

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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4 Attorney General,)

5 Petitioner,)

6 v.) No. 15-1498

7 JAMES GARCIA DIMAYA,)

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10

11 Washington, D.C.

12 Monday, October 2, 2017

13

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

17

18 APPEARANCES:

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

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

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

2 (11:10 a.m.)

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

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.

8 ON BEHALF OF THE PETITIONER

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

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

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

20 Immigration removal is not a
21 punishment for past conduct. It operates
22 prospectively on the basis of the application
23 of standards adopted by Congress under which an
24 alien is regarded as no longer conducive to the
25 -- to welfare.

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

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

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

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

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

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

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

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

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

25 MR. KNEEDLER: There are a number of

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

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

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

12 MR. KNEEDLER: Well, but they were --
13 they were critical attributes of the two.
14 That's the -- that's the important point.

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

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

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

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

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

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

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

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

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

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

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

1 this is not open-ended like that.

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

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

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

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

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

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

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

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

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

1 as the classic example of what is covered by 16

2 --

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

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

7 MR. KNEEDLER: Sure.

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

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

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

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

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

13 So help me out with that.

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

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

23 JUSTICE GORSUCH: Fair notice of the
24 law.

25 MR. KNEEDLER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR. KNEEDLER: But with respect, a
16 crime involving moral turpitude, the
17 categorical approach is applied there. It is
18 not -- it is not a fact-specific determination.

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

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

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

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

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

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

1 have to have an understanding of the ordinary
2 case is.

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

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

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

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

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

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

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

6 JUSTICE GORSUCH: Yes.

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

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

12 MR. KNEEDLER: Yes.

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

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

25 I would probably want to have

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

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

15 JUSTICE GORSUCH: But could you answer
16 my question?

17 MR. KNEEDLER: Yeah. I was -- I was
18 getting there.

19 JUSTICE GORSUCH: Great.

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

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

8 I'm just wondering -- even take
9 burglary in California, how am I supposed to
10 know what ordinary is?

11 MR. KNEEDLER: Well, California --
12 California burglary would be a close question,
13 frankly. Now, here, it was -- it was resident
14 -- it was class 1 burglary.

15 JUSTICE GORSUCH: If burglary is a
16 close case, then doesn't that tells us --

17 MR. KNEEDLER: No, no. California
18 burglary.

19 JUSTICE GORSUCH: California burglary.

20 MR. KNEEDLER: Only because -- only
21 because California burglary does not require an
22 unlawful entry or unlawful remaining, and
23 therefore, it does not satisfy generic
24 burglary, but generic burglary, as this Court
25 again unanimously held in -- in -- in *Leocal*,

1 is a classic example.

2 And if I could use a couple of others,
3 just to show the Court is not at sea here,
4 kidnapping is another one. Kidnapping may be
5 accomplished -- it's typically accomplished
6 maybe by the use of force, but can also be
7 accomplished by trick.

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

15 It's a continuing offense --

16 JUSTICE GORSUCH: But, Mr. Kneedler,
17 I'm sorry, I just -- I just am stuck on my
18 question. How am I supposed to determine what
19 the ordinary case is? Should I bring in some
20 experts and have an evidentiary hearing? And
21 if so, why -- why isn't that a legislative
22 function?

23 MR. KNEEDLER: Well, I -- there may be
24 cases where the statute itself is not clear as
25 to whether the elements give rise to the

1 requisite risk. And -- and California burglary
2 may be one of them.

3 JUSTICE GORSUCH: So you would have me
4 bring in experts?

5 MR. KNEEDLER: No. I --

6 JUSTICE GORSUCH: You wouldn't -- you
7 wouldn't -- look, I'm just trying to get an
8 answer on that.

9 MR. KNEEDLER: No, I'm not -- no, no,
10 I'm not saying -- I'm not saying experts, but
11 -- but -- but where there are statistics
12 available, for example, as -- as there were in
13 several of -- of this Court's cases under the
14 ACCA residual clause, that statistics were
15 looked to to really reinforce common sense.

16 JUSTICE BREYER: But do you
17 remember -- probably you do or maybe not, that
18 several judges, I remember because one of them
19 was me -- and some of the lower court judges
20 said, why doesn't the sentencing commission or
21 why doesn't that part of the Justice Department
22 that keeps track of statistics go out and find
23 out what is the typical way in which, for the
24 ACCA provision, you know, the other provision,
25 they're committed, and case after case went by,

1 and nobody ever had the statistics.

2 And I tended to think, well, they
3 can't get them. Otherwise, they would. And so
4 what's the story? I think it's a similar
5 question to what is being asked.

6 MR. KNEEDLER: Well, there -- there
7 may be general categories of offenses where
8 that -- where that could --

9 JUSTICE BREYER: Well, there were a
10 lot -- in other words, we never had a case,
11 that I can remember, under that other
12 provision, where somebody came up with
13 statistics, despite what I'd call leading by a
14 lot of --

15 MR. KNEEDLER: Well, there were --
16 there were statistics in chambers --

17 JUSTICE BREYER: There were? Okay.

18 MR. KNEEDLER: And then there were
19 statistics --

20 JUSTICE BREYER: Then there are some.

21 MR. KNEEDLER: And there are some
22 statistics and cites dealing with -- with
23 vehicle -- flight from an officer -- but I'm
24 not --

25 JUSTICE GORSUCH: Law clerks are

1 excellent at gathering statistics, but they're
2 probably not as good as a legislative
3 committee.

4 MR. KNEEDLER: Yeah, no, but I think
5 it's important to recognize that what we have
6 here is a legislative enactment in which
7 Congress chose to identify the crimes that are
8 covered by categories, the type of offense.

9 And there -- and there is only so much
10 that one can expect from a legislature in
11 identifying a category. And here, Congress
12 identified a category in 16(b) that is very
13 closely tied to 16(a).

14 16(a) involves the situations where
15 the element -- the element of the offense
16 itself involves the use or threatened use of
17 force. 16(b) expands that slightly to say,
18 okay, it may not be technically an element, but
19 is the -- is the offense under 16(b) so
20 instinct or inherent -- inherently contained, a
21 risk of the use of force, that it -- that it
22 should fall -- should fall in Congress's
23 judgment in that same category?

24 You look at other offenses, a number
25 of lower courts have held that conspiracy to

1 commit Hobbs Act robbery is a crime of
2 violence. Robbery certainly is a crime of
3 violence.

4 Conspiracy itself contains the
5 substantial risk of physical force being used
6 because conspiracy is an agreement to commit
7 the very crime that will -- that will result in
8 physical force, conspiracy to commit --

9 JUSTICE SOTOMAYOR: How about
10 statutory rape?

11 MR. KNEEDLER: Statutory --

12 JUSTICE SOTOMAYOR: To start with,
13 they know -- the courts below --

14 MR. KNEEDLER: Statutory -- sex
15 offenses are difficult in any context. Sexual
16 abuse of a minor, as the Court knows from last
17 year's case, but there is a category of cases,
18 and we cite some in -- in our brief where --
19 with a sufficient age difference between an
20 adult and minor, the use of physical force is
21 inherent in the nature of the offense, that
22 when -- when the adult -- even if the -- even
23 if the adult is able to get the child to comply
24 without actually using physical force, the
25 threat or the potential for physical force is

1 always present, if the child resists the -- the
2 adult can use force.

3 JUSTICE SOTOMAYOR: Is that the
4 ordinary case? I thought that most of the
5 pornography cases that we're seeing are
6 children not being physically forced into sex
7 but being tricked into it by caretakers or --
8 or talked into it, et cetera?

9 One may have personal views about
10 whether an adult can ever not be using
11 improper --

12 MR. KNEEDLER: But -- but the point
13 is, in that -- in that encounter, the potential
14 for the use of force, the risk for the use of
15 force is always -- the same -- the same risk.

16 And -- and whether or not force is
17 used in 50 percent of the cases or 25 percent
18 of the cases --

19 JUSTICE SOTOMAYOR: So it doesn't
20 surprise you --

21 MR. KNEEDLER: -- in that context is
22 not the relevant --

23 JUSTICE SOTOMAYOR: It doesn't
24 surprise you that the courts below are split on
25 this question, just the way they were under

1 ACCA.

2 MR. KNEEDLER: Well, the -- as we
3 point out in our brief, the distinctions in the
4 lower courts on this question and on a number
5 of them have to do with the particular elements
6 of the state offense.

7 What -- particularly when it comes to
8 sex offenses, it's difficult to -- to say
9 statutory rape or sexual abuse of a minor
10 because the elements of the state offense may
11 vary, but if --

12 JUSTICE GORSUCH: Mr. Kneedler, if I
13 may take you in a slightly different direction,
14 some have criticized void-for-vagueness
15 doctrine as a subspecies of substantive due
16 process, and they are legitimate on that score.

17 Others suggest that it really is an
18 element -- form of procedural due process and
19 also a product of our separation of powers, as
20 we've discussed, to keep judges out of making
21 new law.

22 What's -- what's the government's
23 position on that?

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

1 JUSTICE GORSUCH: That's why I'm
2 asking you now.

3 (Laughter.)

4 MR. KNEEDLER: No, it -- it feels like
5 more of a -- it seems like more of a
6 substantive due process limitation, although it
7 does --

8 JUSTICE GORSUCH: Why? Because the
9 doctrine doesn't prohibit the Congress from
10 legislating it in any area. It just says you
11 have to do it in a way that provides fair
12 notice and that doesn't involve this body in
13 law making.

14 MR. KNEEDLER: Well, in that sense, I
15 mean, I suppose it has a procedural aspect, but
16 I -- but I think that, when you think about
17 notice, but I think substantively, it also --
18 it also requires that Congress be --

19 JUSTICE GORSUCH: Congress could do --
20 specify any crimes it wishes to include in this
21 statute tomorrow.

22 MR. KNEEDLER: Yes.

23 JUSTICE GORSUCH: There's no
24 substantive limitation.

25 MR. KNEEDLER: Yes, it -- it could,

1 but Congress chose to identify a category of
2 crimes that it believed gave rise to a
3 substantial risk, and we shouldn't expect the
4 impossible from Congress when it wants to
5 identify crimes by category.

6 JUSTICE GORSUCH: Really? Even when
7 it's going to put people in prison and deprive
8 them of liberty and result in deportation, we
9 shouldn't expect Congress to be able to specify
10 those who are captured by its laws?

11 MR. KNEEDLER: We -- we think this law
12 reasonably captures the category that Congress
13 thought -- whose conduct gave rise to a serious
14 risk of -- of physical force being used. If I
15 could refer --

16 JUSTICE GINSBURG: Mr. Kneedler, did I
17 get, correctly, your answer to the question
18 about a crime of moral turpitude being an
19 alternative that the government could have
20 pursued? You say the immigration judge found
21 that this was a crime.

22 MR. KNEEDLER: But on grounds that we
23 think were not correct because the immigration
24 judge did not apply the categorical approach,
25 which has since been determined to be the right

1 way to look at crime involving moral turpitude.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Kneedler.

4 Mr. Rosenkranz?

5 OPENING ARGUMENT BY COUNSEL FOR RESPONDENT

6 MR. ROSENKRANZ: Thank you, Mr. Chief
7 justice, and may it please the Court.

8 Let me begin -- begin with Justice
9 Gorsuch's central point. Justice Gorsuch is
10 right. This is not a job that Congress can
11 appropriately delegate to the courts and to
12 enforcement officials on the ground.

13 Congress has written a statute that
14 makes it impossible for ordinary citizens or
15 for law enforcement or for immigration
16 officials to figure out what the law is, and
17 Congress has delegated that function to them.

18 It has done it with two features that
19 this Court described as dooming the ACCA
20 residual clause.

21 First, the piece that most concerned
22 the Court, the Court said was most important,
23 hypothesizing this ordinary case of a crime
24 and, second, then estimating the risk
25 associated with that hypothesized version and

1 whether that meets some vague standard.

2 The government warned the Court in
3 Johnson that section 16(b) was "equally
4 susceptible to challenge." The government was
5 right then, and the differences in statutory
6 language that the government has since
7 discovered do not change the outcome.

8 JUSTICE KENNEDY: Well, since
9 discovered, but the statute here says "during
10 the course of committing the offense." And
11 that's quite different from the statute in
12 Johnson.

13 MR. ROSENKRANZ: Your Honor, it isn't
14 quite different from the statute in Johnson.
15 The statute in Johnson has the same limitation
16 in different language. Section 16(b) covers
17 risks in the course of committing the crime,
18 ACCA's residual clause covered "a crime that
19 otherwise involves conduct."

20 Both are referring back to the crime.
21 But I really -- I -- I would like to address
22 more concretely this "in the course of
23 committing the crime" point because I can't
24 tell you why the government is wrong without
25 knowing what the government thinks those words

1 mean.

2 And the government keeps shifting back
3 and forth between two versions of what in the
4 course of committing the crime means. At
5 points, the government says that it means in
6 order to satisfy the elements of the crime.

7 So it reads the sentence to mean you
8 look for substantial risk that physical force
9 may be used in order to satisfy the elements,
10 but that's not how any Court was ever applying
11 this provision. It is not how the government
12 was telling the courts to apply this provision.

13 The government back then and even now,
14 Mr. Kneedler points to conspiracy and other
15 inchoate offenses, those offenses are
16 completed. The elements are completed when you
17 say, I want you to kill my wife, here is 100
18 bucks, they are completed with the utterance of
19 those words.

20 Nevertheless, you look after the
21 utterance, at least the government urged the
22 courts. And what about attempted burglary in
23 James? As Johnson itself points out, or
24 burglary -- Johnson itself points out burglary
25 was a problem. Why? Precisely because, under

1 the ordinary case approach, courts were
2 required to look past the elements. Burglary
3 is committed, the elements are completed the
4 moment you cross the threshold.

5 That's -- if that's the government's
6 reading, then burglary would be out. What the
7 court said in Johnson is that it is what
8 happens after you cross the threshold that
9 creates the risk.

10 But that's -- so -- so then the
11 government shifts to, okay, but no, no, it is
12 while the crime is under way, that's what "in
13 the course of committing the crime" means, but
14 that's not a solution. That is exactly the
15 problem that Johnson describes.

16 Its concern was that the ordinary case
17 analysis was "detached from the statutory
18 elements." And that -- that it leads courts to
19 speculate about what happens after the
20 statutory elements have all been satisfied, but
21 while the crime is under way.

22 That's just as imaginary. Now
23 let's -- let's look at --

24 JUSTICE ALITO: Suppose, Mr.
25 Rosenkranz, suppose a state enacted a statute

1 that says that no person may be licensed to
2 teach preschool, if the person has satisfied
3 the language, not by reference to 16(b), but
4 the language that is included in, in 16(b).

5 Would that be unconstitutionally
6 vague?

7 MR. ROSENKRANZ: No, I -- I don't
8 think it would be. If it is some state that is
9 not incorporating by reference Congress's
10 handiwork or saying, we're adopting this
11 language because this is language Congress
12 adopted, it wouldn't be, but -- and I see we're
13 shifting now to the other piece of the case
14 which is whether -- which is the application of
15 criminal standards --

16 JUSTICE ALITO: Well, before I
17 decide -- before I can determine whether this
18 is unconstitutionally vague, I have to know
19 what the standard is, so that's my question.

20 If we apply the standard that -- that
21 generally applies to civil statutes, would this
22 be unconstitutionally vague?

23 MR. ROSENKRANZ: The standard that --

24 JUSTICE ALITO: We might do -- we
25 might do a wonderful job of pruning the United

1 States Code if we said that every civil statute
2 that is not written with the specificity that
3 is required by criminal statute is
4 unconstitutionally vague, we could boil that
5 down a lot, but that's what I'm asking. Is
6 that what you are arguing?

7 MR. ROSENKRANZ: No, not at all, Your
8 Honor. First, you are talking about a civil
9 statute here that is very different from
10 deportation. It is --

11 JUSTICE ALITO: I am taking it
12 step-by-step.

13 MR. ROSENKRANZ: Right. It is a
14 licensing statute. So there are three things
15 to say about how this criminal standard applies
16 in this civil context.

17 The first is to the premise of Your
18 Honor's question, Jordan settles the
19 question -- the answer to the question how you
20 apply criminal to the deportation context, but
21 this Court never has to decide whether to
22 reaffirm Jordan --

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

25 MR. ROSENKRANZ: Yes, so two things to

1 say before you even address Jordan, and then
2 the third thing to say is that Jordan was
3 right.

4 So the first two things, apropos of
5 Justice Alito's embedded assumption, section
6 16(b) is a criminal statute that Congress
7 elected to import wholesale into this statute.

8 This Court has held that, if Congress
9 does that, it must -- then courts must apply
10 the same criminal vagueness standards to the
11 statute --

12 JUSTICE KENNEDY: Well, that's just a
13 minor point that gets off the basic point of
14 Justice Alito, but it did not incorporate
15 exactly this statute. The language is
16 different. But we will leave that.

17 A question is pending.

18 MR. ROSENKRANZ: I'm sorry, Justice
19 Kennedy. Congress literally said, in the INA,
20 that the crime of the -- that the definition of
21 crime of violence is the definition of section
22 16(b), Section 16(b) being a criminal statute.

23 It then added all sorts of bells and
24 whistles of other ways to create an aggregated
25 felony, but this court, in A.B. Small, said,

1 Here is what you do when you have a statute
2 that has both criminal and civil
3 applications --

4 JUSTICE KENNEDY: Well, I -- I took us
5 away from Justice Alito's inquiry. He -- he
6 wants to know the standard for determining
7 vagueness in civil cases.

8 MR. ROSENKRANZ: So the standard for
9 determining vagueness in civil cases was laid
10 out by this Court in Hoffman Estates, and the
11 answer is it depends on how serious the crime
12 is.

13 The -- the seriousness of the crime --
14 excuse me, how serious the penalty is or how
15 serious the consequence is. And --

16 JUSTICE GORSUCH: Exactly. And that's
17 where I get stuck, right, because the
18 consequences in many civil matters can be very
19 grave, more so even than a lot of criminal
20 penalties. Civil forfeiture, take a man's
21 home, his entire livelihood, deport him.

22 And I can think of lots of other
23 examples that can be graver than misdemeanor
24 offense on the books today. Again, the line
25 between civil and criminal depends upon a

1 7-part non-exclusive factor balancing test. So
2 what am I supposed to do with that?

3 MR. ROSENKRANZ: Well, Your Honor, I
4 will answer the question, but let me preface.

5 JUSTICE GORSUCH: Great.

6 (Laughter).

7 MR. ROSENKRANZ: Let me just preface
8 it by saying I have only mentioned one of the
9 reasons this Court doesn't have to figure out
10 the answer to that question. And then --

11 JUSTICE GORSUCH: All right. But
12 let's answer the question first and then go on.

13 MR. ROSENKRANZ: Okay. So I would go
14 back to your point, Justice Gorsuch, that this
15 Court has repeatedly rejected a sharp line
16 between civil and criminal.

17 The correct distinction is the one
18 that this Court identified in *Hoffman Estates*,
19 cases, whether civil or criminal, with severe
20 consequences --

21 JUSTICE GORSUCH: How do I determine
22 that?

23 MR. ROSENKRANZ: Yes. So here is how
24 you determine it? One thing -- and by the way,
25 this Court has never had to answer that

1 question since Hoffman Estates set this out, so
2 it is not a question that arises very often.

3 The way the Court answers the question
4 here is -- is we know that criminal cases, and
5 First Amendment cases are on one side of the
6 line.

7 And what else comes on that side of
8 the line? If ever there was a consequence that
9 was on a par with criminal cases, it is
10 banishment, exile, lifetime banishment, the
11 Framers understood banishment to be equivalent
12 to taking away that which makes life worth
13 living, Madison talked about banishment as the
14 quintessential penalty, he says it is difficult
15 to imagine a doom to which the name cannot be
16 applied. By the way, this is not new to this
17 Court. It's not just Justice Ginsburg's
18 example.

19 In a case involving a criminal
20 protection, that is a constitutional protection
21 that -- that relates only to crimes, that is
22 Padilla and the -- the Sixth Amendment,
23 deportation already stands alone as the only
24 civil consequence that triggers a
25 constitutional protection on a par with the

1 criminal protection.

2 So you don't get to come into court
3 and say my lawyer didn't get -- didn't tell me
4 that I could forfeit --

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

7 (Laughter.)

8 JUSTICE SOTOMAYOR: But I'm really --
9 I'm very interested in the answer, which is
10 Justice Gorsuch is -- is asking how
11 you -- where do you draw the line? So
12 acceptable civil vagueness and non-acceptable
13 civil vagueness?

14 MR. ROSENKRANZ: Well, Your Honor --

15 JUSTICE SOTOMAYOR: Or vagueness
16 generally.

17 MR. ROSENKRANZ: Hoffman Estates says
18 it varies. So what we're talking about is the
19 line between the severest penalties and those
20 penalties that are less severe.

21 The answer is, if it is on a par with
22 a criminal punishment such that someone would
23 trade one for the other, this Court answered
24 that question in Lee.

25 In Lee, this Court said, as Justice

1 Gorsuch said earlier today, most people would
2 happily take a little bit extra time in prison
3 in order to avoid the consequence of
4 deportation.

5 JUSTICE ALITO: My earlier question
6 was about licensing. So suppose this language
7 applies to license as an attorney, license as a
8 physician. Taking that away from a person is
9 pretty severe.

10 MR. ROSENKRANZ: Yes, Your Honor, but
11 -- but not as severe as lifetime banishment
12 from this country, which is preceded by
13 automatic and mandatory imprisonment.

14 JUSTICE ALITO: And when we start --
15 aren't we going to get into this same kind of
16 legislating and how -- how severe? Where is
17 this line drawn?

18 MR. ROSENKRANZ: Well, Your Honor,
19 this is the line this Court drew in Hoffman
20 Estates. I mean, that was decades ago.

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

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

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

1 MR. ROSENKRANZ: Yes, that's a great
2 line: Life, liberty, or property. And
3 particularly here we're talking about a liberty
4 interest, a liberty interest that says you must
5 leave, for some people, the only home that you
6 have ever -- that you've ever had. You must
7 leave your family.

8 So that when someone is making the
9 decision, am I going to plead guilty to a crime
10 that I've never -- that I didn't commit in
11 return for time served, he needs to know -- by
12 the way, in return for crime served so he can
13 get back to his wife and kids -- he needs to
14 know whether ICE is going to be standing out
15 there depriving him of that liberty and
16 deporting him from his wife and kids?

17 JUSTICE BREYER: You think you could
18 go back to Justice Kennedy's original question?
19 If you don't recall it, what sticks in my mind,
20 if I get it right, is let's look at the old
21 ACCA -- the one we struck down in Johnson, and
22 the difficult language was it involves conduct
23 that presents a serious potential risk of
24 physical injury to another. And then there
25 were a lot of examples where, gee, it's awfully

1 tough to figure out whether it does or does not
2 fall within those words.

3 Now let's look at this language. It
4 involves a substantial risk that physical force
5 against the person or property to another may
6 be used in the course of committing the
7 offense. Now, that would seem to be that if
8 the offense is conspiracy to commit burglary,
9 the conspiracy is finished, over, done with,
10 long before they get to the property.

11 And so that wouldn't be too tough.
12 But burglary, which takes place on the
13 property, or conspiracy under the first statute
14 which would lead to the burglary that takes
15 place, well, that becomes tougher. Okay.

16 Now let's look at our statute now.
17 Give me some examples. I'm sure there are
18 many. But I think it would be helpful where
19 under this language, it seems, my God, what is
20 the basic case? This is impossible.

21 MR. ROSENKRANZ: I'll give you
22 several.

23 JUSTICE BREYER: Okay.

24 MR. ROSENKRANZ: First, Sykes,
25 vehicular flight. Okay. How do we -- the

1 Court was -- was mired in controversy about how
2 you figure out whether vehicular flight is
3 going to give rise to the right sort of risk
4 and how do you -- how did the Court do it? It
5 was looking at the moments or the long time
6 frame after the elements were satisfied. The
7 moment you pull out, you are in vehicular
8 flight.

9 So "in the course of" certainly
10 doesn't help. And the distinction between
11 physical force and physical injury doesn't
12 help. And the distinction between property and
13 personal injury doesn't help. You're still
14 always imagining what is happening after you
15 pull out?

16 Okay, next one, residential trespass.
17 It all depends upon, first, what do you imagine
18 the ordinary case to be of residential trespass
19 and then figure out how it plays out.

20 Or car burglary, same exact problem.
21 Or to take one example directly out of ACCA,
22 extortion.

23 It all depends upon the ordinary case
24 analysis, which -- which goes back to Justice
25 Sotomayor's question early on. The heart of

1 this problem is this ordinary case approach and
2 none of the -- the statutory differences that
3 the Government has pointed to help you figure
4 out what the ordinary case is.

5 JUSTICE KAGAN: And, Mr. Rosenkranz,
6 just to tie in this ordinary case problem with
7 this phrase about -- "during the commission of
8 the crime," has the Government in all of this
9 briefing and in all of this argument ever come
10 up with a single crime in which the ordinary
11 case of that crime, the injury would be
12 occurring after the commission of the crime?
13 If the commission of the crime is taken to mean
14 not just elements but a more general view of
15 what the crime is.

16 MR. ROSENKRANZ: In this case --

17 JUSTICE KAGAN: I'm just suggesting
18 that the Government has never come up with a
19 single case under ACCA in which -- and,
20 remember, ACCA requires you to look at the
21 ordinary case.

22 In the ordinary case, what crime has
23 injury that occurs after the commission of the
24 crime? The Government has not told us of any.

25 MR. ROSENKRANZ: If you are -- that is

1 correct, after the crime is over. I mean,
2 conspiracy or solicitation to murder, the crime
3 is done -- it occurs after. I think the
4 Government's current position, contrary to what
5 it persuaded multiple courts of appeals of, was
6 that that's out.

7 And so that's the example, but in
8 order to get there, the Government has to take
9 the quintessential crime of violence and say
10 that it is not --

11 JUSTICE KAGAN: And that's
12 inconsistent with everything that the
13 Government has said in multiple cases; isn't
14 that correct?

15 MR. ROSENKRANZ: Yes, in -- I mean,
16 the courts of appeals that have said that those
17 crimes are within the residual --

18 JUSTICE BREYER: They're saying right
19 now, what about conspiracy? I mean, you can
20 have conspiracy to commit burglary. It's over,
21 once you conspire.

22 MR. ROSENKRANZ: Right. Well, that's
23 a -- so that's an example, but I think the
24 Government said that's in.

25 JUSTICE KAGAN: That that's in.

1 MR. ROSENKRANZ: Right. And so if
2 that's in, then this whole notion of in the
3 course of committing the crime doesn't do any
4 work.

5 JUSTICE KENNEDY: Could --

6 JUSTICE KAGAN: Similarly, the
7 Government -- please.

8 JUSTICE KENNEDY: It's a different
9 point. Could -- could the government pass a
10 statute saying that aliens who commit criminal
11 offenses are deportable if in the discretion of
12 the Attorney General, the presence of the alien
13 is inconsistent with the best interests of the
14 people of the United States?

15 MR. ROSENKRANZ: That is the basis of
16 deportation? No.

17 JUSTICE KENNEDY: Why?

18 MR. ROSENKRANZ: I'm sorry, let me --
19 let me back up.

20 JUSTICE KENNEDY: Another -- what
21 standards must a statute meet before an
22 administrative officer can make the
23 determination that the -- that remaining in the
24 United States is not in the best interests of
25 the United States?

1 MR. ROSENKRANZ: Well --

2 JUSTICE KENNEDY: Would that -- would
3 that suffice? Would that be unconstitutional?

4 MR. ROSENKRANZ: That would be
5 unconstitutional --

6 JUSTICE KENNEDY: Under what rule and
7 under what context?

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

16 Now, if it's a basis for the Attorney
17 General's exercise of discretion that despite
18 the fact that you are deportable as Congress
19 has defined it, I am not going to deport you,
20 that's another story. And by the way, that was
21 the Mahler case.

22 JUSTICE GORSUCH: Mr. Rosenkranz, what
23 do you say to the critique that the
24 void-for-vagueness doctrine is, as a racial
25 issue matter, is just substantive due process

1 and suspect on that basis and therefore should
2 be narrowly construed?

3 MR. ROSENKRANZ: Your Honor, it's not
4 -- it's not substantive due process. It's a
5 procedural due process concern and it's a
6 separation of powers concern. It's both of
7 those.

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

23 JUSTICE ALITO: How is it procedural?
24 I don't understand how you can say it is a
25 procedural right. You said -- you said the

1 statute is void for vagueness. That certainly
2 is substantive.

3 MR. ROSENKRANZ: Your Honor, you say
4 the statute is void for vagueness because when
5 it is being applied to an individual, that
6 individual is given no notice that lifetime
7 banishment is going to be the consequence of
8 what he thought to be a safe harbor --

9 JUSTICE ALITO: And what if he was
10 given notice in some other way?

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

17 JUSTICE ALITO: So that makes my
18 point. He had notice. He knew. So where's
19 the procedural violation?

20 MR. ROSENKRANZ: Well, for the vast
21 majority of people and the people affected by
22 it, it is procedural.

23 But, you know, Your Honor, I just
24 realized, in this colloquy, I never did answer
25 the other part of Your Honor's question,

1 Justice Alito, about the reasons why the
2 vagueness standard applies here, the criminal
3 vagueness standard.

4 So the first I said, before you ever
5 get to Jordan, is that the -- is that 16(b) is
6 itself a criminal statute.

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

15 The aggregated felon label, once you
16 are an aggregated felon, and that's in the INA,
17 certain immigration crimes are triggered. And
18 so aggregated felon becomes a -- an element of
19 a crime.

20 And I will give you an example.
21 If -- if this -- if this vagueness analysis
22 works the way the government says it works, Mr.
23 Dimaya can be deported because he had
24 sufficient notice or the statute was
25 sufficiently clear, but an aggravated felon who

1 reenters this country is prosecuted as an
2 aggregated felon.

3 So if he reentered the country, he can
4 then be not -- he then -- he can then not be
5 prosecuted as an aggregated felon because the
6 statute would be too vague. That makes no
7 sense, which is exactly why this Court adopted
8 the rule that it adopted in A.B. Small and that
9 four members of this Court repeated in
10 Northwestern Bell, which is, if Congress makes
11 that choice to give civil and criminal
12 ramifications to the same statute, the very
13 same statute, if the statute is void for vague
14 in one context, it is void for vague in the
15 other.

16 And, by the way, that other context in
17 A.B. Small was a silly little contract case,
18 not, you know, even, you know, the licensing of
19 a nursery.

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

25 MR. ROSENKRANZ: Your Honor, the

1 answer is crime involving moral turpitude does
2 not sit in a vacuum by itself. It is a phrase
3 that Congress adopted that has, at this point,
4 probably two centuries' worth of law describing
5 what is in and what is out.

6 And, by the way, what did the Court do
7 in Jordan? What the Court did in Jordan was to
8 say, You, Jordan, you committed a fraud. One
9 thing that has been clear, since as long as
10 those words have been used, is that a fraud is
11 a classic crime involving moral turpitude.

12 That's why he lost that case. And if
13 he had been criminally prosecuted under a
14 statute that made an element of the crime that
15 it become -- that it be a crime involving moral
16 turpitude, the same result would obtain.

17 And -- and so --

18 JUSTICE ALITO: Well, maybe you have
19 in your head a list of -- you could categorize
20 any offense that I might mention and say that's
21 a crime of moral turpitude, that's not a crime
22 of moral turpitude. I couldn't do that.

23 MR. ROSENKRANZ: Well --

24 JUSTICE ALITO: And I doubt that
25 somebody who is facing possible removal

1 consequences would be able to answer that
2 question.

3 MR. ROSENKRANZ: Well, Your Honor --

4 JUSTICE ALITO: Okay. Shooting a bald
5 eagle, is that -- is that a crime of moral
6 turpitude? Some people would think so.

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

8 JUSTICE ALITO: It is not. So how
9 about --

10 MR. ROSENKRANZ: And, by the way, nor
11 is flag burning.

12 But let me -- but let me answer the
13 question this way.

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

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

25 MR. ROSENKRANZ: I think that is what

1 the Court -- not the ordinary case, that is for
2 sure.

3 JUSTICE KAGAN: We don't.

4 MR. ROSENKRANZ: That is correct.

5 JUSTICE KAGAN: All we do is look to
6 the elements everybody has to meet.

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

21 Congress can, of course, decide the
22 circumstances under which lifetime residents
23 can be kicked out of this country, but it
24 disserves the separation of powers, that
25 Justice Gorsuch referred to, to allow Congress

1 to pass the buck to immigration officials and
2 courts with a provision this vague.

3 If there are no further questions, we
4 respectfully request that the Court affirm the
5 Court of Appeals.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Counsel.

9 Mr. Kneedler, three minutes.

10 REBUTTAL ARGUMENT ON BEHALF OF PETITIONER

11 MR. KNEEDLER: Yes, there are several
12 points I would like to make. First of all,
13 with respect to conspiracy and some of the
14 other crimes that have been mentioned, this is
15 a critical point to understand.

16 Those crimes are continuing crimes.
17 Conspiracy is -- conspiracy, you could be
18 prosecuted for conspiracy from the moment of
19 the agreement, but the conspiracy continues up
20 until the commission of the crime. The
21 commission of the crime is the culmination of
22 the conspiracy.

23 The same thing with burglary, burglary
24 is not over when you enter the house. It -- it
25 is over when you leave the house.

1 Kidnapping is not over until the
2 victim is freed. Escape from a prison is a
3 continuing offense.

4 And 16(b) and its counterpart in
5 924(c) serve a critical role in circumstances
6 like that, where a crime extends over a period
7 of time, you can complete the crime without
8 violence being an element, but there is -- it
9 is instinct with risk of crime, and that is
10 why -- excuse me, force, and that is why
11 Congress addressed it, and that is what this
12 Court unanimously focused upon in *Leocal*.

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

20 In the immigration context, this
21 statute is applied all the time through the
22 mediation of an administrative body. It is not
23 like a regular civil law in that respect.

24 JUSTICE SOTOMAYOR: In how many of
25 those cases is it the sole basis of

1 deportation?

2 MR. KNEEDLER: Well, it can be -- I
3 don't know the percentage, but it also a basis
4 of -- of denial for discretionary relief.

5 Also in deciding what falls in this
6 category, statistics are not the -- the major
7 thing. There are plenty of things to look at,
8 the body of judicial decisions construing the
9 very provision, the background of the legal
10 traditional, which is what this Court drew on
11 in -- in Leocal, in saying that burglary is a
12 classic example, it is a classic example for
13 the reasons that I just gave.

14 You can look at the legislative
15 judgments embodied in the crime, is the -- is
16 the circumstance when force is not used, does
17 it -- is it like the situations where the
18 elements are -- are present?

19 You asked for an example, I think, of
20 a crime that would be in under ACCA and out
21 here. Possession of a weapon is one because
22 possession -- inherent in the possession is not
23 the use. There has to be a subsequent act in
24 the use of a weapon.

25 So that's -- that's out here because

1 it is not in the course of committing the crime
2 of possession. We said it was in, in ACCA,
3 because it is -- injury might flow, and it was
4 actually a pretty good illustration of the
5 difference between the two circumstances.

6 And, finally, with respect to
7 immigration, I think it is important for the
8 Court to understand that immigration provisions
9 and grounds for deportation are often written
10 in very broad and general terms and given
11 content by the executive branch in which
12 Congress has -- has vested authority.

13 Crimes involving moral turpitude --

14 JUSTICE GORSUCH: You are not asking
15 for the executive -- for the executive to
16 define these crimes. You are asking for us to
17 do it, right?

18 MR. KNEEDLER: Well, in the
19 immigration context --

20 JUSTICE GORSUCH: This isn't an
21 example where Congress has delegated authority
22 to the executive to do this.

23 Are you asking -- are you suggesting
24 it is delegated to this branch to do it?

25 MR. KNEEDLER: No, it is not delegated

1 to this branch. This branch has to construe
2 the -- the statute that Congress has enacted.
3 In other circumstances, the agency, of course,
4 gets deference in deciding what constitutes a
5 particular removable offense.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Counsel.

8 The case is submitted.

9 (Whereupon, 12:08 p.m. the case was
10 submitted.)

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