

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ERIC J. FEIGIN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	BRANDON E. BECK, ESQ.	
7	On behalf of the Respondents	32
8	REBUTTAL ARGUMENT OF:	
9	ERIC J. FEIGIN, ESQ.	
10	On behalf of the Petitioner	63
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-431,
5 United States versus Davis.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE PETITIONER

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

11 In order to render Section 940 --
12 924(c)(3)(B) unconstitutional, Respondents need
13 to show that the only plausible construction is
14 one in which a defendant's guilt or innocence
15 hinges on a judge's imagination about how an
16 ordinary defendant might act rather than a
17 jury's finding about how a particular defendant
18 acted.

19 That's a very unusual way to draw a
20 line between criminal and non-criminal conduct
21 in the context of a jury trial, and I don't
22 think lower courts would readily have accepted
23 it if Section 924(c) were the only or the first
24 context to present a choice between a
25 categorical approach and a

1 circumstance-specific one.

2 The operative language of the
3 statute --

4 JUSTICE SOTOMAYOR: Mr. Feigin, what
5 do you think Congress intended in 1986?

6 MR. FEIGIN: I -- I think Congress in
7 1986 probably didn't focus on this question --

8 JUSTICE SOTOMAYOR: I -- I --

9 MR. FEIGIN: -- particularly heavily.

10 JUSTICE SOTOMAYOR: -- I understand it
11 didn't.

12 MR. FEIGIN: But I think if Congress
13 had thought about it --

14 JUSTICE SOTOMAYOR: No.

15 MR. FEIGIN: No?

16 JUSTICE SOTOMAYOR: I didn't ask
17 "had," because that's rewriting their intent.
18 Given the circumstances in 1986, that 16(b) had
19 been read in the categorical approach, that
20 they adopted it for the Bail Reform Act, and
21 you're not challenging that that's a
22 categorical approach, that for decades you have
23 been saying that 16(b) is better read as the
24 categorical approach, what do you think
25 Congress intended in 1986?

1 MR. FEIGIN: Well, a couple of points,
2 Your Honor. First --

3 JUSTICE SOTOMAYOR: Without reference
4 to our later holding.

5 MR. FEIGIN: Yeah. A couple points,
6 Your Honor. First of all, we -- we don't agree
7 about the Bail Reform Act necessarily, but --
8 and I also -- this was not -- the ordinary case
9 categorical approach or any categorical
10 approach was not well established in 1986.

11 They've identified a single decision
12 that was a per curiam decision of the Second
13 Circuit that had applied a form of categorical
14 approach to hold that drug-trafficking crimes
15 were not covered by the then existing version
16 of 924(c). Congress clearly repudiated that
17 when it added the definition of drug --

18 JUSTICE SOTOMAYOR: Well, you thought
19 for --

20 MR. FEIGIN: -- trafficking crime.

21 JUSTICE SOTOMAYOR: -- over -- you
22 thought for a very long time that the language
23 was best read as applying the categorical
24 approach?

25 MR. FEIGIN: Well, Your Honor, so, as

1 far as the government's role in this, after a
2 few fits and starts, there were briefs we filed
3 that urged a circumstance-specific approach.
4 And I'd also note the Sentencing Commission
5 read the language in a circumstance-specific
6 way from 1987 to 1989.

7 After a few fits and starts, we
8 settled into the categorical approach because
9 that's where courts seemed to be going,
10 particularly after the ACCA's residual clause
11 and the rest of the Armed Career Criminal Act
12 were enacted, and because it appeared to be
13 workable, it appeared to be constitutional.

14 Now I know you didn't want me to
15 reference this Court's decisions, but after
16 *Dimaya* and *Johnson*, it's clear that it is
17 neither workable nor constitutional, so we've
18 gone back and taken a fresh look.

19 And I think if you take a fresh look
20 at the statute, you'll see that it's better
21 read or at least reasonably read, as the canon
22 of constitutional avoidance would demand, to
23 have a circumstance-specific approach.

24 JUSTICE GINSBURG: But the case --

25 MR. FEIGIN: The operative --

1 JUSTICE GINSBURG: -- this case was
2 not adjudicated on a circumstance-specific
3 approach, right?

4 MR. FEIGIN: That's correct, Your
5 Honor. So there was --

6 JUSTICE GINSBURG: So you -- you would
7 have to have at least a redoing of the trial?

8 MR. FEIGIN: Well, Your Honor, we
9 think that the error could be found harmless,
10 but we would be -- if the Court doesn't agree
11 with us on that, it could send it back to the
12 court of appeals and possibly there could be a
13 retrial.

14 But, if you -- if you look at the
15 operative language of the statute here, it
16 clearly uses the term "crime of violence" in a
17 context-specific way. It prohibits a defendant
18 from using or carrying a firearm during or in
19 relation to a crime of violence.

20 And I think the subsection specific
21 definition of "crime of violence" in Section
22 924(c)(3) is best understood and certainly
23 reasonably understood to have that same
24 circumstance-specific meaning. That's a very
25 logical thing for Congress to have wanted to do

1 because it captures precisely the set of
2 defendants who are committing crimes in violent
3 ways.

4 JUSTICE GINSBURG: Well, when -- if we
5 accepted your -- your theory, who -- you say it
6 would have to be a jury finding. And what
7 would the jury have to find with respect to the
8 predicate offense? Would they take account
9 that there was use of firearms, or you skip the
10 use of firearms and just look at the predicate
11 offense without the firearms?

12 MR. FEIGIN: So the use of a firearm
13 could be a factor, but it couldn't be the only
14 factor that renders a crime violent. I think
15 that is one of the things that the phrase "by
16 its nature" does in the statute.

17 So, for example, if you had a crime
18 where a defendant simply had a gun in his
19 jacket while he was in the front of a store
20 doing some criminal business, if the criminal
21 business were that he was selling cocaine, that
22 would be a crime of violence -- sorry, wouldn't
23 be a crime of violence; it would be a 924(c)
24 violation because he has the gun, he's carrying
25 it in furtherance of a drug-trafficking crime.

1 If all he's doing in the front of the store is
2 selling counterfeit handbags in a perfectly
3 nonviolent way, that would not be a 924(c)
4 violation.

5 This kind of inquiry, I think, is the
6 kind of inquiry that the Court made clear in
7 both *Dimaya* and *Johnson* as the kind of thing
8 that juries can figure out. Juries are well
9 acquainted with figuring out degrees of risk,
10 looking at courses of conduct, and, of course,
11 in the context of 924(c), the jury is already
12 finding the underlying offense conduct that is
13 at issue.

14 So it -- what the categorical approach
15 would do here is get away from the whole idea
16 of sending things to juries and would
17 substitute a judge's categorical judgment about
18 the ordinary case of the crime for the facts
19 that the jury has right in front of it, to
20 which it can easily apply a readily applicable
21 standard of the sort that the Anglo-American
22 system has entrusted to juries for centuries.

23 JUSTICE GORSUCH: Mr. Feigin, looking
24 at the language of (c)(3), the word "offense"
25 is in a prefatory clause before (A) and (B).

1 And as I understand the government's position,
2 (A), we will continue to read "offense" to mean
3 the offense charged on the books and look at
4 the elements.

5 But, with respect to (B), you'd like
6 us to look at the facts and treat the word
7 "offense" there to mean what did the defendant
8 actually do.

9 We don't normally read prefatory
10 language to mean two different things in two
11 clauses that follow. And, in fact, the
12 government earlier this year in -- I -- I don't
13 know how to pronounce it, Cochise, I think it
14 is, argued precisely this point, that normally
15 a single word is given a single construction,
16 at least throughout the same paragraph.

17 So what do we do about that problem?

18 MR. FEIGIN: Well, Your Honor, I think
19 we are giving it a single construction, and let
20 me explain why.

21 First of all, the term "offense" has
22 always been understood, particularly if you
23 look at this Court's double jeopardy
24 jurisprudence, which interprets the term
25 "offense" as the framers used it, to mean

1 transgression of a law, and that encompasses
2 both the acts that the defendant committed and
3 the elements of the statute that the defendant
4 violated. It means both those things at the
5 same time, and you look at both of those things
6 to see whether there's been a double jeopardy
7 violation.

8 In more recent times, this Court has
9 understood "offense" to work exactly the way
10 we're urging here in its decisions in *Nijhawan*,
11 *Kawashima*, and *Hayes*. I think *Hayes* is
12 particularly instructive. If you look at the
13 statute the Court construed there, it was even
14 more of a difficult linguistic lift than this
15 one for two reasons that I'll get to in a
16 second.

17 But, if I can paraphrase that statute
18 only slightly for the Court, the Court there
19 was interpreting misdemeanor --

20 JUSTICE GORSUCH: I -- I -- I'm -- I'm
21 sorry, we're running a little far afield for
22 me. If we could just return to this language.

23 MR. FEIGIN: Sure.

24 JUSTICE GORSUCH: As I understand it,
25 in (A), you would have us read "offense" to

1 mean the offense of -- that's charged on the
2 books. But, when we get to (B), you'd have us
3 look at the facts actually committed. Is that
4 -- is that right? Can we agree on that much?

5 MR. FEIGIN: Yes, Your Honor --

6 JUSTICE GORSUCH: Okay.

7 MR. FEIGIN: -- but if I can qualify
8 that?

9 JUSTICE GORSUCH: All right. No, no,
10 no, no --

11 MR. FEIGIN: Okay.

12 JUSTICE GORSUCH: -- you can qualify
13 it in a minute.

14 MR. FEIGIN: Okay.

15 JUSTICE GORSUCH: But we agree -- we
16 agree on that much?

17 MR. FEIGIN: Well, let me just -- let
18 me just make one --

19 JUSTICE GORSUCH: No, we can't agree
20 on that much?

21 MR. FEIGIN: I would just make one
22 thing clear. I think both of these do hinge on
23 the jury findings. It's just, in the first
24 case, the jury findings necessarily incorporate
25 an element that has a use of force. So, in

1 that case, the jury is still finding use of
2 force, and the jury is finding something in
3 both cases.

4 JUSTICE GORSUCH: I guess I'm not
5 tracking you at all.

6 As I understand in (A), we would look
7 at the offense on the books. Does the offense
8 have an element of force? And all that
9 requires a judge to do is to look at a law on
10 the books, classic categorical approach
11 analysis.

12 And in (B), you're asking us to eschew
13 that same analysis and look at what actually
14 happened. And, again, I'd just like you to
15 address that and not run too far afield to
16 other -- other cases or other statutes, but
17 maybe just focus on this one and explain to me
18 how we might give that same word two different
19 constructions.

20 MR. FEIGIN: Well, Your Honor, I
21 guess -- I guess my answer to you is that I
22 don't think we are giving that same word two
23 different constructions. And the reason I was
24 going to other cases and other examples is to
25 show --

1 JUSTICE GORSUCH: Let's not -- let's
2 not -- let's just stick --

3 MR. FEIGIN: -- how -- how the term
4 has been understood to work both ways.

5 JUSTICE GORSUCH: Help me where I am,
6 okay?

7 MR. FEIGIN: Okay.

8 JUSTICE GORSUCH: I'm on this statute,
9 all right?

10 MR. FEIGIN: So let me -- so "offense"
11 means a transgression of a law. And (A) and --
12 and a transgression of a law has multiple
13 components to it. One is the set of acts that
14 the defendant committed, and another is the
15 legal prohibition that the defendant violated.

16 The Court has -- with apologies, Your
17 Honor, the Court has said that in the double
18 jeopardy context and it said that it --

19 JUSTICE GORSUCH: Well, in double
20 jeopardy --

21 MR. FEIGIN: -- adopted that same
22 approach in Hayes.

23 JUSTICE GORSUCH: -- in Blockburger --
24 and I -- I'll let you go in a second. I
25 promise. I know you want to run off to some

1 other stuff and that's fine.

2 But, in Blockburger, we look at the
3 elements of the claim on the books. And so,
4 when you keep saying double jeopardy, I say,
5 well, that's what -- what you want us to do in
6 (A) but not what you want us to do in (B).

7 MR. FEIGIN: Well --

8 JUSTICE GORSUCH: So I don't -- I'm
9 not sure that helps me. That's why I'm asking
10 you to focus on this statute.

11 MR. FEIGIN: So, Your Honor,
12 Blockburger is only one part of the double
13 jeopardy test. Obviously, if a defendant
14 commits two different murders, you would look
15 to the specific acts that he -- the specific
16 act that he committed each time.

17 JUSTICE GORSUCH: Uh-huh, uh-huh.

18 MR. FEIGIN: But the way in which
19 we're --

20 JUSTICE GORSUCH: But we're not
21 talking about that here. They're not two
22 different crimes being charged, right?

23 MR. FEIGIN: So if we talk about -- if
24 we talk about --

25 JUSTICE GORSUCH: It's the same crime.

1 MR. FEIGIN: -- a transgression of the
2 law, I think it's perfectly natural to talk
3 about both the elements and the particular way
4 in which it was committed. So let me just try
5 this in a sentence.

6 I don't think anyone would look askew
7 if someone were to say that a youthful crime --
8 a youthful gun crime is defined as an offense
9 that has as an element the use of a gun and is
10 committed by someone under the age of 21.

11 In that sentence, we'd understand
12 offense to encompass both the elements of the
13 statutory prohibition and the manner in which
14 the offense was committed, which is, again,
15 exactly how this Court interpreted the phrase
16 "offense that is a misdemeanor" in the context
17 of Hayes. So --

18 JUSTICE GORSUCH: Off you go. Go
19 ahead.

20 MR. FEIGIN: Your Honor, I'm happy to
21 take further questions if I haven't --

22 JUSTICE KAGAN: Well, Mr. Feigin --

23 MR. FEIGIN: -- satisfied you, but --

24 JUSTICE KAGAN: -- can I -- can I ask
25 you some further questions about the language

1 of the statute? And I guess I want to do it by
2 comparing it to this bill that's currently
3 pending in Congress which is meant to change
4 this provision in order to make it
5 fact-specific.

6 And so this bill, rather than says --
7 rather than saying an -- an -- an offense that
8 by its nature involves a substantial risk that
9 physical force may be used, instead says an
10 offense that by -- excuse me, an offense that
11 based on the facts underlying the offense -- so
12 they substitute "by its nature" for "based on
13 the facts underlying the offense" -- and then
14 they change the tense and they say involved a
15 substantial risk that force may have been used,
16 right?

17 So "by its nature" versus "based on
18 the facts" and changing the tense to make it
19 clear that what we're looking at is something
20 that has occurred and that we're able,
21 actually, to make a fact-specific determination
22 about it.

23 Now that's the way you would write a
24 provision of the kind that you want. This is
25 not the way you would write a provision of the

1 kind that you want. "By its nature" clearly is
2 like, what is this offense ordinarily about?

3 And then the use of the present tense
4 is -- is inconsistent with this notion that the
5 jury in this case is having to look back to
6 determine the particular facts of a particular
7 crime.

8 MR. FEIGIN: Well, Your Honor, just as
9 a prefatory matter, the first thing I'd say is
10 if that language is clear to you, I think
11 that's another answer to Justice Gorsuch's
12 question, because even that clarifying
13 construction that Congress might be considering
14 also uses offense to --

15 JUSTICE KAGAN: That -- that
16 language --

17 MR. FEIGIN: -- have an elements
18 clause portion --

19 JUSTICE KAGAN: -- in its -- in -- in
20 that particular portion, which it tried to
21 solve, yes.

22 MR. FEIGIN: Now -- now, to your --
23 well, so I'd just point out that that is
24 another place in which everyone agrees that
25 "offense" could be used in -- in both ways.

1 But --

2 JUSTICE KAGAN: Yeah, you're not
3 answering Justice Gorsuch's question anymore,
4 Mr. Feigin.

5 MR. FEIGIN: Fair enough, Your Honor.
6 To go to your question, I think that language
7 is clearer. I think there are a couple of
8 issues with that language as well.

9 First of all, I wouldn't put any
10 weight on the change in tenses because, of
11 course, Section 924(c), like other crimes that
12 are defined in Title 18, speaks in the present
13 tense. It talks about a defendant who uses or
14 carries a firearm. And the switch to the past
15 tense is something kind of odd.

16 Again, this is the language Congress
17 constructed because it's worried about this
18 Court potentially construing the language in a
19 manner that would render it constitutionally
20 invalid. So it's -- I don't think it's a fair
21 representation of what Congress might have
22 thought in -- in 1986.

23 Also, with reference to the term "by
24 its nature," I do think the term "by its
25 nature" can be used and was used in Section

1 924(c)(3)(B) in a circumstance-specific way.

2 If I were to tell someone, don't bring
3 your gun to a situation that, by its nature, is
4 violent, I think that would be understood as
5 having the kind of limiting feature that "by
6 its nature" has in --

7 JUSTICE KAGAN: Well, that's
8 because --

9 MR. FEIGIN: -- the current version --

10 JUSTICE KAGAN: -- you prefaced it --

11 MR. FEIGIN: -- of Section
12 924(c)(3)(B).

13 JUSTICE KAGAN: -- with the word
14 "situation". You know, you can preface it with
15 the word facts, but this is not prefaced with
16 that word. As Justice Gorsuch said, it's
17 prefaced with the word "offense," which we know
18 from Section (a) is something about the
19 statutory context.

20 And then it's -- you know, the crime
21 that by its nature, the -- the offense that by
22 its nature.

23 MR. FEIGIN: Well --

24 JUSTICE KAGAN: I mean, tell me how
25 that's fact-specific.

1 MR. FEIGIN: Well, Your Honor, I -- I
2 -- I would --

3 JUSTICE KAGAN: Murder by its nature
4 --

5 MR. FEIGIN: -- I guess I would say --

6 JUSTICE KAGAN: -- robbery by its
7 nature, burglary by its nature?

8 MR. FEIGIN: So let me start with "by
9 its nature" and I -- I would like to get back
10 to offense. So by it -- "by its nature" in
11 this -- in the statute as a
12 circumstance-specific -- on a
13 circumstance-specific reading serves some
14 limiting functions.

15 First of all, it focuses on the
16 offense conduct rather than the offender. You
17 know, Tony Soprano is prone to fly into
18 murderous rages at the drop of a hat, but that
19 doesn't make that every crime that Tony Soprano
20 commits a crime of violence.

21 JUSTICE KAGAN: Yeah. Mr. Feigin,
22 what does "murder by its nature" mean? How
23 would you say to somebody -- what -- what does
24 that phrase mean, "murder by its nature"?

25 MR. FEIGIN: Well, Your Honor, then I

1 would want to know whether you were talking
2 about murder in the abstract or a particular
3 murder.

4 JUSTICE KAGAN: But I'm -- I'm just
5 repeating the language of the statute with a
6 particular offense. Robbery by its nature.

7 MR. FEIGIN: Well, Your Honor, that's
8 not how we interpret "offense" here. We
9 interpret "offense" to mean the offense conduct
10 of a particular defendant. Whether that
11 conduct by its nature --

12 JUSTICE KAGAN: Well, that goes back
13 --

14 CHIEF JUSTICE ROBERTS: Well, that's
15 the --

16 JUSTICE KAGAN: -- to Justice
17 Gorsuch's example, because you clearly can't
18 mean it that way, because then Section (a)
19 would be incoherent.

20 MR. FEIGIN: Your Honor, that's
21 exactly the interpretation the Court gave in
22 Hayes, if I could just explain that for a
23 second. The Court there was faced with a
24 statute that had misdemeanor crime of domestic
25 violence. It was defined -- and I'm

1 paraphrasing only slightly here -- as an
2 offense that is a misdemeanor that has as an
3 element the use of force committed by a
4 domestic companion.

5 The Court interpreted the "has as an
6 element" part -- even though "offense as a
7 misdemeanor" applied to the whole thing, the
8 Court interpreted the "has as an element" part
9 to have a categorical approach and the
10 "committed by" part to have a
11 circumstance-specific approach.

12 So I don't think the words "offense
13 that is a felony" can be the words that are
14 doing the work here.

15 JUSTICE KAGAN: But -- but, Mr.
16 Feigin, you're pointing to a statute where
17 there was something else in addition to the
18 language that's in this provision. And that's
19 -- it was true in *Nijhawan* and it was true in
20 *Hayes*, and what the Court pointed to was the
21 something else in addition, the committed by
22 specified persons or the fraud involving over
23 \$10,000, and saying that that peculiar -- you
24 know, that that particular language made it
25 clear that somebody had to look to what had

1 actually happened.

2 But there's no such language in this
3 statute.

4 MR. FEIGIN: Well, Your Honor, if
5 you're with me -- if that is the question
6 you're now raising, then we've gotten past
7 offense that is a felony. Then we're all
8 agreed that offense that is a felony could have
9 a categorical approach --

10 JUSTICE KAGAN: Well, it could if
11 there's other language --

12 MR. FEIGIN: -- and a
13 circumstance-specific approach.

14 JUSTICE KAGAN: -- that suggests that.

15 MR. FEIGIN: And then -- and then
16 we're just on the question of whether Section
17 924(c)(3)(B), read in light of the canon of
18 constitutional avoidance, can reasonably be
19 read to invoke a circumstance-specific
20 approach.

21 And I think "by its nature" there does
22 both what I said about the offense offender and
23 also captures the idea of essentially the word
24 "otherwise". As this Court said in Rosemond,
25 what this statute is going after is it's trying

1 to prevent a defendant from "upping the ante"
2 by bringing a firearm to a situation that would
3 otherwise present risks.

4 It can't just be --

5 JUSTICE ALITO: Mr. Feigin, if I --

6 MR. FEIGIN: Yeah. I'm sorry.

7 JUSTICE ALITO: Oh. Finish your
8 sentence, please. I was just a little
9 concerned I would be able to squeeze in some
10 question during your presentation, but go
11 ahead.

12 MR. FEIGIN: I'm sorry, Justice Alito.
13 As I was saying earlier, it can't just be that
14 the firearm itself creates the risk. It's
15 bringing the gun to a situation that already
16 has it. Without "by its nature," I don't think
17 that would be as clear. I'm sorry, Justice
18 Alito.

19 JUSTICE ALITO: No, no, no.

20 So I'm interested in the practical
21 implications of our decision in this case. How
22 many contemporaneous crime statutes would be
23 put in jeopardy if we rule in -- if we affirm
24 here?

25 MR. FEIGIN: Well, Your Honor, very

1 few of them have their own subsection-specific
2 definition of "crime of violence." So I think
3 the Court's decision here is going to
4 certainly -- would certainly -- if the Court
5 held that the ordinary case categorical
6 approach applies, would certainly invalidate
7 Section 924(c)(3)(B). It would also call into
8 question the Bail Reform Act.

9 But I think, if the Court did that,
10 there would be a couple of other very important
11 consequences. For one, if the Court does so
12 based on Respondents' argument that juries
13 can't possibly figure this kind of thing out
14 because it's too complicated for them, it would
15 call into question a host of other federal and
16 state statutes that call into question matters
17 of degree.

18 Second, we know from Johnson exactly
19 what the fallout of invalidating a provision
20 like this is going to be. And we're going to
21 have the -- hundreds and thousands of very
22 violent offenders, some of the worst offenders
23 in the criminal system, federal criminal
24 system, challenging their -- if they're still
25 on direct review, challenging their convictions

1 or challenging their current prison terms.

2 The other thing it's going to do is
3 increase the amount of litigation under Section
4 924(c)(3)(A) because it will call into question
5 whether some very violent crimes that Congress
6 would undeniably, I think, have wanted to
7 include as Section 924(c) --

8 CHIEF JUSTICE ROBERTS: Well, you keep
9 --

10 MR. FEIGIN: -- predicates actually
11 can serve as Section 924(c) predicates.

12 CHIEF JUSTICE ROBERTS: The government
13 in all of these cases keeps upping the ante,
14 even though they continue to lose hands. I
15 mean, in these prior cases, you say, well, if
16 you rule this way, all these other ones are
17 going to fall. And then we do read that rule
18 that way, and then you've got to come back and
19 you've already given up all those other ones,
20 case after case.

21 I would have thought you'd be more
22 interested in saying that there are plausible
23 distinctions in these other cases so that you
24 don't automatically, you know, stack the odds
25 against you when that next case comes up.

1 MR. FEIGIN: Well, Your Honor, the
2 only federal statute I think we would see next,
3 if it came up, is the Bail Reform Act. We
4 might have some discussion of that.

5 But I think the main concern we have
6 here is going to be the practical concern that
7 I was just mentioning with all the defendants
8 who are going to seek release. And these are
9 -- I -- I -- I -- I don't want to be dramatic
10 about it, but these are violent offenders.
11 This is a case that is of tremendous importance
12 to --

13 JUSTICE GORSUCH: Well --

14 MR. FEIGIN: -- the entire U.S.
15 attorney community and the Department of
16 Justice.

17 JUSTICE GORSUCH: -- on that -- on
18 that, what do you say to your friend's argument
19 on the other side that, while resentencing may
20 be required for a large number of persons, the
21 likelihood of significant changes in prison
22 sentences is low, given that this is usually
23 thrown in as an additional charge, one among
24 many stacked on top of others?

25 MR. FEIGIN: Well, I -- I don't think

1 that's correct, Your Honor. So, for example,
2 although a court is entitled to consider the
3 fact that there's going to be a 924(c)(3)
4 sentence added on to a defendant's sentence,
5 courts will lower sentences if the 924(c)(3) --
6 excuse me, the 924(c) conviction is vacated.
7 We didn't see in the ACCA context every
8 defendant get the maximum non-ACCA sentence and
9 some of them were released.

10 JUSTICE GORSUCH: But, just to be
11 clear, do we have any -- we have this very
12 impressionistic argument, you tell us the end
13 of the world is near, or maybe now, after the
14 Chief Justice, it's not quite so close as we
15 thought, and then your friend's going to argue,
16 well, it's not going to really change much at
17 all. But we don't seem to have a lot more than
18 these very rhetorical arguments. We don't have
19 a lot of empirics before us on this.

20 MR. FEIGIN: Well, fortunately, Your
21 Honor, this -- we haven't faced this amount of
22 collateral litigation yet because most of those
23 cases are on hold. But I can tell you that
24 numerous defendants and numerous federal
25 prisoners are filing for relief. And we do

1 expect that quite a few of them,
2 notwithstanding our urging of courts to impose
3 the same sentence if they can, which won't be
4 possible in every case, but if they can, to
5 impose the same sentence, we do think some of
6 them will be let out.

7 This is also going to increase
8 litigation in the lower courts under the
9 categorical approach under Section 924(c)(3)(A)
10 if the Court rules against us in this case.

11 JUSTICE KAVANAUGH: I -- I thought one
12 of your --

13 MR. FEIGIN: So I'm not --

14 JUSTICE KAVANAUGH: -- excuse me --
15 one of your points was that this was going to
16 significantly lower the sentences of many
17 violent criminals.

18 MR. FEIGIN: So there are going to be
19 cases in which we can't -- that that is --
20 there are going to be cases we cannot get under
21 924(c)(3)(A). And for those defendants, their
22 924(c) convictions are going to be wiped out
23 and they're going to get lower --

24 JUSTICE KAVANAUGH: Right. And then
25 --

1 MR. FEIGIN: -- probably lower
2 sentences.

3 JUSTICE KAVANAUGH: -- and I think the
4 length of sentences is one of the concerns you
5 have to confront squarely here when dealing
6 with 924(c), and so your response to that and
7 what Congress was thinking about in 1986 with
8 respect to why they wanted -- why Congress
9 wanted long sentences for these kind of violent
10 crimes?

11 MR. FEIGIN: Well, I think it is
12 crystal-clear in the legislative history that
13 Congress wanted additional -- and, frankly, in
14 the text of the statute, that Congress wanted
15 additional terms on top of the sentences that
16 the defendants would receive for any underlying
17 crime of violence that was also charged for the
18 924(c) offense.

19 And I think what Respondents' approach
20 here would do is essentially eradicate that
21 judgment, whereas adopting our approach, the
22 only defendants who are going to -- eradicate
23 their judgment as to anyone who would have
24 fallen under 924(c)(3)(B), and I don't think
25 that's the right approach to take when

1 924(c)(3)(B) can at least plausibly be read to
2 have a circumstance-specific approach.

3 Whereas, under a circumstance-specific
4 approach, the only defendants who are going to
5 be able to obtain relief are the ones who
6 actually committed their crimes nonviolently.
7 I think that is exactly the result that
8 Congress would have wanted, had it understood,
9 as the canon of constitutional avoidance
10 presumes, that its choice of an ordinary case
11 categorical approach, had it even imagined one
12 in 1986, would be held unconstitutional.

13 If I could reserve --

14 JUSTICE SOTOMAYOR: Mister --

15 MR. FEIGIN: -- the balance -- I'm
16 sorry, Justice Sotomayor.

17 JUSTICE SOTOMAYOR: No, no, go ahead.

18 MR. FEIGIN: If I could reserve the
19 balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Beck.

23 ORAL ARGUMENT OF BRANDON E. BECK

24 ON BEHALF OF THE RESPONDENTS

25 MR. BECK: Mr. Chief Justice, and may

1 it please the Court.

2 Your Honors, this case is about
3 following the text of a statute where it leads
4 and, when necessary, requiring Congress to
5 speak more clearly on what is prohibited.

6 And there are three reasons why the
7 924(c) residual clause should suffer the same
8 fate as Section 16(b). First, they contain the
9 same language that gives rise to an ordinary
10 case categorical approach.

11 Second, they share a common history,
12 suggesting similar treatment under the law.

13 And, third, a conduct-based approach
14 lies beyond the reach of constitutional
15 avoidance.

16 Before I move to my first --

17 JUSTICE KAVANAUGH: Those cases --
18 those cases were concerned about the jury,
19 protecting the right of the jury to find the
20 facts. That concern, which undergirded all of
21 those cases, that Sixth Amendment concern, as
22 well as the practical concern of trying to
23 relitigate what had happened many years ago,
24 that is totally absent in this case, right?

25 MR. BECK: Your Honor, the

1 constitutional concern is absent in this case.

2 Of course, there may be --

3 JUSTICE KAVANAUGH: And that -- and
4 you agree with me that that concern undergirded
5 Taylor, it undergirded Johnson, it undergirded
6 Dimaya?

7 MR. BECK: I disagree with you that
8 that played a central role in the decision in
9 Taylor versus United States. Your Honor, the
10 best evidence --

11 JUSTICE KAVANAUGH: It's specifically
12 identified -- it's specifically identified in
13 Taylor as a concern on page 601 of the opinion
14 --

15 MR. BECK: Yes.

16 JUSTICE KAVANAUGH: -- where the Court
17 talks about abridging the right to a jury
18 trial.

19 MR. BECK: And, Your Honor, my reading
20 of that portion of Taylor is it's raising a
21 question of judicial economy. It's within the
22 paragraph dealing with practical and
23 workability concerns.

24 JUSTICE KAVANAUGH: Right.

25 MR. BECK: And it's simply raising the

1 question, are we now going to be faced with the
2 problem of every defendant appealing saying
3 they were denied a jury trial?

4 JUSTICE KAVANAUGH: And I -- I raise
5 this because I think the prior cases
6 interpreted language in a way to avoid a
7 constitutional problem, namely, the Sixth
8 Amendment problem when you're focusing on prior
9 convictions, but that reason to stretch the
10 language in one direction is not -- not present
11 here as I see it.

12 This is -- the jury was all -- the --
13 all those cases were about the jury, and the
14 jury would be able to find the facts here.

15 MR. BECK: And, Your Honor, I want to
16 be able to answer your question clearly. In
17 Taylor, when this Court first raised the
18 question of whether to apply a categorical
19 approach or conduct-based approach, the very
20 first statement was we were persuaded by all of
21 the circuits below that reached a categorical
22 approach.

23 In not one of those cases is there a
24 mention of a constitutional concern or the
25 application of constitutional avoidance. The

1 conclusion in Taylor was there's only one
2 plausible --

3 JUSTICE SOTOMAYOR: If there are other
4 interests, why don't you list them. You talk
5 about them generically. So what are the other
6 interests that you think --

7 MR. BECK: Your Honor, Tay --

8 JUSTICE SOTOMAYOR: -- the categorical
9 approach endorsed?

10 MR. BECK: Your Honor, Taylor began
11 with the text, then went to the history, and
12 then noted practical and workability concerns.

13 But Leocal versus Ashcroft in 2004
14 didn't discuss practical or constitutional
15 concerns at all. It relied solely on the text
16 when construing Section -- Section 16 in
17 reaching the singular conclusion that that
18 language, "offense" plus "by its nature," with
19 the absence of conduct-specific language,
20 requires a categorical approach.

21 JUSTICE ALITO: Well, let me ask this
22 question about the text. Let's say that a
23 statutory provision comes before us and it's
24 possible to read the language of this provision
25 in two different ways, and one may argue about

1 which is more -- which is more strongly
2 supported by ordinary textual analysis,
3 disregarding any practical consequences.

4 But we know that one reading is
5 entirely workable and the other one is
6 absolutely unworkable, and would we presume
7 that -- would we not think that Congress is
8 likely to have chosen the -- the -- the
9 interpretation -- likely to have meant the
10 interpretation that is workable as opposed to
11 the one that is absolutely unworkable?

12 MR. BECK: And, Your Honor, I'm -- I'm
13 aware of the presumption of constitutionality,
14 but I'm not sure --

15 JUSTICE ALITO: I'm not talking about
16 the presumption of constitutionality. I'm
17 talking about the -- the presumption of
18 rationality.

19 MR. BECK: I think that's relevant
20 when construing a statute. I would agree with
21 you on that.

22 The question here ultimately --

23 JUSTICE ALITO: So, if the language
24 can be read in the workable way as opposed to
25 the way that's completely unworkable, we would

1 choose the way that's workable. We would think
2 that's what Congress meant, not something that
3 was -- that was dead on arrival.

4 MR. BECK: Your Honor, we -- we must
5 begin with the text when trying to determine
6 what Congress meant. Workability has to be a
7 secondary or tertiary consideration.

8 Here, the government has proposed a
9 new reading, a conduct-based approach, that
10 cannot be reached by constitutional avoidance
11 simply because it's not a plausible reading.

12 JUSTICE ALITO: Well, let me ask you
13 this textual question then, and look -- this is
14 looking at subsection (B). When -- under your
15 understanding of the categorical approach, when
16 the Court is determining whether an offense by
17 its nature involves the requisite risk, is it
18 not asking do the elements in themselves
19 involve that risk? Isn't that what it boils
20 down to?

21 MR. BECK: I disagree under this
22 language, Your Honor.

23 JUSTICE ALITO: So what would the --
24 what does the Court look to besides the
25 elements to determine what is the -- the

1 typical case?

2 MR. BECK: Well, as this language
3 been -- has been construed, this Court would
4 imagine the crime's imagined ordinary case, and
5 we get there from this Court's opinion in James
6 versus United States, noting the dual
7 inherently probabilistic language that's
8 present here.

9 JUSTICE ALITO: Yeah, okay. But let's
10 take burglary, the classical definition.
11 Unlawful entry of a dwelling with the intent to
12 commit a felony.

13 So now I want to think of the -- the
14 ordinary case of burglary, and that's what I
15 think of. What do I think of beyond that?

16 MR. BECK: You think of how burglary
17 is often or ordinarily or typically committed,
18 and you then ask the question is -- what is the
19 risk associated with that.

20 JUSTICE ALITO: Okay. So what --

21 MR. BECK: Now that's if it's
22 constitutional.

23 JUSTICE ALITO: -- what is typically
24 done in a burglary beyond the elements of
25 burglary?

1 MR. BECK: The problem with this is we
2 can't answer that question. Justice Scalia
3 explained, for example, with possession of a
4 short-barreled shotgun in Johnson, as many
5 times as we try, even with these common
6 offenses, ultimately, it becomes an impossible
7 question.

8 JUSTICE ALITO: Well, I understand --

9 JUSTICE BREYER: Why is it impossible?

10 JUSTICE ALITO: -- that, but if I
11 could just -- I'm sorry, Justice Breyer, go
12 ahead, please.

13 JUSTICE BREYER: Go. Finish.

14 JUSTICE ALITO: If -- if you can't
15 tell me what beyond the elements of burglary
16 one would take into account under (B) in
17 determining the typical burglary, I think that
18 what we're talking about there under your
19 categorical approach is the risk that's
20 inherent in the elements of burglary.

21 And if that's the case, why is there
22 no reference to elements in (B) when there is a
23 reference to elements in -- in (A)? Doesn't
24 that tell you we want to look at something
25 other than merely the elements of the offense?

1 MR. BECK: I would agree, Your Honor,
2 but not conduct. Here -- and -- and this kind
3 of goes back to Justice Gorsuch's question to
4 the government, how do we construe this when
5 the word "offense" is the subject phrase for
6 both subsection (A) and subsection (B)?

7 This Court answered that question in
8 Clark versus Martinez, that words cannot be
9 treated as a chameleon, meaning one thing for
10 one purpose and another for another subsection.

11 JUSTICE BREYER: I -- I understand
12 that. I have -- I have a different question
13 which perhaps is puzzling only me. But both
14 you and the government assume that without this
15 case-specific interpretation, the statute would
16 be unconstitutional. Why?

17 MR. BECK: Because --

18 JUSTICE BREYER: Now I -- but let me
19 tell you why not, and then you tell me why I'm
20 wrong.

21 (Laughter.)

22 JUSTICE BREYER: What we had in
23 Johnson was a statute that said, in defining
24 the relevant crime, burglary, which is
25 sometimes violent; arson, probably a lot of

1 violence; extortion, hardly ever violent;
2 explosives, often violent; or otherwise
3 involves conduct that presents a serious risk,
4 potential risk of physical injury.

5 And it's that last phrase that the
6 Court sort of, with Justice Scalia writing,
7 threw up their hands in that context. And both
8 Judge Posner in a lower court opinion and I
9 think I've said the same thing, there's no
10 problem here, let the government go look at the
11 pre-sentence reports and let them discover how
12 often these crimes do involve violence and then
13 categorize.

14 Now that's very tough to do with the
15 Johnson case because, with the Johnson case,
16 you're talking about state crimes that are
17 phrased in 4,000 different ways.

18 But it's sure not tough to do here.
19 This is a federal crime-based statute. The
20 government has all the pre-sentence reports it
21 wants, and it could go through and categorize
22 which are violent and which crimes are not.

23 And if that's so -- I don't see why it
24 couldn't. If that's so, this would not be a
25 difficult statute to interpret. It would not

1 be very ambiguous. And, therefore, you win,
2 but you lose because, in fact, it isn't
3 unconstitutional.

4 Now, if I think that, which I do --
5 (Laughter.)

6 JUSTICE BREYER: -- is there -- is
7 there some absolute -- you know, is there some
8 killing argument against it, which there may
9 well be, which should tell me I'm really either
10 alone or out of my mind or et cetera. You
11 understand?

12 MR. BECK: I understand, Your Honor.

13 One of the reasons we have the void
14 for vagueness doctrine is to support the
15 separation of powers by not delegating to
16 judges and prosecutors the authority to define
17 the contours of a criminal statute,
18 particularly a criminal statute that takes
19 sentencing discretion away from judges and
20 imposes harsh mandatory minimums, in this case,
21 25 years.

22 JUSTICE KAVANAUGH: But the --

23 MR. BECK: But I want to tell you --

24 JUSTICE KAVANAUGH: Keep going.

25 MR. BECK: I want to tell you why this

1 is like Johnson. And, of course, we shouldn't
2 forget about Sessions versus Dimaya, which
3 looked at the same language.

4 The same two features in Johnson that
5 conspired to render the residual clause void
6 for vagueness are also present here: first, a
7 lack of guidance on how to imagine the crime's
8 ordinary case, coupled with an indeterminate
9 risk threshold.

10 And stare decisis finds its greatest
11 strength in questions of statutory --

12 JUSTICE KAVANAUGH: The risk -- the
13 risk threshold --

14 MR. BECK: -- interpretation.

15 JUSTICE BREYER: Wait, let me follow
16 up for a second, because the words are
17 "substantial risk," okay? Substantial risk of
18 physical force.

19 So what the Court writes -- I'm not
20 saying we should -- is, in clause A, it is --
21 it's an offense that is a felony, has an
22 element, the use, attempted use, or threatened
23 use to physical force, right?

24 So we get the pre-sentence reports and
25 we see what the average risk of those crimes is

1 in terms of physical force, and then we say (B)
2 means the same. Those crimes that have the
3 same risk of physical force in respect to (B)
4 as the crimes in respect to (A) are what this
5 language is referring to. That would be clear.
6 Nobody's tried that. I've suggested it.

7 So what do I do? I guess you would
8 like me just to say the government's conceded
9 it's unconstitutional, that's the end of it.

10 MR. BECK: Well, to address your
11 proposed solution, Your Honor, at that point,
12 we'd be delegating to United States Probation
13 the authority to define this. Well, we're
14 looking -- who -- who writes the pre-sentence
15 reports? U.S. Probation.

16 JUSTICE BREYER: Well, they write the
17 pre-sentence reports according to the facts and
18 anybody who wants at trial as to any fact in
19 respect to a pre-sentence report and have a
20 jury to find it or the judge, if it's
21 inappropriate, can do it.

22 MR. BECK: And then we run into the
23 same problem in Johnson and Dimaya. What
24 statistics do we use? What other sources do we
25 use? And this Court has never been able to

1 answer that question, and I think
2 appropriately --

3 JUSTICE KAVANAUGH: But it --

4 MR. BECK: -- because it's an
5 unanswerable question.

6 JUSTICE KAVANAUGH: But on -- in
7 Johnson, we said -- we distinguished cases
8 about prior convictions where you're looking at
9 risk from this case and said, "more
10 importantly, almost all of the cited laws
11 require gauging the riskiness of conduct in
12 which an individual defendant engages on a
13 particular occasion." So that was to say --
14 and then went on to say "as a general matter,
15 we do not doubt the constitutionality of those
16 laws."

17 So why would a law that refers to
18 substantial risk be unconstitutional when the
19 Court in Johnson said that's not an issue?

20 MR. BECK: Well, it's certainly not
21 always the case, Your Honor.

22 JUSTICE KAVANAUGH: But it's usually
23 the case. We, the Court, said do not doubt the
24 constitutionality --

25 MR. BECK: Yeah.

1 JUSTICE KAVANAUGH: -- of all those
2 laws.

3 MR. BECK: Oh, no, I would agree with
4 you that most of the time a jury is capable of
5 making a risk assessment. The question here is
6 not whether the jury is capable of doing but if
7 that's what Congress intended.

8 JUSTICE KAVANAUGH: Right. I --

9 MR. BECK: Here --

10 JUSTICE KAVANAUGH: -- I take your
11 point on that. On your vagueness point,
12 vagueness is born in a conception of fair
13 notice. You would agree with that, right?

14 MR. BECK: A combination of fair
15 notice and the support of separation of powers,
16 Your Honor.

17 JUSTICE KAVANAUGH: And hasn't --
18 Congress in 1986 was concerned about the
19 enormous problem of gun violence, violent
20 crimes committed with guns, which was, bad as
21 it is now, extremely bad, worse, much worse, in
22 19 -- in the 1980s.

23 MR. BECK: No question.

24 JUSTICE KAVANAUGH: And every -- put
25 everyone on notice, on notice, fair notice: If

1 you commit a crime with a gun, you're going
2 away for a long time. That was Congress's
3 obvious intent, overwhelming intent, because of
4 the problem.

5 And the idea that -- I mean, I guess
6 I'm not seeing the notice problem, given that
7 that has been crystal-clear since 1986 for
8 everyone in this country.

9 MR. BECK: Well, if that's what the
10 statute said, I would certainly agree with you,
11 Your Honor. But, if we look to how Congress
12 was thinking about these things when it passed
13 the Comprehensive Crime Control Act in 1984,
14 which created the Armed Career Criminal Act,
15 Section 16, as well as the first definition of
16 "crime of violence" here, Congress was thinking
17 about the predicate offenses categorically, as
18 categories of traditionally violent crimes.

19 JUSTICE ALITO: Well, on the question
20 of what Congress was thinking, maybe we could
21 just take a -- a glimpse at what actually
22 happened in this case, which is that the
23 defendant conspired to commit and then
24 committed a series of robberies of convenience
25 stores, where they put a sawed-off shotgun to

1 the head of a clerk and then robbed cigarettes.

2 Now you really think Congress would
3 say, well, that's not really a crime of
4 violence?

5 MR. BECK: The defendants in this case
6 are guilty of every offense you just described,
7 and we're not challenging any of those
8 convictions.

9 The difference here today, if we were
10 to win and remove one of the six counts that
11 they were convicted under, is that either they
12 would die in prison or be released as very old
13 men.

14 JUSTICE ALITO: But that's not my
15 question. If Congress had in mind this kind of
16 crime, do you think Congress would say, no,
17 that's not a crime of violence?

18 MR. BECK: As to the robbery,
19 certainly, I would agree with you. As to the
20 conspiracy --

21 JUSTICE ALITO: As to the conspiracy
22 -- as to the conspiracy, they would say that's
23 not a crime of violence?

24 MR. BECK: Congress has not spoken
25 clearly on that question, not with the language

1 it chose.

2 JUSTICE ALITO: Do you have any doubt
3 what they would say?

4 MR. BECK: I certainly do have doubt
5 about what -- whether Congress included --
6 intended to include conspiracy when it was
7 thinking about traditionally violent crimes
8 simply because conspiracy is an inchoate
9 offense.

10 JUSTICE GORSUCH: Counsel, looking at
11 what Congress actually wrote, in terms of
12 canons of construction --

13 MR. BECK: Yes, Your Honor.

14 JUSTICE GORSUCH: -- we sometimes
15 consult, one we've heard about so far and
16 talked a little bit about is the canon of
17 constitutional avoidance, that this Court will
18 attempt, when possible, sometimes, to avoid a
19 construction that renders Congress's work null.

20 MR. BECK: Yes.

21 JUSTICE GORSUCH: We also have,
22 though, the canon of construction on the rule
23 of lenity, that we don't typically construe
24 statutes to be as grievous as they could
25 possibly be read, and -- and for the notice

1 problems that you've talked about and the
2 separation of powers problems, if Congress
3 wants to act more grievously, it needs to speak
4 more clearly before it deprives a person of his
5 liberty.

6 Usually, those two canons point in the
7 same direction. This is an unusual case where
8 they point in opposite directions. Have you
9 done any study or examined how historically
10 those two canons, when they compete, are
11 reconciled?

12 MR. BECK: It's a difficult question
13 to answer, Your Honor. We know, for example,
14 from Clark versus Martinez that we resolve all
15 textual canons before reaching avoidance.

16 Dealing with another normative canon
17 like lenity, it's not clear -- I couldn't cite
18 a case, for example. It certainly makes sense
19 that constitutional avoidance --

20 JUSTICE GORSUCH: Well, before we get
21 to what makes sense --

22 MR. BECK: Yeah.

23 JUSTICE GORSUCH: -- we -- we hear a
24 lot about what makes sense in this room.

25 (Laughter.)

1 JUSTICE GORSUCH: I'm curious about
2 what the law is.

3 MR. BECK: Okay, okay.

4 JUSTICE GORSUCH: Have you done any
5 examining of historical sources? You know, I
6 don't know, Joseph Story, you know, a pretty
7 good source; The Commentaries of the
8 Constitution or Blackstone; something you could
9 point me to in the -- that's law --

10 MR. BECK: Okay.

11 JUSTICE GORSUCH: -- about how those
12 two get reconciled? And if the answer's no,
13 that's a perfectly fine answer. I'll go look
14 myself. I just thought you might save me a
15 little time.

16 MR. BECK: I'd like to start with no,
17 but I would --

18 JUSTICE GORSUCH: Okay.

19 MR. BECK: -- like to take another
20 attempt at answering your question. The rule
21 of lenity serves multiple purposes.

22 JUSTICE GORSUCH: I -- all right. Now
23 go on to another question.

24 MR. BECK: Okay.

25 JUSTICE GORSUCH: You'll -- you'll do

1 -- you'll do better work elsewhere.

2 JUSTICE KAVANAUGH: Well, I thought we
3 had said the rule of lenity only kicks in after
4 you've done all the other tools of statutory
5 interpretation, which would include
6 constitutional avoidance.

7 MR. BECK: And, Your Honor, that --
8 that --

9 JUSTICE KAVANAUGH: I thought we said
10 that many times.

11 MR. BECK: I've read it inconsistently
12 in -- in application there. Certainly, they
13 exist in the same sphere. They're both
14 triggered by a concern over ambiguity. They
15 both are used with a plausibility standard.

16 But the reason the government's
17 proposed conduct-based approach is not
18 plausible really comes down to the rule of
19 lenity, but, in -- in addition to that, and
20 perhaps more importantly, it's irreconcilable
21 with the plain text of the statute. It
22 conflicts with how this Court has already
23 interpreted identical language, and it offends
24 the separation of powers.

25 JUSTICE ALITO: Well, can I come back

1 to the question about the meaning of the word
2 "offense," which you addressed -- I'm sorry --
3 which Mr. Feigin addressed extensively earlier.
4 Does that same problem exist under ACCA? And
5 if it doesn't, are you --

6 MR. BECK: Certainly.

7 JUSTICE ALITO: -- saying we should --
8 it does? The problem exists under ACCA?

9 MR. BECK: The -- the problem in the
10 sense of the crime has to mean the same thing
11 for purposes of both subsections because it has
12 the same subject. And that's consistent with
13 our argument. The government, in fact, is
14 trying to change that. So the government, for
15 example --

16 JUSTICE ALITO: All right. Let me ask
17 it a different way. Do you think that the
18 residual clause in ACCA can be objected to on
19 the same ground that you are using to object to
20 the use of the case-specific approach, the
21 fact-specific approach to the residual clause
22 here?

23 MR. BECK: I think so, Your Honor,
24 absolutely.

25 JUSTICE ALITO: Well, could you just

1 explain how that is?

2 MR. BECK: Sure. And if I can refer
3 to precedent while doing so, but I'll do it
4 without mentioning Taylor, for example.

5 JUSTICE ALITO: Well, I -- I thought
6 -- I prefer if you can do it with the language.
7 If you don't have the language in mind, then
8 I'll just leave the question.

9 MR. BECK: I -- I have the language.
10 The same problem exists in both. The lack of
11 guidance on imagining the ordinary case of the
12 crime and the indeterminate risk threshold,
13 those are present here as well as there.

14 You also have the dual inherent
15 probabilistic language that gives rise to the
16 ordinary --

17 JUSTICE ALITO: No, but what I'm
18 getting at is this -- your argument that the
19 provision here under the government's reading
20 interprets the word "offense" to mean two
21 different things, element at one point and
22 facts at the other.

23 The way ACCA is worded, that problem
24 doesn't arise. It says -- it talks about a
25 crime, and then, in subsection (I), has as an

1 element subsection (2), presents a serious
2 potential risk. So you don't have that problem
3 there, do you?

4 MR. BECK: We do have the same problem
5 because what's modifying "crime" is not
6 "presents" but "involves" conduct. So it --
7 it's a parallel reading here.

8 And, of course, if we look to Sessions
9 versus Dimaya, it's the same language. But
10 going back to 19 --

11 JUSTICE ALITO: So you don't think
12 there's an important distinction in this
13 respect between the language of this provision
14 and the provision of ACCA?

15 MR. BECK: Certainly not, Your Honor.
16 And I think the plurality of this Court
17 answered that question in Sessions versus
18 Dimaya just last term.

19 JUSTICE ALITO: So, if I don't think
20 that there is that problem under ACCA, then I
21 shouldn't think there is that problem under
22 this provision?

23 MR. BECK: I -- I would agree with
24 that, Your Honor.

25 JUSTICE ALITO: Okay, good.

1 MR. BECK: If we go back to 1984 when
2 Congress created both Section 16 and for the
3 first time narrowed the application of 924(c)
4 from all felonies to just crimes of violence,
5 there was -- they were conjoined with a
6 cross-reference.

7 At that time, even if we didn't know
8 what Section 16 and Section 924(c) meant, we
9 know Congress intended them to mean the same
10 thing.

11 JUSTICE KAVANAUGH: But they changed
12 it in '86. They changed the cross-reference.

13 MR. BECK: They removed the
14 cross-reference, but what they did --

15 JUSTICE KAVANAUGH: So doesn't that
16 defeat your whole point there?

17 MR. BECK: It does not, Your Honor,
18 because they used the same language. So the
19 truth is neither the government nor Respondents
20 know exactly why Congress chose to copy and
21 paste the language from Section 16 into 924(c),
22 but we know they used the same language.

23 So it makes better sense that they
24 were doing so for convenience because it was at
25 that time that they were also adding a

1 definition of drug-trafficking crime.

2 In *Rasom versus United States*, I
3 believe in 2007, this Court dealt with a
4 similar situation where two provisions used the
5 same language at inception. And the way
6 Congress intended a different meaning there is
7 it changed the language in one but kept the
8 language in the other the same.

9 Yet, here, we're faced with 30 years
10 of a categorical interpretation from circuit
11 courts. We have three different instances
12 where Congress has changed the language of
13 924(c) in that time, and not once has it
14 changed the language that gives rise to this
15 categorical approach.

16 So I think that gives us some insight
17 in -- into congressional intent through this
18 amendment history. Just last term, this Court
19 stated in *Jennings versus Rodriguez*, "Spotting
20 a constitutional issue does not give the Court
21 the authority to rewrite the text of a statute,
22 and the government's proposed conduct-based
23 approach would effectively be asking this Court
24 to do just that."

25 One of the big limitations on the

1 application of constitutional avoidance is the
2 separation of powers. Congress alone is the
3 law-making authority, and a conduct-based
4 approach would offend that in the truest sense.

5 JUSTICE BREYER: Suppose you -- so
6 this -- the basic question we're asked is the
7 question of whether it's too vague. That's why
8 I'm in my dilemma. And, certainly, the
9 conduct-based approach is one effort to escape.
10 Right?

11 MR. BECK: That's correct, Your Honor.

12 JUSTICE BREYER: Well, so what -- what
13 do -- what do I do if I think -- do you see
14 these words here, "a substantial risk that
15 physical force against the person"? What they
16 mean is the same risk of physical force as in
17 (A). And, therefore, it isn't vague.

18 I -- I mean, maybe there's some
19 obvious answer to this, but -- but it's gnawing
20 at me. And --

21 MR. BECK: Yeah.

22 JUSTICE BREYER: -- see -- see -- see,
23 if you -- if you were to do that, it would be
24 very specific and it wouldn't really be like
25 Johnson, because Johnson put a lot of weight on

1 the fact that they have three examples which
2 cut in -- four examples cutting in different
3 directions and there are state crimes and
4 suppose I just wrote that and said that hasn't
5 been argued.

6 MR. BECK: Here's -- here is the
7 difference --

8 JUSTICE BREYER: What -- what -- what
9 would you do if you were -- unless you see some
10 obvious problem, what is --

11 MR. BECK: Here's the difference.
12 Subsection (A) is asking the question, does it
13 have an element of force?

14 JUSTICE BREYER: Uh-huh.

15 MR. BECK: Subsection (B) is asking a
16 different question, what is the risk of force
17 posed by the nature of the offense.

18 JUSTICE BREYER: Uh-huh.

19 MR. BECK: Those are two very
20 different questions, although I would agree
21 with you that subsection (B) sweeps more
22 broadly.

23 JUSTICE BREYER: Maybe that is --
24 maybe that's right.

25 MR. BECK: Yeah.

1 JUSTICE BREYER: I'll think about it.
2 Thank you.

3 MR. BECK: I'd like to address the
4 government's use of Nijhawan and Hayes. In
5 Nijhawan and Hayes, this Court did identify a
6 statute that is a hybrid statute that involves
7 both a categorical inquiry as well as a
8 fact-based inquiry.

9 But what was present there is a clear
10 indication from Congress that we were to look
11 at fact-specific conduct using the language in
12 which or using the language committed by.

13 And it's important to note that one of
14 the reasons this Court ruled the way it did in
15 Nijhawan is because the provision right above
16 it clearly called for a conduct-based approach
17 and it had identical structure.

18 If we were to apply that same
19 reasoning to this case, it would require a
20 categorical approach because drug-trafficking
21 crime is categorical, conceded by the
22 government, the elements clause is categorical,
23 effectively conceded by the government.

24 And why would Congress intend to treat
25 subsection (B) any differently without clear

1 intent based on the language it chose?

2 Two other provisions that are also
3 categorical in nature that apply to present
4 offenses that are cited by the government,
5 Section 929 and Section 931, one dealing with
6 body armor in connection with a crime of
7 violence, one dealing with the use of
8 armor-piercing bullets.

9 If the government is correct here
10 today, those would be treated differently than
11 924(c), use of a gun. And I think that really
12 calls into question the internal coherence of
13 the body of law.

14 I think this Court does have some
15 obligation to seek a harmonious interpretation
16 of the body of law, and many of the points
17 raised by the government today would destroy
18 not only the internal coherence of 924(c) but
19 also -- also its external coherence with the
20 way this Court has interpreted Section 16.

21 And so it's for these reasons that we
22 ask this Court to affirm the judgment of the
23 court of appeals for the Fifth Circuit and hold
24 the 924(c) residual clause void for vagueness.

25 Thank you very much.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Feigin, you have four minutes
4 remaining.

5 REBUTTAL ARGUMENT OF ERIC J. FEIGIN
6 ON BEHALF OF THE PETITIONER

7 MR. FEIGIN: Thank you, Mr. Chief
8 Justice.

9 I just have, I think, four points.
10 One is I think my friend agreed in a number of
11 points that our burden is simply to show that
12 this is a plausible interpretation of the
13 statute.

14 Second, I think it's helpful in that
15 respect to think about whether this particular
16 self-contained provision, if it were to have
17 come before the Court as the first time anyone
18 was ever urging a categorical approach, and a
19 criminal defendant were coming before this
20 Court and saying, no, you should apply the rule
21 of lenity for me because I want a
22 circumstance-specific approach.

23 I understand that an ordinary
24 defendant who commits commercial sex
25 trafficking with a minor does so by threatening

1 the minor with force, but that's not the way my
2 crime was committed, and I want to prove that
3 to a jury.

4 And I were arguing the other side, I
5 were arguing for the government that that
6 didn't matter, it just matters what an ordinary
7 defendant does, you have no right to show the
8 jury what you did.

9 I don't think anyone would think that
10 that was a slam dunk case for the government
11 that the court should apply an ordinary case
12 categorical approach.

13 Third, I think that shows why the rule
14 of lenity shouldn't have any application here
15 because it cuts both directions. A defendant
16 who committed his actual crime in a manner that
17 is nonviolent would invoke the rule of lenity
18 in favor of the very circumstance-specific
19 approach we're urging.

20 There's no reason to apply the rule of
21 lenity to favor defendants who committed --

22 JUSTICE SOTOMAYOR: Mr. Feigin --

23 MR. FEIGIN: -- a string of --

24 JUSTICE SOTOMAYOR: Mr. Feigin --

25 MR. FEIGIN: Excuse me.

1 JUSTICE SOTOMAYOR: -- the reason that
2 you seem to be touting this reading is that
3 it's going to expand -- has to be -- over the
4 categorical approach the number of defendants
5 that this statute now will apply to.
6 Otherwise, you wouldn't be fighting so hard.

7 If it was really a draw, and your
8 brief sort of walks this line in saying there's
9 no empirical evidence to support how large the
10 difference is, but logically speaking, the use
11 of a gun in the vast majority of cases -- I
12 spot you that there's a few where this wouldn't
13 happen -- is itself always going to provide a
14 substantial risk of violence.

15 So I -- I -- I'm not buying that there
16 isn't lenity because, for a very large number
17 of people under your reading, they're going to
18 have this statute now applied to them.

19 MR. FEIGIN: Well, Your Honor, let me
20 --

21 JUSTICE SOTOMAYOR: If we accept your
22 reading.

23 MR. FEIGIN: Let me answer that in --
24 in two ways. Then I think I'd -- my rebuttal
25 will be complete at that point.

1 The first thing I'd say is I don't
2 think this will dramatically expand the scope
3 of crimes.

4 There are going to be very few crimes
5 that we would think about as ordinarily
6 nonviolent that are going to become nonviolent
7 just because there's a gun. And let me give
8 you a specific example of a set of crimes that
9 are now 924(c) crimes that are going to at the
10 very least be jury questions under our
11 approach, which are these stash house sting
12 cases that have come up in some of the amicus
13 briefs where a defendant enters into a
14 conspiracy with an undercover agent to rob a
15 drug stash house -- the stash house that
16 doesn't really exist.

17 Those cases obviously get to the jury
18 because the defendant can claim that the
19 situation was so under control that there was
20 actually no risk that there would be a use of
21 force, and we might lose a lot of those cases.
22 And in some cases, judges might prevent those
23 from coming to the jury.

24 But the other thing I'd say is -- and
25 this was going to be my fourth point -- we're

1 not urging this approach because we want to
2 broaden Section 924(c). It's going to, of
3 course, limit it to only a subset of Hobbs Act
4 conspiracies.

5 We're urging this because we want the
6 statute to remain constitutional and implement
7 Congress's intent and because there are a lot
8 of offenses that we're going to lose.

9 Kidnapping, conspiracies to commit
10 murder, rape, these are the kinds of things
11 that Congress would certainly have wanted to
12 categorize as crimes of violence.

13 And there are a number of other
14 offenses that are going to be called into
15 question because it's not clear we're going to
16 be able to get them in under Section
17 924(c)(3)(A), which is going to spawn a whole
18 new cottage industry of litigation on this
19 issue.

20 I'm not making up these examples.
21 They include assault, manslaughter, material
22 support of terrorism for defendants who have
23 gone and trained at terrorist training camps --

24 JUSTICE SOTOMAYOR: Mr. Feigin --

25 MR. FEIGIN: -- and --

1 JUSTICE SOTOMAYOR: -- with all of
2 those cases, nothing about our ruling will
3 affect the discretion of district court judges
4 if they choose to give the same sentence and
5 even more, because, once a defendant opens up a
6 sentence, a judge has the discretion to go up,
7 down, or stay the same.

8 MR. FEIGIN: May I answer --

9 CHIEF JUSTICE ROBERTS: Sure.

10 MR. FEIGIN: -- Mr. Chief Justice?

11 Your Honor, it's not always going to
12 be possible to impose the same sentence. And
13 Congress clearly made the judgment that it
14 wanted additional sentences for people who used
15 firearms, for example, in furtherance of civil
16 rights crimes that cause physical injury.

17 This issue has come up, for example,
18 in the Dylann Roof prosecution in Charleston.
19 This is -- we -- I don't think it's correct to
20 say that all these defendants are going to get
21 the same sentences no matter what.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 11:05 a.m., the case
2 was submitted.)
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Official - Subject to Final Review

\$	abstract ^[1] 22:2	ante ^[2] 25:1 27:13	balance ^[2] 32:15,19
\$10,000 ^[1] 23:23	ACCA ^[7] 29:7 54:4,8,18 55:23 56:14,20	anybody ^[1] 45:18	based ^[5] 17:11,12,17 26:12 62:1
1	ACCA's ^[1] 6:10	apologies ^[1] 14:16	basic ^[1] 59:6
10:06 ^[2] 1:15 3:2	accept ^[1] 65:21	appealing ^[1] 35:2	BECK ^[7] 1:22 2:6 32:22,23,25 33:25 34:7,15,19,25 35:15 36:7,10
11:05 ^[1] 69:1	accepted ^[2] 3:22 8:5	appeals ^[2] 7:12 62:23	37:12,19 38:4,21 39:2,16,21 40:1
16 ^[6] 36:16 48:15 57:2,8,21 62:20	according ^[1] 45:17	APPEARANCES ^[1] 1:17	41:1,17 43:12,23,25 44:14 45:10,
16(b) ^[3] 4:18,23 33:8	account ^[2] 8:8 40:16	appeared ^[2] 6:12,13	22 46:4,20,25 47:3,9,14,23 48:9
17 ^[1] 1:11	acquainted ^[1] 9:9	applicable ^[1] 9:20	49:5,18,24 50:4,13,20 51:12,22
18 ^[1] 19:12	act ^[11] 3:16 4:20 5:7 6:11 15:16	application ^[5] 35:25 53:12 57:3	52:3,10,16,19,24 53:7,11 54:6,9,
18-431 ^[1] 3:4	26:8 28:3 48:13,14 51:3 67:3	59:1 64:14	23 55:2,9 56:4,15,23 57:1,13,17
19 ^[2] 47:22 56:10	acted ^[1] 3:18	applied ^[3] 5:13 23:7 65:18	59:11,21 60:6,11,15,19,25 61:3
1980s ^[1] 47:22	acts ^[3] 11:2 14:13 15:15	applies ^[1] 26:6	become ^[1] 66:6
1984 ^[2] 48:13 57:1	actual ^[1] 64:16	apply ^[8] 9:20 35:18 61:18 62:3 63:20 64:11,20 65:5	becomes ^[1] 40:6
1986 ^[10] 4:5,7,18,25 5:10 19:22	actually ^[10] 10:8 12:3 13:13 17:21 24:1 27:10 32:6 48:21 50:11	applying ^[1] 5:23	began ^[1] 36:10
31:7 32:12 47:18 48:7	66:20	approach ^[54] 3:25 4:19,22,24 5:9,10,14,24 6:3,8,23 7:3 9:14 13:10	begin ^[1] 38:5
1987 ^[1] 6:6	added ^[2] 5:17 29:4	14:22 23:9,11 24:9,13,20 26:6 30:9 31:19,21,25 32:2,4,11 33:10,13	behalf ^[8] 1:21,23 2:4,7,10 3:8 32:24 63:6
1989 ^[1] 6:6	adding ^[1] 57:25	35:19,19,22 36:9,20 38:9,15 40:19 53:17 54:20,21 58:15,23 59:4,9 61:16,20 63:18,22 64:12,19 65:4 66:11 67:1	believe ^[1] 58:3
2	addition ^[3] 23:17,21 53:19	4 66:11 67:1	below ^[1] 35:21
2 ^[1] 56:1	additional ^[4] 28:23 31:13,15 68:14	appropriately ^[1] 46:2	besides ^[1] 38:24
2004 ^[1] 36:13	address ^[3] 13:15 45:10 61:3	April ^[1] 1:11	best ^[3] 5:23 7:22 34:10
2007 ^[1] 58:3	addressed ^[2] 54:2,3	argue ^[2] 29:15 36:25	better ^[4] 4:23 6:20 53:1 57:23
2019 ^[1] 1:11	adjudicated ^[1] 7:2	argued ^[2] 10:14 60:5	between ^[3] 3:20,24 56:13
21 ^[1] 16:10	adopted ^[2] 4:20 14:21	arguing ^[2] 64:4,5	beyond ^[4] 33:14 39:15,24 40:15
25 ^[1] 43:21	adopting ^[1] 31:21	argument ^[14] 1:14 2:2,5,8 3:4,7 26:12 28:18 29:12 32:23 43:8 54:13 55:18 63:5	big ^[1] 58:25
3	affect ^[1] 68:3	arguments ^[1] 29:18	bill ^[2] 17:2,6
3 ^[1] 2:4	affirm ^[2] 25:23 62:22	arise ^[1] 55:24	bit ^[1] 50:16
30 ^[1] 58:9	afield ^[2] 11:21 13:15	Armed ^[2] 6:11 48:14	Blackstone ^[1] 52:8
32 ^[1] 2:7	age ^[1] 16:10	armor ^[1] 62:6	Blockburger ^[3] 14:23 15:2,12
4	agent ^[1] 66:14	armor-piercing ^[1] 62:8	body ^[3] 62:6,13,16
4,000 ^[1] 42:17	ago ^[1] 33:23	arrival ^[1] 38:3	boils ^[1] 38:19
6	agree ^[15] 5:6 7:10 12:4,15,16,19 34:4 37:20 41:1 47:3,13 48:10 49:19 56:23 60:20	arson ^[1] 41:25	books ^[5] 10:3 12:2 13:7,10 15:3
601 ^[1] 34:13	agreed ^[2] 24:8 63:10	Ashcroft ^[1] 36:13	born ^[1] 47:12
63 ^[1] 2:10	agrees ^[1] 18:24	askew ^[1] 16:6	both ^[21] 9:7 11:2,4,5 12:22 13:3
8	ahead ^[4] 16:19 25:11 32:17 40:12	assessment ^[1] 67:21	14:4 16:3,12 18:25 24:22 41:6,13
86 ^[1] 57:12	ALITO ^[29] 25:5,7,12,18,19 36:21 37:15,23 38:12,23 39:9,20,23 40:8,10,14 48:19 49:14,21 50:2 53:25 54:7,16,25 55:5,17 56:11,19,25	Assistant ^[2] 1:19,22	42:7 53:13,15 54:11 55:10 57:2
9	almost ^[1] 46:10	associated ^[1] 39:19	61:7 64:15
924(c) ^[22] 3:23 5:16 8:23 9:3,11 19:11 27:7,11 29:6 30:22 31:6,18 33:7 57:3,8,21 58:13 62:11,18,24 66:9 67:2	alone ^[2] 43:10 59:2	assume ^[1] 41:14	BRANDON ^[3] 1:22 2:6 32:23
924(c)(3) ^[3] 7:22 29:3,5	already ^[4] 9:11 25:15 27:19 53:22	attempt ^[2] 50:18 52:20	BREYER ^[17] 40:9,11,13 41:11,18,
924(c)(3)(A) ^[4] 27:4 30:9,21 67:17	although ^[2] 29:2 60:20	attempted ^[1] 44:22	22 43:6 44:15 45:16 59:5,12,22
924(c)(3)(B) ^[7] 3:12 20:1,12 24:17 26:7 31:24 32:1	ambiguity ^[1] 53:14	attorney ^[1] 28:15	60:8,14,18,23 61:1
929 ^[1] 62:5	ambiguous ^[1] 43:1	authority ^[4] 43:16 45:13 58:21 59:3	brief ^[1] 65:8
931 ^[1] 62:5	Amendment ^[3] 33:21 35:8 58:18	automatically ^[1] 27:24	briefs ^[2] 6:2 66:13
940 ^[1] 3:11	amicus ^[1] 66:12	average ^[1] 44:25	bring ^[1] 20:2
A	among ^[1] 28:23	avoid ^[2] 35:6 50:18	bringing ^[2] 25:2,15
a.m ^[3] 1:15 3:2 69:1	amount ^[2] 27:3 29:21	avoidance ^[11] 6:22 24:18 32:9 33:15 35:25 38:10 50:17 51:15,19 53:6 59:1	broaden ^[1] 67:2
able ^[7] 17:20 25:9 32:5 35:14,16 45:25 67:16	analysis ^[3] 13:11,13 37:2	aware ^[1] 37:13	broadly ^[1] 60:22
above ^[1] 61:15	ANDRE ^[1] 1:7	away ^[3] 9:15 43:19 48:2	bullets ^[1] 62:8
above-entitled ^[1] 1:13	Anglo-American ^[1] 9:21	B	burden ^[1] 63:11
abridging ^[1] 34:17	another ^[8] 14:14 18:11,24 41:10,10 51:16 52:19,23	back ^[10] 6:18 7:11 18:5 21:9 22:12 27:18 41:3 53:25 56:10 57:1	burglary ^[10] 21:7 39:10,14,16,24,25 40:15,17,20 41:24
absence ^[1] 36:19	answer ^[10] 13:21 18:11 35:16 40:2 46:1 51:13 52:13 59:19 65:23 68:8	bad ^[2] 47:20,21	business ^[2] 8:20,21
absent ^[2] 33:24 34:1	answer's ^[1] 52:12	Bail ^[4] 4:20 5:7 26:8 28:3	buying ^[1] 65:15
absolute ^[1] 43:7	answered ^[2] 41:7 56:17		C
absolutely ^[3] 37:6,11 54:24	answering ^[2] 19:3 52:20		c)(3) ^[1] 9:24

Official - Subject to Final Review

<p>22 51:16 canons ^[4] 50:12 51:6,10,15 capable ^[2] 47:4,6 captures ^[2] 8:1 24:23 Career ^[2] 6:11 48:14 carries ^[1] 19:14 carrying ^[2] 7:18 8:24 Case ^[42] 3:4 5:8 6:24 7:1 9:18 12:24 13:1 18:5 25:21 26:5 27:20,20,25 28:11 30:4,10 32:10 33:2,10,24 34:1 39:1,4,14 40:21 42:15,15 43:20 44:8 46:9,21,23 48:22 49:5 51:7,18 55:11 61:19 64:10,11 68:24 69:1 case-specific ^[2] 41:15 54:20 cases ^[22] 13:3,16,24 27:13,15,23 29:23 30:19,20 33:17,18,21 35:5,13,23 46:7 65:11 66:12,17,21,22 68:2 categorical ^[34] 3:25 4:19,22,24 5:9,9,13,23 6:8 9:14,17 13:10 23:9 24:9 26:5 30:9 32:11 33:10 35:18,21 36:8,20 38:15 40:19 58:10,15 61:7,20,21,22 62:3 63:18 64:12 65:4 categorically ^[1] 48:17 categories ^[1] 48:18 categorize ^[3] 42:13,21 67:12 cause ^[1] 68:16 central ^[1] 34:8 centuries ^[1] 9:22 certainly ^[14] 7:22 26:4,4,6 46:20 48:10 49:19 50:4 51:18 53:12 54:6 56:15 59:8 67:11 cetera ^[1] 43:10 challenging ^[5] 4:21 26:24,25 27:1 49:7 chameleon ^[1] 41:9 change ^[5] 17:3,14 19:10 29:16 54:14 changed ^[5] 57:11,12 58:7,12,14 changes ^[1] 28:21 changing ^[1] 17:18 charge ^[1] 28:23 charged ^[4] 10:3 12:1 15:22 31:17 Charleston ^[1] 68:18 CHIEF ^[13] 3:3,9 22:14 27:8,12 29:14 32:20,25 63:1,7 68:9,10,23 choice ^[2] 3:24 32:10 choose ^[2] 38:1 68:4 chose ^[3] 50:1 57:20 62:1 chosen ^[1] 37:8 cigarettes ^[1] 49:1 Circuit ^[3] 5:13 58:10 62:23 circuits ^[1] 35:21 circumstance-specific ^[16] 4:1 6:3,5,23 7:2,24 20:1 21:12,13 23:11 24:13,19 32:2,3 63:22 64:18 circumstances ^[1] 4:18 cite ^[1] 51:17 cited ^[2] 46:10 62:4 civil ^[1] 68:15 claim ^[2] 15:3 66:18 clarifying ^[1] 18:12</p>	<p>Clark ^[2] 41:8 51:14 classic ^[1] 13:10 classical ^[1] 39:10 clause ^[10] 6:10 9:25 18:18 33:7 44:5,20 54:18,21 61:22 62:24 clauses ^[1] 10:11 clear ^[13] 6:16 9:6 12:22 17:19 18:10 23:25 25:17 29:11 45:5 51:17 61:9,25 67:15 clearer ^[1] 19:7 clearly ^[10] 5:16 7:16 18:1 22:17 33:5 35:16 49:25 51:4 61:16 68:13 clerk ^[1] 49:1 close ^[1] 29:14 cocaine ^[1] 8:21 Cochise ^[1] 10:13 coherence ^[3] 62:12,18,19 collateral ^[1] 29:22 combination ^[1] 47:14 come ^[5] 27:18 53:25 63:17 66:12 68:17 comes ^[3] 27:25 36:23 53:18 coming ^[2] 63:19 66:23 Commentaries ^[1] 52:7 commercial ^[1] 63:24 Commission ^[1] 6:4 commit ^[4] 39:12 48:1,23 67:9 commits ^[3] 15:14 21:20 63:24 committed ^[18] 11:2 12:3 14:14 15:16 16:4,10,14 23:3,10,21 32:6 39:17 47:20 48:24 61:12 64:2,16,21 committing ^[1] 8:2 common ^[2] 33:11 40:5 community ^[1] 28:15 companion ^[1] 23:4 comparing ^[1] 17:2 compete ^[1] 51:10 complete ^[1] 65:25 completely ^[1] 37:25 complicated ^[1] 26:14 components ^[1] 14:13 Comprehensive ^[1] 48:13 conceded ^[3] 45:8 61:21,23 conception ^[1] 47:12 concern ^[10] 28:5,6 33:20,21,22 34:1,4,13 35:24 53:14 concerned ^[3] 25:9 33:18 47:18 concerns ^[4] 31:4 34:23 36:12,15 conclusion ^[2] 36:1,17 conduct ^[11] 3:20 9:10,12 21:16 22:9,11 41:2 42:3 46:11 56:6 61:11 conduct-based ^[8] 33:13 35:19 38:9 53:17 58:22 59:3,9 61:16 conduct-specific ^[1] 36:19 conflicts ^[1] 53:22 confront ^[1] 31:5 Congress ^[42] 4:5,6,12,25 5:16 7:25 17:3 18:13 19:16,21 27:5 31:7,8,13,14 32:8 33:4 37:7 38:2,6 47:7,18 48:11,16,20 49:2,15,16,24 50:5,11 51:2 57:2,9,20 58:6,12 59:2</p>	<p>61:10,24 67:11 68:13 Congress's ^[3] 48:2 50:19 67:7 congressional ^[1] 58:17 conjoined ^[1] 57:5 connection ^[1] 62:6 consequences ^[2] 26:11 37:3 consider ^[1] 29:2 consideration ^[1] 38:7 considering ^[1] 18:13 consistent ^[1] 54:12 conspiracies ^[2] 67:4,9 conspiracy ^[6] 49:20,21,22 50:6,8 66:14 conspired ^[2] 44:5 48:23 Constitution ^[1] 52:8 constitutional ^[19] 6:13,17,22 24:18 32:9 33:14 34:1 35:7,24,25 36:14 38:10 39:22 50:17 51:19 53:6 58:20 59:1 67:6 constitutionality ^[4] 37:13,16 46:15,24 constitutionally ^[1] 19:19 constructed ^[1] 19:17 construction ^[7] 3:13 10:15,19 18:13 50:12,19,22 constructions ^[2] 13:19,23 construe ^[2] 41:4 50:23 construed ^[2] 11:13 39:3 construing ^[3] 19:18 36:16 37:20 consult ^[1] 50:15 contain ^[1] 33:8 contemporaneous ^[1] 25:22 context ^[8] 3:21,24 9:11 14:18 16:16 20:19 29:7 42:7 context-specific ^[1] 7:17 continue ^[2] 10:2 27:14 contours ^[1] 43:17 Control ^[2] 48:13 66:19 convenience ^[2] 48:24 57:24 convicted ^[1] 49:11 conviction ^[1] 29:6 convictions ^[5] 26:25 30:22 35:9 46:8 49:8 copy ^[1] 57:20 correct ^[5] 7:4 29:1 59:11 62:9 68:19 cottage ^[1] 67:18 couldn't ^[3] 8:13 42:24 51:17 counsel ^[4] 32:21 50:10 63:2 68:24 counterfeit ^[1] 9:2 country ^[1] 48:8 counts ^[1] 49:10 couple ^[4] 5:1,5 19:7 26:10 coupled ^[1] 44:8 course ^[6] 9:10 19:11 34:2 44:1 56:8 67:3 courses ^[1] 9:10 COURT ^[55] 1:1,14 3:10 7:10,12 9:6 11:8,13,18,18 14:16,17 16:15 19:18 22:21,23 23:5,8,20 24:24 26:4,9,11 29:2 30:10 33:1 34:16 35:17 38:16,24 39:3 41:7 42:6,8 44:19 45:25 46:19,23 50:17 53:22</p>	<p>56:16 58:3,18,20,23 61:5,14 62:14,20,22,23 63:17,20 64:11 68:3 Court's ^[4] 6:15 10:23 26:3 39:5 courts ^[6] 3:22 6:9 29:5 30:2,8 58:11 covered ^[1] 5:15 created ^[2] 48:14 57:2 creates ^[1] 25:14 crime ^[38] 5:20 7:16,19,21 8:14,17,22,23,25 9:18 15:25 16:7,8 18:7 20:20 21:19,20 22:24 25:22 26:2 31:17 41:24 48:1,13,16 49:3,16,17,23 54:10 55:12,25 56:5 58:1 61:21 62:6 64:2,16 crime's ^[2] 39:4 44:7 crime-based ^[1] 42:19 crimes ^[24] 5:14 8:2 15:22 19:11 27:5 31:10 32:6 42:12,16,22 44:25 45:2,4 47:20 48:18 50:7 57:4 60:3 66:3,4,8,9 67:12 68:16 criminal ^[10] 3:20 6:11 8:20,20 26:23,23 43:17,18 48:14 63:19 criminals ^[1] 30:17 cross-reference ^[3] 57:6,12,14 crystal-clear ^[2] 31:12 48:7 curiam ^[1] 5:12 curious ^[1] 52:1 current ^[2] 20:9 27:1 currently ^[1] 17:2 cut ^[1] 60:2 cuts ^[1] 64:15 cutting ^[1] 60:2</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. ^[2] 1:10,20 DAVIS ^[2] 1:6 3:5 dead ^[1] 38:3 dealing ^[5] 31:5 34:22 51:16 62:5,7 dealt ^[1] 58:3 decades ^[1] 4:22 decision ^[5] 5:11,12 25:21 26:3 34:8 decisions ^[2] 6:15 11:10 decisis ^[1] 44:10 defeat ^[1] 57:16 defendant ^[24] 3:16,17 7:17 8:18 10:7 11:2,3 14:14,15 15:13 19:13 22:10 25:1 29:8 35:2 46:12 48:23 63:19,24 64:7,15 66:13,18 68:5 defendant's ^[2] 3:14 29:4 defendants ^[12] 8:2 28:7 29:24 30:21 31:16,22 32:4 49:5 64:21 65:4 67:22 68:20 Defender ^[1] 1:22 define ^[2] 43:16 45:13 defined ^[3] 16:8 19:12 22:25 defining ^[1] 41:23 definition ^[6] 5:17 7:21 26:2 39:10 48:15 58:1 degree ^[1] 26:17 degrees ^[1] 9:9 delegating ^[2] 43:15 45:12 demand ^[1] 6:22</p>
---	--	---	--

Official - Subject to Final Review

<p>denied ^[1] 35:3 Department ^[2] 1:20 28:15 deprives ^[1] 51:4 described ^[1] 49:6 destroy ^[1] 62:17 determination ^[1] 17:21 determine ^[3] 18:6 38:5,25 determining ^[2] 38:16 40:17 die ^[1] 49:12 difference ^[4] 49:9 60:7,11 65:10 different ^[15] 10:10 13:18,23 15:14,22 36:25 41:12 42:17 54:17 55:21 58:6,11 60:2,16,20 differently ^[2] 61:25 62:10 difficult ^[3] 11:14 42:25 51:12 dilemma ^[1] 59:8 Dimaya ^[7] 6:16 9:7 34:6 44:2 45:23 56:9,18 direct ^[1] 26:25 direction ^[2] 35:10 51:7 directions ^[3] 51:8 60:3 64:15 disagree ^[2] 34:7 38:21 discover ^[1] 42:11 discretion ^[3] 43:19 68:3,6 discuss ^[1] 36:14 discussion ^[1] 28:4 disregarding ^[1] 37:3 distinction ^[1] 56:12 distinctions ^[1] 27:23 distinguished ^[1] 46:7 district ^[1] 68:3 doctrine ^[1] 43:14 doing ^[6] 8:20 9:1 23:14 47:6 55:3 57:24 domestic ^[2] 22:24 23:4 done ^[4] 39:24 51:9 52:4 53:4 double ^[6] 10:23 11:6 14:17,19 15:4,12 doubt ^[4] 46:15,23 50:2,4 down ^[3] 38:20 53:18 68:7 dramatic ^[1] 28:9 dramatically ^[1] 66:2 draw ^[2] 3:19 65:7 drop ^[1] 21:18 drug ^[2] 5:17 66:15 drug-trafficking ^[4] 5:14 8:25 58:1 61:20 dual ^[2] 39:6 55:14 dunk ^[1] 64:10 during ^[2] 7:18 25:10 dwelling ^[1] 39:11 Dylann ^[1] 68:18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[1] 15:16 earlier ^[3] 10:12 25:13 54:3 easily ^[1] 9:20 economy ^[1] 34:21 effectively ^[2] 58:23 61:23 effort ^[1] 59:9 either ^[2] 43:9 49:11 element ^[10] 12:25 13:8 16:9 23:3, 6,8 44:22 55:21 56:1 60:13 elements ^[15] 10:4 11:3 15:3 16:3,</p>	<p>12 18:17 38:18,25 39:24 40:15,20, 22,23,25 61:22 elsewhere ^[1] 53:1 empirical ^[1] 65:9 empirics ^[1] 29:19 enacted ^[1] 6:12 encompass ^[1] 16:12 encompasses ^[1] 11:1 end ^[2] 29:12 45:9 endorsed ^[1] 36:9 engages ^[1] 46:12 enormous ^[1] 47:19 enough ^[1] 19:5 enters ^[1] 66:13 entire ^[1] 28:14 entirely ^[1] 37:5 entitled ^[1] 29:2 entrusted ^[1] 9:22 entry ^[1] 39:11 eradicate ^[2] 31:20,22 ERIC ^[5] 1:19 2:3,9 3:7 63:5 error ^[1] 7:9 escape ^[1] 59:9 eschew ^[1] 13:12 ESQ ^[3] 2:3,6,9 essentially ^[2] 24:23 31:20 established ^[1] 5:10 et ^[1] 43:10 even ^[8] 11:13 18:12 23:6 27:14 32:11 40:5 57:7 68:5 everyone ^[3] 18:24 47:25 48:8 evidence ^[2] 34:10 65:9 exactly ^[6] 11:9 16:15 22:21 26:18 32:7 57:20 examined ^[1] 51:9 examining ^[1] 52:5 example ^[11] 8:17 22:17 29:1 40:3 51:13,18 54:15 55:4 66:8 68:15, 17 examples ^[4] 13:24 60:1,2 67:20 excuse ^[4] 17:10 29:6 30:14 64:25 exist ^[3] 53:13 54:4 66:16 existing ^[1] 5:15 exists ^[2] 54:8 55:10 expand ^[2] 65:3 66:2 expect ^[1] 30:1 explain ^[4] 10:20 13:17 22:22 55:1 explained ^[1] 40:3 explosives ^[1] 42:2 extensively ^[1] 54:3 external ^[1] 62:19 extortion ^[1] 42:1 extremely ^[1] 47:21</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faced ^[4] 22:23 29:21 35:1 58:9 fact ^[6] 10:11 29:3 43:2 45:18 54:13 60:1 fact-based ^[1] 61:8 fact-specific ^[5] 17:5,21 20:25 54:21 61:11 factor ^[2] 8:13,14 facts ^[12] 9:18 10:6 12:3 17:11,13, 18 18:6 20:15 33:20 35:14 45:17</p>	<p>55:22 Fair ^[5] 19:5,20 47:12,14,25 fall ^[1] 27:17 fallen ^[1] 31:24 fallout ^[1] 26:19 far ^[4] 6:1 11:21 13:15 50:15 fate ^[1] 33:8 favor ^[2] 64:18,21 feature ^[1] 20:5 features ^[1] 44:4 Federal ^[6] 1:22 26:15,23 28:2 29:24 42:19 FEIGIN ^[89] 1:19 2:3,9 3:6,7,9 4:4, 6,9,12,15 5:1,5,20,25 6:25 7:4,8 8:12 9:23 10:18 11:23 12:5,7,11,14, 17,21 13:20 14:3,7,10,21 15:7,11, 18,23 16:1,20,22,23 18:8,17,22 19:4,5 20:9,11,23 21:1,5,8,21,25 22:7, 20 23:16 24:4,12,15 25:5,6,12,25 27:10 28:1,14,25 29:20 30:13,18 31:1,11 32:15,18 54:3 63:3,5,7 64:22,23,24,25 65:19,23 67:24,25 68:8,10 felonies ^[1] 57:4 felony ^[5] 23:13 24:7,8 39:12 44:21 few ^[6] 6:2,7 26:1 30:1 65:12 66:4 Fifth ^[1] 62:23 fighting ^[1] 65:6 figure ^[2] 9:8 26:13 figuring ^[1] 9:9 filed ^[1] 6:2 filing ^[1] 29:25 find ^[4] 8:7 33:19 35:14 45:20 finding ^[5] 3:17 8:6 9:12 13:1,2 findings ^[2] 12:23,24 finds ^[1] 44:10 fine ^[2] 15:1 52:13 Finish ^[2] 25:7 40:13 firearm ^[5] 7:18 8:12 19:14 25:2, 14 firearms ^[4] 8:9,10,11 68:15 first ^[18] 3:4,23 5:2,6 10:21 12:23 18:9 19:9 21:15 33:8,16 35:17,20 44:6 48:15 57:3 63:17 66:1 fits ^[2] 6:2,7 fly ^[1] 21:17 focus ^[3] 4:7 13:17 15:10 focuses ^[1] 21:15 focusing ^[1] 35:8 follow ^[2] 10:11 44:15 following ^[1] 33:3 force ^[16] 12:25 13:2,8 17:9,15 23:3 44:18,23 45:1,3 59:15,16 60:13, 16 64:1 66:21 forget ^[1] 44:2 form ^[1] 5:13 fortunately ^[1] 29:20 found ^[1] 7:9 four ^[3] 60:2 63:3,9 fourth ^[1] 66:25 framers ^[1] 10:25 frankly ^[1] 31:13 fraud ^[1] 23:22</p>	<p>fresh ^[2] 6:18,19 friend ^[1] 63:10 friend's ^[2] 28:18 29:15 front ^[3] 8:19 9:1,19 functions ^[1] 21:14 further ^[2] 16:21,25 furtherance ^[2] 8:25 68:15</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gauging ^[1] 46:11 gave ^[1] 22:21 General ^[2] 1:20 46:14 generally ^[1] 36:5 getting ^[1] 55:18 GINSBURG ^[4] 6:24 7:1,6 8:4 give ^[4] 13:18 58:20 66:7 68:4 Given ^[5] 4:18 10:15 27:19 28:22 48:6 gives ^[4] 33:9 55:15 58:14,16 giving ^[2] 10:19 13:22 glimpse ^[1] 48:21 GLOVER ^[1] 1:7 gnawing ^[1] 59:19 GORSUCH ^[34] 9:23 11:20,24 12:6,9,12,15,19 13:4 14:1,5,8,19,23 15:8,17,20,25 16:18 20:16 28:13, 17 29:10 50:10,14,21 51:20,23 52:1,4,11,18,22,25 Gorsuch's ^[4] 18:11 19:3 22:17 41:3 got ^[1] 27:18 gotten ^[1] 24:6 government ^[17] 10:12 27:12 38:8 41:4,14 42:10,20 54:13,14 57:19 61:22,23 62:4,9,17 64:5,10 government's ^[7] 6:1 10:1 45:8 53:16 55:19 58:22 61:4 greatest ^[1] 44:10 grievous ^[1] 50:24 grievously ^[1] 51:3 ground ^[1] 54:19 guess ^[7] 13:4,21,21 17:1 21:5 45:7 48:5 guidance ^[2] 44:7 55:11 guilt ^[1] 3:14 guilty ^[1] 49:6 gun ^[11] 8:18,24 16:8,9 20:3 25:15 47:19 48:1 62:11 65:11 66:7 guns ^[1] 47:20</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>handbags ^[1] 9:2 hands ^[2] 27:14 42:7 happen ^[1] 65:13 happened ^[4] 13:14 24:1 33:23 48:22 happy ^[1] 16:20 hard ^[1] 65:6 hardly ^[1] 42:1 harmless ^[1] 7:9 harmonious ^[1] 62:15 harsh ^[1] 43:20 hat ^[1] 21:18 Hayes ^[8] 11:11,11 14:22 16:17 22:</p>
--	--	--	---

Official - Subject to Final Review

<p>22 23:20 61:4,5 head ^[1] 49:1 hear ^[2] 3:3 51:23 heard ^[1] 50:15 heavily ^[1] 4:9 held ^[2] 26:5 32:12 Help ^[1] 14:5 helpful ^[1] 63:14 helps ^[1] 15:9 hinge ^[1] 12:22 hinges ^[1] 3:15 historical ^[1] 52:5 historically ^[1] 51:9 history ^[4] 31:12 33:11 36:11 58:18 Hobbs ^[1] 67:3 hold ^[3] 5:14 29:23 62:23 holding ^[1] 5:4 Honor ^[47] 5:2,6,25 7:5,8 10:18 12:5 13:20 14:17 15:11 16:20 18:8 19:5 21:1,25 22:7,20 24:4 25:25 28:1 29:1,21 33:25 34:9,19 35:15 36:7,10 37:12 38:4,22 41:1 43:12 45:11 46:21 47:16 48:11 50:13 51:13 53:7 54:23 56:15,24 57:17 59:11 65:19 68:11 Honors ^[1] 33:2 host ^[1] 26:15 house ^[3] 66:11,15,15 hundreds ^[1] 26:21 hybrid ^[1] 61:6</p> <hr/> <p>I</p> <p>idea ^[3] 9:15 24:23 48:5 identical ^[2] 53:23 61:17 identified ^[3] 5:11 34:12,12 identify ^[1] 61:5 imagination ^[1] 3:15 imagine ^[2] 39:4 44:7 imagined ^[2] 32:11 39:4 imagining ^[1] 55:11 implement ^[1] 67:6 implications ^[1] 25:21 importance ^[1] 28:11 important ^[3] 26:10 56:12 61:13 importantly ^[2] 46:10 53:20 impose ^[3] 30:2,5 68:12 imposes ^[1] 43:20 impossible ^[2] 40:6,9 impressionistic ^[1] 29:12 inappropriate ^[1] 45:21 inception ^[1] 58:5 inchoate ^[1] 50:8 include ^[4] 27:7 50:6 53:5 67:21 included ^[1] 50:5 incoherent ^[1] 22:19 inconsistent ^[1] 18:4 inconsistently ^[1] 53:11 incorporate ^[1] 12:24 increase ^[2] 27:3 30:7 indeterminate ^[2] 44:8 55:12 indication ^[1] 61:10 individual ^[1] 46:12 industry ^[1] 67:18</p>	<p>inherent ^[2] 40:20 55:14 inherently ^[1] 39:7 injury ^[2] 42:4 68:16 innocence ^[1] 3:14 inquiry ^[4] 9:5,6 61:7,8 insight ^[1] 58:16 instances ^[1] 58:11 instead ^[1] 17:9 instructive ^[1] 11:12 intend ^[1] 61:24 intended ^[6] 4:5,25 47:7 50:6 57:9 58:6 intent ^[7] 4:17 39:11 48:3,3 58:17 62:1 67:7 interested ^[2] 25:20 27:22 interests ^[2] 36:4,6 internal ^[2] 62:12,18 interpret ^[3] 22:8,9 42:25 interpretation ^[9] 22:21 37:9,10 41:15 44:14 53:5 58:10 62:15 63:12 interpreted ^[6] 16:15 23:5,8 35:6 53:23 62:20 interpreting ^[1] 11:19 interprets ^[2] 10:24 55:20 invalid ^[1] 19:20 invalidate ^[1] 26:6 invalidating ^[1] 26:19 invoke ^[2] 24:19 64:17 involve ^[2] 38:19 42:12 involved ^[1] 17:14 involves ^[5] 17:8 38:17 42:3 56:6 61:6 involving ^[1] 23:22 irreconcilable ^[1] 53:20 Isn't ^[4] 38:19 43:2 59:17 65:16 issue ^[5] 9:13 46:19 58:20 67:19 68:17 issues ^[1] 19:8 itself ^[2] 25:14 65:13</p> <hr/> <p>J</p> <p>jacket ^[1] 8:19 James ^[1] 39:5 Jennings ^[1] 58:19 jeopardy ^[7] 10:23 11:6 14:18,20 15:4,13 25:23 Johnson ^[15] 6:16 9:7 26:18 34:5 40:4 41:23 42:15,15 44:1,4 45:23 46:7,19 59:25,25 Joseph ^[1] 52:6 judge ^[4] 13:9 42:8 45:20 68:6 judge's ^[2] 3:15 9:17 judges ^[4] 43:16,19 66:22 68:3 judgment ^[5] 9:17 31:21,23 62:22 68:13 judicial ^[1] 34:21 juries ^[5] 9:8,8,16,22 26:12 jurisprudence ^[1] 10:24 jury ^[25] 3:21 8:6,7 9:11,19 12:23,24 13:1,2 18:5 33:18,19 34:17 35:3,12,13,14 45:20 47:4,6 64:3,8 66:10,17,23 jury's ^[1] 3:17</p>	<p>Justice ^[167] 1:20 3:3,10 4:4,8,10,14,16 5:3,18,21 6:24 7:1,6 8:4 9:23 11:20,24 12:6,9,12,15,19 13:4 14:1,5,8,19,23 15:8,17,20,25 16:18,22,24 18:11,15,19 19:2,3 20:7,10,13,16,24 21:3,6,21 22:4,12,14,16,16 23:15 24:10,14 25:5,7,12,17,19 27:8,12 28:13,16,17 29:10,14 30:11,14,24 31:3 32:14,16,17,20,25 33:17 34:3,11,16,24 35:4 36:3,8,21 37:15,23 38:12,23 39:9,20,23 40:2,8,9,10,11,13,14 41:3,11,18,22 42:6 43:6,22,24 44:12,15 45:16 46:3,6,22 47:1,8,10,17,24 48:19 49:14,21 50:2,10,14,21 51:20,23 52:1,4,11,18,22,25 53:2,9,25 54:7,16,25 55:5,17 56:11,19,25 57:11,15 59:5,12,22 60:8,14,18,23 61:1 63:1,8 64:22,24 65:1,21 67:24 68:1,9,10,23</p> <hr/> <p>K</p> <p>KAGAN ^[18] 16:22,24 18:15,19 19:2 20:7,10,13,24 21:3,6,21 22:4,12,16 23:15 24:10,14 KAVANAUGH ^[25] 30:11,14,24 31:3 33:17 34:3,11,16,24 35:4 43:22,24 44:12 46:3,6,22 47:1,8,10,17,24 53:2,9 57:11,15 Kawashima ^[1] 11:11 keep ^[3] 15:4 27:8 43:24 keeps ^[1] 27:13 kept ^[1] 58:7 kicks ^[1] 53:3 Kidnapping ^[1] 67:9 killing ^[1] 43:8 kind ^[11] 9:5,6,7 17:24 18:1 19:15 20:5 26:13 31:9 41:2 49:15 kinds ^[1] 67:10</p> <hr/> <p>L</p> <p>lack ^[2] 44:7 55:10 LAMONT ^[1] 1:6 language ^[50] 4:2 5:22 6:5 7:15 9:24 10:10 11:22 16:25 18:10,16 19:6,8,16,18 22:5 23:18,24 24:2,11 33:9 35:6,10 36:18,19,24 37:23 38:22 39:2,7 44:3 45:5 49:25 53:23 55:6,7,9,15 56:9,13 57:18,21,22 58:5,7,8,12,14 61:11,12 62:1 large ^[3] 28:20 65:9,16 last ^[3] 42:5 56:18 58:18 later ^[1] 5:4 Laughter ^[3] 41:21 43:5 51:25 law ^[11] 11:1 13:9 14:11,12 16:2 33:12 46:17 52:2,9 62:13,16 law-making ^[1] 59:3 laws ^[3] 46:10,16 47:2 leads ^[1] 33:3 least ^[5] 6:21 7:7 10:16 32:1 66:10 leave ^[1] 55:8 legal ^[1] 14:15 legislative ^[1] 31:12 length ^[1] 31:4</p>	<p>lenity ^[10] 50:23 51:17 52:21 53:3,19 63:21 64:14,17,21 65:16 Leocal ^[1] 36:13 LEVON ^[1] 1:7 liberty ^[1] 51:5 lies ^[1] 33:14 lift ^[1] 11:14 light ^[1] 24:17 likelihood ^[1] 28:21 likely ^[2] 37:8,9 limit ^[1] 67:3 limitations ^[1] 58:25 limiting ^[2] 20:5 21:14 line ^[2] 3:20 65:8 linguistic ^[1] 11:14 list ^[1] 36:4 litigation ^[4] 27:3 29:22 30:8 67:18 little ^[4] 11:21 25:8 50:16 52:15 logical ^[1] 7:25 logically ^[1] 65:10 long ^[3] 5:22 31:9 48:2 look ^[26] 6:18,19 7:14 8:10 10:3,6,23 11:5,12 12:3 13:6,9,13 15:2,14 16:6 18:5 23:25 38:13,24 40:24 42:10 48:11 52:13 56:8 61:10 looked ^[1] 44:3 looking ^[7] 9:10,23 17:19 38:14 45:14 46:8 50:10 lose ^[4] 27:14 43:2 66:21 67:8 lot ^[7] 29:17,19 41:25 51:24 59:25 66:21 67:7 low ^[1] 28:22 lower ^[7] 3:22 29:5 30:8,16,23 31:1 42:8 Lubbock ^[1] 1:23</p> <hr/> <p>M</p> <p>made ^[3] 9:6 23:24 68:13 main ^[1] 28:5 majority ^[1] 65:11 mandatory ^[1] 43:20 manner ^[3] 16:13 19:19 64:16 manslaughter ^[1] 67:21 many ^[7] 25:22 28:24 30:16 33:23 40:4 53:10 62:16 Martinez ^[2] 41:8 51:14 material ^[1] 67:21 matter ^[5] 1:13 18:9 46:14 64:6 68:21 matters ^[2] 26:16 64:6 MAURICE ^[1] 1:6 maximum ^[1] 29:8 mean ^[17] 10:2,7,10,25 12:1 20:24 21:22,24 22:9,18 27:15 48:5 54:10 55:20 57:9 59:16,18 meaning ^[4] 7:24 41:9 54:1 58:6 means ^[3] 11:4 14:11 45:2 meant ^[5] 17:3 37:9 38:2,6 57:8 men ^[1] 49:13 mention ^[1] 35:24 mentioning ^[2] 28:7 55:4 merely ^[1] 40:25 might ^[3] 3:16 13:18 18:13 19:21</p>
---	--	---	--

Official - Subject to Final Review

<p>28:4 52:14 66:21,22 mind [3] 43:10 49:15 55:7 minimums [1] 43:20 minor [2] 63:25 64:1 minute [1] 12:13 minutes [1] 63:3 misdemeanor [5] 11:19 16:16 22:24 23:2,7 Mister [1] 32:14 modifying [1] 56:5 morning [1] 3:4 most [2] 29:22 47:4 move [1] 33:16 much [6] 12:4,16,20 29:16 47:21 62:25 multiple [2] 14:12 52:21 Murder [6] 21:3,22,24 22:2,3 67:10 murderous [1] 21:18 murders [1] 15:14 must [1] 38:4 myself [1] 52:14</p>	<p>object [1] 54:19 objected [1] 54:18 obligation [1] 62:15 obtain [1] 32:5 obvious [3] 48:3 59:19 60:10 Obviously [2] 15:13 66:17 occasion [1] 46:13 occurred [1] 17:20 odd [1] 19:15 odds [1] 27:24 offend [1] 59:4 offender [2] 21:16 24:22 offenders [3] 26:22,22 28:10 offends [1] 53:23 offense [52] 8:8,11 9:12,24 10:2,3,7,21,25 11:9,25 12:1 13:7,7 14:10,16,8,12,14,16 17:7,10,10,11,13 18:2,14,25 20:17,21 21:10,16 22:6,8,9,9 23:2,6,12 24:7,8,22 31:18 36:18 38:16 40:25 41:5 44:21 49:6 50:9 54:2 55:20 60:17 offenses [5] 40:6 48:17 62:4 67:8,14 often [3] 39:17 42:2,12 Okay [14] 12:6,11,14 14:6,7 39:9,20 44:17 52:3,3,10,18,24 56:25 old [1] 49:12 once [2] 58:13 68:5 one [36] 3:14 4:1 8:15 11:15 12:18,21 13:17 14:13 15:12 26:11 28:23 30:11,15 31:4 32:11 35:10,23 36:1,25 37:4,5,11 40:16 41:9,10 43:13 49:10 50:15 55:21 58:7,25 59:9 61:13 62:5,7 63:10 ones [3] 27:16,19 32:5 only [14] 3:13,23 8:13 11:18 15:12 23:1 28:2 31:22 32:4 36:1 41:13 53:3 62:18 67:3 opens [1] 68:5 operative [3] 4:2 6:25 7:15 opinion [3] 34:13 39:5 42:8 opposed [2] 37:10,24 opposite [1] 51:8 oral [5] 1:14 2:2,5 3:7 32:23 order [2] 3:11 17:4 ordinarily [3] 18:2 39:17 66:5 ordinary [15] 3:16 5:8 9:18 26:5 32:10 33:9 37:2 39:4,14 44:8 55:11,16 63:23 64:6,11 other [27] 13:16,16,16,24,24 15:1 19:11 24:11 26:10,15 27:2,16,19,23 28:19 36:3,5 37:5 40:25 45:24 53:4 55:22 58:8 62:2 64:4 66:24 67:13 others [1] 28:24 otherwise [4] 24:24 25:3 42:2 65:6 out [7] 9:8,9 18:23 26:13 30:6,22 43:10 over [4] 5:21 23:22 53:14 65:3 overwhelming [1] 48:3 own [1] 26:1</p>	<p>PAGE [2] 2:2 34:13 paragraph [2] 10:16 34:22 parallel [1] 56:7 paraphrase [1] 11:17 paraphrasing [1] 23:1 part [4] 15:12 23:6,8,10 particular [11] 3:17 16:3 18:6,6,20 22:2,6,10 23:24 46:13 63:15 particularly [5] 4:9 6:10 10:22 11:12 43:18 passed [1] 48:12 past [2] 19:14 24:6 paste [1] 57:21 peculiar [1] 23:23 pending [1] 17:3 people [2] 65:17 68:14 per [1] 5:12 perfectly [3] 9:2 16:2 52:13 perhaps [2] 41:13 53:20 person [2] 51:4 59:15 persons [2] 23:22 28:20 persuaded [1] 35:20 Petitioner [6] 1:4,21 2:4,10 3:8 63:6 phrase [5] 8:15 16:15 21:24 41:5 42:5 phrased [1] 42:17 physical [9] 17:9 42:4 44:18,23 45:1,3 59:15,16 68:16 place [1] 18:24 plain [1] 53:21 plausibility [1] 53:15 plausible [6] 3:13 27:22 36:2 38:11 53:18 63:12 plausibly [1] 32:1 played [1] 34:8 please [4] 3:10 25:8 33:1 40:12 plurality [1] 56:16 plus [1] 36:18 point [12] 10:14 18:23 45:11 47:11,11 51:6,8 52:9 55:21 57:16 65:25 66:25 pointed [1] 23:20 pointing [1] 23:16 points [6] 5:1,5 30:15 62:16 63:9,11 portion [3] 18:18,20 34:20 posed [1] 60:17 position [1] 10:1 Posner [1] 42:8 possession [1] 40:3 possible [4] 30:4 36:24 50:18 68:12 possibly [3] 7:12 26:13 50:25 potential [2] 42:4 56:2 potentially [1] 19:18 powers [5] 43:15 47:15 51:2 53:24 59:2 practical [7] 25:20 28:6 33:22 34:22 36:12,14 37:3 pre-sentence [6] 42:11,20 44:24 45:14,17,19 precedent [1] 55:3 precisely [2] 8:1 10:14</p>	<p>predicate [3] 8:8,10 48:17 predicates [2] 27:10,11 preface [1] 20:14 prefaced [3] 20:10,15,17 prefatory [3] 9:25 10:9 18:9 prefer [1] 55:6 present [10] 3:24 18:3 19:12 25:3 35:10 39:8 44:6 55:13 61:9 62:3 presentation [1] 25:10 presents [3] 42:3 56:1,6 presume [1] 37:6 presumes [1] 32:10 presumption [3] 37:13,16,17 pretty [1] 52:6 prevent [2] 25:1 66:22 prior [4] 27:15 35:5,8 46:8 prison [3] 27:1 28:21 49:12 prisoners [1] 29:25 probabilistic [2] 39:7 55:15 probably [3] 4:7 31:1 41:25 Probation [2] 45:12,15 problem [20] 10:17 35:2,7,8 40:1 42:10 45:23 47:19 48:4,6 54:4,8,9 55:10,23 56:2,4,20,21 60:10 problems [2] 51:1,2 prohibited [1] 33:5 prohibition [2] 14:15 16:13 prohibits [1] 7:17 promise [1] 14:25 prone [1] 21:17 pronounce [1] 10:13 proposed [4] 38:8 45:11 53:17 58:22 prosecution [1] 68:18 prosecutors [1] 43:16 protecting [1] 33:19 prove [1] 64:2 provide [1] 65:13 provision [13] 17:4,24,25 23:18 26:19 36:23,24 55:19 56:13,14,22 61:15 63:16 provisions [2] 58:4 62:2 Public [1] 1:22 purpose [1] 41:10 purposes [2] 52:21 54:11 put [5] 19:9 25:23 47:24 48:25 59:25 puzzling [1] 41:13</p>
<p style="text-align: center;">N</p> <p>namely [1] 35:7 narrowed [1] 57:3 natural [1] 16:2 nature [26] 8:16 17:8,12,17 18:1 19:24,25 20:3,6,21,22 21:3,7,7,9,10,22,24 22:6,11 24:21 25:16 36:18 38:17 60:17 62:3 near [1] 29:13 necessarily [2] 5:7 12:24 necessary [1] 33:4 need [1] 3:12 needs [1] 51:3 neither [2] 6:17 57:19 never [1] 45:25 new [2] 38:9 67:18 next [2] 27:25 28:2 Nijhawan [5] 11:10 23:19 61:4,5,15 Nobody's [1] 45:6 non-ACCA [1] 29:8 non-criminal [1] 3:20 nonviolent [4] 9:3 64:17 66:6,6 nonviolently [1] 32:6 nor [2] 6:17 57:19 normally [2] 10:9,14 normative [1] 51:16 note [2] 6:4 61:13 noted [1] 36:12 nothing [1] 68:2 notice [7] 47:13,15,25,25,25 48:6 50:25 noting [1] 39:6 notion [1] 18:4 notwithstanding [1] 30:2 null [1] 50:19 number [5] 28:20 63:10 65:4,16 67:13 numerous [2] 29:24,24</p>	<p style="text-align: center;">O</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">Q</p> <p>qualify [2] 12:7,12 question [43] 4:7 18:12 19:3,6 24:5,16 25:10 26:8,15,16 27:4 34:21 35:1,16,18 36:22 37:22 38:13 39:18 40:2,7 41:3,7,12 46:1,5 47:5,23 48:19 49:15,25 51:12 52:20,23 54:1 55:8 56:17 59:6,7 60:12,16 62:12 67:15 questions [5] 16:21,25 44:11 60:20 66:10 quite [2] 29:14 30:1</p>
<p style="text-align: center;">O</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">P</p>	<p style="text-align: center;">R</p> <p>rages [1] 21:18</p>

Official - Subject to Final Review

<p>raise ^[1] 35:4 raised ^[2] 35:17 62:17 raising ^[3] 24:6 34:20,25 rape ^[1] 67:10 Rasom ^[1] 58:2 rather ^[4] 3:16 17:6,7 21:16 rationality ^[1] 37:18 reach ^[1] 33:14 reached ^[2] 35:21 38:10 reaching ^[2] 36:17 51:15 read ^[17] 4:19,23 5:23 6:5,21,21 10:2,9 11:25 24:17,19 27:17 32:1 36:24 37:24 50:25 53:11 readily ^[2] 3:22 9:20 reading ^[10] 21:13 34:19 37:4 38:9,11 55:19 56:7 65:2,17,22 really ^[9] 29:16 43:9 49:2,3 53:18 59:24 62:11 65:7 66:16 reason ^[5] 13:23 35:9 53:16 64:20 65:1 reasonably ^[3] 6:21 7:23 24:18 reasoning ^[1] 61:19 reasons ^[5] 11:15 33:6 43:13 61:14 62:21 REBUTTAL ^[3] 2:8 63:5 65:24 receive ^[1] 31:16 recent ^[1] 11:8 reconciled ^[2] 51:11 52:12 redoing ^[1] 7:7 refer ^[1] 55:2 reference ^[5] 5:3 6:15 19:23 40:22,23 referring ^[1] 45:5 refers ^[1] 46:17 Reform ^[4] 4:20 5:7 26:8 28:3 relation ^[1] 7:19 release ^[1] 28:8 released ^[2] 29:9 49:12 relevant ^[2] 37:19 41:24 relied ^[1] 36:15 relief ^[2] 29:25 32:5 relitigate ^[1] 33:23 remain ^[1] 67:6 remaining ^[1] 63:4 remove ^[1] 49:10 removed ^[1] 57:13 render ^[3] 3:11 19:19 44:5 renders ^[2] 8:14 50:19 repeating ^[1] 22:5 report ^[1] 45:19 reports ^[5] 42:11,20 44:24 45:15,17 representation ^[1] 19:21 repudiated ^[1] 5:16 require ^[2] 46:11 61:19 required ^[1] 28:20 requires ^[2] 13:9 36:20 requiring ^[1] 33:4 requisite ^[1] 38:17 resentencing ^[1] 28:19 reserve ^[2] 32:13,18 residual ^[6] 6:10 33:7 44:5 54:18,21 62:24 resolve ^[1] 51:14</p>	<p>respect ^[8] 8:7 10:5 31:8 45:3,4,19 56:13 63:15 Respondents ^[6] 1:8,23 2:7 3:12 32:24 57:19 Respondents' ^[2] 26:12 31:19 response ^[1] 31:6 rest ^[1] 6:11 result ^[1] 32:7 retrial ^[1] 7:13 return ^[1] 11:22 review ^[1] 26:25 rewrite ^[1] 58:21 rewriting ^[1] 4:17 rhetorical ^[1] 29:18 rights ^[1] 68:16 risk ^[3] 33:9 55:15 58:14 risk ^[27] 9:9 17:8,15 25:14 38:17,19 39:19 40:19 42:3,4 44:9,12,13,17,17,25 45:3 46:9,18 47:5 55:12 56:2 59:14,16 60:16 65:14 66:20 riskiness ^[1] 46:11 risks ^[1] 25:3 rob ^[1] 66:14 robbed ^[1] 49:1 robberies ^[1] 48:24 robbery ^[3] 21:6 22:6 49:18 ROBERTS ^[8] 3:3 22:14 27:8,12 32:20 63:1 68:9,23 Rodriguez ^[1] 58:19 role ^[2] 6:1 34:8 Roof ^[1] 68:18 room ^[1] 51:24 Rosemond ^[1] 24:24 rule ^[11] 25:23 27:16,17 50:22 52:20 53:3,18 63:20 64:13,17,20 ruled ^[1] 61:14 rules ^[1] 30:10 ruling ^[1] 68:2 run ^[3] 13:15 14:25 45:22 running ^[1] 11:21</p> <p style="text-align: center;">S</p> <p>same ^[38] 7:23 10:16 11:5 13:13,18,22 14:21 15:25 30:3,5 33:7,9 42:9 44:3,4 45:2,3,23 51:7 53:13 54:4,10,12,19 55:10 56:4,9 57:9,18,22 58:5,8 59:16 61:18 68:4,7,12,21 satisfied ^[1] 16:23 save ^[1] 52:14 sawed-off ^[1] 48:25 saying ^[11] 4:23 15:4 17:7 23:23 25:13 27:22 35:2 44:20 54:7 63:20 65:8 says ^[3] 17:6,9 55:24 Scalia ^[2] 40:2 42:6 scope ^[1] 66:2 Second ^[8] 5:12 11:16 14:24 22:23 26:18 33:11 44:16 63:14 secondary ^[1] 38:7 Section ^[27] 3:11,23 7:21 19:11,25 20:11,18 22:18 24:16 26:7 27:3,7,11 30:9 33:8 36:16,16 48:15 57:2,8,8,21 62:5,5,20 67:2,16</p>	<p>see ^[12] 6:20 11:6 28:2 29:7 35:11 42:23 44:25 59:13,22,22,22 60:9 seeing ^[1] 48:6 seek ^[2] 28:8 62:15 seem ^[2] 29:17 65:2 seemed ^[1] 6:9 self-contained ^[1] 63:16 selling ^[2] 8:21 9:2 send ^[1] 7:11 sending ^[1] 9:16 sense ^[6] 51:18,21,24 54:10 57:23 59:4 sentence ^[11] 16:5,11 25:8 29:4,4,8 30:3,5 68:4,6,12 sentences ^[9] 28:22 29:5 30:16 31:2,4,9,15 68:14,21 Sentencing ^[2] 6:4 43:19 separation ^[5] 43:15 47:15 51:2 53:24 59:2 series ^[1] 48:24 serious ^[2] 42:3 56:1 serve ^[1] 27:11 serves ^[2] 21:13 52:21 Sessions ^[3] 44:2 56:8,17 set ^[3] 8:1 14:13 66:8 settled ^[1] 6:8 sex ^[1] 63:24 share ^[1] 33:11 short-barreled ^[1] 40:4 shotgun ^[2] 40:4 48:25 shouldn't ^[3] 44:1 56:21 64:14 show ^[4] 3:13 13:25 63:11 64:7 shows ^[1] 64:13 side ^[2] 28:19 64:4 significant ^[1] 28:21 significantly ^[1] 30:16 similar ^[2] 33:12 58:4 simply ^[5] 8:18 34:25 38:11 50:8 63:11 since ^[1] 48:7 single ^[4] 5:11 10:15,15,19 singular ^[1] 36:17 situation ^[6] 20:3,14 25:2,15 58:4 66:19 six ^[1] 49:10 Sixth ^[2] 33:21 35:7 skip ^[1] 8:9 slam ^[1] 64:10 slightly ^[2] 11:18 23:1 solely ^[1] 36:15 Solicitor ^[1] 1:19 solution ^[1] 45:11 solve ^[1] 18:21 somebody ^[2] 21:23 23:25 someone ^[3] 16:7,10 20:2 sometimes ^[3] 41:25 50:14,18 Soprano ^[2] 21:17,19 sorry ^[8] 8:22 11:21 25:6,12,17 32:16 40:11 54:2 sort ^[3] 9:21 42:6 65:8 SOTOMAYOR ^[19] 4:4,8,10,14,16 5:3,18,21 32:14,16,17 36:3,8 64:22,24 65:1,21 67:24 68:1 source ^[1] 52:7</p>	<p>sources ^[2] 45:24 52:5 spawn ^[1] 67:17 speaking ^[1] 65:10 speaks ^[1] 19:12 specific ^[5] 7:20 15:15,15 59:24 66:8 specifically ^[2] 34:11,12 specified ^[1] 23:22 sphere ^[1] 53:13 spoken ^[1] 49:24 spot ^[1] 65:12 Spotting ^[1] 58:19 squarely ^[1] 31:5 squeeze ^[1] 25:9 stack ^[1] 27:24 stacked ^[1] 28:24 standard ^[2] 9:21 53:15 stare ^[1] 44:10 start ^[2] 21:8 52:16 starts ^[2] 6:2,7 stash ^[3] 66:11,15,15 state ^[3] 26:16 42:16 60:3 stated ^[1] 58:19 statement ^[1] 35:20 STATES ^[8] 1:1,3,15 3:5 34:9 39:6 45:12 58:2 statistics ^[1] 45:24 statute ^[35] 4:3 6:20 7:15 8:16 11:3,13,17 14:8 15:10 17:1 21:11 22:5,24 23:16 24:3,25 28:2 31:14 33:3 37:20 41:15,23 42:19,25 43:17,18 48:10 53:21 58:21 61:6,6 63:13 65:5,18 67:6 statutes ^[4] 13:16 25:22 26:16 50:24 statutory ^[5] 16:13 20:19 36:23 44:11 53:4 stay ^[1] 68:7 stick ^[1] 14:2 still ^[2] 13:1 26:24 sting ^[1] 66:11 store ^[2] 8:19 9:1 stores ^[1] 48:25 Story ^[1] 52:6 strength ^[1] 44:11 stretch ^[1] 35:9 string ^[1] 64:23 strongly ^[1] 37:1 structure ^[1] 61:17 study ^[1] 51:9 stuff ^[1] 15:1 subject ^[2] 41:5 54:12 submitted ^[2] 68:24 69:2 subsection ^[11] 7:20 38:14 41:6,6,10 55:25 56:1 60:12,15,21 61:25 subsection-specific ^[1] 26:1 subsections ^[1] 54:11 subset ^[1] 67:3 substantial ^[7] 17:8,15 44:17,17 46:18 59:14 65:14 substitute ^[2] 9:17 17:12 suffer ^[1] 33:7 suggested ^[1] 45:6 suggesting ^[1] 33:12</p>
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Official - Subject to Final Review

<p>suggests ^[1] 24:14 support ^[4] 43:14 47:15 65:9 67:22 supported ^[1] 37:2 Suppose ^[2] 59:5 60:4 SUPREME ^[2] 1:1,14 sweeps ^[1] 60:21 switch ^[1] 19:14 system ^[3] 9:22 26:23,24</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talked ^[2] 50:16 51:1 talks ^[3] 19:13 34:17 55:24 Tay ^[1] 36:7 Taylor ^[8] 34:5,9,13,20 35:17 36:1,10 55:4 tense ^[5] 17:14,18 18:3 19:13,15 tenses ^[1] 19:10 term ^[8] 7:16 10:21,24 14:3 19:23,24 56:18 58:18 terms ^[4] 27:1 31:15 45:1 50:11 terrorism ^[1] 67:22 terrorist ^[1] 67:23 tertiary ^[1] 38:7 test ^[1] 15:13 Texas ^[1] 1:23 text ^[8] 31:14 33:3 36:11,15,22 38:5 53:21 58:21 textual ^[3] 37:2 38:13 51:15 themselves ^[1] 38:18 theory ^[1] 8:5 there's ^[12] 11:6 24:2,11 29:3 36:1 42:9 56:12 59:18 64:20 65:8,12 66:7 therefore ^[2] 43:1 59:17 They've ^[1] 5:11 thinking ^[5] 31:7 48:12,16,20 50:7 third ^[2] 33:13 64:13 though ^[3] 23:6 27:14 50:22 thousands ^[1] 26:21 threatened ^[1] 44:22 threatening ^[1] 63:25 three ^[3] 33:6 58:11 60:1 threshold ^[3] 44:9,13 55:12 threw ^[1] 42:7 throughout ^[1] 10:16 thrown ^[1] 28:23 Title ^[1] 19:12 today ^[3] 49:9 62:10,17 Tony ^[2] 21:17,19 tools ^[1] 53:4 top ^[2] 28:24 31:15 totally ^[1] 33:24 tough ^[2] 42:14,18 touting ^[1] 65:2 tracking ^[1] 13:5 traditionally ^[2] 48:18 50:7 trafficking ^[2] 5:20 63:25 trained ^[1] 67:23 training ^[1] 67:23 transgression ^[4] 11:1 14:11,12 16:1 treat ^[2] 10:6 61:24 treated ^[2] 41:9 62:10</p>	<p>treatment ^[1] 33:12 tremendous ^[1] 28:11 trial ^[5] 3:21 7:7 34:18 35:3 45:18 tried ^[2] 18:20 45:6 triggered ^[1] 53:14 true ^[2] 23:19,19 truest ^[1] 59:4 truth ^[1] 57:19 try ^[2] 16:4 40:5 trying ^[4] 24:25 33:22 38:5 54:14 two ^[17] 10:10,10 11:15 13:18,22 15:14,21 36:25 44:4 51:6,10 52:12 55:20 58:4 60:19 62:2 65:24 typical ^[2] 39:1 40:17 typically ^[3] 39:17,23 50:23</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[2] 28:14 45:15 ultimately ^[2] 37:22 40:6 unanswerable ^[1] 46:5 unconstitutional ^[6] 3:12 32:12 41:16 43:3 45:9 46:18 undeniably ^[1] 27:6 under ^[22] 16:10 27:3 30:8,9,20 31:24 32:3 33:12 38:14,21 40:16,18 49:11 54:4,8 55:19 56:20,21 65:17 66:10,19 67:16 undercover ^[1] 66:14 undergirded ^[4] 33:20 34:4,5,5 underlying ^[4] 9:12 17:11,13 31:16 understand ^[10] 4:10 10:1 11:24 13:6 16:11 40:8 41:11 43:11,12 63:23 understanding ^[1] 38:15 understood ^[7] 7:22,23 10:22 11:9 14:4 20:4 32:8 UNITED ^[8] 1:1,3,15 3:5 34:9 39:6 45:12 58:2 Unlawful ^[1] 39:11 unless ^[1] 60:9 unusual ^[2] 3:19 51:7 unworkable ^[3] 37:6,11,25 up ^[10] 27:19,25 28:3 42:7 44:16 66:12 67:20 68:5,6,17 upping ^[2] 25:1 27:13 urged ^[1] 6:3 urging ^[6] 11:10 30:2 63:18 64:19 67:1,5 uses ^[3] 7:16 18:14 19:13 using ^[4] 7:18 54:19 61:11,12</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacated ^[1] 29:6 vague ^[2] 59:7,17 vagueness ^[5] 43:14 44:6 47:11,12 62:24 vast ^[1] 65:11 version ^[2] 5:15 20:9 versus ^[12] 3:5 17:17 34:9 36:13 39:6 41:8 44:2 51:14 56:9,17 58:2,19 violated ^[2] 11:4 14:15 violation ^[3] 8:24 9:4 11:7</p>	<p>violence ^[20] 7:16,19,21 8:22,23 21:20 22:25 26:2 31:17 42:1,12 47:19 48:16 49:4,17,23 57:4 62:7 65:14 67:12 violent ^[15] 8:2,14 20:4 26:22 27:5 28:10 30:17 31:9 41:25 42:1,2,22 47:19 48:18 50:7 void ^[3] 43:13 44:5 62:24</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wait ^[1] 44:15 walks ^[1] 65:8 wanted ^[9] 7:25 27:6 31:8,9,13,14 32:8 67:11 68:14 wants ^[3] 42:21 45:18 51:3 Washington ^[2] 1:10,20 way ^[23] 3:19 6:6 7:17 9:3 11:9 15:18 16:3 17:23,25 20:1 22:18 27:16,18 35:6 37:24,25 38:1 54:17 55:23 58:5 61:14 62:20 64:1 ways ^[6] 8:3 14:4 18:25 36:25 42:17 65:24 Wednesday ^[1] 1:11 weight ^[2] 19:10 59:25 whereas ^[2] 31:21 32:3 Whereupon ^[1] 69:1 whether ^[11] 11:6 22:1,10 24:16 27:5 35:18 38:16 47:6 50:5 59:7 63:15 whole ^[4] 9:15 23:7 57:16 67:17 will ^[9] 10:2 27:4 29:5 30:6 50:17 65:5,25 66:2 68:2 win ^[2] 43:1 49:10 wiped ^[1] 30:22 within ^[1] 34:21 Without ^[6] 5:3 8:11 25:16 41:14 55:4 61:25 word ^[13] 9:24 10:6,15 13:18,22 20:13,15,16,17 24:23 41:5 54:1 55:20 worded ^[1] 55:23 words ^[5] 23:12,13 41:8 44:16 59:14 work ^[5] 11:9 14:4 23:14 50:19 53:1 workability ^[3] 34:23 36:12 38:6 workable ^[6] 6:13,17 37:5,10,24 38:1 world ^[1] 29:13 worried ^[1] 19:17 worse ^[2] 47:21,21 worst ^[1] 26:22 write ^[3] 17:23,25 45:16 writes ^[2] 44:19 45:14 writing ^[1] 42:6 wrote ^[2] 50:11 60:4</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[1] 10:12 years ^[3] 33:23 43:21 58:9 youthful ^[2] 16:7,8</p>
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