

SUPREME COURT OF THE UNITED STATES

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JEFFERSON B. SESSIONS, III,)
Attorney General,)
 Petitioner,)
 v.) No. 15-1498
JAMES GARCIA DIMAYA,)
 Respondent.)
- - - - -

Pages: 1 through 62

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 Petitioner,)
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 JAMES GARCIA DIMAYA,)
 Respondent.)

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Washington, D.C.

Monday, October 2, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, Deputy Solicitor General,
 Department of Justice, Washington, D.C.; on
 behalf of the United States.

E. JOSHUA ROSENKRANZ, New York, New York; on
 behalf of the Respondent.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-1498, Sessions versus Dimaya.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.

ON BEHALF OF THE PETITIONER

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

The Ninth Circuit erred in holding that this Court's decision in Johnson compelled the conclusion that the definition of crime of violence in the INA's broader definition of aggravated felony is unconstitutionally vague.

That is so for two reasons. First, the standard for assessing vagueness in the immigration context is not the one that's applicable in criminal cases.

Immigration removal is not a punishment for past conduct. It operates prospectively on the basis of the application of standards adopted by Congress under which an alien is regarded as no longer conducive to the safety and welfare.

1 JUSTICE GINSBURG: But Mr. Kneedler, if
2 you're -- if you're making the distinction that
3 Johnson was a criminal case and this is a civil
4 case, this Court has had a number of decisions
5 saying that line is not so rigid. For example,
6 MLB, taking away parental rights, is a civil
7 proceeding. And yet the Court said, as in a
8 criminal proceeding, for an indigent party, the
9 state must give the transcript free. And so, if
10 you had followed a rigid criminal/civil, then
11 if it's civil, no free transcript. Only if
12 it's criminal.

13 But the Court said the -- the line is
14 blurred when there is such a grave consequence.
15 It was a grave consequence to be denied parental
16 rights. It's a grave consequence to be removed
17 from the United States.

18 MR. KNEEDLER: And so our submission
19 is not just the distinction between civil and
20 criminal, although we think this Court's cases
21 establish that there is -- that there is a
22 difference. But the important points here,
23 though, are immigration is distinctive.

24 Immigration, this Court has repeatedly
25 said, even though it may be regarded as a harsh

1 result or -- or can have a serious impact on a
2 person's life, it is not punishment for a past
3 offense. It operates prospectively because
4 Congress has determined that the individual's
5 presence in the United States is no longer
6 conducive to the safety or welfare of the
7 country.

8 JUSTICE SOTOMAYOR: Mr. Kneedler, does
9 that permit arbitrary removal? Can the
10 immigration officials walk down the street and
11 say I just don't like the way you look; out?

12 MR. KNEEDLER: No. And -- and this
13 brings me to --

14 JUSTICE SOTOMAYOR: But -- but let me
15 get to that. So whether the distinction is
16 criminal or civil, the issue for us, as I
17 understand it under Johnson, is, is it
18 arbitrary? Is it so arbitrary that under any
19 standard, criminal or civil, this is vague?

20 Now, I know you're saying it's not
21 arbitrary for a bunch of different reasons.
22 But please explain to me on the two grounds
23 that Johnson used, ordinary case and type of
24 risk, how this is not equally arbitrary.

25 MR. KNEEDLER: There are a number of

1 -- a number of reasons why we -- why we think
2 that's true. First of all, the Court said in
3 Johnson it was the sum of the various
4 attributes of the ACCA residual clause that
5 created the problem.

6 So whatever -- whatever might be the
7 problem with -- with one of those, it was the
8 combination of those. And those --

9 JUSTICE SOTOMAYOR: Well, I thought it
10 was only two. The other things it mentioned
11 were --

12 MR. KNEEDLER: No, but, they -- they
13 were -- they were critical attributes of the
14 two. That's the -- that's the important point.

15 JUSTICE KAGAN: I mean -- I mean, what
16 the Court said is -- I'm quoting -- "two
17 features of the residual clause conspire to make
18 it unconstitutionally vague." And then there's,
19 you know, a clear holding sentence just a
20 little bit later on in the opinion where it
21 basically tells you exactly what two aspects
22 it's talking about. It says, "by combining
23 indeterminacy about how to measure the risk
24 posed by a crime with indeterminacy about how
25 much risk it takes for the crime to qualify as

1 a violent felony. The residual clause produces
2 more unpredictability and arbitrariness than
3 the Due Process Clause authorized tolerates."

4 So, you know, it says, Number 1,
5 ordinary case analysis. Number 2, combined
6 with a fairly fuzzy standard as to the
7 threshold level of risk. And those were the
8 two factors.

9 And I guess the question is, are those
10 two factors any different here?

11 MR. KNEEDLER: Yes, they're -- they're
12 very different here.

13 And as this Court's decision in *Leocal*
14 demonstrates, it relied on the -- on the
15 features that we believe are -- critically
16 distinguished 16(b) from the ACCA residual
17 clause.

18 JUSTICE KAGAN: Here it's the fact
19 that there's ordinary case analysis, both
20 statutes, right?

21 MR. KNEEDLER: No, but they -- but
22 they operate in very different -- in very
23 different ways. The -- ordinary cases is a way
24 of saying that the elements don't have to match
25 up like under 16(a). It doesn't have to be the

1 actual use of force. 16(b) addresses those
2 situations in which the elements of the offense
3 involve a substantial risk that physical force
4 would be used even though it's not actually an
5 element.

6 So whereas under the ACCA residual
7 clause, the ordinary case analysis was not --
8 was not tied to the text of the -- of the
9 relevant provision as it is here. There are
10 three provisions in the -- in the ordinary case
11 analysis that are here that weren't present
12 there.

13 You look to the nature of the offense,
14 the offense by its nature. And this Court said
15 in *Leocal* that means you look at the elements
16 and the nature of the offense, involve a
17 serious or substantial risk that physical force
18 will be used, not that injury might result down
19 the road but physical force, which this Court
20 said is a -- is a focused inquiry and
21 specifically distinguished the possibility that
22 harm might result. And in footnote 7 of the
23 Court's opinion, it specifically distinguished
24 sentencing guideline that uses the very
25 language of the ACCA residual clause and said

1 this is not open-ended like that.

2 And then the -- 16(b) says the
3 substantial risk has to arise in the course of
4 the commission of the offense, which means it's
5 tied both temporally to the -- to the actual
6 conduct of the offense and functionally, does
7 the substantial risk inhere in the elements of
8 the offense.

9 JUSTICE SOTOMAYOR: So how do those
10 two things change the definition of what an
11 ordinary case is in burglary? The only time
12 that I understand that burglars actually go
13 into an occupied home is very little. It's
14 probably less than 10 percent in which they
15 confront someone, probably smaller amount when
16 they actually use force against that person.
17 Lots of burglaries are done with open doors or
18 with jimmying without injuring a lock.

19 How does any of those two things
20 you've mentioned -- how do they change what
21 constitutes an ordinary case for burglary and
22 what the substantial risk of use of physical
23 force or injury is?

24 MR. KNEEDLER: Well, again, I think
25 starting with the text of 16(b), you look at

1 the nature of the offense, the elements of the
2 offense. Do they -- is inherent in those
3 elements a risk, a substantial risk that force
4 will be used?

5 And -- and so looking at burglary, what
6 is the nature of the offense with respect to the
7 risk of harm -- or the, excuse me, the risk of
8 the use of force?

9 Well, this Court said in *Leocal* that
10 the -- the nature of the offense there is that
11 the burglar will encounter someone. If it's
12 risk of force against a person, that the --
13 that the offender will encounter someone while
14 committing the offense --

15 JUSTICE SOTOMAYOR: Justice Scalia did
16 exactly that in *Johnson* and said the ordinary
17 case and the risk of force or injury is
18 something that you're leaving to the judge's
19 intuition.

20 MR. KNEEDLER: No, I mean, with
21 respect, Justice Scalia's opinion in -- in
22 *Johnson* or -- or in *James*, or whatever case you
23 may be speaking of, was not about 16(b), and --
24 and a unanimous decision of this Court written
25 by Chief Justice Rehnquist identified burglary

1 as the classic example of what is covered by 16

2 --

3 JUSTICE SOTOMAYOR: Well, it wasn't
4 part of the residual clause anyway.

5 JUSTICE GORSUCH: Mr. Kneedler, may I
6 -- may I ask you just a couple quick questions?

7 MR. KNEEDLER: Sure.

8 JUSTICE GORSUCH: I hope they're
9 quick.

10 First, getting back to the standard of
11 review and the distinction between criminal and
12 civil, this Court seems to have drawn that line
13 based on the severity of the consequences that
14 follow to the individual, but that seems to me
15 a tough line here to draw because I can easily
16 imagine a misdemeanor who may be convicted of
17 a crime for which the sentence is six months in
18 jail or a \$100 fine, and he wouldn't trade
19 places in the world for someone who is
20 deported -- deported from this country pursuant
21 to a civil order or perhaps the subject of a
22 civil forfeiture requirement and loses his
23 home.

24 So how sound is that line that we've
25 drawn in the past, especially when the

1 civil/criminal divide itself is now a
2 seven-part balancing test, not exclusive, so
3 there may be more than seven factors as I
4 understand it.

5 And I look at the text of the
6 Constitution, always a good place to start, and
7 the Due Process Clause speaks of the loss of
8 life, liberty, or property. It doesn't draw a
9 civil/criminal line, and yet, elsewhere, even
10 in the Fifth Amendment, I do see that line
11 drawn, the right to self-incrimination, for
12 example.

13 So help me out with that.

14 MR. KNEEDLER: Well, I -- the -- I
15 think the analysis derives from the thinking
16 about what the purpose of vagueness
17 restrictions are, and as this Court has said in
18 the criminal context, there are two basic
19 points.

20 One is that an individual, a person of
21 common intelligence should know, have notice of
22 what the law requires --

23 JUSTICE GORSUCH: Fair -- fair notice
24 of the law.

25 MR. KNEEDLER: Right.

1 JUSTICE GORSUCH: And isn't it really
2 important in the civil context, too, when we
3 have so many civil laws today, and they're
4 often hidden away in places like the Federal
5 Register and other -- other fine reads like
6 that?

7 MR. KNEEDLER: Well, and the second
8 point I was going to mention is, is whether it
9 gives rise to the potential for arbitrary
10 enforcement. And what's different about
11 immigration, for example, from -- from the
12 criminal law, for example, the notice --

13 JUSTICE GORSUCH: But you'd agree the
14 fair notice point pertains to both the civil
15 and the criminal sides?

16 MR. KNEEDLER: It does, but I think in
17 -- in -- in different respects, and in some
18 ways, the two points I just mentioned -- or the
19 two points the Court has emphasized are -- are
20 related in -- in some ways.

21 But with respect to the notice point
22 the immigration context, this Court has held
23 that the ex post facto clause, which is
24 applicable in criminal proceedings, does not
25 apply in immigration proceedings.

1 And, therefore, a person may be
2 removed from the United States on a ground that
3 was not a ground for removal at the time he
4 engaged in the particular conduct.

5 So the -- the idea that the -- that
6 the statute for that reason has to have a
7 notice element does not work. And then there
8 is the concern about arbitrary enforcement.

9 This is not, by the way, the sort of
10 statute that regulates loitering or being
11 annoying on the streets or something which is
12 at the height of where I think the Court's
13 concern has been about police and juries and
14 judges being arbitrary in the application.

15 The immigration laws have always been
16 enforced through a broad delegation of
17 authority to the executive branch, reflecting
18 the fact that immigration and immigration
19 enforcement are closely related to the national
20 security and foreign relations of the United
21 States.

22 JUSTICE GINSBURG: Mr. Kneedler, does
23 the government have another string in its bow
24 here? I know we're arguing about 16(b) and its
25 resemblance to ACCA, but you can be removed if

1 you commit a crime of moral turpitude, and
2 wouldn't burglary fall under that?

3 MR. KNEEDLER: Well, it -- it would
4 depend on the -- the rules for what is a crime
5 involving moral turpitude are somewhat
6 intricate, depending on the nature of the
7 offense. It's not --

8 JUSTICE GINSBURG: Well, hasn't it
9 been determined whether burglary is a crime of
10 moral turpitude?

11 MR. KNEEDLER: But it -- again, it
12 would depend on the nature of the offense. In
13 this particular case, the immigration judge
14 concluded that the conduct here involved a
15 crime involving moral turpitude, but the IJ did
16 not apply the categorical approach. It applied
17 a fact-specific approach and concluded that the
18 defendant's conduct in this case amounted to a
19 crime involving moral turpitude.

20 JUSTICE ALITO: You think the concept
21 of a crime of moral turpitude is less vague
22 than 16(b)?

23 MR. KNEEDLER: No, I -- I -- I think
24 not, but -- but this -- this, I think, brings --
25 brings to mind what's important about

1 immigration enforcement or, frankly, a lot of
2 civil enforcement --

3 JUSTICE SOTOMAYOR: But Kneedler --
4 Mr. Kneedler, the crime of moral turpitude is
5 always applied to the facts of the case. So
6 Johnson pointed out that, when you have a
7 statute that uses approximations like
8 substantial or significant or severe, that what
9 gives it life is its application to actual
10 facts.

11 The difference between these two
12 approaches is that this one is asking judges to
13 hypothesize the facts and has nothing to do
14 with the reality of the crime.

15 MR. KNEEDLER: Well, no, with respect,
16 a crime involving moral turpitude, the
17 categorical approach is applied there. It is
18 not -- it is not a fact-specific determination.

19 JUSTICE KAGAN: But it is a different
20 kind of categorical approach, isn't it? It's
21 asking what the elements of the offense are
22 that everybody has to commit, as opposed to
23 what the elements of the offense are that
24 people commit in the ordinary case, whatever
25 that might be.

1 And that raises the question that
2 Justice Scalia thought was so important in
3 Johnson and elsewhere, where he says that
4 there's no way really for a Court to do that,
5 you know, this is the -- the line, should we
6 look to a statistical analysis of the state
7 report or a survey, expert evidence, Google,
8 gut instinct, that this is the problem with
9 ACCA's residual clause under Johnson as it is
10 here, is that we don't really have a source of
11 law to look to to tell what an ordinary case is
12 in -- under either statute.

13 MR. KNEEDLER: No, I -- I -- I really
14 don't think that's correct.

15 In Johnson, again, the Court was
16 concerned about a statute that referred to the
17 chance -- the chance that injury will occur
18 which could be completely open-ended.

19 Here, this is tied to the text of the
20 statute, by its nature, does it give rise to
21 the risk of force or --

22 JUSTICE GORSUCH: Mister --

23 JUSTICE KAGAN: Before you get into
24 that question, before you get into does it do
25 this in terms of force, or does it do that in

1 terms of injury, before you do any of that, you
2 have to have an understanding of what the
3 ordinary case is.

4 And the problem in Johnson with ACCA's
5 residual clause, according to Justice Scalia
6 and the Court, was that there was no way to
7 tell what that ordinary case was.

8 MR. KNEEDLER: Again, with respect,
9 this Court, in Leocal, unanimously held that
10 burglary is a classic example, and it gave the
11 reason why, which I think is helpful for
12 answering this question more generally.

13 And the Court said that -- that
14 burglary, by its nature, in the course of
15 commission -- committing the offense, gives
16 rise to a risk that physical force would be
17 used during the offense because the person will
18 encounter someone else.

19 So built in inherent in the nature of
20 burglary is the risk that the burglar will
21 encounter someone while the crime is being
22 committed.

23 JUSTICE GORSUCH: Well, Mr. -- Mr.
24 Kneedler, if I might interrupt, I'm sorry, but
25 this raises a question for me about the nature

1 of our task here.

2 It seems to me that one function
3 of -- of our void-for-vagueness doctrine is not
4 just to ensure fair notice, procedural due
5 process -- I think you'd agree with that.

6 MR. KNEEDLER: Yes, but the notice --

7 JUSTICE GORSUCH: Yes. Yeah.

8 MR. KNEEDLER: With the caveat about
9 immigration, we're -- right.

10 JUSTICE GORSUCH: Of course not -- of
11 course not in this case, right, but, generally,
12 the doctrine serves that function.

13 MR. KNEEDLER: Yes.

14 JUSTICE GORSUCH: And it also serves a
15 separation of powers function. When the law
16 runs out and judges cannot say what the law
17 is, they don't make it up. Right?

18 And we stop. That's why we don't have
19 a federal common law of crime, for example,
20 right? And I wonder here how I would go about
21 determining what the ordinary case is, the
22 ordinary course of burglary in California, does
23 it include fraudulently selling securities in
24 someone's home, that's burglary in California,
25 is that the ordinary case or not?

1 I would probably want to have
2 statistics and evidentiary hearings and hear
3 experts on that question. And that sounds to
4 me a lot like what a legislative committee
5 might do. And if I can't distinguish my job
6 from a legislative committee's work, am I not
7 verging on the separation of powers problem?

8 MR. KNEEDLER: Well, at the margins or
9 -- or at the outer limits, there may be
10 problems like that. But I think it's important
11 for the Court to focus on the core of what --
12 this -- this, unlike the ACCA residual clause,
13 has a core, what the Court -- another point we
14 haven't discussed, what the Court was concerned
15 about --

16 JUSTICE GORSUCH: Well, but could you
17 answer my question?

18 MR. KNEEDLER: Yeah. I was -- I was
19 getting there. Now I --

20 JUSTICE GORSUCH: Great.

21 MR. KNEEDLER: I apologize. But the --
22 the -- if we look at the -- I think the Court
23 can comfortably look and see whether the statute
24 has a core of administrable offenses. If there
25 are ones at the margin, for example, that would

1 give rise to the concern you're raising --

2 JUSTICE GORSUCH: Well, let's take
3 burglary in California, what the ordinary --
4 oh, and what level of generality am I supposed
5 to look at in terms of what the ordinary case
6 is? Municipality, Orange County, state,
7 California, the country? Or do I make that
8 legislative choice too?

9 I'm just wondering --

10 MR. KNEEDLER: Well --

11 JUSTICE GORSUCH: Even take burglary in
12 California, how am I supposed to know what
13 ordinary is?

14 MR. KNEEDLER: And California --
15 California burglary would be a close question,
16 frankly. Now, here, it was -- it was resident
17 -- it was class 1 burglary.

18 JUSTICE GORSUCH: If burglary is a
19 close case, then doesn't that tell us --

20 MR. KNEEDLER: No, no. California
21 burglary.

22 JUSTICE GORSUCH: California burglary.

23 MR. KNEEDLER: And only because -- only
24 because California burglary does not require an
25 unlawful entry --

1 JUSTICE GORSUCH: Right.

2 MR. KNEEDLER: -- or unlawful
3 remaining, and therefore, it does not satisfy
4 generic burglary, but -- but generic burglary,
5 as this Court again unanimously held in -- in --
6 in *Leocal*, is a classic example.

7 And if I could use a couple of others,
8 just to show that the Court is not at sea here,
9 kidnapping is another one. Kidnapping may be
10 accomplished -- it's typically accomplished
11 maybe by the use of force, but can also be
12 accomplished by trick.

13 But that -- that doesn't mean that
14 it's not covered by 16(b) because the entire
15 time that the victim is being confined, whether
16 or not he or she knows it initially that she's
17 being confined against her will, once she finds
18 out that she is, the risk of harm will
19 materialize.

20 It's a continuing offense --

21 JUSTICE GORSUCH: But -- but, Mr.
22 Kneeder, I'm sorry, I just -- I just am stuck
23 on my question. How am I supposed to determine
24 what the ordinary case is? Should I bring in
25 some experts and have an evidentiary hearing?

1 And if so, why -- why isn't that a legislative
2 function?

3 MR. KNEEDLER: Well, I -- there may be
4 cases where the statute itself is not clear as
5 to whether the elements give rise to the
6 requisite risk. And -- and California burglary
7 may be one of them.

8 JUSTICE GORSUCH: So you would have me
9 bring in experts?

10 MR. KNEEDLER: No. I --

11 JUSTICE GORSUCH: You wouldn't -- you
12 wouldn't --

13 MR. KNEEDLER: No, I'm not --

14 JUSTICE GORSUCH: Look, I'm just trying
15 to get an answer on that.

16 MR. KNEEDLER: No, no, I'm not saying
17 -- I'm not saying experts, but -- but -- but
18 where there are statistics available, for
19 example, as -- as there were in several of -- of
20 this Court's cases under the ACCA residual
21 clause, that statistics were looked to to really
22 reinforce common sense.

23 JUSTICE BREYER: But do you
24 remember -- probably you do or maybe not, that
25 several judges, I remember because one of them

1 was me -- and some of the lower court judges
2 said, why doesn't the sentencing commission or
3 why doesn't that part of the Justice Department
4 that keeps track of statistics go out and find
5 out what is the typical way in which, for the
6 ACCA provision, you know, the other provision,
7 they're committed, and case after case went by,
8 and nobody ever had the statistics.

9 And I tended to think, well, they
10 can't get them. Otherwise, they would. And so
11 what's the story? I think it's a similar
12 question to what is being asked.

13 MR. KNEEDLER: Well, there -- there
14 may be general categories of offenses where
15 that -- where that could --

16 JUSTICE BREYER: Well, there were a
17 lot -- in other words, we never had a case,
18 that I can remember, under that other
19 provision, where somebody came up with
20 statistics, despite what I'd call pleading by a
21 lot of --

22 MR. KNEEDLER: Well, there were --
23 there were statistics in chambers --

24 JUSTICE BREYER: There were? Okay.

25 MR. KNEEDLER: And then there were

1 statistics --

2 JUSTICE BREYER: Then there are some.
3 Then there were some.

4 MR. KNEEDLER: And there were some
5 statistics and cites dealing with -- with
6 vehicle -- flight from an -- from an officer --
7 but I'm not --

8 JUSTICE GORSUCH: Law clerks are
9 excellent at gathering statistics, but they're
10 probably not as good as a legislative
11 committee.

12 MR. KNEEDLER: Yeah, no, but -- but --
13 but I think it's important to recognize that
14 what we have here is a legislative enactment in
15 which Congress chose to identify the crimes that
16 are covered by categories, the type of offense.

17 And there -- and there is only so much
18 that one can expect from a legislature in
19 identifying a category. And here, Congress
20 identified a category in 16(b) that is very
21 closely tied to 16(a).

22 16(a) involves the situations where
23 the element -- the element of the offense
24 itself involves the use or threatened use of
25 force. 16(b) expands that slightly to say,

1 okay, it may not be technically an element, but
2 is the -- is the offense under 16(b) so
3 instinct or inherent -- inherently contained, a
4 risk of the use of force, that it -- that it
5 should fall -- should fall in Congress's
6 judgment in that same category?

7 You look at other offenses, a number
8 of lower courts have held that conspiracy to
9 commit Hobbs Act robbery is a crime of
10 violence. Robbery certainly is a crime of
11 violence.

12 Conspiracy itself contains the
13 substantial risk of physical force being used
14 because conspiracy is an agreement to commit
15 the very crime that will -- that will result in
16 physical force, conspiracy to commit --

17 JUSTICE SOTOMAYOR: How about
18 statutory rape?

19 MR. KNEEDLER: Statutory --

20 JUSTICE SOTOMAYOR: To start with,
21 they know -- the courts below --

22 MR. KNEEDLER: Statutory -- sex -- sex
23 -- sex offenses are difficult in any context.
24 Sexual abuse of a minor, as -- as the Court
25 knows from last year's case, but there is a

1 category of cases, and we cite some in -- in our
2 brief where -- with a sufficient age difference
3 between an adult and minor, the use of physical
4 force is inherent in the nature of the offense,
5 that when -- when the adult -- even if the --
6 even if the adult is able to get the child to
7 comply without actually using physical force,
8 the threat or the potential for physical force
9 is always present, if the child resists the --
10 the adult can use force.

11 JUSTICE SOTOMAYOR: Is that the
12 ordinary case? I thought that most of the
13 pornography cases that we're seeing are
14 children not being physically forced into sex
15 but being tricked into it by caretakers or --
16 or talked into it, et cetera?

17 MR. KNEEDLER: But -- but --

18 JUSTICE SOTOMAYOR: One may have
19 personal views about whether an adult can ever
20 not be using improper --

21 MR. KNEEDLER: But -- but -- but the
22 point is, in that -- in that encounter, the
23 potential for the use of force, the risk for the
24 use of force is always -- the same -- the same
25 risk.

1 And -- and whether or not force is
2 used in 50 percent of the cases or 25 percent
3 of the cases --

4 JUSTICE SOTOMAYOR: So it doesn't
5 surprise you --

6 MR. KNEEDLER: -- in that context is
7 not the relevant --

8 JUSTICE SOTOMAYOR: It doesn't
9 surprise you that the courts below are split on
10 this question, just the way they were under
11 ACCA.

12 MR. KNEEDLER: Well, the -- as we
13 point out in our brief, the distinctions in the
14 lower courts on this question and on a number
15 of them have to do with the particular elements
16 of the state offense.

17 What -- particularly when it comes to
18 sex offenses, it's difficult to -- to say
19 statutory rape or sexual abuse of a minor
20 because the elements of the state offense may
21 vary, but if --

22 JUSTICE GORSUCH: Mr. Kneedler, if I
23 may take you in a slightly different direction,
24 some have criticized void-for-vagueness
25 doctrine as a subspecies of substantive due

1 process, and they are legitimate on that score.

2 Others suggest that it really is an
3 element -- a form of procedural due process and
4 also a product of our separation of powers, as
5 we've discussed, to keep judges out of making
6 new law.

7 What's -- what's the government's
8 position on that?

9 MR. KNEEDLER: Well, I don't know that
10 we've addressed it in precisely those terms.

11 JUSTICE GORSUCH: That's why I'm
12 asking you now.

13 (Laughter.)

14 MR. KNEEDLER: No, it -- it feels like
15 more of a -- it seems like more of a
16 substantive due process limitation, although it
17 does -- it does --

18 JUSTICE GORSUCH: Why? Because the
19 doctrine doesn't prohibit the Congress from
20 legislating in any area. It just says you have
21 to do it in a way that provides fair notice and
22 that doesn't involve this body in law making.

23 MR. KNEEDLER: Well, in that sense, I
24 mean, I suppose it has a procedural aspect, but
25 I -- but I think that, when you think about

1 notice, but I think substantively, it also --
2 it also requires that Congress be --

3 JUSTICE GORSUCH: Congress could do --
4 specify any crimes it wishes to include in this
5 statute tomorrow.

6 MR. KNEEDLER: Yes.

7 JUSTICE GORSUCH: There's no
8 substantive limitation.

9 MR. KNEEDLER: Yes, it -- it could,
10 but Congress chose to identify a category of
11 crimes that it believed gave rise to a
12 substantial risk, and we shouldn't expect the
13 impossible from Congress when it wants to
14 identify crimes by category. Like --

15 JUSTICE GORSUCH: Really? Even when
16 it's going to put people in prison and deprive
17 them of liberty and result in deportation, we
18 shouldn't expect Congress to be able to specify
19 those who are captured by its laws?

20 MR. KNEEDLER: We -- we think this law
21 reasonably captures the category that Congress
22 thought -- whose conduct gave rise to a serious
23 risk of -- of physical force being used. If I
24 could refer --

25 JUSTICE GINSBURG: Mr. Kneeder, did I

1 get, correctly, your answer to the question
2 about a crime of moral turpitude being an
3 alternative that the government could have
4 pursued? You say the immigration judge found
5 that this was a crime.

6 MR. KNEEDLER: But on grounds we think
7 were not correct because the immigration judge
8 did not apply the categorical approach, which
9 has since been determined to be the right way to
10 look at crime involving moral turpitude.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Kneedler.

13 Mr. Rosenkranz?

14 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ, ESQ.,
15 ON BEHALF OF THE RESPONDENT

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

18 Let me begin -- begin with Justice
19 Gorsuch's central point. Justice Gorsuch is
20 right. This is not a job that Congress can
21 appropriately delegate to the courts and to
22 enforcement officials on the ground.

23 Congress has written a statute that
24 makes it impossible for ordinary citizens or
25 for law enforcement or for immigration

1 officials to figure out what the law is, and
2 Congress has delegated that function to them.

3 It has done it with two features that
4 this Court described as dooming the ACCA
5 residual clause.

6 First, the piece that most concerned
7 the Court, the Court said was most important,
8 hypothesizing this ordinary case of a crime
9 and, second, then estimating the risk
10 associated with that hypothesized version and
11 whether that meets some vague standard.

12 The government warned the Court in
13 Johnson that section 16(b) was "equally
14 susceptible to challenge." The government was
15 right then, and the differences in statutory
16 language that the government has since
17 discovered do not change the outcome.

18 JUSTICE KENNEDY: Well, since
19 discovered, but the statute here says "during
20 the course of committing the offense." And
21 that's quite different from the statute in
22 Johnson.

23 MR. ROSENKRANZ: Your Honor, it isn't
24 quite different from the statute in Johnson.
25 The statute in Johnson has the same limitation

1 in different language. Section 16(b) covers
2 risks in the course of committing the crime,
3 ACCA's residual clause covered "a crime that
4 otherwise involves conduct."

5 Both are referring back to the crime.
6 But it really -- I -- I -- I'd like to address
7 more concretely this "in the course of
8 committing the crime" point because I can't
9 tell you why the government is wrong without
10 knowing what the government thinks those words
11 mean.

12 And the government keeps shifting back
13 and forth between two versions of what "in the
14 course of committing the crime" means. At
15 points, the government says that it means in
16 order to satisfy the elements of the crime.

17 So it reads the sentence to mean you
18 look for substantial risk that physical force
19 may be used in order to satisfy the elements,
20 but that's not how any Court was ever applying
21 this provision. It's not how the government
22 was telling the courts to apply this provision.

23 The government back then and even now,
24 Mr. Kneedler points to conspiracy and other
25 inchoate offenses, those offenses are

1 completed. The elements are completed when you
2 say, I want you to kill my wife, here is 100
3 bucks, they are completed with the utterance of
4 those words.

5 Nevertheless, you look after the
6 utterance, at least the government urged the
7 courts. But what about attempted burglary in
8 James? As Johnson itself points out, or
9 burglary -- Johnson itself points out burglary
10 was a problem. Why? Precisely because, under
11 the ordinary case approach, courts were
12 required to look past the elements. Burglary
13 is committed, the elements are completed the
14 moment you cross the threshold.

15 That's -- if that's the government's
16 reading, then burglary would be out. What the
17 court said in Johnson is that it's what
18 happens after you cross the threshold that
19 creates the risk.

20 But that's -- so -- so then the
21 government shifts to, okay, but no, no, it's
22 while the crime is under way, that's what "in
23 the course of committing the crime" means, but
24 that's not a solution. That is exactly the
25 problem that Johnson describes.

1 Its concern was that the ordinary case
2 analysis was "detached from the statutory
3 elements." And that -- that it leads courts to
4 speculate about what happens after the
5 statutory elements have all been satisfied, but
6 while the crime is under way.

7 That's just as imaginary. Now
8 let's -- let's look at --

9 JUSTICE ALITO: Suppose, Mr.
10 Rosenkranz, suppose a state enacted a statute
11 that says that no person may be licensed to
12 teach preschool, if the person has satisfied
13 the language, not by reference to 16(b), but
14 the language that's included in -- in 16(b).

15 Would that be unconstitutionally
16 vague?

17 MR. ROSENKRANZ: No, I -- I don't
18 think it would be. If it's some state that is
19 not incorporating by reference Congress's
20 handiwork or saying, we're adopting this
21 language because this is language Congress
22 adopted, it wouldn't be, but -- and I see we're
23 shifting now to the other piece of the case,
24 which is whether -- which is the application of
25 criminal standards -- for civil --

1 JUSTICE ALITO: Well, before I
2 decide -- before I can determine whether this
3 is unconstitutionally vague, I have to know
4 what the standard is, so that's my question.

5 If we apply the standard that -- that
6 generally applies to civil statutes, would this
7 be unconstitutionally vague?

8 MR. ROSENKRANZ: The standard that
9 applies --

10 JUSTICE ALITO: I mean, we might do --
11 we might do a wonderful job of pruning the
12 United States Code if we said that every civil
13 statute that is not written with the specificity
14 that is required by criminal statute is
15 unconstitutionally vague, we could boil that
16 down a lot, but that's what I'm asking. Is that
17 what you're arguing?

18 MR. ROSENKRANZ: No, not at all, Your
19 Honor. First, you're talking about a civil
20 statute here that is very different from
21 deportation. It's a licensing --

22 JUSTICE ALITO: Yeah. I'm taking it
23 step-by-step.

24 MR. ROSENKRANZ: It -- right. It's a
25 licensing statute. So there are three things

1 to say about how this criminal standard applies
2 in the civil context.

3 The first is to the premise of Your
4 Honor's question, Jordan settles the
5 question -- the answer to the question how you
6 apply criminal to the deportation context, but
7 this Court never has to decide whether to
8 reaffirm Jordan --

9 JUSTICE GORSUCH: Let's -- let's say
10 we don't think Jordan decided that issue.

11 MR. ROSENKRANZ: Yes. So -- so two
12 things to say before you even address Jordan,
13 and then the third thing to say is that Jordan
14 was right.

15 So the first two things, apropos of
16 Justice Alito's embedded assumption, Section
17 16(b) is a criminal statute that Congress
18 elected to import wholesale into this statute.

19 This Court has held that, if Congress
20 does that, it must -- then courts must apply
21 the same criminal vagueness standards to the
22 statute --

23 JUSTICE ALITO: That seems like --

24 JUSTICE KENNEDY: Well, that's just a
25 minor point that gets off the basic point of

1 Justice Alito, but it did not incorporate
2 exactly this statute. The language is
3 different. But we'll leave that.

4 MR. ROSENKRANZ: Your Honor, no, no, I
5 --

6 JUSTICE KENNEDY: A question is
7 pending.

8 MR. ROSENKRANZ: I'm sorry, Justice
9 Kennedy. Congress literally said, in the INA,
10 that the crime of the -- that the definition of
11 crime of violence is the definition of Section
12 16(b), Section 16(b) being a criminal statute.

13 It then added all sorts of bells and
14 whistles of other ways to create an aggravated
15 felony, but this Court, in A.B. Small, said,
16 Here is what you do when you have a statute
17 that has both criminal and civil
18 applications --

19 JUSTICE KENNEDY: Well, I -- I took us
20 -- I took us away from Justice Alito's inquiry.
21 He -- he wants to know the standard for
22 determining vagueness in civil cases.

23 MR. ROSENKRANZ: So the standard for
24 determining vagueness in civil cases was laid
25 out by this Court in Hoffman Estates, and the

1 answer is it depends on how serious the crime
2 is.

3 The -- the seriousness of the crime --
4 excuse me, how serious the penalty is or how
5 serious the consequence is. And --

6 JUSTICE GORSUCH: Exactly. And that's
7 where I get stuck, right, because the
8 consequences in many civil matters can be very
9 grave, more so even than a lot of criminal
10 penalties. Civil forfeiture, take a man's
11 home, his entire livelihood, deport him.

12 And I can think of lots of other
13 examples that can be graver than any misdemeanor
14 offense on the books today. And again, the line
15 between civil and criminal depends upon a
16 seven-part non-exclusive factor balancing test.
17 So what am I supposed to do with that?

18 MR. ROSENKRANZ: Well, Your Honor, I
19 will answer the question, but let me preface it.

20 JUSTICE GORSUCH: Great.

21 (Laughter).

22 MR. ROSENKRANZ: Let me just preface it
23 by saying I've only mentioned one of the reasons
24 that this Court doesn't have to figure out the
25 answer to that question. And let me just --

1 JUSTICE GORSUCH: All right. But
2 let's answer the question first and then you can
3 go on.

4 MR. ROSENKRANZ: Okay. So I would go
5 back to your point, Justice Gorsuch, that this
6 Court has repeatedly rejected a sharp line
7 between civil and criminal.

8 The correct distinction is the one
9 that this Court identified in Hoffman Estates,
10 cases, whether civil or criminal, with severe
11 consequences --

12 JUSTICE GORSUCH: How do I determine
13 that?

14 MR. ROSENKRANZ: Yes. So here is how
15 you determine it. One thing -- and by the way,
16 this Court has never had to answer that
17 question since Hoffman Estates set this out, so
18 it's not a question that arises very often.

19 The way the Court answers the question
20 here is -- is we know that criminal cases and
21 First Amendment cases are on one side of the
22 line.

23 What else comes on that side of
24 the line? If ever there was a consequence that
25 was on a par with criminal cases, it is

1 banishment, exile, lifetime banishment, the
2 Framers understood banishment to be equivalent
3 to taking away that which makes life worth
4 living, Madison talked about banishment as the
5 quintessential penalty, he says it's difficult
6 to imagine a doom to which the name cannot be
7 applied. By the way, this is not new to this
8 Court. It's not just Justice Ginsburg's
9 example.

10 In a case involving a criminal
11 protection, that is a constitutional protection
12 that -- that relates only to crimes, that is
13 Padilla and the -- the Sixth Amendment,
14 deportation already stands alone as the only
15 civil consequence that triggers a
16 constitutional protection on a par with the
17 criminal protection.

18 So you don't get to come into court
19 and say my lawyer didn't get -- didn't tell me
20 that I could forfeit my home.

21 JUSTICE SOTOMAYOR: I get that you
22 don't want to answer the question.

23 (Laughter.)

24 JUSTICE SOTOMAYOR: But I'm really --
25 I'm very interested in the answer, which is

1 Justice Gorsuch is -- is asking how
2 you -- where do you draw the line? So
3 acceptable civil vagueness and non-acceptable
4 civil vagueness?

5 MR. ROSENKRANZ: Well, Your Honor --

6 JUSTICE SOTOMAYOR: Or vagueness
7 generally.

8 MR. ROSENKRANZ: Hoffman Estates says
9 that it varies. So what we're talking about is
10 the line between the severest penalties and
11 those penalties that are less severe.

12 The answer is, if it is on a par with
13 a criminal punishment such that someone would
14 trade one for the other, this Court answered
15 that question in Lee.

16 In Lee, this Court said, as Justice
17 Gorsuch said earlier today, most people would
18 happily take a little bit extra time in prison
19 in order to avoid the consequence of
20 deportation.

21 JUSTICE ALITO: Well, my earlier
22 question was about licensing. So suppose this
23 language applies to license as an attorney,
24 license as a physician. Taking that away from a
25 person is pretty severe.

1 MR. ROSENKRANZ: Yes, Your Honor, but
2 -- but not as severe as lifetime banishment
3 from this country, which is preceded by
4 automatic and mandatory imprisonment.

5 JUSTICE ALITO: And when we start --
6 aren't we going to get into this same kind of
7 legislating and how -- how severe? Where is
8 this line drawn?

9 MR. ROSENKRANZ: Well, Your Honor,
10 this is the line this Court drew in Hoffman
11 Estates. I mean, that was decades ago.

12 JUSTICE GORSUCH: What do you think
13 about this line? Life, liberty, or property.

14 MR. ROSENKRANZ: That's a great line.

15 JUSTICE GORSUCH: It's right out of
16 the text of the Due Process Clause itself.

17 MR. ROSENKRANZ: Yes, that's a great
18 line: Life, liberty, or property. And -- and
19 particularly here we are talking about a liberty
20 interest, a liberty interest that says you must
21 leave, for some people, the only home that
22 you've ever -- that you've ever had. You must
23 leave your family.

24 So that when someone is making the
25 decision, am I going to plead guilty to a crime

1 that I've never -- that I didn't commit in
2 return for time served, he needs to know -- by
3 the way, in return for crime served so he can
4 get back to his wife and kids -- he needs to
5 know whether ICE is going to be standing out
6 there depriving him of that liberty and
7 deporting him from his wife and kids.

8 JUSTICE BREYER: You think you could
9 go back to Justice Kennedy's original question?
10 If you don't recall it --

11 MR. ROSENKRANZ: I do.

12 JUSTICE BREYER: -- what sticks in my
13 mind, if I get it right, is let's look at the
14 old ACCA -- the one we struck down in Johnson,
15 and the difficult language was it involves
16 conduct that presents a serious potential risk
17 of physical injury to another. And then there
18 were a lot of examples where, gee, it's awfully
19 tough to figure out whether it does or does not
20 fall within those words.

21 Now let's look at this language. It
22 involves a substantial risk that physical force
23 against the person or property to another may
24 be used in the course of committing the
25 offense. Now, that would seem to be that if

1 the offense is conspiracy to commit burglary,
2 the conspiracy is finished, over, done with,
3 long before they get to the property.

4 And so that wouldn't be too tough.
5 But burglary, which takes place on the
6 property, or conspiracy under the first statute
7 which would lead to the burglary that takes
8 place, well, that becomes tougher. Okay.

9 Now let's look at our statute now.
10 And give me some examples. I'm sure there are
11 many. But I think it would be helpful where
12 under this language, it seems, my God, what is
13 the basic case? This is impossible.

14 MR. ROSENKRANZ: I'll give you
15 several.

16 JUSTICE BREYER: Okay.

17 MR. ROSENKRANZ: First, Sykes,
18 vehicular flight. Okay. How do we -- the
19 Court was -- was mired in controversy about how
20 you figure out whether vehicular flight is
21 going to give rise to the right sort of risk
22 and how do you -- how did the Court do it? It
23 was looking at the moments or the long time
24 frame after the elements were satisfied. The
25 moment you pull out, you are in vehicular

1 flight.

2 So "in the course of" certainly
3 doesn't help. And the distinction between
4 physical force and physical injury doesn't
5 help. And the distinction between property and
6 personal injury doesn't help. You're still
7 always imagining what is happening after you
8 pull out?

9 Okay, next one, residential trespass.
10 It all depends upon, first, what do you imagine
11 the ordinary case to be of residential trespass
12 and then figure out how it plays out.

13 Or car burglary, same exact problem.
14 Or to take one example directly out of ACCA,
15 extortion.

16 It all depends upon the ordinary case
17 analysis, which -- which goes back to Justice
18 Sotomayor's question early on. The heart of
19 this problem is this ordinary case approach, and
20 none of the -- the statutory differences that
21 the Government has pointed to help you figure
22 out what the ordinary case is.

23 JUSTICE KAGAN: And, Mr. Rosenkranz,
24 just to tie in this ordinary case problem with
25 this phrase about "during the commission of

1 the crime," has the Government in all of this
2 briefing and in all of this argument ever come
3 up with a single crime in which the ordinary
4 case of that crime, the injury would be
5 occurring after the commission of the crime?
6 If the commission of the crime is taken to mean
7 not just elements but a more general view of
8 what the crime is.

9 MR. ROSENKRANZ: In this case, no.

10 JUSTICE KAGAN: I'm just suggesting
11 that the Government has never come up with a
12 single case under ACCA in which -- and,
13 remember, ACCA requires you to look at the
14 ordinary case.

15 In the ordinary case, what crime has
16 injury that occurs after the commission of the
17 crime? The Government has not told us of any.

18 MR. ROSENKRANZ: If you are -- that is
19 correct, after the crime is over. I mean --

20 CHIEF JUDGE ROBERTS: Poison?

21 MR. ROSENKRANZ: -- conspiracy or
22 solicitation to murder, the crime is done -- it
23 occurs after. I think the Government's current
24 position, contrary to what it persuaded multiple
25 courts of appeals of, was that that's out.

1 And so that's the example, but in
2 order to get there, the government has to take
3 the quintessential crime of violence and say
4 that it is not --

5 JUSTICE KAGAN: And that's
6 inconsistent with everything that the government
7 has said in multiple cases; isn't that correct?

8 MR. ROSENKRANZ: Yes, in -- in -- I
9 mean, the courts of appeals that have said that
10 those crimes are within the residual --

11 JUSTICE BREYER: They're saying right
12 now, what about conspiracy? I mean, you can
13 have conspiracy to commit burglary. It's over,
14 once you conspire.

15 MR. ROSENKRANZ: Right. Well, that's
16 a -- so that's an example, but I think the
17 government said that that's in.

18 JUSTICE KAGAN: That that's in.

19 MR. ROSENKRANZ: Right. And so if,
20 that's in, then this whole notion of in the
21 course of committing the crime doesn't do any
22 work.

23 JUSTICE KENNEDY: Could -- could the
24 government --

25 JUSTICE KAGAN: Similarly, the

1 government -- please.

2 JUSTICE KENNEDY: It's a different
3 point. Could -- could the government pass a
4 statute saying that aliens who commit criminal
5 offenses are deportable if in the discretion of
6 the Attorney General, the presence of the alien
7 is inconsistent with the best interests of the
8 people of the United States?

9 MR. ROSENKRANZ: That is the basis of
10 deportation? No.

11 JUSTICE KENNEDY: Why?

12 MR. ROSENKRANZ: I'm sorry, let me --
13 let me back up. If --

14 JUSTICE KENNEDY: In other words, what
15 standards must a statute meet before an
16 administrative officer can make the
17 determination that the -- remaining in the
18 United States is not in the best interests of
19 the United States?

20 MR. ROSENKRANZ: Well --

21 JUSTICE KENNEDY: Would that -- would
22 that suffice? Would that be unconstitutional?

23 MR. ROSENKRANZ: That would be
24 unconstitutional --

25 JUSTICE KENNEDY: Under what rule and

1 under what context?

2 MR. ROSENKRANZ: Under the criminal
3 void-for-vagueness rule. A reasonable person,
4 whether it is the deportee or an official on
5 the ground or an administrative law judge would
6 have no idea what the content of that
7 prescription is, as a basis for being within
8 the universe of people who can -- who are
9 identified as being deportable.

10 Now, if it's a basis for the Attorney
11 General's exercise of discretion that despite
12 the fact that you are deportable as Congress
13 has defined it, I am not going to deport you,
14 that's another story. And by the way, that was
15 the Mahler case.

16 JUSTICE GORSUCH: Mr. Rosenkranz?

17 MR. ROSENKRANZ: Yes.

18 JUSTICE GORSUCH: What do you say to
19 the critique that the void-for-vagueness
20 doctrine, as an originalist issue matter, is
21 just substantive due process and suspect on
22 that basis and therefore should be narrowly
23 construed?

24 MR. ROSENKRANZ: Your Honor, it's not
25 -- it's not substantive due process. It's a

1 procedural due process concern and it's a
2 separation of powers concern. It's both of
3 those.

4 It is the procedural right on the part
5 of the individual who's being accused or being
6 deported to know what the law is in advance.
7 And as Justice Thomas has explained very
8 eloquently, it derives out of the rule of
9 lenity. And it's also, as Your Honor was
10 pointing out, a very important separation of
11 powers set of principles because the law
12 enforcement officer on the ground who gets to
13 tell a non-LPR, you are an aggravated felon and
14 you are out, with no opportunity for BIA review
15 and very limited judicial -- opportunity for
16 judicial review, that is a classic abdication
17 of congressional authority to line level
18 officers.

19 JUSTICE ALITO: How is it -- how is it
20 procedural? I don't understand how you can say
21 it's a procedural right. You said -- you said
22 the statute is void for vagueness. That
23 certainly is substantive.

24 MR. ROSENKRANZ: Your Honor, you say
25 the statute is void for vagueness because when

1 it is being applied to an individual, that
2 individual is given no notice that lifetime
3 banishment is going to be the consequence of
4 what he thought to be a safe harbor --

5 JUSTICE ALITO: And what if he was
6 given notice in some other way?

7 MR. ROSENKRANZ: I think it depends in
8 what way. But this Court said in Johnson -- I
9 mean, Johnson actually had notice. Johnson
10 knew that the illegal -- that the sawed-off
11 shotgun was illegal, but this Court struck the
12 statute.

13 JUSTICE ALITO: So that makes my
14 point. He had notice. He knew. So where's
15 the procedural violation?

16 MR. ROSENKRANZ: Well, for -- for the
17 vast majority of people and the people who are
18 affected by it, it is procedural.

19 But, you know, Your Honor, I just
20 realized, in this colloquy, I never did answer
21 the other part of Your Honor's question,
22 Justice Alito, about the reasons why the
23 vagueness standard applies here, the criminal
24 vagueness standard.

25 So the first I said, before you ever

1 get to Jordan, is that the -- that 16(b) is
2 itself a criminal statute.

3 The second reason is, to the point
4 that Justice Gorsuch was making about the
5 relationship between -- between criminal law
6 and immigration law, there is not an area of
7 law where the two are as integrated, and 16(b),
8 in particular, excuse me, the ACCA provision
9 here, in particular, has very significant
10 criminal consequences.

11 The aggravated felon label, once you
12 are an aggravated felon, now that's in the INA,
13 certain immigration crimes are triggered. And
14 so aggravated felon becomes a -- an element of
15 a crime.

16 And I'll give you an example. If -- if
17 this -- if this vagueness analysis works the way
18 the government says it works, Mr. Dimaya can be
19 deported because he had sufficient notice or the
20 statute was sufficiently clear, but an
21 aggravated felon who reenters this country is
22 prosecuted as an aggregated felon.

23 So, if he reentered the country, he can
24 then be not -- he then -- he can then not be
25 prosecuted as an aggravated felon because the

1 statute would be too vague. That makes no
2 sense, which is exactly why this Court adopted
3 the rule that it adopted in A.B. Small and that
4 four members of this Court repeated in
5 Northwestern Bell, which is, if Congress makes
6 that choice to give civil and criminal
7 ramifications to the same statute, the very
8 same statute, if the statute is void for vague
9 in one context, it's void for vague in the
10 other.

11 And, by the way, that other context in
12 A.B. Small was a silly little contract case,
13 not, you know, even, you know, the licensing of
14 a nursery.

15 JUSTICE GINSBURG: Mr. Rosenkranz, can
16 I ask you a simple question? If -- if, as this
17 Court has held crime of moral turpitude isn't
18 unconstitutionally vague, why should 16(b) fail
19 to meet the vagueness test?

20 MR. ROSENKRANZ: Your Honor, the
21 answer is crime involving moral turpitude does
22 not sit in a vacuum by itself. It is a phrase
23 that Congress adopted that has, at this point,
24 probably two centuries' worth of law describing
25 what is in and what is out.

1 And, by the way, so what did the Court
2 do in Jordan? What the Court did in Jordan was
3 to say, You, Jordan, you committed a fraud. One
4 thing that has been clear, since as long as
5 those words have been used, is that a fraud is a
6 classic crime involving moral turpitude.

7 That's why he lost that case. And if
8 he had been criminally prosecuted under a
9 statute that made an element of the crime that
10 it become -- that it be a crime involving moral
11 turpitude, the same result would obtain.

12 And -- and so --

13 JUSTICE ALITO: I mean, maybe you have
14 in your head a list of -- you could categorize
15 any offense that I might mention and say that's
16 a crime of moral turpitude, that's not a crime
17 of moral turpitude. I couldn't do that.

18 MR. ROSENKRANZ: Well --

19 JUSTICE ALITO: And I doubt that
20 somebody who's facing possible removal
21 consequences would be able to answer that
22 question.

23 MR. ROSENKRANZ: Well, Your Honor --

24 JUSTICE ALITO: Okay. Shooting a bald
25 eagle, is that -- is that a crime of moral

1 turpitude? Some people would think so.

2 MR. ROSENKRANZ: It is -- it is not.

3 JUSTICE ALITO: It is not. How
4 about --

5 MR. ROSENKRANZ: And, by the way, nor
6 is flag burning. And -- but let me -- but let
7 me answer the question this way.

8 You don't have to know, but you -- you
9 have to be able to go to someplace like a
10 lawyer who can tell you what the answer is.
11 And where does a lawyer go? There are 14 pages
12 of -- of Kurzban, where every single possible
13 crime is categorized as in or out based upon
14 decades of -- of judicial and other
15 interpretations. That's how one knows.

16 JUSTICE KAGAN: And -- and in a crime
17 of moral turpitude, we don't have to consider
18 what the ordinary case is, do we?

19 MR. ROSENKRANZ: I think that is what
20 the Court -- no, not the ordinary case, that is
21 for sure.

22 JUSTICE KAGAN: We don't.

23 MR. ROSENKRANZ: Yes. That is correct.

24 JUSTICE KAGAN: All we do is look to
25 the elements that everybody has to meet.

1 MR. ROSENKRANZ: Correct, correct. So
2 let me close with this. I -- I appreciate the
3 instinct to try and see if this Court can do
4 better with Section 16(b) than it did with
5 ACCA's residual clause, but in deciding whether
6 to take that route, this Court has to decide
7 whether anything is to be gained by this whole
8 enterprise of sending the lower courts back to
9 apply now a different standard and figure out
10 how it applies to all of these crimes, that
11 process is going to be no less arbitrary, no
12 less speculative, and lifetime banishment
13 should not hang on the unpredictable answer to
14 the question, Is this crime in or is it out?

15 Congress can, of course, decide the
16 circumstances under which lifetime residents
17 can be kicked out of this country, but it
18 disserves the separation of powers, that
19 Justice Gorsuch referred to, to allow Congress
20 to pass the buck to immigration officials and
21 courts with a provision this vague.

22 If there are no further questions, we
23 respectfully request that the Court affirm the
24 Court of Appeals.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Kneedler, three minutes.

4 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,
5 ON BEHALF OF THE PETITIONER

6 MR. KNEEDLER: Yes, there are several
7 points I would like to make. First of all,
8 with respect to conspiracy and some of the
9 other crimes that have been mentioned, this is
10 a critical point to understand.

11 Those crimes are continuing crimes.
12 Conspiracy is -- conspiracy, you could be
13 prosecuted for conspiracy from the moment of
14 the agreement, but the conspiracy continues up
15 until the commission of the crime. The
16 commission of the crime is the culmination of
17 the conspiracy.

18 The same thing with burglary, burglary
19 is not over when you enter the house. It --
20 it's over when you leave the house.

21 Kidnapping is not over until the
22 victim is freed. Escape from a prison is a
23 continuing offense.

24 And 16(b) and its counterpart in
25 924(c) serve a critical role in circumstances

1 like that, where a crime extends over a period
2 of time, you can complete the crime without
3 violence being an element, but there's -- it
4 is instinct with risk of crime, and that is
5 why -- or, excuse me, force, and that is why
6 Congress addressed it, and that is what this
7 Court unanimously focused upon in Leocal.

8 This -- 16(b) has been on the books
9 for 30 years and has not generated any --
10 anything like the sort of confusion that ACCA's
11 residual clause did. And this Court, we
12 submit, should pause greatly before extracting
13 from the U.S. Code a statute that has so many
14 applications.

15 In the immigration context, this
16 statute is applied all the time through the
17 mediation of an administrative body. It's not
18 like a regular civil law in that respect.

19 JUSTICE SOTOMAYOR: In how many of
20 those cases is it the sole basis of
21 deportation?

22 MR. KNEEDLER: Well, it can be -- I
23 don't know the percentage, but it's also a basis
24 for denial of discretionary relief.

25 Also in deciding what -- what falls in

1 this category, statistics are not the -- the
2 major thing. There are plenty of things to look
3 at, the body of judicial decisions construing
4 the very provision, the background of the legal
5 traditional, which is what this Court drew on in
6 -- in Leocal, in saying that burglary is a
7 classic example, it's a classic example for the
8 reasons that I just gave.

9 You can look at the legislative
10 judgments embodied in the crime, is the -- is
11 the circumstance when force is not used, does
12 it -- is it like the situations where the
13 elements are -- are present?

14 You asked for an example, I think, of
15 a -- of a crime that would be in under ACCA and
16 out here. Possession of a weapon is one because
17 possession -- inherent in the possession is not
18 the use. There has to be a subsequent act in
19 the use of a weapon.

20 So that's -- that's out here because
21 it's not in the course of committing the crime
22 of possession. We said it was in, in ACCA,
23 because it is -- injury might flow, and it was
24 actually a pretty good illustration of the
25 difference between the two circumstances.

1 And, finally, with respect to
2 immigration, I think it's important for the
3 Court to understand that immigration provisions
4 and grounds for deportation are often written
5 in very broad and general terms and given
6 content by the executive branch in which
7 Congress has -- has vested authority.

8 Crimes involving moral turpitude --
9 JUSTICE GORSUCH: You're not asking
10 the executive -- for the executive to define
11 these crimes. You're asking us to do it, right?

12 MR. KNEEDLER: Well, in the
13 immigration context --

14 JUSTICE GORSUCH: This isn't an
15 example where Congress has delegated authority
16 to the executive to do this.

17 Are you asking -- are you suggesting
18 it's delegated to this branch to do it?

19 MR. KNEEDLER: No, it's not delegated
20 to this branch. This branch has to construe
21 the -- the statute that Congress has enacted.
22 In other circumstances, the agency, of course,
23 gets deference in deciding what constitutes a --
24 a particular removable offense.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, 12:08 p.m. the case was
3 submitted.)

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