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

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 06-11543, Begay v. United States.

5 Ms. Katze.

6 ORAL ARGUMENT OF MARGARET A. KATZE

7 ON BEHALF OF THE PETITIONER

8 MS. KATZE: Mr. Chief Justice, and may it  
9 please the Court:

10 The issue in this case is whether DWI is a  
11 violent felony for purposes of an Armed Career Criminal  
12 Act sentencing enhancement. Sentencing enhancement  
13 takes the statutory sentencing range from zero to 10  
14 years and raises it to 15 years to life. The intent of  
15 the Armed Career Criminal Act is to punish most severely  
16 that category of recidivist violent offenders who are  
17 disproportionately responsible for the violent crimes  
18 and who, when they possess a weapon, are more dangerous.

19 The government is trying to expand the reach  
20 of the statute by so broadly reading the residual clause  
21 as to include any crime that presents a serious  
22 potential risk of injury to another.

23 Such a reading of that residual clause would  
24 swallow the entire statute. Congress had no intention  
25 of including DWI within the ambit of the Armed Career

1 Criminal Act. As Justice Breyer, writing for the First  
2 Circuit in Doe, said, "there is no reason to believe  
3 that Congress meant to enhance sentences pursuant to the  
4 Armed Career Criminal Act based on convictions --

5 JUSTICE BREYER: If you're quoting that,  
6 then this is what's now bothering me. I'm not saying I  
7 have an answer one way or the other.

8 Let's take two crimes and imagine that the  
9 same number of people injured or killed is identical for  
10 the two. One let's say is burglary and the other is  
11 driving under the influence. Now, let's imagine exactly  
12 the same number are put at risk, exactly the same number  
13 hurt, exactly the same number killed.

14 When I wrote that opinion, it seemed to me  
15 that there still is an important difference between the  
16 two crimes that is controlling here. But if you look at  
17 what I wrote, I didn't articulate that difference very  
18 well. So I would like you to tell me what I should have  
19 said in order to have said very clearly just what that  
20 intuitive difference was.

21 MS. KATZE: Your Honor, I think what you  
22 said was sufficient, but you might have added that there  
23 are other attributes to the -- the crimes in the -- the  
24 enumerated crimes, those being burglary, arson,  
25 extortion, use of explosives. There are certain

1 attributes that they share in common that DWI does not  
2 share, and those would include those, as you stated, an  
3 active violent crime. But in addition to that, they're  
4 all property crimes, as this Court said in Taylor.

5 They are also all acts that have the intent  
6 of causing harm. DWI does not have that. They are all  
7 more dangerous when committed with a gun. And they're  
8 all typical of crimes that would be committed by career  
9 criminals.

10 JUSTICE ALITO: Some of those  
11 characteristics don't seem to apply to all of the  
12 specific crimes that are mentioned. Take somebody who  
13 sends a series of letter bombs for the purpose of  
14 injuring other people. Now, that would fall within a  
15 crime involving use of explosives. But it's not really  
16 a property crime and it's not a crime that's more  
17 dangerous when done with a gun.

18 So how -- how can you say that those  
19 characteristics apply to every crime in the list?

20 MS. KATZE: Your Honor, arguably they might  
21 not apply to everyone every time. But I think the vast  
22 majority of them do. And what we're looking at are in  
23 ordinary cases. And the example that you gave of the  
24 letter bomb, I believe that would be a property crime.  
25 When we're talking about a property crime as with arson

1 or use of explosives, it's the destruction of property.

2 JUSTICE SCALIA: I think you can say that  
3 all of the crimes that are listed require mens rea and  
4 DUI doesn't; does it?

5 MS. KATZE: Absolutely. Absolutely.

6 JUSTICE SCALIA: That's a big different,  
7 isn't it?

8 MS. KATZE: I think it's a huge difference.  
9 DUI -- DUI in New Mexico is a strict liability crime.  
10 It has no mens rea whatsoever. An individual doesn't  
11 even have to have the intent to drive. And, in fact, we  
12 have a case in New Mexico where a woman had taken Ambien  
13 and was driving, and she didn't even know she was  
14 driving, but she still was convicted because she merely  
15 was in control of the vehicle. So in New Mexico, a  
16 strict liability crime where you don't even have to know  
17 you're driving, as opposed to the four enumerated  
18 offenses, where there is clearly some intent to cause  
19 some harm --

20 JUSTICE KENNEDY: Would you have the same  
21 answer if you had a State statute which defined felony  
22 drunk driving, as many do, as felony drunk driving which  
23 causes serious death or serious physical injury to  
24 another?

25 MS. KATZE: I think it would -- the analysis

1 wouldn't be different. There would be an additional  
2 element, an additional piece of harm. But the --

3 JUSTICE KENNEDY: You would still say that  
4 that statute does not qualify?

5 MS. KATZE: Not unless there is a definition  
6 of -- if there is an actual intent to cause harm. If  
7 there is just merely harm that's caused --

8 JUSTICE KENNEDY: No, there isn't in the  
9 usual felony drunk driving statute, there is --

10 MS. KATZE: And I agree. I think in that  
11 case, then that also would not fall within the statute.  
12 There is not the intent to cause harm.

13 JUSTICE ALITO: What if the crime is  
14 vehicular homicide, defined as causing the death of  
15 another person while driving intoxicated? Would that be  
16 a crime that creates a serious potential risk of  
17 physical injury to another?

18 MS. KATZE: That would not fall under  
19 paragraph 2, because it would not meet any of the other  
20 attributes of the enumerated crimes. Possibly could it  
21 fall under paragraph 1, the use of force? It would  
22 depend how the elements described what the definition of  
23 use of force. This Court has previously defined use of  
24 force as an intentionality that I think normally in that  
25 type of vehicular homicide would not be included.

1 CHIEF JUSTICE ROBERTS: You are assuming, of  
2 course, that the canon of ejusdem generis applies to the  
3 statute, as opposed to Congress just singling out a  
4 couple of things it wanted to be sure were covered. And  
5 we left that issue open in James, didn't we?

6 MS. KATZE: Yes, you did. In James you were  
7 dealing with a clearly analogous case, and DWI is not  
8 analogous in any way, shape, or form with those four  
9 enumerated crimes. And I think that it's pretty  
10 clear --

11 JUSTICE GINSBURG: Well, in one way -- in  
12 one way it is, in that like those other crimes it  
13 presents a serious risk of potential injury to another.  
14 That's what they all have in common. It's a residual --  
15 one argument that was made was when the statute was  
16 first drafted all it had was the residual, "presents a  
17 serious risk of potential injury to another." So  
18 that's, the argument is, that's what drives this  
19 statute, and then these, these specific crimes, were  
20 added just to be sure they would be covered.

21 MS. KATZE: Your Honor, answering your  
22 question and the Chief Justice's question, I think it's  
23 important to remember that the first version of this  
24 statute came out in 1984, and that just involved  
25 burglary and robbery. And then in 1986, we have the



1 version that we have now.

2           What we are discussing is the debate in  
3 Congress that occurred between then and how the actual  
4 wording was made up. But I submit that if Congress  
5 wanted to use those four enumerated crimes merely as an  
6 example, they would have structured the paragraph  
7 differently. They would have made a third paragraph  
8 under definition of violent felony and they didn't.

9           There are two paragraphs. The second  
10 paragraph, the one that we're dealing with, clearly  
11 there's a substantive connection between the four  
12 enumerated crimes and it says, "or otherwise crimes that  
13 present a serious potential risk of injury."

14           It seems clear to me if we look at this  
15 under the rules of statutory interpretation -- and this  
16 is a statutory interpretation case -- that Congress  
17 added those four crimes as a means of limiting the  
18 residual clause.

19           JUSTICE SOUTER: Then why did it use the  
20 word "otherwise"? Why didn't it use the word  
21 "likewise"?

22           MS. KATZE: I would agree, "likewise" would  
23 have been a more artful way to have written it.

24           JUSTICE SOUTER: It would have meant  
25 something different, wouldn't it?

1 MS. KATZE: I think, in fact --

2 JUSTICE SOUTER: "Otherwise" means in some  
3 other way.

4 MS. KATZE: That's the dictionary  
5 definition, Your Honor.

6 JUSTICE SOUTER: Well, yes.

7 (Laughter.)

8 JUSTICE SOUTER: That's usually the best way  
9 to understand each other is by, you know, assuming that.

10 MS. KATZE: I would agree that's one thing  
11 that we look at. But under -- this is a statutory  
12 interpretation case, not a dictionary case, and we have  
13 to look at the plain meaning. And that involves looking  
14 at this turn of the phrase in context, in the whole  
15 text. What was -- what was the intent of this statute?  
16 What's the term to be defined, "violent felony."

17 JUSTICE SCALIA: You've run away from me on  
18 "otherwise." I think the "otherwise" ties the last  
19 paragraph to the -- to the preceding four enumerated  
20 crimes. And if -- if it had just gone on to say "or  
21 presents a serious risk of injury" without the  
22 "otherwise," then I don't think you'd have any argument  
23 that you have to somehow look to the degree of injury,  
24 the -- the manner of injury that the four enumerated  
25 crimes have. The "otherwise" ties it together, "or

1 otherwise presents a risk of serious injury."

2 And I think the implication is that the --  
3 that the -- the injury must be similar to the -- at  
4 least in degree to the enumerated crimes beforehand. I  
5 wouldn't run away from the "otherwise."

6 MS. KATZE: Your Honor, and I'm not running  
7 away from the "otherwise." While I don't agree that  
8 it's the dictionary meaning, I do agree with you, Your  
9 Honor, that it is the substantive link. It's the  
10 connection. It's a word and we have to give meaning to  
11 every word in the statute --

12 JUSTICE SOUTER: But in -- in doing that,  
13 you've got, in other words, to understand what  
14 "otherwise" means. You've got to look at the language  
15 that follows "otherwise." And that's -- that then  
16 refers to "risk of serious injury to a person." And in  
17 effect, it is saying the common element is risk of  
18 injury to the person. How that risk is raised may be in  
19 different ways from the way the risk is raised, say, in  
20 a burglary case or what-not. And if that is the proper  
21 analysis, then it seems to me you've got a tough row to  
22 hoe here.

23 MS. KATZE: I believe the correct  
24 analysis -- and I do believe that ejusdem generis does  
25 apply here, because here we have a list of four specific

1 offenses followed by a general term, and we have to read  
2 that general term narrowly so as not to give additional  
3 breadth to acts of Congress. And we have to remember  
4 that we're defining the term "violent felony". And  
5 those four violent felonies that have the certain  
6 attributes in common then are followed by "or  
7 otherwise." And in looking at it all in context, there  
8 has to be some --

9 CHIEF JUSTICE ROBERTS: No, but then I was  
10 wondering about that as well, that as a violent felony  
11 whether that gives you any traction. But extortion, you  
12 don't normally think of that as a violent felony and yet  
13 it's clearly included in the definition.

14 MS. KATZE: It's violent in the sense that  
15 extortion is trying to get something from somebody of  
16 value. It's the idea that --

17 CHIEF JUSTICE ROBERTS: Yes, but you don't  
18 say, give me that or I'll break your legs all the time.  
19 You may say, give me that or I'll release this  
20 embarrassing letter. That's extortion. It's not  
21 violent, though.

22 MS. KATZE: I think it is violent in the  
23 sense of the terms that this Court used in Leocal and  
24 that Justice Breyer used in Doe, the idea of some kind  
25 of violent act or more closely related action.

1 CHIEF JUSTICE ROBERTS: But then, releasing  
2 the letter is not violent and it may cause embarrassment  
3 rather than physical injury. Yet it would qualify as  
4 extortion.

5 MS. KATZE: It absolutely would, and this  
6 Court in Taylor said that the four crimes all have those  
7 -- basically, in general, have those attributes.

8 But I think we have to look at the ordinary  
9 case. I believe even in the hypothetical that you have  
10 given, Your Honor, is that -- that that does involve an  
11 act of violence against an individual's reputation, that  
12 reputation in the common law sense --

13 JUSTICE SOUTER: No, but it says "person,"  
14 not -- it says "person," not "reputation."

15 MS. KATZE: I'm sorry, Your Honor?

16 JUSTICE SOUTER: You're saying the violence  
17 can be against the reputation. That's not what the  
18 statute is talking about. I mean that is -- that's  
19 inconsistent with the plain language of the statute.

20 MS. KATZE: But the statute does talk about  
21 violence. If we look at the --

22 JUSTICE SOUTER: It doesn't talk about  
23 violence in the abstract. It talks about physical force  
24 against the person of another in number 1; and in number  
25 2, where we are here, "a risk of physical injury to

1 another."

2 MS. KATZE: Yes, Your Honor. And in the  
3 second paragraph it deals with property crimes. And the  
4 whole -- it all comes under the rubric of violent  
5 crimes. That's what Congress was concerned about. Even  
6 the serious drug offenses, the reason those were added  
7 to the statute is the concern about violence with drugs.  
8 So it all has to do with the idea of violence, and so,  
9 initially, it was --

10 JUSTICE SOUTER: Well, it has to do with the  
11 idea of risk of violence. A burglar when he commits  
12 burglary does not want violence. He wants to get the  
13 silver out of the sideboard and get back down the  
14 ladder. He doesn't want any violence with anybody.

15 MS. KATZE: I would agree with you, Your  
16 Honor.

17 JUSTICE SOUTER: And the problem is that, by  
18 being in the situation he's in, he creates a risk that  
19 violence will occur. Somebody may show up.

20 And the person, likewise, who commits DWI  
21 doesn't want to hurt anybody, but he has placed himself  
22 in a situation in which, if somebody shows up driving  
23 another car in front of him or walking across the street  
24 or maybe even in apprehending him for his DWI, a risk of  
25 violence is raised. The two cases in that respect are

1 parallel.

2 MS. KATZE: I would disagree, Your Honor,  
3 and here's why I don't think they're parallel. In a  
4 burglary, I agree with you, The individual doesn't want  
5 to get caught, but goes with the fear or the knowledge  
6 that they may be apprehended. They may arm  
7 themselves -- again, the concern with those violent  
8 activities and being armed.

9 JUSTICE SOUTER: When the drunk leaves the  
10 bar, doesn't he have the realization, unless he is just  
11 blind at that point, that he may be apprehended?

12 MS. KATZE: It is just --

13 JUSTICE SOUTER: He's not going to throw  
14 himself into the arms of the nearest cop.

15 MS. KATZE: Absolutely not, but here's the  
16 big -- the big difference. If somebody is drunk and  
17 gets in a car, at most their intention is to get from  
18 Point A to Point B. They have no intention of hurting  
19 an individual. They don't even have the intent of  
20 driving.

21 JUSTICE SOUTER: Right, but when a guy goes  
22 up the ladder for the silver in the sideboard, at most  
23 what he wants is the silver.

24 MS. KATZE: But he intentionally goes to  
25 somebody else's property to commit this act that will

1     cause harm.

2                   JUSTICE KENNEDY:   Well, the driver  
3     intentionally drives the car knowing that there's a  
4     risk.

5                   MS. KATZE:   With all due respect, Your  
6     Honor, in DWI there is no intention to drive.  It's a  
7     strict liability offense, as the example I gave in --

8                   JUSTICE KENNEDY:   But that -- that is  
9     because everybody knows there are -- there are two  
10    conditions:  One in which he just is reckless and he  
11    doesn't care, in which case he has the intent; the other  
12    one, he's so drunk he can't form the intent.  Both of  
13    them are covered, and the latter is simply because we  
14    don't want an excuse to exonerate the more culpable of  
15    the two.

16                  MS. KATZE:   Your Honor, in New Mexico, DWI  
17    is a strict liability.  There is no intent.  There is  
18    not even negligence.  It's merely being in control of a  
19    vehicle.

20                  JUSTICE KENNEDY:   That's true in almost  
21    every State, for the reasons that I've indicated,  
22    because many people have the intent, and those that  
23    don't shouldn't be exonerated because they're more  
24    drunk.

25                  MS. KATZE:   If I may just add as well, in



1 some of the discussions about the actions of DWI and  
2 running into people, it's important to note, if we're  
3 looking at this with a categorical analysis, just to  
4 look at the elements of the offense. DWI in New Mexico  
5 would necessarily -- there would have to be another  
6 element. If somebody --

7 JUSTICE ALITO: The residual clause is a  
8 difficult problem, but I still have not heard what  
9 characteristic the enumerated offenses have in common,  
10 all of them, that provides a basis for limiting the  
11 residual clause.

12 They're not all property crimes. A lot of  
13 crimes involving explosives: Illegal possession of  
14 explosives, illegally manufacturing explosives,  
15 obtaining explosives by making false statements. None  
16 of those are property crimes and none of them involve  
17 injury to a person -- I mean involve the threat of the  
18 use of force against a person. So what is the  
19 characteristic that all of the enumerated crimes have in  
20 common that would provide a limitation on the residual  
21 clause?

22 MS. KATZE: At their very least, they all  
23 are acts that intend to cause harm. They all are  
24 property crimes. This Court reiterated --

25 JUSTICE ALITO: No, they're not. In 18

1 U.S.C. 842, explosives, unlawful -- "It shall be  
2 unlawful to engage in the business of importing,  
3 manufacturing, or dealing in explosive materials without  
4 a license issued under this chapter."

5 MS. KATZE: Your Honor --

6 JUSTICE ALITO: There's no intent to cause  
7 harm there.

8 MS. KATZE: Your Honor, the term in the  
9 Armed Career Criminal Act is the "use of explosives."  
10 This Court has defined "use" as having an  
11 intentionality, and intent -- and I think it's fair to  
12 say that that intent to use those explosives -- and,  
13 from a practical point of view, people who -- and we  
14 could talk about the ordinary case. People who use  
15 explosives, they blow up property. They blow up houses.  
16 They blow up bridges. At the very least, they're  
17 blowing up explosives. That certainly -- that certainly  
18 is an act to cause some type of harm to property.

19 And, with respect to whether they are  
20 property, I submit all four are property crimes. This  
21 Court said in Taylor all four of them are property  
22 crimes. This Court interpreted the congressional -- the  
23 legislative history. Those were four property crimes  
24 that Congress specifically wanted to add to the concern  
25 about violence --

1 JUSTICE SCALIA: I don't -- I don't  
2 understand this line of argue. You would exclude, let's  
3 say, physical assault from -- from this, I mean assault  
4 with intent to kill, because it's not a property crime?

5 MS. KATZE: Yes.

6 JUSTICE SCALIA: That wouldn't be included  
7 in the "otherwise involved"?

8 MS. KATZE: No, Your Honor, that would not  
9 fit under paragraph 2. That would fit under paragraph  
10 1, the use of force against an individual.

11 Congress carefully crafted this statute.  
12 They dealt with serious drug offenses and they dealt  
13 with offenses against people, and then they dealt with  
14 offenses against property where there was --

15 CHIEF JUSTICE ROBERTS: It's kind of odd,  
16 when the catch-all is phrased in terms of physical  
17 injury to another, to say that it's concerned only with  
18 property crimes.

19 MS. KATZE: Property crimes with the  
20 potential for physical injury to another, not just  
21 purely property crimes. The four enumerated crimes all  
22 have the potential for physical injury to another.

23 JUSTICE KENNEDY: Well, it seems to me that  
24 your argument gives us greater reason to treat the last  
25 clause as independent just so that we can be sure that

1 it doesn't include only property crimes, because, as the  
2 Chief Justice just pointed out, "physical injury" is  
3 really the term that does the work in the second clause.

4 So it seems to me that you're almost giving  
5 us a reason to make that clause more independent, more  
6 forceful, more significant.

7 MS. KATZE: Absolutely not, Your Honor. You  
8 wouldn't be able to make that interpretation, which is  
9 basically what the government is suggesting, which would  
10 read "otherwise" out of the statute and therefore either  
11 make it tantamount to a third paragraph, which there is  
12 not a third paragraph, or would basically make the  
13 residual clause so broad it would swallow the entire  
14 statute. And we can't believe that Congress would have  
15 so carefully delineated the different areas of violent  
16 felonies and then eviscerate it all with this residual  
17 clause.

18 JUSTICE STEVENS: May I ask this question  
19 about your interpretation of the word "otherwise." Do  
20 you think it is the equivalent of the statute that  
21 omitted that word, but added in "conduct that presents  
22 an equally serious potential risk of physical injury"?  
23 Do you think -- in other words, do you think that the  
24 four examples define the risk of physical injury that,  
25 the risk of potential physical injury the statute

1 contemplates?

2 MS. KATZE: Your Honor, I don't know that I  
3 would agree "equally serious" would be the exact correct  
4 equivalent. I think that that would be in keeping with  
5 Justice Scalia's, more or less, my impression of Justice  
6 Scalia's dissent in James, because I would submit that  
7 there has to be even more than just an equal balance of  
8 risk. I do think that is an issue that needs to be  
9 compared, as this Court did in James. The Court  
10 compared the risk of attempted burglary to burglary and  
11 found that they were similar.

12 I think in a non-analogous case there are  
13 other attributes that we'd have to look at, and that's  
14 why we suggest --

15 CHIEF JUSTICE ROBERTS: Well, doesn't that  
16 suggest that "otherwise" in the statute is in fact used  
17 to mean "likewise"? I mean, if we said "attempted  
18 burglary" in James it's obviously included because  
19 burglary is -- attempted burglary doesn't present a risk  
20 in a different fashion from burglary. It presents it in  
21 the same fashion.

22 MS. KATZE: And that was this Court's  
23 analysis in James, and I think that that's reasonable to  
24 --

25 CHIEF JUSTICE ROBERTS: That was a helpful

1 question.

2 (Laughter.)

3 MS. KATZE: I think it's important not to  
4 lose sight of the term that we are defining, "violent  
5 felony," and that -- as well as the purpose or intent of  
6 the statute was to punish a very small percentage, as  
7 this -- as this Court said in Taylor, a very small  
8 percentage of very serious offenders. This isn't a  
9 statute that is written to say any individual who has  
10 three felony convictions that may cause serious  
11 potential risk of injury to an individual is going to  
12 get 15 years. That simply wasn't the purpose. The --  
13 the intent of the statute was to punish this small  
14 population of individuals.

15 CHIEF JUSTICE ROBERTS: Well, particularly  
16 when you look at subsection (i) in the broad reading of  
17 serious potential risk of (ii), why would -- why would  
18 Congress mean to exclude a particular category of  
19 physical injury from the reach of the statute?

20 MS. KATZE: Because if it -- if it did  
21 include absolutely everything, then it would swallow the  
22 whole statute, because certainly --

23 CHIEF JUSTICE ROBERTS: No, not everything;  
24 everything that presents a serious potential risk of  
25 physical injury.

1 MS. KATZE: I think it -- if it -- for  
2 example, if it could include DWI, it would be hard to  
3 imagine what kind of crime wouldn't be included in  
4 there. Under that type of reading, if we look at the  
5 structure --

6 JUSTICE KENNEDY: Filling out a false income  
7 tax return. I mean, I thought of one.

8 MS. KATZE: Other than maybe some  
9 white-collar crime.

10 JUSTICE KENNEDY: Well, there is a whole  
11 category of those. So --

12 MS. KATZE: But the -- the problem with that  
13 analysis is that Congress was very clear who these --  
14 who this statute was geared at; and as Judge McConnell  
15 said in his dissent, the name of the statute, the Armed  
16 Career Criminal Act, is not just window dressing.  
17 There's a -- I mean, that just reinforces our  
18 interpretation that there is this very small percentage  
19 of individuals. It's not supposed to be a general catch  
20 phrase. And --

21 CHIEF JUSTICE ROBERTS: What do you think  
22 presents the most serious potential risk of injury to  
23 all of us, that we are going to be a victim of arson or  
24 that we are likely to get hit by a drunk driver?

25 MS. KATZE: Here's why it's hard to answer

1     that: I wouldn't argue with you that there are more  
2     people driving drunk than there are people burglarizing  
3     houses, but the relevant analysis is what's the risk in  
4     an individual incident? And in that case statistically  
5     there is a greater risk of injury in a burglary, under  
6     this Court's -- in *Tennessee v Garner*, it said 8.3  
7     percent, as opposed to a quarter of a percent in an  
8     individual episode of drunk driving. So we can't put  
9     the cumulative drunk driving on the back of Mr. Begay.  
10    We look at the individual incident, doing categorical  
11    analysis, looking at the elements in that individual  
12    incident.

13               Congress was very concerned about issues of  
14    federalism. The reason for the Armed Career Criminal  
15    Act was to support law enforcement efforts on the part  
16    of States, not to federalize crime, not to federalize  
17    criminal investigation and prosecution. We are  
18    suggesting that keeping that in mind and looking at the  
19    -- the plain meaning of the phrase that we were  
20    discussing, and looking at the way the statute is  
21    actually structured and the fact that there are not  
22    three different paragraphs, as well as the fact that  
23    Congress could have picked to just say "or" as opposed  
24    to "or otherwise," and we have to give "otherwise" a  
25    meaning; and we suggest that our meaning of "likewise"



1 is one that this Court has adopted previously.

2 Previously this Court has said "or otherwise  
3 qualified for a position" and found that people were  
4 qualified in a similar way than other people; "otherwise  
5 qualified to vote," found that individuals were as  
6 qualified or similarly qualified as individuals of  
7 another race. One other example, bringing a -- by  
8 certiorari "or otherwise" was found to be found to mean  
9 to be by similar means as certiorari.

10 And, Your Honor, if I may reserve the  
11 remainder of my time?

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

13 MS. KATZE: Thank you.

14 CHIEF JUSTICE ROBERTS: Ms. Kruger.

15 ORAL ARGUMENT OF LEONDR A R. KRUGER

16 ON BEHALF OF THE RESPONDENT

17 MS. KRUGER: Mr. Chief Justice, and may it  
18 please the Court:

19 Drunk driving is an act that by its nature  
20 endangers people's lives. It is precisely for that  
21 reason that it is a crime under the laws of all 50  
22 States. When a person is repeatedly convicted of that  
23 offense and therefore becomes subject to punishment as a  
24 felon, he has committed a violent felony as Congress  
25 defined that term in the Armed Career Criminal Act, that

1 is because he has committed a crime that in the words of  
2 the statute involves conduct that presents a serious  
3 potential risk of --

4 JUSTICE GINSBURG: How about a habitual  
5 speeder?

6 MS. KRUGER: Well, speeding isn't a felony  
7 offense under the laws of any State, to my knowledge.  
8 And we have to recall that the ACCA contains two  
9 requirements for treatment for prior conviction as a  
10 violent felony that would support enhanced sentencing  
11 under that act. The felony requirement is not a trivial  
12 requirement. It was in fact a focus of congressional  
13 debate, and it was intended to capture only serious  
14 crimes. As a general matter, crimes of ordinary  
15 negligence, simple carelessness, or totally blameworthy  
16 acts don't merit felony punishment.

17 As this Court recognized in Staples, to  
18 label a criminal act as a felony is indeed a serious  
19 thing and something that legislatures, by long  
20 tradition, reserved for truly serious acts.

21 JUSTICE ALITO: And what is the -- if the  
22 legislature made it a crime to send text messages on a  
23 cell phone while driving, and the punishment were severe  
24 enough to qualify here? Would that be treated the same  
25 way?

1                   MS. KRUGER: Well, it would present a harder  
2 question, Justice Alito, and that's because, for one  
3 thing, we don't have the uniform judgment of  
4 legislatures that helps us know in this case that drunk  
5 driving does in all cases present a serious risk of  
6 injury. And also because the conduct that's defined by  
7 the DUI statute of New Mexico, as well as other States,  
8 by definition defines conduct that is unsafe. You only  
9 violate the statute if you are impaired to such a degree  
10 that your faculties and motor skills are such that you  
11 are unable to drive a car safely. With text messaging  
12 there isn't quite that categorical mapping on of the  
13 risk to the conduct that's proscribed.

14                  JUSTICE BREYER: So there is no State where  
15 speeding -- even if maybe you hurt somebody or something  
16 -- there is no State where speeding is under a statute  
17 that you could be imprisoned for more than a year?

18                  MS. KRUGER: To my knowledge, there is no  
19 State in which speeding itself is a felony offense.

20                  JUSTICE BREYER: Well, a felony as defined  
21 here. I just wanted to be sure you're focusing -- it's  
22 defined here as "subject to by imprisonment for a term  
23 exceeding one year." Now is --

24                  MS. KRUGER: To my knowledge, at least,  
25 Justice Breyer --

1 JUSTICE BREYER: Okay, I just want to be  
2 sure we're on the same wavelength. Fine.

3 MS. KRUGER: Reckless driving, on the other  
4 hand, when it does result in serious physical injury to  
5 another, is often punished as a felony. But there is  
6 obviously a difference between speeding by itself and  
7 reckless driving.

8 JUSTICE SCALIA: Ms. Kruger, what I don't  
9 understand about this statute as you're interpreting it  
10 is why you need any of it except the last phrase? Once  
11 you give the last phrase, "involves conduct that  
12 presents a serious potential risk of physical injury to  
13 another," all of the rest of it is automatically  
14 included. "Has as an element the use, attempted use or  
15 threatened use of physical force against the person of  
16 another" -- that obviously presents a serious potential  
17 risk of physical injury to another. Or is burglary,  
18 arson, extortion, the use of explosives? Congress could  
19 have saved itself a lot of trouble by simply erasing all  
20 the rest of the statute and simply saying any conduct  
21 that presents a serious potential risk of physical  
22 injury or not. That can't be what they meant.

23 MS. KRUGER: Well, what this Court said  
24 about the structure of the statute in Taylor is that  
25 Congress's purpose was first to identify crimes that do

1 have as an element the use force, but also to capture a  
2 category of crimes that do not have as an element the  
3 use force but nevertheless present a potential harm to  
4 another human being.

5 JUSTICE SCALIA: Why -- why would Congress  
6 go through that trouble, unless they wanted to suggest  
7 what other kind of crimes they need to include by this  
8 residual category of "any conduct" that presents a  
9 serious potential risk of physical injury?

10 MS. KRUGER: Well, indeed as the Court said  
11 in Taylor and I think as the Court reiterated in James,  
12 it included the examples of four enumerated offenses in  
13 clause 2 to provide examples of the kinds of crimes that  
14 they believed to present a serious --

15 JUSTICE SCALIA: The degree of risk -- the  
16 degree of risk, for example?

17 MS. KRUGER: Yes.

18 JUSTICE SCALIA: So if it doesn't come up to  
19 the degree of risk that any of those four would, it  
20 would not be included?

21 MS. KRUGER: Well, I don't know that the --

22 JUSTICE SCALIA: No.

23 MS. KRUGER: -- that the enumerated crimes  
24 set an absolute four. Congress could have written a  
25 statute that said that --

1 JUSTICE SCALIA: Well, then what did it do?  
2 What's it do?

3 MS. KRUGER: They do provide examples of the  
4 kinds of crimes that Congress thought did present a  
5 serious risk.

6 JUSTICE SCALIA: How? How? How does it  
7 limit the latter part? Is it because they are all  
8 crimes that require mens rea, intent? So should we  
9 limit it by saying it has to be a -- a conduct that's  
10 intentional conduct that presents a serious risk?

11 MS. KRUGER: Well, I think, as the Court  
12 said in James, all of these crimes are quite different  
13 offenses that don't share very many characteristics in  
14 common, including incidentally intent to cause harm.

15 JUSTICE SCALIA: But you say it does limit  
16 it. So tell me how it limits it?

17 MS. KRUGER: Well, what it does is it  
18 provides a useful benchmark against which to assess the  
19 risks that are associated with any other crime.

20 JUSTICE SCALIA: That's nice. Benchmark of  
21 what? Of intent, of degree of risk?

22 MS. KRUGER: Of degree -- it's degree and  
23 kinds of risk. Yes.

24 JUSTICE SCALIA: Okay. So the degree of  
25 risk has to be pretty much similar to those four?

1 MS. KRUGER: It has to be comparable, which  
2 is what the Court said in James --

3 JUSTICE SCALIA: Comparable --

4 MS. KRUGER: And in this case we do think  
5 that the risks associated with DUI are comparable to the  
6 risks --

7 CHIEF JUSTICE ROBERTS: How do we know that?  
8 I guess this is a question I asked your friend. I mean,  
9 degree of risk. I mean what are the odds that we're  
10 going to -- that if there's a burglary, some physical  
11 injury might result as opposed to an episode of drunk  
12 driving.

13 MS. KRUGER: Well, Your Honor --

14 CHIEF JUSTICE ROBERTS: In other words, I  
15 guess -- do we really look at how -- what percentage of  
16 drunk drivers are involved in accidents as opposed to  
17 what percentage of burglars are involved in violent  
18 confrontations?

19 MS. KRUGER: No, Your Honor. I don't think  
20 that the answer to the question can turn on statistical  
21 comparisons of the likelihood that harm will result in  
22 any given episode of any of these crimes. I think that  
23 that is a proposition that the Court underscored in  
24 James, when it decided whether attempted burglary  
25 qualified without reference to hard statistics. And the

1 fact of the matter is that hard statistics in most of  
2 these crimes are simply unavailable. So to make the  
3 answer in any case turn on the availability of  
4 statistics would lead to fundamentally arbitrary  
5 results.

6 JUSTICE GINSBURG: One of the anomalies  
7 about this, and we start out -- this is an armed career  
8 criminal. And you can say, well, burglary -- burglary  
9 and arson, if you're apprehended, you're the career  
10 criminal; you commit these kinds of crimes. Congress  
11 doesn't want you to have a gun, or if you do, you're  
12 going to get the book thrown at you. But there doesn't  
13 seem to be much of a connection. I mean how -- how is  
14 it going to make the dangerous -- the drunk driver more  
15 or less dangerous if he happens to have a gun in the  
16 glove compartment?

17 MS. KRUGER: Well, we think that it's clear  
18 from the enumeration of the offenses in clause 2 in the  
19 definition of "violent felony" that Congress wasn't  
20 intending to capture only a set of crimes that are made  
21 more dangerous when they're committed with a firearm.  
22 It is, in fact, the kind of statute that Congress wrote  
23 in 18 U.S.C. 942(c), which concerns the use or carrying  
24 of a firearm during and in relation to a crime of  
25 violence. But here what Congress was concerned about



1 was capturing a set of offenders who, by their criminal  
2 history, have demonstrated an inherent disregard for the  
3 value of human life and therefore should not only be  
4 prohibited from possessing firearms but should face  
5 particularly severe sanctions for failure to abide by  
6 that prohibition. Our --

7 JUSTICE BREYER: Then they could have turned  
8 it just on dangerousness. I'm back to Justice Scalia  
9 and Justice Ginsburg's question, and I'm simply sort of  
10 repeating those in a sense that make it quite specific.  
11 Imagine a universe of crimes. Every member of that  
12 universe we concede has precisely the same degree of  
13 danger as arson, explosives, burglary. So there's no  
14 argument about the risk to human life. It is identical.  
15 And now we write a statute, and the statute's object is  
16 to take people who are felons in possession of a gun and  
17 those persons whom it is particularly bad that they have  
18 a gun are going to go away for 15 years minimum. So  
19 what we're looking are people who are particularly bad  
20 that they have a gun. Now go back to our universe, and  
21 in that universe we have some things on the one hand  
22 like arson, but on the other hand -- I have to name a  
23 few, environmental crimes committed by negligence or  
24 recklessness, where somebody flushed a toxic substance  
25 down the drain or -- here's a good one I found -- if you

1 are a steamboat captain or an executive of a steamboat  
2 company and you fail through negligence or simple  
3 inadvertence to stop somebody from not inspecting a  
4 lifeboat, well, felony or worse. And there are quite a  
5 few dozens of these things: Failing to stop at an  
6 inspection station if you are a trucker. You know?  
7 There are quite a few, where what's at issue is  
8 negligence, thoughtlessness, and maybe even  
9 recklessness, but it seems to have nothing -- and it's  
10 dangerous -- but has nothing to do with whether, when  
11 later on you want a gun, you are a greater risk for  
12 having a gun, you're more likely to pull the trigger,  
13 you're more likely to aim it at somebody and shoot him.  
14 Now, that's I think what we are trying to drive at.

15 MS. KRUGER: Well, Your Honor, I think that  
16 the initial response to that question is that the  
17 statute that Congress wrote unequivocally focuses the  
18 inquiry on the risk of harm to other human beings.  
19 Congress could very well have written a statute that  
20 required intent to harm. It could have written a  
21 statute that required intentional use of force, as it  
22 did in --

23 JUSTICE SCALIA: Oh, but it didn't mean that  
24 -- you said it didn't mean that because they could have  
25 said that and nothing else. If that's what they meant,

1 they could have eliminated everything else that they  
2 said. They obviously meant to tie that to the preceding  
3 portions. And when you tie it to the preceding  
4 portions, you come up with some limitations of the sort  
5 that Justice Breyer was suggesting.

6 MS. KRUGER: Well, I think you don't, Your  
7 Honor, because I think the most obvious way to tie it to  
8 the preceding sections is, again, to import a kind of  
9 use-of-force requirement such as the 18 U.S.C. 16(b)  
10 requirements that would look at the risk of force  
11 intentionally will be used in the course of committing  
12 the offense, and --

13 CHIEF JUSTICE ROBERTS: How much of a  
14 limitation is the point Justice Breyer was making? I  
15 mean, let's say you've got a habitual drunk driver.  
16 Everybody in town says he always drives drunk. I mean,  
17 how would they greet the news: Guess what? He's just  
18 got a gun. I mean, that raises the level of risk  
19 significantly, doesn't it?

20 MS. KRUGER: Well, indeed, I think that it  
21 does, and I think the facts of this case bear out that  
22 Congress's concern about possession of firearms by  
23 people who have committed crimes of a character that  
24 present a serious risk in a serial manner was indeed  
25 well-founded.

1 JUSTICE KENNEDY: Can you tell me what test,  
2 what conclusion, you want me to come to in your  
3 argument? Drunk driving is within the last clause  
4 because --

5 MS. KRUGER: It is because, first of all,  
6 the risks of drunk driving are commonly understood.  
7 They're supported by the uniform legislative judgment of  
8 the 50 States. And also because those risks are  
9 comparable in both kind and degree to the kinds of risks  
10 that are associated with crimes that Congress  
11 specifically enumerated in the statute as meeting the  
12 test.

13 JUSTICE SCALIA: She says not at all. Your  
14 friend on the other side says that it's something like,  
15 what, two and a half percent for burglary and point  
16 something for the chances of hurting somebody if you're  
17 driving DUI?

18 MS. KRUGER: Well, I think, again, the  
19 statistical inquiry, while it can be helpful and  
20 relevant in individual cases, is not dispositive. I  
21 think if you look at the statistics, the chances of  
22 injury resulting from a given arson fire are also well  
23 below 1 percent. What Congress wasn't concerned about  
24 was the statistical likelihood of any injury in a  
25 particular episode --

1 JUSTICE KENNEDY: Well, I suppose you say  
2 most legislatures think this is dangerous. That's  
3 enough?

4 MS. KRUGER: Well, I think that Congress was  
5 entitled to look at --

6 JUSTICE KENNEDY: I'm not trying to be  
7 captious, but I -- it's difficult to find out what the  
8 standard is.

9 JUSTICE STEVENS: Isn't the significance of  
10 Justice Breyer's point that each of the listed crimes is  
11 more dangerous when a criminal is carrying a gun, but  
12 driving drunk isn't made any more dangerous whether or  
13 not there's a gun in the car?

14 MS. KRUGER: Well, Justice Stevens, it's  
15 difficult to see how arson, for example, or explosives  
16 use is made more dangerous when the criminal is carrying  
17 a gun. Presumably in those cases the criminal's use --  
18 weapon of choice is fire or explosives rather than a  
19 gun. The only risk that would inhere would be the risk  
20 that any criminal would pose when apprehended by the  
21 authorities, and it's the same risk that a presumably a  
22 drunk driver would pose to others when apprehended by an  
23 officer who pulls them over.

24 JUSTICE BREYER: Is a person who  
25 deliberately burns down buildings, is a person who if he

1 had a gun might pull the trigger? And I will suggest  
2 that's a reasonable inference. I also will give you  
3 this: That a person who's so careless as to go drunk  
4 driving is a person whose gun might go off carelessly or  
5 he might leave it around the house. So I'll give you  
6 that one. But my instinct is that Congress, in this  
7 Act, is not worried about guns going off carelessly  
8 around the house. They are worried about a person being  
9 the kind of person who will point a gun at somebody and  
10 pull the trigger. Now, is there something you can say  
11 that disabuses me of that instinct?

12 MS. KRUGER: Well, I think one way to start  
13 to answer that question is by looking specifically at  
14 what Congress likely meant when it referred to "arson"  
15 in the statute. Under 18 U.S.C. 844(i), arson is  
16 defined as maliciously damaging property by means of  
17 fire or explosives. But the way courts have interpreted  
18 that language is not to require intent to damage  
19 property in all instances. It also covers situations in  
20 which the fire is set with willful disregard for the  
21 likelihood that damage will occur; in other words, in  
22 situations in which the fire has occurred and recklessly  
23 poses harm. And we think that that is the kind of  
24 injury that is at issue in this case; that is,  
25 fundamentally the same kind of risk that DUI poses.

1 JUSTICE SCALIA: You don't think this is  
2 just limited to intentional arson? You think negligent  
3 arson? Wow.

4 MS. KRUGER: Well, it's certainly true that  
5 --

6 JUSTICE SCALIA: Negligent extortion,  
7 negligent use of explosives? I mean, it's in a list of  
8 things that are talking about, you know, intentional  
9 crimes that armed career criminals would be likely to  
10 do.

11 MS. KRUGER: Well, I think that Congress was  
12 more than likely aware of the fact that 18 U.S.C. 844  
13 did treat arson in this manner, particularly considering  
14 that --

15 JUSTICE SCALIA: I don't think Congress had  
16 the slightest idea.

17 (Laughter.)

18 MS. KRUGER: Well, the definition of -- the  
19 reach of the Federal arson statute came to encompass use  
20 of fire in 1982, only shortly before the ACCA was  
21 enacted. And certainly it's true that most State  
22 legislatures have also defined arson offenses to include  
23 similar kinds of intentional setting of fire with  
24 reckless disregard to the likelihood of damage or injury  
25 that would result.

1 JUSTICE STEVENS: Could you comment on one  
2 other point that Judge McConnell made in his opinion?  
3 Is there significance in the title of this statute,  
4 "Armed Career Criminal Act." Does this statute intend  
5 to identify career criminals?

6 MS. KRUGER: Well, I think it's difficult to  
7 see how it would support a limitation to the kinds of  
8 crimes that are normally committed as a means of  
9 livelihood in that sense of "career." It certainly does  
10 refer to career criminals in the sense that they are  
11 habitual offenders, that they are recidivists. But  
12 certainly not all the enumerated offenses, nor even the  
13 offenses that are encompassed by the definition that's  
14 contained in clause 1 of the statute, are normally  
15 committed as a means of violent --

16 JUSTICE KENNEDY: Well, I'm not so sure. It  
17 seems to me that the burglary, arson, extortion,  
18 explosives involves at least the stereotype of the armed  
19 career criminal that you see in movies and hear about in  
20 organized crimes testimony and so forth. I don't -- I  
21 don't think it's completely far of the mark.

22 MS. KRUGER: Well, it is certainly true that  
23 the kind of --

24 JUSTICE KENNEDY: Obviously -- obviously  
25 incomplete.



1 MS. KRUGER: Well, it's certainly true that  
2 the kinds of crimes that are encompassed by clause 1 of  
3 the definition, sort of traditional crimes of violence  
4 like murder, assault, rape, are not ordinarily committed  
5 as a means of livelihood. People rarely make a  
6 profession of those types of careers.

7 And it's also true that ordinarily arson is  
8 not committed for insurance fraud, but is committed for  
9 a large number of other purposes that have nothing to do  
10 with the profit motive, including covering up evidence  
11 of other crimes, including simple vandalism.

12 So I think it's implausible to think that  
13 Congress was really focused here on the kinds of crimes  
14 that are normally committed for profit.

15 JUSTICE GINSBURG: What else -- what else  
16 would be in this catalogue? You rejected my speeder,  
17 but I think you said something about a reckless driver  
18 might, habitually reckless driver. What else would fit  
19 the description "conduct that presents a serious  
20 potential risk of physical injury to another"?

21 MS. KRUGER: We think the category of crimes  
22 of recklessness that pose an injury, reckless disregard  
23 of the risk of injury to others, would qualify because  
24 in those cases juries have necessarily found that there  
25 was objectively a serious risk and that failures to

1 appreciate that risk and to act accordingly constitutes  
2 a gross deviation from the ordinary standard of care  
3 that a reasonable person would exercise.

4 JUSTICE GINSBURG: I'd like to know  
5 specifically. You said reckless driving; and what else?

6 MS. KRUGER: Reckless driving that results  
7 in serious bodily injury or death to another, which is a  
8 felony under the laws of many States, would qualify.

9 JUSTICE GINSBURG: That has the potential of  
10 doing that, not --

11 MS. KRUGER: Yes, but reckless driving  
12 simple is ordinarily, not punishable as a felony under  
13 the traffic laws. We think, similarly, reckless  
14 homicide would qualify.

15 JUSTICE GINSBURG: But wouldn't that come in  
16 in the first, the violent crime, the first part?

17 MS. KRUGER: Well, presumably it wouldn't,  
18 because by definition a reckless homicide does not  
19 involve the intentional use of force, the threatened use  
20 of force, or attempted use of force. And the definition  
21 relates solely to the killing of another, whether or not  
22 by intentional use of force, in situations that  
23 disregard the great dangerousness to human life and  
24 those actions.

25 The other things that would qualify would be

1 cases like DUI, where recklessness need not be proved as  
2 such, but that are underscored by legislative  
3 determinations that the conduct that is proscribed is by  
4 definition reckless, by definition poses a serious risk  
5 that a person should appreciate and should accordingly  
6 conform their conduct to a different standard.

7           Petitioner's argument suffers from the  
8 fundamental flaw that it describes a statute that  
9 Congress didn't write. Congress did indeed consider  
10 incorporating the definition of "crime of violence" that  
11 is set forth at 18 U.S.C. 16 when it redrafted the  
12 statute in 1986 and it decided against it, instead  
13 making the inquiry turn on the potential for risk to  
14 human life as opposed to the potential that -- the risk  
15 that force would be used or on the intentional use of  
16 force.

17           We think that that decision is one that  
18 needs to be given effect in interpreting the statute.  
19 As this Court recognized in *Leocal*, the risk of  
20 intentional use of force is simply not the same thing  
21 that a risk of -- the risk that an accident will occur  
22 that will cause serious injury to another.

23           JUSTICE GINSBURG: May I ask about something  
24 in your brief on page 37? You said: "Congress settled  
25 on this language because it had two other proposals, one

1     that it considered too narrow and one that it considered  
2     as potentially too broad." And the one that it  
3     considered potentially too broad is "any felony that by  
4     its nature involves a substantial risk that physical  
5     force against a person or property of another may be  
6     used in the course of committing an offense is the" --  
7     this is on page 37 of your brief.

8                 MS. KRUGER: Yes, Your Honor. That is the  
9     definition of "crime of violence" that's contained at 18  
10    U.S.C. 16. And it is, indeed, unquestionably broader  
11    than the definition of "violent felony" at  
12    924(e)(2)(D)(ii) in at least two respects. One is that  
13    it would cover misdemeanors involving use of force as  
14    well as felonies. And the second is that it would cover  
15    crimes that involve a risk that force would be used  
16    against property, rather than focusing exclusively on  
17    the risk of harm to a human being, as the definition of  
18    "violent felony" in the ACCA does.

19                JUSTICE KENNEDY: It would, in the case of  
20    drunk driving - though, it seems this would be a better  
21    case for the Petitioner if we were operating under this  
22    statute.

23                MS. KRUGER: Well, indeed, I think that that  
24    is the thrust of the court's decision --

25                JUSTICE KENNEDY: It's narrower in that

1 sense as applied to this case.

2 MS. KRUGER: That's correct.

3 JUSTICE KENNEDY: May I ask you this  
4 question? If the government were not to prevail in the  
5 first case, Rodriguez, should we remand in this case,  
6 because -- because then he -- the fourth felony would  
7 have been improperly found if we rule against the  
8 government in Rodriguez?

9 MS. KRUGER: Well, if the Court decided to  
10 reach that issue in this case, even though the issue was  
11 not pressed or passed on in the court of appeals and  
12 wasn't raised in the cert petition, we do think the  
13 Court's analysis of the issue in that case applies  
14 equally to its analysis of the issue of whether or not  
15 the felony prong of the definition of "violent felony"  
16 is applicable in this case.

17 So were the Court to decide that the  
18 applicable maximum term of imprisonment that applies to  
19 a recidivist is the term of imprisonment that would  
20 apply to a hypothetical first-time offender, then that  
21 decision would control in this case as well. And the  
22 Court should dispose of this case accordingly.

23 But it bears noting that that would not  
24 dispose of this question entirely, because there are, of  
25 course, other reasons why States treat drunk driving

1 offenses as felony offenses, particularly in situations  
2 in which they result in serious bodily harm or death to  
3 another, as Your Honor previously noted.

4 The issue in this case comes down to the  
5 interpretation of the statute that Congress wrote, not a  
6 hypothetical statute that Congress could have written.  
7 And that statute identifies one criterion for  
8 determining whether or not a felony offense qualifies as  
9 a violent felony under the ACCA, and that is its  
10 potential for harming other human beings.

11 Drunk driving is commonly understood to  
12 present a serious potential risks of injury. The  
13 potential risks of injury are the only reason why it's a  
14 crime under the laws of 50 States. And the risks  
15 associated with drunk driving are comparable in both  
16 kind and degree to the risks associated with arson and  
17 explosives use, two crimes that Congress specifically  
18 identified in the statute as satisfying its definition.

19 For that reason, we think that the court of  
20 appeals correctly determined that Mr. Begay was  
21 sentenced properly under the Armed Career Criminal Act  
22 and would urge the Court to affirm its determination.

23 If there are no further questions, thank  
24 you.

25 CHIEF JUSTICE ROBERTS: Thank you, Ms.

1 Kruger.

2 Ms. Katze, you have four minutes remaining.

3 REBUTTAL ARGUMENT OF MARGARET A. KATZE

4 ON BEHALF OF THE PETITIONER

5 MS. KATZE: The problem with the  
6 Government's interpretation is that it offers no  
7 limiting principle whatsoever. It's merely open to say  
8 absolutely any offense that would present a serious  
9 potential risk of injury to another would fall within  
10 the statute. And that clearly does not take Congress's  
11 intent to heart.

12 And there has to be some other limiting  
13 principle, something more than just the words in the  
14 residual clause, especially when we are giving every  
15 word in the statute meaning. We suggest that our test  
16 of analyzing those four enumerated crimes which were  
17 intentionally put there by Congress, to look at the  
18 attributes of those four crimes. That they are active,  
19 violent property crimes more typical of crimes committed  
20 by career offenders, more dangerous when committed with  
21 a gun --

22 JUSTICE ALITO: Why wouldn't drunk driving  
23 be property crime? Doesn't it cause an enormous amount  
24 of property damage?

25 MS. KATZE: Under a categorical analysis,

1    there is no element that has anything to do with  
2    property whatsoever in DWI, which brings me to my next  
3    point that recidivism is not an element of DWI in New  
4    Mexico.

5                   The elements to commit DWI in the first  
6    offense are exactly the same as the fourth offense.  
7    There is no difference. And there is -- certainly,  
8    Congress, intended that there would be a distinction  
9    between violent, intentional felonies and accidental or,  
10   at worst, negligent crimes.

11                   CHIEF JUSTICE ROBERTS: Extortion doesn't  
12   involve property as an element.

13                   MS. KATZE: I believe it does. It's trying  
14   to get something of value from another person. That  
15   thing of value is property.

16                   CHIEF JUSTICE ROBERTS: Something of value  
17   -- something of value could be, you know, a confession  
18   in a related case or something. It doesn't necessarily  
19   have to be property.

20                   MS. KATZE: In the ordinary case, it's  
21   property even if we think of it as reputation; property  
22   in the sense of the common law, life, liberty, and  
23   property; that that includes more than just physical  
24   property, I think. In addition, this Court has said  
25   that those four offenses are --



1 CHIEF JUSTICE ROBERTS: I don't understand  
2 that. Yes. Life, liberty, and property include more  
3 than property, but --

4 MS. KATZE: "Property" includes more than  
5 tangible, physical property. Reputation is considered  
6 property under that definition. Merely stating that --

7 JUSTICE GINSBURG: I thought you said that  
8 you -- you look at the generality of cases. In most  
9 extortion cases what they want is money.

10 MS. KATZE: That is correct, and money is  
11 property. And that is exactly what -- in addition to  
12 the fact that this Court said in Taylor that those four  
13 offenses are property offenses. And, again, in James  
14 this Court again referred to those four offenses as --

15 JUSTICE ALITO: Well, if you look at the  
16 generality of drunk-driving offenses, those that result  
17 in physical injury almost always involve, or in the  
18 great majority of cases involve, property damage, too;  
19 don't they?

20 MS. KATZE: But that's not an element of the  
21 crime. We can --

22 JUSTICE ALITO: It's not an element of some  
23 of these other crimes, either. Is it an element in  
24 burglary? Is there a property element in burglary?

25 MS. KATZE: Yes, Your Honor. There is a

1 breaking and entering into a building, in some type or  
2 respect a property.

3 JUSTICE ALITO: That's an entering. An  
4 unlawful entering --

5 MS. KATZE: Right.

6 JUSTICE ALITO: That's a property element?

7 MS. KATZE: Yes, sir.

8 CHIEF JUSTICE ROBERTS: What about --

9 MS. KATZE: You have to enter a property.  
10 It's this something -- property --

11 CHIEF JUSTICE ROBERTS: Well, we know that  
12 attempted burglary is covered, and you don't have to  
13 enter the house in an attempted burglary.

14 MS. KATZE: I think that's exactly the  
15 situation when there are analogous crimes. It's clear  
16 to see that --

17 CHIEF JUSTICE ROBERTS: Yes. Well, you are  
18 saying this is an analogous crime to the four that are  
19 listed, or it is not an analogous crime to the four that  
20 are listed?

21 MS. KATZE: That's correct, but this Court  
22 has said that the four offenses that were enumerated by  
23 Congress are, in fact, property crimes. This Court has  
24 said that in Taylor and again referred to those four  
25 crimes as property crimes in James.

1           But even if this Court doesn't believe they  
2   are property crimes, the bottom line is DWI is so far  
3   afield of the four enumerated crimes, the attributes  
4   that they had, at the very least the intent to do crime,  
5   that it's clearly outside the scope of what Congress  
6   could ever have intended.

7           Thank you.

8           CHIEF JUSTICE ROBERTS: Thank you, Ms.  
9   Katze. The case is submitted.

10           (Whereupon, at 12:04 p.m., the case in the  
11   above-entitled matter was submitted.)

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