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IN THE SUPREME COURT OF THE UNITED STATES

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LORETTA E. LYNCH, :
ATTORNEY GENERAL, :

Petitioner : No. 15-1498

v. :

JAMES GARCIA DIMAYA, :
Respondent. :

- - - - - x

Washington, D.C.

Tuesday, January 17, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:03 a.m.

APPEARANCES:

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behalf of the Petitioner.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case No. 15-1498, Lynch v. Dimaya. Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Mr. Chief Justice, and may it please the Court:

The court of appeals held that the definition of crime of violence in 18 U.S.C 16(b) is unconstitutionally vague on its face, relying on this Court's decision in Johnson, holding the residual clause in the Armed Career Criminal Act unconstitutionally vague.

That was wrong for two reasons. First, the standard of vagueness applicable in an immigration proceeding is not the same as in a criminal proceeding, because the Constitution does not require prior notice that conduct will give rise to removal and also because the immigration laws have long been administered by the executive and administrative proceedings because -- under broad delegations of authority because of the close relation of immigration to foreign relations and national security.

1 Second, though, in any event, under the
2 criminal vagueness standard applied in Johnson 16(b) is
3 not unconstitutional as exemplified by this Court's
4 unanimous decision in Leocal and the more than -- and
5 the more than 30 years that 16(b) has been on the
6 books --

7 JUSTICE GINSBURG: But, Mr. Kneedler, didn't
8 the government argue in -- when Johnson was before us,
9 that if the ACCA residual clause was invalid, then 16(b)
10 would be vulnerable because it was subject to the same
11 central objection. Wasn't that the government's
12 argument?

13 MR. KNEEDLER: Well, the -- the United
14 States was responding to the argument that -- that was
15 made in Johnson, which was broader than the Court's
16 ultimate rationale. The -- to the extent substantial
17 risk alone was thought to be a problem, the Court made
18 clear in Johnson that cases involving references to
19 substantial risk are not inherently problematic and, in
20 fact, there are -- there are many such -- such ones.

21 The Court focused its analysis on two
22 different aspects, but they -- but they have features
23 that 16(b) does not have and make 16(b) very
24 distinctive. And, in fact, that's the reason why 16(b)
25 has not given rise to the interpretive confusion that

1 finally led this Court in Johnson to hold the ACCA
2 provision unconstitutional.

3 JUSTICE SOTOMAYOR: I thought the Johnson,
4 two features at issue were the fact that we were asking
5 courts to imagine what the ordinary crime was, and there
6 was no way to even think about what that was.

7 Your adversary points out, with burglary, if
8 the ordinary crime is during the day, there's one level
9 of risk. If it's at night, there's a different level of
10 risk. The nature of the entry is at question, whether
11 it's forcible or merely walking through an open door
12 uninvited. It may be easier with burglary for lots of
13 reasons, but there -- the level of what -- or what
14 constitutes an ordinary crime was somewhat at the center
15 of Johnson. Why isn't it at the center here?

16 MR. KNEEDLER: Because I -- I -- there are
17 several very important distinctions between this case
18 and Johnson with -- with respect to that.

19 The -- the ACCA residual clause spoke in
20 terms of a serious potential risk that serious injury to
21 another person might -- might result. And as the Court
22 pointed out, that created uncertainty about things that
23 could happen even after the offense was committed and
24 injury to people, bystanders or anyone else it could be.

25 Section 16(b) is very different in that

1 respect. It asks whether the offense by its nature
2 presents a substantial risk that physical force will be
3 used against the person or property of another, and
4 that's very different in several respects.

5 It confines the analysis in both a temporal
6 and functional sense to the elements of the offense.
7 You don't look at what conduct might -- might have
8 happened afterward. It focuses narrowly on the elements
9 of the offense because the -- the question is whether
10 the use of physical force might be used in the course of
11 committing that offense.

12 JUSTICE KAGAN: Well, may I ask,
13 Mr. Kneedler, because this aspect of your brief was
14 confusing to me because sometimes you're talking about
15 temporal, and sometimes you're talking about functional.
16 And I want to know what you think the real limitation
17 is. So take the example that you use, which is the
18 possession of a shotgun example; right?

19 MR. KNEEDLER: Right.

20 JUSTICE KAGAN: And you say that that would
21 fall outside of Section 16.

22 MR. KNEEDLER: Right.

23 JUSTICE KAGAN: And the question is why?
24 Temporally, you know, you're possessing a shotgun when
25 you shoot somebody. You can't do it any other way. So

1 the temporal analysis doesn't work. So what is it about
2 that example that makes it fall outside of Section 16,
3 whereas you argued it would have fallen inside of ACCA?

4 MR. KNEEDLER: Well, the -- well, first of
5 all, in ACCA that was part of the confusion. That was
6 the confusion in Johnson itself.

7 JUSTICE KAGAN: Yes, exactly.

8 MR. KNEEDLER: But -- but --

9 JUSTICE KAGAN: So why are you so sure that
10 there would not be the confusion under Section 16?

11 MR. KNEEDLER: Well, I think, again, because
12 of Leocal. And the courts after Leocal have had no
13 problem concluding that it was not covered. And the
14 reason is that Leocal -- excuse me -- 16(b) requires a
15 risk of the use of physical force, the -- an act of
16 violent crime, as the Court described it in Leocal, and
17 the possession of a -- of a sawed-off shotgun at any
18 particular moment in time. It doesn't have to culminate
19 in its use at all for -- for --

20 JUSTICE KAGAN: Well, that's absolutely
21 true. And that's what gave us trouble in ACCA because
22 it could culminate in its use, but it didn't have to
23 culminate in its use.

24 But then you take a case like burglary, and
25 you could say the exact same thing about burglary.

1 Somebody could walk in on a burglary and all of a sudden
2 there would be a use of force. But a burglary could
3 happen in such a way that nobody walked in and there
4 wouldn't be a use of force.

5 So, again, it just seems as though we're
6 replicating the same kind of confusions, and there's
7 nothing that separates the two.

8 MR. KNEEDLER: I -- I --

9 JUSTICE KAGAN: Or at least I'm trying to
10 find out --

11 MR. KNEEDLER: I --

12 JUSTICE KAGAN: -- what you think separates
13 the two.

14 MR. KNEEDLER: Yes. I don't -- I -- I don't
15 think so, because another important aspect or textual
16 point in 16(b) is whether the offense by its nature
17 presents a substantial risk. "By its nature" means in
18 its natural, ordinary sense. And, for example, in
19 *Leocal*, said in no -- the Court said in no ordinary or
20 natural sense could the -- could DUI be regarded as the
21 affirmative use of physical force. It's not a
22 violent --

23 JUSTICE KAGAN: You know --

24 MR. KNEEDLER: -- crime.

25 JUSTICE KAGAN: -- I -- I was very struck by

1 that language, too. And I think it's that language,
2 more than some of the other language you pointed to in
3 its brief, that might suggest that there's some
4 distinction between 16(b) and -- and the ACCA residual
5 clause.

6 But on the other hand, "by its nature" seems
7 to suggest an elements focus, a real elements focus.
8 Look at the elements and ask, given those elements,
9 given the nature of the offense, what's going to happen?
10 But, you know, the elements section of Section 16 is
11 Section 16(a). So it can't be all about all elements.

12 So what is that "by its nature" doing?

13 MR. KNEEDLER: Well, it's by its nature of
14 the offense, which would incorporate its elements. We
15 think elements are central to both (a) and (b). (a)
16 involves the actual -- actual use of force or threat in
17 use of force or attempted use of force. The element is
18 the actual or threatened use of force. Whereas under
19 16(b), the question is whether the elements add up to an
20 offense in which there is a risk of force being used,
21 even if it doesn't have to.

22 And burglary -- I think burglary is a
23 classic example -- is a classic example of that. And I
24 think --

25 JUSTICE KAGAN: But why isn't also

1 possession of a shotgun a classic example of that?

2 MR. KNEEDLER: Well, let me explain, if I
3 may.

4 Burglary is -- is descended from the common
5 law, and its rationale is precisely because of the risk
6 that the -- that the burglar will encounter someone in
7 the course of committing the burglary. And -- and it --
8 it is logical, built into, inherent in the crime of
9 burglary that there may be a response to an uninvited
10 entry into a home or -- or other structure. By its
11 nature, that transaction, that -- those elements of
12 burglary create the risk that force will have to be
13 used. The same is true of kidnapping.

14 JUSTICE KAGAN: And -- and give me a
15 contrast. And by contrast, what that fell under the
16 ACCA residual clause would not fall under 16(b) because
17 the same thing could not be said.

18 MR. KNEEDLER: Well, I mean, one that did
19 not fall under the -- the ACCA --

20 JUSTICE KAGAN: No. Give me one that would
21 fall under the ACCA residual clause, but -- but -- or
22 where there was confusion as to whether it fell under
23 the residual clause.

24 MR. KNEEDLER: Begay -- Begay is a good
25 example there. It was precisely the -- the crime

1 involved in Leocal where the Court had no trouble in a
2 two-page decision saying that DUI is not covered because
3 of this textual difference, because there has to be risk
4 of the use of force, which is not the accidental or sort
5 of negligent conduct.

6 Whereas in Begay, the Court struggled with
7 how to -- how to deal with that under the residual
8 clause. It -- it created an extra-textual limitation,
9 the purposeful, violent, aggressive test in order to
10 weed out negligent or accidental offenses. Whereas the
11 explicit text of -- of 16(b) itself takes care of that
12 problem. So that is an important difference.

13 Another important difference, though, that I
14 haven't mentioned yet is that the residual clause tied
15 the level of risk to four enumerated offenses, which
16 were not consistent with each other.

17 JUSTICE KENNEDY: I think that you're quite
18 right that that was one of the arguments in Johnson that
19 they said make the statute confusing. It -- it does
20 seem odd before we look at Johnson that giving examples
21 makes the statute more vague. It's a -- it's a little
22 counterintuitive.

23 MR. KNEEDLER: Right.

24 JUSTICE KENNEDY: But you're -- you're
25 correct. I think that's the way the Johnson court saw

1 it.

2 MR. KNEEDLER: And I -- and I think the -- I
3 think the problem was not examples per se, but -- but
4 the fact that they were conflicting examples that I
5 think the court came to conclude embedded an
6 arbitrariness into the ACCA residual clause in all its
7 applications. And that -- and that's effectively
8 what -- there was, like, an ingredient in that statute
9 that made it incapable of consistent application.
10 That's not true here.

11 JUSTICE KAGAN: So, Mr. Kneedler, it's
12 absolutely right that the court in Johnson said that
13 those examples compounded the problem. But the
14 essential problem that the court thought existed was the
15 use of the ordinary case analysis. So I'm just going to
16 ask you the question that the court asked in Johnson,
17 and I'd -- I -- how do we answer this question? This is
18 what the court said in Johnson:

19 "How does one go about deciding what kind of
20 conduct the ordinary case of a crime involves? A
21 statistical analysis of the State reporter? A survey?
22 Expert evidence? Google? Gut instinct? So that's a
23 multiple-choice test. What do we do?

24 MR. KNEEDLER: The --

25 JUSTICE KAGAN: Because that is still the

1 same under this statute.

2 MR. KNEEDLER: Well, I think it's not the
3 same. Again, unlike -- unlike in the ACCA residual
4 clause, you start out by looking at the elements of the
5 offense. What -- and are the elements of the offense
6 such that, by their nature, they give rise to a
7 substantial risk of injury?

8 Now, for some offenses, I think that you can
9 look at the long history of the offense. And burglary
10 is an example. Indeed, in *Leocal*, this Court said that
11 burglary is a classic example of a crime of violence.
12 And, in fact, the Senate Report on this provision says
13 that burglary is the classic example. And if one looks
14 at *LeFave* or other historical materials, it is because
15 of the risk of force that might be used. Of course,
16 this -- this statute also concerned risk to property.
17 So certain offenses, I think the --

18 JUSTICE KAGAN: So can I give you another
19 example just to test how this test works? You say you
20 look to the elements of the -- the offense to see if
21 they give rise to a risk of injury. Do I have that
22 right?

23 MR. KNEEDLER: Yes.

24 JUSTICE KAGAN: Okay. How do we do
25 vehicular flight under that example? I'm just trying to

1 sort of ground this. And you might be right. I'm
2 not -- you know, I'm just trying to figure out what the
3 difference is if we look at it that way, because that
4 doesn't sound so different from what we were trying to
5 do in ACCA. In fact, it sounds kind of the same as,
6 honestly.

7 So give me vehicular flight. How does it
8 work?

9 MR. KNEEDLER: Vehicular flight from a
10 police officer after being ordered to stop is, again, if
11 you think by its nature, what -- what was the
12 legislature envisioning when it enacted that? And I
13 think, again, it's parallel to burglary. The conduct is
14 such that in the -- in the course of committing the
15 offense, in the course of the flight, not something that
16 might be collateral or down the road, is the --

17 JUSTICE KAGAN: So that would fall on -- on
18 the included side? Because I -- I had thought that your
19 brief said something different, but maybe I misread it.

20 MR. KNEEDLER: Well, it may depend on the
21 elements of the particular State statute. One can't
22 give an across-the-board answer to -- to any one label
23 for -- for a type of offense without looking at the
24 elements. But, for example, in -- in vehicular flight
25 or any statute, the State law might, for example, have

1 gradations, which would show that the more aggravated
2 version is one that the legislature had singled out
3 because of the particular risk. So it's -- it's
4 important to look at the State statute and what was it
5 driving at? What are the -- what are the elements?
6 What -- what harms was it -- was it intending?

7 JUSTICE KAGAN: And go back to possession of
8 a shotgun, because I'm running over in my mind my memory
9 of the Johnson oral argument where basically the SG's
10 office made exactly this argument about possession of a
11 shotgun, how the elements of that offense are understood
12 to give rise to a significant level of risk.

13 MR. KNEEDLER: Well, I think the concern,
14 one of the concerns mentioned in -- in Johnson was what
15 if the shotgun might be used way down the road remotely
16 from that -- from any -- remote in time from any moment
17 in time when the -- when the person was arrested
18 possessing the shotgun.

19 JUSTICE KAGAN: Presumably, the person is
20 possessing the shotgun when the person kills somebody,
21 so it's -- temporally, I don't think that that argument
22 works.

23 MR. KNEEDLER: No. The -- the offense
24 continues for the entire duration of possession, but
25 we're not saying that that's enough. There has to be a

1 substantial risk in the -- in the course of committing
2 the offense. And as one of the --

3 JUSTICE SOTOMAYOR: I remember the
4 government arguing in Johnson that most people who are
5 found with sawed-off shotguns are committing crimes.
6 Why isn't that a substantial risk of force being used?

7 MR. KNEEDLER: Well --

8 JUSTICE SOTOMAYOR: If statistically -- if
9 statistically -- and I don't remember the statistics
10 now, but they were very clear then that a huge amount --
11 number of the crimes of possession of a shotgun were --
12 led to criminal activity.

13 MR. KNEEDLER: Well, I think it is the -- is
14 the use of force necessary for the crime of possession
15 of the shotgun. And -- and possession itself --

16 JUSTICE SOTOMAYOR: Well, the use of force
17 is not necessary for the use of -- for burglary if you
18 walk in and there's nobody there. You take what you
19 find.

20 MR. KNEEDLER: No. But the -- but the
21 historical understanding of burglary is precisely that
22 it will, that it will --

23 JUSTICE SOTOMAYOR: So we're now going back
24 to gut instinct.

25 MR. KNEEDLER: No. It's not gut instinct.

1 I think anything but. I -- I think a court looks at
2 the, again, the elements of the offense judicial
3 interpretation, so the statute analysis of what the
4 State legislature was driving at, State judicial
5 decisions that might themselves describe what the risk
6 is or the risk that was being addressed by the -- by the
7 offense. It's a legal -- it's a legal question. A
8 judge's experience, however, for something like burglary
9 can be quite informative.

10 JUSTICE KENNEDY: Before your white light
11 goes on, could you address your first argument that the
12 vagueness standard is different here than in -- than in
13 Johnson?

14 MR. KNEEDLER: Yes.

15 JUSTICE KENNEDY: I might say, *Jordan v.*
16 *deGeorge*, a case from some years ago, is a little more
17 persuasive than I had thought for the Respondent -- for
18 the Respondent here. You could say it's dictum because
19 they didn't really need to reach the issue based on
20 their holding.

21 MR. KNEEDLER: Well, I think there are a
22 number of things to be said about *deGeorge*. You're
23 right. The issue is not addressed. The court applied
24 what seemed to be the same standard, but it -- but it
25 wasn't briefed.

1 JUSTICE KENNEDY: Yes.

2 MR. KNEEDLER: And so the question of -- of
3 how it would apply in that setting wasn't addressed.

4 Also --

5 JUSTICE KENNEDY: Something has to be
6 briefed before we say it's the law?

7 MR. KNEEDLER: Well, the Court often -- if
8 the Court has what might be referred to as a drive-by
9 ruling, I wouldn't say it was drive-by. It was
10 considered, but -- but usually you want adversarial
11 presentation by the parties.

12 For example, one important -- several
13 important aspects of deGeorge, it did not discuss this
14 Court's earlier decision in the Mahler case in which the
15 Court indicated that there could be a looser standard
16 of -- or would be a looser standard of vagueness in
17 immigration cases specifically point out -- pointing out
18 a critical difference. And that is that the ex post
19 facto clause does not apply to immigration; therefore, a
20 person can be removed for conduct that was not a basis
21 for removal before you engaged in that conduct, criminal
22 or not. And, therefore, the notice piece of -- of the
23 vagueness standard really didn't fit well in the -- in
24 the immigration context.

25 JUSTICE SOTOMAYOR: That observation was at

1 a time before the draconian effects of removal and
2 deportation came into effect. We now have lifetime
3 bars, which were rarely or on very limited circumstances
4 imposed previously. We have many more criminal
5 sanctions with harsher sentences now. I think more than
6 anything we have often said that vagueness depends on
7 the gravity of what is at stake. Today what's at stake
8 is a lot more than what was at stake decades ago.

9 MR. KNEEDLER: But what -- what's at stake
10 can't be viewed just from that perspective. What's at
11 stake is the fact that the immigration laws are vital to
12 the nation's national security and foreign relations and
13 the safety and welfare of the country. And --

14 JUSTICE SOTOMAYOR: And there is always the
15 fail safe that the Attorney General in his or her
16 discretion can deny -- can deny anyone the right to stay
17 here. But if we're going to ask immigration judges to
18 impose the consequences that they do today, don't we
19 need something that's not arbitrary?

20 MR. KNEEDLER: Well, if I can address
21 several pieces of that. While there are more criminal
22 offenses now that give rise to removal, the same basic
23 point obtains, which is that a person can be removed on
24 a ground that was not a criminal offense, or it was not
25 a basis for removal at the time he engaged in that

1 conduct. Again, whether it's a crime or not a crime.
2 That means that the alien has no constitutionally-based
3 right to notice. And, therefore, the notice piece of
4 the Vagueness Doctrine has far less force in this
5 context.

6 JUSTICE ALITO: If the Court -- if the Court
7 were to hold that 16(b) is unconstitutionally vague in
8 criminal cases, what would the impact -- in criminal
9 cases involving the application of the categorical
10 approach, what would the -- what would the implications
11 of that be?

12 MR. KNEEDLER: Well, as we cite in our
13 brief, there are a number of places in Title 18 where
14 the definition of crime of violence is used, either by
15 express reference to 16(b) or by use of the same
16 formulation like in 924C where the same formulation
17 is -- is used.

18 JUSTICE ALITO: What would be some of the
19 most important examples?

20 MR. KNEEDLER: Well, that would be -- that
21 would be one. 16(b) is incorporated into offenses
22 dealing with money laundering, hijack robbery, I
23 believe. A number of other -- it's also used to
24 determine whether a juvenile will be prosecuted.

25 CHIEF JUSTICE ROBERTS: Doesn't that --

1 doesn't that suggest that the argument that the civil
2 standards apply rather than the criminal one loses some
3 of its force for precisely that reason?

4 MR. KNEEDLER: No. I don't think so. For
5 one thing, I think it's -- it's important to recall that
6 16(b) is just a definition. It is not a statement of a
7 crime on its own. It is a -- it is a definition or
8 identifying a category of offenses that are then plugged
9 into some other statute, either a criminal offense or
10 the immigration laws. In the immigration laws, for
11 example, it's identifying a category of crimes that
12 are -- that constitute a ground for removal just like
13 all of the other aggravated felony provisions.

14 JUSTICE KENNEDY: But I thought the point
15 the Chief Justice is underscoring is that if we go -- if
16 we base the decision on the fact that -- that this is
17 civil, then you have to come back here for other cases
18 under --

19 MR. KNEEDLER: No. That is -- that is true.
20 And -- and for that reason, the Court may well want to,
21 in our view, sustain 16(b) by applying the criminal
22 standard, because if it -- if it is sustained under the
23 criminal standard, as we think it clearly should be,
24 then -- then a for certiori it would be -- it would be
25 constitutional in the --

1 JUSTICE BREYER: What do you think of the
2 idea suggested in Justice Alito's opinion that the word
3 "offense" like the word "crime" both those words are
4 ambiguous. They can refer either to a category of
5 behaviors that many people can engage in or they can
6 refer to this behavior that this defendant engaged in on
7 this particular instance.

8 So he said, as I read it, let's back up.
9 Can't be done. Congress thought both in this statute
10 and in the other statute, it wouldn't be that tough to
11 categorize all the State criminal laws by their degree
12 of risk of violence. Can't be done. Too many State
13 criminal laws used in too many different ways, too many
14 different words, no statistics are kept, the Justice
15 Department can't get them, so we're left guessing. So
16 let's back up and look at what this person did on this
17 occasion. What is your reaction to that?

18 MR. KNEEDLER: Well, we -- we have not
19 argued that because this Court --

20 JUSTICE BREYER: I think you argued it. I
21 just wanted to know what your reaction is.

22 MR. KNEEDLER: But this Court's decision in
23 *Leocal* said the categorical approach applies. If -- if
24 this Court were to conclude that this could not be
25 sustained under -- under the criminal standard, that may

1 be one option. It may be a particular option.

2 JUSTICE BREYER: You'd have to have it
3 argued. But I think if you really did that, I just
4 don't know if you thought it through at the SG's office
5 about the pros and cons. And in case -- you needn't
6 have done -- but in case you have done, I'd -- I'd
7 appreciate your telling us what you all think even if
8 you're not stuck with it. I know that's unusual for you
9 to be stuck with it. I'm just curious.

10 MR. KNEEDLER: There obviously would be
11 advantages in the sense that the statute would be --
12 would be preserved. There could be questions, though,
13 about how it would be administered to determine what
14 actually happened on the prior occasion. But one -- one
15 place where, you know, the Court might want to consider
16 reserving, if that were -- if that were an issue, would
17 be 924C where the -- where the crime of violence is
18 contemporaneous with the possession of the -- of the
19 firearm. And so you're not looking at a past offense,
20 you're looking at the overall offense in which the -- in
21 which the -- the weapon was possessed.

22 JUSTICE KAGAN: Could -- could I ask, just
23 in thinking through your argument, it would help me to
24 get a few examples.

25 So could you give me three examples, let's

1 say, if there are in -- if there are those -- that many,
2 where we struggled under ACCA, but where the answer is
3 clear under 16(b), so that I understand what it -- what
4 kind of distinction you're drawing.

5 MR. KNEEDLER: Right. I think DUI is
6 sort -- is the prime example. Leocal itself concluded
7 that DUI was not covered. In -- in a unanimous opinion,
8 it's only -- the Court's only occasion to have to
9 address this in 30 years because of the text of 16(b),
10 the act -- it requires the act of use of force. I think
11 the sawed-off shotgun, which this Court in Torres said
12 was not covered by 16(b), and -- and we believe that
13 that's correct, again, because of the -- the -- you
14 don't have to use force in order to possess the -- the
15 shotgun, even though injury could result under the ACCA
16 clause, perhaps, and that's what -- that's what was
17 confusing under the -- under the ACCA clause.

18 So I -- I think those are two prime
19 examples. But I -- 16(b) --

20 JUSTICE KAGAN: Anything else? Because this
21 is really important for me.

22 MR. KNEEDLER: Yeah. Well -- well --

23 JUSTICE KAGAN: I'm trying to figure out
24 what our differences are.

25 MR. KNEEDLER: Yes. And -- and in -- in

1 Begay, where the Court formulated the extra-textual test
2 of the act -- I forget the precise words, but violent
3 aggressive conduct, it pointed out that some such
4 limitation was also necessary because of -- otherwise
5 like pollution offenses or -- or consumer product
6 offenses might be covered.

7 So the Court -- the Court again was -- was
8 juggling with the way the ACCA residual clause operates
9 in order to figure out how to exclude that one. There's
10 no question that those crimes are clearly excluded under
11 the ACCA clause.

12 On the other hand, some other crimes besides
13 burglary, like kidnapping or escape, I think if -- if
14 one pictures those offenses, they clearly present a risk
15 that physical force will be used and give this statute a
16 core of -- of valid applications that it can't be held
17 unconstitutional on its face.

18 If I may --

19 JUSTICE GINSBURG: The immigration judge
20 also found that the -- these burglaries qualified as
21 crimes of moral turpitude. Another ground for removal.
22 Does -- does burglary qualify as -- as a crime of moral
23 turpitude?

24 MR. KNEEDLER: I think in some circumstances
25 it may. I think it may depend on the -- on the nature

1 of the State offense. Again, it's not always
2 possible -- California burglary is not generic burglary
3 as this Court recognized in Descamps.

4 If I may reserve the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Rosenkranz.

7 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

8 ON BEHALF OF THE RESPONDENT

9 MR. ROSENKRANZ: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 As Justice Sotomayor points out, there were
12 two critical factors that this Court pointed to in
13 Johnson that, quote, "conspired to make the ACCA
14 residual clause unconstitutional." Everyone agrees that
15 they are both present here. It's hypothesizing the
16 ordinary instance, the ordinary case of a set of
17 elements, and second, then from that hypothesis,
18 estimating the degree of risk of some sort. And as
19 Justice Ginsburg points out, the government correctly,
20 back in Johnson, said that those two factors are in
21 existence here in Section 16(b), and that the residual
22 clause here was, quote, "equally susceptible to
23 challenge."

24 JUSTICE KAGAN: There was something that --
25 that isn't here, Mr. Rosenkranz, and that is a long

1 history of struggling and failing to come up with an
2 interpretation. And I'm wondering why you think we
3 don't have that same history. Because I don't think
4 that there's any question that we would not have said
5 what we said in Johnson had Johnson been the first case.

6 Johnson was the umpteenth case, and we had
7 gone back and forth and we had struggled and we couldn't
8 figure out, and -- and here we don't seem to have any of
9 that. It seems as though -- and not only with respect
10 to this Court, but with respect to lower courts -- it
11 seems that everybody is getting along just fine. And
12 much as I can't quite understand what the difference is,
13 there just does seem to be a difference in practice.

14 MR. ROSENKRANZ: Well, Justice Kagan, let
15 me -- let me give two answers. The first is that this
16 whole notion that the government is discussing about a
17 different experience with ACCA than with Section 16(b)
18 is revisionist history.

19 Every single ACCA case that this Court
20 decided was presented to this Court in simultaneous cert
21 petitions in the 16(b) context, and this Court would
22 then JVR the 16(b) cases, and the lower courts and this
23 Court would then cross-reference ACCA case -- ACCA
24 residual clause cases into Section 16(b), treating them
25 equivalently.

1 So this Court's experience with the ACCA
2 residual clause is its experience with Section 16(b).
3 And the whole series of questions you asked, Justice
4 Kagan, about well, what about Sykes, how would this turn
5 out here? What about Chambers? What about Johnson
6 itself? Every single one of those cases is coming back
7 here. We know that they're coming. Sykes is already --
8 the -- that is, the Sykes issue -- is already presented
9 as a circuit conflict right now in the lower courts. It
10 is roiling the lower courts. There's a Fifth Circuit
11 case where the majority and the dissent of Sykes are
12 being played out in the Fifth Circuit right now. And
13 the same will be true of all of those.

14 And then, secondly, it is simply not true to
15 say that -- I'd like to say that everyone is getting
16 along just fine in the lower courts. Between our brief
17 and the National Immigration Project, we've identified
18 10 circuit splits, some of them on exactly identical
19 elements. And what is the problem with those cases?
20 The courts on either side -- it's not just that they're
21 engaged in different elemental analysis. The courts on
22 each side are fundamentally disagreeing about what the
23 ordinary case of a particular crime is.

24 JUSTICE GINSBURG: But what of the argument
25 that 16(b) is more precise? For one thing, it is

1 limited to in the course of commission of the offense,
2 and that the offender must be the one who uses the
3 force. And in addition, it covers use of force against
4 the victim's property. So it -- it has a specificity
5 that the ACCA residual clause lacked.

6 MR. ROSENKRANZ: Your Honor, let me start
7 with the -- with in-the-course-of, which took a -- a lot
8 of Mr. Kneedler's argument time.

9 Two things -- well, three things to say
10 about it. First, courts have uniformly held that
11 in-the-course-of does not entail a temporal limitation,
12 that it doesn't --

13 JUSTICE GINSBURG: I think it -- wasn't the
14 word during the "commission" of? Is it -- in the course
15 of or during the commission of?

16 MR. ROSENKRANZ: In -- in --

17 JUSTICE GINSBURG: In 16(b).

18 MR. ROSENKRANZ: In 16(b), the phrase that
19 the government is speaking of is "in the course of
20 committing the offense."

21 And so, just to -- to continue that first
22 answer, courts have held that inchoate offenses of the
23 sort that -- that Justice Kagan was asking about, or
24 possession offenses, do create the risk, and
25 appropriately so, because -- or let's take another

1 example that -- that consumed a lot of time today:
2 Burglary.

3 Justice Kagan's question about burglary.
4 Notably, that is why in *Leocal* this Court held that
5 burglary did -- was sort of the classic example of a
6 16(b) violent crime. Burglary, as this Court said in
7 *Johnson*, it's complete at the moment you cross the
8 threshold. If all we are looking at is the temporal, so
9 when are the elements completed, entering with the bad
10 intent is what completes the elephant -- the -- the
11 elements. So if someone enters, they have completed the
12 elements. They can then ransack the apartment for the
13 next five hours. That is still in the course of
14 committing the offense.

15 Second answer, the government's new
16 interpretation does not change the fundamentally
17 imaginary nature of the inquiry, no matter what. Courts
18 will still be imagining the ordinary case. Only now you
19 have to further imagine, okay, in that ordinary case,
20 when are the elements typically satisfied?

21 And, finally, that textual difference is not
22 actually a textual difference. ACCA says -- the ACCA
23 residual clause says the same thing in different words.

24 JUSTICE KENNEDY: Well, of course -- of
25 course, courts and legislatures always have to imagine

1 consequences when they are classifying crimes. They
2 have to define what burglary is, because they know that
3 in a significant number of cases certain consequences
4 will happen. That -- that's the way the law works.

5 MR. ROSENKRANZ: Yes, of course, Your Honor.
6 And if this were just to the question that Justice Alito
7 asked Mr. Kneedler about ramifications, if this is -- if
8 this were just about importing 16(b) into the
9 definitions of various crimes, there's no vagueness
10 problem, because as this Court said in Johnson -- and it
11 addressed exactly that question in Johnson, it's a
12 totally different inquiry when -- when you are applying
13 the stated elements to an actual concrete example that
14 is there before the Court.

15 JUSTICE ALITO: Mr. Rosenkranz, could I ask
16 you this: Suppose Congress enacted a statute that said
17 any person who commits a crime of moral turpitude in the
18 District of Columbia or with -- within the special or
19 maritime or territorial jurisdiction of the United
20 States shall be imprisoned for not more than 20 years,
21 would that be unconstitutionally vague?

22 MR. ROSENKRANZ: Your Honor, it would
23 certainly be problematic. And the reason it would be
24 problematic is because you don't have an administrative
25 agency that then gives content to the moral turpitude

1 language the way you do, for example, in the immigration
2 context. And by the way, an agency to -- to which
3 deference is owed. But this is a statute, 16(b), that
4 is a criminal statute --

5 JUSTICE ALITO: But that seems to me -- I
6 mean, I'm surprised by -- somewhat surprised by your
7 answer. That seems to me to be at least as vague as
8 16(b). And yet the holding in the Jordan case on which
9 you rely was that that -- that a -- a deportation
10 statute that permitted deportation for a person
11 convicted of a crime of moral turpitude satisfied the
12 applicable vagueness standard there. So --

13 MR. ROSENKRANZ: Well, yes, Justice Alito.
14 And -- and that's -- so that is the distinction. So
15 today, moral turpitude -- "moral turpitude" is a phrase
16 that the -- the executive agency has defined. People
17 know what it means. They know what's in, and they know
18 what's out.

19 JUSTICE ALITO: But, I mean, unless you're
20 willing to say that the criminal statute that I
21 hypothesized would satisfy vagueness standards, I -- I
22 don't see how you can say that the same vagueness
23 standard applies in criminal cases and deportation
24 cases.

25 MR. ROSENKRANZ: Your Honor, the same

1 vagueness standard does apply in -- in the two contexts,
2 but --

3 JUSTICE ALITO: So why does crime -- then
4 the statute making a crime of saying anyone who commits
5 a crime of moral turpitude sentenced to 20 -- up to 20
6 years, that would be -- that would satisfy vagueness for
7 a criminal statute?

8 MR. ROSENKRANZ: In a criminal statute, it
9 would not, because there is no history of agency
10 interpretations to which courts must defer.

11 But let me just back up for a moment.

12 JUSTICE ALITO: What -- is DUI a crime of
13 moral turpitude?

14 MR. ROSENKRANZ: I -- I have no idea.

15 JUSTICE ALITO: How about failure to file an
16 income tax return?

17 MR. ROSENKRANZ: I mean, I don't know what
18 the agency interpretations of moral turpitude --

19 JUSTICE ALITO: How about unlawful entry
20 into the United States?

21 MR. ROSENKRANZ: I think not. But let me
22 just back up, because Your Honor has moved into the
23 second issue.

24 I just want to be clear that, in our view
25 and in the view of all of the lower courts, Jordan

1 settles the question on whether it's the same standard
2 for criminal deportation. But this Court does not have
3 to embrace Jordan or even address the question whether
4 it's the same standard. 16(b) is a criminal statute
5 that Congress chose to import wholesale into the
6 immigration laws and that -- that has criminal
7 applications even under the INA.

8 CHIEF JUSTICE ROBERTS: Johnson talked a lot
9 about the confusion caused by the predicate offenses
10 that were -- were listed; in fact, in colorful terms
11 explained why those compounded the vagueness in the
12 residual clause. And, of course, you don't have those
13 here.

14 MR. ROSENKRANZ: Yes, Your Honor. So -- so
15 I would start with where -- with where Justice Kennedy
16 started, which is, as a general matter, one does not
17 ordinarily think that giving examples makes something
18 more vague than it would otherwise be.

19 And I know this Court spent a lot of time
20 trying to draw lessons from those examples with
21 varying -- with -- actually with no success under
22 varying methodologies to try to narrow the -- what is
23 otherwise a vague statute. And the government's
24 argument in Johnson was that -- that Congress succeeded
25 in narrowing with those enumerated elements, those

1 enumerated crimes, and this Court concluded that it
2 didn't.

3 But a statute that has examples, even if
4 they are confusing examples, has to be better than a
5 statute that is --

6 CHIEF JUSTICE ROBERTS: Well, but the
7 statute as a whole might be because you can look at it
8 and say, well, there's one of the examples. But it
9 seems to me that argument doesn't respond to the point
10 that it makes the residual clause much more confusing if
11 the examples seem to be pointing in different directions
12 and -- and involve different -- totally different
13 consequences.

14 MR. ROSENKRANZ: Right.

15 CHIEF JUSTICE ROBERTS: Basically, what the
16 Court held in Johnson.

17 MR. ROSENKRANZ: So --

18 CHIEF JUSTICE ROBERTS: So the fact that,
19 yes, it's clear when you get to the specific thing
20 that's named, but that, as the Court explained, it makes
21 it much more confusing -- confusing when you get to the
22 residual clause.

23 MR. ROSENKRANZ: So -- so I think the -- the
24 easiest way to look at this, I would say, is if that --
25 if that had been the pivotal factor in Johnson -- so

1 Johnson says there are two factors that conspired. If
2 it had been indeed that other factor, what this Court
3 should have done in Johnson is to say, we will now, as a
4 matter of statutory construction, stop trying to draw
5 lessons from those examples and interpret the residual
6 clause in its own right without trying to figure out
7 whether the examples teach something about the
8 relationships.

9 This Court had an obligation to save the
10 statute if that's what was causing the problem. It
11 didn't. And I think it was -- this Court was very
12 conscious of what it was doing when it said that there
13 were two critical things that conspired -- two critical
14 elements that conspired to make the statute vague.

15 And then in Welch, when this Court repeated
16 what its holding was and its rationale was in Johnson,
17 it repeated those same two critical elements, not this
18 third one about the enumerated clause.

19 JUSTICE BREYER: I -- I see that. The thing
20 underlying this is -- which is a difficult case -- if we
21 say you're right, what then do we say about moral
22 turpitude, unfair competition, just and reasonable
23 rates, public convenience and necessity, and there are a
24 hundred others and they're all civil.

25 Now, what you've suggested is -- well, what

1 you say is this. You say that the Constitution requires
2 the creation of an administrative agency which will
3 develop a tradition over time that will clarify, but
4 will otherwise -- that kind of reasoning was present in
5 the nondelegation doctrine. So what you want to say is
6 that which would -- that which would have saved a
7 statute under the nondelegation doctrine, which is not
8 fair competition, it's delegation of unriort, but which
9 is -- gives meaning is also necessary to save a civil
10 statute from vagueness.

11 Hmm. That's a very interesting holding.
12 I'd rather read it in a law review article than I would
13 write those words which will suddenly become real.

14 MR. ROSENKRANZ: Well --

15 JUSTICE BREYER: So I'm not -- I'm not -- do
16 you see where I'm floating on this? I -- I see your
17 point, it's quite similar, but I quite worry about the
18 implications.

19 MR. ROSENKRANZ: Well, Your Honor, so
20 let's -- so let's talk about the immigration that's
21 in -- excuse me -- the implications that is in the
22 immigration context to begin with.

23 In the immigration context, to the extent
24 that Your Honor -- that you are quoting, Justice Breyer,
25 from --

1 JUSTICE BREYER: I was quoting Cordoza. I'm
2 happy to be confused with him.

3 (Laughter.)

4 MR. ROSENKRANZ: I confuse you all the time
5 with him.

6 So to the extent that we're focusing on
7 language that appears in the immigration statutes, that
8 language has been interpreted. And that is a key
9 distinction between this case and Mahler, for example,
10 with -- with -- which Mr. Kneedler invoked.

11 Mahler was a situation in which Congress had
12 defined the crimes that would make you deportable. And
13 the problem was that the Attorney General could then
14 exercise discretion as to whether he would deport you or
15 not. And it was couched in terms of delegation because
16 it was pre-Chevron and pre-Schechter Poultry. But this
17 Court said, no, the fact that there is discretion
18 doesn't bother us.

19 Now, the second answer is in the immigration
20 context, as distinguished from perhaps any other
21 context, as Justice Sotomayor was saying, the
22 immigration context in particular is a context that
23 implicates liberty with the severest sorts of
24 consequences. So at a minimum in the immigration
25 context, completely apart from the public good sorts of

1 questions and applications of civil --

2 JUSTICE KAGAN: Mr. Rosenkranz, I guess I
3 would have thought that your answer would have been
4 different. I guess I would have thought that your
5 answer would have been whatever implications Johnson had
6 for Vagueness Doctrine, it has already had, and that all
7 you are asking us to do is just essentially to say that
8 this statute is no different from the statute that we
9 looked at in Johnson and to write an opinion that
10 basically just repeats Johnson. And whatever
11 implications it's had or it will have, it will have
12 regardless, and this opinion would do nothing more.

13 MR. ROSENKRANZ: Thank you, Your Honor.
14 Yes.

15 (Laughter.)

16 MR. ROSENKRANZ: What she said.

17 JUSTICE ALITO: I mean, if that's your
18 answer, it totally ignores that this is not a criminal
19 case. And it certainly is true that deportation has
20 more severe consequences than the typical civil case.
21 But there are many other civil cases that can have a
22 devastating impact on someone, such as child custody,
23 loss of a professional license, complete destruction of
24 a business, loss of the home. Now, assuming that there
25 is some sort of vagueness standard that applies in civil

1 cases, I would have thought your answer would be that
2 it's a sliding scale and that the -- the standard for
3 civil cases is not the same as the standard for criminal
4 cases. But how much specificity is required in the
5 civil context depends on the severity of the
6 consequences of the case.

7 MR. ROSENKRANZ: Well, so, Justice Alito,
8 this Court in Hoffman said that it's a sliding scale.
9 But in Jordan, when it came to deportation, which this
10 Court has described as the gravest sort of consequence
11 which directly implicates liberty interests, this Court
12 said it's at the same level as --

13 JUSTICE ALITO: No. That's not exactly the
14 way the Court -- what the Court said, or at least it's
15 not necessary to read Jordan that way. I think Jordan
16 can be read to say, look, the dissent has raised this
17 new argument, it wasn't briefed, it wasn't argued. The
18 dissent says this is unconstitutionally vague; we are
19 going to apply the criminal standard here and it
20 satisfies the criminal standard. It -- it didn't say
21 assume for the sake of argument, but I think it can
22 certainly be read that way. And if you don't read it
23 that way, you are stuck with a conclusion that a statute
24 making a crime of moral turpitude punishable by a felony
25 term of imprisonment would satisfy the vagueness

1 standard for a criminal statute, which I think is very
2 difficult to defend.

3 MR. ROSENKRANZ: Well, Your Honor, let me
4 say, again, two things. The first thing, this Court
5 doesn't have to decide whether Jordan equated criminal
6 cases and civil cases with the most severe consequences,
7 because this is a criminal statute that this Court is
8 interpreting and it has criminal consequences even as
9 imported through the INA. And I just --

10 JUSTICE ALITO: Well, would you say the same
11 thing if it didn't -- if this statute did not
12 incorporate a definition that is also used in criminal
13 statutes and simply had the same standard in a purely
14 immigration statute? So no reference to a -- a
15 definition that also applies in criminal cases.

16 MR. ROSENKRANZ: I would have a different
17 argument. But let me just maybe clear, this Court has
18 said -- and it said in A.B. Small. It took a statute
19 that was held unconstitutional -- and this was back in
20 1924, '25 -- found -- the statute that this Court found
21 unconstitutional in the criminal context. It was then
22 applied -- it was a silly breach of contract case
23 applied as a defense. And this Court said, no. When we
24 struck it over there, we're going to strike the civil
25 ramifications here as well. And this Court could adopt

1 a very narrow holding, saying that what Congress has
2 done is to make the decision to import a criminal
3 statute into a civil context. It brings the soil with
4 the roots. And there's no such thing. It's actually
5 incoherent.

6 JUSTICE ALITO: I don't think that makes the
7 slightest bit of sense. Suppose there were a criminal
8 statute that says that it is a crime -- it is a felony
9 to charge an unjust rate. And then the -- there was a
10 civil statute that incorporated that, and we would say,
11 well, because you can't make it a felony to charge an --
12 an unjust rate or price. You can't have that in the
13 civil statute. You can't incorporate it into the civil
14 statute.

15 MR. ROSENKRANZ: Your Honor, you just
16 recited the facts of A.B. Small. That was exactly the
17 statute there. It was struck in the criminal context.
18 It was then imported as a defense in the civil context,
19 and this Court said in A.B. Small, we don't care whether
20 it's civil or criminal. If it was struck there, we're
21 going to strike it here.

22 And there's an important kind of
23 separation-of-powers reason to do this. Congress made
24 the decision to equate the two. Congress didn't --
25 Congress could have used different words and revised the

1 statute. But think of it in the RICO context. Let's
2 take a classic case that this Court has decided. The
3 definition of "gangster" this Court held in *Renzetta* is
4 unconstitutionally vague. A court couldn't then, in a
5 civil RICO case, adopt that same standard, say that is
6 the predicate crime and impose treble damages. It would
7 be incoherent to tell the lower courts that what you do
8 is take a statute that would be unconstitutional there
9 and import it into the civil context and uphold it as
10 constitutional here.

11 Let me give you a very practical reason on
12 the facts of this case. So in this case, Mr. Dimaya
13 gets deported on the ground that the statute is
14 sufficiently clear and he is an aggravated felon. He
15 then comes back to the United States the next day and
16 can be -- and will be prosecuted as an aggravated felon.
17 But as an aggravated felon, there will be a different
18 standard and he can't be prosecuted. It would make no
19 sense to have a scheme where the same words that use the
20 same statutory definition mean something in one context,
21 as this Court would hold hypothetically in this case,
22 but in the 16(b) context when it -- or in the context of
23 the definition of a crime means something else.

24 JUSTICE GINSBURG: What do you do with
25 Leocal? I mean, one thing is clear. The Court did say

1 that burglary is the classic crime. It fits within
2 16(b).

3 MR. ROSENKRANZ: Well, two things to say
4 about that statement in *Leocal*, which was obviously -- I
5 mean this Court -- *Leocal* burglary was not before this
6 Court. The first is this is a California burglary,
7 which looks very different, as this Court held in
8 *Descamps*, from a normal burglary. California burglary
9 can be committed by being invited into someone's home
10 with the intention of selling them fraudulent
11 securities. That is an actual case that applied it in
12 that way.

13 JUSTICE GINSBURG: That's why this case
14 didn't work under 16(a) and the elements, right?

15 MR. ROSENKRANZ: That's correct, Your Honor.
16 And then you bring me to another point that's really
17 important. Mr. Kneedler never answered Justice Kagan's
18 question about under the government's current view of
19 what 16(b) means where the space is between the elements
20 clause and the residual clause.

21 I'm actually having trouble coming up with
22 an example of a situation of a -- of a scenario in which
23 a crime does not satisfy the elements clause, because
24 there is no element that requires the use or threat or
25 attempt to use force, but on the other hand,

1 quote/unquote, "by its nature, requires the use of force
2 the moment you finish satisfying" --

3 JUSTICE KAGAN: He says burglary is that.

4 MR. ROSENKRANZ: Burglary can't be that. A
5 burglary is committed the moment after you cross the
6 threshold. And by the way, in California, it doesn't
7 have to be an unlicensed crossing of the threshold. So
8 a burglary is -- is committed when you cross the
9 threshold, even if you're crossing the threshold
10 lawfully.

11 JUSTICE KAGAN: If I understood what he was
12 saying, and I won't try to put words in his mouth, but
13 it was something along the lines that, yes, it's true
14 that the elements of burglary do not have the use of
15 force. But if we look back to the historic
16 understanding of burglary, what we find is a
17 longstanding concern with exactly that subject. In
18 other words, that burglary wouldn't have been defined as
19 it was, wouldn't have been prosecuted as it was, except
20 for this fear of the use of force. I don't know. And
21 that's the best I can do with it and he will tell me if
22 he can do better.

23 MR. ROSENKRANZ: So, Your Honor, I can't do
24 any better. That sounds like the ordinary case
25 approach, which creates the mischief when you layer on

1 top of it an assessment of risk.

2 JUSTICE BREYER: What is the principle of
3 law that led to A.B. Small? No one thinks statutory
4 words in the civil context, "unjust or unreasonable
5 rates," whether enforced by courts against railroads, or
6 whether enforced by an agency, is unconstitutional. No
7 one thinks that. A.B. Small holds that, but it holds
8 that in the context of there having been an earlier case
9 that struck those words down in criminal context.

10 So what is the principle of law that it
11 stands for?

12 MR. ROSENKRANZ: Your Honor, the principle
13 of law that A.B. Small stands for that I was arguing
14 specifically, is the principle of law that when a court
15 strikes a statute that Congress has made the decision to
16 impose civil and criminal consequences to, that statute
17 is gone and you don't start preserving the civil
18 consequences to it, because Congress made the decision
19 and we just follow Congress's direction.

20 I do want to close with one last point,
21 which is about the practical consequences of this
22 ruling. First, I already said, in the criminal context,
23 the practical consequences are very limited, because as
24 this Court observed in Johnson, practically all of the
25 applications of 16(b) are applied to a concrete set of

1 facts. Then the question becomes what, in light -- what
2 of the notion that this Court has not decided a lot of
3 16(b) cases, should this Court try to engage in the same
4 exercise in the 16(b) context that was a failure in the
5 ACCA -- in the ACCA context.

6 But in deciding whether to take that route,
7 this Court has to decide what is to be gained by that
8 enterprise. The enterprise of setting the lower courts
9 adrift in -- of considering the risks of the use of
10 force from statutes that do not have use of force as
11 an -- as an element.

12 At some point this Court is going to have to
13 decide whether it's had enough. And it's not like we
14 don't know where this case is headed, where the -- where
15 this inquiry is headed.

16 Justice Kagan unveiled all of the next sets
17 of questions. They are all coming here. We've seen
18 this show before. We know how it ends, so the Court may
19 as well save itself and the lower courts the grief of
20 trying to --

21 JUSTICE KAGAN: Well, what's coming here?
22 The -- you said that the lower courts are all confused,
23 and there are splits developing. What?

24 MR. ROSENKRANZ: Sykes redux is headed to
25 this Court. After Sykes will be a James redux, a

1 Chambers redux.

2 If you look at our brief with the list of
3 examples of circuit conflicts, they are all coming here.
4 Or the National Immigration Project's brief cites
5 another five circuit conflicts. They are all coming to
6 this Court, and the -- this Court will be overwhelmed
7 with the exercise of trying to figure out what the
8 ordinary case of each of those thousands of statutes is,
9 just as it was overwhelmed and finally gave up the
10 exercise in -- in Johnson.

11 So we know that it's coming. We know where
12 it's going to end. So this Court should just end it
13 here and it should end it now.

14 Thank you, Your Honors.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Kneedler, three minutes.

17 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

18 ON BEHALF OF THE PETITIONER

19 MR. KNEEDLER: Thank you, Mr. Chief Justice.

20 First, we explained in our opening brief and
21 reply brief that there is simply not the disarray that
22 there was with respect to the ACCA residual clause.
23 This Court has considered one case in the 30 years --

24 JUSTICE SOTOMAYOR: That's if you
25 concentrate on us, but I did read those portions of

1 Respondent's brief and the amici brief, and it does seem
2 like we are going to have a redux Sykes and a redux
3 James and a redux many of the issues.

4 MR. KNEEDLER: As -- as we -- as we explain
5 in our brief, the -- the conflicts that -- that we
6 address there can be explained by the differences in the
7 state statutes. And that's what you have, you have to
8 apply the -- the statutory standard of creating a risk
9 to particular state statutes, and as we explain, the --
10 the conflicts that they assert are largely that.

11 But if -- if I could then go on. Leocal is
12 the only case this Court considered and the court there
13 considered it clear that it was able to say that DUI was
14 in and -- burglary was in, DUI was out, and that's
15 because of the -- of the sort of textual differences
16 between this statute and that one. It requires not some
17 injury down the road, but physical force actually being
18 used -- a risk of physical force actually being used by
19 the defendant --

20 JUSTICE SOTOMAYOR: There were some --

21 MR. KNEEDLER: -- in the offense.

22 JUSTICE SOTOMAYOR: There were some who
23 argued in the drunken driving test that the minute you
24 get behind the car, you -- drunk, you're using a lethal
25 weapon, a car, to inflict injury on others.

1 MR. KNEEDLER: But the -- the Court --

2 JUSTICE SOTOMAYOR: Didn't win here, but
3 that argument was still being made in the courts below
4 and some courts below bought it.

5 MR. KNEEDLER: Right, but -- but the -- but
6 the important point is this Court clarified it in -- in
7 Leocal to say that you -- it's an act -- it's a category
8 of active violent crimes. Risk of -- of -- of physical
9 force or actual physical force under 16(a).

10 And again, burglary, this Court said -- and
11 burglary is a continuing offense. While you might be
12 able to prosecute somebody for burglary the moment they
13 enter, burglary -- this -- generic burglary, as this
14 Court said in Taylor, includes remaining in the house,
15 and -- and this Court said it's -- it's not made up,
16 that this Court said burglary is included because by its
17 nature it involves a substantial risk that the burglar
18 will use force against a victim in completing a crime.

19 The same thing is true of kidnapping. You
20 can kidnap somebody by inveigling, but the -- the risk
21 of force is that it'll try to escape and you'll have to
22 use physical force.

23 So the -- I don't think the Court is at sea.
24 It can -- it can look at what the -- the state statute
25 is driving at and -- and apply the standard.

1 Many -- also many statutes have civil and
2 criminal applications, but that doesn't mean private
3 litigants can invoke the criminal law standard.

4 A. B. Small, when the Court got to the civil
5 context, it said there was no intelligible standard,
6 which -- which -- which was a much more relaxed
7 standard.

8 Finally on the immigration, immigration is
9 vested in an administrative agency, so there is always
10 the -- the intervening action by the executive, and even
11 in the situation where the agency may not get deference,
12 there is still a centralized control over the bringing
13 of the cases. And the Board of Immigration Appeals can
14 say, this is out, this is in. The courts will only see
15 the cases where the BIA actually sustains the removal,
16 but that has a way of limiting giving -- and giving
17 notice to people.

18 With respect to -- I'm sorry.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 11:03 a.m., the case in the
22 above-entitled matter was submitted.)

23
24
25

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