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STEMMING THE EXPANSION OF THE VOID-FOR-VAGUENESS DOCTRINE UNDER *JOHNSON*

Clancey Henderson*

INTRODUCTION

To the average layperson, the phrases felony “crime of violence” and “violent felony” may be sufficiently axiomatic to enable proper application of the classification to certain crimes.¹ However, for some jurists and legal scholars, the phrase’s definition and its subsequent applications remain elusive. The Supreme Court’s recent decision in *Johnson v. United States*² is a prime example of the ongoing struggle to pin down the application of the phrase “violent felony” as defined by Congress in the Armed Career Criminal Act of 1984 (ACCA).³ In *Johnson*, the Court invalidated a portion of the statutory definition of “violent felony”—known as the “residual clause”—because it was too vague.⁴ Despite the Court’s explicit effort to preserve the legitimacy of other statutes defining the phrase or other equivalent phrases,⁵ the *Johnson* decision opened a floodgate of litigation challenging the constitutionality of those very statutes it sought to excuse.

Criminal litigators were quick to use the decision to justify collateral attacks on sentences imposed under seemingly similar provisions. Several statutory definitions were called into question under an extension of the *Johnson* reasoning, including those given in (1) the Immigration and Nationality Act (INA), which incorporates 18 U.S.C. § 16(b),⁶ (2) the United States Sentencing Guidelines (the “Sentencing

* © 2019 Clancey Henderson. J.D. Candidate, 2019, at the S.J. Quinney College of Law. I would like to thank my wife for her patience, love, and support throughout my law school experience. I offer thanks to Professor Jencie Anderson for teaching me how to compose a legal writing and for her help in polishing this paper. Lastly, I thank the *Utah Law Review* editorial board and staff for their editing assistance.

¹ Justice Thomas opined the residual clause allowed “any fool [to] know that a particular category of conduct would be within the reach of the statute,” and was thus “not unconstitutional on its face.” *Johnson v. United States*, 135 S. Ct. 2551, 2573 (2015) (Thomas, J., dissenting) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 112 (1999)).

² 135 S. Ct. 2551 (2015).

³ Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (1984) (originally codified at 18 U.S.C. § 1202 (1984), now codified at 18 U.S.C. § 924 (2012)).

⁴ *Johnson*, 135 S. Ct. at 2557.

⁵ *Id.* at 2563, 2561 (noting that “[t]oday’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony” and rebuffing the assertions of “[t]he Government and the dissent . . . that dozens of federal and state criminal laws use terms like ‘substantial risk,’ ‘grave risk,’ and ‘unreasonable risk,’ suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt.” (citations omitted)).

⁶ See *infra* note 66 and accompanying text.

Guidelines”),⁷ and (3) 18 U.S.C. § 924(c)(3)(B)’s risk-of-force clause.⁸ The results of these challenges have been mixed and have caused multiple circuit splits.⁹ Because of the interrelated nature of the challenges and their bearing on the precious rights guaranteed under the Fifth Amendment’s Due Process Clause, the Supreme Court must eventually confront each attempted extension of *Johnson*.¹⁰ The Supreme Court has already considered and upheld the constitutionality of the Sentencing Guidelines’ definition in *Beckles v. United States*.¹¹ But 18 U.S.C. § 16(b) was recently overturned by the Supreme Court in *Sessions v. Dimaya*.¹² It seems only a matter of time before the Supreme Court will similarly need to determine the constitutionality of 18 U.S.C. § 924(c)(3)(B)’s risk-of-force clause.

This Note addresses the constitutionality of the risk-of-force clause. Since many of the cases challenging the risk-of-force clause proceed on the argument that it is indistinguishable from the ACCA’s residual clause, the history of the residual clause is particularly relevant. Addressing the constitutionality of the risk-of-force clause will necessarily entail a discussion of whether it is distinguishable from the residual clause. Accordingly, brief histories of the ACCA and the residual clause will be given. This overview will provide a backdrop to the discussion of the Supreme Court’s struggle to define and apply the residual clause in numerous cases preceding the decision in *Johnson*. Understanding the Court’s trouble addressing the residual clause is a key component of the comparative analysis that will follow. After addressing *Johnson* as the culmination of the Court’s dealings with the residual clause, this Note will address how *Johnson* serves as a vehicle for challenges to other statutes under the void-for-vagueness doctrine. The challenges to *Johnson* are presented to establish the certainty of a constitutional challenge coming before the Supreme Court concerning the risk-of-force clause. Last, this Note will address the constitutionality of the risk-of-force clause under a comparative analysis framework. The analysis will ultimately show that § 924(c)(3)(B) is distinguishable from previously invalidated statutory definitions and should be upheld as constitutional.

⁷ See *infra* note 62 and accompanying text.

⁸ See *infra* note 98 and accompanying text.

⁹ See *infra* Part I.C.

¹⁰ See *Johnson*, 135 S. Ct. at 2556 (“The Fifth Amendment provides that ‘[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.’ Our cases establish that the Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)).

¹¹ 137 S. Ct. 886 (2017).

¹² 138 S. Ct. 1204 (2018).

I. BACKGROUND

A. *History of the ACCA*

The ACCA was enacted during a period in which national legislators sought to enhance penalties in order to stem growing crime rates, and in particular, to deter repeat offenders.¹³ The original bill, the Career Criminal Life Sentence Act of 1981, proposed a life sentence for repeat felony offenders.¹⁴ But, Congress passed the bill only after it was revised to include a more lenient sentencing range of “fifteen-years to life.”¹⁵ That bill, however, was vetoed by President Reagan because of federalism concerns—he felt that the bill encroached on the states’ enforcement of the traditionally local crimes of armed burglary and armed robbery.¹⁶ The mandatory sentence enhancements were later modified to apply only to offenders found in violation of a federal firearm statute that prohibits felons from possessing firearms.¹⁷ This enabled the bill to overcome the federalism reservations and secured the ACCA’s passage.¹⁸ Soon after, the ACCA’s scope was broadened considerably by the inclusion of the residual clause, which enumerated certain crimes and implicated

¹³ See *Sen. Arlen Specter, R-Pa., Thursday introduced two bills that . . .*, UPI (Oct. 1, 1981), <https://www.upi.com/Archives/1981/10/01/Sen-Arlen-Specter-R-Pa-Thursday-introduced-two-bills-that/1351370756800/> [<https://perma.cc/6YEEY-5BL9>] (quoting Senator Specter, indicating the bill punished “habitual offenders” because “about two-thirds of robberies and burglaries are committed by career criminals”); see also S. REP. NO. 98-190, at 3, 6 (1983) (noting robbery and burglary, crimes addressed by the bill, “are more prevalent and have increased faster than any other type of violent crime”); James G. Levine, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 546–48 (2009) (detailing the ACCA’s legislative history); see, e.g., Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 165 (2004), <http://pricetheory.uchicago.edu/levitt/Papers/LevittUnderstandingWhyCrime2004.pdf> [<https://perma.cc/F45X-9J83>] (confirming that statistics reflect that the “same pattern observed for homicide is present for every major crime” and observing that murder rates doubled over a 15-year period, “rising to a peak . . . in 1980”).

¹⁴ S. 1688, 97th Cong. § 2 (1981).

¹⁵ S. 52, 98th Cong. § 2 (1st Sess. 1983) (enacted).

¹⁶ *Id.* § 3 (noting President Reagan would not sign the bill because of his “concern about the jurisdictional nature of the local prosecutor’s ‘veto’ power over Federal prosecutions contained in the career criminal portion of the bill.”); see also *Constitutionality of Federal Habitual Offender Legislation*, 344 Op. Att’y Gen, Crim. Div. (1981) (“[W]e would observe that the bill might be read to impose its substantive requirements on the states in the course of their conduct of state prosecution.”).

¹⁷ Levine, *supra* note 13, at 546–47 (citing H.R. REP. NO. 98-1073 (1984)).

¹⁸ *Id.*

other similar crimes.¹⁹ This served to incapacitate a greater swath of career criminals, beyond burglars and robbers, and reoriented the ACCA to its original intentions.²⁰

The ACCA, as referenced for the remainder of this Note, is best understood as a federal law establishing a fifteen-year mandatory minimum sentencing enhancement for the unlawful possession of a firearm by repeat offenders with at least three prior convictions for either violent or drug felonies. The ACCA, as codified, reads in relevant part:

(1) In the case of a person who violates section 922(g) of this title [as a felon in possession of a firearm] and has three previous convictions . . . for a violent felony or a serious drug offense, or both, . . . such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person

(2) As used in this subsection—

. . . .
(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year . . . that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another²¹

Section 924(e)(2)(B)(i) is known as the “elements clause.” The latter half of 924(e)(2)(B)(ii)—which defines “violent felony” as a felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another,”—is the residual clause which was invalidated by the Supreme Court in *Johnson*.²²

Prior to the invalidation of the ACCA’s residual clause, an estimated 600 sentences were enhanced by the statute each year.²³ Despite the relatively limited

¹⁹ H.R. REP. NO. 99-849, at 6 (1986); *see also* Levine, *supra* note 13, at 547.

²⁰ Levine, *supra* note 13.

²¹ 18 U.S.C. § 924(e) (2012).

²² *Johnson v. United States*, 135 S. Ct. 2551, 2556–58 (2015).

²³ Caroline Grueskin, *13 Words That Could Mean Freedom for Many: The Debate over the Federal Residual Clause*, MARSHALL PROJECT (Oct. 19, 2015), <https://www.themarshallproject.org/2015/10/19/13-words-that-could-mean-freedom-for-many#.QPbesy5jR> [<https://perma.cc/L7DL-GBZG>].

application of the statutory enhancement,²⁴ many costly appeals resulted²⁵ because of the statute's considerable penalty—a fifteen-year mandatory minimum sentence imposed in addition to the underlying crime's sentence.²⁶ Even measured against the subgroup of offenders that get to trial at almost twice the average rate for federal criminal defendants (those subject to mandatory minimum sentences), offenders sentenced under the ACCA were almost three times more likely to get an appeal.²⁷ The above average appeal rate was initially spurred by the broad and inexact language employed by the statute. The primary issue concerned the ambiguity stemming from the definitions for predicate offenses—those which qualified the felons' past conduct to justify the imposition of the statutory enhancement. Even greater confusion and uncertainty resulted from a series of Supreme Court decisions interpreting the statutory language and its application in conflicting ways.²⁸ The Court's struggle to give form to the statutory definitions was key to the ultimate decision to invalidate the residual clause.²⁹ These opinions are addressed below briefly for context.

B. The Court's Struggle to Apply the ACCA's Residual Clause

Prior to the decision in *Johnson*, the Court considered the ACCA's residual clause four times in five years. First, in *James v. United States*, the Court determined the residual clause covers attempted burglary, as defined by Florida state law.³⁰ Less

²⁴ Avi M. Kupfer, Note, *A Comprehensive Administrative Solution to the Armed Career Criminal Act Debacle*, 113 MICH. L. REV. 151, 152 n.2 (2014) (citing U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 282–84 (2011) and concluding that “approximately 3 percent of federal inmates, qualify for the sentencing enhancement.”).

²⁵ 156 CONG. REC. S10,516 (daily ed. Dec. 17, 2010) (statement of Sen. Arlen Specter) (expressing disappointment over the “costly and time-consuming [ACCA] litigation at every level of the Federal court system . . .”).

²⁶ 18 U.S.C. § 924(e)(1) (“[N]otwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction . . .”); see also *id.* § 924(c)(1)(D) (“Notwithstanding any other provision of law—(i) a court shall not place on probation any person convicted of a violation of this subsection; and (ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.”).

²⁷ In 2010, 17.4 percent of the defendants sentenced under the ACCA went to trial. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 284 (2011).

²⁸ *James v. United States*, 550 U.S. 192, 228 (2007) (Scalia, J., dissenting) (“This indeed leaves the lower courts and those subject to this law to sail upon a virtual sea of doubt.”), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015).

²⁹ *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

³⁰ See *James*, 550 U.S. at 195.

than one year later, the clause came before the Court again in *Begay v. United States*.³¹ This time the Court considered and rejected the applicability of the statute to the offense of driving under the influence under New Mexico law.³² Not ten months later, the Court again considered the clause in *Chambers v. United States* and determined that it does not cover the offense of failing to report to a penal institution under Illinois state law.³³ The Court then had a small reprieve from the clause and did not address it again for eighteen months until *Sykes v. United States*, at which point it again declined to find that the statute encompassed the offense in question, vehicular flight from a law-enforcement officer under Indiana law.³⁴ Notably, in both *James* and *Sykes*, Justice Scalia dissented, questioning the constitutionality of the clause.³⁵ But, Scalia's dissents were absent in *Begay* and *Chambers*. Justice Scalia, in his dissent in *Sykes*, noted that the Court's opinion was "an attempt to clarify, for the fourth time since 2007," the residual clause and only served to "produce[] a fourth ad hoc judgment that will sow further confusion."³⁶ Despite Justice Scalia's quip that the Court tries "to include an ACCA residual-clause case in about every second or third volume of the United States Reports," he was frustrated with the Court's inability to craft and adhere to a single cognizable test in their "tutti-frutti opinion."³⁷

By the time the residual clause graced the Court's docket for the fifth time, the frustration voiced by Justice Scalia had spread among the other Justices: "[f]our times [was] enough."³⁸ In the lead up to *Johnson*, Justice Kennedy, who authored *Sykes* over Justice Scalia's dissent, expressed uncertainty about the clause.³⁹ Similarly, Justice Bryer seemed discontent with the confusion his *Begay* opinion generated among the lower courts.⁴⁰ By the time *Johnson* was decided, the Court had applied four different analyses to a single clause in less than a decade, resulting in confusion and frustration.

³¹ 553 U.S. 137, 140 (2008), *abrogated by* *Johnson v. United States*, 135 S. Ct. 2551 (2015).

³² *Id.*

³³ *See* *Chambers v. United States*, 555 U.S. 122, 130 (2009), *abrogated by* *Johnson v. United States*, 135 S. Ct. 2551 (2015).

³⁴ *See* *Sykes v. United States*, 564 U.S. 1, 4 (2011), *overruled by* *Johnson v. United States*, 135 S. Ct. 2551 (2015).

³⁵ *See* *James*, 550 U.S. at 229–30 (Scalia, J., dissenting) (opining that the statute contained "shoddy draftsmanship" and the court could rightly "hold it void for vagueness"); *Sykes*, 564 U.S. at 28 (Scalia, J., dissenting) ("We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness.").

³⁶ *Sykes*, 564 U.S. at 28 (Scalia, J., dissenting).

³⁷ *Id.* at 28, 30.

³⁸ *Id.* at 28; *see* Rory Little, *Re-Argument analysis: The votes are not there to sustain the residual clause*, SCOTUSBLOG (Apr. 22, 2015, 3:11 PM), <http://www.scotusblog.com/2015/04/re-argument-analysis-the-votes-are-not-there-to-sustain-the-residual-clause/> [<https://perma.cc/6PXU-GFSB>].

³⁹ Little, *supra* note 38.

⁴⁰ *Id.*

On June 26, 2015, the Supreme Court held in *Johnson* that the residual clause of the ACCA's definition of "violent felony" was unconstitutionally vague.⁴¹ The opinion, written by Justice Scalia, was the last in the series through which the Supreme Court struggled to establish a definitive interpretation and application of the clause. The *Johnson* Court summarized the source of the constitutional vagueness of the residual clause as follows:

[t]wo features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves?

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.⁴²

In short, the meaning of "violent felony" is more "unpredictabl[e] and arbitrar[y] than the Due Process Clause tolerates" because of (1) the indeterminacy of measuring the risk posed by a crime and (2) the uncertainty about the level of risk necessary for a crime to qualify as a "violent felony."⁴³

To reach its conclusion in *Johnson*, the Court had to take some unusual measures. First, it abjured an interpretive canon of judicial restraint, which dictates the Court should avoid calling into question a law's constitutionality where it could otherwise be interpreted within the confines of constitutional limitations.⁴⁴ Similarly

⁴¹ *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

⁴² *Id.* at 2557–58.

⁴³ CHARLES DOYLE, CONG. RES. SERV., R41449, ARMED CAREER CRIMINAL ACT (18 U.S.C. 924(e)): AN OVERVIEW 6 (2015); see also *Johnson*, 135 S. Ct. at 2556 ("[T]he Government violates [the Fifth Amendment] guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.").

⁴⁴ Although the concurring opinion by Justice Brandeis in *Ashwander v. Tennessee Valley Authority* is often used as the primary reference for the doctrine of constitutional avoidance, the idea was one of the many offered by Chief Justice Marshall who played a pivotal part in shaping the role of the court. See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1012 (1994) (describing Brandeis's concurrence as "the most significant formulation of the avoidance doctrine."); Andrew Nolan, CONG. RES. SERV., 7-5700, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW, 9, 9, n.84 (2014) (observing the portion on constitutional avoidance is "the most famous and quoted aspect of the Ashwander concurrence" and noting that "Brandeis's Ashwander concurrence has been cited in 1,279 federal cases" as of 2014.); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) ("No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a

unusual was the Court's decision to overturn the piecemeal precedent it had formed around the residual clause within just a few years of their prior decisions.⁴⁵ Last, the Court had to expose the vagueness doctrine as being broader than previously understood by some, and potentially expose other statutes to "constitutional doubt."⁴⁶

Despite the unusual measures necessary to reach the decision, a majority of the Court felt justified under the circumstances. The Court had previously intimated to Congress that the drafting was subpar and needed to be addressed.⁴⁷ Indeed, before *Johnson*, Congress's legal advisors made note of the Court's difficulty interpreting the statute.⁴⁸ After five cases and almost ten years of inaction by Congress, the Court was indeed "tired of the [ACCA]" and "[a]nxious to rid [its] docket of bothersome residual clause cases."⁴⁹ At the conclusion of the ordeal, the Court simply could not use the residual clause's guidance to craft a consistently applicable principle with which to differentiate crimes posing a serious risk of injury from those that do not.⁵⁰ So, rather than continuing to take on the residual clause's ambiguity repeatedly on a case-by-case basis, the Court foreclosed the discussion by ruling the clause

legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed."'). It wasn't for another one hundred years that the doctrine was articulated by Justice Brandeis as a list of seven loosely related rules restraining the court from issuing broad holdings on matters of constitutional law. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). Over time, the Court has reemphasized the importance of this fundamental doctrine. Although, the Court does not treat the doctrine as paramount and has on a number of occasions hedged it in order to reach a conclusion that a law is constitutionally invalid, as in the current case.

⁴⁵ *See Johnson*, 135 S. Ct. at 2573 (Alito, J., dissenting) ("So brushing aside *stare decisis*, the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years.").

⁴⁶ *Id.* at 2561 (majority opinion).

⁴⁷ *See Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting) ("Congress can quickly add what it wishes."); *James v. United States*, 550 U.S. 192, 230 (2011) (Scalia, J., dissenting) ("Congress has simply abdicated its responsibility when it passes a criminal statute unsusceptible of an interpretation that enables principled, predictable application . . ."); *Chambers v. United States*, 555 U.S. 122, 134 (2009) (Alito, J., concurring) ("At this point, the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement."); *Begay v. United States*, 553 U.S. 137, 142–43 (2008) (discussing the court's division in determining the intent of Congress in regard to the residual clause).

⁴⁸ *See* LARRY M. EIG, CONG. RES. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 12–13, 13 n.72 (2014).

⁴⁹ *Johnson*, 135 S. Ct. at 2573 (Alito, J., dissenting).

⁵⁰ *United States v. Snyder*, 793 F.3d 1241, 1245 (10th Cir. 2015) (quoting *Johnson*, 135 S. Ct. at 2558).

unconstitutionally vague.⁵¹ But the ruling was not without consequence. Just as some feared, *Johnson* opened the door for litigants seeking to invalidate other clauses bearing a seemingly similar degree of ambiguity.⁵²

C. *Johnson as a Vehicle to Challenge the Constitutionality of Other Statutes*

Johnson had an immediate impact. Within weeks, the United States Sentencing Commission determined that it would amend the Sentencing Guidelines, which used language identical to that of the residual clause.⁵³ Shortly thereafter, the federal courts of appeals reached different conclusions on the retroactive applicability of *Johnson*.⁵⁴ In an ironic twist, within a year of *Johnson*, the residual clause was again before the Supreme Court to resolve this circuit split. The Court then made *Johnson*'s holding retroactive to cases on collateral review in *Welch v. United States*.⁵⁵ *Welch* temporarily opened the floodgates of litigation for review of sentences enhanced under the ACCA's residual clause. But, it also had the unintended consequence of further fomenting litigation of other clauses bearing some similarities to the ACCA's residual clause.

Under 28 U.S.C. § 2255, prisoners can seek review of their conviction if they file a motion within one year of the date on which the right asserted is initially recognized by the Supreme Court, if the right is made retroactively applicable on collateral review.⁵⁶ *Johnson* recognized a new right which, having been made retroactively applicable, enabled prisoners sentenced under the residual clause to petition the court to reduce or vacate their sentences.⁵⁷ However, because *Welch* was decided several months after *Johnson*, prisoners had a little over two months to file a habeas petition for collateral review of a sentence based on the right recognized by *Johnson*. With little time for interpretation or application by the federal courts,

⁵¹ *Johnson*, 135 S. Ct. at 2560 (“Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.”).

⁵² *Id.* at 2577 (Alito, J., dissenting) (expressing concerns that the opinion was a “nuclear explosion” and could invalidate “scores of federal and state laws”).

⁵³ Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Seeks Comment on Revisions to Definition of Crime of Violence (Aug. 7, 2015), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20150807_Press_Release.pdf [<https://perma.cc/2XW6-QXEA>]. Oddly, this reaction proved seemingly unnecessary as the Court subsequently ruled in *Beckles v. United States* that the Sentencing Guidelines were not implicated by *Johnson* because the Guidelines are advisory and thus not subject to a vagueness challenge. See *Beckles v. United States*, 137 S. Ct. 886, 892 (2017).

⁵⁴ See Brian Toth, *On Johnson Retroactivity, the Eleventh Circuit Splits with the Seventh Circuit*, SDFLA BLOG (Aug. 12, 2015), <http://sdfla.blogspot.com/2015/08/on-johnson-retroactivity-eleventh.html> [<https://perma.cc/JPU2-WPFG>].

⁵⁵ 136 S. Ct. 1257, 1265 (2016).

⁵⁶ 28 U.S.C. § 2255(f)(3) (2012).

⁵⁷ *Id.*; *Welch*, 136 S. Ct. at 1264 (“It is undisputed that *Johnson* announced a new rule.”).

prisoners liberally invoked the Court's decision and sought review of statutes beyond the ACCA's residual clause under broad readings of *Johnson*. Some courts permitted these broad readings and others rejected the notion that *Johnson* supplied the right necessary to challenge statutes beyond the residual clause.⁵⁸ This confusion among the district courts permeated to the federal courts of appeals, resulting in another circuit split.⁵⁹

Among the language to which petitioners tried to extend *Johnson* was the definition of "crime of violence" articulated in the Sentencing Guidelines.⁶⁰ After a circuit split emerged, the Supreme Court took a Ninth Circuit case to resolve the question.⁶¹ The case was the first to reach the Supreme Court that questioned the extension of *Johnson* beyond the residual clause. In *Beckles v. United States*,⁶² the Court upheld the Sentencing Guidelines' definition for "crime of violence," not under some permissible application of the *Johnson* standard, but because the Sentencing Guidelines are advisory and thus not vulnerable to a vagueness challenge.⁶³

Similar challenges were raised under *Johnson* against the INA,⁶⁴ which incorporated 18 U.S.C. § 16(b)'s definition of "crime of violence." This was done in order to contest crimes of violence qualifying as deportable offenses.⁶⁵ This application also led to a circuit split, and the question went before the Supreme Court in *Sessions v. Dimaya*.⁶⁶ *Dimaya* was the second case to address the extension of

⁵⁸ See, e.g., *United States v. Maldonado*, 636 F. App'x 807, 810 (2d Cir. 2016) (assuming the Supreme Court's reasoning in *Johnson* applies to U.S.S.G. § 4B1.2(a)(2)). But see, e.g., *United States v. Gonzalez-Longoria*, 831 F.3d 670, 679 (5th Cir. 2016), *order vacated on reh'g*, No. 16-6259, 2018 WL 3013812 (U.S. June 18, 2018), and *cert. granted, judgment vacated*, No. 16-6259, 2018 WL 3013812 (U.S. June 18, 2018) (determining that *Johnson* did not extend to the INA's § 16(b)).

⁵⁹ See *infra* note 99 and accompanying text.

⁶⁰ *United States v. Gonzalez-Longoria*, 831 F.3d 670, 674 (5th Cir. 2016), *abrogated by Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

⁶¹ *Id.* at 679; *Dimaya v. Lynch*, 803 F.3d 1110, 1115 (9th Cir. 2015), *aff'd sub nom. Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

⁶² 137 S. Ct. 886 (2017).

⁶³ *Id.* at 892.

⁶⁴ Immigration and Nationality Act of 1965, H.R. 2580; Pub. L. 89-236, 79 Stat. 911, (1965).

⁶⁵ See Katherine Brady, *Some Felonies Should No Longer Be "Crimes of Violence" for Immigration Purposes, under Johnson v. United States*, IMMIGRANT LEGAL RESOURCE CTR. 1 (2015) https://www.ilrc.org/sites/default/files/resources/johnson_v_us_ilrc_adv_8_2015_pdf_0.pdf [<https://perma.cc/U7MF-KLKD>] ("Conviction of a state offense that meets the definition of a crime of violence (COV) at 18 USC § 16 has two potential immigration penalties. If committed against a victim with whom the defendant shared a protected domestic relationship, a COV may be a deportable crime of domestic violence. If a sentence of a year or more is imposed, a COV is an aggravated felony, regardless of the type of victim." (citations omitted)).

⁶⁶ 138 S. Ct. 1204, 1210 (2018).

Johnson's holding to statutes other than the residual clause. But the resolution of *Dimaya* did not adjudicate the underlying question of whether *Johnson* and its newly created right apply beyond the residual clause. Rather, the Court used the same standards of vagueness articulated in *Johnson* to summarily find the statute unconstitutional.⁶⁷ The outcome of *Dimaya* holds particular relevance to the risk-of-force clause because the two statutes share identical language.⁶⁸ However, the *Dimaya* holding does not directly address the risk-of-force clause and its unique factors.⁶⁹

Not surprisingly, a similar split in opinion has also resulted as the appellate courts have considered vagueness challenges to the risk-of-force clause in § 924(c)(3)(B). The statutory language has been challenged with mixed success among some circuits and is still being considered in others.⁷⁰ Given the related nature of the argument to extend *Johnson* and the existing circuit split, it is likely the statute will eventually be challenged before the Supreme Court.⁷¹ It is in this context that this Note now turns to discuss § 924(c)(3)(B) and concludes that it is not unconstitutionally vague under *Johnson*.

D. 18 U.S.C. § 924(c) in Perspective

Mandatory minimum sentence enhancements are present in two federal firearm statutes: the ACCA and § 924(c).⁷² Section 924(c), as part of the Gun Control Act of 1968, predates the ACCA.⁷³ However, the sections defining a crime of violence

⁶⁷ *Id.* at 1216.

⁶⁸ Compare 18 U.S.C. § 16(b) (2012), with 18 U.S.C. § 924(c)(3)(B) (2012) (defining a crime of violence, in part, as a crime “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.”).

⁶⁹ Despite the identical language of the two provisions, several factors distinguish the two provisions which would necessitate separate consideration. See *infra* Part II.A. Additionally, the judgment on the unconstitutionality only facially prejudices a future consideration of the risk-of-force clause under the reaffirmed rule for vagueness determination. But given that there are distinguishing factors between the two statutes, the Court may wish to revisit its void-for-vagueness doctrine in the near future to stem the tide of new litigation, which has arisen as a (mostly) unforeseen consequence.

⁷⁰ See *infra* note 99 and accompanying text.

⁷¹ It is worth noting that at least one circuit court has reversed its position on the risk-of-force clause in a decision following *Dimaya*. See *United States v. Salas*, 889 F.3d 681, 683 (10th Cir. 2018). While others may similarly follow, it is unlikely that all will equate the two statutory provisions. Rather some may join the unique position of the Sixth Circuit, which is the only court to have found § 16(b) unconstitutionally vague, yet upheld § 924(c)(3)(B) as constitutional. See *Shuti v Lynch*, 828 F.3d 440, 449–51 (6th Cir. 2016).

⁷² CHARLES DOYLE, CONG. RES. SERV., R41412, FEDERAL MANDATORY MINIMUM SENTENCING: THE 18 U.S.C. 924(C) TACK-ON IN CASES INVOLVING DRUGS OR VIOLENCE 1 (2015).

⁷³ See Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1224 (1968).

were not added until Congress passed the Firearm Owner's Protection Act of 1986.⁷⁴ While the ACCA addresses recidivists, as previously mentioned, § 924(c) mandates additional periods of incarceration any time a firearm is used or possessed during and in relation to a federal crime of violence or a drug trafficking crime.⁷⁵ The statute provides enhancements based on factors including the various types of firearms, the manner of the firearm's employment relative to the crime, and whether the charge is a first-time offense or one among several violations.⁷⁶ It has been subject to several challenges before the Supreme Court⁷⁷ since its inception and has been amended various times.⁷⁸ It has been upheld against several constitutional challenges, including the right to bear arms under the Second Amendment,⁷⁹ the prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment,⁸⁰ the

⁷⁴ Firearm Owner's Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, 457 (1986).

⁷⁵ 18 U.S.C. § 924(c)(1)(A) (2012); *see also* Michael J. Riordan, *Using a Firearm During and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. § 924(c)(1)*, 30 DUQ. L. REV. 39, 40 (1991) ("The change was primarily attributable to the bipartisan belief that rehabilitation of criminals was difficult to accomplish and by widespread dissatisfaction with judicial discretion in sentencing, which critics argued actually exacerbated the problems of controlling crime. This dissatisfaction resulted in renewed support for mandatory minimum penalties, especially for crimes involving narcotics offenses." (citations omitted)).

⁷⁶ 18 U.S.C. § 924(c)(1)(A) (2012).

⁷⁷ DOYLE, *supra* note 72, at 12–21.

⁷⁸ 18 U.S.C. § 924(c) (1970); Pub. L. No. 91–644, § 13, 84 Stat. 1889 (codified as amended at 18 U.S.C. § 924(c) (1976)); Pub. L. No. 98–473, § 1005, 98 Stat. 2138 (codified as amended at 18 U.S.C. § 924(c) (1982)); Pub. L. No. 99–308, 100 Stat. 457 (1986); Pub. L. No. 100–690, § 6460, 102 Stat. 4373 (codified as amended at 18 U.S.C. § 924(c) (1988)); Pub. L. No. 101–647, § 1101, 104 Stat. 4829 (1990); Pub. L. No. 105–386, § 1, 112 Stat. 3469 (codified as amended at 18 U.S.C. § 924(c) (2000)); Pub. L. No. 109–92, § 6(b), 119 Stat. 2102 (2005). One example is that the statute originally condemned the "use" of a firearm. 18 U.S.C. § 924(c) (1970). But, the Supreme Court found the word "use" anticipates more than possession. *Bailey v. United States*, 516 U.S. 137, 143 (1995) (noting that § 924(c) "requires evidence sufficient to show . . . a use that makes the firearm an operative factor . . . '[U]se' must connote more than mere possession . . ."). So, Congress amended the language in 1998 to outlaw both use and possession "in furtherance" of a predicate offense. Pub. L. No. 105–386 § 1, 112 Stat. 3469 (codified as amended at 18 U.S.C. § 924(c) (2000)).

⁷⁹ *See, e.g., United States v. Napolitan*, 762 F.3d 297, 311 (3d Cir. 2014); *United States v. Bryant*, 711 F.3d 364, 368–69 (2d Cir. 2013); *United States v. Potter*, 630 F.3d 1260, 1261 (9th Cir. 2011); *United States v. Jackson*, 555 F.3d 635, 636 (7th Cir. 2009).

⁸⁰ *See, e.g., United States v. Richardson*, 793 F.3d 612, 633–34 (6th Cir. 2015), *vacated*, 136 S. Ct. 1157 (mem.), *remanded in light of Johnson v. United States*, 135 S. Ct. 2551 (2015); *United States v. Haile*, 685 F.3d 1211, 1222 (11th Cir. 2012); *United States v. Major*, 676 F.3d 803, 812 (9th Cir. 2012); *United States v. Thomas*, 627 F.3d 146, 160 (5th Cir. 2010).

right to trial by jury under the Sixth Amendment;⁸¹ the Fifth Amendment's proscriptions of double jeopardy and due process;⁸² the constitutional structure for separation of powers;⁸³ and congressional authority granted under the Commerce Clause.⁸⁴

Because a court may not circumvent the sentence enhancements called for by § 924(c) by ordering concurrent sentences,⁸⁵ imposing a probationary sentence,⁸⁶ nor artificially reducing the sentence of the predicate offense,⁸⁷ sentences under § 924(c) are especially potent.⁸⁸ In addition, a criminal series—which involves multiple acts qualifying as predicate offenses—“trigger[s] enhanced mandatory minimum penalties” and allows the court to impose enhanced sentences for multiple violations.⁸⁹ This makes prisoners all the more desperate to seek its invalidation.

⁸¹ See *United States v. Smith*, 775 F.3d 1262, 1266 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2827 (2015); *United States v. Hunter*, 770 F.3d 740, 745–46 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 2338 (2014).

⁸² See *United States v. Catalan-Roman*, 585 F.3d 453, 471–72 (1st Cir. 2009), *cert. denied*, 560 U.S. 948 (2010); *United States v. Khan*, 461 F.3d 477, 493–94 (4th Cir. 2006), *cert. denied*, 550 U.S. 956 (2007).

⁸³ See *United States v. Major*, 676 F.3d 803, 811 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 280 (2012); *United States v. Walker*, 473 F.3d 71, 75–76 (3d Cir. 2007), *cert. denied*, 127 S. Ct. 1924 (2007).

⁸⁴ See *United States v. Belfast*, 611 F.3d 783, 815–16 (11th Cir. 2010), *cert. denied*, 562 U.S. 1236 (2011); *United States v. Lynch*, 367 F.3d 1148, 1158 (9th Cir. 2004), *aff'd*, 437 F.3d 902 (9th Cir. 2006); *United States v. Miller*, 283 F.3d 907, 913–14 (8th Cir. 2002), *cert. denied*, 537 U.S. 871 (2002).

⁸⁵ 18 U.S.C. § 924(c)(1)(D)(ii) (2012).

⁸⁶ *Id.* § 924(c)(1)(D)(i).

⁸⁷ *E.g.*, *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008) (confirming the district court's conclusion that it is “not permitted to reduce that prison term [for an underlying offense] on account of the mandatory minimum sentence provided by § 924(c) . . .”); *United States v. Hatcher*, 501 F.3d 931, 933–34 (8th Cir. 2007), *cert. denied*, 552 U.S. 1170 (2008) (holding that the sentence enhancement provided by § 924 must be imposed independently of the sentence for the underlying crime); *United States v. Franklin*, 499 F.3d 578, 583 (6th Cir. 2007) (“[The] statutory language reflects the intent of Congress that the § 924(c)(1) sentence must be imposed ‘in addition to’ a reasonable guideline range sentence.”); *United States v. Roberson*, 474 F.3d 432, 437 (7th Cir. 2007) (“The district judge was therefore required to determine the proper sentence for the bank robbery entirely independently of the section 924(c)(1) add-on”); see S. REP. NO. 98-225, at 312–14 (1984) (“Section 924(c) sets out an offense distinct from the underlying felony and is not simply a penalty provision.”).

⁸⁸ See DOYLE, *supra* note 72, at 9.

⁸⁹ *Id.* at 9, 9 n.76 (“[M]ultiple underlying offenses support multiple § 924(c)(1) convictions” (alterations in original) (quoting *United States v. Sandstrom*, 594 F.3d 634, 658 (8th Cir. 2010)); see also *United States v. Catalan-Roman*, 585 F.3d 453, 472 (1st Cir. 2009); *United States v. Penney*, 576 F.3d 297, 316 (6th Cir. 2009) (“[W]hen ‘two separate predicate offenses for triggering § 924(c)(1) were charged and proven,’ a defendant may be convicted and sentenced for two separate crimes, even if both offenses were committed in the course

With an understanding of the fundamental purpose, history, and complications of the clauses, this Note can proceed to juxtapose the residual clause with the risk-of-force clause found in § 924(c)(3)(B). This is necessary because advocates of a broad reading of *Johnson* enjoyed some level of success with statutes beyond the residual clause. Given the previous success of cases argued under an expansive reading of *Johnson*, this Note forecasts that the current circuit split concerning the risk-of-force clause will inevitably come before the Supreme Court soon and turns to discuss whether the risk-of-force clause is unconstitutionally vague in light of *Johnson*.

II. ANALYSIS

“Importing a definition from a different statute, even with identical language, has serious implications on the constitutionality of the Act.”⁹⁰ Consequently, an analysis of the risk-of-force clause should be independent of any assumption that it bares any meaningful similarity to the residual clause with which it is often associated, or even that of the identical language used in § 16(b).⁹¹ But, because the cases which consider the constitutional vagueness of the risk-of-force clause do so in light of *Johnson* and *Dimaya*—out of procedural necessity—rather than independently, the analysis will proceed in kind. Therefore, the question becomes whether the risk-of-force clause can be distinguished from the residual clause and whether it is distinguishable from the INA statute. Additionally, this Note begins with the presumption that all statutes are constitutional.⁹²

of the same event.” (quoting *United States v. Naboor*, 901 F.2d 1351, 1357–58 (6th Cir. 1990)); *United States v. Looney*, 532 F.3d 392, 397 (5th Cir. 2008).

⁹⁰ Raymond E. Gazer, *The Presumption of Innocence: Why Should the Accused Care Whether He Is Being Detained Before Trial for Regulatory or Punitive Reasons? Jail Is Still Jail: Re-Examining the Judicial Gloss that Has Diluted the Bail Reform*, 25 PACE L. REV. 355, 360 (2005).

⁹¹ Chief Justice Roberts notes his concern of an out-of-control void-for-vagueness doctrine and the potential invalidation of other statutes in subsequent rulings. *Session v. Dimaya*, 138 S. Ct. 1204, 1241 (2018) (Roberts, C.J., dissenting) (“In addition, § 16 serves as the universal definition of ‘crime of violence’ for all of Title 18 of the United States Code. Its language is incorporated into many procedural and substantive provisions of criminal law, including provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives. See 18 U.S.C. §§ 25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a) (4), 2261(a), 3561(b). Of special concern, § 16 is replicated in the definition of ‘crime of violence’ applicable to § 924(c), which prohibits using or carrying a firearm ‘during and in relation to any crime of violence,’ or possessing a firearm ‘in furtherance of any such crime.’ §§ 924(c)(1)(A), (c)(3).”).

⁹² *United States v. Harris*, 106 U.S. 629, 635 (1883) (“Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in

“The prohibition of vagueness in criminal statutes ‘is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,’ and a statute that flouts it ‘violates the first essential of due process.’”⁹³ In brief review, *Johnson* held that the residual clause of the ACCA was “so vague that it fail[ed] to give ordinary people fair notice of the conduct it punishes, or so standardless that it invite[d] arbitrary enforcement.”⁹⁴ The Court found there was a two-tiered problem, the clause left “grave uncertainty about how to estimate the risk posed by a crime,” as well as “how much risk it takes for a crime to qualify as a violent felony.”⁹⁵ It was the aggregate uncertainty—the combination of unpredictability and arbitrariness—not just the formulaic uncertainties, that made the residual clause unconstitutionally vague.⁹⁶ *Johnson* does not invalidate all other “risk clauses” for this reason.⁹⁷

The extension of *Johnson* to the risk-of-force clause has been addressed by various courts of appeals, the majority of which reject the argument and uphold the statute as constitutional,⁹⁸ at least prior to *Dimaya*.⁹⁹ In doing so, the courts have proposed a number of factors which distinguish the risk-of-force clause from the

question is clearly demonstrated.”). For an interesting discussion of the doctrine in its early formation, see generally Note, *The Presumption of Constitutionality*, 31 COLUM. L. REV. 1136 (1931).

⁹³ *Golicov v. Lynch*, 837 F.3d 1065, 1068 (10th Cir. 2016) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015)).

⁹⁴ *Johnson*, 135 S. Ct. at 2556 (internal quotations omitted).

⁹⁵ *Id.* at 2557–58; see *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) (observing that the ACCA clause failed because it “required courts to assess the hypothetical risk posed by an abstract generic version of the offense”).

⁹⁶ See *Johnson*, 135 S. Ct. at 2558.

⁹⁷ *Id.* at 2561, 2563 (concluding criminal laws using terms like “substantial risk,” “grave risk,” and “unreasonable risk,” were not called into question).

⁹⁸ See *United States v. Eshetu*, 863 F.3d 946, 955 (D.C. Cir. 2017) (making special mention of the Supreme Court’s unanimous decisions in response to the language used in the risk-of-force clause, but noting the Court’s division when the residual clause was at issue); *Ovalles v. United States*, 861 F.3d 1257, 1263 (11th Cir. 2017) (“*Johnson* does not apply to or invalidate § 924(c)(3)(B).”); *United States v. Davis*, 677 F. App’x 933, 936 (5th Cir. 2017) (“*Johnson* does not invalidate § 924(c)(3)(B).”); *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016) (holding that § 924(c)(3)(B) is considerably narrower than the ACCA’s residual clause and much of *Johnson*’s analysis does not apply to it); *Hill*, 832 F.3d 135, 146 (2nd Cir. 2016) (“[T]he Supreme Court’s explanation for its conclusion in [*Johnson*] renders that case inapplicable to the risk-of-force clause.”); *United States v. Graham*, 824 F.3d 421, 424 n.1 (4th Cir. 2016) (en banc) (rejecting vagueness challenge under plain error review); *United States v. Taylor*, 814 F.3d 340, 375–76 (6th Cir. 2016) (holding § 924(c)(3)(B) as constitutional despite holdings by the Seventh and Ninth Circuits invalidating 18 U.S.C. § 16(b)). *But see* *United States v. Cardena*, 842 F.3d 959, 996 (7th Cir. 2016) (holding that because a previous ruling found § 16(b) unconstitutionally vague and because the language is identical, “the residual clause in 18 U.S.C. § 924(c)(3)(B) is also unconstitutionally vague”).

⁹⁹ See *supra* note 71.

residual clause. These factors are incorporated into the broader debate as springboards for reasoned discussion. Factors largely emphasized in *Dimaya*, which support an opposing conclusion, are also addressed to demonstrate why they are an insufficient basis for concluding that the risk-of-force clause is unconstitutionally vague. Each of the factors addressed below demonstrates how the risk-of-force clause has less aggregate ambiguity than the residual clause—a key distinction given the Court’s concern over the summation of the “grave uncertainty” involved in determining whether an underlying crime qualified under the residual clause.¹⁰⁰ The distinguishing factors can be separated into two categories: textual differences and contextual differences.

A. *Textually Differentiating § 924(c)(3)(B)*

The first source of distinction is found by comparing the text of the clauses. The risk-of-force clause defines “crime of violence” as an 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.”¹⁰¹ In contrast, the residual clause defines violent felony as a felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”¹⁰² The plain reading of the statutes provides three easily discernable differences. These are: (1) a focus on conduct using physical force rather than the resultant physical injury;¹⁰³ (2) the inclusion of the phrase “by its nature” in only the risk-of-force clause;¹⁰⁴ and (3) a restriction unique to the risk-of-force clause.¹⁰⁵

The first textual factor which distinguishes the risk-of-force clause from the residual clause is that “the statutory language of § 924(c)(3)(B) is distinctly narrower, especially because it deals with physical force rather than physical injury.”¹⁰⁶ The difference between the two is that one concerns a result, while the other concerns conduct.¹⁰⁷ The statute concerned with the result of physical injury encompasses more offenses because it includes conduct lacking a violent aspect, like

¹⁰⁰ *Session v. Dimaya*, 138 S. Ct. 1204, 1240 (2018) (Roberts, C.J., dissenting) (“The decision emphasized that it was the ‘sum’ of the ‘uncertainties’ in the ACCA residual clause, confirmed by years of experience, that ‘convince[d]’ us the provision was beyond salvage.” (citing *Johnson*, 135 S. Ct. at 2560)).

¹⁰¹ 18 U.S.C. § 924(c)(3) (2012).

¹⁰² *Id.* § 924(e)(2)(B)(ii).

¹⁰³ *Infra* notes 106–118 and accompanying text.

¹⁰⁴ *Infra* notes 106–118 and accompanying text.

¹⁰⁵ *Infra* notes 106–118 and accompanying text.

¹⁰⁶ *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016); *United States v. Serafin*, 562 F.3d 1105, 1109 (10th Cir. 2009) (finding the risk of use of force is narrower than risk of injury) *overruled by* *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018).

¹⁰⁷ *Compare* 18 U.S.C. § 924(e)(2)(B)(ii) (2012) (“risk of physical *injury* to another”) (emphasis added), *with* 18 U.S.C. § 924(c)(3)(B) (2012) (“risk that physical force . . . *be used*”) (emphasis added).

drunk driving.¹⁰⁸ Accordingly, the statute concerned with the conduct using physical force necessarily is limited to fewer offenses and therefore permits less ambiguity.¹⁰⁹ This is especially true in light of the Court's decision in *Leocal v. Ashcroft*,¹¹⁰ which narrowed the definition of "use of physical force against another person" to "suggest[] a category of violent, active crimes."¹¹¹ This qualification supports the conclusion that the "[r]isk of physical force against a victim is much more definite than risk of physical injury to a victim."¹¹² Logically speaking, it is far easier to judge whether a crime is violent by how it is conducted than by the potential consequences of the crime.¹¹³ Thus, judgments under the risk-of-force clause are less likely to be imposed arbitrarily.

In *Dimaya*, the Court sidelines this distinction, citing a recent opinion holding that "'physical force' means 'force capable of causing physical pain or injury.'"¹¹⁴ There, the Court lost sight of the forest for the trees in trying to equate physical force with resultant injury. In attempting to discount this important factor, the Court overlooked the statute's context. The requirement for physical force goes to the intentional aspect of the action taken, not just the outcome of the action.¹¹⁵ The spirit and intent of the statute are manifestly obvious when read as a whole. The statute seeks to cover criminal conduct that purposefully or "actively" exercises physical force, rather than conduct which incidentally results in harm.¹¹⁶ The interpretation

¹⁰⁸ This was the question at issue in *Begay v. United States*, 553 U.S. 137 (2008). Ultimately, the Court decided driving under the influence is not a violent felony, despite the fact that "[d]runk driving is an extremely dangerous crime," which in the preceding year "claimed the lives of more than 17,000 individuals and harmed untold amounts of property." *Begay*, 553 U.S. at 141–42 (citations omitted).

¹⁰⁹ See *supra* note 107 and accompanying text.

¹¹⁰ 543 U.S. 1 (2004).

¹¹¹ See *id.* at 11 (finding that under § 16(b) the "use of physical force against another person . . . suggests a category of violent, active crimes"); see also *United States v. Serafin*, 562 F.3d 1105, 1114 (10th Cir. 2009) (applying *Leocal* to § 924(c) so that the analysis focuses on whether the nature of the offense causes physical force to actually arise in the course of the offense, rather than the possibility of it arising in the result).

¹¹² *United States v. Taylor*, 814 F.3d 340, 376–77 (6th Cir. 2016).

¹¹³ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1237 (2018) (Roberts, C.J., dissenting).

¹¹⁴ *Dimaya*, 138 S. Ct. at 1208 (majority opinion) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)).

¹¹⁵ See *id.* at 1236–37 (Roberts, C.J., dissenting) ("The difference is that [physical force] asks about the risk that the offender himself will *actively employ* force against person or property. That language does not sweep in all instances in which the offender's acts, or another person's reaction, might result in unintended or negligent harm.").

¹¹⁶ *Id.* This is consistent with the requirement that courts read into a statute the scienter necessary to separate wrongful conduct from innocent conduct. See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("We therefore generally 'interpret [] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.'" (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994))).

of physical force offered by the Court before it fully scrapped the residual clause in disregard for much of the reasoning presented in *Johnson*¹¹⁷ hardly qualifies as justification to treat a better-tailored statute as its equal.¹¹⁸

Second, the risk-of-force clause “also contains the ‘narrowing aspects’ of . . . ‘requiring that the felony be one which “by its nature” involves the risk that the offender will use physical force.’”¹¹⁹ This differs from the residual clause’s requirement that conduct merely “involve” a risk of injury. The phrase “by its nature” is absent from the residual clause and must be given meaning.¹²⁰ The phrase indicates that a court should focus on the nature of the felony in question. Unlike the residual clause, the risk-of-force clause does not permit “a court to consider risk-related conduct beyond that which is an element of the predicate crime.”¹²¹ So, courts have no need to look to a “judicially imagined ‘ordinary case’ of a crime” because an offense is only a valid predicate if every conceivable conviction includes the risk of the use of physical force.¹²² This is starkly different from the residual clause, which required courts to look to an “ordinary case” under the categorical approach—meaning that an offense would qualify if it *ordinarily* involves a risk of injury, even if a particular commission might lack a violent element.¹²³ “The mere fact that a

¹¹⁷ *Dimaya*, 138 S. Ct. at 1240 (Roberts, C.J., dissenting).

¹¹⁸ *See id.* at 1236 (“But the Court too readily dismisses the significant textual distinctions between § 16(b) and the ACCA residual clause.”).

¹¹⁹ *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016) (quoting *United States v. Taylor*, 814 F.3d 340, 377 (6th Cir. 2016)); *see also Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (holding that under the ACCA clause, a “court’s task goes beyond deciding whether creation of risk is an element of the crime” because the question becomes “whether the crime ‘involves conduct’ that presents too much risk of physical injury.”). *But see United States v. Vivas-Ceja*, 808 F.3d 719, 722 (7th Cir. 2015) (opining that the phrases “by its nature” and “involves conduct” are synonymous).

¹²⁰ The rule to avoid surplusage indicates that each word or phrase has a meaning and use in the broader text and any interpretation that renders the word or phrase meaningless should be rejected. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.” (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))); *see WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 833 (3d. ed. 2001).

¹²¹ *Taylor*, 814 F.3d at 377.

¹²² *Johnson*, 135 S. Ct. at 2554; *see United States v. Hart*, 578 F.3d 674, 681 (7th Cir. 2009) (determining that federal escape could be committed without violent force and therefore it was not, as a categorical matter, a crime of violence); *see also Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (“[A] state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense.”).

¹²³ The categorical approach is generally used to apply an enhancement provision and “look[s] only to the fact of conviction and the statutory definition of the predicate offense, rather than to the particular underlying facts.” *Taylor v. United States*, 495 U.S. 575, 576 (1990). Appellate courts are beginning to reject this approach when considering whether the risk-of-force clause applies since a conviction under a § 924(c) offense is concurrently

crime could be committed without a risk of physical harm does not exclude it from the statute's reach" because "the residual clause speaks of 'potential risk[s],' . . . suggesting 'that Congress intended to encompass possibilities even more contingent or remote than a simple "risk," much less a certainty.'"¹²⁴

Such a commission—one lacking a *substantial* risk of the use of violent force—is not possible under the risk-of-force clause. This is because the language indicates that such a risk is inherent within the criminal elements required to secure a conviction for the predicate offense, even if it is not facially present in the criminal statute.¹²⁵ This is a distinction the Court largely ignores in *Dimaya*,¹²⁶ except for Justice Gorsuch, who signaled in a concurring opinion his interest in exploring a meaningful interpretation of the language.¹²⁷

determined with the underlying offense. *United States v. Kennedy*, 720 F. App'x 104, 110 (3d Cir. 2017) ("[T]he rationales for applying the categorical approach were not present when the predicate offense was tried contemporaneously before the same court." (citing *United States v. Robinson*, 844 F.3d 137, 142 (3rd Cir. 2016), *cert. denied*, 138 S. Ct. 1601 (2018))); *United States v. Cravens*, No. 16-8111, 2017 WL 6559798, at *8 (10th Cir. Dec. 19, 2017) ("It is time to re-think our use of the categorical approach in § 924(c) cases."). This further distinguishes the two statutes and their potential for arbitrary application by eliminating the uncertainty inherent in post-conviction determinations of an offense's violent nature. *But see Sessions v. Dimaya*, 138 S. Ct. 1204, 1231 (2018) (Gorsuch, J., concurring).

¹²⁴ *Johnson*, 135 S. Ct. at 2582 (Alito, J., dissenting) (quoting *James v. United States*, 550 U.S. 192, 207–208 (2007)).

¹²⁵ It is worth noting that the risk-of-force clause is less expansive than the residual clause in that it does not include offenses with potential risk, only those with substantial risk. Furthermore, the Supreme Court has defined physical force as "violent force - that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010); *accord United States v. Ventura-Perez*, 666 F.3d 670, 674 (10th Cir. 2012) ("The Court construed physical force to require 'violent force.'"). Indicating that an offense with a substantial risk of physical force is seen as one which bears a strong likelihood of employing violent force during its commission.

¹²⁶ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018).

¹²⁷ *See id.* at 1233 (Gorsuch, J., concurring) ("Plausibly, anyway, the word 'nature' might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. 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." (citation omitted)).

Furthermore, the risk-of-force clause applies “a qualitative risk standard to ‘real-world facts or statutory elements’” by requiring “an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding.”¹²⁸ This reduces the ambiguity stemming from both modalities that undermined the residual clause, as there is no longer *grave* uncertainty in estimating the risk posed by an ordinary offense, nor about how much risk is needed to qualify.¹²⁹

Third, the risk-of-force clause also contains the “narrowing aspect[]” of ‘requiring that the risk of physical force arise “in the course of” committing the offense.’”¹³⁰ This prevents courts from considering factors “remote from the criminal act,” a consideration that supported the Court’s vagueness analysis in *Johnson*.¹³¹ It further fulfills the purpose of punishing those willing to put others at risk of violence but differentiates between those who incidentally cause harm in the course of their criminal conduct.¹³² This contrasts with “the wide judicial latitude permitted by the ACCA’s coverage of crimes that involve conduct presenting a serious risk of injury,”¹³³ a determination which stands independent of the offender’s intent and one which inexcusably permits a court to “evaluate the risk of injury arising after the crime has been completed.”¹³⁴

The Court in *Dimaya* half-heartedly dismissed this distinction as not meaningful given the “ordinary case” approach, reasoning that the risk only occurs during the commission anyway.¹³⁵ Under traditional canons of interpretation, “all words of a statute [are to] be given effect if possible”¹³⁶ The Court seems to deliberately misconstrue the language of the risk-of-force clause to make it seem as though any conduct during the crime, from start to finish, should be considered in determining an ordinary crime. An alternative view, encompassing the reality of the

¹²⁸ *Shuti v. Lynch*, 828 F.3d 440, 449 (6th Cir. 2016) (quoting *Johnson*, 135 S. Ct. at 2561).

¹²⁹ While there may remain a certain degree of uncertainty in determining the applicability of the clause, it is within the tolerable levels and beyond vagueness challenges. The no-set-of-circumstances rule overlooked by the *Johnson* court holds that “a law is facially invalid ‘only if the enactment is impermissibly vague in *all* of its applications.’” *Johnson*, 135 S. Ct. at 2581, 2581 n.2. (Alito, J., dissenting) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–95 (1982)).

¹³⁰ *United States v. Prickett*, 839 F.3d 697, 699 (8th Cir. 2016) (quoting *United States v. Taylor*, 814 F.3d 340, 376–77); *see also Johnson*, 135 S. Ct. at 2562 (emphasizing that the ACCA required courts to review conduct that happened after the offense’s conclusion).

¹³¹ *Prickett*, 839 F.3d at 699 (internal quotations omitted).

¹³² *See Voisine v. United States*, 136 S. Ct. 2272, 2284 (2016) (Thomas, J., dissenting) (opining that the “‘use of physical force’ connotes an intentional act” and recklessness is insufficient to warrant an enhanced sentence).

¹³³ *Prickett*, 839 F.3d at 699 (alterations incorporated) (internal quotation marks omitted).

¹³⁴ *United States v. Taylor*, 814 F.3d 340, 377 (6th Cir. 2016) (citing *Johnson*, 135 S. Ct. at 2557).

¹³⁵ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1208 (2018).

¹³⁶ LARRY M. EIG, *supra* note 48.

statute's plain language, points to conduct inherent in that crime's commission when read as a whole.¹³⁷ That is, the words "in the course of" should be understood to mean "necessary for the commission of."¹³⁸ This interpretation lends to the deliberateness with which violent force must be applied, rather than when violent force might occur. Accidental or incidental harms were not the target of the risk-of-force clause, but could rightly be included in the residual clause.¹³⁹ Because the risk-of-force clause restricts qualifying offenses to those that generate the risk necessary to its accomplishment, it again reduces the level of ambiguity and diminishes the likelihood a court could arbitrarily apply the enhancement.

Each of the aforementioned factors is important, not only individually, but collectively. If the risk-of-force clause were distinct in only one aspect, it might fail to overcome the greater uncertainty which doomed the residual clause.¹⁴⁰ As one court later observed, "*Johnson* did not invalidate the ACCA residual clause because the clause employed an ordinary case analysis, but rather because of a greater sum of several uncertainties" which "may be tolerable in isolation."¹⁴¹ The cumulative effect of the textual differences lessens 18 U.S.C. § 924(c)(3)(B)'s aggregate vagueness and uncertainty enough to make the statute constitutional.¹⁴² However, the textual dissimilarities are not the sole source providing criteria by which to distinguish between the two statutes.

B. Contextual Differences

Another way to distinguish the two statutes is by examining the contextual differences under which the statutes exist. These are present in two forms; The first difference concerns the holistic historic context of each statute. This is important to consider given the unique circumstances under which the residual clause was invalidated.¹⁴³ The second is the contextual difference found in the framework of the statutory body which shapes the meaning and application of a statute's subsections.

¹³⁷ See *Dimaya*, 138 S. Ct. at 1237 (Roberts, C.J., dissenting) ("Properly interpreted, this means the statute requires a substantial risk that the perpetrator *will use* force while carrying out the crime.") (emphasis added).

¹³⁸ The House Subcommittee on Crime opined that the bill enacting 924(c) should be altered because as it is written, proving the crime's "element[s] would involve additional analysis of the defendant's conduct, the circumstances of the violent crime and evidence of the defendant's state of mind. It would be a substantial burden on the prosecution and is unnecessary to prevent injustice." See H.R. REP. No. 99-495, at 9 (1986). Thus, the legislators understood this language to call for a fact specific inquiry into the offense rather than an "ordinary case" analysis or a categorical approach.

¹³⁹ See *id.* ("[Section] 16(b) . . . does not cover offenses where the danger arises from the offender's negligent or accidental conduct . . .").

¹⁴⁰ See *supra* note 100 and accompanying text.

¹⁴¹ *United States v. Taylor*, 814 F.3d 340, 378 (6th Cir. 2016).

¹⁴² *Shuti v. Lynch*, 828 F.3d 440, 450 (6th Cir. 2016).

¹⁴³ See *Johnson*, 135 S. Ct. at 2557; Little, *supra* note 38.

As explained below, this is accomplished by both qualifying statements and restrictive applications.

A primary distinction in the historical context is that “§ 924(c)’s [risk-of-force] clause has not been subject to the same kind of uncertainty in application that long plagued the residual clause of the ACCA and ultimately led the Supreme Court to strike that clause.”¹⁴⁴ *Johnson* was exceptional. It was a product of the Court’s frustration with Congress’s lack of response to the Court’s decade-long struggle to define the clause,¹⁴⁵ which caused the Court to cry, “*no más*.”¹⁴⁶ As discussed above, prior to *Johnson*, the Court interpreted the ACCA clause four times and applied four different analyses to it within a five-year period.¹⁴⁷ The Court was frustrated not only with its own inability to define a workable standard, but with the ensuing confusion it caused among federal judges who sought to follow the Court’s awkward and shifting guidance, as well as the pressure placed upon defendants to plead guilty to lesser offenses in order to avoid the uncertainty of incurring a sentence enhancement should they risk fighting the charges.¹⁴⁸ It was only after the Court’s failed efforts that Justice Scalia reiterated that “the life of the law is experience” and concluded that the Court’s poignant experience with the residual clause over a decade left only “guesswork and intuition.”¹⁴⁹ In contrast, the Court has not articulated varying standards for the risk-of-force clause, nor has it been petitioned to resolve ambiguities on multiple occasions within only a few years. As Justice Scalia indicated, only experience can reveal a statute to be unconstitutionally unwieldy.¹⁵⁰

¹⁴⁴ *In re Smith*, 829 F.3d 1276, 1279 (11th Cir. 2016) (noting “*Johnson* decline[d] to expressly invalidate § 924(c)’s residual clause”); *see also* *United States v. Breshers*, No. 10-40107-01-SAC, 2017 WL 2378349, at *4 (D. Kan. June 1, 2017) (finding consistency in the application of the risk-of-force clause among the Third, Eighth, Ninth, Eleventh, and Fifth Circuits); *United States v. Bowen*, 228 F. Supp. 3d 1204, 1209 (D. Colo. 2017) (noting the differences of applicable standards for the ACCA and the risk-of-force clause); *Lloyd v. United States*, No. CIV 16-0513 JB/WPL, 2016 WL 5387665, at *3 (D.N.M. Aug. 31, 2016) (“The lower courts have noted no similar concerns [of vague or confusing application] with § 924(c)(3)(B).”).

¹⁴⁵ *See* Little, *supra* note 38.

¹⁴⁶ *Dimaya*, 138 S. Ct. at 1239 (Roberts, C.J., dissenting).

¹⁴⁷ *See Johnson*, 135 S. Ct. at 2558–59; *Sykes v. United States*, 564 U.S. 1, 4 (2011); *Chambers v. United States*, 555 U.S. 122, 130 (2009); *Begay v. United States*, 553 U.S. 137, 139 (2008); *James v. United States*, 550 U.S. 192, 195 (2007); *see also supra* notes 30–34 and accompanying text.

¹⁴⁸ *See* Little, *supra* note 38. (“The problem with the [residual] clause has been that many people—including federal judges and Justices—cannot agree as to what non-violent offenses should ‘categorically’ fit this general definition. And as Chief Justice John Roberts pointed out . . . uncertainty about the clause’s meaning . . . can pressure defendants to plead guilty to lesser offenses rather than risk fifteen years in jail.”).

¹⁴⁹ *Johnson*, 135 S. Ct. at 2559–60.

¹⁵⁰ *See id.* at 2562 (“Experience is all the more instructive when the decision in question rejected a claim of unconstitutionality. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in

The Court simply has not had this experience with the risk-of-force clause.¹⁵¹

The second contextual differences between the two statutes is found in the framework of the statutory body in the form of a qualifying statement. The residual clause is preceded by an enumerated list of offenses.¹⁵² The clause states that a violent felony is a felony 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.*”¹⁵³ This confusing attempt to establish an underlying link between the listed offenses is one defect from which the residual clause suffers. Justice Scalia emphasized this by writing in comparison, “[t]he 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.”¹⁵⁴ But, a “required nexus to the enumerated crimes . . . [is not] an infirmity from which” the risk-of-force clause suffers.¹⁵⁵ The list of enumerated crimes obscures the “degree of risk” required because the listed offenses are an odd combination lacking a common class of risk.¹⁵⁶ While a “confusing list” of offenses was not dispositive for *Johnson*, it contributed to “significantly less predictability” in the clause’s application and was an additional factor lending to the residual clause’s grave uncertainty.¹⁵⁷ The lack of an inconsistent, enumerated list of offenses lends credibility to the risk-of-force clause.¹⁵⁸

subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause [T]he provision remains . . . ‘a black hole of confusion and uncertainty’” (internal citations omitted)).

¹⁵¹ Arbitrary enforcement was also a fatal feature of the INA clause because the ACCA standards were “regularly applied” despite differing statutory language. *Golicov v. Lynch*, 837 F.3d 1065, 1074 (10th Cir. 2016). In contrast, courts do not apply the ACCA standards to the risk-of-force clause. *See Shuti v. Lynch*, 828 F.3d 440, 449 (6th Cir. 2016) (2018).

¹⁵² *See* 18 U.S.C. § 924(e)(2)(B) (2012).

¹⁵³ *Id.* § 924(e)(2)(B)(ii) (emphasis added).

¹⁵⁴ *Johnson*, 135 S. Ct. at 2561 (quoting *James v. United States*, 550 U.S. 192, 230 n.7 (2007) (Scalia, J., dissenting)).

¹⁵⁵ DOYLE, *supra* note 72, at 5.

¹⁵⁶ *Johnson*, 135 S. Ct. at 2558.

¹⁵⁷ *Id.* at 2561 (noting that other risk clauses are saved from scrutiny because they are not linked to a “confusing list of examples”); *United States v. Hill*, 832 F.3d 135, 146 (2d Cir. 2016) (“[T]he risk-of-force clause contains no mystifying list of offenses and no indeterminate ‘otherwise’ phraseology—a defining feature of the ACCA’s residual clause that, in [*Johnson*], was understood to add an additional layer of uncertainty as to ‘how much risk it takes for a crime to qualify as a violent felony.’” (citation omitted)). *But see Golicov v. Lynch*, 837 F.3d 1065, 1074 (10th Cir. 2016) (noting the absence of enumerated crimes was not one of the two determinative features used to invalidate the ACCA clause).

¹⁵⁸ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1239 (2018) (Roberts, C.J., dissenting) (“The enumerated offenses, and our Court’s failed attempts to make sense of them, were essential

Furthermore, the risk-of-force clause is distinguishable because of its restricted application as designated by the statutory framework. The clause applies only when an individual uses or carries a firearm “during and in relation to,” or possesses a firearm “in furtherance of,” a “crime of violence.”¹⁵⁹ This requisite nexus is not a part of the broader residual clause found in § 924(e)(2)(B)(ii), but it is specific to § 924(c).¹⁶⁰ The additional criterion ensures that predicate offenses include the risks inherent when an offender employs a firearm during the commission of a crime.¹⁶¹ It therefore allows less indeterminacy about whether a predicate offense involves risk-creation because firearms, when used for crime, inherently introduce a risk of violence.¹⁶² The risk posed by the use of a firearm is in addition to the risk of the use of physical force inherent in an underlying offense. This double layer of risk makes it all the less likely that the courts could arbitrarily apply the clause.

Finally, § 924(c)(3)(B) “appl[ies] a qualitative risk standard to ‘*real-world facts* or *statutory elements*’” by “requir[ing] an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding.”¹⁶³ The retrospective assessment of qualifying crime made necessary by the residual clause’s premise of three previous convictions is not a deficiency from which the risk-of-force clause suffers because the application of § 924(c)(3)(B) is concurrent with the trial for the underlying crime.¹⁶⁴ The Supreme Court has emphasized that “[t]he residual clause failed not because it adopted a ‘serious potential risk’ standard but because applying that standard under the categorical approach required courts to assess the hypothetical risk posed by an abstract generic version of the offense.”¹⁶⁵ Because the application of the risk-of-force clause is concurrent, the categorical approach is

to *Johnson*’s conclusion that the residual clause ‘leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.’” (citing *Johnson*, 130 S. Ct. at 2558)).

¹⁵⁹ 18 U.S.C. § 924 (c)(1)(A) (2012).

¹⁶⁰ *Id.*; 18 U.S.C. § 924 (e)(2)(B)(ii).

¹⁶¹ *See supra* note 138.

¹⁶² *See generally* *United States v. Dillard*, 214 F.3d 88, 93 (2d Cir. 2000) (“Firearms are instruments designed for the use of violent physical force . . . Possession of a gun greatly increases one’s ability to inflict harm on others and therefore involves some risk of violence.”).

¹⁶³ *Shuti v. Lynch*, 828 F.3d 440, 449 (6th Cir. 2016) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2561); *see id.* (finding § 16(b) as unconstitutionally vague but affirming a previous ruling that § 924 (c)(3)(b) is constitutional).

¹⁶⁴ The residual risk clause looks to previous conduct: “In the case of a person who violates section 922(g) of this title and has three *previous convictions*” 18 U.S.C. § 924 e(1) (2012) (emphasis added).

¹⁶⁵ *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016); *see* *United States v. Taylor*, 814 F.3d 340, 378 (6th Cir. 2016) (“*Johnson* did not invalidate the ACCA residual clause because the clause employed an ordinary case analysis, but rather because of a greater sum of several uncertainties . . . [which] may be tolerable in isolation.”) (quoting *Johnson*, 135 S. Ct. at 2560).

unnecessary.¹⁶⁶ The sentencing official has the exact facts of the case and underlying conviction readily available and could eliminate a great deal of uncertainty by using the “underlying-conduct approach.”¹⁶⁷ This difference eliminates one level of uncertainty at issue in *Johnson* and is sufficient to “uphold the constitutionality of 18 U.S.C. § 924(c)(3)(B).”¹⁶⁸

After examining the potential extension of *Johnson* to the risk-of-force clause, this Note concludes—as have a majority of the courts of appeals which have considered the issue—that the statute is not so ambiguous or vague that it is unconstitutional. The textual and contextual factors are sufficient to distinguish the risk-of-force clause from the residual clause. And the apparent similarities are insufficient to warrant extending *Johnson* or *Dimaya* to invalidate the clause because the uncertainty that remains is within the range of what is tolerable. This conclusion preserves Justice Scalia’s assurance that “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”¹⁶⁹ and stems the expanding tide of void-for-vagueness doctrine.¹⁷⁰

CONCLUSION

In sum, the risk-of-force clause is distinguishable from the residual clause. The statute is textually narrower than the residual clause and encompasses less conduct

¹⁶⁶ *United States v. Cravens*, 719 F. App’x 810, 818–19 (10th Cir. 2017), *cert. denied*, No. 17-8796, 2018 WL 2118861 (2018) (“A number of district courts have also questioned the use of the categorical approach in § 924(c) cases . . . It is time to re-think our use of the categorical approach in § 924(c) cases. Easily determined facts are always preferable to rank speculation . . . [W]hile the statutory language between the Armed Career Criminal Act (ACCA), which was the genesis of the categorical approach, and 18 U.S.C. § 924(c)(3) may be similar, the question of whether a crime is a crime of violence arises in significantly different contexts under the two statutes.” (internal quotation marks omitted)); *United States v. Kennedy*, 720 F. App’x 104, 110 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 1601 (2018) (“[T]he rationales for applying the categorical approach were not present when the predicate offense was tried contemporaneously before the same court.” (citing *United States v. Robinson*, 844 F.3d 137, 142 (3rd Cir. 2016))).

¹⁶⁷ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1255 (2018) (Thomas, J., dissenting) (advocating the adoption of the underlying-conduct approach because the ordinary case analysis is unworkable); *Johnson*, 135 S. Ct. at 2578–80 (Alito, J., dissenting) (inviting the court to abandon the categorical approach in favor of a fact specific inquiry). *But see Dimaya*, 138 S. Ct. at 1217 (rejecting the underlying conduct approach and finding that the “Court adopted the categorical approach in part to ‘avoid[] the Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries.” (quoting *Descamps v. United States*, 570 U.S. 254, 267 (2013))).

¹⁶⁸ *Shuti*, 828 F.3d at 450.

¹⁶⁹ *Johnson*, 135 S. Ct. at 2561.

¹⁷⁰ *See Dimaya*, 138 S. Ct. at 1242 (Thomas, J., dissenting) (“I am also skeptical that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context.”).

with more definitive standards for determining predicate offenses. It is qualified by the statutory framework and additional requirements imposed by precedent. The risk-of-force clause has been consistently applied, suffers from no confusing interpretive applications, and addresses a specific and identifiable set of offenses. Thus, it is not so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. Simply put, the risk-of-force clause does not contain the aggregate ambiguity necessary to warrant invalidation. When it is considered by the Supreme Court, it should not be found to be so vague that it is beyond what the Constitution tolerates.