

No. 17-6721

IN THE SUPREME COURT OF THE UNITED STATES

ADRIAN EFRAIN ONTIVEROS-CEDILLO AND
MARTIN BOLANOS-GALVAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Petitioners contend (Pet. 5-6, 8) that the definition of the term "crime of violence" in 18 U.S.C. 16(b) is unconstitutionally vague and suggest that their petition be held pending this Court's decision in Sessions v. Dimaya, No. 15-1498 (reargued Oct. 2, 2017). In Dimaya, the Court is considering whether Section 16(b), as incorporated into the definition of the term "aggravated felony" in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. Contrary to petitioners' suggestion, their petition should be denied.

Petitioners' challenge does not, as in Dimaya, concern Section 16(b)'s definition of a "crime of violence" as incorporated into a statutory provision. Instead, petitioners challenge (Pet. 5-6) that definition as incorporated into a provision of the advisory United States Sentencing Guidelines. See Sentencing Guidelines § 2L1.2(b)(1)(C) & cmt. (n.3(A)) (2014); see also Pet. App. A1, B1 (noting that petitioners challenged the application of the Guidelines below). That argument is foreclosed by this Court's decision in Beckles v. United States, 137 S. Ct. 886 (2017). In Beckles, the Court held that "the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause." Id. at 895. The Court in Beckles thus rejected a vagueness challenge to a provision of the advisory Guidelines that was identical to the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii), which the Court deemed unconstitutionally vague in Johnson v. United States, 135 S. Ct. 2551 (2015).

Because petitioners' claim is ultimately a vagueness challenge to a provision of the advisory Guidelines, and not a federal statute, it is foreclosed by Beckles. The petition for a writ of certiorari therefore need not be held pending the Court's disposition of Dimaya, and should instead be denied.*

* The government waives any further response to the petition unless this Court requests otherwise.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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