PRACTICE ADVISORY

Sessions v. Dimaya: Supreme Court strikes down 18 U.S.C. § 16(b) as void for vagueness

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Introduction

On April 17, 2018, in *Sessions v. Dimaya*, __ U.S. __, No. 15-1498 (April 17, 2018), the U.S. Supreme Court considered the constitutionality of 18 U.S.C. §16(b), which defines a crime of violence and is cross-referenced in the Immigration and Nationality Act's ("INA") aggravated felony definition. For decades, the federal government has shifted the playing field for noncitizens in removal proceedings by invoking this amorphous and speculative statute, which was often applied unpredictably and unevenly to expand the aggravated felony "crime of violence" ground to preclude relief eligibility for many groups of noncitizens in the United States, including lawful permanent residents, undocumented individuals, individuals seeking family unification, domestic violence survivors, and individuals seeking asylum. The Court ruled that 18 U.S.C. §16(b) fails to meet the minimum test for fairness and due process under the law and is, therefore, unconstitutional. As a result, Mr. Dimaya, a permanent resident for 25 years, alongside countless other noncitizens like him, will finally have a fair day in court.

Going forward, the government may charge noncitizens convicted of certain offenses previously deemed to be §16(b) crimes of violence, such as burglary, residential trespass, statutory rape, and fleeing from an officer, as removable under alternative grounds, including 18 U.S.C. §16(a) crime of violence and crimes involving moral turpitude. In such cases, practitioners should hold the government to the requirements of the elements-based categorical approach most recently affirmed in *Mathis v. United States*, 136 S. Ct. 2243 (2016). The government very well may not prevail under the rigors of the categorical approach, which it previously escaped by looking to §16(b).

In this advisory, we review the Supreme Court's decision in *Dimaya* (see Section I) and what the decision may mean for others charged with other similarly nebulous removal grounds (see Section II). We also discuss suggested strategies and provide a sample motion to reconsider for cases affected by *Dimaya*, which should be filed **by May 17, 2018**. (see Section III).

I. THE *DIMAYA* DECISION

A. Brief Summary of the Case

James Garcia Dimaya is a lawful permanent resident who has resided in the United States since 1992. After being convicted twice of burglary under a California statute, he was placed in removal proceedings. Both an Immigration Judge ("IJ") and the Board of Immigration Appeals ("BIA") found that Mr. Dimaya's burglary convictions constituted aggravated felonies under the INA §101(a)(43)(F) "crime of violence" ground. Specifically, the BIA found that the burglary convictions qualified as "crimes of violence" under the cross-referenced 18 U.S.C. §16 "crime of violence" definition's residual clause subsection (b), which reaches any offense "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."

Mr. Dimaya appealed the agency's removal order to the Ninth Circuit Court of Appeals, which overruled the agency and held that §16(b), as incorporated into the INA, is unconstitutionally vague. *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015). The Ninth Circuit relied on the Supreme Court's decision in *Johnson v. U.S.*, 135 S.Ct. 2551 (2015), which had struck down as void for vagueness a similar provision in the Armed Career Criminal Act ("ACCA"). The Ninth Circuit concluded: "As with ACCA, section 16(b) . . . requires courts to 1) measure the risk by an indeterminate standard of a 'judicially imagined ordinary case,' not by real-world facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson*, these uncertainties render the INA provision unconstitutionally vague." *Dimaya*, 803 F.3d at 1120.

The government then petitioned for certiorari to the Supreme Court, which granted certiorari and accepted the case for review in 2016. After presumably deadlocking 4-4 last term on whether to affirm or reverse the Ninth Circuit's judgment (the Court was down one Justice last term after Justice Scalia passed away and before a replacement was nominated and confirmed), the Court restored the case to the calendar for re-argument this term after replacement Justice Gorsuch joined the Court. Re-argument was held on October 2, 2017.

B. Supreme Court Holding – 16(b) Residual Clause Portion of Title 18 "Crime of Violence" Definition Cross-Referenced in INA Aggravated Felony Definition Is Impermissibly Vague under the U.S. Constitution

In its April 17 decision, by a 5-4 vote, the Supreme Court affirmed the judgment of the Ninth Circuit and held that the subsection (b) portion of the 18 U.S.C. §16 "crime of violence" definition, as cross-referenced in the INA "aggravated felony" definition, is impermissibly vague in violation of the U.S. Constitution's due process clause.

1. INA aggravated felony definition and cross-referenced 18 U.S.C. §16 crime of violence definition

Justice Kagan, writing for the Court, began by pointing out the mandatory deportation consequences for most noncitizens of being deemed convicted of an "aggravated felony" under the INA. Slip. op. 1-2 ("removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here").

The INA at §101(a)(43)(F) defines "aggravated felony" to include a "crime of violence," as defined in the federal criminal law at 18 U.S.C. §16, which covers

(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.

The Court referred to subsection (a) of this federal criminal definition as the "elements clause" and subsection (b) as the "residual clause." Slip op. 2.

The Court explained that, to determine whether a person's conviction falls within 18 U.S.C. §16(b)'s residual clause, which was the clause at issue in the *Dimaya* case, courts use "a distinctive form of what we have called the categorical approach." Slip op. 2. The Court noted that the form of the categorical approach used to determine whether a prior conviction is for a particular listed offense, e.g. murder or arson, asks "what the elements of a given crime always require." Slip op. 2, n.1 (citing *Descamps v. United States*, 570 U.S. 254, 260–261 (2013); *Moncrieffe v. Holder*, 569 U.S. 184, 190–191 (2013). In contrast, the Court stated the §16(b) residual clause requires a court to ask "whether '*the ordinary case*' of an offense poses the requisite risk." Slip op. 3 (quoting *James v. United States*, 550 U.S. 192, 208 (2007)) (emphasis added).

2. Standard of vagueness in deportation law context

Before addressing the question of whether the 18 U.S.C. §16(b) residual clause is impermissibly vague, the Court first discussed the constitutional due process prohibition against vagueness in criminal statutes and whether and to what extent it applied in the deportation law context. The Court's five-Justice majority found that this "void-for-vagueness doctrine" does apply in the deportation law context as it does in the criminal law context. However, Justice Kagan's opinion for four Justices and Justice Gorsuch's concurring opinion, providing the crucial fifth vote, arrived there in different ways.

Justice Kagan, writing on this issue for herself and Justices Breyer, Ginsburg and Sotomayor, stated that the void-for-vagueness doctrine, as it has been applied to criminal statutes, guarantees that ordinary people have "fair notice" of the conduct a statute proscribes and 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. Slip op. 4-5. Kagan then rejected the government's argument that a less rigorous form of the void-for-vagueness doctrine applied to deportation or removal laws:

> . . . 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 definite." That provision, we noted, "is not a criminal statute" (as §16(b) actually is). Still, we chose to

> test (and ultimately uphold) it "under the established criteria of the 'void for vagueness' doctrine" applicable to criminal laws. That approach was demanded, we explained, "in view of the grave nature of deportation,"—a "drastic measure," often amounting to lifelong "banishment or exile."
>
> 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." 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." What follows, as *Jordan* recognized, is the use of the same standard in the two settings.

Slip op. 5-6 (citations omitted).

Justice Gorsuch, on the other hand, did not rely on the particularly severe consequences of deportation, but instead found that the void-for-vagueness doctrine applies to all statutes "affecting a person's life, liberty or property," J. Gorsuch, slip op. 4, whether criminal or civil. Justice Gorsuch wrote:

> . . . 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." 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." 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.

J. Gorsuch, slip op. 10 (citations omitted).

Justice Gorsuch rejected the government's call at least for a less-than-fair-notice standard for civil cases, pointing out that the Court has made clear that due process protections against vague laws are not determined by whether a law is found in the civil or criminal part of the statute books. J. Gorsuch, slip op. 10. Then, focusing specifically on the removal proceedings context, Gorsuch stated that, once the government affords a noncitizen like Mr. Dimaya lawful permanent residency in this country, the government has extended to him a statutory liberty interest to remain in and move about the country free from physical imprisonment and restraint. J. Gorsuch, slip op. 13-14. Thus, Gorsuch concluded, whatever processes are in general due such an individual before he may be deprived of his liberty, "it's hard to fathom why fair notice of the law—the most

venerable of due process's requirements—would not be among them." J. Gorsuch, slip op. 14.

3. 18 U.S.C. §16(b) is vague because of the same two infirmities as ACCA residual clause

The majority found that "a straightforward application of *Johnson*" effectively "resolve[s] this case." Slip op. 6, 24. In *Johnson*, the Court singled out two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." Slip op. 7:

First, in order to determine the risk posed by the crime, the residual clause "requires a court to picture the kind of conduct that the crime involves 'in the ordinary case.'" *Johnson*, 135 S.Ct. at 2557. The Court condemned the ACCA's residual clause for asking judges "to imagine how the *idealized ordinary case* of the crime plays out." *Id.* at 2557-58. To illustrate its point, the Court asked rhetorically, "how does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Id.* at 2257-58 (internal citation omitted). The residual clause itself offered no "reliable way to choose between . . . competing accounts of what" constitutes an "ordinary case." *Id.* The Supreme Court thus found that the process of identifying the "ordinary case" rather than "real-world facts" created "grave uncertainty." Slip op. 7.

Second, compounding that uncertainty, ACCA's residual clause layered an imprecise "serious potential risk" standard on top of the requisite "ordinary case" inquiry. Slip op. 8. 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," resulted in "more unpredictability and arbitrariness than the Due Process Clause tolerates." Slip op. 8.

The Court found that §16(b) suffers from those same two flaws. Like ACCA's residual clause, §16(b) requires the court to identify a crime's "ordinary case" in order to measure the crime's risk, but "nothing in §16(b) helps courts to perform that task." Slip op. 9. Justice Gorsuch, in his concurrence, sketched out the guesswork involved in the inquiry by walking through the questions a judge looking to apply the statute would 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.

J. Gorsuch, slip op. 16.

And the Court found that §16(b)'s "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. Slip op. 11.

In holding so, the Court debunked the government's arguments. The government pointed to three textual discrepancies between ACCA's residual clause and §16(b), arguing that they make §16(b) significantly easier to apply. The Court found that each of those discrepancies was a "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." Slip op. 16.

First, the Government argued that §16(b)'s express requirement (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. But the Court found that this is not a meaningful limitation, that "[i]n the ordinary case of any offense, the riskiness of a crime arises from events occurring *during* its commission, not events occurring later. Slip op. 17. 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. *See* Slip op. 18 ("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."). The Court concluded that 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 said that the §16(b) inquiry, which focuses on the risk of "physical force," looks "solely" at the conduct typically involved in a crime, which by the government's logic makes the inquiry easier to administer. Slip op. 19. In contrast, because ACCA's residual clause asked about the risk of "physical injury," the court had to look first at the conduct typically involved in the crime and second "speculate about a chain of causation that could possibly result in a victim's injury." But the Court in *Dimaya* found that this force/injury distinction does not clarify a court's analysis of whether a crime qualifies as violent. The Court reasoned that because it's prior precedent in *Johnson v. United States*, 559 U. S. 133, 140 (2010), made clear that "physical force" is defined as "force capable of causing physical pain or injury," §16(b), as with the ACCA, requires a court to not only identify the conduct typically involved in a crime, but also gauge its potential consequences (i.e., the risk of injury).

Third, the Government argued that §16(b) avoids the vagueness of ACCA's residual clause because it is not preceded by a "confusing list of exemplar crimes." The Court agreed that those enumerated crimes were in fact too varied to assist the Court in giving ACCA's residual clause meaning. But "to say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem." Slip op. 21.

Lastly, the Government argued that because §16(b) has divided lower courts less often and resulted in only one certiorari grant, it must be clearer than its ACCA counterpart. But the Court rejoined that in fact a host of issues respecting §16(b)'s application to specific crimes divide the federal appellate courts. Slip op. 22 (citing to Brief of NIPNLG, IDP, *et al*. as *Amici Curiae* 7–18). The Court also reminded that government that it had vacated and remanded the judgments in a number of other §16(b) cases in light of ACCA decisions.

II. OTHER STATUTES POTENTIALLY VOID FOR VAGUENESS UNDER *JOHNSON* AND *DIMAYA*

This section covers a few select statutes, but not the full panoply of statutes where vagueness may be a concern.

A. Potential Impact of Gorsuch's Limitation on the Holding

After being the fifth Justice to strike down 18 U.S.C. §16(b) it is initially puzzling why Justice Gorsuch writes:

> 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.

J. Gorsuch, slip op. 18.

One answer is that the crime of violence definition in 18 U.S.C. §924(c)(3)(B) has the same language as 18 U.S.C. §16(b).[1] By including language about being "open to different arguments," Justice Gorsuch responded to Justice Thomas' dissent that would have avoided reaching the constitutional issue by reading the statutory phrase "by its nature" to mean that a factfinder could look to the actual underlying facts of the case to determine if "by its nature" the offense satisfied the crime of violence definition. The United States did not make the argument in *Dimaya* or in *Johnson*. J. Gorsuch, slip op. 18.

Interestingly, Justice Gorsuch suggested that another way to avoid reaching the constitutional issue would be to read the statute as requiring that an offense *always* has the risk of physical force. J. Gorsuch, slip op. 18 (emphasis in original). This alternative view adds another possibility to what J. Gorsuch might do in the likely event that the Court hears a case challenging the constitutionality of 18 U.S.C. §924(c)(3) or other similar statute.

The one issue about which there is no doubt is that the Court struck down 18 U.S.C. §16(b). For anyone to suggest otherwise is to avoid the holding of *Sessions v. Dimaya*.

B. Potential Applications to Other Statutes

Besides 18 U.S.C. § 924(c)(3) discussed above, *Dimaya* bolsters the argument that another now-challenged criminal provision in Title 8 United States Code should be held void for vagueness. That provision, 8 U.S.C. §1324(a)(1)(A)(iv), punishes any person who:

> Encourages or induces an alien to come to, enter, or reside in the United States knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law

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[1] There are contextual reasons why circuit courts have distinguished 18 U.S.C. § 924(c)(3) from 18 U.S.C. § 16(b), which are beyond the scope of this advisory. *See, e.g.*, *Ovalles v. United States*, 861 F.3d 1257, 1265-66 (11th Cir. 2017); *United States v. Eshetu*, 863 F.3d 946, 952–55 (D.C. Cir. 2017); *United States v. Jones*, 854 F.3d 737, 740 (5th Cir. 2017).

In a published order last year, the Ninth Circuit invited IDP, NIPNLG, and the Federal Defenders to brief, among other issues, whether 8 U.S.C. §1324(a)(1)(A)(iv) is void for vagueness. *Dimaya* strengthens the argument that §1324(a)(1)(A)(iv) is unconstitutionally vague because the statutory text has several difficult to understand terms like "whether the alien is or will be unlawfully present," "encourage or induce," and "reside." The same cumulative impact of confusing terms that the *Dimaya* Court found especially problematic applies to 1324(a)(1)(A)(iv) too. *See* Slip op. 9.

There are also pending vagueness challenges to "crimes involving moral turpitude." That the Court 67 years ago in *Jordan v. DeGeorge* held that the term "crime of moral turpitude" was not void for vagueness as applied to fraud offenses, does not foreclose an as-applied challenge to another type of crime since arguably the court was limiting itself to the fraud conviction that was before the Court. 341 U.S. 223, 232 (1951) ("Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude."). In addition, a facial challenge is available even where a statute is not vague in all situations. Slip op. 9 n.3 ("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.'") (citing *Johnson*, 135 S.Ct. at 2561).

III. SUGGESTED STRATEGIES FOR CASES AFFECTED BY *DIMAYA*

This section offers strategies to consider for individuals whose cases are affected by *Dimaya*. These include: 1) individuals who have pending removal proceedings before the IJ or BIA; 2) individuals who have been ordered removed by the IJ or BIA, and have either been deported already or are still physically present in the United States; and 3) individuals who have been ordered removed by the BIA and have pending or denied petitions for review from a court of appeals, and have either been deported already or are still physically present in the United States. For those individuals already ordered removed, accompanying this advisory is a sample motion to reconsider and terminate because they are no longer removable as a result of the *Dimaya* decision. *See* Appendix (Sample Motion to Reconsider to Terminate Removal Proceedings). Because the crime of violence aggravated felony ground affects both deportability and relief eligibility, individuals must assess the impact of *Dimaya* on their particular case—i.e., whether they can seek termination of removal proceedings, or the ability to apply for discretionary relief from removal. The attached sample motion to reconsider seeks only termination, but can be adapted for filing in the relief eligibility context.

A. Individuals in Pending Removal Proceedings

Individuals who are in removal proceedings (either before an IJ or on appeal at the BIA) and whose cases are affected by *Dimaya* should promptly bring the decision to the attention of the IJ or BIA, explaining how the decision controls the removability or

relief eligibility question at issue. For example, if a person is only charged with deportability based on a charge of a crime of violence under INA §101(a)(43)(F), 8 U.S.C. §1101(a)(43)(F), where the Notice to Appear ("NTA") specifies that the deportability charge is lodged pursuant to 18 U.S.C. §16(b), or where the NTA lodges the deportability charge pursuant to 18 U.S.C. §16 without further specifying whether it is pursuant to subsection (a) or (b), the person could file a motion to terminate. *See* Section I(C). Or, if the person is otherwise removable but becomes eligible for a form of relief from removal (e.g., cancellation of removal, asylum) as a result of *Dimaya*, the individual could argue that *Dimaya* eliminates the prior bar to relief.

An individual could bring the *Dimaya* decision to the attention of the IJ or BIA by filing a notice of supplemental authority, *see* BIA Practice Manual, Ch. 4.6(g), (Supplemental Briefs) 4.9 (New Authorities Subsequent to Appeal); a motion to terminate (if appropriate), or a merits brief. If the case is on appeal at the BIA and the person is eligible for relief as a result of the decision, it is advisable to file a motion to remand, *see* BIA Practice Manual Ch. 5.8 (Motions to Remand), *before* the BIA rules on the appeal to preserve his or her statutory right to later file *one* motion to reconsider and reopen (*see infra*, §III.B., *Administrative Motion to Reconsider*).

In addition, where a §16(b) crime of violence is the sole ground of removability, seeking termination of removal proceedings is essential. Once removal proceedings are terminated, DHS can no longer amend charges under 8 C.F.R. § 1003.30 and would have to file a new NTA with new charges. In some cases, for example, DHS may file a new NTA charging removability under §16(a) or another aggravated felony or other removal ground. In that case, counsel should argue that res judicata bars DHS from bringing any new charges based on facts that were available to DHS in the prior proceedings because DHS had the opportunity to amend the charges during the pendency of the prior removal proceedings but chose not to. *See Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1360 (9th Cir. 2007). This is especially true where the prior removal proceedings occurred after *Johnson v. United States*, 135 S.Ct. 2551 (2015), *United States* v. *Vivas-Ceja*, 808 F. 3d 719 (7th Cir. 2015), *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), or *Shuti* v. *Lynch*, 828 F. 3d 440 (6th Cir. 2016) since DHS was on notice about the possible constitutional defects of §16(b).

B. Individuals with Final Orders

Petition for Review. Individuals with pending petitions for review should consider filing a motion to summarily grant the petition or a motion to remand the case to the BIA, whichever is appropriate. The Department of Justice attorney on the case may even consent to such a motion. Regardless whether a motion to remand is filed, if briefing has not been completed, the opening brief and/or the reply brief should address *Dimaya*. If briefing has been completed, the petitioner may file a letter under Federal Rule of Appellate Procedure (FRAP) 28(j) ("28(j) Letter") informing the court of the decision and its relevance to the case.

Denied Petition for Review. If the court of appeals already denied a petition for review, and the time for seeking rehearing has not expired (*see* FRAP 35 and 40 and local rules), a person may file a petition for rehearing, explaining *Dimaya*'s relevance to the case and its impact on the outcome. If the court has not issued the mandate, a person may file a motion to stay the mandate. *See* FRAP 41 and local rules. If the mandate has issued, the person may file a motion to recall (withdraw) the mandate. *See* FRAP 27 and 41, and local rules. Through the motion, the person should ask the court to reconsider its prior decision in light of *Dimaya* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). *See* FRAP 13. The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Dimaya*. *See, e.g.*, *Madrigal-Barcenas v. Lynch*, No. 13-697 (2015) (petition granted, judgment vacated, and case remanded for further consideration in light of *Mellouli v. Lynch*, 575 U. S. ___, 135 S.Ct. 1980 (2015)).

Administrative Motion to Reconsider. Regardless whether an individual sought judicial review, he or she may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case). There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* 8 U.S.C. §1229a(c)(6)(C).[2] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* 8 U.S.C. §§1229a(c)(6)(B) and 1229a(c)(7)(C)(i); *see also* 8 C.F.R. §103.5 (for individuals in administrative removal proceedings under 8 U.S.C. §1228(b), providing 30 days for filing a motion to reopen or reconsider a DHS decision).[3] If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of April 17, 2018, the date the Court issued its decision in *Dimaya*, i.e., by **May 17, 2018, or July 16,**

[2] For technical assistance with filing motions to reconsider, or petitions for review of denial of motions to reconsider, please contact Trina Realmuto (TRealmuto@immcouncil.org) or Kristin Macleod-Ball (KMacleod-Ball@immcouncil.org) at the American Immigration Council.

[3] One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. §103.5 for lack of jurisdiction).

2018, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Dimaya* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (establishing the factors for equitable tolling determinations). *See also, e.g., Iavorski v. INS*, 232 F.3d 124 (2d Cir. 2000) (applying equitable tolling to the motion to reopen/reconsider deadline in the immigration context); *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc) (same).[4] Individuals should label their motions: "Statutory Motion to Reconsider." *Arguably*, the BIA may not deny a statutory motion to reconsider or reopen in the exercise of discretion. [5]

If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel *might* consider making an *alternative* request for *sua sponte* reconsideration or reopening (i.e., "Statutory Motion to Reconsider or, in the Alternative, Reconsider *Sua Sponte*").

C. Additional Considerations for Individuals Abroad

An individual's physical location outside the United States *arguably* should not present an obstacle to returning to the United States if the Court of Appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the Court of Appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS *should* facilitate the petitioner's return to the United States.[6]

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[4] For additional resources regarding equitable tolling of the time and numeric limitations on motions to reconsider, *see* NIP-NLG and AIC, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues* (2013) *available at* https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2013_20Nov_departure-bar.pdf.

[5] For additional resources supporting the argument that the BIA lacks discretion to deny a timely-filed statutory motion to reconsider or reopen, s*ee* AIC, *The Basics of Motions to Reopen EOIR-Issued Removal Orders, §8 Can the IJ or BIA deny statutory motions to reopen in the exercise of discretion?* (2018) *available at* https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf

[6] For more information about returning to the United States after prevailing in court or on an administrative motion, *see* NIP-NLG, NYU Immigrant Rights Clinic, and AIC, Return

Noncitizens outside the United States may file administrative motions notwithstanding the departure bar regulations, 8 C.F.R. §§1003.2(d) and 1003.23(b), if removal proceedings were conducted within any judicial circuit, with the exception of removal proceedings conducted in the Eighth Circuit.[7] If filing a motion to reconsider or reopen in the Eighth Circuit, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations. It is important to note that the cases invalidating the departure bar regulation involved statutory (not *sua sponte*) motions to reopen or reconsider. In those cases, the courts found the regulation is unlawful either because it conflicts with the motion to reopen or reconsider statute or because it impermissibly contracts the BIA's jurisdiction. Thus, whenever possible, counsel should make an argument that the motion qualifies under the motion statutes (8 U.S.C. §§1229a(c)(6) or 1229a(c)(7)), i.e., that the motion is timely filed or that the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Counsel should consider arguing that the statutory deadline should be equitably tolled due to errors outside the noncitizen's control that are discovered with diligence or due to ineffective assistance of counsel. If the person did not appeal her or his case to the Board or circuit court, counsel may wish to include a declaration from the person explaining the reason, including lack of knowledge about the petition for review process or inability to afford counsel. Counsel should also review the record to determine whether the immigration judge, DHS counsel, or prior counsel led the noncitizen to believe that any further appeals would be futile.

Significantly for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g.*, *Desai v. AG of*

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to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider (April 27, 2015).

[7] Although the BIA interprets the departure bar regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the Courts of Appeals (except the Eighth Circuit, which has not decided the issue) have invalidated the bar. *See Perez Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

the United States, 695 F.3d 267 (3d Cir. 2012); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009). In addition, most Courts of Appeals have held that they lack jurisdiction to review *sua sponte* motions.[8]

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[8] For additional information on the departure bar regulations, *see* NIP-NLG and AIC, Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues (Nov. 20, 2013).