# SUPREME COURT OF THE UNITED STATES

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

Place: Washington, D.C.

Date: October 9, 2018


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10 Washington, D.C.

11 Tuesday, October 9, 2018

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13 The above-entitled matter came on for

14 oral argument before the Supreme Court of the

15 United States at 10:07 a.m.

16

17 APPEARANCES:

18 BRENDA G. BRYN, ESQ., Ft. Lauderdale, Florida; on

19 behalf of the Petitioner.

20 FREDERICK LIU, Assistant to the Solicitor General,

21 Department of Justice, Washington, D.C.; for

22 the Respondent.

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1 P R O C E E D I N G S
2 (10:07 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 17-5554,
5 Stokeling versus United States.
6 Ms. Bryn.
7 ORAL ARGUMENT OF BRENDA G. BRYN
8 ON BEHALF OF THE PETITIONER
9 MS. BRYN: Mr. Chief Justice, and may
10 it please the Court:
11 Since the invalidation of the residual
12 clause in 2015, the only way for a state
13 robbery offense to qualify as an ACCA violent
14 felony is if it has violent force as an
15 element. Florida robbery does not have that
16 element because it requires only slight force
17 to overcome slight victim resistance.
18 JUSTICE GINSBURG: So your -- your
19 position is no robbery conviction in Florida
20 counts under the Armed Career Criminal offense?
21 A robbery in Florida is out entirely?
22 MS. BRYN: Because of the categorical
23 approach. Because the least culpable conduct
24 for robbery in Florida does not require a
25 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. You know, that covers a broader area
2 than some of the other adjectives that were in
3 the same 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: I thought under the
7 categorical approach, you have to look at the
8 category. So I really don't understand why you
9 can't answer that question.
10 MS. BRYN: Well, they have --
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: And that's the
11 point. So I know you use "reasonably
12 expected," but is it reasonably expected or
13 just simply capable in -- in -- in the normal
14 course to --
15 MS. BRYN: The -- the reason that we
16 have articulated reasonably expected is to
17 contrast with an outlier case. And as Your
18 Honor mentioned, a tap can cause pain or injury
19 if you have an injured shoulder, if the victim
20 has some unique susceptibility to pain. So
21 that's why it is difficult to talk about
22 categories, and you have to look at the
23 circumstances. But the circumstances are the
24 normal ones, as Your Honor --
25 JUSTICE ALITO: Well, this has --

1 JUSTICE KAGAN: Ms. Bryn, I wonder if
2 you could say a bit more about this reasonable
3 expectation standard, because I'm not sure it
4 does all that much that's different from what
5 the government's standard does.
6 I mean, if you take something like
7 grabbing money out of a hand and say could that
8 reasonably be expected to cause pain or injury,
9 well, maybe some injury, maybe a bruise, maybe
10 a little scratch, maybe a little cut.
11 And, similarly, even a pinch. I mean,
12 reasonably expected to cause pain? Sure, for a
13 while, for a moment. So how does your standard
14 really help to distinguish the kinds of cases
15 that you want to distinguish?
16 MS. BRYN: Because I think the
17 categorical approach requires you to look at
18 real cases, and our real cases involve this
19 minimal pulling or tugging action that resulted
20 in no pain or injury. And that's a very
21 powerful --
22 JUSTICE GINSBURG: That -- that could
23 be in a particular case, but don't you have to
24 take the conduct in -- in general? And
25 particularly Justice Alito's question about

1 pinching, there are some people who have thin
2 skin and bruise very easily, and a pinch will
3 probably be sufficient to cause bruising,
4 actual injury.
5 MS. BRYN: Right. So that would not
6 be a circumstance known to the perpetrator.
7 And the test that the Court set forth in Curtis
8 Johnson by specifying over and over again that
9 it's a degree of force, and the Court used the
10 word "degree" four separate times, is a test
11 that is focused on the perpetrator, not on the
12 victim.
13 I mean, we -- we all know from first
14 year of law school that there are eggshell
15 plaintiffs. And the purpose of ACCA is to
16 predict future violence with a gun for people
17 who possess a gun, who would be the people that
18 would be willing to pull a trigger and kill
19 someone.
20 So, if there is an incidental injury,
21 an accidental injury that no one could have
22 imagined because someone does have thin skin or
23 someone has just had shoulder surgery or has a
24 tender area of their body, it would --
25 JUSTICE KAGAN: But my question wasn't

1 that. It wasn't the eggshell plaintiff. It
2 was the ordinary person who can reasonably be
3 expected to suffer some, even if minimal, pain
4 or injury, the pain that a pinch causes or the
5 injury that comes from your hand being bruised
6 when somebody tries to grab some cash out of
7 it.
8 And I guess I was -- I was confused
9 that you wanted to use this standard,
10 reasonably be expected to cause pain or injury"
11 because it does seem to me as though a lot of
12 minor activity could -- could satisfy that
13 standard.
14 MS. BRYN: So that's why we -- we have
15 said, number one, that whether there is an
16 actual pain or injury in the actual reported
17 cases, what has been prosecuted by the state?
18 Has the state prosecuted for no injury or for
19 exceedingly minor injuries? In Florida, they
20 prosecute for no injury.
21 So even though it is possible to
22 hypothesize a case where the same conduct might
23 cause injury, I mean, we think those are
24 outlier cases because the real cases that
25 resulted in prosecution in our state have not

1 resulted in injury.

2 JUSTICE GINSBURG: How -- how --

3 MS. BRYN: We're not saying it can

4 never happen.

5 JUSTICE GINSBURG: -- how -- how then

6 would you -- you -- would you describe an ACCA

7 qualifying physical force? Can you give us

8 your definition?

9 MS. BRYN: Yes. It's a degree of

10 force that is substantial enough to be

11 reasonably expected to cause pain or injury in

12 most cases, rather than an outlier case.

13 And in -- in determining whether the

14 offenses under our statute match that, a

15 powerful circumstance is if the conduct has not

16 resulted in any pain or injury.

17 JUSTICE ALITO: In Taylor, the Court

18 said that the revision of ACCA to include the

19 elements clause expanded the predicate offenses

20 beyond just robbery and burglary.

21 But we are told that your reading of

22 the statute would knock out robbery offenses in

23 30 to 40 case -- in 30 to 40 states.

24 What is your response to that? Does

25 that seem -- does it seem likely that that's

1 what Congress was intending to do?

2 MS. BRYN: Well, there -- there are

3 two parts of that question. Congress intended

4 to cover robbery in the expansion, robbery and

5 additional crimes. The way it sought to do

6 that was by writing two different violent

7 felony definitions.

8 One was very narrow and circumscribed.

9 That's the elements clause. The other one was

10 quite expansive, capacious, and would sweep in

11 every type of robbery, even snatchings, even

12 not -- robberies, pickpocketings, theft

13 offenses that require no force whatsoever.

14 JUSTICE ALITO: So your answer -- your

15 answer is that they thought that robbery was

16 going to be covered by the residual clause, is

17 that right?

18 MS. BRYN: They wrote language that

19 would have covered it under the residual

20 clause. And it did until three years ago.

21 This issue did not really come before the

22 Court.

23 JUSTICE GORSUCH: Counsel, I'm stuck

24 there too, because if Congress uses the word

25 robbery, we wouldn't normally think that it's

1 excluding more than half the states' statutes
2 that are defining robbery.
3 That -- that -- that just seems like a
4 strike against the statutory reading you're
5 asking us to adopt. And -- and I understand
6 there's the residual clause, but Congress used
7 the term "robbery" --
8 MS. BRYN: Well, it --
9 JUSTICE GORSUCH: -- and we've said it
10 used it in the ordinary sense at the time of
11 adoption. And at the time of adoption, it
12 appears that, as Justice Alito suggested, over
13 half the states would have included this kind
14 of conduct.
15 MS. BRYN: Well, again, two answers to
16 that question. It used "robbery" in the '84
17 act and it deleted "robbery" in the '86 act at
18 the same time that it continued to enumerate
19 burglary.
20 To capture the robberies, Congress had
21 two different definitions. And as to whether
22 43 states would be knocked out by our
23 definition, as we have said in our reply brief
24 and demonstrated in our appendix, the
25 government has only matched words in the

1 statute, the word "force" and the word
2 "resistance."
3 It has not done what the categorical
4 approach requires, which is to take a deep dive
5 into state law.
6 JUSTICE KAGAN: Well, how many states
7 do you think --
8 JUSTICE ALITO: I don't understand
9 your --
10 JUSTICE KAGAN: -- how many states do
11 you think will be knocked out? Because, I
12 mean, Florida seems as though it's out of luck
13 because both -- it can't pick up under armed
14 robbery what it loses under unarmed robbery for
15 the reason that you said earlier.
16 Presumably, there are other states in
17 which armed robbery would count as -- as a --
18 as -- as under the -- this clause. So how many
19 states do you think are going to be in
20 Florida's position that none of their robbery
21 statutes count under this clause?
22 MS. BRYN: I -- I would say four or
23 less.
24 JUSTICE KAGAN: Four or less?
25 MS. BRYN: I would say four or less --

1 JUSTICE KAGAN: Why is that?
2 MS. BRYN: -- would have no form of
3 robbery because there are, first of all, just
4 from my review, and I'm not an authority on
5 every state, but from my review, there are not
6 many states that have the Trifecta that Florida
7 has.
8 And let me say what that is. It is
9 quite unique. And that is explicit embracing
10 of any degree of resistance, number one.
11 Number two, embracing the principle
12 that any degree of force can overcome any
13 degree of resistance.
14 And, third, actual prosecutions for
15 slight force robberies. Some states embrace
16 the immateriality principle. There are some
17 states that have one or two applications. But
18 there are very few states that I have seen in
19 my research that are like Florida in having
20 everything.
21 And then, on top of it, there are very
22 few states that would be like Florida that also
23 don't have an armed robbery provision that
24 involves use, display, threat of a weapon.
25 We've listed those in our appendix.

1 JUSTICE ALITO: Well, in how many
2 states would common law robbery, would simple
3 robbery, not armed robbery or an aggravated
4 form of robbery, be knocked out by your
5 understanding of the statute?
6 MS. BRYN: So, again, it -- it's --
7 it's hard to give an actual number. And we see
8 from the -- the mistakes that were made in the
9 government's appendix, that's really a fraught
10 inquiry, but what I would suggest is that it's
11 really only a handful, maybe six states or
12 less, that are like Florida in having
13 everything, the principles and the
14 applications. There are a few others that
15 state the principles broadly, but there are no
16 applications. And a few others that have
17 slight force applications.
18 JUSTICE ALITO: So you think that in
19 -- in applying the categorical approach here,
20 it's necessary to look to the cases that are
21 prosecuted?
22 MS. BRYN: Yes, I think --
23 JUSTICE ALITO: To -- you have to look
24 to -- to -- beyond the statute, you have to
25 look to prosecutorial policies and practices?

1 MS. BRYN: That -- that's what the
2 Court said in Duenas-Alvarez, to determine if a
3 statute can be or has been applied to
4 non-violent, non-generic conduct or in an
5 overbroad way. The only way you can know that
6 is to find actual cases. And that's --
7 JUSTICE KAGAN: Well, even if the
8 statute on its face includes that kind of
9 conduct?
10 MS. BRYN: The statute -- well, first
11 of all, the Florida statute on its face does
12 not even include resistance. That's been
13 judicially implied, and that's the fact in some
14 states as well.
15 But let's say there's a statute that
16 uses the term "resistance" or overcoming
17 resistance and force.
18 Still, what the Court said in Curtis
19 Johnson is that this Court, federal courts,
20 have to defer to the state's interpretation of
21 their elements.
22 In our appendix, we cited a Michigan
23 case that -- that -- the statute uses the term
24 violence, and there is a case in Michigan that
25 says spitting is sufficient violence for the

1 statute. I mean, that's Curtis Johnson,
2 touching, contact behavior.
3 At the other side of the spectrum, we
4 have common law robbery states that say there
5 are no minimal force applications. Our state
6 Supreme Court has never said that the degree of
7 force is immaterial. South Carolina, for
8 example. And the Fourth Circuit said that in
9 Doctor. And that's a common law robbery state.
10 And they said it qualifies because
11 there are no -- no broad principles embraced by
12 this Court which would suggest slight force can
13 qualify, nor are there any applications.
14 So, under the categorical approach, it
15 will be a state-by-state inquiry, but all of
16 the circuit court of appeals know how to do it.
17 They've been doing it since Taylor. And they
18 have to examine each state's law.
19 I -- I have exhaustively reviewed
20 Florida law, and I have looked at other states'
21 law, and I can tell you that not many states
22 are like Florida in having everything.
23 JUSTICE GORSUCH: Counsel, let's say
24 we -- we disagree with your understanding of
25 Duenas, and we think that if it's clear on the

1 face of a statute that conduct is encompassed.
2 Under the elements approach in Taylor, then
3 that's how we would define it.
4 Does that alter the number of states
5 that you think would be knocked out under your
6 approach?
7 MS. BRYN: Well, I've already knocked
8 out, I -- I believe, at least 10 states on --
9 in my approach by reporting in our appendix the
10 full language of the statute that the
11 government excerpted out of its own appendix.
12 So statutes which make clear on the
13 face of the statute that violence can be
14 contact. Mere touching, any impact.
15 So, yes, that reduces the number. But
16 other than that, once we are down to force,
17 violence, and resistance, those are common
18 words that come from the common law, but each
19 state has gone in its own direction.
20 And in order to properly do the
21 categorical approach under the elements clause,
22 you have to defer to the interpretation of
23 those elements.
24 It's a different type of inquiry than
25 for the generic offense determination. Some

1 generic offense determinations can be made on
2 the face of the statute because the statutory
3 language is plain, but as we have shown by case
4 law showing that resistance can be nothing more
5 than the momentary tightening of one's hand,
6 that the word "resistance" does not have a
7 meaning in and of itself.
8 JUSTICE KAVANAUGH: But -- but,
9 counsel -- counsel, in Curtis Johnson, you rely
10 heavily on the general statements of the Court,
11 but the application of those general statements
12 was to something very specific: Battery and a
13 mere tap on the shoulder. And all Curtis
14 Johnson seemed to hold was that that was
15 excluded.
16 So why don't we follow what Curtis
17 Johnson seemed to do in applying those general
18 statements to the specific statute at issue
19 here and why wouldn't that then encompass the
20 Florida statute, which requires more than, say,
21 a tap on the shoulder?
22 MS. BRYN: Because what the Court did
23 before applying the standard to the statute --
24 to the Florida battery statute was to
25 definitively construe the words that --

1 JUSTICE KAVANAUGH: Well, but it --
2 but it's --
3 MS. BRYN: -- Congress used in the
4 elements clause.
5 Go ahead.
6 JUSTICE KAVANAUGH: But it -- as you
7 point out, it's -- it's a bit general, those
8 statements, that language. And so how do we
9 understand what the Court meant by that? You
10 look at how it applied it, and it was to a
11 battery statute, and it was a case where the
12 government argued that the mere tap on the
13 shoulder was okay. And the Court said no,
14 that's not enough. But all it seemed to carve
15 out was that kind of statute. At least as I
16 read page 139 of the Curtis Johnson opinion, it
17 seemed to very carefully distinguish those two
18 situations.
19 MS. BRYN: Your -- Your Honor, I -- I
20 disagree with that, because I believe that the
21 standard the -- the Court set forth was a
22 violent felony definition. The Court said that
23 the word "violent" alone connotes a substantial
24 degree of force, and used words like "severe,"
25 "extreme," "vehement," "furious" to

1 characterize and flesh out the concept of what
2 a substantial degree of force is.
3 And the conduct in our case, yes, it's
4 more than a mere touching, but it's not
5 extreme, furious, severe, vehement, any -- any
6 of the adjectives, the ordinary dictionary
7 terms, which -- which was the definition of
8 "violent force" the Court embraced in -- in
9 rejecting the common law view.
10 So the Court did not draw a line. It
11 would have been a very short opinion if
12 touching is out and everything else is in. And
13 we see from Castleman four years later that
14 other minor uses of force do not convey the
15 sense of violence in the -- the colloquial
16 sense, and the Court reinforced that in
17 Castleman.
18 So I think there's a lot more in the
19 definition of Curtis Johnson. The standard was
20 a substantial degree. The Court gave
21 adjectives that meet it, and the conduct in
22 several of the Florida cases does not amount to
23 that level. And that's why Florida robbery
24 does not qualify.
25 JUSTICE ALITO: But the statutory term

1 is physical force.
2 MS. BRYN: Right.
3 JUSTICE ALITO: And in the ordinary
4 understanding of that, force sufficient to
5 overcome resistance would be physical force.
6 The holding in Curtis Johnston was what Justice
7 Kavanaugh described, battery -- the touching
8 that is necessary for a battery is not physical
9 force; any unwanted touching satisfies common
10 law battery.
11 Now, if we go beyond that, you have --
12 it would be necessary to quantify the degree of
13 physical force that's required, like how many
14 pounds per square inch. I have no idea how you
15 do that.
16 MS. BRYN: The -- the standard that
17 the Court set in Curtis Johnson, I believe, is
18 a substantial degree in force and as --
19 JUSTICE ALITO: So what is a
20 substantial degree of force?
21 MS. BRYN: So the -- as the Chief
22 Justice stated in -- most recently in Dimaya,
23 that substantial standards are found all
24 through the law. "Substantial" is a familiar
25 term. Judge --

1 CHIEF JUSTICE ROBERTS: How many votes
2 did that get in Dimaya?
3 (Laughter.)
4 CHIEF JUSTICE ROBERTS: Not five.
5 (Laughter.)
6 MS. BRYN: The -- the majority in
7 Dimaya --
8 JUSTICE KAGAN: The majority agreed
9 with that point.
10 MS. BRYN: Yes, the majority in Dimaya
11 actually said that "substantial" is not a
12 difficult term to apply at all when it's being
13 applied to real-world conduct. And that's what
14 the categorical approach requires. We have
15 real cases. Apply the term "substantial" to
16 real-world cases.
17 And one important factor in our
18 real-world cases, our prosecutions, is whether
19 there was pain or injury in -- in the actual
20 case. We have cases that --
21 JUSTICE ALITO: Well, do you think
22 there could not be substantial force unless it
23 actually causes pain or injury?
24 MS. BRYN: No, I'm not -- I'm not
25 saying that either. And -- and I think we said

1 that in our brief. It's -- it's -- that's a
2 significant circumstance like circumstantial
3 evidence.
4 There could be someone who is uniquely
5 immune to pain. I mean, if you're pinching
6 Arnold Schwarzenegger or slapping him or
7 something else --
8 JUSTICE ALITO: But you think this
9 depends on a case-by-case determination?
10 MS. BRYN: No. I think it depends on
11 judges using their common sense and common
12 experience that they use every day under the
13 guidelines to make determinations of degree,
14 determining what's minor, what's major. This
15 -- this is what judging is. This is what
16 juries do.
17 JUSTICE ALITO: But you -- you have to
18 hypothesize a particular type of robber and a
19 particular type of victim. So, you know, what
20 is the -- what is the quintessential robber and
21 what is the quintessential victim as you -- you
22 know, as you just mentioned?
23 If you have a very strong victim and a
24 very weak robber, an awful lot of force could
25 be applied without a reasonable possibility of

1 causing pain. On the other hand, in what might
2 be the more typical situation, if you have a
3 young, strong robber who pulls a purse out of
4 the hands of an elderly woman or a briefcase
5 out of the hands of an elderly man, there's a
6 real chance that that's going to cause pain and
7 maybe serious physical injury.
8 MS. BRYN: Well --
9 JUSTICE ALITO: So I have no idea how
10 to imagine that the -- the typical robber and
11 the typical victim.
12 MS. BRYN: Well, I can't --
13 JUSTICE ALITO: Who are these people?
14 Can you describe them for me?
15 MS. BRYN: I -- I don't think that our
16 test or the standard requires imagining a
17 typical victim. It requires, under the
18 categorical approach, to look at the actual
19 cases.
20 Our cases did involve, to -- to use
21 your language, typical victims.
22 JUSTICE ALITO: Okay. Under your --
23 under the cases -- under the Florida cases,
24 you've studied them all, what is the typical
25 victim and what is the typical robber?

1 MS. BRYN: Someone that doesn't have
2 any of those unique characteristics that you
3 just described. They were not particularly
4 weak, frail, any -- anything that would have
5 been obvious.
6 And -- and let me just stress this:
7 The encounters in the Florida cases took place
8 in a split second. They were momentary,
9 one-handed, tearing -- tearing something out of
10 another person's hand with one hand. Maybe if
11 you used two hands and grabbed someone by the
12 arm and pull at the same time, that's a
13 different degree of force.
14 But doing it one-handed in a momentary
15 encounter like this, I -- I think in everyone's
16 common experience, judges and juries would be
17 able to say that is not a substantial degree of
18 force. That's not like slapping someone in the
19 face. That's not like stabbing someone in the
20 back or those type of facts.
21 I -- I -- I don't think that's
22 difficult. It may be a more difficult
23 determination where the least culpable conduct
24 in a state involves substantial injury because
25 there was some sort of vulnerability of the

1 victim, but that's not Florida. So that --
2 that would be a different case.
3 But what we know from Florida is that
4 any degree of resistance and any degree of
5 force -- I see that I have my light. I'd like
6 to reserve my retaining time for rebuttal.
7 Thank you.
8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.
10 Mr. Liu.
11 ORAL ARGUMENT OF FREDERICK LIU
12 ON BEHALF OF THE RESPONDENT
13 MR. LIU: Mr. Chief Justice, and may
14 it please the Court:
15 For centuries, the common law has
16 provided a basis to distinguish violent takings
17 of property from non-violent takings. Violent
18 takings or robberies were takings that involved
19 the use of force sufficient to overcome the
20 victim's resistance.
21 That's the element of force that's
22 found in the robbery -- basic robbery statutes
23 of over 40 states, including Florida. It's the
24 element of force that Congress used in its own
25 definition of robbery in the original 1984

1 ACCA.

2 And when Congress amended the ACCA two

3 years later, it took that element and made it

4 the centerpiece of the new elements clause.

5 Under Petitioner's interpretation of

6 the ACCA, however, common law robbery would not

7 qualify as an ACCA predicate.

8 In fact, the Petitioner cannot

9 identify a single state whose basic robbery

10 statute, whether based on the common law or

11 not, would qualify under his interpretation.

12 JUSTICE KAGAN: Mr. -- Mr. Liu, could

13 I just ask what you understand the Florida

14 cases to be saying? So I'll give you a hypo to

15 elucidate that.

16 So I'm walking down the street and I'm

17 carrying a handbag with a strap over my

18 shoulder, and, as everybody knows, the way you

19 carry that is you essentially grab on to the

20 strap. So -- and then somebody comes and runs

21 and wrests it out of my grasp.

22 Does that count under Florida law as

23 robbery?

24 MR. LIU: It -- it depends. I think

25 it would depend on a few more facts, but I

1 think -- I think the Florida cases do focus
2 just on this issue. And if I -- if I could
3 illustrate my answer with a couple of the
4 Florida cases.
5 JUSTICE KAGAN: No, I want -- well,
6 you can illustrate it, sure --
7 MR. LIU: Well, I -- I think the --
8 JUSTICE KAGAN: -- but, I mean, I want
9 an answer to my hypothetical.
10 MR. LIU: -- I think the facts you
11 described are not too different from the facts
12 of Rigell, and I think that is a case where the
13 Florida courts did conclude that the force used
14 was sufficient.
15 There, the -- the -- the victim had a
16 bag on his shoulder -- on her shoulder. The
17 victim -- the defendant came around, yanked the
18 bag off. There was a bit of a struggle because
19 the -- the victim turned and tried to resist in
20 that fashion.
21 JUSTICE KAGAN: Yeah, so --
22 MR. LIU: And the purse -- the strap
23 of the purse --
24 JUSTICE KAGAN: -- I was actually
25 taking that out, because, you know, I'm -- I'm

1 -- I'm holding on to the bag, so you're going
2 to need some force to get it.
3 But -- and -- and that kind of force
4 is used. Robbery?
5 MR. LIU: Yes.
6 JUSTICE KAGAN: Okay. Well, then
7 robbery in Florida really includes pretty much
8 the full gamut of bag snatchings.
9 MR. LIU: I don't -- I don't think so.
10 And I'll give you a case that illustrates that.
11 A case called RP, which is cited in the
12 Robinson case -- that's sort of the seminal
13 case -- involves someone who grabbed a camera
14 that was hanging off someone's shoulder, and
15 that did not rise to the -- to the level of
16 force necessary for robbery.
17 And the difference between the two
18 cases is the added element of violence. It is
19 the resistance by the victim.
20 JUSTICE KAGAN: Right. All I was
21 saying, I mean, I'm sure you can find me a
22 couple of cases where people walk around with
23 cameras or bags and -- and don't have their
24 hands on them. But I'm going to say, as every
25 woman who carries around handbags knows, that's

1 just the normal way you carry around a handbag.
2 So -- so -- so that would be the usual
3 case, maybe not the always case, but it's the
4 usual case of bag snatching that you say falls
5 under the robbery definition.
6 MR. LIU: And I think what's important
7 to remember about even that case is that there
8 is force on the one hand being applied by the
9 victim which is being met by force on the other
10 being applied by the defendant. And what that
11 amounts to is a physical struggle over a piece
12 of property. I think it --
13 JUSTICE SOTOMAYOR: But the problem is
14 --
15 JUSTICE KAGAN: Yeah, I mean -- I'm
16 sorry.
17 JUSTICE SOTOMAYOR: I'm sorry. The
18 problem is, just in common parlance, the
19 definition that the courts have given in
20 Florida is the slightest resistance qualifies
21 as violent force so that if the victim just
22 merely moves you away and you push him back --
23 MR. LIU: I don't think that's --
24 JUSTICE SOTOMAYOR: -- that's the
25 slightest force.

1 MR. LIU: Well, but I think what's --
2 what's important to keep in mind -- I guess
3 this finishes my answer to Justice Kagan -- is
4 that what is inherent in the offense every time
5 it occurs in Florida is this violent contest
6 over a piece of property.
7 And I think it's natural to conceive
8 of the force necessary to prevail in such a
9 contest as force capable of causing --
10 JUSTICE SOTOMAYOR: But that's not the
11 words the Court has used. It said the
12 slightest resistance and the slightest force
13 used to overcome it qualify as a robbery.
14 And under the categorical approach, I
15 thought that we had to eliminate something that
16 was slight.
17 MR. LIU: Well, I think it's true that
18 what -- that the -- that the resistance can be
19 of any degree, but I think you have to view
20 that resistance --
21 JUSTICE SOTOMAYOR: So the force can
22 be of any degree?
23 MR. LIU: Well, but I think what's key
24 is -- is the context in which that interaction
25 is occurring. When you have force on the one

1 hand being met by force on the other, what you
2 have is a fight over the property. And I think
3 that is a quintessentially --
4 JUSTICE SOTOMAYOR: No, because what
5 you have is slight force over slight -- slight
6 resistance and slight force to overcome it.
7 MR. LIU: Well, you're -- you're --
8 JUSTICE SOTOMAYOR: How do you get
9 past that into that it's a tug of war?
10 I mean, some people grab you by your
11 arm and you just pull it away, and it doesn't
12 necessarily have to be a very forceful pulling
13 away.
14 MR. LIU: Well, this -- this sort of
15 interaction where force is met by force has
16 been understood by the common law since
17 Blackstone as being violent.
18 JUSTICE GINSBURG: But we have to deal
19 with the Florida statute and how that -- how
20 the Florida court, Supreme Court understands
21 the use, what -- what violent force is, what
22 its own statute requires.
23 And the Florida Supreme Court has used
24 words like robbery can be committed with any
25 degree of force. So any degree of force

1 certainly can't be substantial degree.
2 MR. LIU: Justice Ginsburg, I think
3 that quote comes from a case called McCloud
4 from 1976 -- I mean from 1972. The -- the --
5 the Florida Supreme Court in Robinson in 1997
6 said that that was merely dicta and, in fact,
7 pointed to one Florida intermediate court case
8 that had read that literally to mean any, and
9 expressly disapproved that holding.
10 JUSTICE GORSUCH: Well, counsel, I'm
11 not sure that quite solves the problem, though,
12 because the statute on its face says not just
13 force or violence or assault, but it says "or
14 putting in fear." That is sufficient to
15 constitute robbery in Florida.
16 MR. LIU: Right.
17 JUSTICE GORSUCH: And Robinson I'm not
18 sure helps you very much because I think it's
19 susceptible to a reading of saying, in the
20 cases of purse snatching where force is alleged
21 as the mode for creating a robbery, then you
22 need whatever -- whatever you've been talking
23 about with Justice Kagan and Justice Sotomayor.
24 But I don't read Robinson as
25 suggesting force is the only way of

1 establishing robbery under Florida or doing
2 anything to eliminate the disjunctive language
3 of "or putting in fear."
4 MR. LIU: Justice Gorsuch --
5 JUSTICE GORSUCH: What do I do about
6 that?
7 MR. LIU: -- in Florida, there are two
8 ways to commit robbery. One is robbery by
9 force. The other is robbery by intimidation.
10 And that picks up the putting in fear language
11 you just pointed to in the statute.
12 Petitioner has not disputed in this
13 entire case that that type of robbery, robbery
14 by intimidation or putting in fear, satisfies
15 the elements clause of ACCA.
16 JUSTICE GORSUCH: I -- I don't care
17 what Petitioner has challenged.
18 (Laughter.)
19 MR. LIU: And that's --
20 JUSTICE GORSUCH: I'm asking you why
21 isn't that a problem under Taylor for the
22 government in this case?
23 MR. LIU: Because the Florida courts
24 have construed "putting in fear" to mean a fear
25 of bodily injury. And under --

1 JUSTICE GORSUCH: But fear of force is
2 not the same thing as force, right?
3 MR. LIU: That's -- that's correct.
4 So we look at the text --
5 JUSTICE GORSUCH: So why don't you
6 lose?
7 MR. LIU: So we look at the text of
8 the Armed Career Criminal Act and it says: Any
9 -- any felony offense that has as an element
10 the use or threatened use of force.
11 And that's why there hasn't been any
12 debate about why the putting in fear prong
13 satisfies the elements.
14 JUSTICE GORSUCH: So you think the
15 putting in fear prong is always and can only be
16 accomplished by threats of force?
17 MR. LIU: By -- exactly, by threats of
18 putting --
19 JUSTICE GORSUCH: Do you know that --
20 do we know that's right? Is there any evidence
21 that that's right?
22 MR. LIU: Well, that -- that is how
23 the statute has been construed, as -- as
24 applying to threats to cause bodily harm.
25 JUSTICE GORSUCH: By -- by what --

1 what authority? Robinson isn't -- Robinson
2 doesn't do that.
3 MR. LIU: It's a case we cite in the
4 beginning of our argument section called
5 Baldwin versus State that gave that
6 interpretation. Bodily harm is the
7 quintessential injury that satisfies the Curtis
8 Johnson standard. And so a threat of such harm
9 is going to be threatened use of force under
10 the ACCA. And that's why no one has disputed
11 that in this entire case.
12 I -- I guess I'd like to return to the
13 -- I guess I'd like to turn to Petitioner's
14 test and -- and --
15 JUSTICE KAGAN: Mr. Liu, could I ask
16 before you do that, you keep referring to the
17 common law, but I had thought that the whole
18 structure of the Curtis Johnson opinion is to
19 say, well, we have this common law definition,
20 but it's in the context of a statute which is
21 trying to identify violent felonies. And in
22 that particular context, Justice Scalia said
23 we're going to ignore the common law definition
24 and, instead, use an ordinary language
25 definition of what force is.

1 And he basically says physical force
2 in the context of a statute that is trying to
3 define violent felonies is violent force,
4 substantial force, and so forth.
5 So why -- why is this common law
6 argument relevant at all?
7 MR. LIU: Well, I think it's relevant
8 for a number of reasons. First of all, Curtis
9 Johnson did reject a common law definition, but
10 the common law definition it rejected was one
11 drawn from a misdemeanor offense.
12 Curtis Johnson didn't call into
13 question that a felony definition of force
14 might fit. And this one does fit perfectly.
15 You're right that Johnson also
16 referenced the ordinary meaning of force in
17 terms --
18 JUSTICE KAGAN: It didn't reference
19 it. The whole argument -- the whole decision
20 was based on that.
21 MR. LIU: And I -- and that's why I --
22 I think I would return to what I was saying
23 earlier. I think if you took someone off the
24 -- in everyday English and explained to them
25 what happens in these cases, where someone

1 resists, that resistance is physically
2 overpowered by someone else, I think "violence"
3 is actually the word a lot of people would use.
4 It also is the word the common law has
5 used for centuries. It's the -- it's the word
6 "violence" that's found in the statutes of
7 dozens of states. And it's the word that
8 Congress used when it enacted the basic robbery
9 definition in the '84 Act.
10 It regarded this type of robbery,
11 Congress regarded this type of robbery, common
12 law robbery, as one of the most violent street
13 crimes -- one of the most common violent street
14 crimes that existed.
15 And so I think this ordinary approach,
16 this ordinary language approach to how we would
17 use violence in -- in ordinary English actually
18 cuts against --
19 JUSTICE KAGAN: I guess the ordinary
20 English view is something like, look, when I'm
21 walking down the street and somebody puts a --
22 a gun in the air and says give me your money,
23 that I know, I understand to be a violent
24 offense.
25 But, when I'm walking down the street

1 and somebody grabs my handbag, I'm not happy
2 about that, but it's -- it just doesn't have
3 that violent aspect of it in ordinary language
4 that I think, you know, beating somebody up
5 does, putting a gun in their face does.
6 And this is a -- a state that defines
7 robbery so broadly that you tell me it
8 basically includes every bag snatcher.
9 MR. LIU: Well, I guess -- I guess
10 what I would say to that is whether -- whether
11 -- you know, what I would say is the key point
12 is what Congress thought, and I -- and I think
13 all the indications are that Congress regarded
14 this as violent.
15 JUSTICE KAGAN: But what is the "this"
16 that Congress thought? I mean, in all of these
17 cases, we have to look to whether the state has
18 defined its crime more broadly than the basic
19 offense.
20 MR. LIU: Well, the idea that Florida
21 here is somehow an outlier among common law
22 jurisdictions is just not correct. The Florida
23 case law tracks exactly the sort of case law we
24 found in the common law treatises dating back
25 to Blackstone.

1 And that was the notion of violence
2 that Congress had in mind when it wrote the
3 definition of robbery in the '84 Act. Two
4 years later, Congress's intent was to expand
5 the scope of the ACCA. That was the very title
6 in the text of the --
7 JUSTICE GINSBURG: But that was
8 through the residual clause? The --
9 MR. LIU: No, Your Honor. Congress at
10 the same time made clear that it thought
11 robbery as defined in the '84 Act would satisfy
12 the elements clause. It wasn't -- it wasn't
13 depending on the residual clause to do the work
14 of the elements clause.
15 We know that from both the text and
16 the history of the '84 Act and the '86 Act
17 because, starting with the text, Congress took
18 the very key element in its robbery definition,
19 force, and made that the centerpiece of the
20 elements clause.
21 JUSTICE KAVANAUGH: But -- but Curtis
22 Johnson says substantial degree of force, as
23 Justice Kagan points out, and how are we
24 supposed to deal with that language in the
25 Curtis Johnson opinion if we're trying to

1 follow Curtis Johnson strictly?
2 MR. LIU: Well, Justice Kavanaugh, the
3 force used -- the type of force involved in a
4 Florida robbery or any common law robbery is
5 substantial in two ways Curtis Johnson itself
6 found relevant.
7 The first is this kind of force is
8 force capable of causing physical pain or
9 injury. That's what Curtis Johnson meant by
10 "substantial." The two sentences, one follows
11 right after the other.
12 The second --
13 JUSTICE KAGAN: Could -- force capable
14 of causing physical pain or injury, I mean, it
15 touches capable of causing physical pain or
16 injury when done in the wrong context. I'm
17 standing at the top of a stairs, somebody
18 startles me by putting his hand on my shoulder,
19 I fall down the stairs, I break my leg, that's
20 capable of causing physical pain and injury, it
21 just caused physical pain and injury.
22 So why doesn't your test -- why isn't
23 it defeated even by the holding of Curtis
24 Johnson, the -- the particular application of
25 Curtis Johnson?

1 MR. LIU: Well, we -- we -- it appears
2 there's common ground here. We -- we
3 absolutely agree that whether something is
4 violent has to be evaluated in the context.
5 And a tap on the shoulder, I think, if -- if
6 you pulled someone off the street and said is a
7 tap on the shoulder without more violent, that
8 person would say no.
9 But, as I was saying, if you describe
10 to them the -- the situations that are inherent
11 in a Florida robbery offense, a physical
12 contest where two people are fighting over a
13 piece of property, that is quintessentially
14 violent and has been so --
15 JUSTICE SOTOMAYOR: But, I'm sorry --
16 MR. LIU: -- for centuries.
17 JUSTICE SOTOMAYOR: -- you keep using
18 the word "fight." But the statute just says
19 the least resistance met by the least force.
20 That's not a fight in my dictionary.
21 The fact that somebody has something
22 and pulls back and you just walk away with it,
23 that's not substantial force.
24 MR. LIU: Oh, it -- it -- it is,
25 because whatever the resistance, the form the

1 resistance that the victim is providing, is
2 being physically overpowered by the defendant.
3 And --
4 JUSTICE SOTOMAYOR: But how does that
5 define it as a substantial force? Even as
6 capable of producing injury if the example that
7 the Chief used, an elderly victim, just simply
8 can be overcome with no -- virtually no force
9 whatsoever?
10 MR. LIU: Well, I don't -- 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 defendant, I guess,
6 grabbed on to the -- or the victim grabbed on
7 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 way, 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 JUSTICE SOTOMAYOR: So what do you
18 think --
19 MR. LIU: -- for one thing, the
20 resistance has to come from the victim to
21 overcome --
22 JUSTICE SOTOMAYOR: Not the way I read
23 the statute. It says when in the course of the
24 taking, there is a use of force, violence,
25 assault, or putting in fear. In the course of?

1 MR. LIU: Right. The -- the timing,
2 the force can come before or after the taking.
3 JUSTICE SOTOMAYOR: But it has to be
4 directed at the victim?
5 MR. LIU: It has to be directed at --
6 JUSTICE SOTOMAYOR: If there's a
7 Florida case --
8 MR. LIU: Right.
9 JUSTICE SOTOMAYOR: -- to the
10 contrary, then do you lose?
11 MR. LIU: No, because what the ACCA
12 cares about is the use of force without regard
13 to who it's directed against.
14 CHIEF JUSTICE ROBERTS: What -- what
15 -- what ACCA cares about -- in Curtis Johnson
16 said we have to determine meaning in context --
17 they wanted to keep off the street people who
18 were likely to use a gun.
19 MR. LIU: Right.
20 CHIEF JUSTICE ROBERTS: And at a broad
21 -- the broadest level, is somebody who engages
22 in a purse snatching with -- with some degree
23 of resistance, is that person -- do you look at
24 that and say, well, that person's likely to use
25 a gun?

1 MR. LIU: Well, Congress thought so.
2 We know that because Congress adopted this very
3 definition of robbery in the '84 Act. Robbery,
4 common law robbery, was an original ACCA
5 predicate. And in doing so, Congress described
6 these types of robberies as the most common,
7 violent street crimes.
8 JUSTICE KAGAN: Why does burglary end
9 up as an enumerated crime and robbery does not
10 when Congress changed the Act?
11 MR. LIU: Because it wasn't necessary
12 to enumerate robbery, given that Congress was
13 taking an element of robbery and making it the
14 basis of the elements clause.
15 By contrast, there was a lot more
16 doubt about whether the ACCA -- the new ACCA
17 without a specific reference to burglary would
18 have covered burglary. This Court recognized
19 that on pages 584 to 589 of Taylor. There was
20 a concern that burglary would be inadvertently
21 left out.
22 But there was -- there could be no
23 such concern with robbery because Congress did
24 the most straightforward thing it could do to
25 ensure that the new Act covered robbery, and

1 not just robbery but also things like rape and
2 murder.
3 What it did was it took that element,
4 thus guaranteeing that all the '84 covered
5 robberies would -- would come along with it,
6 and made that the basis such that other crimes
7 too -- rape, murder, et cetera -- would --
8 would come in as well. So there just simply
9 was no need for Congress to re-enumerate
10 robbery.
11 And the indications we have from the
12 text and the history are that Congress thought
13 the old ACCA was working perfectly well.
14 Senator Specter got up and said: Look, we want
15 to include everything that was included in the
16 old one, and we want to expand it.
17 And this Court in Taylor noted the
18 same thing. It said the consensus at the time
19 was the only issue before us is how to expand
20 it. And so --
21 JUSTICE ALITO: Ms. -- Ms. Bryn says
22 that her understanding of what Curtis Johnson
23 requires would have a minimal effect on the
24 robbery statutes of the states. Is she
25 counting the states correctly?

1 MR. LIU: No. And if you look at our
2 petition appendix, we've separated the
3 states' -- the states' basic robbery statutes
4 into three basic categories.
5 The biggest category, over 40 states,
6 have adopted the common law standard, the same
7 standard as Florida. There's no indication
8 that Florida is an outlier.
9 All those states would be knocked out.
10 That leaves three or four states that have a
11 notion of force that is broader than the common
12 law. That is, that would cover things like
13 sudden snatchings, purse snatchings, simple --
14 JUSTICE KAGAN: When you say "knocked
15 out," do you mean everything is knocked out or
16 only the basic robbery offense is knocked out,
17 but that leaves aggravated robbery offenses?
18 MR. LIU: I say only the basic robbery
19 is knocked out, but I think that's the right
20 focus because we know from the '84 Act Congress
21 was concerned about keeping in basic robbery.
22 You look at the definition in the '84
23 Act, it's not armed robbery, it's not
24 aggravated robbery; it's simple common law
25 robbery.

1 JUSTICE GORSUCH: Let -- let's put
2 that aside for the moment, say we disagree with
3 you. How many states have a robbery statute
4 that would be left under ACCA under your
5 opposing counsel's interpretation?
6 MR. LIU: Basic robbery statutes?
7 JUSTICE GORSUCH: No. Basic or
8 aggravated.
9 MR. LIU: Basic or aggravated, it's --
10 we don't have the exact number. Part of that
11 is because Petitioner is unwilling to commit to
12 whether some of those aggravated states
13 actually qualify.
14 So the aggravated -- the aggravated
15 factor that Petitioner points to is an element
16 in the offense that requires a showing of
17 actual injury, the causation of injury as an
18 element. But Petitioner, on page 8 of his
19 reply brief, isn't even willing to say whether
20 those offenses qualify.
21 JUSTICE KAVANAUGH: But, if they did
22 qualify, then how many states are affected?
23 MR. LIU: I don't have an exact
24 number. I think it would be maybe two dozen
25 states that would qualify. But I just want to

1 reiterate, I think that is the wrong lens to
2 look at this issue because Congress, when it
3 wrote a basic robbery definition to '84 and
4 then wanted to expand the ACCA, didn't --
5 didn't think the expanded ACCA was then going
6 to cut back and limit the coverage of the ACCA
7 to only a small subset of robberies that
8 qualified as armed and aggravated.
9 JUSTICE GORSUCH: The -- the problem I
10 -- I have with that, counsel, and hopefully you
11 can help me with this, is you keep coming back
12 to the -- the -- the belief that Congress
13 wished to or intended to keep in common law
14 robbery in its simple form, but Curtis Johnson
15 expressly rejects the common law definition of
16 force.
17 MR. LIU: No, it --
18 JUSTICE GORSUCH: So --
19 MR. LIU: It -- rejected the common
20 law definition of force --
21 JUSTICE GORSUCH: -- what do we do
22 about that?
23 MR. LIU: -- that came from a
24 misdemeanor offense.
25 What was key in Curtis Johnson was

1 that the key term being defined was "violent
2 felony." And so Justice Scalia said it would
3 have been a comical misfit, a mismatch --
4 JUSTICE GORSUCH: Well, as the dissent
5 pointed out and -- and the majority
6 acknowledged, the misdemeanor/felony line at
7 common law simply meant: One, you're put to
8 death, and the other you are put in prison. So
9 it wasn't -- it wasn't quite the same line that
10 we have today.
11 And that was the common law definition
12 of robbery. Robbery was a misdemeanor --
13 MR. LIU: No, robbery was a --
14 JUSTICE GORSUCH: -- often.
15 MR. LIU: -- robbery was a felony at
16 common law.
17 JUSTICE GORSUCH: Often it was. But
18 the force required was very minimal at common
19 law. And the majority expressly rejects that
20 in Curtis Johnson as sufficient to satisfy the
21 statute.
22 Now, maybe that's wrong. Maybe you
23 want to revisit Curtis Johnson. I've heard a
24 lot of arguments today that seem along those
25 lines. But what do we do if we don't?

1 MR. LIU: Well, I -- it -- it's not
2 true that Curtis Johnson rejected this -- this
3 -- this definition of force. The definition of
4 force that Curtis Johnson rejected was one that
5 could be satisfied by the merest touching.
6 And common --
7 JUSTICE GORSUCH: Which we
8 acknowledged was the common law definition.
9 MR. LIU: Was the common law
10 definition that came from the misdemeanor
11 offense of battery.
12 Common law robbery, which has a felony
13 definition of force, force overcoming
14 resistance, cannot be satisfied by the merest
15 touching. We know that because not only did
16 the treatises say so, but Florida in particular
17 has said so in the Walker case which involved a
18 -- a -- a mere touching where someone took --
19 took away someone's property, and that did not
20 rise to the level of common law robbery. And
21 so --
22 JUSTICE GINSBURG: What do you -- what
23 do you do with the express statement in Curtis
24 Johnson that the word "violent" in 924(e)(2)(B)
25 connotes a substantial degree of force?

1 MR. LIU: We -- we have three
2 responses. Once -- one, the substantialness of
3 the force has to be understood in context. And
4 in the context of a physical struggle, I think
5 people would call that force substantial or
6 violent.
7 JUSTICE SOTOMAYOR: This really has --
8 sounds like we're overruling Johnson and
9 reintroducing into the categorical approach
10 this whole notion of -- of what's the normal
11 situation?
12 I -- I -- I guess if I'm looking at
13 something in a categorical way, I'm saying
14 little force is not substantial force, period,
15 end of story.
16 MR. LIU: And -- and I --
17 JUSTICE SOTOMAYOR: If that's what the
18 categorical approach means, which is what it
19 appears our cases say --
20 MR. LIU: And Curtis Johnson didn't
21 adopt a quantitative measure of force. Yes, I
22 -- I will acknowledge that if you measured the
23 force in some of these cases on a quantitative
24 basis, we're not going to get to a lot of
25 Newton's or foot pounds or foot meters --

1 JUSTICE SOTOMAYOR: And you're not
2 going to even get to pain --
3 MR. LIU: But --
4 JUSTICE SOTOMAYOR: -- and suffering.
5 MR. LIU: But Curtis Johnson made
6 clear that that wasn't the right inquiry. It's
7 a qualitative assessment. It -- the words
8 capable of causing injury were a gloss on the
9 word "violent."
10 And I go back to what I said earlier.
11 This sort of interaction, a physical struggle
12 between two people over a piece of property,
13 has been regarded as violent in the common law
14 by Congress, by over 40 states for hundreds --
15 for a very long time.
16 JUSTICE ALITO: But isn't the standard
17 force sufficient to overcome resistance a
18 quantification? That's a way of quantifying
19 how much force is necessary.
20 So the -- the force that is required
21 for a battery, the merest touching, is not
22 enough, but there has to be a substantial
23 amount, a quantifiable amount, and the
24 quantification is the amount of force necessary
25 to overcome resistance.

1 If you don't adopt that, then I do
2 think you have to get to foot pounds, or
3 something like that.
4 MR. LIU: Well, no, that -- that's
5 sort of -- I think I'm agreeing with you more
6 than disagreeing, Justice Alito.
7 I -- I -- I don't think we should
8 measure force in terms of some statistic or --
9 or -- or, you know, exact degree.
10 I think -- I think the force used has
11 to be understood in context. And I think the
12 sort of force that is necessary to overcome
13 someone's resistance is going to be more than a
14 mere touching and is the sort -- is the type of
15 violence that has been regarded as violent by
16 the common law and, even more relevant,
17 Congress.
18 JUSTICE KAGAN: I guess, Mr. Liu, the
19 problem I'm having in a nutshell is you keep on
20 referring to this as a physical struggle over
21 property. But at the same time you tell me
22 that if somebody snatches a bag off my
23 shoulder, it's -- it counts as robbery --
24 MR. LIU: Well, I --
25 JUSTICE KAGAN: -- under Florida law.

1 And to me that is not a physical
2 struggle of a property. And if a state defines
3 its robbery statute that broadly so as to
4 include, you know, thefts of property but that
5 are not done with physical contestation,
6 physical struggle, then the state has made a
7 choice.
8 MR. LIU: And, Justice Kagan, I -- I
9 think we just disagree about what's covered by
10 state law then because I don't think a simple
11 purse snatching or pickpocketing, those things
12 were the very reason -- was the very reason for
13 Robinson.
14 Robinson, the Florida Supreme Court
15 case, the very reason for it was to clarify
16 that those sorts of things are punished as
17 theft, as larceny, as sudden snatching --
18 JUSTICE KAGAN: But I go back to what
19 your answers to my first questions were. I'm
20 carrying my bag with my hand over the strap,
21 and you say when somebody wrests the bag from
22 me, that's -- that -- that's robbery.
23 MR. LIU: But --
24 JUSTICE KAGAN: And I say that's every
25 bag snatching in America, save a few.

1 MR. LIU: Well, but I think only in a
2 case where there is actual victim resistance,
3 physical resistance to the taking. In a case
4 where that's absent, like the AJ case discussed
5 in Robinson itself, that's not going to rise to
6 the level of a robbery. That's going to be
7 prosecuted, if at all, only as a theft or a
8 larceny.
9 And so I think what the question
10 before this Court boils down to is whether it
11 should recognize a line between violent and
12 non-violent takings.
13 JUSTICE KAVANAUGH: But, counsel, can
14 I say one thing on Curtis Johnson there, which
15 is it says violent force. And if I -- if it
16 stopped there, I think you might have an issue,
17 but then it says "that is force capable of
18 causing physical pain or injury to another
19 person."
20 And "capable of" seems to me much
21 different from what we usually, as Justice
22 Kagan would say, think of as violent force.
23 So maybe -- maybe there is something
24 in Curtis Johnson itself, we've talked a lot
25 about it, but in that one sentence it says

1 "violent force" and it says something else that
2 seems intention with violent force.
3 MR. LIU: Mr. Chief Justice, may I
4 answer?
5 CHIEF JUSTICE ROBERTS: Certainly.
6 MR. LIU: I think the capable language
7 is a gloss on violent. I think it is an
8 ordinary English way of translating, of
9 spelling out what violent means.
10 And I think whether you look at
11 violent or the capable language, common law
12 robbery is -- satisfies that -- that
13 definition.
14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.
16 Ms. Bryn, you have four minutes
17 remaining.
18 REBUTTAL ARGUMENT OF BRENDA G. BRYN
19 ON BEHALF OF THE PETITIONER
20 MS. BRYN: Thank you.
21 Your Honor, at common law no physical
22 resistance was even required for robbery. The
23 classic example from Blackstone is pulling a
24 watch chain and snapping a watch off of
25 someone. The person doesn't have to do

1 anything.

2 So under the government's view here,

3 that would constitute violent force, where

4 there wasn't even any -- it's a fiction if

5 resistance was implied in the watch chain at

6 common law. Common law resistance was so

7 broad, and that was the intent in '84.

8 But let me just say Florida robbery

9 would not even need the 1984 definition because

10 Florida's expanded the temporal scope of

11 robbery far beyond the common law. So that --

12 so Florida robbery today is essentially

13 shoplifting and pickpocketing, plus resisting

14 apprehension in some way.

15 Now, to include these slight force

16 robberies as a predicate for a -- an

17 enhancement that would start at 15 years

18 imprisonment and authorize a penalty up to

19 life, is really inconsistent with Congress's

20 purpose of identifying the worst of the worst

21 offenders, exactly those offenders who would be

22 likely not only to possess a gun, but kill

23 someone with a gun.

24 And there is no predictive value from

25 using slight force to snap a bag or pull a

1 dollar bill or even just pull one's arm away
2 from a security guard. It would be predictive
3 of the willingness to use violent force.
4 If Congress finds that the result in
5 this case is counterintuitive, not what it
6 intended, and it really wants slight force
7 robberies to qualify as violent felonies
8 sufficient to support that enhancement, it's in
9 Congress's hands.
10 They can easily rewrite this statute.
11 There were two definitions originally. All
12 robberies came within the residual clause for
13 many, many years. This has only become a
14 question after the elimination of the residual
15 clause, and Congress has multiple resources --
16 JUSTICE ALITO: Well, the residual
17 clause referred to "capable of causing" -- I'm
18 sorry -- "a serious risk of physical injury."
19 So how would common law robbery come within
20 that?
21 MS. BRYN: It -- it -- it -- just by
22 the possibility of a confrontation afterwards,
23 which was the way -- which was the standard
24 this Court used for the residual-clause crimes,
25 which swept in pickpocketing --

1 JUSTICE ALITO: I'm sorry, you think
2 that --
3 MS. BRYN: And all these offenses that
4 Congress --
5 JUSTICE ALITO: You think that common
6 law robbery involves a serious risk of physical
7 injury?
8 MS. BRYN: No. I -- I --
9 JUSTICE ALITO: Then how would it fall
10 within the residual clause, which is what you
11 just said?
12 MS. BRYN: I'm -- I'm -- I'm not
13 saying that, Your Honor. I'm saying that, as
14 applied, as the residual clause was applied,
15 because the language was so capacious and the
16 standard was unclear and it focused on a
17 hypothetical possible confrontation, one could
18 hypothesize a confrontation after
19 pickpocketings, after shopliftings, and
20 ultimately the residual clause swept in
21 everything.
22 And that's why I believe it was
23 invalidated by this Court. But now this Court
24 cannot compensate for the loss of the residual
25 clause by reading the elements clause beyond

1 its terms, and one very important term is "has
2 as an element."
3 Congress dictated the categorical
4 approach. If it doesn't like the results of
5 the categorical approach, it can easily rewrite
6 ACCA.
7 Thank you. I ask Your Honor to affirm
8 -- to reverse the decision below.
9 (Laughter.)
10 MS. BRYN: Thank you.
11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.
13 (Whereupon, at 11:08 a.m., the case
14 was submitted.)
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