state law or burglary in the generic sense. After “devoting 10 pages of [its] opinion to legislative history,” id., at 603 (Scalia, J., concurring in part and concurring in judgment), and finding that Congress had made “an inadvertent casualty in [the] complex drafting process,” id., at 589–590 (majority opinion), the Court concluded that ACCA referred to burglary in the generic sense, id., at 598. The Court then addressed how the Government would prove that a defendant was convicted of generic burglary, as opposed to another offense. Id., at 599–602. Taylor rejected the notion that the Government could introduce evidence about the “particular facts” of the defendant’s underlying crime. Id., at 600. Instead, the Court adopted a “categorical approach,” which focused primarily on the “statutory definition of the prior offense.” Id., at 602.

Although Taylor was interpreting one of ACCA’s enumerated offenses, this Court later extended the categorical approach to ACCA’s residual clause. See James, 550 U. S., at 208. That extension required some reworking. Because ACCA’s enumerated-offenses clause asks whether a prior conviction “is burglary, arson, or extortion,” 18 U. S. C. §924(e)(2)(B)(ii), Taylor instructed courts to focus on the definition of the underlying crime. The residual clause, by contrast, asks whether a prior conviction “involves conduct that presents a serious potential risk of physical injury to another.” §924(e)(2)(B)(ii). Thus, the Court held that the categorical approach for the residual clause asks “whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” James, supra, at 208 (emphasis added). This “ordinary case” approach allowed courts to apply the residual clause without inquiring into the individual facts of the defendant’s prior crime.

Taylor gave a few reasons why the categorical approach was the correct reading of ACCA, see 495 U. S., at 600–
601, but the “heart of the decision” was the Court’s concern with limiting the amount of evidence that the parties could introduce at sentencing. *Shepard v. United States*, 544 U. S. 13, 23 (2005). Specifically, the Court was worried about potential violations of the Sixth Amendment. If the parties could introduce evidence about the defendant’s underlying conduct, then sentencing proceedings might devolve into a full-blown minitrial, with factfinding by the judge instead of the jury. See *id.*, at 24–26; *Taylor, supra*, at 601. While this Court’s decision in *Almendarez-Torres v. United States*, 523 U. S. 224 (1998), allows judges to find facts about a defendant’s prior convictions, a full-blown minitrial would look “too much like” the kind of factfinding that the Sixth Amendment requires the jury to conduct. *Shepard*, 544 U. S., at 25. By construing ACCA to require a categorical approach, then, the Court was following “[t]he rule of reading statutes to avoid serious risks of unconstitutionality.” *Ibid.*

I disagreed with the Court’s decision to extend the categorical approach to ACCA’s residual clause. See *James*, 550 U. S., at 231–232 (dissenting opinion). The categorical approach was an “unnecessary exercise,” I explained, because it created the same Sixth Amendment problem that it tried to avoid. *Id.*, at 231. Absent waiver, a defendant has the right to have a jury find “every fact that is by law a basis for imposing or increasing punishment,” including the fact of a prior conviction. *Apprendi v. New Jersey*, 530 U. S. 466, 501 (2000) (THOMAS, J., concurring). The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. See *Mathis v. United States*, 579 U. S. __, ___ (2016) (THOMAS, J., concurring) (slip op., at 1); *Shepard, supra*, at 27–28 (THOMAS, J., concurring in part and
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concurring in judgment). In my view, if the Government wants to enhance a defendant’s sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt. 6

B

My objection aside, the ordinary-case approach soon created problems of its own. The Court’s attempt to avoid the Scylla of the Sixth Amendment steered it straight into the Charybdis of the Fifth. The ordinary-case approach that was created to honor the individual right to a jury is now, according to the Court, so vague that it deprives individuals of due process.

I see no good reason for the Court to persist in reading the ordinary-case approach into §16(b). The text of §16(b) does not mandate the ordinary-case approach, the concerns that led this Court to adopt it do not apply here, and there are no prudential reasons for retaining it. In my view, we should abandon the categorical approach for §16(b).

The text of §16(b) does not require a categorical approach. The INA declares an alien deportable if he is

6 The Sixth Amendment is, thus, not a reason to maintain the categorical approach in criminal cases. Contra, ante, at 13–14 (plurality opinion). Even if it were, the Sixth Amendment does not apply in immigration cases like this one. See Part II–B–2, infra. The plurality contends that, if it must contort the text of §16(b) to avoid a Sixth Amendment problem in criminal cases, then it must also contort the text of §16(b) in immigration cases, even though the Sixth Amendment problem does not arise in the immigration context. See ante, at 13–14, 15. But, as I have explained elsewhere, this “lowest common denominator” approach to constitutional avoidance is both ahistorical and illogical. See Clark v. Martinez, 543 U. S. 371, 395–401 (2005) (dissenting opinion).
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"convicted of an aggravated felony" after he is admitted to the United States. 8 U. S. C. §1227(a)(2)(A)(iii). Aggravated felonies include "crime[s] of violence" as defined in §16. §1101(a)(43)(F). Section 16, in turn, defines crimes of violence as follows:

"(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

At first glance, §16(b) is not clear about the precise question it poses. On the one hand, the statute might refer to the metaphysical "nature" of the offense and ask whether it ordinarily involves a substantial risk of physical force. On the other hand, the statute might refer to the underlying facts of the offense that the offender committed; the words "by its nature," "substantial risk," and "may" would mean only that an offender who engages in risky conduct cannot benefit from the fortuitous fact that physical force was not actually used during his offense. The text can bear either interpretation. See Nijhawan v. Holder, 557 U. S. 29, 33–34 (2009) ("[I]n ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime . . . and sometimes refer to the specific acts in which an offender engaged on a specific occasion"). It is entirely natural to use words like "nature" and "offense" to refer to an offender's actual underlying conduct.7

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7 See, e.g., 18 U. S. C. §3553(a)(2) (directing sentencing judges to consider "the nature and circumstances of the offense"); Schware v. Board of Bar Examiners of N. M., 333 U. S. 232, 242–243 (1947) (describing "the nature of the offense" committed by a bar applicant as "recruiting
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Although both interpretations are linguistically possible, several factors indicate that the underlying-conduct approach is the better one. To begin, §16(b) asks whether an offense “involves” a substantial risk of force. The word “involves” suggests that the offense must necessarily include a substantial risk of force. See The New Oxford Dictionary of English 962 (2001) (“include (something) as a necessary part or result”); Random House Dictionary of the English Language 1005 (2d ed. 1987) (“1. to include as

persons to go overseas to aid the Loyalists in the Spanish Civil War”); TXO Production Corp. v. Alliance Resources Corp., 509 U. S. 443, 482 (1993) (O’Connor, J., dissenting) (describing “the nature of the offense at issue” as not “involving grave physical injury” but rather as a “business dispute between two companies in the oil and gas industry”); United States v. Broce, 488 U. S. 563, 585–587 (1989) (Blackmun, J., dissenting) (describing “the nature of the charged offense” in terms of the specific facts alleged in the indictment); People v. Golba, 273 Mich. App. 603, 611, 729 N. W. 2d 916, 922 (2007) (“The underlying factual basis for a conviction governs whether the offense ‘by its nature constitutes a sexual offense against an individual who is less than 18 years of age.’” (quoting Mich. Comp. Laws §28.722(e)(xi) (2006))); A Fix for Animal Abusers, Boston Herald, Nov. 22, 2017, p. 16 (“prosecutors were so horrified at the nature of his offense—his torture of a neighbor’s dog”); P. Ward, Attorney of Convicted Ex-Official Accuses Case’s Judge, Pittsburgh Post-Gazette, Nov. 10, 2015, p. B1 (identifying the “nature of his offense” as “taking money from an elderly, widowed client, and giving it to campaign funds”); Cross-Burning—Article Painted an Inaccurate Picture of Young Man in Question, Seattle Times, Aug. 12, 1991, p. A9 (“The defendant] took no steps to prevent the cross that was burned from being constructed on his family’s premises and later ... assisted in concealing a second cross ... . This was the nature of his offense”); N. Libman, A Parole/Probation Officer Talks With Norma Libman, Chicago Tribune, May 29, 1988, p. 131 (describing “the nature of the offense” as “not serious” if “there was no definitive threat on life” or if “the dollar- and cents-amount was not great”); E. Walsh, District—U. S. Argument Delays Warrant for Escapee’s Arrest, Washington Post, May 29, 1986, p. C1 (describing “the nature of Murray’s alleged offenses” as “point[ing] at two officers a gun that was later found to contain one round of ammunition”).
a necessary circumstance, condition, or consequence”); Oxford American Dictionary 349 (1980) (“1. to contain within itself, to make necessary as a condition or result”). That condition is always satisfied if the Government must prove that the alien’s underlying conduct involves a substantial risk of force, but it is not always satisfied if the Government need only prove that the “ordinary case” involves such a risk. See Johnson, 576 U.S., at ___ (ALITO, J., dissenting) (slip op., at 12). Tellingly, the other aggravated felonies in the INA that use the word “involves” employ the underlying-conduct approach. See 8 U. S. C. §1101(a)(43)(M)(i) (“an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000”); §1101(h)(3) (“any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another”). As do the similarly worded provisions of the Comprehensive Crime Control Act of 1984, the bill that contained §16(b). See, e.g., 98 Stat. 2059 (elevating the burden of proof for the release of “a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage”); id., at 2068 (establishing the sentence for drug offenses “involving” specific quantities and types of drugs); id., at 2137 (defining violent crimes in aid of racketeering to include “attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury”).

A comparison of §16(b) and §16(a) further highlights why the former likely adopts an underlying-conduct approach. Section 16(a) covers offenses that have the use, attempted use, or threatened use of physical force “as an element.” Because §16(b) covers “other” offenses and is separated from §16(a) by the disjunctive word “or,” the natural inference is that §16(b) asks a different question.
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In other words, §16(b) must require immigration judges to look beyond the elements of an offense to determine whether it involves a substantial risk of physical force. But if the elements are insufficient, where else should immigration judges look to determine the riskiness of an offense? Two options are possible, only one of which is workable.

The first option is to consult the underlying facts of the alien’s crime and then assess its riskiness. This approach would provide a definitive answer in every case. And courts are already familiar with this kind of inquiry. Cf. Johnson, supra, at ___ (slip op., at 12) (noting that “dozens” of similarly worded laws ask courts to assess “the riskiness of conduct in which an individual defendant engages on a particular occasion”). Nothing suggests that Congress imposed a more limited inquiry when it enacted §16(b) in 1984. At the time, Congress had not yet enacted ACCA’s residual clause, this Court had not yet created the categorical approach, and this Court had not yet recognized a Sixth Amendment limit on judicial factfinding at sentencing, see Chambers v. United States, 555 U. S. 122, 132 (2009) (ALITO, J., concurring in judgment).

The second option is to imagine the “ordinary case” of the alien’s crime and then assess the riskiness of that hypothetical offense. But the phrase “ordinary case” does not appear in the statute. And imagining the ordinary case, the Court reminds us, is “hopeless[ly] indetermina[te],” “wholly ‘speculative,’” and mere “guesswork.” Ante, at 7, 24 (quoting Johnson, supra, at ___ (slip op., at 5, 7)); see also Chambers, supra, at 133 (opinion of ALITO, J.) (observing that the categorical approach is “nearly impossible to apply consistently”). Because courts disfavor interpretations that make a statute impossible to apply, see A. Scalia & B. Garner, Reading Law 63 (2012), this Court should reject the ordinary-case approach for §16(b) and adopt the underlying-facts approach instead.
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See Johnson, supra, at ___ (ALITO, J., dissenting) (slip op., at 10) (“When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply”).

That the categorical approach is not the better reading of §16(b) should not be surprising, since the categorical approach was never really about the best reading of the text. As explained, this Court adopted that approach to avoid a potential Sixth Amendment problem with sentencing judges conducting minitrials to determine a defendant’s past conduct. But even assuming the categorical approach solved this Sixth Amendment problem in criminal cases, no such problem arises in immigration cases. “[T]he provisions of the Constitution securing the right of trial by jury have no application” in a removal proceeding. Turner, 194 U. S., at 290. And, in criminal cases, the underlying-conduct approach would be perfectly constitutional if the Government included the defendant’s prior conduct in the indictment, tried it to a jury, and proved it beyond a reasonable doubt. See Johnson, 576 U. S., at ___ (ALITO, J., dissenting) (slip op., at 12). Nothing in §16(b) prohibits the Government from proceeding this way, so the plurality is wrong to suggest that the underlying-conduct approach would necessarily “ping-pong us from one constitutional issue to another.” Ante, at 14.

If constitutional avoidance applies here at all, it requires us to reject the categorical approach for §16(b). According to the Court, the categorical approach is unconstitutionally vague. And, all agree that the underlying-conduct approach would not be. See Johnson, 576 U. S., at ___ (majority opinion) (slip op., at 12) (“[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-
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world conduct”). Thus, if the underlying-conduct approach is a “reasonab[le]” interpretation of §16(b), it is our “plain duty” to adopt it. United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 407 (1909). And it is reasonable, as explained above.

In Johnson, the Court declined to adopt the underlying-conduct approach for ACCA’s residual clause. See 576 U. S., at ___—___ (slip op., at 12–13). The Court concluded that the categorical approach was the only reasonable reading of ACCA because the residual clause uses the word “convictions.” Id., at ___ (slip op., at 13). The Court also stressed the “utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.” Ibid.

Neither of these arguments is persuasive with respect to the INA. Moreover, this Court has already rejected them. In Nijhawan, this Court unanimously concluded that one of the aggravated felonies in the INA—“an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000,” §1101(a)(43)(M)(i)—applies the underlying-conduct approach, not the categorical approach. 557 U. S., at 32. Although the INA also refers to “convict[ion],” §1227(a)(2)(A)(ii), the Court was not swayed by that argument. The word “convict[ion]” means only that the defendant’s underlying conduct must “be tied to the specific counts covered by the conviction,” not “acquitted or dismissed counts or general conduct.” Id., at 42. As for the supposed practical problems with proving an alien’s prior conduct, the Court did not find that argument persuasive either. “[T]he ‘sole purpose’ of the ‘aggravated felony’ inquiry,” the Court explained, “is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.” Ibid. And because the INA places the burden on the Government to prove an alien’s conduct by clear and convincing evidence, §1229a(c)(3)(A), “uncertainties caused by the passage of
time are likely to count in the alien’s favor,” *id.*, at 42.

There are additional reasons why the practical problems identified in *Johnson* should not matter for §16(b)—even assuming they should have mattered for ACCA’s residual clause, see *Lewis v. Chicago*, 560 U. S. 205, 217 (2010) (“[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted”). In a removal proceeding, any difficulties with identifying an alien’s past conduct will fall on immigration judges, not federal courts. But those judges are already accustomed to finding facts about the conduct underlying an alien’s prior convictions, since some of the INA’s aggravated felonies employ the underlying-conduct approach. The BIA has instructed immigration judges to determine such conduct based on “any evidence admissible in removal proceedings,” not just the elements of the offense or the record of conviction. See *Matter of Babaisakov*, 24 I. & N. Dec. 306, 307 (2007). No one has submitted any evidence that the BIA’s approach has been “utter[ly] impracticable” or “daunting[ly] difficult” in practice. *Ante*, at 15. And even if it were, “how much time the agency wants to devote to the resolution of particular issues is . . . a question for the agency itself.” *Ali v. Mukasey*, 521 F. 3d 737, 741 (CA7 2008). Hypothetical burdens on the BIA should not influence how this Court interprets §16(b).

In short, we should not blithely assume that the reasons why this Court adopted the categorical approach for ACCA’s residual clause also apply to the INA’s list of aggravated felonies. As *Nijhawan* explained, “the ‘aggravated felony’ statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed.” 557 U. S., at 38. “The question” in each case is “to which category [the aggravated felony] belongs.” *Ibid.* As I have explained, §16(b)
THOMAS, J., dissenting

belongs in the underlying-conduct category. Because that is the better reading of §16(b)'s text—or at least a reasonable reading—the Court should have adopted it here.

3

I see no prudential reason for maintaining the categorical approach for §16(b). The Court notes that the Government “explicitly acknowledges” that §16(b) employs the categorical approach. *Ante*, at 9. But we cannot permit the Government’s concessions to dictate how we interpret a statute, much less cause us to invalidate a statute enacted by a coordinate branch. See United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U. S. 439, 446–447 (1993); Young v. United States, 315 U. S. 257, 258–259 (1942). This Court’s “traditional practice” is to “refus[e] to decide constitutional questions” when other grounds of decision are available, “whether or not they have been properly raised before us by the parties.” Neese v. Southern R. Co., 350 U. S. 77, 78 (1955) (*per curiam*); see also Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1948–1949 (1997) (explaining that courts commonly “decide an antecedent statutory issue, even one waived by the parties, if its resolution could preclude a constitutional claim”). This Court has raised potential saving constructions “on our own motion” when they could avoid a ruling on constitutional vagueness grounds, even in cases where the Government was a party. United States v. L. Cohen Grocery Co., 255 U. S. 81, 88 (1921). We should have followed that established practice here.

Nor should *stare decisis* prevent us from rejecting the categorical approach for §16(b). This Court has never held that §16(b) incorporates the ordinary-case approach. Although *Local* held that §16(b) incorporates a version of the categorical approach, the Court must not feel bound by that decision, as it largely overrules it today. See *ante*, at 22, n. 7. Surely the Court cannot credibly invoke *stare
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decisis to defend the categorical approach—the same approach it says only a “lunatic” would continue to apply. Ante, at 24. If the Court views the categorical approach that way—the same way Johnson viewed it—then it must also agree that “[s]tanding by [the categorical approach] would undermine, rather than promote, the goals that stare decisis is meant to serve.” 576 U. S., at ____ (slip op., at 15). That is especially true if the Court’s decision leads to the invalidation of scores of similarly worded state and federal statutes, which seems even more likely after today than it did after Johnson. Instead of adhering to an interpretation that it thinks unconstitutional and then using that interpretation to strike down another statute, the Court should have taken this opportunity to abandon the categorical approach for §16(b) once and for all.

*   *   *

The Court’s decision today is triply flawed. It unnecessarily extends our incorrect decision in Johnson. It uses a constitutional doctrine with dubious origins to invalidate yet another statute (while calling into question countless more). And it does all this in the name of a statutory interpretation that we should have discarded long ago. Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.
Extreme Vetting in Business Immigration

Employers of foreign workers face new challenges

While still a presidential candidate, President Trump said he wanted “extreme vetting” of all immigrants coming to the United States. Originally deployed in attempts to bar Muslims and stem the flow of refugees, the plan first took concrete form just one week after the presidential inauguration, when the White House published its first executive order seeking to impose a travel ban against citizens of seven predominantly Muslim countries. Both that order, and a second executive order providing a revised travel ban that sought to correct the constitutional infirmities courts found in the first one, were battered by legal challenges and judicial injunctions. On September 24, 2017, a third revised travel ban was issued via a presidential proclamation. That order, too, has largely been enjoined by the courts.

Away from the headlines, though, the administration has quietly been implementing extreme vetting of family- and employment-based immigration, both of the temporary and permanent varieties. A few examples of recent changes in how the federal government is handling business visas illustrate the new challenges faced by employers of foreign workers in the United States. In addition, a new set of “Immigration Principles and Policies” issued by the White House on October 8, 2017, provides a further blueprint for the administration’s immigration agenda.

H-1B Processing

In April 2017, the Trump administration issued its “Buy American and Hire American” executive order. The executive order directed the Departments of Labor, Homeland Security, Justice and State to propose revisions to employment-based immigration program regulations and policies with the goal of protecting the economic interests of U.S. workers. The order did not provide specifics but indicated that the agencies would focus on increasing H-1B wage minimums in an effort to promote the hiring of U.S. workers over foreign workers.

The policies embodied in that order have translated into greater scrutiny—a new kind of extreme vetting— of H-1B petitions, resulting in a higher rate of requests for evidence (RFEs), more denials, and longer processing times for employers in nearly all industries.

According to a Reuters news report published in September 2017, the rate of H-1B RFEs from January through August 2017 was up by more than 45 percent compared to the RFE rate during the same period in 2016. Many of this year’s RFEs have focused on wages, specifically on whether a job with wages that the Department of Labor (DOL) designates as “Level I” is too complex to be considered entry-level, or whether an entry level job can be considered a “specialty occupation” for H-1B purposes. As set out in a U.S. Citizenship and Immigration Services (USCIS) policy memorandum issued in March 2017, computer programming jobs are now subject to special scrutiny on this basis.

We have also seen increased USCIS scrutiny of F-1 students changing status to H-1B, and more site visits at companies that employ workers in H-1B status.

There have also been delays in processing visa applications at U.S. consulates abroad, as consular officers are also directed to consider the protection of U.S. workers’ wages and employment rates in the adjudication of H-1B visa applications (as well as E, L, O and P visa applications).

Nonimmigrant Extensions

In recent months, practitioners have noted increased scrutiny by USCIS of employers’ petitions seeking an extension of stay for nonimmigrant (temporary) workers, especially employees holding H-1B, L-1A or L-1B visa status. This increased scrutiny continues a trend that began in the Obama administration, when denials of L-1B petitions, for example, reached record highs, especially when the beneficiaries were nationals of India.

The trend became official policy with the release of new guidance by USCIS on October 23, 2017. In a significant policy reversal, USCIS officers are no longer bound by previous petition approvals when reviewing requests for extensions of H-1B, L-1 or other nonimmigrant categories filed on Form I-129. Instead, officers have been given broader authority to re-adjudicate a foreign beneficiary’s eligibility for a nonimmigrant classification each time an extension request is filed—even in cases where there has been no change in facts since the initial petition was approved.

The new guidance is expected to result in a significant increase in requests for evidence in H-1B, H-1B1, L-1, O, E, TN and other nonimmigrant extension cases. An increase in scrutiny is likely to mean longer processing times, compounding the delays that have plagued extension filings for some time.

Though foreign nationals in E, H, L-1, O, P, and TN status receive a 240-day automatic extension of status and work authorization following the timely filing of an extension petition, processing times may extend beyond this grace period. This can result in employment disruptions and impede a foreign national’s ability to renew a driver’s license, among other negative consequences.

Tougher scrutiny and new agency interpretations of nonimmigrant eligibility criteria ultimately lead to more frequent extension denials.

Permanent Residence

Starting Tuesday, October 2, 2017, USCIS instituted a new policy of interviewing all employment-based applicants for adjustment of status to permanent residence. Interviews for employment-based adjustment applicants are not new, but USCIS has had a longstanding policy of waiving them for most applicants, recognizing that employer-sponsored green card applicants posed few security risks.

The renewed interview requirement is part of the agency’s compliance with President Trump’s March 6 executive order on protection of the United States from terrorist activities (the same order that set out the administration’s second travel ban). The order also directed federal agencies to implement uniform screening and vetting standards for all immigration programs.

However, local field offices have not been provided with any additional funding or staff to carry out the interview mandate. Accordingly, the interview requirement is expected to increase significantly the processing times of employment-based adjustment applications.

Looking Ahead

The Trump administration’s long-awaited “Immigration Principles & Policies” paper sets forth the administration’s plans for overhauling the country’s immigration system. While mostly meant to serve as a set of pre-conditions for the administration to agree to legislative relief for Deferred Action for Childhood Arrivals (DACA) recipients, the 70-item wish list also addresses a handful of issues related to employment-based immigration.

For example, the administration is calling on Congress to pass the Reforming American Immigration for Strong Employment (RAISE) Act, which would implement a broad array of changes including reductions in family-based immigration and the replacement of the current permanent residence system with a merit-based point system.

Other proposed changes that constitute extreme vetting include requiring all employers to use E-Verify and increasing penalties for failure to comply with E-Verify, including debarment of noncompliant federal contractors. The administration would also increase the penalties for visa overstay, including making even technical overstay a misdemeanor offense.

The Bottom Line

These are just a few examples of how a policy of “extreme vetting” is changing—and will continue to change—the landscape for employers who employ foreign workers. Along with a general policy of tougher screening of applicants for visas at U.S. consular posts around the world, these changes mean that to the extent that employers ever considered visa cases to be routine, they can do so no longer.

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On September 5, 2017, U.S. Attorney General Jeff Sessions announced that the government was terminating the Deferred Action for Childhood Arrivals, or DACA, program. That same day, then—Acting Secretary of Homeland Security Elaine Duke issued a memorandum directing the U.S. Department of Homeland Security to reject all initial DACA applications and associated applications for work authorization received after Sep. 5, 2017; to reject all renewal applications after Oct. 5, 2017, from current DACA recipients whose status expired between Sep. 5, 2017, and March 5, 2018; and to reject all other renewal applications from DACA recipients.¹

In the days and months following, multiple lawsuits challenging the Trump administration’s actions to terminate DACA were filed across the country. Two U.S. district courts have since enjoined, or halted, the government’s termination of DACA and required U.S. Citizenship and Immigration Services (USCIS) to continue accepting DACA applications from individuals who have previously had DACA. A third U.S. district court has ordered the government to follow its original 2012 policy of not sharing DACA recipients’ private information for enforcement purposes, and a fourth U.S. district court (in the District of Columbia) has twice issued orders striking down the termination of DACA and reinstating the original program, but “stayed” its own order until August 23, 2018, to give the federal government a chance to appeal the decision, i.e., to ask a higher court to block the DC district court’s order from going into effect pending appeal.

On May 1, 2018, Texas and six other states filed a lawsuit in the U.S. District Court for the Southern District of Texas challenging the 2012 DACA program itself. On May 2, the plaintiffs asked the court to issue a preliminary injunction that would stop USCIS from adjudicating applications for deferred action under DACA while the lawsuit is pending. A hearing on whether to grant a preliminary injunction halting the 2012 DACA program is scheduled to take place in Houston, Tex., on August 8, 2018.


On January 9, 2018, Judge William Alsup of the U.S. District Court for the Northern District of California issued a preliminary injunction requiring the federal government to maintain the Deferred Action for Childhood Arrivals, or DACA, program on a nationwide basis by allowing individuals to submit applications to renew their enrollment in DACA, subject to a few exceptions.\(^3\) Generally, parties objecting to a district court’s order must wait until the litigation is completed before asking the court of appeals for review.\(^4\) However, a preliminary injunction order is immediately appealable (a process referred to as an “interlocutory appeal”), meaning that the government can ask the Ninth Circuit Court of Appeals to review Judge Alsup’s order immediately.\(^5\)

**Supreme Court denies government’s request for unusual “cert. before judgment” review.** In this case, however, the government took the unusual step of seeking to skip review in the Ninth Circuit and instead appeal directly to the U.S. Supreme Court through a rarely used legal mechanism called “cert. before judgment.”\(^6\) The government filed its request, or petition for certiorari, with the Supreme Court on Jan. 18, 2018.\(^7\) This kind of request is rarely granted, as Supreme Court rules warn that the Court will grant this kind of early review only “upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.”\(^8\)

On Feb. 26, 2018, the Supreme Court announced that it had “denied cert.,”\(^9\) meaning that it declined to hear the government’s direct appeal from the district court. Therefore, the case will return to the lower courts, and appeals will be heard first by the Ninth Circuit Court of


Appeals. In other words, although the Supreme Court could hear the case eventually, the appeals process will be the normal one, beginning with the court of appeals.

**Government continues to accept DACA renewal applications.** Although the government could have sought a stay of Judge Alsup’s preliminary injunction — i.e., while it could have asked the judge or the Supreme Court to allow the government to continue with its process of shutting down DACA\(^\text{10}\) — it did not do so. Therefore, the government must continue to accept DACA renewal applications in accordance with the preliminary injunction.

**Other orders subject to appeal.** In the order issued on Jan. 9, Judge Alsup also ruled for the plaintiffs in holding that the decision to terminate DACA was reviewable by the courts under the Administrative Procedure Act because the decision was not committed to the agency’s discretion by law, as well as under the Immigration and Nationality Act. On Jan. 12, Judge Alsup issued an additional order that addresses the issue of whether the plaintiffs had pled enough facts to support additional legal claims. Usually, these kinds of intermediate orders in a case would not be directly appealable to the court of appeals, but Judge Alsup also granted the government’s request to appeal these portions of his January 9 decision and his January 12 decision to the Ninth Circuit through a special appeal mechanism that allows immediate appeals of intermediary orders.\(^\text{11}\) The Ninth Circuit heard oral argument in the case on May 15, 2018, in Pasadena, Calif.\(^\text{12}\)

**Government’s request to narrow the preliminary injunction.** On August 1, 2018, the Ninth Circuit, in an unrelated case,\(^\text{13}\) found that there was not sufficient support in the record for the district court to have issued an injunction that applied nationwide as opposed to limiting itself to California. The Ninth Circuit vacated the injunction in that case to the extent it applied outside of California and remanded the case back to the district court to further consider the appropriate scope of the injunction. In light of this case, on August 3, 2018, the federal government defendants in Regents wrote a letter to the Ninth Circuit Court of Appeals, asking it to vacate the nationwide injunction requiring the government to continue processing DACA renewals, because the nationwide scope is not necessary to remedy the injuries of the plaintiffs in Regents.


On Feb. 13, 2018, a U.S. district court in Brooklyn, New York, issued a second preliminary injunction requiring USCIS to accept DACA applications from people who have had DACA previously.\(^\text{15}\) The preliminary injunction was the same in scope as the order from the U.S. district court in California. The court in New York held that there was a substantial likelihood that the plaintiffs would prevail on their claim that the Trump administration ended DACA in a way that was arbitrary and capricious, and therefore unlawful.


The order was issued in two lawsuits currently pending before Judge Nicholas Garaufis. The *Batalla Vidal* case was brought by six New Yorkers who had benefited from DACA and stood up to challenge the administration’s decision to end the program. The plaintiffs in that case are represented by NILC, along with the Jerome N. Frank Legal Services Organization at Yale Law School and Make the Road New York. The *State of New York* case was brought by a coalition of seventeen attorneys general.16

The government has appealed the decision to the Second Circuit Court of Appeals. The parties are in the process of submitting supplemental briefing, which should be completed by October 5, 2018. Oral argument has not yet been scheduled.


On March 5, 2018, the U.S. District Court for the District of Maryland issued an opinion in *CASA de Maryland v. Trump* dismissing most of the plaintiffs’ claims in that case, including the claim that the DACA termination was unlawful. However, the court did grant a nationwide preliminary injunction to DACA recipients on their claim regarding the sharing and usage of the information DACA recipients have provided to the government when applying for DACA. The court ordered the U.S. Department of Homeland Security (DHS) to follow its original 2012 guidance about not sharing or using DACA recipients’ private information for enforcement purposes against them or their family members unless certain circumstances exist, such as that the person poses a national security threat or has committed certain crimes.

The *CASA de Maryland* court order prohibits DHS from rescinding, modifying, or superseding this guidance for the time being. In addition, under the order, if DHS wants to use any DACA recipient’s information against them for enforcement purposes, DHS is required to make this request to the court directly and have the court do a confidential review of the request.

The plaintiffs appealed the dismissal of their claim that the DACA termination was unlawful to the Fourth Circuit Court of Appeals, and the parties are currently in the process of submitting briefing to that court. Oral argument has not yet been scheduled.


On April 24, 2018, Judge John Bates of the U.S. District Court for the District of Columbia issued a final judgment that (a) grants, in part, summary judgment in favor of Deferred Action for Childhood Arrivals (DACA) recipients and organizations that sued to reverse the Trump administration’s termination of the DACA program and (b) orders that

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the memorandum terminating the program be vacated. The order was issued in NAACP v. Trump and Princeton v. Trump, two cases that the court related to each other such that the order applies to both.

The judge’s decision would reinstate the status quo as it was before September 5, 2017, when the original DACA program was in place and U.S. Immigration and Citizenship Services (USCIS) was accepting first-time applications for DACA (rather than only DACA renewal applications). But, critically, the court also stayed (or paused) its own order for 90 days to allow the government to come up with a better explanation than the one it presented to the court for why it ended DACA.

In response, on June 22, 2018, DHS Secretary Kirstjen Nielsen issued a new memorandum that “concur[s] with and decline[s] to disturb” the September 5, 2017, memorandum that terminated the DACA program.19 Afterward, the government asked Judge Bates to reconsider his April 24 order in light of Secretary Nielsen’s new memorandum, which the government said provided more detail on why it decided to end DACA.

In an order issued on August 3, 2018,20 Judge Bates rejected the government’s request for the court to reconsider its previous decision that the memorandum terminating the DACA program must be vacated, potentially paving the way for the original (2012) DACA program to be fully reinstated. The order issued on August 3 carefully analyzes Secretary Nielsen’s June 22 memorandum but holds that the court’s previous decision, issued April 24, still stands. However, the court in DC pauses its order for 20 days (until August 23) to give the federal government the chance to appeal the decision, to request a stay or hold of the reinstatement of the original 2012 DACA program.

For now, this order does not change the status quo. People who are otherwise DACA-eligible still may not submit a first-time application for DACA. Judge Bates’s August 3, 2018, order does not go into effect for 20 days. This means that on August 23, the memorandum terminating DACA will be vacated, unless the federal government appeals the decision and/or obtains a stay of Judge Bates’s order pending appeal. If Judge Bates’s order goes into effect on August 23, the status quo before September 5, 2017, will be reinstated. If nothing changes in the interim, the original 2012 DACA memorandum would go back into effect and immigrant youth would be able to submit initial, first-time applications for DACA, and DACA recipients possibly would be able to apply for advance parole (permission to travel outside the U.S.). However, before August 23, there may be further developments in other cases.

Due to the nationwide injunctions issued by the U.S. District Courts for the Northern District of California and the Eastern District of New York earlier this year, USCIS still is required to accept, and is currently processing, DACA renewal applications from people who have previously received deferred action and a work permit through DACA, while litigation in those courts works through the normal appeals process.

For more information on how to apply for DACA renewal, see NILC’s Frequently Asked Questions: USCIS Is Accepting DACA Renewal Applications.21 For more detail on what the April 24, 2018, decision from the D.C. District means, see NILC’s Alert: U.S. District Court in D.C. Orders That the DACA Termination Memo Be Vacated — but Not for at Least 90 Days.22 For more detail on what the August 3, 2018, decision from the district court in DC means, see

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19 https://www.dhs.gov/sites/default/files/publications/18_0622_St_Memorandum_DACA.pdf.
NILC’s Alert: U.S. District Court in DC Rules Again That the Trump Administration’s Termination of DACA Is Unlawful — but Pauses Order until August 23.  


On May 1, 2018, Texas and six other states (Alabama, Arkansas, Louisiana, Nebraska, South Carolina, and West Virginia) filed a lawsuit against the federal government in the U.S. District Court for the Southern District of Texas, Brownsville Division, challenging the creation of the 2012 DACA program. The case was eventually assigned to the same judge who presided over *U.S. v. Texas* in 2015, Judge Andrew Hanen. *U.S. v. Texas*, which when it was originally filed was called *Texas v. U.S.*, was a lawsuit filed to block the Obama administration’s implementation of both (a) an expansion of DACA (that was intended to make DACA available to more people) and (b) another, related program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). In that lawsuit, Judge Hanen blocked the implementation of DAPA and expanded DACA, a decision that was upheld by the Fifth Circuit Court of Appeals and left in place by a 4-4 nonprecedential decision of the U.S. Supreme Court.

In their complaint, Texas and the other states argue that, over the summer of 2017, a larger group of ten states had threatened to amend their 2015 lawsuit to also challenge the original DACA program if the government did not terminate it by September 5, 2017 — and, in response, the government terminated DACA on Sep. 5. Though Texas and the other states dropped their threat to challenge DACA at that time, they now argue that the California and New York injunctions and the District of Columbia order (see above) have had the effect of prolonging the DACA program indefinitely. The injunctions issued in California and New York allow people who have had DACA to apply to renew it, and the D.C. order could nullify the Trump administration memorandum that terminated DACA, if the government does not act by July 23, 2018. Texas and the other states say that this indefinite prolongation of a program that the government terminated is why they filed a lawsuit now against a program that has been in place for nearly six years.

The plaintiff states’ complaint raises the same legal claims that the 2015 *U.S. v. Texas* lawsuit did, alleging that the creation of DACA violated both the procedural and substantive requirements of the Administrative Procedure Act, as well as the Take Care Clause of the U.S. Constitution. They seek a declaration that DACA is unlawful and a nationwide order prohibiting the government from issuing new periods of deferred action under the program. Judge Hanen ordered that an initial scheduling conference be held on July 31, 2018.

On May 2, 2018, Texas and the other states filed a motion for preliminary injunction to halt the 2012 DACA program from operating during the pendency of this lawsuit, both for initial and renewal applications. The plaintiff states requested relief by July 23, 2018, the date on which the 90-day period set out in the *NAACP v. Trump* and *Princeton v. Trump* cases expires. As of the date this issue brief was published, Judge Hanen has not responded to the plaintiff states’ request for a preliminary injunction.

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24 [Texas, et al. v. United States, No. 18-00068 (S.D. Tex. May 1, 2018)].


On May 8, 2018, 22 individual DACA recipients, represented by the Mexican American Legal Defense and Educational Fund (MALDEF), asked Judge Hanen to intervene formally in this case as defendants. In their motion, they argue that if the court does not let them become part of the case, the agencies of the federal government that are the defendants in the case will not adequately represent DACA recipients’ interests.\(^{28}\) On May 15, 2018, Judge Hanen granted MALDEF’s and the 22 DACA recipients’ request to intervene, formally making them defendants in the case.\(^{29}\) On June 25, 2018, the court granted a request by the state of New Jersey to intervene, formally making it a defendant in the case as well.

There is a hearing scheduled on August 8, 2018, in Houston, Tex., on the plaintiff states’ request for a preliminary injunction. Judge Hanen will then decide whether to issue a preliminary injunction against the DACA program, possibly ordering USCIS to stop accepting DACA applications, including applications for renewal. (It is very uncommon for judges to issue orders, such as preliminary injunctions, during hearings. Usually they will issue a written order sometime after the hearing concludes.)

**Two weeks after a potential injunction in Texas v. Nielsen.** The federal government has asked the court in Texas that any future injunction in Texas v. Nielsen be delayed by two weeks to allow time for “stay” applications to be filed with all the courts that are hearing DACA-related cases, and potentially the U.S. Supreme Court. A stay is a court order that halts further legal proceedings or the enforcement of orders in a case until the stay is either removed or made permanent. The government will want the courts to stay all the orders issued by courts in the DACA–related cases, so that the cases can be reviewed and any conflicts among the California, New York, Texas, and possibly DC court orders can be reconciled. For a stay to be granted by the Supreme Court, five Court justices must be in favor of granting it. If the Supreme Court does not grant a stay, the order(s) already issued by the U.S. courts of appeals and/or district courts will remain in effect.

If Judge Hanen orders USCIS to no longer accept DACA renewal applications and if that order is not “stayed” — or if the courts stay all the orders, including the New York and California injunctions — USCIS could stop accepting renewal applications as early as mid-August 2018. Therefore, eligible DACA recipients are encouraged to consult with an attorney or Board of Immigration Appeals—accredited representative and decide as soon as possible whether to submit their renewal applications immediately, just in case USCIS does stop accepting applications sometime in August.

\(^{28}\) MALDEF’s press release about its filing, which includes hyperlinks to the Motion for Leave to Intervene, supporting documents, and biographies of all the proposed intervenors, is available at www.maldef.org/news/releases/2018_05_08_MALDEF_Files_Motion_to_Intervene_on_Behalf_of_Dreamers_in_Texas-Led_Lawsuit_Challenging_DACA/.

Supreme Court Upholds Travel Ban

At a glance

- The Supreme Court held that President Trump acted within his authority when he imposed travel restrictions on certain nationals of Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen.
- The Court also found that the travel restrictions are justified by national security concerns; as such, the plaintiffs were unlikely to succeed in their claim that the restrictions violate the First Amendment.
- Nationals of the restricted countries remain subject to travel limitations, unless otherwise exempt or granted a waiver.

A closer look

The Supreme Court today upheld a presidential proclamation that imposes indefinite travel restrictions on certain nationals of Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen, reversing a federal district court’s grant of a preliminary injunction against the restrictions. The Court had previously permitted the Trump Administration to temporarily enforce the ban pending ongoing litigation.

The Court held that the travel restrictions are within the President’s broad powers to suspend the entry of foreign nationals where such entry would be detrimental to the national interest. The majority found that the travel restrictions are rationally related to U.S. national security objectives and thus the plaintiffs are unlikely to succeed in their claim that the presidential proclamation violates the First Amendment’s prohibition on the government favoring one religion over another. The Court also held that laws prohibiting nationality-based discrimination do not limit the President’s power to determine who may enter the United States.

The case is Trump v. Hawaii.

The travel restrictions

Nationals of the restricted countries will remain subject to the following U.S. travel limitations, unless otherwise exempt or granted a waiver:

- **Iran**: No nonimmigrant visas except F/M student visas and J exchange visitor visas; no immigrant or diversity lottery visas.
- **Libya**: No B-1, B-2 or B-1/B-2 visitor visas; no immigrant or diversity lottery visas.
- **North Korea**: No nonimmigrant, immigrant or diversity lottery visas.
- **Somalia**: Nonimmigrant visa applicants subject to heightened scrutiny; no immigrant or diversity visas.
- **Syria**: No nonimmigrant, immigrant or diversity lottery visas.
- **Venezuela**: No B-1, B-2 or B-1/B-2 visas for officials of designated Venezuelan government agencies. Other visa holders are subject to verification of traveler information. No restrictions on immigrant or
diversity lottery visas.

- **Yemen**: No B-1, B-2 or B-1/B-2 visitor visas; no immigrant or diversity lottery visas.

The Department of Homeland Security previously lifted the proclamation’s restrictions on nationals of Chad.

**Exemptions and waivers**

Several classes of foreign national are exempt from the restrictions, including U.S. lawful permanent residents, dual nationals traveling on a passport from a non-restricted country, foreign nationals who hold a valid U.S. visa or advance parole and those who were physically in the United States on the applicable original effective date of the travel restrictions.

Those who are not exempt may request a waiver when applying for a visa. To be eligible for a waiver, a foreign national must demonstrate that he or she would suffer undue hardship if denied entry, and that his or her entry would not pose a threat to U.S. national security or public safety and would be in the U.S. national interest. Waivers are highly discretionary and may be difficult to obtain.

**Looking ahead**

The current travel restrictions will remain in place until the Administration lifts them or removes particular countries from the list. The Administration could add new countries and broaden restrictions on foreign nationals already subject to the proclamation.

With the lifting of the preliminary injunction against the travel restrictions, the State of Hawaii’s challenge to the proclamation will now return to federal district court for further proceedings, consistent with the Supreme Court’s ruling.

Fragomen is closely following administration of the travel restrictions and will provide updates as developments occur.

*This alert is for informational purposes only. If you have any questions, please contact the immigration professional with whom you work at Fragomen.*
Surge in ICE I-9 Investigations Continues

At a glance
- *U.S. Immigration and Customs Enforcement (ICE) has initiated 5,200 worksite audits and investigations since January of this year – three times the number of worksite investigations that took place in all of FY 2017 and significantly more than the agency had previously completed in the past in any one year.*
- *More than 2,700 inspections were initiated from July 16 to July 20 alone.*

The situation
U.S. employers have seen a marked increase in [Immigration and Customs Enforcement (ICE) I-9 inspections in the last seven months](https://www.fragomen.com/insights/alerts/surge-ice-i-9-investigations-continues), since the initiation of a two-stage agency program intended to “create a culture of compliance among employers.”

During the first phase of the program, from January to March of this year, ICE initiated 2,540 I-9 inspections and made 61 arrests. In a dramatic surge over the four day period from July 16 to 20, some 2,738 inspections were initiated and 32 arrests were made. ICE conducted [1,716 worksite investigations in all of FY 2017](https://www.fragomen.com/insights/alerts/surge-ice-i-9-investigations-continues), including 1,360 I-9 audits.

Increased worksite enforcement has been one of the key goals of the Trump Administration. In October 2017, then-Acting ICE Director Thomas Homan announced that his agency would seek to quadruple to quintuple the number of worksite inspections conducted annually.

ICE worksite investigations: the basics
ICE initiates an I-9 audit by issuing a Notice of Inspection (NOI) to an employer. The employer has three days to produce its I-9 employment eligibility verification forms, after which ICE conducts a compliance inspection.

Employers who violate I-9 rules are subject to civil and criminal penalties. Civil fines for I-9 paperwork violations range from $224 to $2,236 per violation, depending on whether the employer has committed repeated violations. Penalties for knowingly hiring or continuing to employ an unauthorized worker range from $559 to $22,363 per worker. ICE can further increase penalty amounts if there are aggravating circumstances. Criminal penalties are possible if an employer has engaged in a pattern or practice of knowingly employing unauthorized workers or has committed other serious violations.

In the current environment, it is more important than ever that employers have a comprehensive and effective immigration compliance program. Internal review of an organization’s compliance program can help to remediate errors, identify areas for improvement, and minimize the risk of future violations and penalties. If your organization has questions about compliance, please contact your Fragomen immigration professional or the firm’s [Government Strategies and Compliance Group](https://www.fragomen.com/insights/alerts/surge-ice-i-9-investigations-continues). This alert is for
informational purposes only.
USCIS Broadens Immigration Enforcement Policy

At a glance

- Nonimmigrants whose applications for immigration benefits are denied after their underlying status has expired are subject to the initiation of removal proceedings, according to a new USCIS policy directive.
- The new policy also increases the risk that any criminal act, arrest or conviction could subject a foreign national to removal proceedings, even if the conduct was not the basis for denial of an immigration benefit.

The situation

In a significant shift, USCIS will require the initiation of removal proceedings against a broader group of foreign nationals, according to a new agency policy memorandum. Notably, USCIS will issue Notices to Appear (NTAs) to those whose application for an immigration benefit – such as an extension of a nonimmigrant stay or adjustment of status – is denied and whose underlying status has expired. Additionally, when adjudicating an individual’s application for immigration benefits, agency officers will not be permitted to overlook instances where “fraud, misrepresentation, or evidence of abuse of public benefit programs is part of the record,” where the foreign national has been charged with a criminal offense and the case has not been resolved, or where he or she is under investigation for any crime.

A foreign national who is issued an NTA should retain counsel to understand and navigate the removal process, which ultimately will require appearance before an immigration judge. The judge will determine whether the foreign national should be removed from the United States or is entitled to legal relief that permits him or her to remain.

How the new policy affects employer-sponsored foreign nationals

Though USCIS has long had the authority to issue NTAs and initiate removal proceedings, it typically exercised its discretion to do so only in serious cases that met the Department of Homeland Security’s enforcement priorities, leaving enforcement efforts largely in the hands of U.S. Immigration and Customs Enforcement (ICE), the enforcement branch of DHS. It rarely, if ever, issued an NTA after the denial of an employment-based application for benefits when an applicant had no history of fraud, criminal activity or immigration violations.

In early 2017, however, President Trump issued an executive order that greatly expanded DHS’s enforcement priorities to include a wide range of conduct that was not previously prosecuted, and ordered agencies to develop policies consistent with these priorities. In turn, DHS issued an implementing memorandum limiting immigration officials’ authority to use discretion to decline to prosecute certain classes of foreign national, subjecting many more foreign nationals to removal proceedings. USCIS’s new NTA policy is an extension of the executive order and the DHS
Though it is not yet clear how USCIS will implement its new policy, employer-sponsored foreign nationals will now be subject to removal proceedings in a number of circumstances. These include:

- A foreign national whose application to extend or change to H-1B, L-1 or another nonimmigrant status has been denied and whose I-94 expired during the adjudication of his or her application.
- A foreign national whose change of employer petition has been denied and whose I-94 has expired.
- Starting August 9, 2018, an F-1 student whose application to change status to H-1B has been denied and who has been found to have violated his or her nonimmigrant status, under USCIS guidance concerning unlawful presence for F, M and J nonimmigrants.
- A foreign national whose application for employment-based or family-based adjustment of status to permanent residence has been denied and who no longer has an underlying nonimmigrant status.

**Additional focus on criminal conduct, fraud and misrepresentation**

Though criminal conduct has long had negative consequences for foreign nationals in the United States, the new guidance indicates that any criminal act, arrest or conviction could subject a foreign national to removal proceedings, even if the conduct was not the basis for denial of an immigration benefit. A USCIS finding of fraud or willful misrepresentation in prior government matters could also increase the risk of NTA issuance, even if the application is denied for a reason other than fraud or misrepresentation. In addition, USCIS has added a mandate for issuance of an NTA where there is “evidence of abuse of public benefit programs.” USCIS has given its officers the authority to refer groups of cases to -ICE for investigation before immigration benefit applications are adjudicated.

**Limiting prosecutorial discretion**

A USCIS officer’s ability to use his or her discretion not to issue an NTA has also been curtailed. Exercises of prosecutorial discretion will be subject to a narrow and formal agency review process outlined in the memo. Therefore, it is expected that discretion will not be exercised except in rare circumstances.

The new policy is expected to result in an influx of new cases and exacerbate the backlog in U.S. immigration courts, which currently stands at some 700,000 cases.

_Fragomen is closely monitoring the implementation of USCIS’s new enforcement policy and will provide updates as developments occur. This alert is for informational purposes only._
USCIS Issues I-9 Guidance for Employers of DACA Recipients

A valid employment authorization document (EAD) issued under the Deferred Action for Childhood Arrivals (DACA) program is an acceptable List A document for Form I-9 employment verification purposes, USCIS has advised. If a current employee presents a new DACA EAD, the employer may need to amend the employee’s I-9 or complete a new one.

The DACA program offers relief from deportation to unauthorized foreign nationals age 30 or younger who arrived in the United States before the age of 16 and meet other eligibility criteria. DACA beneficiaries are eligible for a USCIS employment authorization document that is annotated “C-33” in the “Category” section of the document. The document also bears an alphanumeric card number.

New Hires Who Are DACA Beneficiaries

If a new hire presents a DACA EAD as an I-9 document, the employer should accept it as long as it appears to be genuine and to relate to the employee who presents it. The document title, number and expiration date should be entered on Form I-9 in Section 2 under List A.

Because the EAD is a List A document that establishes the presenter’s identity and employment authorization, the employer may not request additional documentation from the employee. Employers must remember that DACA beneficiaries – like all other legally authorized workers – are protected against I-9 document abuse. This means an employer may not subject a DACA beneficiary to higher scrutiny than any other employee, as doing so violates the anti-discrimination provisions of federal immigration law.

When the DACA EAD expires, the employer must reverify the employee’s work eligibility in Section 3 of Form I-9.

Current Employees Who Are DACA Beneficiaries

In some cases, a current employee may present a DACA EAD to the employer, either during a Form I-9 reverification or to notify the employer of a change in the worker’s personal information. Depending upon the circumstances, the employer may need to amend the employee’s existing I-9 or complete a new I-9. As noted above, the employer may not request any additional documentation from the employee for I-9 purposes.
New I-9 required. A new I-9 is required if there is a change in the employee’s name, date of birth, immigration status attestation or Social Security number (if the number was provided on the previous I-9). When completing the new I-9, the employer should enter the employee’s original hire date in Section 2 of the form, and attach the previously completed I-9 to the new form.

Section 3 only required. If there is no change to the employee’s name, date of birth, attestation or Social Security number, the employer must complete Section 3 of Form I-9 to reverify the employee’s work eligibility. The document title, number and expiration date of the DACA EAD must be entered, and the employer must sign and date the section.

If the employer previously completed Section 3 for employee or if the edition of the original Form I-9 is no longer valid, the employer must use a new I-9 form, completing only Section 3, and attach it to the previously completed I-9. (The current edition of Form I-9 is dated August 7, 2009; the February 2, 2009 edition is also acceptable).

When to Use E-Verify for DACA Beneficiaries

Employers who participate in E-Verify should use the system to check a DACA beneficiary’s work eligibility only if the individual is a new hire or a current employee for whom a new I-9 was completed because of a chance in the employee’s name, birth date, immigration status attestation or Social Security number. If the employer only completes Section 3 (whether on a previously completed I-9 or on a new I-9), E-Verify should not be used.

What the DACA I-9 Guidance Means for Employers

The new USCIS guidance answers some of the technical I-9 questions employers have raised since the DACA program was unveiled several months ago, and makes clear a DACA EAD is a valid I-9 document. But it does not provide guidance on two key issues for employers: What should the employer do if a current employee informs the employer that he or she is applying for DACA benefits – essentially admitting that he or she is not in the country legally and does not have work authorization? And what if an employee uses pay stubs or other employment records to demonstrate eligibility for DACA? In these circumstances, DACA poses some potential risks for employers.

USCIS has stated that it will not used information obtained in the DACA application process to pursue employers who have employed DACA applicants or refer those employers to Immigration and Customs Enforcement, the agency responsible for I-9 compliance. However, ICE has not made a similar statement, and it is unclear how it will handle information pertaining to DACA applicants and their employers.
An employer who completes Form I-9 correctly at the start of employment is shielded from liability if the employee later is discovered to be unauthorized or, relatedly, using a stolen or fraudulent identity. But if an employee advises an employer that he or she is seeking DACA benefits, the employer will acquire actual knowledge of the employee’s lack of work authorization. Under current law, permitting the employee to continue employment in this situation would make the employer liable for knowingly continuing to employ someone without authorization to work. If your organization learns of an employee’s plan to apply for DACA, consult your Fragomen professional as soon as possible.

If you have any questions about this alert, please contact your designated Fragomen professional. You may also direct your question compliance@fragomen.com.

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What Employers Need to Know About Site Visits

With the Trump administration’s focus on immigration enforcement, an unannounced workplace visit from authorities is more likely than ever. There are several reasons that an employer could receive an unannounced visit from Immigration and Customs Enforcement (ICE) or the Fraud Detection and National Security (FDNS) unit. A visit from ICE is sometimes referred to as a workplace “raid” and is targeted at employers who hire undocumented workers and at the workers themselves. Media coverage often accompanies ICE raids, along with images of undocumented workers being led out of the workplace in handcuffs. In contrast, as its name suggests, the FDNS unit is charged with finding fraud within the legal immigration system by verifying that the information employers provide with visa petitions is accurate and valid and that sponsored workers are complying with the terms of their admission. This column will focus on FDNS visits and provide process and best practice recommendations.

FDNS has been making employer site visits for several years, focusing principally on H-1B visa (a numerically limited specialty occupation visa that permits U.S. employers to hire foreign workers with a related bachelor’s degree or equivalent into a job requiring that degree) employment. In 2014, the agency expanded the program to include site inspections of L-1A (multinational transferees) employers. There are indications that the Trump Administration plans to expand FDNS inspections in the coming months and to broaden the program to other types of employment-based immigration categories beyond the H-1B and L-1A.

Why Does USCIS Make Visits?

FDNS conducts site visits under two initiatives. Under FDNS’s Administrative Site Visit and Verification Program (ASVVP), immigration petitions are randomly selected for inspection. The FDNS inspector may arrive at the worksite unannounced, or contact your organization by email to request responses to questions about the organization, the immigration petition and the organization’s immigration program generally. The email inquiry may be followed by an in-person inspection.

Benefits Fraud Assessments (BFAs) are initiatives that review specific immigration programs—such as the H-1B or L-1 program—to determine the incidence of fraud or technical violations in that particular program. A BFA typically lasts for several months. During this time, USCIS randomly selects a large number of petitions or applications for benefits in the particular category being assessed. The agency analyzes the results, and then may issue a public report on the rate of
fraud and program violations in the immigration category under review. The BFA program has been on hold for several years, but is expected to be revived.

In both programs, cases are assigned to FDNS officers, who visit the premises of sponsoring employers to verify the existence of the employer, the validity of the information the employer has provided in an immigration petition, and whether sponsored foreign nationals are working in compliance with the terms of their admission to the United States.

**Trump’s Plans for FDNS Program**

The Trump Administration is expected to increase the scope of the site visit program to cover more nonimmigrant categories. The Administration is reportedly planning to issue an executive order on employment-based immigration programs in the near future that would expand the program in several key respects. The draft order would direct DHS to immediately revive the Benefits Fraud Assessment program, which could result in a sharp increase in site inspections. Within six months after the order is issued, the Administration is expected to expand the L-1 site visit program to include L-1B specialized knowledge nonimmigrants. Within two years, expansion of the FDNS program to all immigration categories is expected.

**FDNS Officers: Cooperation**

In submitting petitions for immigration benefits, employers subject themselves to reasonable inquiries from the government. The regulations governing immigration petitions expressly allow the government to take testimony and conduct broad investigations relating to the petition. Employers who file nonimmigrant and immigrant petitions on behalf of employees authorize the release of any information from its records that USCIS might need to determine eligibility for the immigration benefit sought. The instructions to the government forms state that USCIS may verify the information submitted in the petition through any means that the agency deems appropriate, including on-site inspections. Thus, it is important to make efforts to cooperate with FDNS officers. When an FDNS officer appears at your company premises, you should ask to see his or her identification and business card and note the site visitor’s name, title, and contact information for your company’s records of the site visit.

This does not mean that there are no off-limits requests. Depending upon all of the circumstances, an employer may conclude that a government request is not sufficiently related to the immigration petition being verified and could decline to respond to a particular request. But it is important to weigh your company’s interests before deciding not to respond, because a failure to cooperate fully could jeopardize the specific immigration petition in question and compromise the company’s likelihood of success in future filings.

**What Happens During Site Visits?**

Usually, the officer is making the site inspection to verify information in a specific immigration petition, and will generally have a copy of the petition. The officer may ask to speak to an employer representative, such as a human resources manager, as well as the foreign beneficiary of the petition in question and his or her direct supervisor or manager. The officer may ask for a tour of the employer’s premises and the foreign national’s work area, and may want to photograph the premises. Employers may be asked to provide documents like W-2 forms, payroll records or paystubs for the foreign national, or an organizational chart. The visit should last around 60 to 90 minutes.

Sometimes, the officer will email the company and request written responses to questions, as well as relevant documents. Depending on the responses, the officer may elect not to make an in-person visit to the worksite.

The FDNS officer typically conducts the site visit at the worksite of the foreign beneficiary of an immigration petition, whether the worksite is the employer’s own premises or the premises of a client. If your company has a foreign employee stationed at a client site—for example, to perform services for a client pursuant to a contract with your company—an FDNS officer could seek to conduct a visit at the client site. Likewise, if a foreign national employee of another company is stationed at your company’s worksite, FDNS could seek to visit your premises to interview the employee.

Therefore, employers should communicate with vendors and/or clients to discuss the possibility of FDNS visits at either premises. Your clients should be asked to contact your organization immediately if an FDNS officer appears for a site visit pertaining to one of your
employees, so that a representative from your company can be present in person or by phone during the visit. Similarly, if your organization receives a site visit pertaining to a vendor’s employee, you should immediately contact the vendor.

**Representative Questions**

During a visit or in an email request, the FDNS officer usually works from a standard list of questions used for all employers. The officer may ask about:

- The employer’s business, annual revenue and the number of employees at a particular location, in the United States or worldwide;
- Whether the employer or its representative actually signed and filed the immigration petition, to make sure it was not filed fraudulently;
- The organization’s immigration program in general, including the number of foreign nationals sponsored for nonimmigrant programs and employment-based green card;
- The foreign worker’s job title, responsibilities, salary and work schedule, as well as those of other employees in similar positions; and
- The foreign national’s education, previous employment, residence, and family members in the United States.

The officer may also ask for documents pertaining to the company and the foreign national, including:

- The foreign national’s paystubs and W-2 forms;
- Paystubs for employees supervised by the foreign national, if any;
- Organizational chart for the U.S. organization;
- Organizational chart for the related foreign organization (L-1 site visits);
- Company wage and tax documentation; and
- Contracts, statements of work and/or agreements between the petitioner and an end-client, if the foreign national is placed offsite.

If you can’t give an exact answer to the question without reviewing company records or if you need the assistance of outside immigration counsel to obtain the data, let the officer know. The officer may be satisfied with an approximate answer. If the officer asks for exact information, you can request a reasonable amount of time to gather the information sought and follow up with the officer.

**Company Policy Considerations**

In each worksite where a sponsored foreign national is employed, your organization should designate a point of contact, such as an HR manager, to receive FDNS officers. Make sure to instruct receptionists and security personnel of the possibility of a site visit and whom to contact when an officer arrives. Instruct them to request the officer’s business card and advise them that officers should not be permitted to tour the worksite or speak to employees without a company representative present.

Foreign nationals and their managers should be advised about the possibility of a site visit and what to expect during the visit. Also, a company representative should accompany the officer while he or she is onsite. Be aware that the FDNS officer may decline the representative’s request to sit in on interviews with foreign employees, however.

During the site visit, the company representative should take detailed notes, including the officer’s name, title and contact information; the names and titles of individuals the officer interviews; the questions asked during interviews; any company documents provided to the officer; the areas of the worksite that the officer visits; and any photographs taken by the officer. If company documents are provided to the officer, the company representative should be sure to list the documents provided and retain their copies. If the FDNS officer takes photographs of the premises, the representative should ask for copies of them.

**Next Steps**

After a site visit, the FDNS officer may contact the employer by phone or email to request additional information. In cases where there appears to be a discrepancy between the information in an immigration petition and the circumstances at the worksite, USCIS may notify the employer of its intent to revoke the petition. If that occurs, the agency will provide the employer with an opportunity to explain any perceived inconsistencies. If there have been changes in a foreign worker’s conditions of employment since the approval of the petition, the employer may need to file an amendment with USCIS.
USCIS Employer Site Visits: What Employers Need to Know

Since 2010, the USCIS Fraud Detection and National Security (FDNS) unit has conducted unannounced inspections of the worksites of employers who sponsor foreign workers. The purpose of site inspections is to verify the information that employers provide in their immigration petitions and make sure that sponsored workers are complying with the terms of their admission. In recent years, FDNS inspectors have concentrated on H-1B employment, but USCIS has recently expanded the program to include L-1 employers as well.

The following updated Frequently Asked Questions address the latest developments in the site visit program, based on Fragomen’s continuing analysis of FDNS practices. If your company is contacted by an FDNS officer, call your designated Fragomen professional immediately to discuss options, including the possibility of having counsel present during a site visit.

1. Why does USCIS make employer site visits?

The Fraud Detection and National Security unit of USCIS has been making employer site visits for several years under its Administrative Site Visit and Verification Program (ASVVP). The goal of ASVVP is verify that the petitioning employer and foreign beneficiary are complying with the terms of the approved nonimmigrant worker petition and, more generally, to raise awareness of compliance obligations among the employer community.

Site visits may also be conducted as part of a Benefits Fraud and Compliance Assessment (BFCA). BFCA.s are initiatives that review specific immigration programs – such as the H-1B or L-1 program – to determine the incidence of fraud in that particular program. A BFCA typically lasts for several months. During this time, USCIS randomly selects a large number of petitions or applications for benefits in the particular category being assessed. These cases are assigned to FDNS officers, who visit the premises of sponsoring employers to verify the existence of the employer, the validity of the information the employer has provided in an immigration petition, and whether sponsored foreign nationals are working in compliance with the terms of their admission to the United States.

In addition to verifying the validity of data contained in an immigration petition, FDNS officers use information collected during site visits to help USCIS develop a fraud detection database. FDNS officers gather information to build profiles of the types of companies that have records of good faith use of immigration programs and records of immigration compliance, and also to identify factors that could indicate fraud.
2. How are organizations selected for an FDNS site inspection? How many site inspections are conducted each year?

USCIS randomly selects immigration petitions for verification and site inspection. According to officials, the agency does not rely on fraud indicators or other specific criteria to choose petitions for inspection. Employers that are frequent H-1B and/or L-1 petitioners stand a greater chance of being selected for site visits.

FDNS conducts roughly 15,000 site inspections per year. Despite the expansion of the program to L-1 petitions, the agency is not expected to increase the number of inspections it conducts.

3. Does USCIS give advance notice of a site visit?

In most cases, officers from the FDNS unit will arrive at the worksite unannounced, though occasionally an officer may call the company to inform it of an impending visit.

4. Can I request our Fragomen attorney's presence during the site visit?

You can ask to have counsel present during the site visit, especially because your attorney has submitted a Form G-28 notice of appearance, confirming that the company has legal representation in connection with each petition it files. In our experience, FDNS officers will not typically reschedule a site visit so that an attorney can be physically present, but may agree to allow counsel to be present by phone. In the alternative, you may contact your Fragomen professional with questions during the course of the site visit. If the officer is resistant, you should explain that having the company’s immigration counsel present or available by phone will help the employer respond fully and accurately to the officer’s questions and requests for information.

5. Who are the FDNS officers? Can I ask to see the officer’s identification?

Currently, site visits are conducted by USCIS officers. There are 74 FDNS inspectors located around the United States. Previously, USCIS contracted with private investigation firms to conduct site inspections, but that practice has been discontinued.

When an FDNS officer appears at your company premises, you should ask to see his or her identification and business card. If you have any concerns about the visitor’s credentials, you may call the telephone number on the business card to verify the visitor’s authority to conduct the inquiry. You should note the site visitor’s name, title and contact information for your company’s records of the site visit.
6. My company has a policy of admitting government officials only when they have a subpoena. Must we cooperate with the FDNS officer?

Fragomen strongly urges employers to cooperate with FDNS officers.

In submitting petitions for immigration benefits, employers subject themselves to reasonable inquiries from the government. The regulations governing immigration petitions expressly allow the government to take testimony and conduct broad investigations relating to the petition. Employers who file an I-129 petition for a nonimmigrant worker authorize the release of any information from its records that USCIS might need to determine eligibility for the immigration benefit sought. The instructions to the I-129 petition state that USCIS may verify the information submitted in the petition through any means that the agency deems appropriate, including on-site inspections. Thus, it is important to make efforts to cooperate with FNDS officers.

This does not mean that there are no “off limits” requests. Depending upon all of the circumstances, an employer may conclude that a government request is not sufficiently related to the immigration petition being verified and could decline to respond to a particular request. But it is important to weigh your company’s interests before deciding not to respond, because a failure to cooperate fully could jeopardize the specific immigration petition in question and compromise the company’s likelihood of success in future filings.

7. What happens during an FDNS site visit?

Usually, the officer is making the site visit to verify information in a specific immigration petition, and will generally have a copy of the petition. Typically, the officer will ask to speak to an employer representative, such as a human resources manager, as well as the foreign beneficiary of the petition in question and his or her direct supervisor or manager. The officer may ask for a tour of the employer’s premises and the foreign national’s work area, and may want to photograph the premises. Employers may be asked to provide documents like payroll records or paystubs for the foreign national, or an organizational chart.

8. Should a company representative accompany the FDNS officer during the site visit? Should the representative take notes?

Yes, a company representative should accompany the officer while he or she is onsite. Be aware that the FDNS officer may decline the representative’s request to sit in on interviews with foreign employees, however.
During the site visit, the company representative should take detailed notes, including the officer’s name, title and contact information; the names and titles of individuals the officer interviews; the questions asked and responses offered; any company documents provided to the officer; the areas of the worksite that the officer visits; and any photographs taken by the officer. If company documents are provided to the officer, the company representative should be sure to list the documents provided and retain copies of them. If the FDNS officer takes photographs of the premises, the representative should ask for copies of them.

9. How long does a site visit usually last?

In our experience, FDNS officers typically spend anywhere from 15 to 90 minutes at the employer’s site, with visits usually taking under an hour. However, longer visits are possible.

10. My company has already received visits from FDNS. Should we expect additional visits?

Multiple visits to an employer’s worksite are possible. If an employer has multiple H-1B and/or L-1 employees, it may receive more than one visit, with each visit pertaining to a specific nonimmigrant petition. In addition, an FDNS officer could return to the premises to follow up on a previous visit.

FDNS is reportedly considering an initiative that would allow officers to conduct petition verifications entirely by phone or to defer verifications if the employer has a strong record of compliance as demonstrated in prior on-site inspections.

11. If a foreign employee is stationed at a third-party worksite, could FDNS conduct a visit at that site?

The FDNS officer typically conducts the site visit at the worksite of the foreign beneficiary of an immigration petition, whether the worksite is the employer’s own premises or the premises of a client. If your company has a foreign employee stationed at a client site – for example, to perform services for a client pursuant to a contract with your company – an FDNS officer could seek to conduct a visit at the client site. Likewise, if a foreign national employee of another company is stationed at your company’s worksite, FDNS could seek to visit your premises to interview the employee.

Therefore, employers should communicate with vendors and/or clients to discuss the possibility of FDNS visits at either premises. Your clients should be asked to contact your organization immediately if an FDNS officer appears for a site visit pertaining to one of your employees, so that a representative from your company can be present in person or by phone during the visit. Similarly, if your organization receives a site visit pertaining to a vendor’s employee, you should immediately contact the vendor.
12. What kinds of questions will the FDNS officer ask?

During a visit, the FDNS officer usually works from a standard list of questions used for all employers. The officer may ask about the employer’s business, annual revenue and the number of employees at a particular location, in the United States or worldwide. The officer may also ask whether the employer actually signed and filed the immigration petition, to make sure that it was not filed fraudulently, and may also ask about the employer’s overall use of specific immigration programs.

The FDNS officer may want to question the HR representative and the foreign national about the foreign worker’s job title, responsibilities and salary, as well as those of other employees in similar positions. The officer may also ask about the foreign national’s education, previous employment, residence, and family members in the United States.

13. What if I don’t know the exact answer to the FDNS officer’s question?

In some cases, the FDNS officer may ask for very specific information, like the number of all sponsored foreign workers employed by the company in the United States or the number of immigration petitions filed by the employer within a given time period. If you can’t give an exact answer to the question without reviewing company records or if you need the assistance of outside immigration counsel to obtain the data, let the officer know. In some cases, the officer may be satisfied with an approximate answer. If the officer asks for exact information, you can request a reasonable amount of time to gather the information sought and follow up with the officer.

14. Our company has a policy against allowing unaffiliated individuals to tour or photograph our premises. If the officer asks to see or take pictures of the worksite, must we cooperate?

Fragomen recommends that employers comply with reasonable requests to examine and photograph the employer’s premises or work area. However, if your company has a strict policy against tours or photographs, you should explain that to the officer.

15. What happens after a site visit?

After a site visit, the FDNS officer may contact the employer or the foreign national by phone or email to request additional information. In cases where there appears to be a discrepancy between the information in an immigration petition and the circumstances at the worksite, USCIS may notify the employer of its intent to revoke the petition. If that occurs, the agency will provide the employer with an opportunity to explain any perceived inconsistencies. If there have been changes in a foreign worker’s conditions of employment since the approval of the petition, the employer may need to file an amendment with USCIS.
If your organization is contacted after a site visit, let your designated Fragomen professional know as soon as possible.
Immigration Compliance – Preparing for DOL/WHD Investigation

On July 31, 2018, the Department of Labor (DOL) and the Department of Justice (DOJ) Civil Rights Division announced an expansion of its collaboration to better protect U.S. workers from discrimination by employers that prefer to hire temporary visa workers over qualified U.S. workers...and to stop companies from discriminating against U.S. workers and assist the Department of Labor’s Employment and Training Administration in identifying noncompliance with its foreign labor certification process. The announcement of this collaboration as memorialized in a Memorandum of Understanding between the agencies in addition to prior agreements sends a clear message to employers who sponsor temporary foreign national workers and permanent foreign labor certifications (PERM) to prepare for increased audits and investigations. Immigration practitioners must prepare employers to think offensively instead of defensively to prepare for DOL audits and investigations. Program compliance and compliant audit files pre-filing make the best line of defense against DOL audits and investigations.

I. Labor Condition Application (Public Access Folder) Compliance

Employers who sponsor H-1B visas, H-1B1 for nationals of Singapore and Chile, and the E-3 visa for nationals of Australia must file a Labor Condition Application (LCA) with the DOL and maintain a LCA Public Access Folder. The LCA requirement is intended to protect United States labor standards and to prevent the employment of foreign professionals at substandard wages or working conditions. INA § 212(n); 8 U.S.C. § 1182(n).

In filing an LCA, an employer attests to the following:


2 DOL entered in a series of agreements in 2017 pursuant to the June 6, 2017 DOL press release where Secretary of Labor Alexander Acosta directed DOL’s Wage and Hour Division (WHD) to use all of its available tools in conducting civil investigations to enforce labor protections provided by the visa programs as it focuses on preventing visa abuse, and to take any legal action against those who abuse any non-immigrant program.
1. The wages paid to the foreign national employee will be at least the higher of:
   a. the actual wage paid to all other employees with similar experience and qualifications for the specific position in question; or
   b. the prevailing wage for the position in the area of intended employment.

2. The employment of the H-1B worker will not adversely affect the working conditions of other workers similarly employed in the area. The same set of benefits should be offered.

3. There is no strike or lockout in the course of a labor dispute.

4. The employer will give its employees notice of the application through posting or through notice to a bargaining representative. The notice must be posted within 30 days before the LCA is filed with the DOL and remain posted for 10 days. INA § 212(n)(1)(A)–(D); 20 C.F.R. § 655.730(d).

An H-1B dependent employer, where 15 percent or more of the employer’s workforce are H-1B employees, or an employer found to be a willful violator of prior LCA obligations must also make the following attestations:

- **No Displacement.** United States workers employed by the company have not been or will not be displaced within the period beginning 90 days before the LCA filing and ending 90 days after the H-1B filing.

- **Secondary Non-Displacement.** The H-1B worker will not be subcontracted to another employer unless the H-1B employer has checked with the other employer and has been assured that there has been or will be no displacement during this period.

- **Prior Recruitment.** Good-faith steps have been taken to recruit United States workers for the position and the job has been offered to any United States worker who applied and was equally or better qualified than the H-1B worker. INA § 212(n)(3)(B).

The LCA Public Access Folder must be available for public examination within 24 hours of the filing of the LCA. For H-1B cases, the file must be retained at the employer’s principal place of business or the place of employer for one year beyond the end of the H-1B employment period or if no one was actually employed, one year beyond the employment expiration date specified on the LCA or when it was revoked. In addition to the documentation for the file, the employer must maintain certain documents for the DOL to review in the event of a complaint. The employer must also maintain payroll records for the H-1B employee and any individuals with similar experience and qualifications.

II. **PERM COMPLIANCE**
The PERM labor certification process is a minefield of potential compliance failures which requires attorneys to carefully navigate the PERM process with their clients and clearly inform them of their compliance obligations under the program. In filing a PERM, the employer must attest to the following under penalty of perjury, 20 CFR § 656.10(c):

(1) The offered wage equals or exceeds the prevailing wage determined pursuant to 20 CFR § 656.40 and § 656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the beneficiary begins work or from the time the beneficiary is admitted to take up the certified employment;

(2) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage;

(3) The employer has enough funds available to pay the wage or salary offered the alien;

(4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;

(5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;

(6) The employer's job opportunity is not:

   (i) Vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage; and/or,

   (ii) At issue in a labor dispute involving a work stoppage.

(7) The job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law;

(8) The job opportunity has been and is clearly open to any U.S. worker;

(9) The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons; and,

(10) The job opportunity is for full-time, permanent employment for an employer other than the beneficiary. Id.

Actions to comply with the PERM program must be taken prior and not after a PERM filing. There is no room for correcting non-compliance once an ETA 9089 is filed except to withdraw and re-file. As part of the PERM filing, an employer must maintain documentation of all recruitment efforts as part of its PERM audit file for five years from the date of filing the labor certification application. 20 CFR § 656.10(f). If and when DOL issues a Notice for an Audit, the employer must be ready to present documentation of the recruitment efforts in addition to the recruitment report, and copies of all resumes received in response to the recruitment efforts. 20 CFR § 656.17(a)(3). Documentation of the recruitment efforts must include a report signed by the employer or the employer’s representative “who normally interviews or considers, on behalf of the employer, applicants for job opportunities”. 20 CFR § 656.17(g)(1) and § 656.10(b)(2)(ii). The contents of the recruitment report must include at minimum: a description of the employer’s
recruitment efforts, a summary of the number of resumes received and the business-related reasons why the candidates were legally disqualified by category. Id.; DOL website, “OFLC Frequently Asked Questions and Answers,” available at www.foreignlaborcert.doleta.gov/faqanswers.cfm.

In light of the DOL’s increased focus on protecting US workers in the foreign labor certification process, it is also critical to clearly outline in Section K of the ETA 9089 how the beneficiary meets all the requirements outlined in Section H of the ETA 9089.

**Practice Tip:** While the regulations address the minimum information required in the recruitment report, the employer should also include in the recruitment report the full job description including specific requirements, how the beneficiary meets the requirements of the PERM position; and, identify each recruitment source by name, dates of advertisements, and document the recruitment. Documentation of recruitment sources can include tear sheets of the advertisements placed in newspapers, professional, trade, or ethnic publications, proof of publication furnished by the publication, or dated copies of the web pages if the advertisement appeared on the web as well as in the publication in which the advertisement appeared. For advertisements that are posted for more than one day, the employer should provide copies of the first date of posting and the last date of posting.

In order to clearly identify the results of the recruitment efforts, employers can create an Excel spreadsheet outlining the names, addresses, and provide resumes of the U.S. workers who applied for the job opportunity, the number of workers interviewed, and the job title of the person who interviewed the workers. The spreadsheet should include with specificity, the lawful job-related reason(s) for not hiring each U.S. worker who applied. Where a U.S. employer did not possess the required skills, the employer should be prepared to provide a business necessity letter explaining how the U.S. worker cannot acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training.

### III WHD INVESTIGATIONS: AN OVERVIEW AND PRACTICAL INSIGHTS

#### A. Enforcement Jurisdiction of WHD

A discussion with immigration clients regarding immigration audits and investigations must also include the audit and investigative powers of Wage and Hour Division (WHD) of the DOL. Wage and Hour Division (WHD) investigations can go beyond the reach of LCA or H-2 violations under the INA and DOL regulations. WHD, during the course of an enforcement investigation, may also investigate violations under other federal laws, including but not limited to the following:

- The Fair Labor Standards Act (FLSA)
- The Family and Medical Leave Act (FMLA)

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3 See U.S. Department of Labor, Wage and Hour Division, Factsheet #44: Visits to Employers, revised January 2015, for a full listing of federal laws under the enforcement jurisdiction of the WHD. https://www.dol.gov/whd/regs/compliance/whdfs44.htm.
The Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

Immigration and Nationality Act (INA)

For example, in the course of a H-2 WHD investigation, WHD is tasked with determining whether the target employer has complied with not only H-2 obligations, but also with other U.S. labor laws to protect U.S. workers and ensure they had access to the job opportunity offered, and that U.S. workers were not laid off or displaced to foreign employees and have complied with the wage requirements and all of the obligations of the H-2 state workforce job order and labor certification.

B. An Anatomy of a WHD Investigation

Most WHD investigations are initiated through complaints, but WHD has no obligation to confirm or disclose the source of the investigation or the complaint. Normally, WHD officers will notify an employer verbally or through written communication before they open an investigation, although they are under no obligation to do so. The rationale for “just showing up” without an advance appointment is that an unannounced site visit may be needed to ensure the gathering of accurate information and to “observe normal business operations.” When investigators do show up without an advance appointment, the investigation can be delayed so that the employer can conduct normal business operations. In reality, any attempt to delay an investigation can be deemed an obstruction of justice or lack of cooperation. Specifically, an investigator does not need probable cause or consent to conduct an investigation.

WHD has the statutory authority to enter an employer’s premises for the purpose of inspecting both the operations and employer records, as well as interviewing relevant employees. WHD may ask for records of: the employer’s annual dollar volume of business transactions, engagement in interstate commerce, and work on government contracts. Often the employer may stipulate to coverage and avoid disclosure of business records unnecessarily. Investigators may also request payroll and time records, transcription and photocopies included. WHD officials can conduct private interviews with employees (typically on the employer’s premises) to corroborate their findings and determine if the employer has complied with its requirements under the law. Former and current employees may also be contacted via telephone or mail.

A typical WHD investigation may include the following steps:

a. The WHD official(s) will identify themselves to an employer upon arrival and explain the steps of an investigation and the materials required. (Always be sure to get copies of the credentials of anyone purporting to be an investigator and designate one knowledgeable person who has good judgment to work with the investigators.) There can be situations when WHD will just appear at a worksite and interview employees without any forewarning to the employer. In such cases, the employer should find a firm, polite way to require the investigators to conduct the investigation in a reasonable manner that does not unduly interfere with operations or deprive the employer or employee of their rights.
b. If a document request has not been made in advance, investigators may provide such a list via email, hand delivery or a letter sent via U.S. Mail of documents and records that they will want to review.

c. Investigators will also examine payroll and time records and take notes or make transcriptions or photocopies of documents.

d. Investigators will conduct interviews with selected employees in private. The purposes of these interviews include verifying the accuracy and completeness of the employer’s payroll and time records, identifying workers’ particular duties in sufficient detail to determine if they are working in accordance with related nonimmigrant petition. In some instances, present and former employees may be interviewed at their homes or by mail or telephone.

e. When all of the fact-finding steps have been completed, the investigator(s) will ask to meet with the employer and/or a representative of the firm who has the authority to make decisions and commit the employer to corrective actions if violations have occurred in what is called a “closing conference.” By this time, the employer likely has an idea of whether the investigator will contend that there have been legal violations. The employer will be told whether the investigator believes violations have occurred and, if so, what the violations are and what the investigator believes must be done to correct them. At any step, and certainly before the closing conference, if an employer believes DOL will contend that there have been substantial violations, the employer may wish to obtain legal counsel who will assist it in connection with the conduct of the investigation.

The above steps are a general overview of a WHD investigation, as provided by WHD with a few editorial comments. In reality, WHD investigations can be different throughout the country since each Regional WHD office has its own procedures and practices, and there is variation among the District offices within the same Region.

Once an investigation is completed, WHD will issue a notice that provides some details concerning its findings. Should violations be found, this notice also includes information about how to request a hearing before a DOL Administrative Law Judge (ALJ) and the time limit for appealing a finding. If the violation is related to OSHA, the employer has a right to a hearing before a separate OSHA Review Commission Administrative Law Judge, but these violations are usually investigated by OSHA’s own COs or state OSHA investigators in the states that are state-plan states. WHD will issue a finding of violations if it determines there has been willful misrepresentation of material fact or any failure to meet the terms and conditions of the H-2B program.

C. Request for ALJ Hearing

Once a finding of violation is issued by WHD, the employer has 30 days from the date of the notice of determination to request a hearing before an ALJ to the Chief Administrative Law Judge in Washington, D.C. There is no specific form that must be completed to make the request. The

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4 U.S. Department of Labor, Wage and Hour Division, Fact Sheet #44, supra.
written request for a hearing must be dated, specifying the issue(s) forming the basis of the request, the reasons the employer believes the citation was incorrectly issued errors, and signed by the party or the party’s attorney. In addition, copies of the request for hearing must be provided to the Administrator of the Wage and Hour Division in Washington, D.C., to the WHD official who signed the notice of determination, and to the representative(s) of Solicitor of the DOL who are identified in the notice. A decision of the ALJ can be appealed to the Administrative Review Board (ARB).

Employers and their counsel must understand that the DOL has broad jurisdiction beyond immigration matters. An investigation regarding LCA or other immigration related compliance can open a Pandora box into other employment and labor noncompliance issues.
The Department of Homeland Security’s (DHS) focus on employers and employer sanctions as part of its immigration enforcement strategy requires all employers to establish an effective I-9 and immigration compliance and audit policy and an immigration worksite enforcement response plan.

Companies have different cultures, resources and needs, and it is important to take these into consideration when establishing a comprehensive corporate immigration compliance plan. While there is no “one size fits all” strategy, employers must address the following in order to develop an effective Corporate Immigration Compliance Program:

- Is there currently an effective I-9 policy?
- Is there a Social Security Administration “No-Match” Policy?
- Is the Social Security Number Verification System used and how is it used?
- Has the company registered with E-Verify, and if not, should it?
- Has the company registered with IMAGE, and if not, should it?
- Are foreign workers sponsored? If yes, are compliance files maintained?
- If you use subcontractors, are they in compliance with their I-9 obligations?

A. Is There an Effective I-9 Policy?

An effective I-9 policy should include at minimum the following:

1. **An Overall I-9 Compliance Administrator.** An I-9 compliance administrator should be designated. This person should be charged with centralized oversight, management and training regarding the compliance program. It is crucial that a culture of compliance is created within the company.

2. **Integration with the Overall Personnel Policy, Materials and Applications.** The I-9 policy should be in writing, published and communicated to the entire workforce.

3. **Overall Guidance on I-9 Procedures.** The policy must state that the company:
   a. Requires the proper and timely completion and retention of Forms I-9 for all employees hired after November 6, 1986;
   b. Will not hire individuals who do not provide the requisite and timely identity and employment eligibility documents;
   c. Conducts timely I-9 reverification; and
   d. Holds regular I-9 trainings for all company representatives who are part of the recruitment, orientation and hiring processes for the company.

4. **Clarification to All Company Employees Who Have Hiring Authority or Are Part of the Hiring Process Concerning:**
   a. Who must complete Form I-9;
   b. When verification must be completed;
   c. What questions may be lawfully asked prior to the actual offer of employment;
   d. What limits may be placed on the hiring of certain individuals; and
   e. To whom employees should be referred for guidance and assistance on I-9 verification procedures.

5. **Guidance on I-9 Verification for Employees Charged with the Implementation of I-9 Procedures.**
   a. How an I-9 must be properly completed, including the appropriate use of List A, B and C documents;
   b. When further inquiry is appropriate;
   c. What, how and for how long I-9 records should be maintained;
   d. Whether it is company policy for the I-9 support documents to be copied;
   e. Whether to maintain paper files or electronic signature and storage;
   f. Where the I-9 files should be maintained;
g. When I-9s need to be reverified and docketing procedures for reverification;
h. When the I-9 compliance administrator or legal counsel should be consulted; and
i. When and how to process the I-9 through E-Verify, if registered with E-Verify.

6. Clear Instructions for Internal I-9 Audits. To ensure compliance and mitigate damages, the company should conduct, or arrange for legal counsel to conduct, regularly scheduled, random or tip-based internal I-9 audits. Periodic I-9 audits may also serve as training opportunities for company personnel.

B. Does the Company Have an SSA No-Match Policy?

DHS commonly requests “no-match” letters and evaluates an employer’s response as part of an I-9 audit. Accordingly, the Compliance Program should include a statement regarding its policy on SSA “no-match” letters. Specific follow-up action should be taken whenever “no-match” letters are received.

In developing its “no-match” policy, an employer should take the following into consideration:

1. Do Not Jump To Conclusions. An employee should not be terminated solely on the basis of a “no-match” letter. An employer may terminate an employee for employment eligibility violations only if the employer has actual or constructive knowledge that an employee is unauthorized to work in the United States. A “no-match” letter alone does not constitute actual or constructive knowledge.

2. Investigate. A “no-match” letter should never be ignored. We recommend that an employer confer with counsel in following these procedures, particularly if they involve termination of employees:
   a. Records should be reviewed to ensure a typographical error was not made in reporting the employee’s SSN to the SSA.
   b. If there is no error, the “no-match” letter should be shared with each employee listed on the letter, and request that the employee verify the name and SSN are correct.
   c. An employee should not be asked or required to produce his or her social security card or any other specific documentation, as this could be considered document abuse.
   d. The employee should be given a reasonable amount of time to investigate and/or correct any errors.
   e. If the employee reports an error that can be remedied, in addition to submitting the correct information to the SSA, the employee’s Form I-9 should also be corrected.
   f. If the employee admits that he or she is unauthorized to work in the United States, employment must immediately be terminated.
   g. If the employee verifies that the employer has the correct name and SSN, the employee should be asked if he or she can provide any other reason for the “no match” letter. If the answer is no, the employer may, but is not required to, report back to the SSA that the company has re-verified that the information submitted to the SSA is correct and that neither the employer nor the employee can explain the discrepancy.
   h. If during investigation the employer receives additional information constituting actual or constructive knowledge that the employee is unauthorized to work in the United States, the employer must terminate the employee’s employment. Additional information may come in the form of credible and specific tips from co-workers or anonymous informants, an employee admission, job abandonment, etc. Absent other evidence, a co-worker’s tip, in and of itself, is an insufficient basis for termination. The determination of actual or constructive knowledge is highly fact-dependent. Accordingly, employers are advised to contact legal counsel before taking adverse action.

C. Is the Social Security Number Verification System Used? The Social Security Number Verification System (SSNVS) is an online tool which allows employers to verify the names and social security numbers of employees. The SSNVS policy should clearly state that any use of the SSNVS is for the exclusive purpose of ensuring that the employer meets its W-2 reporting responsibilities. Please note that if you use SSNVS and a no-match is received, further inquiry is required, and it must not be ignored.

D. Should the Company Register with E-Verify? E-Verify is a web-based program that allows employers to electronically verify information provided on the Form I-9, including social security numbers, with databases of the SSA and DHS. Certain federal contractors are required to register with E-Verify. In addition, employers with multi-state operations must check as to whether any of the states in which it has operations mandate the use of E-Verify. Unless or until employers are absolutely required to participate, they should exercise caution when considering E-Verify registration. E-Verify requires employers to enter into a Memorandum of Understanding (MOU) with the SSA and the DHS and imposes significant obligations and liabilities.
E. Are Foreign National Workers Sponsored for Non-Immigrant or Immigrant Visas? If Yes, Are Compliance Files Maintained?

Employers should include in their compliance program at least an annual audit of all immigration-related applications and petitions which at minimum should consist of a review of all PERM Audit Files and H-1B filings along with the LCA Public Access Folders. Just as a worksite investigation can turn into a DOL audit, a DOL audit or USCIS investigation can easily turn into a criminal worksite investigation.

The Immigration & Customs Enforcement (ICE) Worksite Investigation Response Plan

Employers should be armed with a worksite investigation response plan. The response plan should include action items in case of an I-9 audit, the execution of an outstanding warrant of removal for a particular employee and a full-blown worksite investigation.

A Worksite Investigation Response Plan should include the following:

a. Instructions to employees not to provide any documentation, information or consent to enter the restricted areas of the worksite to ICE unless there is a judicial warrant issued, and, if possible, to do so only under the supervision of legal counsel or designated contact;

b. The designation of one central point of contact for ICE or any other government agency. The name of the company’s appointed representative for the investigation and any related matters should be given as soon as contact is made with the company;

c. The name and contact information of legal counsel. If the company’s legal counsel is not in-house, there should be written instructions for personnel to contact outside counsel immediately;

d. The name of company officials to notify immediately of the ICE investigation or audit;

e. Key management employees should be informed of any government investigation unless their knowledge is in conflict with the interests of the company; and

f. Name and contact information of public relations consultant to assist the company to respond to press requests and coverage of the investigation.

One of the most dangerous aspects of any worksite investigation is the lack of control an employer has over its employees and the chaos that can ensue once ICE enters the worksite. Employers must be prepared for any government investigation, whether it is by ICE or another agency. In addition to establishing the Audit/Investigation Response Plan, employers can hold worksite investigation training sessions to educate employees about their rights during an investigation.

Please contact the Fredrikson & Byron Immigration Team at 612.492.7648 for additional information.
Preparation for I-9 Audits Under the Trump Administration

The federal government’s employment eligibility verification form (Form I-9) is a seemingly simple form whose completion is, in fact, fraught with pitfalls for the unwary employer. Since the inception of employer sanctions in the mid 1980s, government investigations of employers’ I-9 compliance have been a key part of both Democratic and Republican administrations’ efforts to combat unauthorized immigration.

Three factors are now combining to increase corporate I-9 risk: (1) the Trump Administration has issued policy directives to enhance “interior enforcement” and has proposed budget increases for Immigration and Customs Enforcement (ICE) to give it the resources to achieve these policy objectives; (2) recent statutory increases to civil fines for both I-9 noncompliance and I-9-related anti-discrimination violations make even “paperwork errors” a more expensive proposition, and (3) federal prosecutors are showing an increased interest in proceeding criminally against employment verification failures.

President Trump, in his Buy American and Hire American Executive Order (E.O. 13788 of April 18, 2017, published at 82 Fed. Reg. 18837 (April 21, 2017)), directed the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to protect the interests of U.S. workers in the administration of the immigration system, including through the prevention of fraud or abuse.

This Executive Order follows an earlier one titled Enhancing Public Safety in the Interior of the United States (E.O. 13768 of Jan. 25, 2017, published at 82 Fed. Reg. 8799 (Jan. 30, 2017)), pursuant to which Department of Homeland Security (DHS) Secretary John Kelly called for a hiring surge of 10,000 ICE agents to focus on the criminal and civil enforcement measures associated with the Order. Hiring 10,000 new ICE agents against a backdrop of other intended government cuts and hiring freezes demonstrates that the administration intends to put in place a strong infrastructure that will be able to take on these challenges. We encourage employers to review their internal I-9 program, so that they can best implement appropriate processes and procedures for I-9 compliance, as an increase in worksite inspections is inevitable.

Notably, the Obama Administration had already set in place a more robust framework on worksite enforcement, including increased penalties that went into effect last year, that represented an increase by 96 percent in the fines that could be assessed against employers in instances of substantive or “paperwork violations.” For example, the civil penalty range for 100 I-9s completed after the three-business-day deadline for completion increased from $11,000-$110,000 to $21,600-$215,600. The civil penalty for knowingly hiring 10 unauthorized workers increased from $3,750-$32,000 to $5,390-$43,130. Further, a new version of the Form I-9 went into effect in January of this year, that incorporates “smart” technology. To address these changes,
and provide employers with more guidance, U.S. Citizenship and Immigration Services (USCIS) also released a now-expanded 64-page Handbook for Employers to provide employers more hands-on guidance on how to properly prepare Forms. (M-274 Handbook for Employers). While the completion of Form I-9 would appear seemingly straightforward, these additional developments certainly suggest otherwise. Thus, it is critical that employers not underestimate the importance of maintaining a compliant program.

Compliance Program

In light of the increased I-9 liability and enforcement focus, it is critical that employers have an immigration compliance program that incorporates the factors for an effective program set forth in the U.S. Federal Sentencing Guidelines. Such a compliance program includes an assessment of the company’s most significant immigration-related risks, a compliance program that addresses those risks, and an audit function that confirms that the company’s compliance procedures are being followed.

It is prudent to consult outside counsel to ensure that the immigration compliance program meets these objectives, as significant reductions in corporate liability are available when isolated misconduct occurs but a generally effective compliance program is in place.

Bases of Legal Liability

Employers face civil liability for failure to complete an I-9 Form properly, 8 U.S.C. 1324a(b), for hiring or continuing to hire an individual knowing that the individual is unauthorized to work, and for entering into a contract with an entity for the labor or services of a worker knowing that the worker to be supplied is unauthorized. 8 U.S.C. 1324a(a). In each instance where “knowledge” is required, ICE can meet its burden by showing that the employer had

“constructive knowledge” based on the specific facts and circumstances of the case. 8 CFR 274a.1(i). There is a criminal misdemeanor penalty for a “pattern and practice” of such knowledge, 8 USG 1324a(f)(1), and a criminal felony penalty for knowing acceptance of a false document for purposes of satisfying an I-9 requirement. 18 U.S.G. 1546(b).

There is also civil liability for an employer that: (1) intentionally discriminates in the employment verification process on the basis of citizenship status against U.S. citizens, permanent resident aliens, or asylees and refugees, by failing to hire or unlawfully terminating them, 8 U.S.C. 1324b(a)(1), and (2) for an employer that requests more or different documents than are required to satisfy the Form I-9 from any individual. 8 U.S.C. 1324b(a)(6).

Ensure Audit-Readiness

Enforcement of the prohibition against unlawful employment is typically initiated by an ICE Notice of Inspection (NOI) of a company’s Forms I-9. Enforcement of the anti-discrimination rules is typically initiated by a Department of Justice (DOJ) request for a variety of hiring related documents, including an employer’s Forms I-9. A key aspect of preparation for an I-9 audit lies in understanding how audits work, and mitigating risk by ensuring that a well-communicated policy is in place. The policy should assure, among other things, that all new employees’ employment eligibility is verified by the timely completion of an I-9, and that company employees administering the I-9 process are properly trained. In order to best prepare for audits, it is important to understand the key triggers that initiate an ICE or DOJ audit of a company. A company may be targeted for an audit where ICE focuses on a certain industry that is widely known to employ an undocumented workforce. Other audits may be based upon a tip received by the government, or in the case of anti-discrimination cases by a complaint from an individual claiming to be aggrieved by an unfair immigration-related employment practice.

Anatomy of an Audit. An ICE audit starts when an ICE officer shows up unannounced to an employer’s premises with a Notice of Inspection (an administrative subpoena). The Notice will demand that an employer produce I-9s for its workforce, as well as supporting materials such as payroll records, I-9s, and verifying documents if the employer has a practice of keeping those. When faced with an audit, an employer should use the three business days afforded by the ICE regulation, but the facts and circumstances might require that additional time be allowed so that the inspection is “reasonable” within the statute and the Fourth Amendment. This additional time enables the employer to locate its I-9s and then make corrections, which in turn will help to reduce potential fines.

Request for Documents. The ICE investigator will first review the I-9s to determine if a properly completed I-9 exists for each employee, and if there are violations, the investigator will determine a level of fines based upon the findings. Even for employers that traditionally have not had a history of employing an undocumented workforce, it is common to see patterns of finable activity, including failure to reverify, paperwork violations, and even missing I-9s for currently employed workers. The ICE audit might end with no finding of violation, or a list of corrections that the employer must make, or in a modest civil paperwork penalty. It is possible that the employer will receive a “Notice of Suspect Documents” if certain employees appear to ICE to be unauthorized, to which the employer must respond promptly. A “Notice of Intent to Fine” document is sometimes issued that articulates the findings of the ICE agent in evaluating the employer’s poor
task should be assigned to capable individuals—whether in-house or outside the company.

While a spot audit can certainly be helpful in identifying regular mistakes and patterns present in an employer’s I-9 population, an actual I-9 audit would typically survey the entire population, rather than just a percentage of the workforce.

Interestingly, in its most recent Guidance for Employers Conducting Internal Employment Eligibility Form I-9 Audits, ICE advises that “the employer should carefully consider how it chooses Forms I-9 to be audited to avoid discriminatory or retaliatory audits, or the perception of discriminatory or retaliatory audits.”

Employers are well advised to establish or strengthen their immigration compliance programs, and to ensure that regular I-9 audits are a feature of such programs.

It is important to ensure that the internal audit is a part of an immigration compliance program that is sensitive to the company’s particular immigration-related risks. Vulnerabilities in the program identified by the audit should be properly evaluated, and recurring errors should be rectified by an improvement in process.

If an employer participates in E-Verify, or is a federal contractor, the compliance stakes increase, and the need for regular audits is elevated. E-Verify records every I-9 transaction engaged in by the employer, to which ICE has access without the need for a Notice of Inspection or other notice to an employer. Federal contractors face potential suspension or debarment for significant I-9 noncompliance, and a regular internal audit allows employers to identify and remedy any problems in advance.

Finally, it is important for employers to conduct adequate due diligence when considering electronic I-9 software programs that may be add-on modules to their existing human resource information systems. Regardless of whether an employer chooses to maintain paper I-9s or stores them electronically, the program must still adhere to certain recordkeeping standards, and technical safeguards that track the I-9 regulations and agency guidance. Retailer Abercrombie & Fitch was fined $1 million in 2010 due to deficiencies found in its electronic I-9 systems, even though ICE did not find that the company had knowingly hired any undocumented workers. A deficient I-9 software program potentially increases corporate liability every time an I-9 is created or updated, and potential civil fine liability in the millions of dollars is not uncommon.

**Conclusion**

Given the renewed enforcement focus by both ICE and DOJ on immigration compliance, the nearly doubled civil fines available to both agencies, and the potential criminal liability for employment verification misconduct, employers are well advised to establish or strengthen their immigration compliance programs, and to ensure that regular I-9 audits are a feature of such programs.