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6 v. :

8 Respondent. :

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11 Tuesday, January 17, 2017

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

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

20 E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on

21       behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER

7 ON BEHALF OF THE PETITIONER

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

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

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