Dale L. Wilcox*
Michael M. Hethmon
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: litigation@irli.org
Attorneys for Amicus Curiae Federation for American Immigration Reform

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

Amicus Invitation No. 15-09-28	Case No.: A028-741-611

REQUEST TO APPEAR AS *AMICUS CURIAE* AND
SUPPLEMENTAL BRIEF OF THE
FEDERATION FOR AMERICAN IMMIGRATION REFORM

TABLE OF CONTENTS

I. INTEREST OF *AMICUS CURIAE*

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request of the Board of Immigration Appeals (Board) on September 28, 2015, for supplemental briefing on this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, to stop illegal immigration, and to promote immigration levels consistent with the national interest. The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g.*, *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

II. ISSUE PRESENTED

FAIR respectfully submits a supplemental brief on the following issue for the Board's consideration in the instant case:

- Does the Supreme Court's discussion of the "ordinary case" method in *Johnson v. United States*, 135 S. Ct. 2551 (2015) affect the viability of *Matter of Francisco-Alonzo*, 26 I. & N. Dec. 549 (B.I.A. 2015)?

III. SUMMARY OF THE ARGUMENT

The Board should continue to use the "ordinary case" method in its analysis of § 16(b) because the Supreme Court's decision in *Johnson* does not apply to the Board's decision in *Matter of Francisco-Alonzo*. In *Johnson*, the Supreme Court did not invalidate the "ordinary case" methodology, but only held that its application to § 924(e)(2)(B) (defining the term "violent felony") did not bring clarity to the statute sufficient to save it from falling due to vagueness. Nothing within the *Johnson* opinion prevents the Board from applying the "ordinary

case" method to § 16(b) (defining the term "crime of violence"). Although the Ninth Circuit recently found § 16(b) void for vagueness based upon *Johnson*, an in-depth textual analysis reveals that the Ninth Circuit erred because the statute at issue in *Johnson* and the statute at issue here are not comparable. Therefore, the text of § 16(b) is not void for vagueness and the "ordinary case" methodology previously used by the Board survives *Johnson.*

IV. ARGUMENT

In the recent case, *Johnson v. United States*, the Supreme Court found the residual clause of 18 U.S.C. § 924(e)(2)(B) void for vagueness. 135 S. Ct. 2551, 2557 (2015). The Court found the use of the "ordinary case" methodology to interpret the residual clause of § 924(e)(2)(B) led to arbitrary enforcement of the statute by judges. *Id.* However, the Court's reasoning in *Johnson* does not apply to the residual clause of 18 U.S.C. § 16 because the statutes differ and the "ordinary case" method poses no interpretative problems in determining when conduct falls within 18 U.S.C. § 16's crime of violence residual clause. Therefore, the Board should find that *Johnson* does not affect the viability of the Board's decision in *Matter of Francisco-Alonzo,* 26 I. & N. Dec. 594 (B.I.A. 2015).

A. The *Johnson* Court Overturned *James* Because the Residual Clause of 18 U.S.C. 924(e)(2)(B) Was Void for Vagueness, Not Due to Any Insufficiencies in the "Ordinary Case" Methodology.

In *James v. United States*, 550 U.S. 192, 207 (2007), the Supreme Court established the "ordinary case" methodology to analyze residual clauses. To determine whether the conduct at issue fits within the residual clause, the method asks whether "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.* at 208. In *James*, the Court used the new methodology to determine whether the

conduct at issue fell within the residual clause of 18 U.S.C. § 924(e)(2)(B), which provided "or otherwise involves conduct that prevents a serious potential risk of physical injury to another."

In *Johnson*, the Court reassessed the "ordinary case" methodology's ability to save § 924(e)(2)(B)'s residual clause from a constitutional vagueness attack. "In so doing, the Court provided an extensive textual analysis of the inconsistencies created by the vague language of § 924(e)(2)(B). *Id.* at 2557, 2561. Throughout the opinion, the Justices refer to the uncertainty created by the language of the residual clause. *E.g.*, *id.* at 2557-58 ("The residual clause offers no reliable way to choose between these competing accounts of what 'ordinary' attempted burglary involves."). Ultimately, the Court found the residual clause void for vagueness as it "fail[ed] to give ordinary people fair notice of the conduct it punishes[]. . . ." *Id.* at 2556 (quoting *Kolender v. Lawson*, 461 U.S. 232, 357-58 (1983)).

Importantly, the Court did not question the viability of the "ordinary case" method, just its application to that particular residual clause. Indeed, in applying the void for vagueness doctrine, the Supreme Court has primarily looked at the statutory language, rather than the means of analysis or application used by the lower court to determine if the statute was unconstitutional. "What renders a *statute* vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008) (finding 18 U.S.C. § 2252A(a)(3)(B) not void for vagueness) (emphasis added). The Court, in *Johnson*, recognized that it was the *language* of the residual clause that required a broad inquiry not the use of the "ordinary case" methodology. *See Johnson*, 135 S. Ct. at 2557.

The history of the void for vagueness doctrine affirms that the doctrine voids the statutory language, not the approach or analysis applied by the federal courts when a constitutional

vagueness challenge has been made. As far back as 1921, the Court has focused its inquiry on the *text* of the statute, not the method of analysis. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (voiding a pricing statute for vagueness because it required an inquiry by the courts where "no one can foresee and the result of which no one can foreshadow or adequately guard against."). "The sole remaining inquiry, therefore, is the certainty or uncertainty of the *text* in question. . . ." *Id.* (emphasis added). "A *statute* which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (citing *Int'l Harvestor Co. v. Kentucky*, 234 U.S. 216, 221 (1912)). Even more recent Supreme Court cases that discuss the void for vagueness doctrine focus exclusively on the statute's text. *See e.g.*, *Skilling v. United States*, 561 U.S. 358, 405-06 (2010). Accordingly, the BIA should not focus on the viability of "ordinary case" methodology, which was not questioned by the Supreme Court in *Johnson*, but exclusively on the statutory language in question.

B. Voiding the Statutory Language in *Johnson* Did Not Automatically Void the "Ordinary Case" Method.

"The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *See Skilling v. United States*, 561 U.S. 358, 406 (2010) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1985) (emphasis added)). If it requires just a different construction, a court is to forgo the traditional method for one that saves the statute from unconstitutionality. *See Johnson*, 135 S. Ct. at 2561. Thus, if § 924(e)(2)(B)'s infirmity was due to the use of the "ordinary case" method of analysis, the Supreme Court would simply interpreted the statute differently or limited its construction.

The dissent in *Johnson* suggested applying a different method of interpretation to save the residual clause. 135 S. Ct. at 2578 (Alito, J., dissenting). However, the majority rejected the dissent's claim that the statute could be interpreted using a different methodology to avoid vagueness. *See id.* at 2561. The majority clearly stated that if a statute is deemed vague in one application, it is vague in all applications. *Id.* Therefore, the Supreme Court overruled *James* not due to the "ordinary case" methodology but because the Court found the particular language vague regardless of what method of analysis was or would be used. As the Supreme Court did not overrule the "ordinary case" methodology of *James*, the Board may continue to apply the method in the instant case.[1]

C. The Supreme Court Has Not Found the Language of 18 U.S.C. § 16 Vague.

The Supreme Court has had the opportunity to review the language of 18 U.S.C. § 16 previously and has not found any basis to consider the language of the residual clause to be unconstitutionally vague. *See generally Leocal v. Ashcroft*, 543 U.S. 1 (2004). The *Leocal* Court recognized that the language of the residual clause in § 16(b) was broader than § 16(a), but did not give any indication that the language was unfit for interpretation by the courts. *Id.* at 10. *Leocal* was a unanimous Supreme Court decision that did not question § 16 as unconstitutional, but only clarified its application. *Id.* at 2563. The Supreme Court was in consensus that not only was 18 U.S.C. § 16 not vague and capable of interpretation, but the proper mode of interpretation for the statute was the "ordinary case" method. *See generally, id.*

The unanimous acceptance of the "ordinary case" method's application in *Leocal* contrasts earlier Supreme Court opinions that discussed the vagueness of § 924(e)(2)(B), before

[1] As will be discussed more below, the Ninth Circuit recently found § 16(b) void for vagueness based upon *Johnson* in an incomplete and superficial analysis of the text. *Dimaya v. Lynch*, No 11-71307, 2015 U.S. App. LEXIS 18045 (9th Cir. Oct. 19, 2015). In doing so, it did not even invalidate the efficacy in general of the "ordinary case" method.

finally overturning its own precedent in *Johnson.* 135 S. Ct. at 2556. Twice, Justice Scalia's dissents criticized the statute as being unconstitutionally vague before ultimately writing the majority opinion for *Johnson*. *See James*, 550 U.S. at 210 n.6 (Scalia, J., dissenting); *Sykes v. United States*, 131 S. Ct. 2267, 2286-88 (2001) (Scalia, J., dissenting). "The brief discussion of vagueness in *James* and *Sykes* homed in on the imprecision of the phrase; 'serious potential risk'; neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime." *Johnson*, 135 S. Ct. at 2563. While some have found this explanation unconvincing because the Supreme Court often hears more criminal appeals than immigration appeals, it cannot be denied that the Board has only the *Leocal* case from the Supreme Court as binding precedent to guide its analysis of § 16(b) and the "ordinary case" method. *See Dimaya*, 2015 U.S. App. LEXIS 18045 at *25-26 ("That the Supreme Court has decided more residual clause cases than § 16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application.").

Despite this, the Ninth Circuit recently found that the residual clause in § 16 void for vagueness. *See generally, Dimaya*, 2015 U.S. App. LEXIS 18045. This outlier decision however only provided a surface level analysis of the text § 16(b), and drew conclusions without providing a full rationale on why the court considered the statute vague. Other circuit courts have had the opportunity to apply the "ordinary case" method to § 16(b) and have rendered decisions using the "ordinary case" method without difficulty. *See e.g.*, *United States v. Keelan*, 786 F.3d 865 (11th Cir. 2015); *United States v. Avila*, 770F.3d 1100 (4th Cir. 2014); *United States v. Fish*, 758 F.3d 1 (1st Cir. 2014). Even after the Supreme Court's decision in *Johnson*, the Fourth Circuit has found occasion to discuss the "ordinary case" method in analyzing § 924(c)(3)(B), a statute whose language is identical to that of § 16(b). *See United States v.*

Fuentes, No. 13-4755, 2015 U.S. App. LEXIS 14475, *30 n.6 (4th Cir. Aug. 18, 2015). Given this precedent, it would be inappropriate for the BIA to uncritically accept *Johnson* as binding on the language of § 16(b), especially when another subsection of 924 maps verbatim onto § 16(b).

D. The "Ordinary Method" Should Be Applied to 18 U.S.C. § 16 Because the Statute Is Sufficiently Clear, and Thus, *Matter of Francisco-Alonz*o, 26 I. & N. Dec. 549 (B.I.A. 2015) is Binding Precedent for Future Board Decisions.

The Supreme Court in *Johnson* did not discuss any concerns over the language found in the § 16(b) residual clause. The Supreme Court only focused on the vagueness of § 924(e)(2)(B). To find §16(b) void by proxy would unconstitutionally expand the void for vagueness doctrine to statutes that are not textually identical. The Ninth Circuit, in finding § 16(b) unconstitutional vague, stated that only a few minor distinctions exist between the residual clauses of § 924(e)(2)(B) and § 16(b). *Dimaya*, 2015 U.S. LEXIS 18045 at *27. However, a true analysis of the textual differences between § 16(b) and § 924(e)(2)(B) allow § 16(b) to survive any attack on the language. In fact, a side by side comparison of the language would show that very little commonality exists between the two statutes. Thus, the "ordinary case" method can be applied to § 16(b) without concern about its constitutionality.

1. Title 18 U.S.C. § 16 Narrows the List of Offenses to Felonies Which Gives Proper Notice as to What Offenses are Violations Under the Statute, Unlike 18 U.S.C. § 924(e)(B)(2).

Subsection 16(b) of Title 18 provides clear language to guide citizens on what convictions are included under the statutory language. Section 16(b)'s residual clause only includes felonies. 18 U.S.C. § 16(b). A felony is an offense that carries a sentence of more than one year of imprisonment. *Moncrieffe v. United States*, 133 S. Ct. 1678, 1683 (2013). By including convictions that are only felonies, Congress clearly narrowed the range of possible offenses that may be a violation of the statute.

Conversely, the language of 18 U.S.C. § 924(e)(B)(2) did not provide notice as to what category of offenses would be included as a violation of the residual clause, and thus was found vague by the Court. The residual clause of § 924(e)(B)(2) includes "burglary, arson, or extortion," and "use of explosives. . . ." Prior to *Johnson*, the Supreme Court decided in *Begay* that to be considered a violent felony under the residual clause, the crime must resemble one of the enumerated crimes "in kind." *Begay v. United States*, 553 U.S. 137, 143 (2008). The Court found the enumerated crimes limited what other misconduct could be considered under the residual clause. *Id.* In *Johnson*, the Supreme Court still found the enumerated crimes to be "a confusing list of examples" even after attempts to clarify its position in *Begay*. 135 S. Ct. at 2561.

Section 16(b)'s use of "felony" as the qualifier provides the Board with a much more precise and definitive inquiry as to what crimes fall within the statute's purview. Section 16(b) provides one qualified, felony status. A crime either falls within this category or outside of it. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability, but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *Johnson*, 135 S. Ct. at 2561 (quoting *James*, 550 U.S.at 230 n.7 (Scalia, J., dissenting)). The impermissibly vague enumeration of crimes in § 924(e)(B)(2) attempted to string together unrelated criminal conduct as violations of the statute without any indication as to the common thread for interpretation by an individual, how it ensured that person had notice, or by a court in applying the statute. The use of "felony" in §16(b) is like the stand-alone phrase "shades of red" sought by the Supreme Court when applying the "ordinary case" method to a statute. It provides citizens as well as a trial court with a clear indication of what criminal convictions will be included under the statute.

2. 18 U.S.C. § 16(b)'s Language "By Its Nature" Favors the Use of the "Ordinary Case" Method to Determine Which Crimes Fall Within the Statute's Purview.

When interpreting § 16(b), the one phrase found within the statute that has not been given much discussion or analysis by the courts is the "by its nature" phrase. When engaging in statutory interpretation, courts are to give each word affect within their ordinary meaning. *Leocal*, 543 U.S. at 12; *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Smith v. United States*, 508 U.S. 223, 228 (1993). The phrase "by its nature" in § 16(b), while seemingly inconspicuous, provides important support for the Board's continued use of the "ordinary case" method when interpreting the residual clause.

The common use of the phrase embodies the principle task of the "ordinary case" method. When the Supreme Court first introduced the "ordinary case" method in *James*, it described it as a method for analyzing "the conduct encompassed by the elements of the offense, in the ordinary case . . . ." 550 U.S. at 208. In describing the "ordinary case" method, the Supreme Court used the exact language found in § 16(b): "As long as an offense is of the type that, *by its nature*, presents . . . risk of injury to another, it satisfies the requirements of . . . [the] residual clause." *Id.* at 209 (emphasis added).

The language of the statute itself thus instructs the Board that the "ordinary case" method should be used to discover the "nature" of the crime at issue. Section 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used. . . ." *Leocal*, 543 U.S. at 10. The statutory language requires the Board not to consider sets of facts that may be considered outliers, but to find those crimes that by their very essence would involve a substantial risk of force. This analysis is the basis for both the "ordinary case" test and § 16(b)'s language. The ordinary use of the phrase "by its nature" would require the Board to

favor the "ordinary case" method. Otherwise, the Board could arbitrarily give the statutory language a forced interpretation that does not comport with the common use of the language.

3. Title 18 U.S.C § 16(b) Provides a Risk Standard that the Supreme Court in Johnson Determined Constitutional.

A major infirmary of the statutory language of § 924(e)(2)(B) was that the residual clause left too much uncertainty as to how much risk was required by the statute. *Johnson*, 135 S. Ct. at 2557. The "potential risk" standard created too much ambiguity when the Court attempted to apply the "ordinary case" method. *Id.* Attempts by a court to assess the "potential risk" within the "ordinary case" methodology would become too speculative, because imagining "potential risk" became a "judge-imagined abstraction" rather than a legal inquiry. *Id.* at 2558. "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes[,] . . . the residual clause produces mores unpredictability and arbitrariness. . . ." *Id.* The language invalidated in *Johnson* attempted to link seemingly different offenses with a "potential risk" standard that proved too uncertain for the Supreme Court to interpret. *See Dimaya*, 2015 U.S. App. LEXIS 18045 at *20.

However, the flaws that the Supreme Court complained about in using the "potential risk" standard are not a concern under a substantial risk standard. While the Ninth Circuit has recently stated that the substantial risk standard is no more arbitrary than the "potential risk" standard, this conclusion was unfounded and completely contradicts what the Supreme Court stated about the substantial risk standard in *Johnson*. *Dimaya*, 2015 U.S. App. LEXIS 18045 at *18; *Johnson*, 135 S. Ct. at 2561. The substantial risk standard does not focus on the possibility of harm, but instead on the risk that physical force will be required for the commission of the crime. *Leocal*, 543 U.S. at 10. Substantial risk considers the inherent possibility, depending upon the crime, that physical force will be used during the commission. *See United States v.*

Avila, 770 F.3d 1100, 1106 (4th Cir. 2014). Congress's use of "substantial" as the qualifier for risk comports with the "ordinary case" method.

In *Matter of Francisco-Alonzo*, the Board was concerned with whether the "ordinary case" method had been discarded for risk-based offenses. 26 I. & N. Dec. 594, 12 (B.I.A. 2015). While the "ordinary case" method may have been abrogated for some risk-based offenses that involve analyzing *potential* risk, it has not been abrogated for all risk-based offenses. The Court in *Johnson* even reinforced the use of *James'* "ordinary case" method for some risk-based crimes. *Johnson* specifically referred to a substantial risk standard as one where such analysis is still applicable: "As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real world conduct." *Johnson*, 135 S. Ct. at 2561. While the "potential harm" standard required determinations by judges that may be too speculative, "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." *Id.* (citing *Nash v. United States*, 229 U.S. 373, 377 (1913)). Interestingly, the Ninth Circuit, even while citing the above quotation from *Johnson*, still found § 16(b) void for vagueness, stating that the substantial risk standard is "no less arbitrary" than the "potential risk" standard of § 924(e)(2)(B) analyzed in *Johnson*. *Dimaya*, 2015 U.S. App. LEXIS 18045 at *16. The Supreme Court found the "substantial risk" standard to properly provide the federal courts with the correct level of guidance to access real world conduct. Therefore, the Board should continue to follow the Supreme Court's decision in *Leocal* because the substantial risk standard was validated in *Johnson.*

Another major component of risk evaluation is the harm element. Section 924(e)(2)(B) focuses on the injury to a third party. Under § 16(b), Congress did not use a harm element but focused on the actions taking place during the felony by evaluating the "physical force against

the person or property of another [that] may be used. . . ." This language provides the Board with a clear indication of what must occur for an action to warrant conviction under the statute.

In *Johnson*, the Court determined that attempting to evaluate the risk of physical injury to a victim was too vague. While the residual clause of § 924(e)(2)(B) focused on conduct, the ultimate inquiry was that of physical injury. *See Johnson*, 135 S. Ct. at 2557. How is one to know if the conduct poses a risk of harm to an individual? "[I]n each case, we found it necessary to resort to a different ad hoc test to guide our inquiry." *Id.* at 2558.

However, the focus § 16(b)'s has nothing to do with harm to a third party. "The reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result. . . ." *Leocal*, 543 U.S. at 5. The risk that injury will occur is not the same as using physical force against another. *Id.* at 5 n.7 (citing *United States v. Lucio-Lucio*, 347 F.3d 1202, 1205-07 (10th Cir. 2003); *Bazan-Reyes v. INS*, 256 F.3d 600, 609-10 (7th Cir. 2001) (discussing what actions qualify as use of force in DUI cases)). The crime of violence definition under § 16(b) examines "active crimes," *i.e.*, where physical force or action is a natural consequence. *See id.* at 11.

4. Title 18 U.S.C. § 16(b) Avoids Vagueness Because It Lists a Specific Timeframe as to When the Physical Force Must Occur.

The language of § 16(b) makes it very clear as to *when* the violent use of physical force must occur in order for the action to fall within the statute's purview. The use of physical force must occur *in the course* of committing the felony offense. 18 U.S.C. § 16(b) (emphasis added). This provides a court with a very narrow timeframe in which to evaluate a person's misconduct, and thus avoids the impermissible vagueness that the Supreme Court condemned in the *Johnson* decision.

In *Johnson*, the Supreme Court recognized that the statute left courts with no indication about when the potential for physical harm must occur in order to fall within the statutory

language. The Court determined that the risk of injury often occurred after the requisite offense had already occurred: "The residual clause confirms that the court's task also goes beyond evaluating the chances that physical acts will make up the crime will injure someone." *Johnson*, 135 S. Ct. at 2557. Having no point of reference for timeframes of risk of injury, the Supreme Court found § 924(e)(2)(B) constitutionally vague.

However, the language of § 16(b) eliminates any uncertainty the Board may have about when the physical force must occur by providing that it must occur during the course of commission of the crime. This greatly limits the window of opportunity for the court to evaluate the physical actions of the individual. While the Ninth Circuit found that there is very little distinction between the timing of § 924(e)(2)(B) and § 16(b)'s residual clauses, the Ninth Circuit completely ignored one portion of § 16(b) text in its conclusion. In *Dimaya*, the Ninth Circuit used Cal. Penal Code § 459 as the example felony. Section 459 defines burglary as "[e]very person who enters any house . . . with intent to commit grand or petit larceny or any felony. . . ." The court found that by the time the risk of physical force against a person occurs, the elements of burglary have already been satisfied and thus § 16(b) suffers the same timing flaw as § 924(e)(2)(B). *See Dimaya*, 2015 U.S. App. 18045 at *22. This conclusion ignored binding Ninth Circuit case law that specifically found the risk of physical force against an occupant to be present in California's burglary statute. *See Lopez-Cardona v. Holder*, 662 F.3d 1110, 1113 (9th Cir. 2011); *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990).

However, even if the Board were to find that the risk of physical force against the occupant only occurs after the burglary has taken place, this analysis completely ignores the fact that § 16(b) also considers physical force against *property* as well. Using the Ninth Circuit's example of burglary, most individuals entering into a home with the intent to commit a felony

will almost always be uninvited by the occupant and thus physical force will be required to gain entry to the property. The California Penal Code itself categorizes burglary as a crime against *property*, not a crime against the person. *Id.* (Section 459 falls under title 13 of the California Penal Code which is entitled "Of Crimes Against Property"). Thus, the Cal. Penal Code § 459 should be analyzed not only for force against a person but also against the property itself as required by § 16(b). The Ninth Circuit simply ignored this half of the physical force analysis pertaining to the timeframe required by the statute. The timeframe provided for by the statute significantly narrows when the court must evaluate the substantial risk of physical force against person and property. The correct analysis of the timing element enables the Board to properly evaluate only the physical force that would occur *during* the crime's execution and not afterwards. Therefore, the Ninth Circuit's reasoning to the contrary is flawed.

E. In *Leocal*, the Supreme Court Announced the Relevant *Mens Rea* Level Which Helps Eliminate any Vagueness Concerns.

In criminal law, the inclusion of a scienter element prevents the law from being found void for vagueness. A criminal law that has no *mens rea* requirement suffers from unconstitutional vagueness. *City of Chi. v. Morales*, 527 U.S. 41, 55 (1999). "When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* However the *mens rea* requirement does not have to be explicitly found within the statutory text. *United States v. Matus-Leva*, 311 F.3d 1214, 1218 (9th Cir. 2002). For example, the *mens rea* can be deduced from the accompanying statutory provisions, congressional intent, or even text of the statute. *See Id.* at 1219.

In *Johnson* and its predecessors, the Supreme Court never settled on what *mens rea* requirement was necessary under the statutory text of § 924(e)(2)(B). In *Sykes*, the Supreme Court stated that there was "no textual link" between the federal statute's language and the

language of the state's statute *mens rea* requirement. 131 S. Ct. at 2266. The Court in *Begay* refused to provide a specific *mens rea* requirement for conviction under the statute. *See* 553 U.S. at 151-53. The Court found that the statute only limited crimes by the degree of risk, not by its *mens rea*. *Id.* at 152. The Court was left with no factors or standards to apply consistently. *Johnson*, 135 S. Ct. at 2560. The lack of a *mens rea* requirement added to the Court's continued confusion of how to interpret the statute.

However, unlike § 924(e)(2)(B), § 16(b) has a settled *mens rea* requirement; one that the Court itself decided upon in *Leocal*. The Supreme Court announced that § 16(b) required "a higher *mens rea* than the merely accidental or negligent conduct involved" in committing the offense. *Leocal*, 543 U.S. at 11. Conduct, at the least, should include reckless use of force under §16(b) to qualify as a crime of violence. *Id.* at 13. Furthermore, other circuits have found that intent creates the substantial risk necessary for fulfillment of § 16(b). *United States v. Serafin*, 592 F.3d 1105, 1112 (10th Cir. 2009) (citing *Henry v. Bureau of Immigration & Customs Enf't*, 493 F.3d 303(3d Cir. 2007) (discussing whether mere possession of a gun without intent can fulfill § 16(b)). In the Ninth Circuit's decision which declared §16(b) vague, the court did not even attempt to attack or refute the Supreme Court's finding that §16(b) does indeed have a required *mens rea* or that intent to burglarize the home can create the substantial risk of physical force against property. *See generally Dimaya*, 2015 U.S. App. LEXIS 18045; *Serafin*, 493 F.3d at 1112. The Ninth Circuit basically ignored a major holding of the Supreme Court's decision in *Leocal* regarding §16(b)'s *mens rea*.

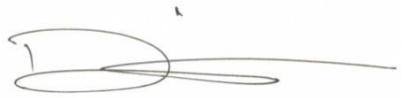
The Board should continue to follow Supreme Court precedent in applying the *mens rea* requirement, and also reaffirm the continued use of the "ordinary case" method by immigration

judges. To find otherwise would force the Board to violate the Supreme Court's jurisprudence regarding § 16(b) which it has no reason to do in the case currently before the Board.

V. CONCLUSION

The Board should continue to use the "ordinary case" method in its analysis of § 16(b) because the Supreme Court's decision in *Johnson* does not apply to the Board's decision in *Matter of Francisco-Alonzo*. The "ordinary case" method continues to be the correct method of analysis under the Supreme Court's decision in *Leocal*. While some courts may attempt to use *Johnson* to find the text of § 16(b) void for vagueness and thus unconstitutional, this conclusion is unfounded. Not only does *Leocal* support the use of the "ordinary case" method for analyzing § 16(b), but a textual analysis of the statute's language reveals that it is markedly different than § 924(e)(2)(B) and should not be found void for vagueness under *Johnson.*

Respectfully submitted,



Dale L. Wilcox*
Michael M. Hethmon
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
Fax: 202-464-3590
Email: litigation@irli.org

*DC Bar admission pending;
Under supervision