

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DENARD STOKELING, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 17-5554  
 )  
 UNITED STATES, )  
 )  
 Respondent. )  
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Pages: 1 through 66  
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Date: October 9, 2018

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Petitioner, )

v. ) No. 17-5554

UNITED STATES, )

Respondent. )

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Washington, D.C.

Tuesday, October 9, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

BRENDA G. BRYN, ESQ., Ft. Lauderdale, Florida; on behalf of the Petitioner.

FREDERICK LIU, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the Respondent.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-5554, Stokeling versus United States.

Ms. Bryn.

ORAL ARGUMENT OF BRENDA G. BRYN  
ON BEHALF OF THE PETITIONER

MS. BRYN: Mr. Chief Justice, and may it please the Court:

Since the invalidation of the residual clause in 2015, the only way for a state robbery offense to qualify as an ACCA violent felony is if it has violent force as an element. Florida robbery does not have that element because it requires only slight force to overcome slight victim resistance.

JUSTICE GINSBURG: So your -- your position is no robbery conviction in Florida counts under the Armed Career Criminal offense? A robbery in Florida is out entirely?

MS. BRYN: Because of the categorical approach. Because the least culpable conduct for robbery in Florida does not require violent force.

1           JUSTICE SOTOMAYOR: I'm sorry. Does  
2 that apply -- your answer apply to the armed  
3 robbery subsections of the Florida statute?

4           MS. BRYN: In the Florida statute,  
5 yes, because armed robbery in Florida does not  
6 require using or brandishing or displaying or  
7 even representing that one has a weapon. It  
8 only requires carrying.

9           But in most states that have armed  
10 robbery, aggravated robbery offenses that  
11 require using, displaying, threatening a  
12 weapon, those offenses would qualify because  
13 that's a threatened use of violent force.

14           Florida juries are instructed every  
15 day in Florida that although resistance is  
16 required, no particular degree of resistance is  
17 required. A victim can resist to any  
18 particular extent, and, in fact, the case law  
19 in Florida confirms that resistance sufficient  
20 for a robbery conviction and a penalty up to 15  
21 years in the state penitentiary can involve  
22 nothing more than the tightening of one's hand  
23 momentarily on a dollar bill before releasing  
24 it.

25           CHIEF JUSTICE ROBERTS: I actually

1     tried that, holding, since I knew this was --  
2     this was your most -- this was your most  
3     important case, and I held on to a dollar bill  
4     and asked each of my law clerks to try to pull  
5     it out of my hand. And I was surprised. I  
6     mean, people think, oh, it tears easily. Well,  
7     it tears easily if you go like this, but if  
8     you're really tugging on it -- I mean, it's --  
9     I'm not saying nobody could do it, but -- but  
10    it requires --

11                   (Laughter.)

12                   CHIEF JUSTICE ROBERTS: -- a lot of  
13    force, more than you might think.

14                   MS. BRYN: I don't think, Your Honor,  
15    that it requires a substantial degree of force  
16    as this Court defined that in Curtis Johnson  
17    using the adjectives, all of which connote  
18    actual violence, which are severe force,  
19    extreme, furious, vehement, strong, and  
20    powerful force.

21                   Clearly, there is some force involved.

22                   CHIEF JUSTICE ROBERTS: Well, it also  
23    said -- it also said -- and this, of course, is  
24    the language your friend on the other side  
25    stresses -- capable of causing physical pain or

1 injury. That covers a broader area than some  
2 of the other adjectives that were in the same  
3 paragraph.

4 MS. BRYN: The -- the phrase "force  
5 capable of causing pain or injury" has to be  
6 understood in context, and it is explaining  
7 violent force in the context of a violent  
8 felony definition.

9 The Court emphasized the word  
10 "violence" by italicizing it, and then the  
11 Court gave all of these ordinary dictionary  
12 definitions of "violence" or "violent" which  
13 are extreme force, vehement, furious force.

14 So I --

15 JUSTICE ALITO: Do you think that --  
16 do you think that shoving, grabbing, and  
17 pinching count as physical force under ACCA?

18 MS. BRYN: Your Honor, the  
19 determination under ACCA cannot be made in a  
20 vacuum. So there's no -- there's no category  
21 of conduct, I guess we can say, besides  
22 stabbing someone in the back directly would  
23 involve that.

24 Most conduct has to be viewed in  
25 context. For instance, the Court gave the

1 example in ACCA of a slap to the face. In  
2 Castleman, they gave the example of a squeeze  
3 to the arm. So you have to look beyond the  
4 actual category.

5 And one very powerful --

6 JUSTICE ALITO: Well, I thought under  
7 the categorical approach, you have to look at  
8 the category. So I really don't understand why  
9 you can't answer that question.

10 MS. BRYN: Well, the --

11 JUSTICE ALITO: Does pinching, for  
12 example, constitute physical force sufficient  
13 to -- to activate ACCA?

14 MS. BRYN: The categorical approach  
15 actually does not require you to look at a  
16 category. It requires you to look at the  
17 actual cases and determine what the least  
18 culpable conduct for a conviction, and that  
19 conduct does not exist in a vacuum.

20 JUSTICE SOTOMAYOR: I'm sorry, we used  
21 the example of a tap on the shoulder not being  
22 sufficient force. So can you answer Justice  
23 Alito's hypothetical?

24 MS. BRYN: Right.

25 JUSTICE SOTOMAYOR: Is a pinch, an



1 ordinary pinch -- let's not talk about an  
2 extraordinary --

3 (Laughter.)

4 JUSTICE SOTOMAYOR: -- pulling of the  
5 ears that a parent might sometimes do. Let's  
6 talk about just a pinch.

7 (Laughter.)

8 JUSTICE SOTOMAYOR: Is that sufficient  
9 force? If we said a tap on the shoulder  
10 couldn't be, why could a pinch be?

11 MS. BRYN: I -- I think the -- the  
12 answer is looking at the -- the other side of  
13 the equation from what a substantial degree of  
14 force is. And Your Honor mentioned force  
15 capable of -- of causing pain or injury. And I  
16 think the only way to read that explanation of  
17 violent force is as force that's -- a degree of  
18 force that's reasonably expected to cause pain  
19 or injury.

20 JUSTICE SOTOMAYOR: You've --

21 MS. BRYN: I don't think a pinch --

22 JUSTICE SOTOMAYOR: -- you've said the  
23 reasonable -- and I do understand your point,  
24 which is, from personal experience, if you tap  
25 an injured shoulder, it could cause injury.

1 It's capable of causing physical pain and  
2 injury.

3 But we said, in the normal course of  
4 circumstances, a tap on the shoulder would not  
5 -- is not capable of producing injury. So --

6 MS. BRYN: Nor would a pinch.

7 JUSTICE SOTOMAYOR: I'm sorry? What?

8 MS. BRYN: Nor would a pinch in normal  
9 circumstances.

10 JUSTICE SOTOMAYOR: That's the point.  
11 So I know you use "reasonably expected," but is  
12 it reasonably expected or just simply capable  
13 in -- in -- in the normal course to --

14 MS. BRYN: The -- the reason that we  
15 have articulated reasonably expected is to  
16 contrast with an outlier case. And as Your  
17 Honor mentioned, a tap can cause pain or injury  
18 if you have an injured shoulder, if the victim  
19 has some unique susceptibility to pain. So  
20 that's why it is difficult to talk about  
21 categories, and you have to look at the  
22 circumstances. But the circumstances are the  
23 normal ones, as Your Honor --

24 JUSTICE ALITO: Well, this has --

25 JUSTICE KAGAN: Ms. Bryn, I wonder if

1 you could say a bit more about this reasonable  
2 expectation standard, because I'm not sure it  
3 does all that much that's different from what  
4 the government's standard does.

5 I mean, if you take something like  
6 grabbing money out of a hand and say could that  
7 reasonably be expected to cause pain or injury,  
8 well, maybe some injury, maybe a bruise, maybe  
9 a little scratch, maybe a little cut.

10 And, similarly, even a pinch. I mean,  
11 reasonably expected to cause pain? Sure, for a  
12 while, for a moment. So how does your standard  
13 really help to distinguish the kinds of cases  
14 that you want to distinguish?

15 MS. BRYN: Because I think the  
16 categorical approach requires you to look at  
17 real cases, and our real cases involve this  
18 minimal pulling or tugging action that resulted  
19 in no pain or injury. And that's a very  
20 powerful --

21 JUSTICE GINSBURG: That -- that could  
22 be in a particular case, but don't you have to  
23 take the conduct in -- in general? And  
24 particularly Justice Alito's question about  
25 pinching, there are some people who have thin

1 skin and bruise very easily, and a pinch would  
2 probably be sufficient to cause bruising,  
3 actual injury.

4 MS. BRYN: Right. So that would not  
5 be a circumstance known to the perpetrator.  
6 And the test that the Court set forth in Curtis  
7 Johnson by specifying over and over again that  
8 it's a degree of force, and the Court used the  
9 word "degree" four separate times, is a test  
10 that is focused on the perpetrator, not on the  
11 victim.

12 I mean, we -- we all know from first  
13 year of law school that there are eggshell  
14 plaintiffs. And the purpose of ACCA is to  
15 predict future violence with a gun for people  
16 who possess a gun, who would be the people that  
17 would be willing to pull a trigger and kill  
18 someone.

19 So, if there is an incidental injury,  
20 an accidental injury that no one could have  
21 imagined because someone does have thin skin or  
22 someone has just had shoulder surgery or has a  
23 tender area of their body, it would --

24 JUSTICE KAGAN: But my question wasn't  
25 that. It wasn't the eggshell plaintiff. It

1 was the ordinary person who can reasonably be  
2 expected to suffer some, even if minimal, pain  
3 or injury, the pain that a pinch causes or the  
4 injury that comes from your hand being bruised  
5 when somebody tries to grab some cash out of  
6 it.

7           And I guess I was -- I was confused  
8 that you wanted to use this standard,  
9 "reasonably be expected to cause pain or  
10 injury," because it does seem to me as though a  
11 lot of minor activity could -- could satisfy  
12 that standard.

13           MS. BRYN: So that's why we -- we have  
14 said, number one, that whether there is an  
15 actual pain or injury in the actual reported  
16 cases, what has been prosecuted by the state?  
17 Has the state prosecuted for no injury or for  
18 exceedingly minor injuries? In Florida, they  
19 prosecute for no injury.

20           So even though it is possible to  
21 hypothesize a case where the same conduct might  
22 cause injury, I mean, we think those are  
23 outlier cases because the real cases that  
24 resulted in prosecution in our state have not  
25 resulted in injury.

1 JUSTICE GINSBURG: How -- how --

2 MS. BRYN: We're not saying it can  
3 never happen.

4 JUSTICE GINSBURG: -- how -- how then  
5 would you -- you -- would you describe an ACCA  
6 qualifying physical force? Can you give us  
7 your definition?

8 MS. BRYN: Yes. It's a degree of  
9 force that is substantial enough to be  
10 reasonably expected to cause pain or injury in  
11 most cases, rather than an outlier case.

12 And in -- in determining whether the  
13 offenses under our statute match that, a  
14 powerful circumstance is if the conduct has not  
15 resulted in any pain or injury.

16 JUSTICE ALITO: In Taylor, the Court  
17 said that the revision of ACCA to include the  
18 elements clause expanded the predicate offenses  
19 beyond just robbery and burglary.

20 But we are told that your reading of  
21 the statute would knock out robbery offenses in  
22 30 to 40 case -- in 30 to 40 states.

23 What is your response to that? Does  
24 that seem -- does it seem likely that that's  
25 what Congress was intending to do?

1 MS. BRYN: Well, there -- there are  
2 two parts of that question. Congress intended  
3 to cover robbery in the expansion, robbery and  
4 additional crimes. The way it sought to do  
5 that was by writing two different violent  
6 felony definitions.

7 One was very narrow and circumscribed.  
8 That's the elements clause. The other one was  
9 quite expansive, capacious, and would sweep in  
10 every type of robbery, even snatchings, even  
11 not -- robberies, pickpocketings, theft  
12 offenses that require no force whatsoever.

13 JUSTICE ALITO: So your answer -- your  
14 answer is that they thought that robbery was  
15 going to be covered by the residual clause, is  
16 that right?

17 MS. BRYN: They wrote language that  
18 would have covered it under the residual  
19 clause. And it did until three years ago.  
20 This issue did not really come before the  
21 Court.

22 JUSTICE GORSUCH: Counsel, I'm stuck  
23 there too, because if Congress uses the word  
24 robbery, we wouldn't normally think that it's  
25 excluding more than half the states' statutes

1 that are defining robbery.

2 That -- that -- that just seems like a  
3 strike against the statutory reading you're  
4 asking us to adopt. And -- and I understand  
5 there's the residual clause, but Congress used  
6 the term "robbery" --

7 MS. BRYN: Well, it --

8 JUSTICE GORSUCH: -- and we've said it  
9 used it in the ordinary sense at the time of  
10 adoption. And at the time of adoption, it  
11 appears that, as Justice Alito suggested, over  
12 half the states would have included this kind  
13 of conduct.

14 MS. BRYN: Well, again, two answers to  
15 that question. It used "robbery" in the '84  
16 Act and it deleted "robbery" in the '86 Act at  
17 the same time that it continued to enumerate  
18 burglary.

19 To capture the robberies, Congress had  
20 two different definitions. And as to whether  
21 43 states would be knocked out by our  
22 definition, as we have said in our reply brief  
23 and demonstrated in our appendix, the  
24 government has only matched words in the  
25 statute, the word "force" and the word



1 "resistance."

2 It has not done what the categorical  
3 approach requires, which is to take a deep dive  
4 into state law.

5 JUSTICE KAGAN: Well, how many states  
6 do you think --

7 JUSTICE ALITO: I don't understand  
8 your --

9 JUSTICE KAGAN: -- how many states do  
10 you think will be knocked out? Because, I  
11 mean, Florida seems as though it's out of luck  
12 because both -- it can't pick up under armed  
13 robbery what it loses under unarmed robbery for  
14 the reason that you said earlier.

15 Presumably, there are other states in  
16 which armed robbery would count as -- as a --  
17 as -- as under the -- this clause. So how many  
18 states do you think are going to be in  
19 Florida's position that none of their robbery  
20 statutes count under this clause?

21 MS. BRYN: I -- I would say four or  
22 less.

23 JUSTICE KAGAN: Four or less?

24 MS. BRYN: I would say four or less --

25 JUSTICE KAGAN: Why is that?

1 MS. BRYN: -- would have no form of  
2 robbery because there are, first of all, just  
3 from my review, and I'm not an authority on  
4 every state, but from my review, there are not  
5 many states that have the trifecta that Florida  
6 has.

7 And let me say what that is. It is  
8 quite unique. And that is explicit embracing  
9 of any degree of resistance, number one.

10 Number two, embracing the principle  
11 that any degree of force can overcome any  
12 degree of resistance.

13 And, third, actual prosecutions for  
14 slight force robberies. Some states embrace  
15 the immateriality principle. There are some  
16 states that have one or two applications. But  
17 there are very few states that I have seen in  
18 my research that are like Florida in having  
19 everything.

20 And then, on top of it, there are very  
21 few states that would be like Florida that also  
22 don't have an armed robbery provision that  
23 involves use, display, threat of a weapon.  
24 We've listed those in our appendix.

25 JUSTICE ALITO: Well, in how many

1 states would common law robbery, would simple  
2 robbery, not armed robbery or an aggravated  
3 form of robbery, be knocked out by your  
4 understanding of the statute?

5 MS. BRYN: So, again, it -- it's --  
6 it's hard to give an actual number. And we see  
7 from the -- the mistakes that were made in the  
8 government's appendix, that's really a fraught  
9 inquiry, but what I would suggest is that it's  
10 really only a handful, maybe six states or  
11 less, that are like Florida in having  
12 everything, the principles and the  
13 applications. There are a few others that  
14 state the principles broadly, but there are no  
15 applications. And a few others that have  
16 slight force applications.

17 JUSTICE ALITO: So you think that in  
18 -- in applying the categorical approach here,  
19 it's necessary to look to the cases that are  
20 prosecuted?

21 MS. BRYN: Yes, I think --

22 JUSTICE ALITO: To -- you have to look  
23 to -- to -- beyond the statute, you have to  
24 look to prosecutorial policies and practices?

25 MS. BRYN: That -- that's what the

1 Court said in Duenas-Alvarez, to determine if a  
2 statute can be or has been applied to  
3 non-violent, non-generic conduct or in an  
4 overbroad way. The only way you can know that  
5 is to find actual cases. And that's --

6 JUSTICE KAGAN: Well, even if the  
7 statute on its face includes that kind of  
8 conduct?

9 MS. BRYN: The statute -- well, first  
10 of all, the Florida statute on its face does  
11 not even include resistance. That's been  
12 judicially implied, and that's the fact in some  
13 states as well.

14 But let's say there's a statute that  
15 uses the term "resistance" or overcoming  
16 resistance and force.

17 Still, what the Court said in Curtis  
18 Johnson is that this Court, federal courts,  
19 have to defer to the state's interpretation of  
20 their elements.

21 In our appendix, we cited a Michigan  
22 case that -- that -- the statute uses the term  
23 violence, and there is a case in Michigan that  
24 says spitting is sufficient violence for the  
25 statute. I mean, that's Curtis Johnson,

1 touching, contact behavior.

2 At the other side of the spectrum, we  
3 have common law robbery states that say there  
4 are no minimal force applications. Our state  
5 Supreme Court has never said that the degree of  
6 force is immaterial. South Carolina, for  
7 example. And the Fourth Circuit said that in  
8 Doctor. And that's a common law robbery state.

9 And they said it qualifies because  
10 there are no -- no broad principles embraced by  
11 this Court which would suggest slight force can  
12 qualify, nor are there any applications.

13 So, under the categorical approach, it  
14 will be a state-by-state inquiry, but all of  
15 the circuit court of appeals know how to do it.  
16 They've been doing it since Taylor. And they  
17 have to examine each state's law.

18 I -- I have exhaustively reviewed  
19 Florida law, and I have looked at other states'  
20 law, and I can tell you that not many states  
21 are like Florida in having everything.

22 JUSTICE GORSUCH: Counsel, let's say  
23 we -- we disagree with your understanding of  
24 Duenas, and we think that if it's clear on the  
25 face of a statute that conduct is encompassed.

1 Under the elements approach in Taylor, then  
2 that's how we would define it.

3 Does that alter the number of states  
4 that you think would be knocked out under your  
5 approach?

6 MS. BRYN: Well, I've already knocked  
7 out, I -- I believe, at least 10 states on --  
8 in my approach by reporting in our appendix the  
9 full language of the statute that the  
10 government excerpted out of its own appendix.

11 So statutes which make clear on the  
12 face of the statute that violence can be  
13 contact. Mere touching, any impact.

14 So, yes, that reduces the number.  
15 But, other than that, once we are down to  
16 force, violence, and resistance, those are  
17 common words that come from the common law, but  
18 each state has gone in its own direction.

19 And in order to properly do the  
20 categorical approach under the elements clause,  
21 you have to defer to the interpretation of  
22 those elements.

23 It's a different type of inquiry than  
24 for the generic offense determination. Some  
25 generic offense determinations can be made on

1 the face of the statute because the statutory  
2 language is plain, but, as we have shown by  
3 case law showing that resistance can be nothing  
4 more than the momentary tightening of one's  
5 hand, that the word "resistance" does not have  
6 a meaning in and of itself.

7 JUSTICE KAVANAUGH: But -- but,  
8 counsel -- counsel, in Curtis Johnson, you rely  
9 heavily on the general statements of the Court,  
10 but the application of those general statements  
11 was to something very specific: battery and a  
12 mere tap on the shoulder. And all Curtis  
13 Johnson seemed to hold was that that was  
14 excluded.

15 So why don't we follow what Curtis  
16 Johnson seemed to do in applying those general  
17 statements to the specific statute at issue  
18 here, and why wouldn't that then encompass the  
19 Florida statute, which requires more than, say,  
20 a tap on the shoulder?

21 MS. BRYN: Because what the Court did  
22 before applying the standard to the statute --  
23 to the Florida battery statute was to  
24 definitively construe the words that --

25 JUSTICE KAVANAUGH: Well, but it --

1 but it's --

2 MS. BRYN: -- Congress used in the  
3 elements clause.

4 Go ahead.

5 JUSTICE KAVANAUGH: But it -- as you  
6 point out, it's -- it's a bit general, those  
7 statements, that language. And so how do we  
8 understand what the Court meant by that? You  
9 look at how it applied it, and it was to a  
10 battery statute, and it was a case where the  
11 government argued that the mere tap on the  
12 shoulder was okay. And the Court said no,  
13 that's not enough. But all it seemed to carve  
14 out was that kind of statute. At least as I  
15 read page 139 of the Curtis Johnson opinion, it  
16 seemed to very carefully distinguish those two  
17 situations.

18 MS. BRYN: Your -- Your Honor, I -- I  
19 disagree with that, because I believe that the  
20 standard the -- the Court set forth was a  
21 violent felony definition. The Court said that  
22 the word "violent" alone connotes a substantial  
23 degree of force, and used words like "severe,"  
24 "extreme," "vehement," "furious" to  
25 characterize and flesh out the concept of what



1 a substantial degree of force is.

2 And the conduct in our case, yes, it's  
3 more than a mere touching, but it's not  
4 extreme, furious, severe, vehement, any -- any  
5 of the adjectives, the ordinary dictionary  
6 terms, which -- which was the definition of  
7 "violent force" the Court embraced in -- in  
8 rejecting the common law view.

9 So the Court did not draw a line. It  
10 would have been a very short opinion if  
11 touching is out and everything else is in. And  
12 we see from Castleman four years later that  
13 other minor uses of force do not convey the  
14 sense of violence in the -- the colloquial  
15 sense, and the Court reinforced that in  
16 Castleman.

17 So I think there's a lot more in the  
18 definition of Curtis Johnson. The standard was  
19 a substantial degree. The Court gave  
20 adjectives that meet it, and the conduct in  
21 several of the Florida cases does not amount to  
22 that level. And that's why Florida robbery  
23 does not qualify.

24 JUSTICE ALITO: But the statutory term  
25 is physical force.

1 MS. BRYN: Right.

2 JUSTICE ALITO: And in the ordinary  
3 understanding of that, force sufficient to  
4 overcome resistance would be physical force.  
5 The holding in Curtis Johnson was what Justice  
6 Kavanaugh described, battery -- the touching  
7 that is necessary for a battery is not physical  
8 force; any unwanted touching satisfies common  
9 law battery.

10 Now, if we go beyond that, you have --  
11 it would be necessary to quantify the degree of  
12 physical force that's required, like how many  
13 pounds per square inch. I have no idea how you  
14 do that.

15 MS. BRYN: The -- the standard that  
16 the Court set in Curtis Johnson, I believe, is  
17 a substantial degree in force and as --

18 JUSTICE ALITO: So what is a  
19 substantial degree of force?

20 MS. BRYN: So the -- as the Chief  
21 Justice stated in -- most recently in Dimaya,  
22 that substantial standards are found all  
23 through the law. "Substantial" is a familiar  
24 term. Judge --

25 CHIEF JUSTICE ROBERTS: How many votes

1 did that get in Dimaya?

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: Not five.

4 (Laughter.)

5 MS. BRYN: The -- the majority in

6 Dimaya --

7 JUSTICE KAGAN: The majority agreed

8 with that point.

9 MS. BRYN: Yes, the majority in Dimaya  
10 actually said that "substantial" is not a  
11 difficult term to apply at all when it's being  
12 applied to real-world conduct. And that's what  
13 the categorical approach requires. We have  
14 real cases. Apply the term "substantial" to  
15 real-world cases.

16 And one important factor in our  
17 real-world cases, our prosecutions, is whether  
18 there was pain or injury in -- in the actual  
19 case. We have cases that --

20 JUSTICE ALITO: Well, do you think  
21 there could not be substantial force unless it  
22 actually causes pain or injury?

23 MS. BRYN: No, I'm not -- I'm not  
24 saying that either. And -- and I think we said  
25 that in our brief. It's -- it's -- that's a

1 significant circumstance, like circumstantial  
2 evidence.

3           There could be someone who is uniquely  
4 immune to pain. I mean, if you're pinching  
5 Arnold Schwarzenegger or slapping him or  
6 something else --

7           JUSTICE ALITO: But you think this  
8 depends on a case-by-case determination?

9           MS. BRYN: No. I think it depends on  
10 judges using their common sense and common  
11 experience that they use every day under the  
12 guidelines to make determinations of degree,  
13 determining what's minor, what's major. This  
14 -- this is what judging is. This is what  
15 juries do.

16           JUSTICE ALITO: But you -- you have to  
17 hypothesize a particular type of robber and a  
18 particular type of victim. So, you know, what  
19 is the -- what is the quintessential robber and  
20 what is the quintessential victim?

21           As you -- you know, as you just  
22 mentioned, if you have a very strong victim and  
23 a very weak robber, an awful lot of force could  
24 be applied without a reasonable possibility of  
25 causing pain. On the other hand, in what might

1 be the more typical situation, if you have a  
2 young, strong robber who pulls a purse out of  
3 the hands of an elderly woman or a briefcase  
4 out of the hands of an elderly man, there's a  
5 real chance that that's going to cause pain and  
6 maybe serious physical injury.

7 MS. BRYN: Well --

8 JUSTICE ALITO: So I have no idea how  
9 to imagine that the -- the typical robber and  
10 the typical victim.

11 MS. BRYN: Well, I can't --

12 JUSTICE ALITO: Who are these people?  
13 Can you describe them for me?

14 MS. BRYN: I -- I don't think that our  
15 test or the standard requires imagining a  
16 typical victim. It requires, under the  
17 categorical approach, to look at the actual  
18 cases.

19 Our cases did involve, to -- to use  
20 your language, typical victims.

21 JUSTICE ALITO: Okay. Under your --  
22 under the cases -- under the Florida cases,  
23 you've studied them all, what is the typical  
24 victim and what is the typical robber?

25 MS. BRYN: Someone that doesn't have

1 any of those unique characteristics that you  
2 just described. They were not particularly  
3 weak, frail, any -- anything that would have  
4 been obvious.

5           And -- and let me just stress this:  
6 The encounters in the Florida cases took place  
7 in a split second. They were momentary,  
8 one-handed, tearing -- tearing something out of  
9 another person's hand with one hand. Maybe if  
10 you use two hands and grab someone by the arm  
11 and pull at the same time, that's a different  
12 degree of force.

13           But doing it one-handed in a momentary  
14 encounter like this, I -- I think in everyone's  
15 common experience, judges and juries would be  
16 able to say that is not a substantial degree of  
17 force. That's not like slapping someone in the  
18 face. That's not like stabbing someone in the  
19 back or those type of facts.

20           I -- I -- I don't think that's  
21 difficult. It may be a more difficult  
22 determination where the least culpable conduct  
23 in a state involves substantial injury because  
24 there was some sort of vulnerability of the  
25 victim, but that's not Florida. So that --

1 that would be a different case.

2 But what we know from Florida is that  
3 any degree of resistance and any degree of  
4 force -- I see that I have my light. I'd like  
5 to reserve my retaining time for rebuttal.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Liu.

10 ORAL ARGUMENT OF FREDERICK LIU  
11 ON BEHALF OF THE RESPONDENT

12 MR. LIU: Mr. Chief Justice, and may  
13 it please the Court:

14 For centuries, the common law has  
15 provided a basis to distinguish violent takings  
16 of property from non-violent takings. Violent  
17 takings or robberies were takings that involved  
18 the use of force sufficient to overcome the  
19 victim's resistance.

20 That's the element of force that's  
21 found in the robbery -- basic robbery statutes  
22 of over 40 states, including Florida. It's the  
23 element of force that Congress used in its own  
24 definition of robbery in the original 1984  
25 ACCA.

1           And when Congress amended the ACCA two  
2 years later, it took that element and made it  
3 the centerpiece of the new elements clause.

4           Under Petitioner's interpretation of  
5 the ACCA, however, common law robbery would not  
6 qualify as an ACCA predicate.

7           In fact, Petitioner cannot identify a  
8 single state whose basic robbery statute,  
9 whether based on the common law or not, would  
10 qualify under his interpretation.

11           JUSTICE KAGAN: Mr. -- Mr. Liu, could  
12 I just ask what you understand the Florida  
13 cases to be saying? So I'll give you a hypo to  
14 elucidate that.

15           So I'm walking down the street and I'm  
16 carrying a handbag with a strap over my  
17 shoulder, and, as everybody knows, the way you  
18 carry that is you essentially grab on to the  
19 strap. So -- and then somebody comes and runs  
20 and wrests it out of my grasp.

21           Does that count under Florida law as  
22 robbery?

23           MR. LIU: It -- it depends. I think  
24 it would depend on a few more facts, but I  
25 think -- I think the Florida cases do focus



1 just on this issue. And if I -- if I could  
2 illustrate my answer with a couple of the  
3 Florida cases.

4 JUSTICE KAGAN: No, I want -- well,  
5 you can illustrate it, sure --

6 MR. LIU: Well, I -- I think the --

7 JUSTICE KAGAN: -- but, I mean, I want  
8 an answer to my hypothetical.

9 MR. LIU: -- I think the facts you  
10 described are not too different from the facts  
11 of Rigell, and I think that is a case where the  
12 Florida courts did conclude that the force used  
13 was sufficient.

14 There, the -- the -- the victim had a  
15 bag on his shoulder -- on her shoulder. The  
16 victim -- the defendant came around, yanked the  
17 bag off. There was a bit of a struggle because  
18 the -- the victim turned and tried to resist in  
19 that fashion.

20 JUSTICE KAGAN: Yeah, so --

21 MR. LIU: And the purse -- the strap  
22 of the purse broke --

23 JUSTICE KAGAN: -- but I was actually  
24 taking that out, because, you know, I'm -- I'm  
25 -- I'm holding on to the bag, so you're going

1 to need some force to get it. But -- and --  
2 and that kind of force is used. Robbery?

3 MR. LIU: Yes.

4 JUSTICE KAGAN: Okay. Well, then  
5 robbery in Florida really includes pretty much  
6 the full gamut of bag snatchings.

7 MR. LIU: I don't -- I don't think so.  
8 And I'll give you a case that illustrates that.  
9 A case called RP, which is cited in the  
10 Robinson case -- that's sort of the seminal  
11 case -- involves someone who grabbed a camera  
12 that was hanging off someone's shoulder, and  
13 that did not rise to the -- to the level of  
14 force necessary for robbery.

15 And the difference between the two  
16 cases is the added element of violence. It is  
17 the resistance by the victim.

18 JUSTICE KAGAN: Right. All I was  
19 saying, I mean, I'm sure you can find me a  
20 couple of cases where people walk around with  
21 cameras or bags and -- and don't have their  
22 hands on them. But I'm going to say, as every  
23 woman who carries around handbags knows, that's  
24 just the normal way you carry around a handbag.

25 So -- so -- so that would be the usual

1 case, maybe not the always case, but it's the  
2 usual case of bag snatching that you say falls  
3 under the robbery definition.

4 MR. LIU: And I think what's important  
5 to remember about even that case is that there  
6 is force on the one hand being applied by the  
7 victim which is being met by force on the other  
8 being applied by the defendant. And what that  
9 amounts to is a physical struggle over a piece  
10 of property. I think it --

11 JUSTICE SOTOMAYOR: But the problem is  
12 --

13 JUSTICE KAGAN: Yeah, I mean -- I'm  
14 sorry.

15 JUSTICE SOTOMAYOR: I'm sorry. The  
16 problem is, just in common parlance, the  
17 definition that the courts have given in  
18 Florida is the slightest resistance qualifies  
19 as violent force so that if the victim just  
20 merely moves you away and you push him back --

21 MR. LIU: I don't think that's --

22 JUSTICE SOTOMAYOR: -- that's the  
23 slightest force.

24 MR. LIU: Well, but I think what's --  
25 what's important to keep in mind -- I guess

1 this finishes my answer to Justice Kagan -- is  
2 that what is inherent in the offense every time  
3 it occurs in Florida is this violent contest  
4 over a piece of property.

5 And I think it's natural to conceive  
6 of the force necessary to prevail in such a  
7 contest as force capable of causing --

8 JUSTICE SOTOMAYOR: But that's not the  
9 words the Court has used. It said the  
10 slightest resistance and the slightest force  
11 used to overcome it qualify as a robbery.

12 And under the categorical approach, I  
13 thought that we had to eliminate something that  
14 was slight.

15 MR. LIU: Well, I think it's true that  
16 what -- that the -- that the resistance can be  
17 of any degree, but I think you have to view  
18 that resistance --

19 JUSTICE SOTOMAYOR: So the force can  
20 be of any degree?

21 MR. LIU: Well, but I think what's key  
22 is -- is the context in which that interaction  
23 is occurring. When you have force on the one  
24 hand being met by force on the other, what you  
25 have is a fight over the property. And I think

1 that is a quintessentially --

2 JUSTICE SOTOMAYOR: No, because what  
3 you have is slight force over slight -- slight  
4 resistance and slight force to overcome it.

5 MR. LIU: Well, you're -- you're --

6 JUSTICE SOTOMAYOR: How do you get  
7 past that into that it's a tug of war?

8 I mean, some people grab you by your  
9 arm and you just pull it away, and it doesn't  
10 necessarily have to be a very forceful pulling  
11 away.

12 MR. LIU: Well, this -- this sort of  
13 interaction where force is met by force has  
14 been understood by the common law since  
15 Blackstone as being violent.

16 JUSTICE GINSBURG: But we have to deal  
17 with the Florida statute and how that -- how  
18 the Florida court, Supreme Court, understands  
19 the use, what -- what violent force is, what --  
20 what its own statute requires.

21 And the Florida Supreme Court has used  
22 words like robbery can be committed with any  
23 degree of force. So any degree of force  
24 certainly can't be a substantial degree.

25 MR. LIU: Well, Justice Ginsburg, I

1 think that quote comes from a case called  
2 McCloud from 1976 -- I mean from 1972. The --  
3 the -- the Florida Supreme Court in Robinson in  
4 1997 said that that was merely dicta and, in  
5 fact, pointed to one Florida intermediate court  
6 case that had read that literally to mean any,  
7 and expressly disapproved that holding.

8 JUSTICE GORSUCH: Well, counsel, I'm  
9 not sure that quite solves the problem, though,  
10 because the statute on its face says not just  
11 force or violence or assault, but it says "or  
12 putting in fear." That is sufficient to  
13 constitute robbery in Florida.

14 MR. LIU: Right.

15 JUSTICE GORSUCH: And Robinson I'm not  
16 sure helps you very much because I think it's  
17 susceptible to a reading of saying, in the  
18 cases of purse snatching where force is alleged  
19 as the mode for creating a robbery, then you  
20 need whatever -- whatever you've been talking  
21 about with Justice Kagan and Justice Sotomayor.

22 But I don't read Robinson as  
23 suggesting force is the only way of  
24 establishing robbery under Florida or doing  
25 anything to eliminate the disjunctive language

1 of "or putting in fear."

2 MR. LIU: Justice Gorsuch --

3 JUSTICE GORSUCH: What do I do about  
4 that?

5 MR. LIU: -- in Florida, there are two  
6 ways to commit robbery. One is robbery by  
7 force. The other is robbery by intimidation.  
8 And that picks up the putting in fear language  
9 you just pointed to in the statute.

10 Petitioner has not disputed in this  
11 entire case that that type of robbery, robbery  
12 by intimidation or putting in fear, satisfies  
13 the elements clause of ACCA.

14 JUSTICE GORSUCH: I'm -- I don't care  
15 what Petitioner has challenged.

16 (Laughter.)

17 MR. LIU: And that's -- and --

18 JUSTICE GORSUCH: I'm asking you why  
19 isn't that a problem under Taylor for the  
20 government in this case?

21 MR. LIU: Because the Florida courts  
22 have construed "putting in fear" to mean a fear  
23 of bodily injury. And under --

24 JUSTICE GORSUCH: But fear of force is  
25 not the same thing as force, right?

1 MR. LIU: That's -- that's correct.

2 So we look at the text --

3 JUSTICE GORSUCH: So why don't you  
4 lose?

5 MR. LIU: So we look at the text of  
6 the Armed Career Criminal Act and it says: Any  
7 -- any felony offense that has as an element  
8 the use or threatened use of force.

9 And that's why there hasn't been any  
10 debate about why the putting in fear prong  
11 satisfies the elements.

12 JUSTICE GORSUCH: So you think the  
13 putting in fear prong is always and can only be  
14 accomplished by threats of force?

15 MR. LIU: By -- exactly, by threats of  
16 putting --

17 JUSTICE GORSUCH: Do you know that --  
18 do we know that's right? Is there any evidence  
19 that that's right?

20 MR. LIU: Well, that -- that is how  
21 the statute has been construed, as -- as  
22 applying to threats to cause bodily harm.

23 JUSTICE GORSUCH: By -- by what --  
24 what authority? Robinson isn't -- Robinson  
25 doesn't do that.



1           MR. LIU: It's a case we cite in the  
2 beginning of our argument section called  
3 Baldwin versus State that gave that  
4 interpretation. Bodily harm is the  
5 quintessential injury that satisfies the Curtis  
6 Johnson standard. And so a threat of such harm  
7 is going to be threatened use of force under  
8 the ACCA. And that's why no one has disputed  
9 that in this entire case.

10           I -- I guess I'd like to return to the  
11 -- I guess I'd like to turn to Petitioner's  
12 test and -- and --

13           JUSTICE KAGAN: Mr. Liu, could I ask  
14 before you do that, you keep referring to the  
15 common law, but I had thought that the whole  
16 structure of the Curtis Johnson opinion is to  
17 say, well, we have this common law definition,  
18 but it's in the context of a statute which is  
19 trying to identify violent felonies. And in  
20 that particular context, Justice Scalia said  
21 we're going to ignore the common law definition  
22 and, instead, use an ordinary language  
23 definition of what "force" is.

24           And he basically says physical force  
25 in the context of a statute that is trying to

1 define violent felonies is violent force,  
2 substantial force, and so forth.

3 So why -- why is this common law  
4 argument relevant at all?

5 MR. LIU: Well, I think it's relevant  
6 for a number of reasons. First of all, Curtis  
7 Johnson did reject a common law definition, but  
8 the common law definition it rejected was one  
9 drawn from a misdemeanor offense.

10 Curtis Johnson didn't call into  
11 question that a felony definition of force  
12 might fit. And this one does fit perfectly.

13 You're right that Johnson also  
14 referenced the ordinary meaning of "force" in  
15 terms --

16 JUSTICE KAGAN: It didn't reference  
17 it. The whole argument -- the whole decision  
18 was based on that.

19 MR. LIU: And I -- and that's why I --  
20 I think I would return to what I was saying  
21 earlier. I think if you took someone off the  
22 -- in every -- in everyday English and -- and  
23 explained to them what happens in these cases,  
24 where someone resists, that resistance is  
25 physically overpowered by someone else, I think

1 "violence" is actually the word a lot of people  
2 would use.

3 It also is the word the common law has  
4 used for centuries. It's the -- it's the word  
5 "violence" that's found in the statutes of  
6 dozens of states. And it's the word that  
7 Congress used when it enacted the basic robbery  
8 definition in the '84 Act.

9 It regarded this type of robbery,  
10 Congress regarded this type of robbery, common  
11 law robbery, as one of the most violent street  
12 crimes -- one of the most common violent street  
13 crimes that existed.

14 And so I think this ordinary approach,  
15 this ordinary language approach how we would  
16 use violence in -- in ordinary English actually  
17 cuts against my friend --

18 JUSTICE KAGAN: I guess the ordinary  
19 English view is something like, look, when I'm  
20 walking down the street and somebody puts a --  
21 a gun in the air and says give me your money,  
22 that I know, I understand to be a violent  
23 offense.

24 But, when I'm walking down the street  
25 and somebody grabs my handbag, I'm not happy

1 about that, but it's -- it just doesn't have  
2 that violent aspect of it in ordinary language  
3 that I think, you know, beating somebody up  
4 does, putting a gun in their face does.

5 And this is a -- a state that defines  
6 robbery so broadly that you tell me it  
7 basically includes every bag snatcher.

8 MR. LIU: Well, I guess -- I guess  
9 what I would say to that is whether -- whether  
10 -- you know, what I would say is the key point  
11 is what Congress thought, and I -- and I think  
12 all the indications are that Congress regarded  
13 this as violent.

14 JUSTICE KAGAN: But what is the "this"  
15 that Congress thought? I mean, in all of these  
16 cases, we have to look to whether the state has  
17 defined its crime more broadly than the basic  
18 offense.

19 MR. LIU: Well, the idea that Florida  
20 here is somehow an outlier among common law  
21 jurisdictions is just not correct. The Florida  
22 case law tracks exactly the sort of case law we  
23 found in the common law treatises dating back  
24 to Blackstone.

25 And that was the notion of violence

1 that Congress had in mind when it wrote the  
2 definition of "robbery" in the '84 Act. Two  
3 years later, Congress's intent was to expand  
4 the scope of the ACCA. That was the very title  
5 in the text of the --

6 JUSTICE GINSBURG: But that was  
7 through the residual clause? The --

8 MR. LIU: No, Your Honor. Congress at  
9 the same time made clear that it thought  
10 robbery as defined in the '84 Act would satisfy  
11 the elements clause. It wasn't -- it wasn't  
12 depending on the residual clause to do the work  
13 of the elements clause.

14 We know that from both the text and  
15 the history of the '84 Act and the '86 Act  
16 because, starting with the text, Congress took  
17 the very key element in its robbery definition,  
18 force, and made that the centerpiece of the  
19 elements clause.

20 JUSTICE KAVANAUGH: But -- but Curtis  
21 Johnson says substantial degree of force, as  
22 Justice Kagan points out, and how are we  
23 supposed to deal with that language in the  
24 Curtis Johnson opinion if we're trying to  
25 follow Curtis Johnson strictly?

1           MR. LIU: Well, Justice Kavanaugh, the  
2 force used -- the type of force involved in a  
3 Florida robbery or any common law robbery is  
4 substantial in two ways Curtis Johnson itself  
5 found relevant.

6           The first is this kind of force is  
7 force capable of causing physical pain or  
8 injury. That's what Curtis Johnson meant by  
9 "substantial." The two sentences, one follows  
10 right after the other.

11           The second --

12           JUSTICE KAGAN: Could -- force capable  
13 of causing physical pain or injury, I mean, it  
14 touches capable of causing physical pain or  
15 injury when done in the wrong context. I'm  
16 standing at the top of a stairs, somebody  
17 startles me by putting his hand on my shoulder,  
18 I fall down the stairs, I break my leg, that's  
19 capable of causing physical pain and injury, it  
20 just caused physical pain and injury.

21           So why doesn't your test -- why isn't  
22 it defeated even by the holding of Curtis  
23 Johnson, the -- the particular application of  
24 Curtis Johnson?

25           MR. LIU: Well, we -- we -- I -- it

1 appears there's common ground here. We -- we  
2 absolutely agree that whether something is  
3 violent has to be evaluated in the context.  
4 And a tap on the shoulder, I think, if -- if  
5 you pulled someone off the street and said is a  
6 tap on the shoulder without more violent, that  
7 person would say no.

8 But, as I was saying, if you describe  
9 to them the -- the situations that are inherent  
10 in a Florida robbery offense, a physical  
11 contest where two people are fighting over a  
12 piece of property, that is quintessentially  
13 violent and has been so --

14 JUSTICE SOTOMAYOR: But, I'm sorry --

15 MR. LIU: -- for centuries.

16 JUSTICE SOTOMAYOR: -- you keep using  
17 the word "fight." But the statute just says  
18 the least resistance met by the least force.  
19 That's not a fight in my dictionary.

20 The fact that somebody has something  
21 and pulls back and you just walk away with it,  
22 that's not substantial force.

23 MR. LIU: Oh, it -- it -- it is,  
24 because whatever the resistance, the form the  
25 resistance that the victim is providing, is

1 being physically overpowered by the defendant.

2 And --

3 JUSTICE SOTOMAYOR: But how does that  
4 define it as a substantial force? Even as  
5 capable of producing injury, if the example  
6 that the Chief used, an elderly victim, just  
7 simply can be overcome with no -- virtually no  
8 force whatsoever?

9 MR. LIU: Well, I don't -- I don't --  
10 I don't --

11 JUSTICE SOTOMAYOR: Then that's not  
12 capable of causing injury, even in an elderly  
13 person?

14 MR. LIU: Again -- again, the force  
15 shouldn't be measured in some quantitative  
16 respect, like foot pounds or force meters.  
17 Force does have to be evaluated in the context.  
18 And so, yes, in some cases, the degree of  
19 resistance may be small.

20 JUSTICE SOTOMAYOR: All right. How  
21 about a pickpocket that walks away and someone  
22 grabs them lightly and they just pull their arm  
23 and keep walking? As I read the Florida  
24 statute, that would cover that as well. Not  
25 force directed by the victim or resistance by



1 the victim but resistance by someone else in  
2 the course of the taking.

3 MR. LIU: Right. And I -- I -- I  
4 think that the facts you gave -- gave me were  
5 it seemed like the -- -- the that the  
6 defendant, I guess, grabbed on to the -- or the  
7 victim grabbed on to the defendant?

8 JUSTICE SOTOMAYOR: No, victim goes  
9 over, pickpockets --

10 MR. LIU: Oh.

11 JUSTICE SOTOMAYOR: I'm sorry. The  
12 thief walks over, pickpockets the victim, turns  
13 around, starts to walk away, and a passerby  
14 grabs hold of his arm, and he pulls it away and  
15 keeps walking.

16 MR. LIU: No. The -- the -- for --  
17 for --

18 JUSTICE SOTOMAYOR: So what do you  
19 think --

20 MR. LIU: -- for one thing, the  
21 resistance has to come from the victim to  
22 overcome --

23 JUSTICE SOTOMAYOR: Not the way I read  
24 the statute. It says when in the course of the  
25 taking, there is a use of force, violence,

1 assault, or putting in fear. In the course of?

2 MR. LIU: Right. The -- the timing,  
3 the force can come before or after the taking.

4 JUSTICE SOTOMAYOR: But it has to be  
5 directed at the victim?

6 MR. LIU: It has to be directed at --

7 JUSTICE SOTOMAYOR: If there's a  
8 Florida case --

9 MR. LIU: Right.

10 JUSTICE SOTOMAYOR: -- to the  
11 contrary, then do you lose?

12 MR. LIU: No, because what the ACCA  
13 cares about is the use of force without regard  
14 to who it's directed against.

15 CHIEF JUSTICE ROBERTS: What -- what  
16 -- what ACCA cares about -- in Curtis Johnson  
17 said we have to determine meaning in context --  
18 they wanted to keep off the street people who  
19 were likely to use a gun.

20 MR. LIU: Right.

21 CHIEF JUSTICE ROBERTS: And at a broad  
22 -- the broadest level, is somebody who engages  
23 in a purse snatching with -- with some degree  
24 of resistance, is that person -- do you look at  
25 that and say, well, that person's likely to use

1 a gun?

2 MR. LIU: Well, Congress thought so.  
3 We know that because Congress adopted this very  
4 definition of "robbery" in the '84 Act.  
5 Robbery, common law robbery, was an original  
6 ACCA predicate. And in doing so, Congress  
7 described these types of robberies as the most  
8 common violent street crimes.

9 JUSTICE KAGAN: Why does burglary end  
10 up as an enumerated crime and robbery does not  
11 when Congress changed the Act?

12 MR. LIU: Because it wasn't necessary  
13 to enumerate robbery, given that Congress was  
14 taking an element of robbery and making it the  
15 basis of the elements clause.

16 By contrast, there was a lot more  
17 doubt about whether the ACCA -- the new ACCA  
18 without a specific reference to burglary would  
19 have covered burglary. This Court recognized  
20 that on pages 584 to 589 of Taylor. There was  
21 a concern that burglary would be inadvertently  
22 left out.

23 But there was -- there could be no  
24 such concern with robbery because Congress did  
25 the most straightforward thing it could do to

1 ensure that the new Act covered robbery, and  
2 not just robbery but also things like rape and  
3 murder.

4           What it did was it took that element,  
5 thus guaranteeing that all the '84 covered  
6 robberies would -- would come along with it,  
7 and made that the basis such that other crimes  
8 too -- rape, murder, et cetera -- would --  
9 would come in as well. So there just simply  
10 was no need for Congress to re-enumerate  
11 robbery.

12           And the indications we have from the  
13 text and the history are that Congress thought  
14 the old ACCA was working perfectly well.  
15 Senator Specter got up and said: Look, we want  
16 to include everything that was included in the  
17 old one, and we want to expand it.

18           And this Court in Taylor noted the  
19 same thing. It said the consensus at the time  
20 was the only issue before us is how to expand  
21 it. And so --

22           JUSTICE ALITO: Ms. -- Ms. Bryn says  
23 that her understanding of what Curtis Johnson  
24 requires would have a minimal effect on the  
25 robbery statutes of the states. Is she

1 counting the states correctly?

2 MR. LIU: No. And if you look at our  
3 petition appendix, we've separated the  
4 states' -- the states' basic robbery statutes  
5 into three basic categories.

6 The biggest category, over 40 states,  
7 have adopted the common law standard, the same  
8 standard as Florida. There's no indication  
9 that Florida is an outlier.

10 All of those states would be knocked  
11 out. That leaves three or four states that  
12 have a notion of force that is broader than the  
13 common law. That is, that would cover things  
14 like sudden snatchings, purse snatchings,  
15 simple --

16 JUSTICE KAGAN: When you say "knocked  
17 out," do you mean everything is knocked out or  
18 only the basic robbery offense is knocked out,  
19 but that leaves aggravated robbery offenses?

20 MR. LIU: I say only the basic robbery  
21 is knocked out, but I think that's the right  
22 focus because we know from the '84 Act Congress  
23 was concerned about keeping in basic robbery.

24 You look at the definition in the '84  
25 Act, it's not armed robbery, it's not

1 aggravated robbery; it's simple common law  
2 robbery.

3 JUSTICE GORSUCH: Let -- let's put  
4 that aside for the moment, say we disagree with  
5 you. How many states have a robbery statute  
6 that would be left under ACCA under your  
7 opposing counsel's interpretation?

8 MR. LIU: Basic robbery statutes?

9 JUSTICE GORSUCH: No. Basic or  
10 aggravated.

11 MR. LIU: Basic or aggravated, it's --  
12 we don't have the exact number. Part of that  
13 is because Petitioner is unwilling to commit to  
14 whether some of those aggravated states  
15 actually qualify.

16 So the aggravated -- the aggravated  
17 factor that Petitioner points to is an element  
18 in the offense that requires a showing of  
19 actual injury, the causation of injury as an  
20 element. But Petitioner, on page 8 of his  
21 reply brief, isn't even willing to say whether  
22 those offenses qualify.

23 JUSTICE KAVANAUGH: But, if they did  
24 qualify, then how many states are affected?

25 MR. LIU: I don't have an exact

1 number. I think it would be maybe two dozen  
2 states that would qualify. But I just want to  
3 reiterate I think that is the wrong lens to  
4 look at this issue because Congress, when it  
5 wrote a basic robbery definition to '84 and  
6 then wanted to expand the ACCA, didn't --  
7 didn't think the expanded ACCA was then going  
8 to cut back and limit the coverage of the ACCA  
9 to only a small subset of robberies that  
10 qualified as armed and aggravated.

11 JUSTICE GORSUCH: The -- the problem I  
12 -- I have with that, counsel, and hopefully you  
13 can help me with this, is you keep coming back  
14 to the -- the -- the belief that Congress  
15 wished to or intended to keep in common law  
16 robbery in its simple form, but Curtis Johnson  
17 expressly rejects the common law definition of  
18 force.

19 MR. LIU: No, it --

20 JUSTICE GORSUCH: So --

21 MR. LIU: -- it rejected the common  
22 law definition of force --

23 JUSTICE GORSUCH: -- what do we do  
24 about that?

25 MR. LIU: -- that came from a

1 misdemeanor offense.

2           What was key in Curtis Johnson was  
3 that the key term being defined was "violent  
4 felony." And so Justice Scalia said it would  
5 have been a comical misfit, a mismatch --

6           JUSTICE GORSUCH: Well, as the dissent  
7 pointed out and -- and the majority  
8 acknowledged, the misdemeanor/felony line at  
9 common law simply meant: One, you're put to  
10 death, and the other you're put in prison. So  
11 it wasn't -- it wasn't quite the same line that  
12 we have today.

13           And that was the common law definition  
14 of robbery. Robbery was a misdemeanor --

15           MR. LIU: No, robbery was a --

16           JUSTICE GORSUCH: -- often.

17           MR. LIU: -- robbery was a felony at  
18 common law.

19           JUSTICE GORSUCH: Often it was. But  
20 the force required was very minimal at common  
21 law. And the majority expressly rejects that  
22 in Curtis Johnson as sufficient to satisfy the  
23 statute.

24           Now maybe that's wrong. Maybe you  
25 want to revisit Curtis Johnson. I've heard a



1 lot of arguments today that seem along those  
2 lines. But what do we do if we don't?

3 MR. LIU: Well, I -- it -- it's not  
4 true that Curtis Johnson rejected this -- this  
5 -- this definition of "force." The definition  
6 of "force" that Curtis Johnson rejected was one  
7 that could be satisfied by the merest touching.

8 And common --

9 JUSTICE GORSUCH: Which we  
10 acknowledged was the common law definition.

11 MR. LIU: Was the common law  
12 definition that came from the misdemeanor  
13 offense of battery.

14 Common law robbery, which has a felony  
15 definition of force, force overcoming  
16 resistance, cannot be satisfied by the merest  
17 touching. We know that because not only do the  
18 treatises say so, but Florida in particular has  
19 said so in the Walker case, which involved a --  
20 a -- a mere touching where someone took -- took  
21 away someone's property, and that did not rise  
22 to the level of common law robbery. And so --

23 JUSTICE GINSBURG: What do you -- what  
24 do you do with the express statement in Curtis  
25 Johnson that the word "violent" in 924(e)(2)(B)

1 connotes a substantial degree of force?

2 MR. LIU: We -- we have three  
3 responses. Once -- one, the substantialness of  
4 the force has to be understood in context. And  
5 in the context of a physical struggle, I think  
6 people would call that force substantial or  
7 violent.

8 JUSTICE SOTOMAYOR: This really has --  
9 sounds like we're overruling Johnson and  
10 reintroducing into the categorical approach  
11 this whole notion of what's the normal  
12 situation.

13 I -- I -- I guess, if I'm looking at  
14 something in a categorical way, I'm saying  
15 little force is not substantial force, period,  
16 end of story.

17 MR. LIU: And -- and I --

18 JUSTICE SOTOMAYOR: If that's what the  
19 categorical approach means, which is what it  
20 appears our cases say --

21 MR. LIU: And Curtis Johnson didn't  
22 adopt a quantitative measure of force. Yes, I  
23 -- I will acknowledge that if you measured the  
24 force in some of these cases on a quantitative  
25 basis, we're not going to get to a lot of

1 Newton's or foot pounds or foot meters --

2 JUSTICE SOTOMAYOR: And you're not  
3 going to even get to pain --

4 MR. LIU: But --

5 JUSTICE SOTOMAYOR: -- and suffering.

6 MR. LIU: -- but Curtis Johnson made  
7 clear that that wasn't the right inquiry. It's  
8 a qualitative assessment. It -- the words  
9 "capable of causing injury" were a gloss on the  
10 word "violent."

11 And I go back to what I said earlier.  
12 This sort of interaction, a physical struggle  
13 between two people over a piece of property,  
14 has been regarded as violent in the common law  
15 by Congress, by over 40 states for hundreds --  
16 for a very long time.

17 JUSTICE ALITO: But isn't the standard  
18 force sufficient to overcome resistance a  
19 quantification? That's a way of quantifying  
20 how much force is necessary.

21 So the -- the force that is required  
22 for a battery, the merest touching, is -- is  
23 not enough, but there has to be a substantial  
24 amount, a quantifiable amount, and the  
25 quantification is the amount of force necessary

1 to overcome resistance.

2 If you don't adopt that, then I do  
3 think you have to get to foot pounds or  
4 something like that.

5 MR. LIU: Well, no, that -- that's  
6 sort of -- I think I'm agreeing with you more  
7 than disagreeing, Justice Alito.

8 I -- I -- I don't think we should  
9 measure force in terms of some statistic or --  
10 or -- or, you know, exact degree.

11 I think -- I think the force used has  
12 to be understood in context. And I think the  
13 -- the sort of force that is necessary to  
14 overcome someone's resistance is going to be  
15 more than a mere touching and is the sort -- is  
16 the type of violence that has been regarded as  
17 violent by the common law and, even more  
18 relevant, Congress.

19 JUSTICE KAGAN: I guess, Mr. Liu, the  
20 problem I'm having in a nutshell is you keep on  
21 referring to this as a physical struggle over  
22 property, but at the same time, you tell me  
23 that if somebody snatches a bag off my  
24 shoulder, it's -- it counts as robbery --

25 MR. LIU: Well, I --

1 JUSTICE KAGAN: -- under Florida law.

2 And, to me, that is not a physical  
3 struggle over property. And if a state defines  
4 its robbery statute that broadly so as to  
5 include, you know, thefts of property but that  
6 are not done with physical contestation,  
7 physical struggle, then the state has made a  
8 choice.

9 MR. LIU: And, Justice Kagan, I -- I  
10 think we just disagree about what's covered by  
11 state law then because I don't think a simple  
12 purse snatching or pickpocketing -- those  
13 things were the very reason -- was the very  
14 reason for Robinson.

15 Robinson, the Florida Supreme Court  
16 case, the very reason for it was to clarify  
17 that those sorts of things are punished as  
18 theft, as larceny, as sudden snatching --

19 JUSTICE KAGAN: But I go back to what  
20 your answers to my first questions were. I'm  
21 carrying my bag with my hand over the strap,  
22 and you say when somebody wrests the bag from  
23 me, that's -- that that's robbery.

24 MR. LIU: But --

25 JUSTICE KAGAN: And I say that's every

1 bag snatching in America, save a few.

2 MR. LIU: Well, but I think only in a  
3 case where there is actual victim resistance,  
4 physical resistance to the taking. In a case  
5 where that's absent, like the AJ case discussed  
6 in Robinson itself, that's not going to rise to  
7 the level of a robbery. That's going to be  
8 prosecuted, if at all, only as a theft or a  
9 larceny.

10 And so I think what the question  
11 before this Court boils down to is whether it  
12 should recognize a line between violent and  
13 non-violent takings.

14 JUSTICE KAVANAUGH: But -- but,  
15 counsel, can I -- I say one thing on Curtis  
16 Johnson there, which is it says violent force.  
17 And if I -- if it stopped there, I think you  
18 might have an issue, but then it says "that is  
19 force capable of causing physical pain or  
20 injury to another person."

21 And "capable of" seems to me much  
22 different from what we usually, as Justice  
23 Kagan would say, think of as violent force.

24 So maybe -- maybe there's something in  
25 Curtis Johnson itself, we've talked a lot about

1 it, but in that one sentence, it says "violent  
2 force" and it says something else that seems  
3 intention with violent force.

4 MR. LIU: Mr. Chief Justice, may I  
5 answer?

6 CHIEF JUSTICE ROBERTS: Certainly.

7 MR. LIU: I think the capable language  
8 is a gloss on violent. I think it is an  
9 ordinary English way of translating, of  
10 spelling out what "violent" means.

11 And I think whether you look at  
12 violent or the capable language, common law  
13 robbery is -- satisfies that -- that -- that  
14 definition.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Ms. Bryn, you have four minutes  
18 remaining.

19 REBUTTAL ARGUMENT OF BRENDA G. BRYN  
20 ON BEHALF OF THE PETITIONER

21 MS. BRYN: Thank you.

22 Your Honor, at common law, no physical  
23 resistance was even required for robbery. The  
24 classic example from Blackstone is pulling a  
25 watch chain and snapping a watch off of

1 someone. The person doesn't have to do  
2 anything.

3 So, under the government's view here,  
4 that would constitute violent force, where  
5 there wasn't even any -- it's a fiction if  
6 resistance was implied in the watch chain at  
7 common law. Common law resistance was so  
8 broad, and that was the intent in '84.

9 But let me just say Florida robbery  
10 would not even need the 1984 definition because  
11 Florida's expanded the temporal scope of  
12 robbery far beyond the common law so that there  
13 -- so Florida robbery today is essentially  
14 shoplifting and pickpocketing, plus resisting  
15 apprehension in some way.

16 Now to include these slight force  
17 robberies as a predicate for a -- an  
18 enhancement that would start at 15 years  
19 imprisonment and authorize a penalty up to life  
20 is really inconsistent with Congress's purpose  
21 of identifying the worst of the worst  
22 offenders, exactly those offenders who would be  
23 likely not only to possess a gun but kill  
24 someone with a gun.

25 And there is no predictive value from



1 using slight force to snap a bag or pull a  
2 dollar bill or even just pull one's arm away  
3 from a security guard it would be predictive of  
4 the willingness to use violent force.

5 If Congress finds that the result in  
6 this case is counterintuitive, not what it  
7 intended, and it really wants slight force  
8 robberies to qualify as violent felonies  
9 sufficient to support that enhancement, it's in  
10 Congress's hands.

11 They can easily rewrite this statute.  
12 There were two definitions originally. All  
13 robberies came within the residual clause for  
14 many, many years. This has only become a  
15 question after the elimination of the residual  
16 clause, and Congress has multiple resources --

17 JUSTICE ALITO: Well, the residual  
18 clause referred to "capable of causing" -- I'm  
19 sorry -- "a serious risk of physical injury."  
20 So how would common law robbery come within  
21 that?

22 MS. BRYN: It -- it -- it -- just by  
23 the possibility of a confrontation afterwards,  
24 which was the way -- which was the standard  
25 this Court used for the residual clause crimes,

1 which swept in pickpocketing --

2 JUSTICE ALITO: I'm sorry, you think  
3 that --

4 MS. BRYN: -- and all these offenses  
5 that Congress --

6 JUSTICE ALITO: -- you think that  
7 common law robbery involves a serious risk of  
8 physical injury?

9 MS. BRYN: No. I -- I --

10 JUSTICE ALITO: Then how would it fall  
11 within the residual clause, which is what you  
12 just said?

13 MS. BRYN: I'm -- I'm -- I'm not  
14 saying that, Your Honor. I'm saying that, as  
15 applied, as the residual clause was applied,  
16 because the language was so capacious and the  
17 standard was unclear and it focused on a  
18 hypothetical possible confrontation, one could  
19 hypothesize a confrontation after  
20 pickpocketings, after shopliftings, and,  
21 ultimately, the residual clause swept in  
22 everything.

23 And that's why I believe it was  
24 invalidated by this Court. But now this Court  
25 cannot compensate for the loss of the residual

1 clause by reading the elements clause beyond  
2 its terms, and one very important term is "has  
3 as an element."

4 Congress dictated the categorical  
5 approach. If it doesn't like the results of  
6 the categorical approach, it can easily rewrite  
7 ACCA.

8 Thank you. I ask Your Honor to affirm  
9 -- to reverse the decision below.

10 (Laughter.)

11 MS. BRYN: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel. The case is submitted.

14 (Whereupon, at 11:08 a.m., the case  
15 was submitted.)

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