

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 62

Place: Washington, D.C.

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3       JEFFERSON B. SESSIONS, III,           )  
4       Attorney General,                    )  
5                                    Petitioner,                    )  
6                                    v.                                ) No. 15-1498  
7       JAMES GARCIA DIMAYA,                )  
8                                    Respondent.                    )  
9       - - - - -

10  
11                                   Washington, D.C.  
12                                   Monday, October 2, 2017

13  
14                                   The above-entitled matter came on  
15       for oral argument before the Supreme Court of  
16       the United States at 11:10 a.m.

17  
18       APPEARANCES:  
19       EDWIN S. KNEEDLER, Deputy Solicitor General,  
20                                   Department of Justice, Washington, D.C.; on  
21       behalf  
22                                   of the United States.  
23       E. JOSHUA ROSENKRANZ, New York, New York; on  
24       behalf of  
25                                   the Respondent.

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P R O C E E D I N G S

(11:10 a.m.)

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

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.

ON BEHALF OF THE PETITIONER

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

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

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

Immigration removal is not a punishment for past conduct. It operates prospectively on the basis of the application of standards adopted by Congress under which an alien is regarded as no longer conducive to the safety and welfare.

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

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

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

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

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

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

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

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

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

25 MR. KNEEDLER: There are a number of

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

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

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

12 MR. KNEEDLER: No but, but they were  
13 -- they were critical attributes of the two.  
14 That's the -- that's the important point.

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

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

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

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

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

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

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

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



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

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

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

1 this is not open-ended like that.

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

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

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

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

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

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

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

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

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

1 as the classic example of what is covered by 16

2 --

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

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

7 MR. KNEEDLER: Sure.

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

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

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

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

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

13 So help me out with that.

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

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

23 JUSTICE GORSUCH: Fair -- fair notice  
24 of the law.

25 MR. KNEEDLER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

15 MR. KNEEDLER: Well no with respect, a  
16 crime involving moral turpitude, the  
17 categorical approach is applied there. It is  
18 not -- it is not a fact-specific determination.

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

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

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

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

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

22                  JUSTICE GORSUCH: Mister --

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

1 terms of injury, before you do any of that, you  
2 have to have an understanding of the ordinary  
3 case is.

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

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

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

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

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

1 of our task here.

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

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

7 JUSTICE GORSUCH: Yes. Yeah.

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

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

13 MR. KNEEDLER: Yes.

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

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

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

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

16                  JUSTICE GORSUCH: Well, but could you  
17                  answer my question?

18                  MR. KNEEDLER: Yeah. I was -- I was  
19                  getting there. No I --

20                  JUSTICE GORSUCH: Great.

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

1 give rise to the concern you're raising --

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

9 I'm just wondering --

10 MR. KNEEDLER: Well --

11 JUSTICE GORSUCH: Even take burglary in  
12 California, how am I supposed to know what  
13 ordinary is?

14 MR. KNEEDLER: And California --  
15 California burglary would be a close question,  
16 frankly. Now, here, it was -- it was resident  
17 -- it was class 1 burglary.

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

20 MR. KNEEDLER: No, no. California  
21 burglary.

22 JUSTICE GORSUCH: California burglary.

23 MR. KNEEDLER: And only because -- only  
24 because California burglary does not require an  
25 unlawful entry --

1 JUSTICE GORSUCH: Right.

2 MR. KNEEDLER: -- or unlawful  
3 remaining, and therefore, it does not satisfy  
4 generic burglary, but -- but generic burglary,  
5 as this Court again unanimously held in -- in --  
6 in *Leocal*, is a classic example.

7 And if I could use a couple of others,  
8 just to show that the Court is not at sea here,  
9 kidnapping is another one. Kidnapping may be  
10 accomplished -- it's typically accomplished  
11 maybe by the use of force, but can also be  
12 accomplished by trick.

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

20 It's a continuing offense --

21 JUSTICE GORSUCH: But -- but, Mr.  
22 Kneeder, I'm sorry, I just -- I just am stuck  
23 on my question. How am I supposed to determine  
24 what the ordinary case is? Should I bring in  
25 some experts and have an evidentiary hearing?

1 And if so, why -- why isn't that a legislative  
2 function?

3 MR. KNEEDLER: Well, I -- there may be  
4 cases where the statute itself is not clear as  
5 to whether the elements give rise to the  
6 requisite risk. And -- and California burglary  
7 may be one of them.

8 JUSTICE GORSUCH: So you would have me  
9 bring in experts?

10 MR. KNEEDLER: No. I --

11 JUSTICE GORSUCH: You wouldn't -- you  
12 wouldn't --

13 MR. KNEEDLER: No, I'm not --

14 JUSTICE GORSUCH: Look, I'm just trying  
15 to get an answer on that.

16 MR. KNEEDLER: No, no, I'm not saying  
17 -- I'm not saying experts, but -- but -- but  
18 where there are statistics available, for  
19 example, as -- as there were in several of -- of  
20 this Court's cases under the ACCA residual  
21 clause, that statistics were looked to to really  
22 reinforce common sense.

23 JUSTICE BREYER: But do you  
24 remember -- probably you do or maybe not, that  
25 several judges, I remember because one of them



1 was me -- and some of the lower court judges  
2 said, why doesn't the sentencing commission or  
3 why doesn't that part of the Justice Department  
4 that keeps track of statistics go out and find  
5 out what is the typical way in which, for the  
6 ACCA provision, you know, the other provision,  
7 they're committed, and case after case went by,  
8 and nobody ever had the statistics.

9 And I tended to think, well, they  
10 can't get them. Otherwise, they would. And so  
11 what's the story? I think it's a similar  
12 question to what is being asked.

13 MR. KNEEDLER: Well, there -- there  
14 may be general categories of offenses where  
15 that -- where that could --

16 JUSTICE BREYER: Well, there were a  
17 lot -- in other words, we never had a case,  
18 that I can remember, under that other  
19 provision, where somebody came up with  
20 statistics, despite what I'd call leading by a  
21 lot of --

22 MR. KNEEDLER: Well, there were --  
23 there were statistics in chambers --

24 JUSTICE BREYER: There were? Okay.

25 MR. KNEEDLER: And then there were

1 statistics --

2 JUSTICE BREYER: Then there are some.  
3 Then there were some.

4 MR. KNEEDLER: And there were some  
5 statistics and cites dealing with -- with  
6 vehicle -- flight from an officer -- but I'm  
7 not --

8 JUSTICE GORSUCH: Law clerks are  
9 excellent at gathering statistics, but they're  
10 probably not as good as a legislative  
11 committee.

12 MR. KNEEDLER: Yeah, no, but -- but --  
13 but I think it's important to recognize that  
14 what we have here is a legislative enactment in  
15 which Congress chose to identify the crimes that  
16 are covered by categories, the type of offense.

17 And there -- and there is only so much  
18 that one can expect from a legislature in  
19 identifying a category. And here, Congress  
20 identified a category in 16(b) that is very  
21 closely tied to 16(a).

22 16(a) involves the situations where  
23 the element -- the element of the offense  
24 itself involves the use or threatened use of  
25 force. 16(b) expands that slightly to say,

1           okay, it may not be technically an element, but  
2           is the -- is the offense under 16(b) so  
3           instinct or inherent -- inherently contained, a  
4           risk of the use of force, that it -- that it  
5           should fall -- should fall in Congress's  
6           judgment in that same category?

7                         You look at other offenses, a number  
8           of lower courts have held that conspiracy to  
9           commit Hobbs Act robbery is a crime of  
10          violence. Robbery certainly is a crime of  
11          violence.

12                        Conspiracy itself contains the  
13          substantial risk of physical force being used  
14          because conspiracy is an agreement to commit  
15          the very crime that will -- that will result in  
16          physical force, conspiracy to commit --

17                        JUSTICE SOTOMAYOR: How about  
18          statutory rape?

19                        MR. KNEEDLER: Statutory --

20                        JUSTICE SOTOMAYOR: To start with,  
21          they know -- the courts below --

22                        MR. KNEEDLER: Statutory -- sex -- sex  
23          -- sex offenses are difficult in any context.  
24          Sexual abuse of a minor, as -- as the Court  
25          knows from last year's case, but there is a

1 category of cases, and we cite some in -- in our  
2 brief where -- with a sufficient age difference  
3 between an  
4 adult and minor, the use of physical force is  
5 inherent in the nature of the offense, that  
6 when -- when the adult -- even if the -- even  
7 if the adult is able to get the child to comply  
8 without actually using physical force, the  
9 threat or the potential for physical force is  
10 always present, if the child resists the -- the  
11 adult can use force.

12 JUSTICE SOTOMAYOR: Is that the  
13 ordinary case? I thought that most of the  
14 pornography cases that we're seeing are  
15 children not being physically forced into sex  
16 but being tricked into it by caretakers or --  
17 or talked into it, et cetera?

18 MR. KNEEDLER: But -- but --

19 JUSTICE SOTOMAYOR: One may have  
20 personal views about whether an adult can ever  
21 not be using improper --

22 MR. KNEEDLER: The point is, in that --  
23 in that encounter, the potential for the use of  
24 force, the risk for the use of force is always  
25 -- the same -- the same risk.

1                   And -- and whether or not force is  
2                   used in 50 percent of the cases or 25 percent  
3                   of the cases --

4                   JUSTICE SOTOMAYOR:   So it doesn't  
5                   surprise you --

6                   MR. KNEEDLER:   -- in that context is  
7                   not the relevant --

8                   JUSTICE SOTOMAYOR:   It doesn't  
9                   surprise you that the courts below are split on  
10                  this question, just the way they were under  
11                  ACCA.

12                  MR. KNEEDLER:   Well, the -- as we  
13                  point out in our brief, the distinctions in the  
14                  lower courts on this question and on a number  
15                  of them have to do with the particular elements  
16                  of the state offense.

17                  What -- particularly when it comes to  
18                  sex offenses, it's difficult to -- to say  
19                  statutory rape or sexual abuse of a minor  
20                  because the elements of the state offense may  
21                  vary, but if --

22                  JUSTICE GORSUCH:   Mr. Kneedler, if I  
23                  may take you in a slightly different direction,  
24                  some have criticized void-for-vagueness  
25                  doctrine as a subspecies of substantive due

1 process, and they are legitimate on that score.

2 Others suggest that it really is an  
3 element -- form of procedural due process and  
4 also a product of our separation of powers, as  
5 we've discussed, to keep judges out of making  
6 new law.

7 What's -- what's the government's  
8 position on that?

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

11 JUSTICE GORSUCH: That's why I'm  
12 asking you now.

13 (Laughter.)

14 MR. KNEEDLER: No, it -- it feels like  
15 more of a -- it seems like more of a  
16 substantive due process limitation, although it  
17 does -- it does --

18 JUSTICE GORSUCH: Why? Because the  
19 doctrine doesn't prohibit the Congress from  
20 legislating in any area. It just says you have  
21 to do it in a way that provides fair notice and  
22 that doesn't involve this body in law making.

23 MR. KNEEDLER: Well, in that sense, I  
24 mean, I suppose it has a procedural aspect, but  
25 I -- but I think that, when you think about

1 notice, but I think substantively, it also --  
2 it also requires that Congress be --

3 JUSTICE GORSUCH: Congress could do --  
4 specify any crimes it wishes to include in this  
5 statute tomorrow.

6 MR. KNEEDLER: Yes.

7 JUSTICE GORSUCH: There's no  
8 substantive limitation.

9 MR. KNEEDLER: Yes, it -- it could,  
10 but Congress chose to identify a category of  
11 crimes that it believed gave rise to a  
12 substantial risk, and we shouldn't expect the  
13 impossible from Congress when it wants to  
14 identify crimes by category. Like --

15 JUSTICE GORSUCH: Really? Even when  
16 it's going to put people in prison and deprive  
17 them of liberty and result in deportation, we  
18 shouldn't expect Congress to be able to specify  
19 those who are captured by its laws?

20 MR. KNEEDLER: We -- we think this law  
21 reasonably captures the category that Congress  
22 thought -- whose conduct gave rise to a serious  
23 risk of -- of physical force being used. If I  
24 could refer --

25 JUSTICE GINSBURG: Mr. Kneeder, did I

1 get, correctly, your answer to the question  
2 about a crime of moral turpitude being an  
3 alternative that the government could have  
4 pursued? You say the immigration judge found  
5 that this was a crime.

6 MR. KNEEDLER: But on grounds that we  
7 think were not correct because the immigration  
8 judge did not apply the categorical approach,  
9 which has since been determined to be the right  
10 way to look at crime involving moral turpitude.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 Mr. Kneedler.

13 Mr. Rosenkranz?

14 OPENING ARGUMENT BY COUNSEL FOR  
15 RESPONDENT

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

18 Let me begin -- begin with Justice  
19 Gorsuch's central point. Justice Gorsuch is  
20 right. This is not a job that Congress can  
21 appropriately delegate to the courts and to  
22 enforcement officials on the ground.

23 Congress has written a statute that  
24 makes it impossible for ordinary citizens or  
25 for law enforcement or for immigration



1 officials to figure out what the law is, and  
2 Congress has delegated that function to them.

3 It has done it with two features that  
4 this Court described as dooming the ACCA  
5 residual clause.

6 First, the piece that most concerned  
7 the Court, the Court said was most important,  
8 hypothesizing this ordinary case of a crime  
9 and, second, then estimating the risk  
10 associated with that hypothesized version and  
11 whether that meets some vague standard.

12 The government warned the Court in  
13 Johnson that section 16(b) was "equally  
14 susceptible to challenge." The government was  
15 right then, and the differences in statutory  
16 language that the government has since  
17 discovered do not change the outcome.

18 JUSTICE KENNEDY: Well, since  
19 discovered, but the statute here says "during  
20 the course of committing the offense." And  
21 that's quite different from the statute in  
22 Johnson.

23 MR. ROSENKRANZ: Your Honor, it isn't  
24 quite different from the statute in Johnson.  
25 The statute in Johnson has the same limitation

1 in different language. Section 16(b) covers  
2 risks in the course of committing the crime,  
3 ACCA's residual clause covered "a crime that  
4 otherwise involves conduct."

5 Both are referring back to the crime.  
6 But I really -- I -- I would like to address  
7 more concretely this "in the course of  
8 committing the crime" point because I can't  
9 tell you why the government is wrong without  
10 knowing what the government thinks those words  
11 mean.

12 And the government keeps shifting back  
13 and forth between two versions of what in the  
14 course of committing the crime means. At  
15 points, the government says that it means in  
16 order to satisfy the elements of the crime.

17 So it reads the sentence to mean you  
18 look for substantial risk that physical force  
19 may be used in order to satisfy the elements,  
20 but that's not how any Court was ever applying  
21 this provision. It is not how the government  
22 was telling the courts to apply this provision.

23 The government back then and even now,  
24 Mr. Kneedler points to conspiracy and other  
25 inchoate offenses, those offenses are

1 completed. The elements are completed when you  
2 say, I want you to kill my wife, here is 100  
3 bucks, they are completed with the utterance of  
4 those words.

5           Nevertheless, you look after the  
6 utterance, at least the government urged the  
7 courts. But what about attempted burglary in  
8 James? As Johnson itself points out, or  
9 burglary -- Johnson itself points out burglary  
10 was a problem. Why? Precisely because, under  
11 the ordinary case approach, courts were  
12 required to look past the elements. Burglary  
13 is committed, the elements are completed the  
14 moment you cross the threshold.

15           That's -- if that's the government's  
16 reading, then burglary would be out. What the  
17 court said in Johnson is that it is what  
18 happens after you cross the threshold that  
19 creates the risk.

20           But that's -- so -- so then the  
21 government shifts to, okay, but no, no, it is  
22 while the crime is under way, that's what "in  
23 the course of committing the crime" means, but  
24 that's not a solution. That is exactly the  
25 problem that Johnson describes.

1                   Its concern was that the ordinary case  
2                   analysis was "detached from the statutory  
3                   elements." And that -- that it leads courts to  
4                   speculate about what happens after the  
5                   statutory elements have all been satisfied, but  
6                   while the crime is under way.

7                   That's just as imaginary. Now  
8                   let's -- let's look at --

9                   JUSTICE ALITO: Suppose, Mr.  
10                  Rosenkranz, suppose a state enacted a statute  
11                  that says that no person may be licensed to  
12                  teach preschool, if the person has satisfied  
13                  the language, not by reference to 16(b), but  
14                  the language that is included in, in 16(b).

15                  Would that be unconstitutionally  
16                  vague?

17                  MR. ROSENKRANZ: No, I -- I don't  
18                  think it would be. If it is some state that is  
19                  not incorporating by reference Congress's  
20                  handiwork or saying, we're adopting this  
21                  language because this is language Congress  
22                  adopted, it wouldn't be, but -- and I see we're  
23                  shifting now to the other piece of the case  
24                  which is whether -- which is the application of  
25                  criminal standards -- for civil --

1 JUSTICE ALITO: Well, before I  
2 decide -- before I can determine whether this  
3 is unconstitutionally vague, I have to know  
4 what the standard is, so that's my question.

5 If we apply the standard that -- that  
6 generally applies to civil statutes, would this  
7 be unconstitutionally vague?

8 MR. ROSENKRANZ: The standard that --

9 JUSTICE ALITO: We might do -- we  
10 might do a wonderful job of pruning the United  
11 States Code if we said that every civil statute  
12 that is not written with the specificity that  
13 is required by criminal statute is  
14 unconstitutionally vague, we could boil that  
15 down a lot, but that's what I'm asking. Is  
16 that what you are arguing?

17 MR. ROSENKRANZ: No, not at all, Your  
18 Honor. First, you are talking about a civil  
19 statute here that is very different from  
20 deportation. It is a licensing --

21 JUSTICE ALITO: I am taking it  
22 step-by-step.

23 MR. ROSENKRANZ: It -- right. It is a  
24 licensing statute. So there are three things  
25 to say about how this criminal standard applies

1 in this civil context.

2 The first is to the premise of Your  
3 Honor's question, Jordan settles the  
4 question -- the answer to the question how you  
5 apply criminal to the deportation context, but  
6 this Court never has to decide whether to  
7 reaffirm Jordan --

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

10 MR. ROSENKRANZ: Yes, so two things to  
11 say before you even address Jordan, and then  
12 the third thing to say is that Jordan was  
13 right.

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

18 This Court has held that, if Congress  
19 does that, it must -- then courts must apply  
20 the same criminal vagueness standards to the  
21 statute --

22 JUSTICE ALITO: That seems like --

23 JUSTICE KENNEDY: Well, that's just a  
24 minor point that gets off the basic point of  
25 Justice Alito, but it did not incorporate

1 exactly this statute. The language is  
2 different. But we will leave that.

3 MR. ROSENKRANZ: Your Honor, no, no --

4 JUSTICE KENNEDY: A question is  
5 pending.

6 MR. ROSENKRANZ: I'm sorry, Justice  
7 Kennedy. Congress literally said, in the INA,  
8 that the crime of the -- that the definition of  
9 crime of violence is the definition of section  
10 16(b), Section 16(b) being a criminal statute.

11 It then added all sorts of bells and  
12 whistles of other ways to create an aggregated  
13 felony, but this court, in A.B. Small, said,  
14 Here is what you do when you have a statute  
15 that has both criminal and civil  
16 applications --

17 JUSTICE KENNEDY: Well, I -- I took us  
18 away from Justice Alito's inquiry. He -- he  
19 wants to know the standard for determining  
20 vagueness in civil cases.

21 MR. ROSENKRANZ: So the standard for  
22 determining vagueness in civil cases was laid  
23 out by this Court in Hoffman Estates, and the  
24 answer is it depends on how serious the crime  
25 is.

1                   The -- the seriousness of the crime --  
2                   excuse me, how serious the penalty is or how  
3                   serious the consequence is. And --

4                   JUSTICE GORSUCH: Exactly. And that's  
5                   where I get stuck, right, because the  
6                   consequences in many civil matters can be very  
7                   grave, more so even than a lot of criminal  
8                   penalties. Civil forfeiture, take a man's  
9                   home, his entire livelihood, deport him.

10                  And I can think of lots of other  
11                  examples that can be graver than misdemeanor  
12                  offense on the books today. Again, the line  
13                  between civil and criminal depends upon a  
14                  7-part non-exclusive factor balancing test. So  
15                  what am I supposed to do with that?

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

18                  JUSTICE GORSUCH: Great.

19                  (Laughter).

20                  MR. ROSENKRANZ: And let me just  
21                  preface it by saying I have only mentioned one  
22                  of the reasons this Court doesn't have to figure  
23                  out the answer to that question. And then --

24                  JUSTICE GORSUCH: All right. But  
25                  let's answer the question first and then you can



1 go on.

2 MR. ROSENKRANZ: Okay. So I would go  
3 back to your point, Justice Gorsuch, that this  
4 Court has repeatedly rejected a sharp line  
5 between civil and criminal.

6 The correct distinction is the one  
7 that this Court identified in Hoffman Estates,  
8 cases, whether civil or criminal, with severe  
9 consequences --

10 JUSTICE GORSUCH: How do I determine  
11 that?

12 MR. ROSENKRANZ: Yes. So here is how  
13 you determine it? One thing -- and by the way,  
14 this Court has never had to answer that  
15 question since Hoffman Estates set this out, so  
16 it is not a question that arises very often.

17 The way the Court answers the question  
18 here is -- is we know that criminal cases, and  
19 First Amendment cases are on one side of the  
20 line.

21 What else comes on that side of  
22 the line? If ever there was a consequence that  
23 was on a par with criminal cases, it is  
24 banishment, exile, lifetime banishment, the  
25 Framers understood banishment to be equivalent

1 to taking away that which makes life worth  
2 living, Madison talked about banishment as the  
3 quintessential penalty, he says it is difficult  
4 to imagine a doom to which the name cannot be  
5 applied. By the way, this is not new to this  
6 Court. It's not just Justice Ginsburg's  
7 example.

8 In a case involving a criminal  
9 protection, that is a constitutional protection  
10 that -- that relates only to crimes, that is  
11 Padilla and the -- the Sixth Amendment,  
12 deportation already stands alone as the only  
13 civil consequence that triggers a  
14 constitutional protection on a par with the  
15 criminal protection.

16 So you don't get to come into court  
17 and say my lawyer didn't get -- didn't tell me  
18 that I could forfeit --

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

21 (Laughter.)

22 JUSTICE SOTOMAYOR: But I'm really --  
23 I'm very interested in the answer, which is  
24 Justice Gorsuch is -- is asking how  
25 you -- where do you draw the line? So

1 acceptable civil vagueness and non-acceptable  
2 civil vagueness?

3 MR. ROSENKRANZ: Well, Your Honor --

4 JUSTICE SOTOMAYOR: Or vagueness  
5 generally.

6 MR. ROSENKRANZ: Hoffman Estates says  
7 that it varies. So what we're talking about is  
8 the line between the severest penalties and  
9 those penalties that are less severe.

10 The answer is, if it is on a par with  
11 a criminal punishment such that someone would  
12 trade one for the other, this Court answered  
13 that question in Lee.

14 In Lee, this Court said, as Justice  
15 Gorsuch said earlier today, most people would  
16 happily take a little bit extra time in prison  
17 in order to avoid the consequence of  
18 deportation.

19 JUSTICE ALITO: My earlier question  
20 was about licensing. So suppose this language  
21 applies to license as an attorney, license as a  
22 physician. Taking that away from a person is  
23 pretty severe.

24 MR. ROSENKRANZ: Yes, Your Honor, but  
25 -- but not as severe as lifetime banishment

1 from this country, which is preceded by  
2 automatic and mandatory imprisonment.

3 JUSTICE ALITO: And when we start --  
4 aren't we going to get into this same kind of  
5 legislating and how -- how severe? Where is  
6 this line drawn?

7 MR. ROSENKRANZ: Well, Your Honor,  
8 this is the line this Court drew in Hoffman  
9 Estates. I mean, that was decades ago.

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

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

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

15 MR. ROSENKRANZ: Yes, that's a great  
16 line: Life, liberty, or property. And  
17 particularly here we're talking about a liberty  
18 interest, a liberty interest that says you must  
19 leave, for some people, the only home that you  
20 have ever -- that you've ever had. You must  
21 leave your family.

22 So that when someone is making the  
23 decision, am I going to plead guilty to a crime  
24 that I've never -- that I didn't commit in  
25 return for time served, he needs to know -- by

1 the way, in return for crime served so he can  
2 get back to his wife and kids -- he needs to  
3 know whether ICE is going to be standing out  
4 there depriving him of that liberty and  
5 deporting him from his wife and kids?

6 JUSTICE BREYER: You think you could  
7 go back to Justice Kennedy's original question?  
8 If you don't recall it --

9 MR. ROSENKRANZ: I do.

10 JUSTICE BREYER: -- what sticks in my  
11 mind, if I get it right, is let's look at the  
12 old ACCA -- the one we struck down in Johnson,  
13 and the difficult language was it involves  
14 conduct that presents a serious potential risk  
15 of physical injury to another. And then there  
16 were a lot of examples where, gee, it's awfully  
17 tough to figure out whether it does or does not  
18 fall within those words.

19 Now let's look at this language. It  
20 involves a substantial risk that physical force  
21 against the person or property to another may  
22 be used in the course of committing the  
23 offense. Now, that would seem to be that if  
24 the offense is conspiracy to commit burglary,  
25 the conspiracy is finished, over, done with,

1 long before they get to the property.

2 And so that wouldn't be too tough.

3 But burglary, which takes place on the  
4 property, or conspiracy under the first statute  
5 which would lead to the burglary that takes  
6 place, well, that becomes tougher. Okay.

7 Now let's look at our statute now.

8 And give me some examples. I'm sure there are  
9 many. But I think it would be helpful where  
10 under this language, it seems, my God, what is  
11 the basic case? This is impossible.

12 MR. ROSENKRANZ: I'll give you  
13 several.

14 JUSTICE BREYER: Okay.

15 MR. ROSENKRANZ: First, Sykes,  
16 vehicular flight. Okay. How do we -- the  
17 Court was -- was mired in controversy about how  
18 you figure out whether vehicular flight is  
19 going to give rise to the right sort of risk  
20 and how do you -- how did the Court do it? It  
21 was looking at the moments or the long time  
22 frame after the elements were satisfied. The  
23 moment you pull out, you are in vehicular  
24 flight.

25 So "in the course of" certainly

1 doesn't help. And the distinction between  
2 physical force and physical injury doesn't  
3 help. And the distinction between property and  
4 personal injury doesn't help. You're still  
5 always imagining what is happening after you  
6 pull out?

7 Okay, next one, residential trespass.  
8 It all depends upon, first, what do you imagine  
9 the ordinary case to be of residential trespass  
10 and then figure out how it plays out.

11 Or car burglary, same exact problem.  
12 Or to take one example directly out of ACCA,  
13 extortion.

14 It all depends upon the ordinary case  
15 analysis, which -- which goes back to Justice  
16 Sotomayor's question early on. The heart of  
17 this problem is this ordinary case approach and  
18 none of the -- the statutory differences that  
19 the Government has pointed to help you figure  
20 out what the ordinary case is.

21 JUSTICE KAGAN: And, Mr. Rosenkranz,  
22 just to tie in this ordinary case problem with  
23 this phrase about -- "during the commission of  
24 the crime," has the Government in all of this  
25 briefing and in all of this argument ever come

1 up with a single crime in which the ordinary  
2 case of that crime, the injury would be  
3 occurring after the commission of the crime?  
4 If the commission of the crime is taken to mean  
5 not just elements but a more general view of  
6 what the crime is.

7 MR. ROSENKRANZ: In this case no.

8 JUSTICE KAGAN: I'm just suggesting  
9 that the Government has never come up with a  
10 single case under ACCA in which -- and,  
11 remember, ACCA requires you to look at the  
12 ordinary case.

13 In the ordinary case, what crime has  
14 injury that occurs after the commission of the  
15 crime? The Government has not told us of any.

16 MR. ROSENKRANZ: If you are -- that is  
17 correct, after the crime is over. I mean --

18 CHIEF JUDGE ROBERTS: Poison?

19 MR. ROSENKRANZ: -- conspiracy or  
20 solicitation to murder, the crime  
21 is done -- it occurs after. I think the  
22 Government's current position, contrary to what  
23 it persuaded multiple courts of appeals of, was  
24 that that's out.

25 And so that's the example, but in



1 order to get there, the Government has to take  
2 the quintessential crime of violence and say  
3 that it is not --

4 JUSTICE KAGAN: And that's  
5 inconsistent with everything that the  
6 Government has said in multiple cases; isn't  
7 that correct?

8 MR. ROSENKRANZ: Yes, in -- I mean,  
9 the courts of appeals that have said that those  
10 crimes are within the residual --

11 JUSTICE BREYER: They're saying right  
12 now, what about conspiracy? I mean, you can  
13 have conspiracy to commit burglary. It's over,  
14 once you conspire.

15 MR. ROSENKRANZ: Right. Well, that's  
16 a -- so that's an example, but I think the  
17 Government said that's in.

18 JUSTICE KAGAN: That that's in.

19 MR. ROSENKRANZ: Right. And so if  
20 that's in, then this whole notion of in the  
21 course of committing the crime doesn't do any  
22 work.

23 JUSTICE KENNEDY: Could the government  
24 --

25 JUSTICE KAGAN: Similarly, the

1 Government -- please.

2 JUSTICE KENNEDY: It's a different  
3 point. Could -- could the government pass a  
4 statute saying that aliens who commit criminal  
5 offenses are deportable if in the discretion of  
6 the Attorney General, the presence of the alien  
7 is inconsistent with the best interests of the  
8 people of the United States?

9 MR. ROSENKRANZ: That is the basis of  
10 deportation? No.

11 JUSTICE KENNEDY: Why?

12 MR. ROSENKRANZ: I'm sorry, let me --  
13 let me back up. If --

14 JUSTICE KENNEDY: Another -- what  
15 standards must a statute meet before an  
16 administrative officer can make the  
17 determination that the -- that remaining in the  
18 United States is not in the best interests of  
19 the United States?

20 MR. ROSENKRANZ: Well --

21 JUSTICE KENNEDY: Would that -- would  
22 that suffice? Would that be unconstitutional?

23 MR. ROSENKRANZ: That would be  
24 unconstitutional --

25 JUSTICE KENNEDY: Under what rule and

1 under what context?

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

10 Now, if it's a basis for the Attorney  
11 General's exercise of discretion that despite  
12 the fact that you are deportable as Congress  
13 has defined it, I am not going to deport you,  
14 that's another story. And by the way, that was  
15 the Mahler case.

16 JUSTICE GORSUCH: Mr. Rosenkranz --

17 MR. ROSENKRANZ: Yes.

18 JUSTICE GORSUCH: What do you say to  
19 the critique that the void-for-vagueness  
20 doctrine is, as a racial issue matter, is just  
21 substantive due process and suspect on that  
22 basis and therefore should be narrowly  
23 construed?

24 MR. ROSENKRANZ: Your Honor, it's not  
25 -- it's not substantive due process. It's a

1 procedural due process concern and it's a  
2 separation of powers concern. It's both of  
3 those.

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

19 JUSTICE ALITO: How is it procedural?  
20 I don't understand how you can say it is a  
21 procedural right. You said -- you said the  
22 statute is void for vagueness. That certainly  
23 is substantive.

24 MR. ROSENKRANZ: Your Honor, you say  
25 the statute is void for vagueness because when

1           it is being applied to an individual, that  
2           individual is given no notice that lifetime  
3           banishment is going to be the consequence of  
4           what he thought to be a safe harbor --

5                         JUSTICE ALITO:  And what if he was  
6           given notice in some other way?

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

13                        JUSTICE ALITO:  So that makes my  
14          point.  He had notice.  He knew.  So where's  
15          the procedural violation?

16                        MR. ROSENKRANZ:  Well, for the vast  
17          majority of people and the people affected by  
18          it, it is procedural.

19                        But, you know, Your Honor, I just  
20          realized, in this colloquy, I never did answer  
21          the other part of Your Honor's question,  
22          Justice Alito, about the reasons why the  
23          vagueness standard applies here, the criminal  
24          vagueness standard.

25                        So the first I said, before you ever

1 get to Jordan, is that the -- is that 16(b) is  
2 itself a criminal statute.

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

11 The aggregated felon label, once you  
12 are an aggregated felon, now that's in the INA,  
13 certain immigration crimes are triggered. And  
14 so aggregated felon becomes a -- an element of  
15 a crime.

16 And I will give you an example.  
17 If -- if this -- if this vagueness analysis  
18 works the way the government says it works, Mr.  
19 Dimaya can be deported because he had  
20 sufficient notice or the statute was  
21 sufficiently clear, but an aggravated felon who  
22 reenters this country is prosecuted as an  
23 aggregated felon.

24 So if he reentered the country, he can  
25 then be not -- he then -- he can then not be

1 prosecuted as an aggregated felon because the  
2 statute would be too vague. That makes no  
3 sense, which is exactly why this Court adopted  
4 the rule that it adopted in A.B. Small and that  
5 four members of this Court repeated in  
6 Northwestern Bell, which is, if Congress makes  
7 that choice to give civil and criminal  
8 ramifications to the same statute, the very  
9 same statute, if the statute is void for vague  
10 in one context, it is void for vague in the  
11 other.

12 And, by the way, that other context in  
13 A.B. Small was a silly little contract case,  
14 not, you know, even, you know, the licensing of  
15 a nursery.

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

21 MR. ROSENKRANZ: Your Honor, the  
22 answer is crime involving moral turpitude does  
23 not sit in a vacuum by itself. It is a phrase  
24 that Congress adopted that has, at this point,  
25 probably two centuries' worth of law describing

1 what is in and what is out.

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

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

13 And -- and so --

14 JUSTICE ALITO: I mean, maybe you have  
15 in your head a list of -- you could categorize  
16 any offense that I might mention and say that's  
17 a crime of moral turpitude, that's not a crime  
18 of moral turpitude. I couldn't do that.

19 MR. ROSENKRANZ: Well --

20 JUSTICE ALITO: And I doubt that  
21 somebody who is facing possible removal  
22 consequences would be able to answer that  
23 question.

24 MR. ROSENKRANZ: Well, Your Honor --

25 JUSTICE ALITO: Okay. Shooting a bald



1 eagle, is that -- is that a crime of moral  
2 turpitude? Some people would think so.

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

4 JUSTICE ALITO: It is not. How  
5 about --

6 MR. ROSENKRANZ: And, by the way, nor  
7 is flag burning. And --

8 But let me -- but let me answer the  
9 question this way.

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

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

21 MR. ROSENKRANZ: I think that is what  
22 the Court -- not the ordinary case, that is for  
23 sure.

24 JUSTICE KAGAN: We don't.

25 MR. ROSENKRANZ: That is correct.

1                   JUSTICE KAGAN: All we do is look to  
2 the elements everybody has to meet.

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

17                   Congress can, of course, decide the  
18 circumstances under which lifetime residents  
19 can be kicked out of this country, but it  
20 disserves the separation of powers, that  
21 Justice Gorsuch referred to, to allow Congress  
22 to pass the buck to immigration officials and  
23 courts with a provision this vague.

24                   If there are no further questions, we  
25 respectfully request that the Court affirm the

1 Court of Appeals.

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 Counsel.

5 Mr. Kneedler, three minutes.

6 REBUTTAL ARGUMENT ON BEHALF OF PETITIONER

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

12 Those crimes are continuing crimes.  
13 Conspiracy is -- conspiracy, you could be  
14 prosecuted for conspiracy from the moment of  
15 the agreement, but the conspiracy continues up  
16 until the commission of the crime. The  
17 commission of the crime is the culmination of  
18 the conspiracy.

19 The same thing with burglary, burglary  
20 is not over when you enter the house. It -- it  
21 is over when you leave the house.

22 Kidnapping is not over until the  
23 victim is freed. Escape from a prison is a  
24 continuing offense.

25 And 16(b) and its counterpart in

1           924(c) serve a critical role in circumstances  
2           like that, where a crime extends over a period  
3           of time, you can complete the crime without  
4           violence being an element, but there is -- it  
5           is instinct with risk of crime, and that is  
6           why -- excuse me, force, and that is why  
7           Congress addressed it, and that is what this  
8           Court unanimously focused upon in Leocal.

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

16                        In the immigration context, this  
17           statute is applied all the time through the  
18           mediation of an administrative body. It is not  
19           like a regular civil law in that respect.

20                        JUSTICE SOTOMAYOR: In how many of  
21           those cases is it the sole basis of  
22           deportation?

23                        MR. KNEEDLER: Well, it can be -- I  
24           don't know the percentage, but it's also a basis  
25           for denial for discretionary relief.

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

10                   You can look at the legislative  
11                   judgments embodied in the crime, is the -- is  
12                   the circumstance when force is not used, does  
13                   it -- is it like the situations where the  
14                   elements are -- are present?

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

21                   So that's -- that's out here because  
22                   it is not in the course of committing the crime  
23                   of possession. We said it was in, in ACCA,  
24                   because it is -- injury might flow, and it was  
25                   actually a pretty good illustration of the

1 difference between the two circumstances.

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

9 Crimes involving moral turpitude --  
10 JUSTICE GORSUCH: You are not asking  
11 for the executive -- for the executive to  
12 define these crimes. You are asking for us to  
13 do it, right?

14 MR. KNEEDLER: Well, in the  
15 immigration context --

16 JUSTICE GORSUCH: This isn't an  
17 example where Congress has delegated authority  
18 to the executive to do this.

19 Are you asking -- are you suggesting  
20 it is delegated to this branch to do it?

21 MR. KNEEDLER: No, it is not delegated  
22 to this branch. This branch has to construe  
23 the -- the statute that Congress has enacted.  
24 In other circumstances, the agency, of course,  
25 gets deference in deciding what constitutes a

1 particular removable offense.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 Counsel.

4 The case is submitted.

5 (Whereupon, 12:08 p.m. the case was  
6 submitted.)

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Official - Subject to Final Review

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