

No. 17-6751

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IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO GUTIERREZ-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 4-5, 11-12) that the definition of the term “crime of violence” in 18 U.S.C. 16(b) is unconstitutionally vague and suggests that his 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 petitioner’s suggestion, his petition should be denied.

Petitioner’s challenge does not, as in Dimaya, concern Section 16(b)’s definition of a “crime of violence” as incorporated

into a statutory provision. Instead, petitioner challenges (Pet. 11-12) 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 (noting that petitioner's challenge below concerned the Guidelines' "incorporat[ion] by reference" of Section 16(b)). 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 petitioner's 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.\*

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\* 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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