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The Federal “Crime of Violence” Definition: Overview and Judicial Developments

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Summary

In an effort to deter violent crime, and to limit the broad discretion accorded to federal judges with respect to prison sentencing, Congress in 1984 passed legislation that revised the federal criminal code. The Comprehensive Crime Control Act of 1984 (CCCA) aimed to substantially reform and improve federal criminal laws, and “to restore a proper balance between the forces of law and the forces of lawlessness.” To that end, the CCCA adopted new bail procedures, imposed mandatory minimum sentences for certain criminal offenses, increased the penalties for drug offenses and violent crimes, and created new federal criminal offenses. The term “crime of violence” was used in various provisions of the CCCA that defined the elements of certain newly established criminal offenses, set forth conditions for bail, and provided for enhanced prison sentences when certain aggravating factors were met. Since the CCCA’s enactment, several federal laws have incorporated the act’s “crime of violence” definition. For example, under the Immigration and Nationality Act, a non-U.S. national who commits a “crime of violence” for which the term of imprisonment is at least one year may face significant immigration consequences, including being subject to removal from the country and thereafter rendered generally ineligible for readmission.

As codified in 18 U.S.C. § 16, the CCCA contains a two-pronged definition of a crime of violence. Specifically, the term includes both (1) “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another”; and (2) “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 any offense.”

Since the CCCA’s enactment, reviewing courts have had to interpret and apply the statutory definition of a crime of violence, sometimes reaching disparate conclusions over the scope of that term. For example, courts have differed regarding the degree of “physical force” required for an offense to constitute a crime of violence. Courts have also reached conflicting rulings on whether a crime of violence encompasses only intentional or deliberate acts, or whether the term also covers offenses involving gross negligence or pure recklessness. Moreover, courts have sometimes looked to the crime of violence definition (and jurisprudence interpreting that provision) for guidance in interpreting similarly worded provisions found elsewhere in the federal criminal code, such as those provisions referencing a “misdemeanor crime of domestic violence” or “violent felony.” More recently, courts have addressed an entirely different question—whether the crime of violence definition is unconstitutionally vague. In particular, litigants have challenged the second prong of 18 U.S.C. § 16’s crime of violence definition, arguing that there is no reliable standard to assess whether a criminal offense constitutes a crime of violence because it carries a “substantial risk” of physical force. In its 2018 decision in *Sessions v. Dimaya*, the Supreme Court held that the second prong of the crime of violence definition, as incorporated into the INA, was unconstitutionally vague under the Due Process Clause. While the first prong of the crime of violence definition was not affected by the *Dimaya* ruling, the Court’s invalidation of the second prong narrows the potential application of the crime of violence definition, possibly having far-reaching consequences for the application of numerous statutes that incorporate that definition.

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Introduction

In 1984, Congress passed the Comprehensive Crime Control Act (CCCA).¹ The act, in the words of the Senate Judiciary Committee report that accompanied the legislation, was “the product of a decade long bipartisan effort . . . to make major comprehensive improvements to the federal criminal laws.”² In an effort to achieve that goal, the CCCA established new bail procedures, imposed mandatory minimum sentences for many criminal offenses, increased the penalties for drug offenses and violent crimes, and created additional federal criminal offenses.³

Various provisions of the CCCA employ the term “crime of violence” in reference to the elements of certain offenses, the conditions for the issuance of bail, and the circumstances where enhanced prison sentences are required.⁴ For example, the CCCA requires a judge to consider, among other things, the nature and circumstances of a criminal defendant’s offense, including whether the offense is a crime of violence, when assessing whether conditions permit the defendant’s release from custody while awaiting trial.⁵ In addition, the CCCA directs the United States Sentencing Commission to ensure that the Sentencing Guidelines specify a term of imprisonment “at or near the maximum term” authorized by the federal criminal code for adult criminal defendants convicted of a crime of violence.⁶

A number of federal statutes have been enacted that employ the CCCA’s crime of violence definition (COV definition) to describe proscribed conduct, including in both the criminal and immigration context.⁷ In addition, courts have sometimes looked to the COV definition (and jurisprudence interpreting that provision) for guidance in interpreting similarly worded provisions found elsewhere in the federal criminal code, such as those statutory provisions referencing a “misdemeanor crime of domestic violence” or “violent felony.”⁸ The Supreme Court has found the COV definition relevant in interpreting some of these provisions, while finding the definition inapposite in other cases.⁹

The COV definition contains two prongs. In its 2018 ruling in *Sessions v. Dimaya*, the Supreme Court struck down on vagueness grounds the second prong of the COV definition, as incorporated into the Immigration and Nationality Act (INA),¹⁰ which covers any felony offense that, “by its nature, involves a substantial risk that physical force . . . may be used in the course of

¹ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837 (1984).

² S. REP. NO. 98-225, at 1 (1983).

³ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837 (1984); S. REP. NO. 98-225, at 3, 66 (1983).

⁴ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837 (1984).

⁵ *Id.* § 203 (adding 18 U.S.C. § 3142).

⁶ *Id.* § 217 (adding 28 U.S.C. § 994(h)(1)(A)).

⁷ See e.g., 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii); 18 U.S.C. §§ 25(b), 842(p), 1959(a), 2250; 21 U.S.C. § 841.

⁸ See *United States v. Castleman*, 695 F.3d 582, 586 (6th Cir. 2012), *rev’d*, 134 S. Ct. 1405 (2014); *United States v. White*, 606 F.3d 144, 153 (4th Cir. 2010); *United States v. Hays*, 526 F.3d 674, 677-78 (10th Cir. 2008).

⁹ Compare *United States v. Castleman*, 134 S. Ct. 1405, 1411 n. 4 (2014) (explaining that the phrase “physical force” has a different meaning in the misdemeanor crime of domestic violence context than it has in the crime of violence context) with *Johnson v. United States*, 559 U.S. 133, 140 (2010) (concluding that the Supreme Court’s interpretation of the crime of violence definition as referring to “violent, active crimes” informs the meaning of the “very similar” statutory definition of a “violent felony”).

¹⁰ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018).

committing the offense.”¹¹ The ruling narrows the scope of the offenses covered by the COV definition and may have consequences for the application of a number of laws that incorporate the COV definition or employ similar language as the “residual clause” struck down by the Court.¹² Nonetheless, the first prong of the COV definition remains in effect, covering any offense “that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”¹³

This report examines the statutory definition of a crime of violence and notable judicial developments concerning the definition’s scope, including the Court’s ruling in *Dimaya* narrowing the application of the COV definition. In particular, this report examines how the courts have interpreted the elements of the COV definition found in 18 U.S.C. § 16 and similarly worded provisions in the federal criminal code. The report concludes by considering the implications of these legal issues and judicial developments for Congress.

The Statutory Definition of a “Crime of Violence”

Prior to the CCCA, some federal statutes employed the term “crime of violence” in setting forth the elements of a criminal offense or the conditions of confinement.¹⁴ Although there was no uniform definition of a crime of violence, Congress typically provided definitions of that term when they appeared in a federal law. For example, in the Narcotic Addict Rehabilitation Act of

¹¹ 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b).

¹² See e.g., 2 U.S.C. § 1967(a) (authorizing a Capitol Police officer to arrest a person who has committed a crime of violence within the United States Capitol Grounds or in the presence of a Member of Congress); 8 U.S.C. §§ 101(a)(43)(F) (defining an aggravated felony to include a crime of violence for which the term of imprisonment is at least one year), 1227(a)(2)(A)(iii) (rendering removable aliens who have been convicted of an aggravated felony at any time after admission into the United States); 18 U.S.C. §§ 25(b) (prohibiting the use of a minor to commit a crime of violence), 119(a) (prohibiting the disclosure of restricted personal information about government personnel, jurors, and witnesses with the intent to threaten, intimidate, or incite the commission of a crime of violence against that person), 373(a) (making it unlawful to solicit another person to engage in a crime of violence), 842(p)(2) (prohibiting the teaching or demonstration of the making or use of an explosive device with the intent that such information be used for a crime of violence), 924(c)(1)(A) (prohibiting the use or carrying of a firearm during a crime of violence), 931(a)(1) (prohibiting a person from purchasing, owning, or possessing body armor if that person has been convicted of a felony that is a crime of violence), 1959(a) (making it unlawful to receive anything of pecuniary value from an enterprise engaged in racketeering activity in exchange for threatening to commit a crime of violence against an individual), 2250(d)(1) (imposing an enhanced prison sentence on a person who knowingly fails to register as a sex offender and who commits a crime of violence), 3142(g)(1) (requiring a judge to consider whether a criminal defendant has been charged with a crime of violence in setting the conditions of release pending trial); 20 U.S.C. § 1232g(b)(6) (authorizing a postsecondary educational institution to disclose the results of a disciplinary proceeding against a student who allegedly committed a crime of violence); 21 U.S.C. § 841(b)(7)(A) (penalizing the distribution of a controlled substance with the intent to commit a crime of violence); 34 U.S.C. §§ 40702(a)(1)(B), (d)(3) (authorizing the Bureau of Prisons to collect DNA samples from a person in its custody who has been convicted of a qualifying federal offense, including any crime of violence).

¹³ 18 U.S.C. § 16(a).

¹⁴ See e.g., 18 U.S.C. § 1952 (1982 ed.) (making it unlawful to “travel[] in interstate or foreign commerce or use[] the mail or any facility in interstate or foreign commerce with intent to . . . commit any crime of violence to further any unlawful activity”); *id.* § 4251(f)(1) (1982 ed.), *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 218(a)(6), 98 Stat. 1837 (1984) (excluding from definition of an “eligible offender,” for purposes of drug rehabilitation and treatment, a person “who is convicted of a crime of violence”); 28 U.S.C. § 2901(c) (1982 ed.), *repealed by* Advancement in Pediatric Autism Research Act of 2000, Pub. L. No. 106-310, tit. XXXIV, § 3405(b), 114 Stat. 1101 (2000) (providing for civil commitment and rehabilitation of narcotic addicts unless they are charged with a crime of violence).

1966, Congress included a definition of a crime of violence that was limited to specific criminal offenses:

voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary or housebreaking in the nighttime, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony, or an attempt or conspiracy to commit any of the foregoing offenses.¹⁵

Eventually, in an effort to provide a universal and broader definition of a crime of violence, Congress created a two-pronged COV definition in the CCCA.¹⁶ That definition, which is codified at 18 U.S.C. § 16,¹⁷ covers each of the following:

(a) [A]n 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 any offense.¹⁸

Following passage of the CCCA, Congress incorporated the COV definition into a number of other federal statutory provisions.¹⁹ For example, under the INA, a non-U.S. national who commits a crime of violence for which the term of imprisonment is at least one year may face significant immigration consequences, including being subject to removal from the United States, subject to mandatory detention pending removal proceedings, ineligible for certain forms of relief from removal, barred from naturalization, and generally barred for readmission into the United States.²⁰ In the criminal context, other examples include a statutory provision that imposes increased prison sentences on a person who intentionally uses a minor to commit a crime of

¹⁵ Narcotic Addict Rehabilitation Act of 1966, Pub. L. No. 89-793, tit. I, § 201, 80 Stat. 1438 (1966), *repealed by* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 218(a)(6), 98 Stat. 1837 (1984). *See also* Federal Firearms Act of 1938, Pub. L. No. 75-785, § 1, 52 Stat. 1250 (1938) (defining a crime of violence as “murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year”), *repealed by* Gun Control Act of 1968, Pub. L. No. 90-618, § 203, 82 Stat. 1214 (1968).

¹⁶ *See* United States v. Johnson, 704 F. Supp. 1398, 1400 (E.D. Mich. 1988) (observing that, “[i]n moving to provide a uniform definition of ‘crimes of violence,’ Congress concurrently jettisoned a more limited conception of ‘crimes of violence’ previously included in Title 18,” and that Congress revised the definition “in more nebulous and seemingly more expansive terms”).

¹⁷ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 203, 98 Stat. 1837 (1984). *See also* S. REP. NO. 98-225, at 307 (1983).

¹⁸ 18 U.S.C. § 16.

¹⁹ *See e.g.*, 18 U.S.C. § 931(a)(1) (prohibiting a person from purchasing, owning, or possessing body armor if that person has been convicted of a “crime of violence”); 20 U.S.C. § 1232g(b)(6) (authorizing a postsecondary educational institution to disclose the results of a disciplinary proceeding against a student who allegedly committed a “crime of violence”); 21 U.S.C. § 841(b)(7)(A) (providing for a prison sentence of not more than 20 years where a person distributes a controlled substance to an individual without his knowledge, with the intent to commit a “crime of violence” against that individual); 34 U.S.C. §§ 40702(a)(1)(B), (d)(3) (authorizing the Bureau of Prisons to collect DNA samples from a person in its custody who has been convicted of a qualifying federal offense, which includes “any crime of violence”).

²⁰ *See* 8 U.S.C. §§ 1101(a)(43)(F), 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i), 1182(a)(2)(A)(i)(I), 1182(a)(9)(A), 1182(h), 1227(a)(2)(A)(iii), 1229b(a)(3), 1229b(b)(1)(C), 1229c(b)(C), 1231(b)(3)(B)(ii), 1236(c)(1), 1254a(c)(2)(B), 1427(a); 8 C.F.R. 316.10(b)(ii). Certain waivers may apply to these prohibitions. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(A)(iii) (authorizing readmission of an alien if the Department of Homeland Security consents to the alien’s reapplying for admission), (d)(3)(A) (allowing many inadmissibility grounds to be waived with respect to aliens seeking to enter the United States temporarily as nonimmigrants).

violence, and a provision that makes it unlawful to receive anything of pecuniary value from an enterprise engaged in racketeering activity in exchange for threatening to commit a crime of violence.²¹

Judicial Interpretation of the Crime of Violence Definition

Despite Congress's attempt to provide a uniform definition of a crime of violence, courts have struggled to assess the scope of that definition. And on multiple occasions, the Supreme Court has intervened to clarify the meaning of a crime of violence and similarly worded phrases found elsewhere in the federal criminal code. The following section briefly discusses three major issues the courts have considered in assessing the scope of activities covered by the COV definition: (1) whether to examine either the underlying conduct of a criminal offense, the statutory elements of the offense, or some combination in order to determine whether a person has been convicted of a crime of violence; (2) the degree of force necessary for an act to satisfy the "physical force" element of the COV definition; and (3) whether a crime of violence requires a specific mental state.

Examination of the Statutory Elements Rather Than the Underlying Facts of a Criminal Conviction

Following the enactment of the CCCA, reviewing courts were confronted with the issue of how to determine whether a criminal conviction fell within the COV definition. In particular, courts considered whether a conviction under a criminal statute that covered a broader range of conduct than the COV definition could nonetheless be deemed a conviction for a crime of violence. This issue typically arose when the underlying conduct that gave rise to the criminal conviction was the type covered by the COV definition, but the statute of conviction also covered conduct that would not meet the COV definition.²² This debate was part of a broader disagreement among courts as to how to determine whether a criminal conviction falls within the definition of a predicate crime—that is, a generic crime defined in statute (e.g., a crime of violence or a violent felony) for purposes of imposing enhancements and other penalties.²³

Ultimately, in *Taylor v. United States*, which addressed the meaning of the term "burglary" under the Armed Career Criminal Act (ACCA),²⁴ the Supreme Court adopted a "categorical approach"

²¹ 18 U.S.C. §§ 25(b), 1959(a).

²² See e.g., *United States v. Cruz*, 805 F.2d 1464, 1469 (11th Cir. 1986) (holding that drug trafficking offenses were not crimes of violence under 18 U.S.C. § 16(b) because the sale of drugs "is often a consensual transaction in which violence is not involved," and declining to adopt a case-by-case approach to determine whether the crimes actually involved a substantial risk of harm); *United States v. Flores*, 875 F.2d 1110, 1112 (5th Cir. 1989) (holding that burglary convictions were crimes of violence even though criminal statute was broader than the COV definition because evidence outside of the conviction record showed that underlying criminal conduct fell within the COV definition); *United States v. Johnson*, 704 F. Supp. 1398, 1402-03 (E.D. Mich. 1988) (declining to consider the specific facts underlying a conviction for being a felon in possession of a firearm in assessing whether the conviction was a crime of violence).

²³ See *Taylor v. United States*, 495 U.S. 575, 599-600 (1990) (recognizing lingering question of how to determine whether a broad criminal statute corresponds with a predicate offense).

²⁴ See 18 U.S.C. § 924(e)(2)(B)(ii) (imposing enhanced prison sentences for firearm offenders who have been convicted of certain enumerated crimes, including "burglary").

analysis where courts may look only to the statutory elements of a criminal conviction, rather than the particular facts underlying that conviction, to determine whether the criminal offense fits within the definition of a predicate crime.²⁵ In applying this analysis, reviewing courts must presume that the conviction was based on the least culpable conduct under the criminal statute.²⁶ If the crime of conviction “sweeps more broadly” than the generic offense, the criminal conviction does not fit within that predicate offense.²⁷

Where statutes have multiple alternative elements of a crime, only some of which correspond to the generic offense, courts may employ a “modified categorical approach” and examine a limited set of documents relating to the conviction (such as charging papers, jury instructions, and plea agreements) to determine which elements a defendant was convicted of, and compare those elements to the predicate crime definition.²⁸ The Supreme Court has strictly confined this analysis to “divisible” statutes that define multiple crimes with different elements, rather than statutes that contain a “single, indivisible set of elements” that cover more conduct than the predicate offense, or merely list the alternate *means* of committing a crime.²⁹

The Supreme Court’s elements-based approach to determining whether a criminal offense meets the definition of a predicate crime may have consequences for assessing whether a criminal offense is considered a crime of violence. For example, even if a criminal defendant was convicted of a crime that involved the use of physical force—as the COV definition requires—courts have found that the conviction will not be considered a crime of violence if the statute that formed the basis for his conviction proscribes additional conduct that does *not* involve physical force.³⁰

²⁵ *Taylor*, 495 U.S. at 577-78, 600-02; *see also* *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013); *Descamps v. United States*, 570 U.S. 254, 260-61 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (discussing categorical approach for determining whether a criminal conviction corresponds with the definition of a generic offense).

²⁶ *Moncrieffe*, 569 U.S. at 190-91 (citing *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

²⁷ *Descamps*, 570 U.S. at 260; *see also Mathis*, 136 S. Ct. at 2248 (noting that if the criminal statute “covers any more conduct than the generic offense,” it does not meet the generic definition, “even if the defendant’s actual conduct (*i.e.*, the facts of the crime) fits within the generic offense’s boundaries”).

²⁸ *Descamps*, 570 U.S. at 260-63 (citing *Taylor*, 495 U.S. at 602); *Shepard v. United States*, 544 U.S. 13, 26 (2005).

²⁹ *Descamps*, 570 U.S. at 263-67, 272-73; *Mathis*, 136 S. Ct. at 2253-55; *see also* *Ramirez v. Lynch*, 810 F.3d 1127, 1134-38 (9th Cir. 2016) (declining to apply modified categorical approach to determine whether California child abuse conviction was a crime of violence because statute only listed alternative means of committing the offense, but did not create separate crimes defined by distinct elements); *United States v. Estrella*, 758 F.3d 1239, 1248-49 (11th Cir. 2014) (applying modified categorical approach to determine whether conviction for throwing an object at an occupied vehicle constituted a crime of violence under the Sentencing Guidelines because the Florida statute under which the defendant was convicted contained multiple, alternative elements, and only some of them involved the use of physical force against a person); *Karimi v. Holder*, 715 F.3d 561, 567-68 (4th Cir. 2013) (declining to apply the modified categorical approach for a Maryland second-degree assault conviction because the statute covered both violent and non-violent conduct and did not have multiple, alternative elements); *United States v. Gomez*, 690 F.3d 194, 202-03 (4th Cir. 2012) (holding that the modified categorical approach did not apply in determining whether child abuse under Maryland law constituted a crime of violence under the Sentencing Guidelines because every element of the statute could be accomplished with or without the use of physical force).

³⁰ *See* *Accardo v. United States Att’y Gen.*, 634 F.3d 1333, 1339 (11th Cir. 2011) (holding that the federal offense of extortionate extension of credit was not categorically a crime of violence because, under the statute, a person could commit the offense through the use of physical force or “other criminal means”); *Banuelos-Ayon v. Holder*, 611 F.3d 1080, 1083-84 (9th Cir. 2010) (holding that the California offense of corporal injury to a spouse or cohabitant was categorically a crime of violence because the statute required the intentional use of physical force); *Popal v. Gonzales*, 416 F.3d 249, 254-55 (3d Cir. 2005) (holding that Pennsylvania conviction for simple assault was not categorically a crime of violence because the statute only required recklessness and thus did not necessarily involve the “use of force,” which the court construed as requiring “an intent to use force”). *See also infra* at 8 (discussing the first prong of the ACCA’s violent felony definition, which requires “the use, attempted use, or threatened use of physical force against (continued...)”).

Severity of Force Necessary to Satisfy the "Physical Force" Element

Under both prongs of the COV definition found in 18 U.S.C. § 16, a crime of violence is predicated on the use of (or the risk of using) "physical force."³¹ In interpreting 18 U.S.C. § 16 and related, similarly worded statutory provisions, courts have differed over the *degree* of physical force that a criminal offense must entail to satisfy this definitional element. With respect to 18 U.S.C. § 16, courts of appeals for the majority of federal circuits have held that "physical force" must be violent or destructive in nature, distinguishing such force from mere physical contact—however rude or offensive—with a property or person, or any act that intentionally causes physical injury.³² The U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit³³), on the other hand, has rejected the notion that a statute must require violent force to qualify as a crime of violence. For example, the Eleventh Circuit has concluded that a simple battery offense, which under the common law only requires offensive physical contact,³⁴ may meet the COV definition if it involves the intentional infliction of physical injury.³⁵

The Board of Immigration Appeals (BIA), the highest administrative body charged with interpreting and applying federal immigration laws, has taken different positions regarding the severity of force necessary to satisfy the "physical force" element of the COV definition. Originally, the BIA took a position similar to the Eleventh Circuit, and held that any assault that results in physical injury meets the COV definition.³⁶ Citing the Senate Judiciary Committee report for the CCA, which included a footnote suggesting that a crime of violence included misdemeanor simple assault and battery offenses, the BIA determined in a 2002 case that "Congress unequivocally manifested its understanding that assault offenses involving the intentional infliction or threatened infliction of 'injury' or 'bodily harm' . . . have as an inherent element the actual or threatened use of physical force."³⁷ In addition, the BIA cited decisions from

(...continued)

the person of another.").

³¹ 18 U.S.C. § 16.

³² See *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015); *Karimi*, 715 F.3d at 569; *United States v. Rede-Mendez*, 680 F.3d 552, 558 (6th Cir. 2012); *United States v. Haileselassie*, 668 F.3d 1033, 1035 (8th Cir. 2012); *Singh v. Ashcroft*, 386 F.3d 1228, 1233-34 (9th Cir. 2004); *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003); *United States v. Venegas-Ornelas*, 348 F.3d 1273, 1275 (10th Cir. 2003); *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-97 (2d Cir. 2003); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426-27 (5th Cir. 2001).

³³ This report references a significant number of decisions by federal appellate courts of various regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Eleventh Circuit) refer to the U.S. Court of Appeals for that particular circuit.

³⁴ See *United States v. Lewellyn*, 481 F.3d 695, 697-98 (9th Cir. 2007) (noting that common law battery only requires intentional "offensive touching").

³⁵ See *Hernandez v. United States Attorney Gen.*, 513 F.3d 1336, 1340-42 (11th Cir. 2008); *United States v. Griffith*, 455 F.3d 1339, 1342-45 (11th Cir. 2006); *United States v. Parra-Guzman*, 648 Fed.Appx. 974, 976 (11th Cir. Apr. 27, 2016); *United States v. Yanes-Cruz*, 634 Fed.Appx. 247, 252 (11th Cir. Dec. 11, 2015).

³⁶ *Matter of Martin*, 23 I. & N. Dec. 491, 494 (BIA 2002) (overruled by *Matter of Guzman-Polanco*, 26 I. & N. Dec. 713 (BIA 2016)).

³⁷ *Id.* at 494-95 (citing S. REP. NO. 98-225, at 307 (1983)). The Second Circuit rejected this argument in *Chrzanoski v. Ashcroft*, stating that, notwithstanding Congress's expectation, the plain text of 18 U.S.C. § 16 unambiguously requires a crime of violence to involve the use of force, and that, "as the Supreme Court [had] recently stated, 'reference to legislative history is inappropriate when the text of the statute is unambiguous.'" *Chrzanoski*, 327 F.3d at 196 (quoting *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002)); see also *Flores*, 350 F.3d at 671 ("[T]his footnote [to the Senate report] did not purport to disambiguate any statutory language and thus lacks weight on the Supreme Court's view of legislative history's significance").

the First, Eighth, and Ninth Circuits holding that assault offenses involving the intentional infliction of physical injury implicitly have as an element the use of physical force.³⁸

More recently, the BIA reversed course and held that the physical force element of the COV definition requires the *violent* application of force.³⁹ In particular, the BIA cited the Supreme Court's intervening decision in *Johnson v. United States*, which addressed the meaning of a "violent felony" under the ACCA.⁴⁰ Closely resembling the COV definition in 18 U.S.C. § 16, the ACCA definition of "violent felony" applies to a felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another."⁴¹ In *Johnson*, the Court determined that the phrase "physical force" refers to violent force.⁴² Applying the Supreme Court's interpretation of "physical force" under the ACCA, the BIA concluded that aggravated battery under the Puerto Rico penal code did not fall under the federal COV definition because, unlike offenses covered under that definition, the use of violent force was not a required element under the Puerto Rico law.⁴³

To date, the Supreme Court has not directly addressed the meaning of "physical force" under 18 U.S.C. § 16's COV definition.⁴⁴ Nevertheless, in deciding the separate question of whether a crime of violence under 18 U.S.C. § 16 requires a specific mental state, the Supreme Court has observed that the language of that provision "suggests a category of violent, active crimes."⁴⁵ When interpreting the meaning of "physical force" in other similarly worded provisions of the federal criminal code, some federal courts of appeals have construed the Supreme Court's observation to mean that the "physical force" element of the COV definition refers to the violent use of force.⁴⁶

The Required Mental State

Courts have also addressed whether the "use of force" component of the COV definition requires a specific state of mind. Initially, some courts held that a criminal offense involving

³⁸ *Id.* at 496-98 (citing *United States v. Nason*, 269 F.3d 10, 20 (1st Cir. 2001); *United States v. Ceron-Sanchez*, 222 F.3d 1169, 1172-73 (9th Cir. 2000); *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999)). In *Nason* and *Smith*, the First and Eighth Circuits considered the meaning of physical force under 18 U.S.C. § 921(a)(33)(A), a different statutory provision that defines a "misdemeanor crime of domestic violence." In *Ceron-Sanchez*, the Ninth Circuit construed the meaning of "physical force" for purposes of 18 U.S.C. § 16's COV definition; however, the Ninth Circuit later overruled that decision in *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1134-35 (9th Cir. 2006).

³⁹ *Matter of Guzman-Polanco*, 26 I. & N. Dec. at 716 (overruling *Matter of Martin*, 23 I. & N. Dec. 491).

⁴⁰ *Id.* at 715-16 (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

⁴¹ 18 U.S.C. § 924(e)(2)(B)(i).

⁴² *Johnson*, 559 U.S. at 140.

⁴³ *Matter of Guzman-Polanco*, 26 I. & N. Dec. at 718; *see also* *Matter of Velasquez*, 25 I. & N. Dec. 278, 283 (BIA 2010) (holding that an alien's Virginia conviction for assault and battery of a family member was not a crime of domestic violence under the INA because the Virginia statute did not require the use of violent physical force).

⁴⁴ As discussed in more detail later in this report, the Court has considered the meaning of "physical force" as used in other statutes: 18 U.S.C. § 924(e)(2)(B), which defines a "violent felony," and 18 U.S.C. § 921(a)(33)(A), which defines a "misdemeanor crime of domestic violence." *See infra* at 9-12. *See also* *United States v. Castleman*, 134 S. Ct. 1405, 1409-12 (2014); *Johnson*, 559 U.S. at 140-44.

⁴⁵ *Leocal v. Ashcroft*, 543 U.S. 1, 18 (2004).

⁴⁶ *See e.g.*, *Johnson*, 559 U.S. at 140 (interpreting 18 U.S.C. § 924(e)(2)(B)(i)); *United States v. Castleman*, 695 F.3d 582, 587 (6th Cir. 2012) (interpreting 18 U.S.C. § 921(a)(33)(A)) (overruled by *Castleman*, 134 S. Ct. 1405); *United States v. White*, 606 F.3d 144, 153 (4th Cir. 2010) (same); *United States v. Hays*, 526 F.3d 674, 677 (10th Cir. 2008) (same).

recklessness—that is, knowingly creating a serious risk of harm to another person⁴⁷—was sufficient to meet the COV definition.⁴⁸ Other courts, meanwhile, concluded that crimes of violence encompassed only offenses that involved deliberate, intentional acts.⁴⁹ In contrast, a few courts determined that grossly negligent behavior—such as drunk driving—could fall within the statutory COV definition.⁵⁰

In *Leocal v. Ashcroft*, the Supreme Court considered a Haitian national's argument that his Florida conviction for driving under the influence of alcohol (DUI) and causing serious bodily injury did not constitute a crime of violence that rendered him removable under the INA⁵¹ because the Florida DUI statute did not require the *intentional* use of force.⁵² The government had argued that 18 U.S.C. § 16's "use of force" language did not require any specific mental state, and could thus encompass negligent or even inadvertent behavior.⁵³

The Supreme Court in *Leocal* determined whether a DUI offense constituted a crime of violence under either prong of the COV definition. The Court held that the use of force requirement in the first prong of the COV definition, 18 U.S.C. § 16(a), referred to the "active employment" of force and involved "a higher degree of intent than negligent or merely accidental conduct."⁵⁴ The Court also held that, although the second prong of the COV definition, 18 U.S.C. § 16(b), was broader in the sense that it only required a "substantial risk" of force, that provision equally required "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense."⁵⁵ In short, the Court determined that the ordinary meaning of the term "crime of violence," combined with the definitional statute's emphasis on the use of physical force, "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."⁵⁶ The Court warned that to interpret the COV definition to cover accidental or negligent conduct "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened

⁴⁷ See *Slade v. Bd. of Sch. Dirs. of City of Milwaukee*, 702 F.3d 1027, 1029 (7th Cir. 2012) ("The cases generally understand 'recklessness' to mean knowledge of a serious risk to another person, coupled with failure to avert the risk though it could easily have been averted.").

⁴⁸ See *e.g.*, *Park v. INS*, 252 F.3d 1018, 1023-25 (9th Cir. 2001) (ruling that involuntary manslaughter was a crime of violence, and that "a reckless *mens rea* is sufficient for both [18 U.S.C.] § 16(a) and § 16(b)) (overruled by *Fernandez-Ruiz*, 466 F.3d 1121); *Ceron-Sanchez*, 222 F.3d at 1172-73 (holding that aggravated assault involving element of recklessly causing physical injury was a crime of violence) (overruled by *Fernandez-Ruiz*, 466 F.3d 1121).

⁴⁹ See *e.g.*, *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001) (holding that driving while intoxicated is not a crime of violence because "[i]ntentional force against another's person or property is virtually never employed to commit this offense") (emphasis in original); *United States v. Rutherford*, 54 F.3d 370, 374 (7th Cir. 1995) (ruling that driving under the influence and causing serious injury is not a crime of violence because "use of force" does not apply to negligent or reckless criminal acts) (overruled on other grounds by *Begay v. United States*, 553 U.S. 137 (2008)); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (ruling that reckless endangering in the first degree is not a crime of violence under 18 U.S.C. § 16 because it does not involve an intent to use force against other persons), overruled on other grounds by *Begay*, 553 U.S. 137.

⁵⁰ See *e.g.*, *Tapia Garcia v. INS*, 237 F.3d 1216, 1222-23 (10th Cir. 2001) (holding that driving under the influence is a crime of violence because it involves gross negligence or a reckless act that often results in injury); *Le v. United States Attorney Gen.*, 196 F.3d 1352, 1354 (11th Cir. 1999) (concluding that driving under the influence with serious bodily injury is a crime of violence) (abrogated by *Leocal*, 543 U.S. 1).

⁵¹ *Leocal*, 543 U.S. at 3-4; see 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).

⁵² *Leocal*, 543 U.S. at 9.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 10-11.

⁵⁶ *Id.* at 11.

punishment and other crimes.”⁵⁷ The Court, however, left open the question of whether a criminal offense involving the reckless use of force could qualify as a crime of violence.⁵⁸

Following the Supreme Court’s decision in *Leocal*, the federal courts of appeals have confronted whether the COV definition may include offenses involving the reckless use of force. These courts have generally determined that criminal offenses involving recklessness do not fall within the COV definition.⁵⁹ Citing the Supreme Court’s instruction that the use of physical force “requires active employment” rather than *accidental* conduct, reviewing courts have reasoned that recklessness falls into the category of accidental conduct that lies beyond the reach of the COV definition.⁶⁰ While the Supreme Court has not yet addressed whether reckless offenses may constitute crimes of violence under 18 U.S.C. § 16, the Court, as discussed below, has ruled that a reckless offense may constitute a “misdemeanor crime of domestic violence” under 18 U.S.C. § 921(a)(33)(A).⁶¹

Judicial Interpretation of Related Federal Criminal Code Provisions

As courts have been called to interpret the scope of conduct covered by the COV definition in 18 U.S.C. § 16, notable disagreement has arisen regarding the scope of other federal criminal code provisions with similar, but not identical wording. In analyzing the meaning of these related provisions, courts have sometimes looked to the COV definition for guidance and clarification.

Violent Felony

In 1984 Congress passed the ACCA as a component of the CCCA.⁶² The ACCA imposed enhanced penalties on certain firearm offenders who had three previous convictions for robbery or burglary.⁶³ In 1986, Congress amended the ACCA by removing robbery and burglary from the

⁵⁷ *Id.*

⁵⁸ *Id.* at 13.

⁵⁹ See *Jimenez-Gonzalez v. Mukasey*, 548 F.3d 557, 560-61 (7th Cir. 2008) (holding that criminal recklessness conviction based on shooting a firearm into an apartment was not a crime of violence); *United States v. Zuniga-Soto*, 527 F.3d 1110, 1123-24 (10th Cir. 2008) (holding that assaulting a public servant was not a crime of violence because the criminal statute only required recklessness); *United States v. Torres-Villalobos*, 487 F.3d 607, 615-16 (8th Cir. 2007) (holding that second-degree manslaughter was not a crime of violence); *United States v. Portela*, 469 F.3d 496, 499 (6th Cir. 2006) (ruling that reckless vehicular assault was not a crime of violence); *Fernandez-Ruiz*, 466 F.3d at 1129-32 (ruling that a misdemeanor domestic violence conviction was not a crime of violence because the statute imposed liability based on reckless conduct); *Garcia v. Gonzales*, 455 F.3d 465, 468-69 (4th Cir. 2006) (holding that reckless assault in the second degree was not a crime of violence); *Oyebanji v. Gonzales*, 418 F.3d 260, 263-65 (3d Cir. 2005) (holding that vehicular homicide conviction was not a crime of violence because statute only required proof of reckless driving of a motor vehicle); *Tran v. Gonzales*, 414 F.3d 464, 469-72 (3d Cir. 2005) (ruling that reckless burning or exploding was not a crime of violence).

⁶⁰ See e.g., *Jimenez-Gonzalez*, 548 F.3d at 560; *Zuniga-Soto*, 527 F.3d at 1124; *Portela*, 469 F.3d at 499; *Oyebanji*, 418 F.3d at 263-64. But some courts have held that reckless offenses may constitute crimes of violence under 18 U.S.C. § 16(b) if they raise a substantial risk that the perpetrator will intentionally use force during the commission of the crime. See *Baptiste v. Att’y Gen.*, 841 F.3d 601, 612-13 (3d Cir. 2016); *Aguilar v. Att’y Gen. of the United States*, 663 F.3d 692, 699 (3d Cir. 2011) (overruled on other grounds).

⁶¹ *Voisine v. United States*, 136 S. Ct. 2272, 2276, 2279 (2016).

⁶² Armed Career Criminal Act, Pub. L. No. 98-473, tit. II, Ch. 18, 98 Stat. 1837 (1984).

⁶³ *Id.* The ACCA amended the Omnibus Crime Control and Safe Streets Act of 1968. *Id.*; see Pub. L. No. 90-351, 82 Stat. 197 (1968).

list of offenses that warranted enhanced punishment, and providing instead that certain firearm offenders who had three previous convictions for a “violent felony” or “serious drug offense” (or both) were subject to enhanced prison sentences.⁶⁴ The ACCA defines a violent felony to include a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another.”⁶⁵

Severity of Force Necessary to Satisfy the “Physical Force” Element

In *Johnson v. United States*, the Supreme Court considered the meaning of “physical force” under the ACCA’s definition of a violent felony.⁶⁶ Citing 18 U.S.C. § 16’s “very similar” COV definition, the Court held that “physical force” in the ACCA’s violent felony definition refers to “violent force—that is, force capable of causing physical pain or injury to another person.”⁶⁷ The Court determined that, in the context of the violent felony definition, the ordinary meaning of “physical force” suggests “a degree of power that would not be satisfied by the merest touching.”⁶⁸

More recently, the Supreme Court granted a criminal defendant’s petition to review the Eleventh Circuit’s decision in *United States v. Stokeling*. The Eleventh Circuit had held that a robbery conviction under a Florida statute constituted a violent felony under the ACCA even though the offense has been interpreted by state appellate courts to require only slight force to overcome a victim’s resistance to the robbery.⁶⁹ The Supreme Court’s forthcoming decision in that case may provide further guidance with respect to the degree of force required to meet the ACCA’s violent felony definition.

The Required Mental State

While the Supreme Court has considered the physical force element of the ACCA’s violent felony provision, the Court has not specifically addressed the required mental state necessary for a person to commit a violent felony under the ACCA. As discussed above, however, the Supreme Court in *Leocal v. Ashcroft* previously addressed the required mental state for a crime of violence under 18 U.S.C. § 16, holding that a crime of violence involves “a higher degree of intent than negligent or merely accidental conduct.”⁷⁰ Relying on *Leocal* and subsequent jurisprudence interpreting that decision to exclude recklessness from the COV definition, some federal courts of appeals have held, expressly or implicitly, that a violent felony under the ACCA requires the

⁶⁴ Career Criminals Amendment Act, Pub. L. No. 99-570, Sec. 1402, 100 Stat. 3207 (1986).

⁶⁵ 18 U.S.C. § 924(e)(2)(B)(i). The ACCA also contains a “residual clause” that defines a “violent felony” as a felony offense 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.” *Id.* § 924(e)(2)(B)(ii).

⁶⁶ *Johnson*, 559 U.S. at 137-38.

⁶⁷ *Id.* at 140. In doing so, the Court rejected the government’s invitation to look to the common law definition of battery for interpretive guidance of the type of force covered by ACCA’s “violent felony” definition; the government’s interpretation would have covered the application of any unlawful force on another person that is punishable as a misdemeanor or greater offense. *Id.* at 141-42.

⁶⁸ *Id.* at 139, 143-44.

⁶⁹ *United States v. Stokeling*, No. 16-12951, 684 Fed.Appx. 870 (11th Cir. Apr. 6, 2017), *cert. granted*, 138 S. Ct. 1438 (2018) (No. 17-5554); *see also* *United States v. Fritts*, 841 F.3d 937, 943-44 (11th Cir. 2016) (holding that robbery under prior Florida law constituted a violent felony under the ACCA because it required resistance by the victim and the use of force to overcome that resistance).

⁷⁰ *Leocal*, 543 U.S. at 9.

intentional use of force.⁷¹ The Ninth Circuit, for example, has reasoned that, because the first prong of the COV definition “contains an element test that is materially identical” to the language of the violent felony definition, the Supreme Court’s analysis in *Leocal* extends to the ACCA’s violent felony provision.⁷²

Misdemeanor Crime of Domestic Violence

In 1968, Congress passed the Gun Control Act of 1968, which, among other prohibitions, made it unlawful for certain individuals, such as those convicted of felony offenses, “to ship or transport any firearm or ammunition in interstate or foreign commerce.”⁷³ In 1996, Congress amended that legislation by prohibiting the use of firearms by anyone convicted of a “misdemeanor crime of domestic violence.”⁷⁴ Under 18 U.S.C. § 921(a)(33)(A), a misdemeanor crime of domestic violence is defined as a misdemeanor offense that “has, as an element, the use or attempted use of physical force” against a victim in a domestic relationship.⁷⁵ While the jurisprudence concerning the COV definition has guided some reviewing courts in analyzing the scope of the ACCA’s violent felony definition, the Supreme Court and lower courts have generally found the COV definition less relevant to interpreting the misdemeanor crime of domestic violence definition.

Severity of Force Necessary to Satisfy the “Physical Force” Element

Mirroring the litigation over the COV definition, federal appellate courts have examined the meaning of “physical force” under the misdemeanor crime of domestic violence definition.⁷⁶ Eventually, in *United States v. Castleman*, the Supreme Court addressed the meaning of “physical force” under 18 U.S.C. § 921(a)(33)(A).⁷⁷ The Court held that Congress incorporated the

⁷¹ See *United States v. Doctor*, 842 F.3d 306, 311 (4th Cir. 2016) (holding that robbery was a violent felony under the ACCA because “the intentional taking of property, by means of violence or intimidation sufficient to overcome a person’s resistance, must entail more than accidental, negligent, or reckless conduct.”); *United States v. Hudson*, 823 F.3d 11, 17 (1st Cir. 2016) (holding that an assault with a deadly weapon conviction was a violent felony because the offense “requires that the use or threat of physical force be intentional.”); *United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (stating that a violent felony’s “use of force must be intentional, not just reckless or negligent.”); *United States v. McMurray*, 653 F.3d 367, 373-74 (6th Cir. 2011) (holding that, because 18 U.S.C. § 16(a)’s “use of force” clause “is in relevant part identical to the ‘use of force’ clause of the ACCA,” the use of physical force under the ACCA “requires more than reckless conduct.”); *United States v. Lawrence*, 627 F.3d 1281, 1283-84 (9th Cir. 2010) (“We also are cognizant that, to qualify as defining a violent felony, a state statute must require that the physical force be inflicted intentionally, as opposed to recklessly or negligently.”) (overruled on other grounds).

⁷² *Lawrence*, 627 F.3d at 1284 n. 3.

⁷³ Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1214 (1968) (codified at 18 U.S.C. § 922(g)).

⁷⁴ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009 (1996) (codified at 18 U.S.C. § 922(g)(9)).

⁷⁵ 18 U.S.C. § 921(a)(33)(A).

⁷⁶ For example, the Fourth, Sixth, Ninth and Tenth Circuits have held that, under this definition, “physical force” refers to the violent use of force, and these courts have cited jurisprudence narrowly interpreting 18 U.S.C. § 16’s arguably similar language to support that conclusion. See *United States v. Castleman*, 695 F.3d 582, 586-89 (6th Cir. 2012), *rev’d*, 134 S. Ct. 1405 (2014); *United States v. White*, 606 F.3d 144, 153 (4th Cir. 2010); *United States v. Hays*, 526 F.3d 674, 677 (10th Cir. 2008); *United States v. Belless*, 338 F.3d 1063, 1067-68 (9th Cir. 2003) (citing *Leocal*’s construction of the crime of violence provision as referring to “violent, active crimes”). In contrast, the First, Fifth, Eighth, and Eleventh Circuits have favored a more literal and expansive interpretation of “physical force,” and held that any unlawful physical contact meets the “misdemeanor crime of domestic violence” definition. *United States v. Griffith*, 455 F.3d 1339, 1342-45 (11th Cir. 2006); *United States v. Shelton*, 325 F.3d 553, 561 (5th Cir. 2003); *United States v. Nason*, 269 F.3d 10, 18 (1st Cir. 2001); *United States v. Smith*, 171 F.3d 617, 621 n. 2 (8th Cir. 1999).

⁷⁷ *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014).

common law definition of “physical force”—any offensive touching—into the statutory definition of a misdemeanor crime of domestic violence.⁷⁸ The Court determined that “[t]he very reasons [it] gave for rejecting that meaning in defining a ‘violent felony’ are reasons to embrace it in defining a ‘misdemeanor crime of domestic violence.’”⁷⁹ The Court reasoned that, because domestic violence offenders are typically prosecuted under general assault or battery laws (which would cover relatively minor misdemeanor assaults), Congress likely intended to incorporate the common law’s “misdemeanor-specific meaning” of “force” into the misdemeanor crime of domestic violence definition.⁸⁰ Additionally, the Court noted, while the word “violent” or “violence” standing alone suggests the substantial use of force, “domestic violence” covers “acts that one might not characterize as ‘violent’ in a nondomestic context.”⁸¹

The *Castleman* Court also observed that the BIA and the majority of the federal courts of appeals have construed the “physical force” component of the COV definition as involving more than offensive contact—consistent with the Supreme Court’s construction of the “physical force” element of the ACCA’s violent felony definition.⁸² Significantly, the Court declared that its determination that a misdemeanor crime of domestic violence includes any offensive touching did not call these prior decisions into question because “‘domestic violence’ encompasses a range of force broader than that which constitutes ‘violence’ *simpliciter*.”⁸³ In other words, while the Court concluded that any offensive physical contact might constitute “domestic violence,” the Court did not suggest that such contact would necessarily be considered “violence” in other contexts.

The Required Mental State

Apart from the element of “physical force,” the Supreme Court has also addressed the required mental state necessary for a person to commit a misdemeanor crime of domestic violence. Specifically, in *Voisine v. United States*, the Court considered whether a misdemeanor assault conviction for reckless conduct constitutes a misdemeanor crime of domestic violence.⁸⁴ The Court held that reckless misdemeanor assaults fall within the definition of a misdemeanor crime of domestic violence, reasoning that the active employment of force only requires a volitional motion, but “does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so.”⁸⁵ Accordingly, the Court determined that the use of force “is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.”⁸⁶ Further, citing *Leocal*, the Court distinguished reckless behavior from “merely accidental” conduct.⁸⁷ Unlike accidents, the Court explained, reckless acts

⁷⁸ *Id.* at 1410.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1411.

⁸¹ *Id.* The Court explained that, although relatively minor uses of force such as pushing, grabbing, shoving, slapping, hitting, and squeezing “may not constitute ‘violence’ in the generic sense,” they could easily be described as “domestic violence,” and if such acts can result in a prosecution for a misdemeanor offense, “it does not offend common sense or the English language to characterize the resulting conviction as a ‘misdemeanor crime of domestic violence.’” *Id.* at 1412.

⁸² *Id.* at 1411 n. 4.

⁸³ *Id.*

⁸⁴ *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016).

⁸⁵ *Id.* at 2279.

⁸⁶ *Id.*

⁸⁷ *Id.* at 2279-80.

are “undertaken with awareness of their substantial risk of causing injury,” and stem from “a deliberate decision to endanger another.”⁸⁸

Implications for 18 U.S.C. § 16’s Crime of Violence Definition

The Supreme Court’s construction of the violent felony and misdemeanor crime of domestic violence definitions may offer guidance with respect to the proper interpretive scope of the COV definition. As discussed *infra*, the Supreme Court’s jurisprudence concerning the “residual clause” of the ACCA’s violent felony definition informed the Court’s determination in *Dimaya v. Sessions* that the second prong of the COV definition, as incorporated into the INA, was unconstitutionally vague.⁸⁹ But Court jurisprudence on the violent felony and misdemeanor crime of domestic violence definitions may be relevant to the construction of the COV definition in other ways as well. For example, the Supreme Court’s ruling in *Johnson* that “physical force” refers to the violent application of force, for purposes of the ACCA’s violent felony definition, suggests that the “very similar” COV definition under 18 U.S.C. § 16 would likewise require an offense to involve a substantial degree of force in order to satisfy that definition.⁹⁰ In addition, the Supreme Court’s observation in *Castleman* that the word “violence,” by itself, suggests a greater degree of force than a “misdemeanor crime of domestic violence” indicates that a “crime of violence” under 18 U.S.C. § 16 is more closely aligned with the ACCA’s violent felony definition than with the federal definition of a misdemeanor crime of domestic violence.⁹¹

With regard to the requisite mental state for a crime of violence, aspects of the Court’s decision in *Voisine* recognizing that a reckless assault may satisfy the definition of a misdemeanor crime of violence suggest that the Court would not necessarily deem reckless acts to satisfy the COV definition. In particular, the *Voisine* Court cautioned that its decision “does not resolve whether § 16 includes reckless behavior,” and the Court further noted that lower courts have sometimes given the COV and misdemeanor crime of domestic violence definitions “divergent readings in light of differences in their contexts and purposes.”⁹²

Constitutional Challenges to the Second Prong of the Crime of Violence Definition

In addition to considering the degree of physical force that must be employed and the mental state required for an offense to constitute a crime of violence, courts have also considered a more fundamental question—is the COV definition unconstitutionally vague? The Fifth Amendment’s

⁸⁸ *Id.* at 2279.

⁸⁹ See *Johnson v. United States*, 135 S. Ct. 2551, 2557-58 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018).

⁹⁰ *Johnson*, 559 U.S. at 140.

⁹¹ See *Castleman*, 134 S. Ct. at 1411. Although the majority of federal appellate courts to have considered the issue have limited “physical force” to violent force for purposes of 18 U.S.C. § 16, there has been disagreement as to what constitutes violent force itself. For example, courts have reached different conclusions as to whether causing death or serious injury through indirect means (such as poisoning) necessarily involves the violent use of physical force. Compare *Whyte v. Lynch*, 807 F.3d 463, 469-71 (1st Cir. 2015); *United States v. Torres-Miguel*, 701 F.3d 165, 168-70 (4th Cir. 2012) (overruled on other grounds); *United States v. Cruz-Rodriguez*, 625 F.3d 274, 276-77 (5th Cir. 2010) (holding that violent force requires the actual and direct use of force, and that it is not enough that the act cause physical injury or death); *with* *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016); *De Leon Castellanos v. Holder*, 652 F.3d 762, 765-67 (7th Cir. 2011) (ruling that indirect application for force may constitute violent force if it results in bodily injury).

⁹² *Voisine*, 136 S. Ct. at 2280 n. 4.

Due Process Clause⁹³ requires that a criminal statute define an offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁹⁴ In recent years, several courts considered whether 18 U.S.C. § 16’s COV definition, as incorporated into the INA and other statutes carrying penalties or other negative consequences for a covered individual, sufficiently meets the specificity standard under the Due Process Clause.⁹⁵

In 2018, the Supreme Court in *Dimaya v. Sessions* ruled that the second prong of the COV definition, as incorporated in the INA, is unconstitutionally vague.⁹⁶ In *Dimaya*, a lawful permanent resident (Dimaya) challenged his order of removal that was predicated on a finding that his burglary conviction constituted a crime of violence under the second prong of the COV definition, 18 U.S.C. § 16(b), which covers “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 any offense.”⁹⁷ In his petition for review to the Ninth Circuit, Dimaya argued that 18 U.S.C. § 16(b) is unconstitutionally vague because it has no standard to determine whether a criminal offense carries a “substantial risk” of physical force.⁹⁸

While Dimaya’s case was pending in the Ninth Circuit, the Supreme Court in *Johnson v. United States* (not to be confused with the Supreme Court’s 2010 *Johnson* decision discussed *supra*, which addressed the meaning of “physical force” under the ACCA) held that a similarly worded provision of the ACCA, which was employed for the purpose of imposing increased prison sentences on certain firearm offenders convicted of a “violent felony,” was unconstitutionally vague.⁹⁹ Specifically, the ACCA’s multi-pronged violent felony definition included a provision covering a felony offense that

[I]s burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.¹⁰⁰

In *Johnson*, the Supreme Court addressed the constitutionality of the “residual clause” of this definition (italicized above).¹⁰¹ In doing so, the Court observed that, under the “categorical approach,” a court may look only to the statutory elements of an offense, rather than the facts underlying a conviction, to determine whether the crime meets the definition of a violent felony.¹⁰² Given the limitations of this approach, the Court determined that the ACCA’s residual clause “leaves grave uncertainty” about how to estimate the risk ordinarily posed by a crime.¹⁰³

⁹³ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

⁹⁴ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted).

⁹⁵ See *Dimaya v. Lynch*, 803 F.3d 1110, 1112 (9th Cir. 2015); *Baptiste v. Att’y Gen.*, 841 F.3d 601, 615 (3d Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440, 442–43 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015); *Golicov v. Lynch*, 837 F.3d 1065, 1067 (10th Cir. 2016); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 673 (5th Cir. 2016). See also 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii) (rendering aliens removable based on a conviction for an aggravated felony, including a crime of violence for which the term of imprisonment is at least one year).

⁹⁶ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1216 (2018).

⁹⁷ *Dimaya*, 803 F.3d at 1111; 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).

⁹⁸ *Dimaya*, 803 F.3d at 1112.

⁹⁹ *Johnson v. United States*, 135 S. Ct. 2551, 2557–58 (2015).

¹⁰⁰ 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).

¹⁰¹ *Johnson*, 135 S. Ct. at 2556.

¹⁰² *Id.* at 2557 (citing *Taylor*, 495 U.S. at 600).

¹⁰³ *Id.* The Court reasoned that, in analyzing under the categorical approach whether a criminal offense constitutes a violent felony, a court – confined strictly to the language of a criminal statute – is required “to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential (continued...)”

The Court also determined that the residual clause offers no practicable way to measure the level of risk required to meet the “serious potential risk” threshold.¹⁰⁴ The Court thus held that the residual clause “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”¹⁰⁵

The Ninth Circuit granted Dimaya’s petition for review, and held that the second prong of the COV definition, which rendered Dimaya’s burglary conviction an aggravated felony that made him removable, was unconstitutionally vague.¹⁰⁶ The circuit court concluded that the Supreme Court’s holding in *Johnson* concerning the ACCA’s residual clause “applies with equal force to the similar statutory language and identical mode of analysis used” by the second prong of the COV definition.¹⁰⁷ Apart from the Ninth Circuit, the Third, Sixth, Seventh, and Tenth Circuits had also held that 18 U.S.C. § 16(b)’s COV definition is unconstitutionally vague in light of *Johnson*.¹⁰⁸ The Fifth Circuit, however, rejected a vagueness challenge to 18 U.S.C. § 16(b).¹⁰⁹

Given the circuit split over the constitutionality of the second prong of the COV definition, the Supreme Court granted the government’s petition to review the Ninth Circuit’s decision in *Dimaya*.¹¹⁰ Citing *Johnson* as “a straightforward decision, with equally straightforward application here,” the Court determined that 18 U.S.C. § 16(b) suffers from the same “constitutionally problematic” features that infected the ACCA’s residual clause struck down in

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risk of physical injury.” *Id.* The Court determined that linking “the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime,” without resort to the underlying facts of a criminal conviction, would rely largely on speculation. *Id.* at 2557-58.

¹⁰⁴ *Id.* at 2558. The Court explained that “[i]t is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.” *Id.* The Court further observed that, in assessing whether a crime presents a “serious potential risk,” reviewing courts are forced to interpret that standard in light of the four enumerated crimes listed in the second prong of the ACCA’s violent felony definition – burglary, arson, extortion, and crimes involving the use of explosives – each of which “are ‘far from clear in respect to the degree of risk each poses.’” *Id.* (quoting *Begay*, 553 U.S. at 143).

¹⁰⁵ *Id.*

¹⁰⁶ *Dimaya*, 803 F.3d at 1115.

¹⁰⁷ *Id.* The court reasoned that 18 U.S.C. § 16(b), like its ACCA counterpart found unconstitutionally vague by the Supreme Court in *Johnson*, requires a “judicially imagined” assessment of whether the conduct involved in a criminal offense, “in the ordinary case,” presents a substantial risk of physical force, and that 18 U.S.C. § 16(b) offers no guidance as to when a risk is sufficiently “substantial” to satisfy the COV definition. *Id.* at 1115-17.

¹⁰⁸ *Golicov v. Lynch*, 837 F.3d 1065, 1072, 1075 (10th Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440, 441, 451 (6th Cir. 2016); *Baptiste v. Att’y Gen.*, 841 F.3d 601, 621 (3d Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 720, 723 (7th Cir. 2015). As the Ninth Circuit did in *Dimaya*, these other circuit courts cited the textual similarities between the ACCA’s residual clause and 18 U.S.C. § 16(b), and concluded that both provisions shared the same uncertainties involved in estimating the risk ordinarily posed by a crime and the level of risk that would be required to meet the applicable statutory definition. *Golicov*, 837 F.3d at 1072-73; *Shuti*, 828 F.3d at 446-47; *Baptiste*, 841 F.3d at 617-18; *Vivas-Ceja*, 808 F.3d at 722-23.

¹⁰⁹ *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677-78 (5th Cir. 2016). The court, sitting en banc, determined that evaluating whether a crime involves a substantial risk of physical force, as 18 U.S.C. § 16(b) requires, is a “notably more narrow” inquiry than “imputing clairvoyance as to a potential risk of injury” resulting from the crime under the ACCA’s residual clause. *Id.* at 676-77. The court also noted that, unlike the ACCA’s residual clause, 18 U.S.C. § 16(b) does not require courts to determine the necessary level of risk in light of a “confusing list of examples” of enumerated crimes. *Id.* at 677.

¹¹⁰ *Lynch v. Dimaya*, No. 15-1498, 137 S. Ct. 31 (2016).

Johnson.¹¹¹ Given these concerns, the Court concluded that 18 U.S.C. § 16(b) is unconstitutionally vague.¹¹²

The Court also rejected the government's contention that 18 U.S.C. § 16(b)'s "distinctive textual features" rendered it less susceptible to vagueness concerns than its ACCA counterpart found unconstitutional in *Johnson*.¹¹³ The Court determined that, although 18 U.S.C. § 16(b) temporally limits its analysis to the risk of force arising "in the course of committing any offense," this language made no meaningful difference because analyzing a crime's inherent risk is already limited to what usually happens during its commission.¹¹⁴ The Court also recognized that 18 U.S.C. § 16(b) focuses on the risk of "physical force" rather than "physical injury" as is the case with the ACCA's violent felony definition, but the Court found no significant distinction because both standards require a court to gauge a crime's potential consequences.¹¹⁵ Finally, the Court noted, although 18 U.S.C. § 16(b) is not preceded by a list of enumerated crimes like the ACCA's residual clause, the absence of such a list is immaterial because the textually indeterminate features of 18 U.S.C. § 16(b) remain.¹¹⁶

In striking down the second prong of the federal COV definition, the Supreme Court has potentially narrowed the scope of criminal offenses that would render an alien subject to removal.¹¹⁷ Courts have previously interpreted 18 U.S.C. § 16(b) to cover a wide range of offenses such as first-degree manslaughter,¹¹⁸ kidnapping,¹¹⁹ lewd and lascivious acts upon a child,¹²⁰ sexual assault,¹²¹ burglary,¹²² aggravated fleeing,¹²³ and assault on a police officer.¹²⁴ While many of these offenses may still constitute removable offenses under the INA,¹²⁵ there may

¹¹¹ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018).

¹¹² *Id.* at 1216.

¹¹³ *Id.* at 1216, 1218.

¹¹⁴ *Id.* at 1219.

¹¹⁵ *Id.* at 1220-21.

¹¹⁶ *Id.* at 1221. In an opinion concurring in part and concurring in the judgment, Justice Gorsuch agreed that, because 18 U.S.C. § 16(b) "uses almost exactly the same language as the [ACCA's] residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment." *Id.* at 1224 (Gorsuch, J., concurring). Justice Gorsuch opined, however, that the vagueness doctrine should extend to all civil statutes – not just the civil immigration law at issue in the case – because many civil laws impose "similarly severe sanctions" as those imposed by the INA. *Id.* at 1228-31 (Gorsuch, J., concurring).

¹¹⁷ See 8 U.S.C. §§ 1101(a)(43)(F) (defining aggravated felony to include a crime of violence for which the term of imprisonment is at least one year), 1227(a)(2)(A)(iii) (providing that an alien who has been convicted of an aggravated felony at any time after admission is subject to removal), 1227(a)(2)(E)(i) (rendering aliens subject to removal if they have been convicted of a crime of domestic violence after admission, and defining crime of domestic violence as a crime of violence against a person in a domestic relationship with the victim).

¹¹⁸ *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159, 168-73 (2d Cir. 2006).

¹¹⁹ *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1133 (9th Cir. 2012).

¹²⁰ *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 860 (9th Cir. 2013).

¹²¹ *Aguiar v. Gonzales*, 438 F.3d 86, 91 (1st Cir. 2006).

¹²² *United States v. Avila*, 770 F.3d 1100, 1107 (4th Cir. 2014).

¹²³ *Dixon v. U.S. Att'y Gen.*, 768 F.3d 1339, 1345-46 (11th Cir. 2014).

¹²⁴ *Blake v. Gonzales*, 481 F.3d 152, 162 (2d Cir. 2007).

¹²⁵ For example, an alien's criminal conviction could still fall within 18 U.S.C. § 16(a)'s elements-based prong of the COV definition, or one of the other enumerated categories of aggravated felonies that render an alien subject to removal, such as rape, sexual abuse of a minor, certain firearm-related crimes, and felony theft and burglary offenses. See 8 U.S.C. § 1101(a)(43). In the alternative, immigration authorities may pursue other grounds of removability for aliens who were formerly removable under 18 U.S.C. § 16(b), such as those predicated on convictions for crimes involving moral turpitude, controlled substance offenses, certain firearm offenses, stalking, and child abuse. See 8 (continued...)

be some types of criminal conduct that would only fall within the second prong of the COV definition.¹²⁶ Beyond the immigration context, the *Dimaya* Court's ruling potentially impacts many other criminal and civil statutes that expressly incorporate the COV definition.¹²⁷ Therefore, the Court's decision in *Dimaya* may have significant consequences for those subject to the heightened criminal penalties and other legal consequences resulting from the commission of a crime of violence.¹²⁸

Conclusion

When Congress passed the CCCA in 1984, it intended to create a clear definition of a crime of violence—a definition that could be readily applied for purposes of defining certain criminal offenses and imposing mandatory prison sentences.¹²⁹ And following codification of the COV definition, Congress expressly incorporated that language into a number of other federal statutes, including the INA.¹³⁰ Over the last few decades, however, courts have grappled over the scope of the COV definition, occasionally resulting in divergent interpretations. To add to the quandary, the Supreme Court has now struck down as unconstitutionally vague the second prong of the COV definition, raising new questions concerning 18 U.S.C. § 16's already contested scope and application.¹³¹

Regardless of how the courts construe the federal COV definition, it is within Congress's power to amend that definition to clarify or alter its scope. For example, Congress could, if it believes such an approach is warranted, provide clarification with respect to the degree of force that a crime of violence requires; whether a crime of violence requires a specific state of mind; and the

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U.S.C. § 1227(a)(2)(A)(i), (A)(ii), (B)(i), (C), (E)(i). *See also* *Torres v. Lynch*, 136 S. Ct. 1619, 1636-37 (2016) (Sotomayor, J., dissenting) (observing that the "overlapping structure" of the INA "as a whole ensures that serious criminal conduct is adequately captured").

¹²⁶ Following the Court's ruling in *Dimaya*, the Department of Homeland Security asserted that the Supreme Court's decision "significantly undermines" the agency's efforts to remove certain categories of aliens with violent crime convictions. Press Release, Dep't of Homeland Sec., DHS Press Secretary Statement on *Sessions v. Dimaya* (Apr. 17, 2018).

¹²⁷ *See e.g.*, 18 U.S.C. §§ 25(b) (prohibiting the use of a minor to commit a crime of violence), 842(p)(2) (prohibiting the teaching or demonstration of the making or use of an explosive device with the intent that such information be used for a crime of violence), 1959(a) (making it unlawful to receive anything of pecuniary value from an enterprise engaged in racketeering activity in exchange for threatening to commit a crime of violence against an individual), 2250(d)(1) (imposing increased prison sentence on a person who fails to register as a sex offender and commits a crime of violence); 20 U.S.C. § 1232g(b)(6) (authorizing a postsecondary educational institution to disclose the results of a disciplinary proceeding against a student who allegedly committed a crime of violence). The Court's decision in *Dimaya* also calls into question the viability of 18 U.S.C. § 924(c)(3)(B), which imposes mandatory minimum sentences for people who use or carry a firearm during the commission of a "crime of violence," and employs an identical COV definition as 18 U.S.C. § 16(b). *See also* *Petition for Writ of Certiorari, Sessions v. Dimaya* (No. 15-1498), at 30 (arguing that an invalidation of 18 U.S.C. § 16(b) "create[s] a cloud of uncertainty over the lawfulness of criminal prosecutions and sentencing enhancements" under federal law).

¹²⁸ *See Dimaya*, 138 S. Ct. at 1259 (Thomas, J., dissenting) (warning that Court's decision could "lead[] to the invalidation of scores of similarly worded state and federal statutes").

¹²⁹ S. REP. NO. 98-225, at 307 (1983); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 203, 98 Stat. 1837 (1984).

¹³⁰ *See e.g.*, 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), 1227(a)(2)(E)(i).

¹³¹ *Dimaya*, 138 S. Ct. at 1216.

circumstances in which a criminal offense may constitute a crime of violence in the absence of the actual (or threatened or attempted) application of physical force. Alternatively, Congress could simply limit the scope of the COV definition to certain enumerated types of inherently violent crimes such as robbery, arson, manslaughter, aggravated assault, or forcible sex crimes. Conversely, in shaping the scope of the COV definition, Congress could set forth the types of offenses that would *not* constitute crimes of violence.

In any event, while the creation of a statutory definition of a crime of violence in 1984 did not result in a uniform judicial interpretation of the term in the decades that followed, Congress has the power to alter or clarify the statutory definition to resolve some ambiguities that have arisen regarding the term's meaning.

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