

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
)
) Petitioner,)
)
) v.) No. 17-765
)
VICTOR J. STITT, II,)
)
) Respondent.)
)

UNITED STATES,)
)
) Petitioner,)
)
) v.) No. 17-766
)
JASON DANIEL SIMS,)
)
) Respondent.)
)

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12 JASON DANIEL SIMS,)

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15 Washington, D.C.

16 Tuesday, October 9, 2018

17 The above-entitled matter came on for
18 oral argument before the Supreme Court of the
19 United States at 11:08 a.m.

20 APPEARANCES:

21 ERICA ROSS, Assistant to the Solicitor General,
22 Department of Justice, Washington, D.C. ;
23 on behalf of the Petitioner.

24 JEFFREY L. FISHER, ESQ., Menlo Park, California ;
25 on behalf of the Respondents.

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

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-765, United States
5 versus Stitt, and Case Number 17-766, United
6 States versus Sims.

7 Ms. Ross.

8 ORAL ARGUMENT OF ERICA ROSS

9 ON BEHALF OF THE PETITIONER

10 MS. ROSS: Mr. Chief Justice, and may
11 it please the Court:

12 The crime of burglary has always
13 focused on dwellings. By the time Congress
14 adopted the current version of the Armed Career
15 Criminal Act in 1986, the vast majority of
16 states had burglary statutes protecting all
17 types of homes, including the non-permanent and
18 mobile dwellings at issue in these cases.

19 In the words of Taylor versus United
20 States, that was the generic sense in which the
21 term "burglary" was then used in the criminal
22 codes of most states.

23 JUSTICE GINSBURG: That wasn't the
24 position that the government took prior --
25 prior to Mathis, was it? I thought that prior

1 to Mathis, the government acknowledged that
2 generic burglary did not include motor vehicles
3 as habitations?

4 MS. ROSS: I don't think that's quite
5 right, Your Honor. Before Mathis, this issue
6 didn't come up as often because, obviously, the
7 government often had two arguments it could
8 make. It would make a divisibility argument as
9 well as a mobile dwellings argument, but the
10 government did, in many of the court of appeals
11 cases going back to the '90s and the early
12 2000s, actually make this argument.

13 Again, it's become more important
14 following Mathis because now the divisibility
15 analysis is harder, and so, in more cases, the
16 outcome is actually turning on whether burglary
17 is capacious enough to include the very types
18 of burglaries that, as we note in the brief, at
19 least 44 states would have counted in 1986.

20 JUSTICE SOTOMAYOR: I have little
21 problem understanding your argument with
22 respect to mobile homes or floating homes.
23 Those are structures that don't have any
24 propulsion -- self-propulsion mechanisms. If I
25 drive by a mobile home, it's a home on land. I

1 don't think of it as a vehicle in any
2 meaningful way. A floating home is essentially
3 the same. It just floats, but, to move it, you
4 need a vehicle to move it of some sort, a ship.

5 But RVs, campers, tents, these
6 temporary things, how is some -- someone
7 supposed to know that people are using them to
8 sleep in at a particular moment?

9 MS. ROSS: Well, Your Honor, to answer
10 sort of your question directly and then just
11 take -- take a step back, I think people often
12 will know that those are being used because
13 those are, in fact, designed or adapted for
14 that purpose. And so you sort of know that an
15 RV generally has --

16 JUSTICE SOTOMAYOR: All right. But
17 how about a -- just a car? There are plenty of
18 homeless people, I know, in both New York and
19 Washington, because I've seen them, sleep in
20 their cars, but, if I'm a thief and I see a
21 blanket or a pillow in the back of the car, I
22 have no idea, there's no notice that it's being
23 used to sleep in because -- or to sleep in
24 overnight. You know, parents who take a kid on
25 a trip will throw a pillow and a blanket in the

1 back. I've thrown one in the back if someone
2 else is driving during the day.

3 So what are we supposed to do about
4 the "used" part of this? "Adapted" I
5 understand. You might be able to see that.
6 But how would you, if you're a thief, know that
7 a car is being used for someone to sleep in
8 overnight?

9 MS. ROSS: So, Your Honor, I think
10 there are a number of points sort of in that
11 question and I want to try to get to all of
12 them.

13 I actually don't think that the
14 vehicle that's simply being used on the trip
15 taking the kid to college is at all at issue in
16 this case. That's not a sort of ordinary
17 interpretation of either of the statutes that
18 we have before us.

19 The Sims statute that comes closest to
20 make this -- to making this argument, the
21 Arkansas statute applies either to a vehicle
22 that is customarily used for overnight
23 accommodation or one in which a person lives.
24 So somebody sleeping overnight would not fall
25 in there. I also think --

1 JUSTICE SOTOMAYOR: So where any
2 person lives. The homeless person who lives in
3 a car.

4 MS. ROSS: Right, Your Honor. And we
5 don't think that even that interpretation is in
6 front of this Court because that was not raised
7 previously in the brief in opposition. And it
8 also --

9 JUSTICE SOTOMAYOR: So define "used"
10 for me. How is --

11 MS. ROSS: So --

12 JUSTICE SOTOMAYOR: And define it in a
13 way that a thief is going to know or a burglar
14 is going to know that it's being used as a
15 home.

16 MS. ROSS: So, Your Honor, the -- I
17 don't think Congress was focusing specifically
18 on whether a burglar would know ahead of time.
19 What Congress was doing was looking at how the
20 states defined "burglary," and that is
21 essentially the -- the central intuition of
22 this Court's decision in Taylor, is that
23 Congress did not itself provide a functional
24 definition of "burglary."

25 What it did was it looked at how the

1 states defined "burglary." And the states, by
2 and large, included vehicles used and adapted
3 for overnight accommodation.

4 Now the specific provision that's at
5 issue in the Sims statute, again, if you think
6 it's properly before the Court, it requires an
7 interpretation of the state law. That's
8 something that this Court would ordinarily
9 defer to the regional court of appeals on, and
10 -- and the regional court of appeals didn't
11 consider that here. But I think it's
12 significant that what the statute says is
13 "lives." And that is someplace in which
14 someone, even in ordinary usage, makes a home.

15 And so I don't think that will
16 necessarily be an ordinary structurally, not at
17 all adapted or changed vehicle.

18 JUSTICE GORSUCH: Well --

19 JUSTICE SOTOMAYOR: You've gone around
20 my question. Would someone who breaks into a
21 car that a homeless person is using as their
22 home -- are they encompassed by your definition
23 or by these statutes?

24 MS. ROSS: So, Your Honor, I think
25 they are not encompassed by these statutes.

1 And I think that our definition turns on
2 whether most states would, in fact, have
3 included that person.

4 So I don't think that it's encompassed
5 by this statute because, again, I think even
6 the homeless person that you're hypothesizing
7 would change their vehicle in some way that
8 might put a burglar on notice.

9 But even if you disagree with me on
10 that, no state case -- as Respondent Sims
11 readily admits in the brief, no state case has
12 applied it to a vehicle in which someone
13 happens to live. And that's not just true of
14 Arkansas.

15 Between the Respondents' brief and our
16 reply brief, we've come up with about 12 case
17 -- 12 states that have language that's similar
18 to that, and in none of those states can the
19 government find a case in which these types of
20 statutes were applied to a place where someone
21 lives. And so I think --

22 JUSTICE GORSUCH: Well, counsel, I'm
23 not sure how that helps you, because you've
24 identified, first of all, that only 12 states
25 are at issue, which seems to me a strike

1 against the government here, as to suggest that
2 this was what Congress had in mind in 1984/'86.

3 Second, the -- the statute at least in
4 Arkansas is disjunctive, right? It says a -- a
5 place customarily used to -- to -- to live,
6 which might be your -- line up with the
7 Tennessee statute and suggest some sort of
8 customization or change. But then it uses
9 "lives in." And that doesn't connote any
10 changes to the vehicle itself at all. That
11 could be sleeping in the back of -- of a car,
12 nothing more.

13 And I wonder, under your
14 interpretation, about this hypothetical, let's
15 say someone breaks into such a car where
16 someone's living, a homeless person or someone
17 crossing the country, to steal a flip phone.
18 That would be burglary, I -- I think you'd say,
19 and the ACCA would kick in and 15 years might
20 -- might follow as a sentence.

21 Compared to the person who tows away
22 the same car without entering it and commits a
23 theft, that would just be a common law theft
24 and -- with no -- no attendant problem, even
25 though maybe an arguably greater harm has

1 occurred. What do you think about that?

2 MS. ROSS: Well, Justice Gorsuch, to
3 sort of answer your questions in reverse order
4 perhaps, I think that's actually not
5 particularly anomalous because what the -- what
6 the burglar has done in the first case but
7 hasn't done in the second case is opened up
8 exactly the risk of a violent confrontation
9 with which Congress was concerned in -- in
10 enacting a statute that specifically both in
11 1984 and 1986 --

12 JUSTICE GORSUCH: Well, if the car is
13 empty and no one's around, it's -- it's quite
14 unlike a home. You don't know what you're
15 going to enter -- what you're going to find
16 when you enter. A car, you can look in and
17 see. So there's no risk of violent encounter
18 in either of my hypotheticals. So I modified
19 my hypothetical for you there. Now what?

20 MS. ROSS: You have, Your Honor. But
21 I think at the same time what Congress was
22 doing, again, was not creating its own -- its
23 own definition of "burglary." It was trying to
24 use the work that the states had already done.
25 And that makes significant sense given that it

1 was enacting a recidivism statute and,
2 therefore, would want to cast its net broadly.

3 And this, I think, takes me to Your
4 Honor's first question, which is that,
5 actually, the numbers work in exactly the
6 opposite way, as you suggest.

7 On Respondents' view, there would only
8 be in 1986 -- and the numbers are similar today
9 -- about 12 states in the entire country that
10 would have any burglary offense whatsoever that
11 qualified under the Armed Career Criminal Act.

12 By contrast, on our view --

13 JUSTICE GORSUCH: I'm -- I'm sure he's
14 going to dispute that. We've been around the
15 numbers game already this morning. I'm sure
16 we'll be around it again.

17 But how many states in 1986 had
18 anything like a lives-in statute? It seems to
19 me an exceedingly small number you've cited to
20 us.

21 MS. ROSS: No, Your Honor, I don't
22 think it's exceedingly small. And this, I
23 think, will get me back to your second question
24 if the Court will bear with me.

25 So I think there are about 12 statutes

1 that had "lived in" or some kind of similar
2 language, but that's a subset of over 44
3 statutes that would have reached vehicles
4 generally in which people lived that were
5 adapted for overnight accommodation that were
6 customarily used for overnight accommodation.

7 And so I think what you see is that
8 the states all sort of coalesced around this
9 notion of what is a modern-day dwelling.

10 And that makes particular sense
11 because, as I began my presentation this
12 morning, common law or, excuse me, burglary has
13 always focused on dwellings. And so it is
14 hardly surprising that a large number of states
15 would have, over time, noticed and taken heed
16 of the fact that people live in many different
17 places and that burglary statutes, therefore,
18 should protect all of those places.

19 And so I think what Congress, again,
20 was doing was seeing where the states drew
21 those lines. And we know that from this
22 Court's decision in Taylor. I mean, Taylor
23 said on no fewer than four occasions that
24 burglary was, in fact, meant in the Armed
25 Career Criminal Act to capture the common sense

1 in which the states were using the term.

2 JUSTICE GINSBURG: But you are using
3 any car, that is, any car is capable of being
4 lived in, so the burglary statute that you're
5 -- you are envisioning, a statute that took in
6 anything capable of being lived in would
7 include any car?

8 MS. ROSS: No, Justice Ginsburg, I
9 don't necessarily agree with that. I think
10 that the Arkansas statute does not actually
11 cover that type of any car that is lived in for
12 the reasons I was giving earlier.

13 One, I think the -- the definition --
14 the dictionary definition of "lived" would be
15 to occupy as a home, and so we ordinarily would
16 see some type of change to the structure.

17 Two, there is no state case, whether
18 in Arkansas or in any other jurisdiction, that
19 has similar language actually applying the
20 statute to the home in which someone lives
21 without any modification or really to a vehicle
22 at all.

23 And, three, I think if you look at the
24 two parts of the statute, as I believe Justice
25 Gorsuch was noting earlier, one prong says

1 "customarily used," and we think that that's
2 something that is commonly used, perhaps
3 because it's designed for overnight
4 accommodation, and the other is someplace where
5 someone lives. And we think that that brings
6 in sort of the -- the adapted in this
7 particular case.

8 And so, when you put those two prongs
9 together, you actually get to a place that is
10 quite similar to the Tennessee statute. And I
11 think that perhaps is why this --

12 JUSTICE GORSUCH: It sure sounds to me
13 like you've turned those two prongs into one,
14 made them superfluous.

15 MS. ROSS: I don't think so, Your
16 Honor, because something that is customarily
17 used would be everyone knows that you can live
18 in that. So it's a mobile home. It's
19 something of that nature.

20 Whereas the lived in is just sort of
21 saying, if you actually live in your car, or
22 not your car because no cases, again, actually
23 cover your car, but, if you actually live in
24 another type of structure, we're going to
25 assume that you've adapted it in some way.

1 JUSTICE SOTOMAYOR: I'm -- I'm sorry.
2 What is "assume"? And then what's the meaning
3 of "adapted"? Is it a structural change of
4 some sort, or is it throwing a pillow and
5 blanket? Is it putting a mattress in there?
6 What -- what's "adapted" mean?

7 MS. ROSS: So, again, Your Honor, I
8 would --

9 JUSTICE SOTOMAYOR: And what's
10 customary to understand that adaptation?

11 MS. ROSS: So I think the states have
12 grappled with what -- what is adapted for
13 overnight accommodation under their statutes,
14 and, by and large, this comes up in cases
15 involving campers, hotels, houses under
16 renovation, and -- and the answers are not
17 surprising.

18 Respondent Stitt cites three cases for
19 the suggestion that maybe it's difficult to
20 decide whether something is adapted for
21 overnight accommodation. And all three of
22 those involve just the types of structures --

23 JUSTICE SOTOMAYOR: But we can't just
24 leave it in state hands. We're providing a
25 federal definition. So what's the federal

1 definition that we give?

2 MS. ROSS: You are providing a federal
3 definition, Your Honor, but, again, I don't
4 think that when Congress did this it was trying
5 to itself determine these edge cases. I think
6 instead it was looking to the content --

7 JUSTICE SOTOMAYOR: Well, we said
8 dwelling and structure. So now -- building and
9 structure. Pardon me. Now we have to define
10 "structure."

11 MS. ROSS: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: Or give some
13 understanding of what the federal meaning of it
14 was. In our cases, we very clearly excluded
15 vehicles. We said that.

16 And so now you want us to put a gloss
17 on that. And I want to know how and what
18 guidance we give on that gloss.

19 MS. ROSS: Yes, Your Honor. So --

20 JUSTICE SOTOMAYOR: So does it have to
21 be something permanent to be adapted?

22 MS. ROSS: So I don't think that there
23 is a -- a clear answer to that question,
24 unfortunately. I think the -- the general
25 answer is yes.

1 JUSTICE SOTOMAYOR: Well, the problem
2 really is that, if it's criminal law, so
3 shouldn't we be clear?

4 MS. ROSS: Well, we should be --

5 JUSTICE SOTOMAYOR: Shouldn't we give
6 notice to people of what the consequences of
7 their actions are, and so don't we have an
8 obligation to be as clear as we can be?

9 MS. ROSS: Yes, Your Honor. I think
10 specifically of the examples that you
11 mentioned, the bed and the -- the structural
12 change, those are clearly adaptations that
13 would count. But even --

14 JUSTICE SOTOMAYOR: Just a bed,
15 putting a mattress?

16 MS. ROSS: Yes, Your Honor. I mean, I
17 --

18 JUSTICE SOTOMAYOR: How about the
19 people who are carrying the mattress from the
20 store to their home? I see that all the time.

21 MS. ROSS: Well, no, Your Honor,
22 because that wouldn't be installed in a way
23 that was actually adapted for overnight
24 accommodation. You would just be --

25 JUSTICE SOTOMAYOR: So it has to be

1 installed in some way?

2 MS. ROSS: I mean, you would just be
3 transporting your mattress in that case. I
4 don't think you've installed your groceries
5 when you bring them home, or things of that
6 nature, or adapted them to that.

7 JUSTICE GINSBURG: Does it matter if
8 it says sometimes, sometimes I sleep in my car,
9 and sometimes I sleep in a home?

10 Does it have to be the regular
11 residence? Does the car to qualify have to be
12 what you sleep in all the time, or could it be
13 that you have a principal residence someplace
14 else, but many times you sleep in your car?

15 MS. ROSS: Well, Justice Ginsburg,
16 just to back up again, I think that the vehicle
17 in which you happen to sleep on occasion
18 wouldn't fall in even under the broadest
19 possible interpretation of the Arkansas statute
20 at issue in Sims because you wouldn't live in
21 your car in that instance. You wouldn't occupy
22 it as a home.

23 JUSTICE BREYER: I'd like to ask you a
24 general question, if you would answer it.
25 You've read probably Justice Alito's opinion

1 about the woman who was trying to go to
2 Brussels and she ended up in Serbia.

3 MS. ROSS: Yes. I have.

4 JUSTICE BREYER: All right. Now
5 you've used the words -- I mean, that -- that
6 -- I think there's a point there -- you've used
7 words like common sense. You just heard
8 Justice Sotomayor use somewhat similar words.
9 How to -- generic burglary, that's the word,
10 generic burglary.

11 I mean, Congress wrote 10 words in
12 this statute. It thought it had a simple task.
13 All we have to do is look to state law, and
14 then we'll see whether it's a violent crime or
15 not. But Congress forgot that there are
16 thousands of state laws with variations all
17 over the place.

18 So what this reminds me of, what we're
19 doing, *Swift v. Tyson*, the brooding
20 omnipresence of the law. We look up in the sky
21 to decide what is generic burglary. So what in
22 your opinion do we do?

23 Now Judge Posner said -- and I agreed
24 with this -- what you should do or the
25 Sentencing Commission should find out how these

1 cases are actually prosecuted, which you
2 haven't, nor has the Sentencing Commission.

3 A second possibility was to say:
4 We'll go back and see if there was violence in
5 this individual case, which is almost
6 impossible because all you see is a rap sheet
7 or something, you know, you don't know, but
8 over time, maybe.

9 And a third possibility is that the
10 Department of Justice asks Congress to rewrite
11 the statute, which is exactly what Ms. Bryn
12 said.

13 All right. Have you thought about
14 this over at the department? You have to
15 prepare these cases. Have you thought about
16 it? And, if you have a better approach than --
17 than I've just outlined, I'm -- my ears are
18 open.

19 MS. ROSS: Well, Your Honor, I -- I
20 certainly understand all of those concerns and
21 I don't think anyone standing here from the
22 Department of Justice would suggest that this
23 is always an easy determination under the
24 categorical approach.

25 I do think in this case it is not

1 particularly difficult, and that is because, as
2 I started out, burglary has always concerned
3 dwelling. So whatever the edge cases, whatever
4 the difficult cases under the categorical
5 approach, it's very clear that when this Court
6 noted in Taylor that Congress had eschewed the
7 common law and gone beyond the common law, that
8 it should have at least captured the types of
9 dwellings that we're talking about today
10 because, again, 44 states capture them.

11 JUSTICE BREYER: It may be, but do you
12 know when the last time was that I thoroughly
13 looked into state criminal law? It was my
14 first year of law school, and I'm not sure how
15 -- how much I looked into it even then.

16 (Laughter.)

17 MS. ROSS: Understood, Your Honor. We
18 have looked at it more -- more recently, and --

19 (Laughter.)

20 MS. ROSS: -- and, again, I mean, the
21 best I can give you is that 44 states would
22 have covered this in 1986. By contrast, on
23 Respondents' view, you would have 12 states
24 that have a generic burglary statute today.

25 And, as Justice Gorsuch noted, perhaps

1 my friend will quibble with that, but I --

2 JUSTICE GORSUCH: Well, I'd like you
3 to return to Justice Breyer's original
4 question. I know you want to run straight to
5 this case, and I appreciate that, but -- but
6 live with us for a moment in the unease of the
7 more general concern that Justice Breyer
8 raised.

9 If you survey circuit judges across
10 the country about one gripe they have with this
11 Court's jurisprudence, it may be the ACCA you'd
12 hear a lot. And the -- maybe the fourth option
13 I sometimes hear is why not do an Erie, instead
14 of Swift versus Tyson, and say, well, if the
15 state calls it robbery, if the state calls it
16 burglary, then it's robbery or burglary.

17 And I'd be curious, and -- and I'm not
18 holding you to any of it, but has the
19 department given any thought to any of these
20 options that Justice Breyer has outlined or
21 that I've just added?

22 JUSTICE KAGAN: May I add a fifth?

23 (Laughter.)

24 JUSTICE GORSUCH: Please.

25 JUSTICE KAGAN: Because I know there

1 actually is a statute in Congress right now
2 that replaces ACCA with a statute that looks to
3 the penalties that have been given. So I guess
4 my question is, has the department taken a
5 position on that statute that is pending in
6 Congress currently?

7 MS. ROSS: Your Honor, I apologize,
8 I'm actually not aware of whether the
9 department has taken an official position on
10 that. I know that the Attorney General issued
11 some sort of general remarks praising that
12 effort, but I don't know if that's gone to the
13 level of a real sort of department position.

14 I do think that we have thought about
15 sort of the other ideas that Justice Breyer and
16 Justice Gorsuch suggest, and among those, I
17 know, Justice Gorsuch, I believe you added
18 anything that the state calls burglary we'll
19 call burglary.

20 I know that this Court at least
21 rejected that in Taylor because, you know, you
22 would have some sort of unfortunate
23 consequences. For example, Michigan has always
24 entitled its burglary statutes as breaking and
25 entering, and they very clearly are burglary,

1 but that just happens to be the nomenclature
2 that Michigan used.

3 And what this Court said in Taylor and
4 -- and what Congress said was that it really
5 didn't want sort of offenders who exhibited
6 these -- these qualities, had had these
7 dangerous convictions previously, to escape on
8 a technicality.

9 JUSTICE ALITO: Well, at least with
10 respect --

11 MS. ROSS: And they do worry --

12 JUSTICE ALITO: Yeah. I mean, you're
13 not exactly on a winning streak here in ACCA
14 cases.

15 (Laughter.)

16 JUSTICE ALITO: You might have gotten
17 a hint that a majority of the Court really
18 hates ACCA and is picking it apart bit by bit
19 by bit.

20 And at least with respect to the
21 enumerated offenses like burglary, why not
22 depart from this categorical approach and look
23 at what actually happened in the particular
24 case to the extent that you can determine it?
25 If you can't determine that it -- it falls

1 within generic burglary, fine. But, in a lot
2 of cases, you're going to be able to figure
3 that out very quickly.

4 Otherwise, you're going to be at the
5 mercy of these hypothetical -- these marginal,
6 hypothetical cases that the -- the members of
7 the Court and their law clerks can think of.
8 So the car that is -- you know, has a mattress
9 in the back and -- and, you know, things like
10 that. Why not look at what actually happened
11 in the real world, as opposed to these -- these
12 hypotheticals?

13 JUSTICE GINSBURG: Because didn't this
14 Court say you can -- couldn't do that?

15 JUSTICE ALITO: Yeah, the Court said
16 that, but the Court isn't always right.
17 Sometimes when we make a mess --

18 (Laughter.)

19 JUSTICE ALITO: -- which we have done
20 in this -- in my humble opinion, in this area,
21 we have made one royal mess. Maybe we ought to
22 go back and correct our own mess.

23 MS. ROSS: Your Honor, again, I -- I
24 think perhaps in some case that would be
25 something that this Court needed to think

1 about. I really -- I apologize for keep
2 bringing -- for continuing to bring us back to
3 this case, but we haven't asked that the Court
4 reconsider Taylor in this case. And that's --
5 that's because we really don't think that we
6 need that in order to prevail here.

7 Taylor, obviously, is where the Court
8 first really embraced the categorical approach
9 with respect to burglary. And in this case, it
10 is quite clear, again, this -- this was really
11 the way in which the states defined burglary by
12 1984 and 1986. And in Taylor, this Court made
13 clear that it was helping or -- or illuminating
14 what Congress had done by looking to those same
15 state burglary statutes.

16 And Respondents' suggestion in this
17 case is essentially that this Court take the
18 words that Taylor drew from the state statutes
19 and this Court construe those words
20 significantly more narrowly than the courts of
21 those states actually did, and the statutes of
22 those states actually did, and in the process
23 eliminate more than 20 state burglary statutes
24 from the books, essentially, for ACCA purposes,
25 precisely because those state statutes would

1 cover all types of dwellings.

2 And whatever the edge cases, whatever
3 the hard cases under the Armed Career Criminal
4 Act, we just don't think that that is this
5 case, given what -- what had been on the books
6 in the states at that time.

7 Now I know there's been some
8 discussion this morning about how offenders
9 would have notice of -- of what is in and what
10 is out, but I think we can point you to the
11 same thing, which is that this was the commonly
12 understood -- understanding of burglary in 1984
13 and 1986, and so I don't think that it's too
14 much to assume that if you're convicted of
15 burglary under a typical burglary statute, that
16 that will, in fact, be what Congress and what
17 this Court considers burglary for purposes of
18 the Armed Career Criminal Act.

19 JUSTICE BREYER: Well --

20 JUSTICE GINSBURG: Suppose we think
21 about the consequences, the number of years
22 that are added to a person's life by ACCA.
23 Another approach the Court could take is to say
24 because this is such a harsh statute that has
25 such extreme consequences for the individual,

1 we are going to have a clear statement rule for
2 Congress. If you want to have this kind of
3 heavy penalties, you have to be clear. And if
4 it's ambiguous, we will -- we will not uphold
5 the application of ACCA.

6 The -- starting out with the premise
7 that when the consequences are so severe,
8 Congress has an obligation to be plain.

9 MS. ROSS: Your Honor, I -- I think
10 Congress was very plain in this statute. I
11 think, if you took someone in 1984 and 1986 and
12 said burglary, you would think, hmm, burglary
13 isn't generally a federal law or isn't
14 generally a federal crime; I'll look to how the
15 states define burglary. And this was how, in
16 fact, the states defined burglary.

17 Again, 44 states would include this
18 type of conduct. At least 31 include it in a
19 way that's narrow enough that they would have
20 an ACCA burglary statute on our view.

21 If you take my friend's position, that
22 number dwindles down to 12. And I don't think
23 that -- keeping in mind that Congress enacted a
24 very -- a significant penalty for these
25 offenses, I don't think Congress would have

1 expected its work to do so little.

2 And, importantly, it's not as though
3 those 12 would actually be the most severe or
4 the most aggravated burglary offenses in those
5 states. It's entirely based on this question
6 of whether they did or they didn't think about
7 all types of places, whether elaborate or
8 modest, where people live.

9 So you wouldn't even necessarily be
10 getting the aggravated burglary statutes in
11 that instance. In fact, if you look at the
12 Tennessee case that we have before us, Stitt,
13 that is an aggravated burglary conviction
14 because it's burglary of a habitation because
15 the court -- or the state very soundly made the
16 determination that when one burgles a
17 habitation, that is a more dangerous and a more
18 serious offense.

19 If I could reserve the remainder of my
20 time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Fisher.
24
25

1 ORAL ARGUMENT OF JEFFREY L. FISHER
2 ON BEHALF OF THE RESPONDENTS

3 MR. FISHER: Mr. Chief Justice, and
4 may it please the Court:

5 We ask the Court to affirm the
6 judgments below for three reasons.

7 First, this Court's precedent, from
8 Taylor on through to Mathis, make clear that
9 when it comes to the burglary provision of
10 ACCA, buildings and structures are in one
11 category that are inside the statute, vehicles
12 are in another category that are outside the
13 statute, and this case involves quintessential
14 vehicles.

15 Secondly, the "use" prong of the
16 government's definition that it offers to this
17 Court is an independent reason why Arkansas's
18 law goes beyond any generic definition of
19 burglary that would be acceptable.

20 And, third, if necessary, we would ask
21 this Court to apply the Sixth Amendment rule
22 that Justice Thomas announced in Apprendi and
23 himself laid out in Mathis and Shepard, that
24 ACCA itself violates the Sixth Amendment
25 because it transgresses the jury trial right.

1 Now --

2 JUSTICE KAGAN: May I stop you on your
3 first point, Mr. Fisher? So the Court has
4 indeed said many times that vehicles fall
5 outside the generic definition of "burglary."
6 But I think that when the Court said that, what
7 it really meant was this is a way to say if --
8 if the -- if a statute covers basic car theft,
9 it's outside ACCA. That's not the typical
10 burglary offense.

11 And the Court was not thinking about
12 mobile homes or RVs. It just didn't have that
13 in its head when it made those statements. So
14 those statements really don't have much to do
15 with the question in this case.

16 MR. FISHER: I think the -- the
17 closest the Court did come to actually dealing
18 with that question was in Mathis. Remember,
19 the Iowa statute there didn't simply cover all
20 vehicles; it covered vehicles that were adapted
21 for an over -- overnight accommodation or use
22 in a couple of other ways.

23 And the government in its brief said
24 the mere fact that the statute covers vehicles
25 is enough to put it outside of ACCA. And the

1 Court said the same thing four times in its
2 opinion.

3 And I'd hasten to add -- and I think
4 this goes back to Justice Ginsburg's question
5 in the first part of the argument about the
6 government's position in Mathis -- the
7 government on page 42 in Mathis said if you
8 adopt the divisibility rule being urged by the
9 other side, you're going to leave many state
10 statutes outside of burglary. And in Footnote
11 12, the government cited many state statutes
12 that it now is back here claiming actually do
13 fall within burglary, even though the
14 government's representation to this Court in
15 Mathis is that they would fall outside.

16 So I -- I understand --

17 JUSTICE GORSUCH: What do we --

18 JUSTICE KAGAN: But I don't think -- I
19 don't think Mathis really is -- is at odds with
20 what I was saying. Everybody in that case
21 agreed that this covered vehicles, broadly
22 speaking, and the government conceded it, the
23 -- the other party conceded it. All -- all --
24 all of the opinions viewed it that way.

25 And so nobody really ever addressed

1 the question of, are there different kinds of
2 vehicles in the world? Are there cars and are
3 there mobile homes?

4 MR. FISHER: Yeah. So -- so I
5 understand, Justice Kagan, you haven't had this
6 precise type of object in front of you. But I
7 think the Court's opinions are still
8 illuminating because the Court does say there's
9 vehicles on the one hand and structures and
10 buildings on the other.

11 And so the project here is which
12 category do things like sleeper vans or a
13 sailboat tied up at harbor that has a sleeping
14 quarters underneath fit into.

15 And so, just as the Court has held in
16 the Fourth Amendment context of California
17 versus Carney, just as the HUD regulations that
18 we cite at page 11 of our brief lay out, just
19 as the state law like Tennessee lays out, just
20 like local law, like local zoning law we cite
21 on the same page of our brief, they all
22 distinguish between floating homes and mobile
23 homes, which are designed to be stationary on
24 the one hand, and put those in the structure
25 category, or a -- or a dwelling or a residence

1 category.

2 On the other hand, there are things
3 like recreational vehicles, sleeper vans, and
4 boats that have sleeping quarters that have
5 always been in the vehicle category, and the
6 reason why is because the principal purpose of
7 those objects is transportation.

8 They can be used incidentally for
9 overnight accommodation and they are
10 occasionally used, but I want to stress to the
11 Court it's only occasional. And I know I heard
12 some displeasure with the categorical approach
13 in the first part of the case, and I'm happy to
14 engage in that, but just to take the law as it
15 stands, and as the government is not asking you
16 to change it, the -- the hypothetical the
17 government has to answer for is the vacant
18 sleeper van or boat tied up at harbor that is
19 used only a few days a year and shows no
20 outward signs of current habitation.

21 That's the hypothetical that both
22 Tennessee and Arkansas sweep in. I'll turn
23 later to the specific provision of Arkansas
24 law, the lives-in provision, which is even
25 broader. But that's the hypothetical the

1 government has to answer. Justice Kagan --

2 JUSTICE ALITO: But there are a lot of
3 -- there are a lot of vacation homes that are
4 occupied for only a short period of time and
5 a -- somebody contemplating a burglary can look
6 at them and determine pretty easily that place
7 is not occupied at the -- at the present time.

8 But what about, say you have a house,
9 and then next to it you have a self-propelled
10 vehicle that is designed or adapted for the
11 overnight accommodation of persons and is
12 actually occupied at the time of the initial
13 entry by the defendant.

14 Is there any reason why the -- the
15 burglary of the house should be treated
16 differently from the burglary of this vehicle?
17 Isn't the risk exactly the same?

18 MR. FISHER: Well, Justice Alito, I'm
19 going to answer that question, but just allow
20 me to preface it.

21 I don't have -- I don't have to win
22 that hypothetical because I -- the hypothetical
23 the government has to win is the person not
24 being in and it not being near a house. But,
25 to answer your question directly, I would still

1 say --

2 JUSTICE ALITO: Well, why don't you
3 have to win that? That's the Arkansas statute.
4 What I read you is exactly what the Arkansas
5 statute says.

6 MR. FISHER: No, no, no, the Arkansas
7 -- well, the Arkansas statute says --

8 JUSTICE ALITO: I'm sorry, the
9 Tennessee statute.

10 MR. FISHER: The Tennessee statute
11 does not require it -- it does require the
12 person to be there, yes, Justice Alito.

13 JUSTICE ALITO: Right.

14 MR. FISHER: But it does not require
15 it to be sitting right by a house. So it could
16 be --

17 JUSTICE ALITO: No, no. I'm just
18 saying, this is the contrast, why would -- why
19 is one you would concede burglary and the
20 other -- and the other is not? I don't see any
21 possible reason why the law should treat those
22 two situations differently.

23 MR. FISHER: I think because the
24 criminal law, we've heard a lot about notice
25 this morning, and a core concept of criminal

1 law is providing fair notice.

2 And so, for the same reason that a
3 vacation home is inside burglary because it is
4 a home, it is a dwelling, and so you would
5 expect it to be occupied as a residence, even
6 if it happens to be somebody's second home,
7 that is in.

8 The same objective characteristics of
9 a vehicle, even a recreational vehicle adapted
10 for occasional overnight accommodation, fall
11 outside. And so the criminal law has to draw
12 lines. You can't simply do it in that
13 fine-grained of a basis.

14 And the government's argument, Justice
15 Alito, I would add, does not depend on the
16 person being inside the vehicle at the time of
17 the crime. The government doesn't make that
18 argument. And that's the only way the
19 government could sweep in even the -- even the
20 customary use prong of the Arkansas statute.

21 But, Justice Kagan, you asked --

22 JUSTICE KAVANAUGH: But I notice if --
23 if you're convicted three times of burglary for
24 burglarizing an RV, you're on notice,
25 presumably, if you look at the federal statutes

1 and you then possess a firearm, that -- that
2 those burglaries were of a structure, as Taylor
3 said. I don't understand the notice point.

4 MR. FISHER: Well, Justice Kavanaugh,
5 I think that, if I may, it begs the question a
6 little bit whether the RV is, in fact, a
7 structure that's covered by --

8 JUSTICE KAVANAUGH: But you would look
9 at Taylor and you'd see it's citing the model
10 -- Taylor's the case, right, focus on Taylor.
11 It's a long time ago. It talks about other
12 structures. It doesn't limit it to the '84
13 definition, cites the Model Penal Code, cites
14 the LaFave Treatise, points out all the state
15 statutes, and I think if you're convicted three
16 separate times of breaking into an RV and look
17 at that, those sources, you would be on some
18 notice that you shouldn't be possessing a
19 firearm under federal law.

20 MR. FISHER: Well, Justice -- Justice
21 Kavanaugh, there are many, many pieces of
22 Taylor. So there is the state law piece that
23 my friend is focused on.

24 But Taylor also says on the very same
25 page that Congress in 1986 intended the

1 practical identical definition of "burglary" as
2 in the '84 Act. Remember, the '84 Act covered
3 only buildings.

4 JUSTICE KAVANAUGH: But Taylor --
5 Taylor does not do that, though, when it says
6 other -- or other structures. Quite clearly,
7 Taylor departs from the '84 statute in what it
8 describes there, don't you agree, when it says
9 "or other structures"?

10 MR. FISHER: I think it departs from
11 the '84, but that's why -- that's why the court
12 --

13 JUSTICE KAVANAUGH: Because the '84
14 Act only says building.

15 MR. FISHER: That's right. I think
16 that's why the court said practically identical
17 and not identical.

18 JUSTICE KAVANAUGH: And one of the --
19 I'm sorry to interrupt. And one of the reasons
20 it departed, as I read the opinion, which is
21 quite thorough, is it did a full excavation of
22 the Model Penal Code, of the treatises, of the
23 state statutes, and said the '84 definition
24 does not reflect common understanding, as Judge
25 Sutton described in detail in his opinion, of

1 the common understanding at the time of what
2 burglary entailed.

3 MR. FISHER: Right. The Court did
4 look to state law in Taylor, but, as I said, it
5 also looked to legislative intent and the
6 drafting history and the like.

7 And I think Taylor was correct insofar
8 as it went at that time that you still would
9 have covered a majority of the states, even if
10 Taylor covered vehicles adapted for overnight
11 accommodation. The switch happened in Mathis.

12 That's when the government came to the
13 Court and said, if you have an aggressive
14 divisibility jurisprudence, that's going to
15 leave aside many state laws because of
16 divisibility reasons. So the answer to the
17 state law concern is in Mathis. And that's the
18 bridge the Court has already crossed and that
19 the government doesn't ask the Court to -- to
20 -- to revisit.

21 If we're talking about Congressional
22 intent, I think there's one other important
23 thing to put on the table in the text of the
24 law, and that's the residual clause. I know
25 the Court obviously has invalidated that

1 clause, but we think the text is relevant in
2 terms of Congressional intent.

3 And the text of that clause, remember,
4 reads as follows. After the enumerated crimes,
5 it says any other crime that "otherwise
6 involves" -- I'm sorry, I'm reading at page
7 10-A of the government's appendix -- "that
8 otherwise involves conduct that presents a
9 serious potential risk of physical injury."

10 And so the word "otherwise" tells us
11 that when Congress defined "burglary" -- in
12 fact, it didn't define it -- but when Congress
13 used the word "burglary," it must have assumed
14 that the version of burglary it had in mind
15 "involved conduct that presents a serious
16 potential risk of physical injury."

17 Now, if you look at the NAFD amicus
18 brief -- and this is responsive also to Justice
19 Breyer's questions about statistics -- there
20 actually have been quite a lot of studies
21 conducted about burglary law, and what they
22 find is that when there's a burglary of a home
23 or somebody's residence, there is a real
24 possibility that you could have a violent
25 confrontation or physical injury, something in

1 the range of 2 to 7 percent of the time.

2 By contrast, when it's burglary of a
3 non-residential structure, the percentage goes
4 down to .17 percent, which translates to one
5 out of every 700 crimes that involve what a
6 state would expansively call burglary of a
7 non-residential structure.

8 JUSTICE BREYER: Which category does
9 this case belong in?

10 MR. FISHER: So this case belongs in
11 the latter.

12 JUSTICE BREYER: Why?

13 MR. FISHER: Because we're talking
14 about things that are not primary residences.
15 They're not --

16 JUSTICE BREYER: But they're -- I
17 mean, they're residences, they're inhabited by
18 people, and so I don't know why it would be a
19 lower statistic if it's, say, a car or a
20 trailer or -- or some kind of motorized vehicle
21 that a person uses as his home.

22 MR. FISHER: Well, I think, Justice
23 Breyer, the typical usage of something like a
24 sleeper van or recreational vehicle is not as a
25 residence. A person has a home, and then they

1 have a second vehicle that they use for trips
2 and weekends and vacations and the like.

3 And so, if you ask somebody that has a
4 house and a sleeper van, where is your
5 residence, they would point to their house, not
6 the sleeper van.

7 JUSTICE KAVANAUGH: What are you --
8 what are you --

9 MR. FISHER: And I think that's the
10 way the statistics work.

11 JUSTICE KAVANAUGH: What are you --
12 what are you basing that assertion on?

13 MR. FISHER: I'm just basing it on a
14 common sense understanding of the word
15 "residence," Justice Kavanaugh. And I think --

16 JUSTICE KAVANAUGH: Are these
17 assertions about RVs you're --

18 MR. FISHER: The customary usage
19 assertion?

20 JUSTICE KAVANAUGH: Yes. Yes.

21 MR. FISHER: Well, we -- we do cite --
22 we cite a statistic in our brief from a -- from
23 a trade association, Justice Kavanaugh, if you
24 want to look at that as a pretty thorough study
25 done out of the University of Michigan, and

1 what they found is that the typical owner of a
2 recreational vehicle uses it only 19 nights a
3 year. That's 5 percent of the time.

4 JUSTICE KAGAN: Your position, Mr.
5 Fisher, is that mobile homes are included, but
6 RVs are excluded, is that correct?

7 MR. FISHER: I think -- I think it's
8 probably correct as to mobile homes. It's not
9 at issue in front of the Court. But I think
10 that would be --

11 JUSTICE KAGAN: Yeah, but that's --
12 that's what I understood you to be saying in
13 your brief.

14 MR. FISHER: Yeah. Uh-huh.

15 JUSTICE KAGAN: Does any state make
16 that distinction in its law?

17 MR. FISHER: Well, Tennessee does,
18 just to start with Tennessee. Subsection (a)
19 of the Tennessee law on page 14-A has -- covers
20 structures, which it includes in the definition
21 of structure a mobile home.

22 Subsection (b) talks about vehicles.
23 And vehicles is the subsection in front of the
24 Court, and so you don't have to look any
25 further than the government's appendix in this

1 case. And you find it in other state laws too.
2 Illinois, the Smith case, which the government
3 itself cites and, in fact, asks this Court to
4 follow, distinguishes between motor homes on
5 the one hand and things that are -- that are
6 less -- less commonly used for overnight
7 accommodation on the other.

8 JUSTICE KAGAN: Could you give your
9 view of where, if -- if we accepted your
10 position, what that would mean in terms of how
11 many states' laws qualified?

12 MR. FISHER: Yes. And I want to -- I
13 think I can give you a thorough typology, if
14 you let me, which is we -- we do agree with the
15 government that -- that only about 12 states
16 would be within the definition if you were to
17 hold both Tennessee and Arkansas law fall
18 outside of it. So the "adapted" clause would
19 bring in -- would bring in many states.

20 But, on the other hand, the government
21 hasn't told you that, on the back end, you have
22 about 20 other states that are broad even under
23 the government's -- overbroad even under the
24 government's definition.

25 So what this -- what this case boils

1 down to, Justice Kagan, is a delta between the
2 parties of something about between 15 and 19
3 state -- states. And even in those states, you
4 have states like Tennessee --

5 JUSTICE KAGAN: I'm sorry, you said
6 that in a way that --

7 MR. FISHER: I'm sorry.

8 JUSTICE KAGAN: -- that the delta,
9 what -- what you're fighting about --

10 MR. FISHER: Yes.

11 JUSTICE KAGAN: -- is in the high
12 teens?

13 MR. FISHER: Yes, that's right. And
14 even -- and even among that group of states --

15 JUSTICE KAGAN: I mean, that's
16 significant. That's a lot.

17 MR. FISHER: I -- I -- I -- I don't
18 dispute that that's somewhat significant. Even
19 among those states, though, there are many
20 states like Tennessee that would have a
21 separate provision that it's divisible, that
22 would still qualify as -- as burglary. So it's
23 even, I think, less than the high teens.

24 And I understand that the government
25 keeps harping on the number of states because

1 that is certainly the -- the strongest version
2 of their argument. But even if this were a
3 case about first principles and not about stare
4 decisis where the Court had already said that
5 vehicles are out, we think there's three
6 countervailing forces that -- that, as a matter
7 of first principles, should leave the kind of
8 vehicles we have at issue here out.

9 First, we have the broader context of
10 the law that I've described, which is the 1984
11 Act and the -- and this Court's understanding
12 that Congress didn't intend to significantly
13 expand upon the definition there, as well as
14 the residual clause and what that tells you
15 about Congressional intent, trying to get only
16 those burglaries that had a significant risk of
17 violent acts or physical injury.

18 Secondly, we have the purpose of ACCA,
19 which is laid out at great length in the Taylor
20 opinion, where, again, the Court said, in much
21 the same words as the residual clause, what
22 Congress was worried about were particular
23 crimes where there's a risk of -- inherent risk
24 of physical injury and not only the inherent
25 risk but a awareness on the fact of the

1 perpetrator that that risk was present. And
2 this -- this speaks to some of the conversation
3 earlier.

4 And then, thirdly, we haven't yet
5 talked about administrability. And I think the
6 Court got a preview into the difficulty in
7 terms of administrability when you asked Ms.
8 Ross about what the word "adapted" means.

9 Now our definition, Justice Kagan --
10 this brings me back to the conversation we just
11 had -- is well-grounded in federal, state, and
12 local law. There's a definition that runs
13 throughout every level of law that separates
14 stationary structures that can be moved, like a
15 mobile home or a floating home on the one hand,
16 and things that are essentially vehicles on the
17 other.

18 The "adapted" definition that the
19 government gives you they readily admit is not
20 easily defined. And I still, as I stand here,
21 just to be candid, don't know whether a
22 physical adaptation is required. Is a mattress
23 in the back of a station van -- wagon enough?
24 Is, as the government suggests at page 18 of
25 its brief, simply hanging a T-shirt in the

1 window like a curtain to block a light enough?

2 Different states are going to answer
3 that question differently. And not only does
4 the Stitt brief point out a couple of examples,
5 but the NACDL brief points out examples at
6 pages 13 to 15 of its brief.

7 So "adapted" is going to be a very,
8 very difficult line to draw, and I don't know
9 how -- how many cases the Court wants to have
10 come back to it on that.

11 JUSTICE KAVANAUGH: But isn't that
12 what the Model Penal Code had and some states
13 already have? In other words, this is not
14 something that would be created now.

15 MR. FISHER: Well, Justice Kavanaugh,
16 it's true that many states have statutory
17 language that says adapted for overnight
18 accommodation. But what I'm telling you is
19 different states will interpret that
20 differently, which is my -- why Ms. Ross
21 couldn't give you --

22 JUSTICE KAVANAUGH: I understand, but
23 that's always going to be the case that there
24 will be some slight differences, right? I
25 mean --

1 MR. FISHER: That may be true. But I
2 think, when you don't have a firm grounding
3 throughout other areas of law like our rule
4 does, you're more likely to have variation in
5 problems. I think that's what I would tell
6 you.

7 JUSTICE KAVANAUGH: And you don't
8 think "adapted" has a firm grounding, even
9 though it's been around in most state statutes
10 for -- or many state statutes?

11 MR. FISHER: Well, I don't see a
12 definition in the government's brief, and I
13 haven't seen a definition anywhere else. So --
14 so I'm certainly not aware of one.

15 I would ask you also, in -- as you
16 look sort of as a matter of first principles,
17 if you have any doubt as to how to resolve this
18 case, we think this is a case that really cries
19 out for the rule of lenity.

20 Another important aspect of notice, of
21 course, is for defendants to have fair
22 understanding of what conduct would qualify for
23 a given sentencing enhancement.

24 And, if nothing else, the fact that
25 this Court has said on so many occasions that

1 vehicles are out, without any qualifications,
2 without any reservations, and that structures
3 and buildings are in, would have told the
4 ordinary person that -- that vehicles, even
5 like sleeper vans, recreational vehicles, were
6 outside of the definition of generic burglary.

7 If I may, I'd like to spend a few
8 minutes on the specific provision of Arkansas
9 law that was also spoke -- talked about at the
10 beginning of the argument.

11 As I understand the government's
12 position, it's not disputing that an ordinary
13 car would be outside the locational element of
14 burglary.

15 Now the first thing the government
16 said was they didn't think that was before the
17 Court. But I just don't see how that could be
18 this case, given that it's within the question
19 presented.

20 The question presented that the
21 government itself drafted says "adapted or
22 used." And so "used" has to mean something
23 different than "adapted." And we think it
24 quite obviously covers things like the Arkansas
25 statute, which is an ordinary vehicle in which

1 somebody lives.

2 And the government's only answer to
3 that statutory language is, well, every single
4 time somebody lives in a car, it will, in fact,
5 be adapted. Now Justice Gorsuch already
6 pointed out one problem with that, which is
7 surplusage. If that were the case, you
8 wouldn't need anything other than an "adapted"
9 clause. But --

10 JUSTICE ALITO: But we're talking
11 about a state statute that could well be
12 interpreted in lots of different ways by the
13 state courts. You want us to provide a -- a
14 definitive interpretation of the Arkansas
15 statute here?

16 MR. FISHER: I think if it were
17 ambiguous, Justice Alito, that might be
18 something you wouldn't want to do. But, when
19 the plain language so obviously covers an
20 ordinary car, we don't think there's any reason
21 to flinch from that. In Mellouli --

22 JUSTICE GORSUCH: Well, this was --
23 this was raised pretty late in the day, this
24 argument about the Arkansas statute and "living
25 in." And given that -- and given our decision

1 in Duenas, why don't we do exactly what Justice
2 Alito is suggesting and just remand it and let
3 -- let the lower courts figure it out? Maybe
4 they can certify it to the Arkansas Supreme
5 Court and figure this out.

6 MR. FISHER: So for -- so for two
7 reasons, one procedural and one substantive,
8 Justice Gorsuch. The procedural reason is it's
9 squarely within the government's question
10 presented. It's within the rule the government
11 is asking the Court to adopt. The government's
12 header in the argument section to its rule says
13 vehicles that are adapted or used for overnight
14 accommodation.

15 So I don't know how you --

16 JUSTICE GORSUCH: I'll spot you all of
17 that.

18 MR. FISHER: Okay.

19 JUSTICE GORSUCH: I'm -- I'm with you.

20 (Laughter.)

21 MR. FISHER: So --

22 JUSTICE GORSUCH: But it -- the -- the
23 Eighth Circuit didn't have a chance to consider
24 this particular argument about living in. And
25 it's a -- it's a -- it's a nifty little

1 argument, but maybe we'd benefit from being a
2 court of review rather than first view on it.

3 MR. FISHER: Well, I'd encourage the
4 Court to do exactly -- this is my substantive
5 answer -- to do exactly what it did in Mellouli
6 when the -- we had a controlled substances law
7 in front of you and the question was whether
8 that state law from Kansas was overbroad into
9 the categorical approach. The government
10 argued in its brief that because there were no
11 state court decisions that actually applying
12 that state law in the broader way, that the
13 Court shouldn't accept that under
14 Duenas-Alvarez. But the Court --

15 JUSTICE BREYER: The obvious -- I
16 mean, the obvious interpretation the other way
17 is that what they mean by "used" is used
18 regularly or used more than once or used in
19 some other way. And we don't know -- I mean, I
20 can't believe that they'd mean used once --

21 MR. FISHER: No --

22 JUSTICE BREYER: -- and the person
23 left his briefcase or something in the car.
24 They can't mean that.

25 MR. FISHER: No, I agree it doesn't

1 mean that, Justice Breyer. What we say it
2 means is what Justice Sotomayor was describing
3 earlier, which is somebody who uses the car as
4 their home and sleeps in the car every night.

5 And -- and this is the empirical
6 answer to the government's assertion, which is
7 just it is empirically untrue that every time
8 somebody sleeps in a car, they will adapt it
9 for that overnight accommodation. In fact,
10 quite to the contrary, many people would be
11 embarrassed to be using their car as a home.
12 Or they would be concealing that fact because
13 they would be looking to evade local zoning
14 laws that would prohibit sleeping overnight in
15 parking lots or the like.

16 So we cite in our -- in our red brief,
17 Justice Breyer, an article from The New York
18 Times in a footnote of a whole collection of
19 studies and articles that explain this
20 phenomenon. And it is just not true, as an
21 empirical matter, that a car in which somebody
22 lives will be necessarily adapted for overnight
23 use.

24 JUSTICE ALITO: But if you were
25 representing a defendant before the Arkansas

1 Supreme Court and the person had been convicted
2 under this statute, a person lived in the car
3 but every morning cleaned up the car so there
4 was no way anybody could tell that anybody had
5 been living there, wouldn't -- would you rule
6 out the possibility of arguing to the Arkansas
7 Supreme Court that there might -- that maybe
8 there should be some additional requirements
9 read into this provision?

10 MR. FISHER: Well, Justice Alito, if I
11 were appointed to that case, I might make that
12 argument, but I think I would have a pretty
13 lousy argument, and the reason why is because
14 the plain text of the law would be directly
15 against my argument.

16 Remember, the -- there's already --
17 there's a separate prong of Arkansas law that
18 covers customary usage, and I think I heard Ms.
19 Ross say that covers the kinds of vehicles that
20 are designed for that purpose or physically
21 adapted to that purpose.

22 So the only thing the other clause can
23 mean under standard tools of statutory
24 construction is the other -- is some other kind
25 of car, in which somebody lives. And so I

1 think, even if somebody were to make that
2 argument to the Arkansas Supreme Court, we cite
3 in our brief cases from the State of Arkansas
4 that says we follow ordinary statutory
5 construction principles. And it would just be
6 a flat loser of an argument.

7 And even if the plain text arguments
8 weren't enough, we outline in our red brief in
9 the Sims case the numerous other reasons why
10 the plain language of the state statute ought
11 to control for categorical approach purposes,
12 and those -- and those are two general
13 categories: first, the efficiency,
14 predictability, and fairness that undergird the
15 categorical approach, and, secondly, the Sixth
16 Amendment concerns that undergird the
17 categorical approach, all of which coalesce to
18 amount to if the state law is clear on its face
19 that it's broader than the federal counterpart
20 that -- that the prior conviction under the
21 state law simply can't be a qualifying offense.
22 And so we think that's enough to decide the
23 case on the Arkansas side.

24 There were some questions earlier
25 about how the Court should think about the

1 categorical approach more generally, and so let
2 me say a couple words about that because I do
3 think it is a fair observation from the Court
4 that part of what's dwindling down the number
5 of states covered by the government's approach
6 in -- in our case is the nature of the
7 categorical approach.

8 Now the Court had fair notice of that.
9 The government told you this in Mathis, and it
10 told you even in Taylor that if you go down
11 these roads, you're going to start to dwindle
12 the number of states.

13 And the Court, I think, had good
14 reasons to do that because, when you turn to
15 the categorical approach, it's not just about
16 Congressional intent, it's about these
17 predictability, fairness, and Sixth Amendment
18 constitutional concerns that have to be in
19 play. So it's not purely a question of
20 Congressional intent. It's also a question of
21 workability. But -- as workability and
22 constitutional jurisprudence.

23 But -- but regardless of how different
24 members of the Court think about those
25 undergirding principles, there is, in fact, as

1 Justice Kagan mentioned, there's a -- there's a
2 bill before Congress right now that would adopt
3 a totally different approach. And this is
4 something Attorney General Sessions spoke about
5 in August. And so it is very much on the table
6 in Congress right now to take a different
7 approach.

8 And I'd return the Court, if I may, to
9 Taylor. In Taylor, there was actually a bill
10 pending at the time of that decision, and the
11 Court, for whatever reason, went ahead and
12 issued its opinion in Taylor and has sort of
13 owned this jurisprudence ever since.

14 And one thing that you might think
15 about here is there's a bill pending in
16 Congress right now. We think the safer path is
17 for the Court to continue down its -- its prior
18 precedent. They have good -- you have good
19 reasons for what you've done.

20 I understand some of you are
21 frustrated with it. And maybe Congress is
22 frustrated with it. But the best thing the
23 Court, I think, can do is follow its own
24 jurisprudence in this case, which is -- which
25 means two things:

1 One is apply the categorical approach
2 as you've outlined it, all the way up through
3 Mathis, and even apply it as to burglary, as
4 you've put structures and buildings on the one
5 hand and vehicles on the other.

6 And if Congress is dissatisfied with
7 the outcome, it's obviously fully able to pass
8 the law that's pending, and the department,
9 even if it hasn't taken a firm position, can
10 take a position and get something done.

11 But we think if the Court goes out of
12 its way again to do something more extravagant
13 in these cases, you're going to potentially own
14 this jurisprudence a lot longer. And that's
15 what -- really what's happening here.

16 The reason these cases are in front of
17 you, you may know this already, but the reason
18 these cases are in front of you are because
19 after the invalidation of the residual clause
20 the government is going around and making a
21 bunch of arguments that it didn't make before,
22 trying to get in various prior state
23 convictions that it wasn't arguing for under
24 the enumerated clauses or under the use of
25 force clauses. That's why you have this new

1 explosion of ACCA cases.

2 And so I think the better thing is for
3 the Court to follow its own cases, its own
4 precedent, leave it to Congress to adjust if it
5 wants, but not feel like it has to solve every
6 single problem as it arises.

7 JUSTICE SOTOMAYOR: Mr. Fisher, if we
8 accept the government's "adapted," and I
9 understand all its problems, would the
10 Tennessee statute survive?

11 MR. FISHER: If you --

12 JUSTICE SOTOMAYOR: And if it's not,
13 why not?

14 MR. FISHER: If you accept the
15 government's -- if you accept the government's
16 definition of "adapted," then the Tennessee
17 statute would -- would fall within it, but it
18 would be also -- there -- there would be -- so,
19 yeah, I think the answer to that is yes, if you
20 accept the government's argument on "adapted,"
21 then Tennessee is within it.

22 But we ask, for all the reasons I've
23 asked before, not to accept the government's
24 argument to "adapted."

25 The only thing the government has to

1 say for itself, Justice Sotomayor, and I may be
2 repeating myself here, is the state-by-state
3 count. We think the state count is answered by
4 the flow of this Court's jurisprudence and the
5 other things in Taylor, things like adhering to
6 the '84 Congressional intent, adhering to the
7 most important thing perhaps, which is just
8 sweeping in violent offenders.

9 Mr. Chief Justice, you talked about
10 people using guns. You know, that would be the
11 quintessential case. Of course, Congress drew
12 it a little bit more broadly, a risk of
13 physical injury, but for all the reasons I've
14 argued and we've shown in our briefs, the outer
15 limits of the Tennessee law, even on its own
16 terms, covers these kinds of cases that, as I
17 said to Justice Breyer earlier, are a
18 one-in-700 chance of physical injury.

19 And in those kinds of cases, we don't
20 think Congress would have expected a state law
21 to -- to be swept up into ACCA. And I would
22 hasten to add that I think this is also
23 responsive, Justice Breyer, you asked about how
24 these cases are charged.

25 When there are the kinds of

1 altercations that Justice Alito, for example,
2 was -- was hypothesizing, somebody is in inside
3 and there is a violent altercation, those cases
4 aren't charged as burglary. They're charged as
5 things like carjacking, robbery, assault.

6 So the burglary convictions, and this
7 is what the Sentencing Commission found when it
8 backed burglary out of even the crime of
9 violence provisions in the Sentencing
10 Guidelines, it found that when burglary is
11 charged, it's in the cases where nothing
12 happened but the entry.

13 And so that may well still satisfy the
14 categorical definition of burglary under ACCA,
15 the residential entry, because of the awareness
16 and because of the inherent risk, but once you
17 go beyond primary residences and talk about
18 things that are hardly ever occupied and that
19 people are going to target specifically because
20 they're hardly ever occupied, walking down to
21 the -- to the -- to the marina with a sleepy
22 sailboat on the dock and rummaging through the
23 contents, those are the kinds of things that
24 Congress, I don't think, would have expected to
25 be swept up and any sensible definition of ACCA

1 wouldn't trigger the harsh consequences that
2 follow.

3 If there are no more questions, I'll
4 submit the case.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Five minutes, Ms. Ross.

8 REBUTTAL ARGUMENT OF ERICA ROSS
9 ON BEHALF OF PETITIONER

10 MS. ROSS: Thank you, Mr. Chief
11 Justice.

12 I just want to make a few points. The
13 first is that Justice Gorsuch suggested that
14 perhaps my friend on the other side would
15 quibble with our numbers with respect to how
16 many states would have ACCA burglary and how
17 many wouldn't under our view and under
18 Respondents' view.

19 And my friend has not actually
20 quibbled with those numbers. He agrees that,
21 at most, we're looking at 12 states with ACCA
22 burglary under his view.

23 And I think that that is itself, if
24 not dispositive, very close to it because,
25 again, we -- we don't think that's a statute

1 that Congress would have passed.

2 Now my friend has a couple of reasons
3 why Congress might have done that. He says,
4 well, really the delta's only 20 or so cases --
5 or 20 or so states, but those 20 states make
6 the difference between the definition of ACCA
7 burglary, satisfying what this Court said four
8 times over in Taylor, that it was trying to get
9 at the way that the states used the term
10 "burglary," the majority of states. It said
11 that with respect to the 1984 statute, with
12 respect to the 1986 statute, as a reason for
13 rejecting the common law definition, and when
14 it introduced the categorical approach and said
15 that a few state statutes might be broader than
16 the definition that it was adopting.

17 So those 20 state statutes, I think,
18 really cannot be underestimated here.

19 The other reason that my friend gave
20 for why the numbers are so low is that Mathis
21 changed everything, but Mathis didn't change
22 everything. As Mathis itself would explain,
23 Mathis interpreted this -- the ACCA as it
24 always stood. And so I don't think that
25 Congress when it enacted the statute in the

1 first instance would have expected about 12
2 state laws to come in as burglary.

3 Another thing that my friend mentioned
4 was the residual clause. Again, I don't think
5 that when Congress enacted a statute with the
6 word "burglary" and then with the residual
7 clause, which we know was an attempt to expand
8 the scope of the statute to reach other crimes,
9 that it, in fact, would have meant for most
10 burglary statutes or a substantial number of
11 burglary statutes to come in through the
12 residual clause while narrowing the point or
13 the -- the word "burglary" to essential
14 obsolescence.

15 So, given the way that the state
16 statutes play out here, we think that our
17 reading is the one that is consistent with what
18 Congress was -- was trying to do and with
19 Taylor itself.

20 Now, speaking in terms of Taylor, my
21 friend mentioned that Taylor said that the
22 definition that it was taking on was
23 practically identical to the 1984 definition
24 and that that definition only included
25 buildings.

1 What I think -- I apologize, I don't
2 remember exactly who said it -- someone had
3 mentioned, one of the Justices had mentioned
4 that, in fact, the practical difference may
5 make up for the fact -- I believe it was
6 Justice Kavanaugh -- that really the difference
7 between buildings and structures. And that
8 might well be true.

9 I also think that Taylor itself was
10 looking at a definition of "building." And
11 Congress in 1984 was looking at a definition of
12 "building" that had taken on its own very broad
13 meaning in burglary law.

14 If you look at the appendix to our
15 brief in this case, most, if not all, of the
16 states that actually defined "building" did so
17 in terms of vehicles, other structures, et
18 cetera.

19 So they had a very broad definition
20 that might not make sense in ordinary English
21 but was what state burglary statutes used. And
22 so, when this Court comes along in Taylor and
23 says building or structure, it's really just
24 explicating that.

25 Another way to look at this is through

1 the LaFave treatise that we obviously rely on
2 in the briefs, which similarly makes clear that
3 those -- that both "building" and "structure"
4 were often broadly construed.

5 Another point that I just wanted to
6 clear up with respect to the government's
7 position in Mathis. I don't think it is true
8 that the government said that all of the
9 statutes that it noted would, in fact, be out
10 if Mathis came out the way it did. It said it
11 would raise some questions.

12 And many of those statutes, in fact,
13 are broader than the statutes that we're
14 talking about here today.

15 In closing, we heard a lot about
16 numbers this morning both on our side and --
17 and from my friend. I think the thing that we
18 -- there are two things, really, at the core at
19 this case that can't be denied:

20 One is that burglary has always
21 protected the core of dwellings. And the
22 second is that, on Respondents' view, ACCA
23 burglary takes a step back from that and
24 includes far fewer dwellings, eliminates the
25 majority of state statutes precisely because

1 they cover exactly what courts for centuries
2 have thought of as the core of burglary.

3 We don't think that's what Congress
4 intended. We don't think that's what this
5 Court intended in Taylor. And we would,
6 therefore, ask that the decisions below be
7 reversed.

8 JUSTICE KAGAN: Sorry, Ms. Ross. Do
9 you agree that if a statute covers just regular
10 cars, that that falls outside?

11 MS. ROSS: Regular cars meaning no --
12 nobody's living there?

13 JUSTICE KAGAN: Nobody's living there.
14 Nobody's doing that. You're just driving it.

15 MS. ROSS: Yes, Your Honor, I think it
16 would be difficult in light of this Court's
17 cases, even though actually a large number of
18 states covered those, I think it would be very
19 difficult in light of Mathis and -- and
20 Duenas-Alvarez and all the other cases in which
21 this Court said --

22 JUSTICE KAGAN: So -- so you're
23 accepting that those are out?

24 MS. ROSS: Yes, Your Honor, you're
25 right.

1 JUSTICE KAGAN: And how about the --
2 the ones that say vehicles that are used for
3 business activities, commercial activities, are
4 those in or out?

5 MS. ROSS: So, Your Honor, we haven't
6 taken a position on that. In this Court, it's
7 not raised in these cases. That is not sort of
8 the considered view of the Justice Department
9 at this point. We are not using either of
10 those statutes at this point.

11 If the -- if the Court has no further
12 questions, we'd ask that you reverse in both
13 cases. Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 12:08 p.m., the case
17 was submitted.)

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