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

2 (11:08 a.m.)

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

7 Ms. Ross.

8 ORAL ARGUMENT OF ERICA ROSS

9 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: So where any

1 person lives. The homeless person who lives in
2 a car.

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

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

10 MS. ROSS: So --

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

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

24 What it did was it looked at how the
25 states defined burglary. And the states, by

1 and large, included vehicles used and adapted
2 for overnight accommodation.

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

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

17 JUSTICE GORSUCH: Well --

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

23 MS. ROSS: So, Your Honor, I think
24 they are not encompassed by these statutes.
25 And I think that our definition turns on

1 whether most states would, in fact, have
2 included that person.

3 So I don't think that it's encompassed
4 by this statute because, again, I think even
5 the homeless person that you're hypothesizing
6 would change their vehicle in some way that
7 might put a burglar on notice. But even if you
8 disagree with me on that, no state case -- as
9 Respondent Sims readily admits in the brief, no
10 state case has applied it to a vehicle in which
11 someone happens to live. And that's not just
12 true of Arkansas.

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

20 JUSTICE GORSUCH: Well, counsel, I'm
21 not sure how that helps you, because you've
22 identified, first of all, that only 12 states
23 are at issue, which seems to me a strike
24 against the government here, as to suggest that
25 this was what Congress had in mind in 1984/'86.

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

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

18 Compared to the person who tows away
19 the same car without entering it and commits a
20 theft, that would just be a common law theft
21 and -- with no -- no attendant problem, even
22 though maybe an arguably greater harm has
23 occurred. What do you think about that?

24 MS. ROSS: Well, Justice Gorsuch, to
25 sort of answer your questions in reverse order

1 perhaps, I think that's actually not
2 particularly anomalous because what the -- what
3 the burglar has done in the first case but
4 hasn't done in the second case is opened up
5 exactly the risk of a violent confrontation
6 with which Congress was concerned in -- in
7 enacting a statute that specifically both in
8 1984 and 1986 --

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

17 MS. ROSS: You have, Your Honor. But
18 I think at the same time what Congress was
19 doing, again, was not creating its own -- its
20 own definition of burglary. It was trying to
21 use the work that the states had already done.
22 And that makes significant sense given that it
23 was enacting a recidivism statute and,
24 therefore, would want to cast its net broadly.

25 And this I think takes me to Your

1 Honor's first question, which is that actually
2 the numbers work in exactly the opposite way as
3 you suggest.

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

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

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

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

22 So I think there are about 12 statutes
23 that had "lived in" or some kind of similar
24 language, but that's a subset of over 44
25 statutes that would have reached vehicles

1 generally in which people lived that were
2 adapted for overnight accommodation that were
3 customarily used for overnight accommodation.

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

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

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

24 JUSTICE GINSBURG: But you are using
25 any car, that is, any car is capable of being

1 lived in, so the burglary statute that you're
2 -- you are envisioning, a statute that took in
3 anything capable of being lived in would
4 include any car?

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

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

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

19 And, three, I think if you look at the
20 two parts of the statute, as I believe Justice
21 Gorsuch was noting earlier, one prong says
22 customarily used, and we think that that's
23 something that is commonly used, perhaps
24 because it's designed for overnight
25 accommodation, and the other is someplace where

1 someone lives. And we think that that brings
2 in sort of the -- the adapted in this
3 particular case.

4 And so, when you put those two prongs
5 together, you actually get to a place that is
6 quite similar to the Tennessee statute. And I
7 think that perhaps is why this --

8 JUSTICE GORSUCH: It sure sounds to me
9 like you've turned those two prongs into one,
10 made them superfluous.

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

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

22 JUSTICE SOTOMAYOR: I'm -- I'm sorry.
23 What is "assume"? And then what's the meaning
24 of "adapted"? Is it a structural change of
25 some sort, or is it throwing a pillow and

1 blanket? Is it putting a mattress in there?

2 What -- what does "adapted" mean?

3 MS. ROSS: So, again, Your Honor, I
4 would --

5 JUSTICE SOTOMAYOR: And what's
6 customary to understand that adaptation?

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

14 Respondent cites three cases for the
15 suggestion that maybe it's difficult to decide
16 whether something is adapted for overnight
17 accommodation. And all three of those involve
18 just the types of structures --

19 JUSTICE SOTOMAYOR: But we can't just
20 leave it in state hands. We're providing a
21 federal definition. So what's the federal
22 definition that we give?

23 MS. ROSS: You are providing a federal
24 definition, Your Honor, but, again, I don't
25 think that when Congress did this it was trying

1 to itself determine these edge cases. I think
2 instead it was looking to the content --

3 JUSTICE SOTOMAYOR: Well, we said
4 dwelling and structure. So now -- building and
5 structure. Pardon me. Now we have to define
6 "structure."

7 MS. ROSS: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: Or give some
9 understanding of what the federal meaning of it
10 was. In our cases, we very clearly excluded
11 vehicles. We said that.

12 And so now you want us to put a gloss
13 on that. And I want to know how and what
14 guidance we give on that gloss?

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

16 JUSTICE SOTOMAYOR: So does it have to
17 be something permanent to be adapted?

18 MS. ROSS: So I don't think that there
19 is a -- a clear answer to that question,
20 unfortunately. I think the -- the general
21 answer is yes.

22 JUSTICE SOTOMAYOR: Well, the problem
23 really is that, if it's criminal law, shouldn't
24 we be clear?

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

1 JUSTICE SOTOMAYOR: Shouldn't we give
2 notice to people of what the consequences of
3 their actions are, and so don't we have an
4 obligation to be as clear as we can be?

5 MS. ROSS: Yes, Your Honor. I think
6 specifically of the examples that you
7 mentioned, the bed and the -- the structural
8 change, those are clearly adaptations that
9 would count. But even --

10 JUSTICE SOTOMAYOR: Just a bed,
11 putting a mattress?

12 MS. ROSS: Yes, Your Honor. I mean, I
13 --

14 JUSTICE SOTOMAYOR: How about the
15 people who are carrying the mattress from the
16 store to their home? I see that all the time.

17 MS. ROSS: Well, no, Your Honor,
18 because that wouldn't be installed in a way
19 that was actually adapted for overnight
20 accommodation. You would just be --

21 JUSTICE SOTOMAYOR: So it has to be
22 installed in some way?

23 MS. ROSS: I mean, you would just be
24 transporting your mattress in that case. I
25 don't think you've installed your groceries

1 when you bring them home, or things of that
2 nature, or adapted them to that.

3 JUSTICE GINSBURG: Does it matter if
4 it says sometimes, sometimes I sleep in my car,
5 and sometimes I sleep in a home?

6 Does it have to be the regular
7 residence? Does the car to qualify have to be
8 what you sleep in all the time, or could it be
9 that you have a principal residence someplace
10 else, but many times you sleep in your car?

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

19 JUSTICE BREYER: I'd like to ask you a
20 general question, if you would answer it.
21 You've read probably Justice Alito's opinion
22 about the woman who was trying to go to
23 Brussels and she ended up in Serbia.

24 MS. ROSS: Yes.

25 JUSTICE BREYER: All right. Now

1 you've used the words -- I mean, that -- that
2 -- I think there's a point there -- you've used
3 words like common sense. You just heard
4 Justice Sotomayor use somewhat similar words.
5 Generic burglary, that's the word, generic
6 burglary.

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

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

19 Now Judge Posner said -- and I agreed
20 with this -- what you should do or the
21 Sentencing Commission should find out how these
22 cases are actually prosecuted, which you
23 haven't, nor has the Sentencing Commission.

24 A second possibility was to say:
25 We'll go back and see if there was violence in

1 this individual case, which is almost
2 impossible because all you see is a rap sheet
3 or something, you know, you don't know, but
4 over time, maybe.

5 And a third possibility is that the
6 Department of Justice asks Congress to rewrite
7 the statute, which is exactly what Ms. Bryn
8 said.

9 All right. Have you thought about
10 this over at the department? Well, you have to
11 prepare these cases. Have you thought about
12 it? And, if you have a better approach than --
13 than I've just outlined, I'm -- my ears are
14 open.

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

21 I do think in this case it is not
22 particularly difficult, and that is because, as
23 I started out, burglary has always concerned
24 dwelling. So whatever the edge cases, whatever
25 the difficult cases under the categorical

1 approach, it's very clear that when this Court
2 noted in Taylor that Congress had eschewed the
3 common law and gone beyond the common law, that
4 it should have at least captured the types of
5 dwellings that we're talking about today
6 because, again, 44 states capture them.

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

12 (Laughter.)

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

15 (Laughter.)

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

21 And, as Justice Gorsuch noted, perhaps
22 my friend will quibble with that, but I --

23 JUSTICE GORSUCH: Well, I'd like you
24 to return to Justice Breyer's original
25 question. I know you want to run straight to

1 this case, and I appreciate that, but -- but
2 live with us for a moment in the unease of the
3 more general concern that Justice Breyer
4 raised.

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

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

18 JUSTICE KAGAN: May I add a fifth?

19 (Laughter.)

20 JUSTICE GORSUCH: Please.

21 JUSTICE KAGAN: Because I know there
22 actually is a statute in Congress right now
23 that replaces ACCA with a statute that looks to
24 the penalties that have been given. So I guess
25 my question is, has the department taken a

1 position on that statute that is pending in
2 Congress currently?

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

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

16 I know that this Court at least
17 rejected that in Taylor because, you know, you
18 would have some sort of unfortunate
19 consequences. For example, Michigan has always
20 entitled its burglary statutes as breaking and
21 entering, and they very clearly are burglary,
22 but that just happens to be the nomenclature
23 that Michigan used.

24 And what this Court said in Taylor and
25 -- and what Congress said was that it really

1 didn't want sort of offenders who exhibited
2 these -- these qualities, had had these
3 dangerous convictions previously, to escape on
4 a technicality.

5 JUSTICE ALITO: Well, at least with
6 respect --

7 MS. ROSS: And they do worry --

8 JUSTICE ALITO: Yeah. I mean, you're
9 not exactly on a winning streak here in ACCA
10 cases.

11 (Laughter.)

12 JUSTICE ALITO: You might have gotten
13 a hint that a majority of the Court really
14 hates ACCA and is picking it apart bit by bit
15 by bit.

16 And at least with respect to the
17 enumerated offenses like burglary, why not
18 depart from this categorical approach and look
19 at what actually happened in the particular
20 case to the extent that you can determine it?
21 If you can't determine that it -- it falls
22 within generic burglary, fine, but in a lot of
23 cases, you're going to be able to figure that
24 out very quickly.

25 Otherwise, you're going to be at the

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

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

11 JUSTICE ALITO: Yeah, the Court said
12 that, but the Court isn't always right.
13 Sometimes when we make a mess --

14 (Laughter.)

15 JUSTICE ALITO: Which we have done in
16 this -- in my humble opinion, in this area, we
17 have made one royal mess. Maybe we ought to go
18 back and correct our own mess.

19 MS. ROSS: Your Honor, again, I -- I
20 think perhaps in some case that would be
21 something that this Court needed to think
22 about. I really -- I apologize for keep
23 bringing -- for continuing to bring us back to
24 this case, but we haven't asked that the Court
25 reconsider Taylor in this case. And that's --

1 that's because we really don't think that we
2 need that in order to prevail here.

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

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

23 And whatever the edge cases, whatever
24 the hard cases under the Armed Career Criminal
25 Act, we just don't think that that is this

1 case, given what -- what had been on the books
2 in the states at that time.

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

15 JUSTICE BREYER: Well --

16 JUSTICE GINSBURG: Suppose we think
17 about the consequences, the number of years
18 that are added to a person's life by ACCA.
19 Another approach the Court could take is to say
20 because this is such a harsh statute, it has
21 such extreme consequences for the individual,
22 we are going to have a clear statement rule for
23 Congress. If you want to have this kind of
24 heavy penalties, you have to be clear. And if
25 it's ambiguous, we will -- we will not uphold

1 the application of ACCA.

2 The -- starting out with the premise
3 that when the consequences are so severe,
4 Congress has an obligation to be plain.

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

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

17 If you take my friend's position, that
18 number dwindles down to 12. And I don't think
19 that -- keeping in mind that Congress enacted a
20 very -- a significant penalty for these
21 offenses, I don't think Congress would have
22 expected its work to do so little.

23 And, importantly, it's not as though
24 those 12 would actually be the most severe or
25 the most aggravated burglary offenses in those

1 states. It's entirely based on this question
2 of whether they did or they didn't think about
3 all types of places, whether elaborate or
4 modest, where people live.

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

15 If I could reserve the remainder of my
16 time.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Fisher.

20 ORAL ARGUMENT OF JEFFREY L. FISHER
21 ON BEHALF OF THE RESPONDENTS

22 MR. FISHER: Mr. Chief Justice, and
23 may it please the Court:

24 We ask the Court to affirm the
25 judgments below for three reasons.

1 First, this Court's precedent, from
2 Taylor on through to Mathis, make clear that
3 when it comes to the burglary provision of
4 ACCA, buildings and structures are in one
5 category that are inside the statute, vehicles
6 are in another category that are outside the
7 statute, and this case involves quintessential
8 vehicles.

9 Secondly, the "use" prong of the
10 government's definition that it offers to this
11 Court is an independent reason why Arkansas's
12 law goes beyond any generic definition of
13 burglary that would be acceptable.

14 And, third, if necessary, we would ask
15 this Court to apply the Sixth Amendment rule
16 that Justice Thomas announced in Apprendi and
17 himself laid out in Mathis and Shepard, that
18 ACCA itself violates the Sixth Amendment
19 because it transgresses the jury trial right.

20 Now --

21 JUSTICE KAGAN: May I stop you on your
22 first point, Mr. Fisher? So the Court has
23 indeed said many times that vehicles fall
24 outside the generic definition of burglary.
25 But I think that when the Court said that, what

1 it really meant was this is a way to say if --
2 if the -- if a statute covers basic car theft,
3 it's outside ACCA. That's not the typical
4 burglary offense.

5 And the Court was not thinking about
6 mobile homes or RVs. It just didn't have that
7 in its head when it made those statements. So
8 those statements really don't have much to do
9 with the question in this case.

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

17 And the government in its brief said
18 the mere fact that the statute covers vehicles
19 is enough to put it outside of ACCA. And the
20 Court said the same thing four times in its
21 opinion.

22 And I'd hasten to add -- and I think
23 this goes back to Justice Ginsburg's question
24 in the first part of the argument about the
25 government's position in Mathis -- the

1 government on page 42 in Mathis said if you
2 adopt the divisibility rule being urged by the
3 other side, you're going to leave many state
4 statutes outside of burglary. And in Footnote
5 12, the government cited many state statutes
6 that it now is back here claiming actually do
7 fall within burglary, even though the
8 government's representation to this Court in
9 Mathis is that they would fall outside.

10 So I -- I understand --

11 JUSTICE KAGAN: But I don't think -- I
12 don't think Mathis really is -- is at odds with
13 what I was saying. Everybody in that case
14 agreed that this covered vehicles, broadly
15 speaking, and the government conceded it, the
16 -- the other party conceded it. All -- all --
17 all of the opinions viewed it that way.

18 And so nobody really ever addressed
19 the question of are there different kinds of
20 vehicles in the world? Are there cars and are
21 there mobile homes?

22 MR. FISHER: Yeah. So -- so I
23 understand, Justice Kagan, you haven't had this
24 precise type of object in front of you. But I
25 think the Court's opinions are still

1 illuminating because the Court does say there's
2 vehicles on the one hand and structures and
3 buildings on the other.

4 And so the project here is which
5 category do things like sleeper vans or a
6 sailboat tied up at harbor that has a sleeping
7 quarters underneath fit into.

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

20 On the other hand, there are things
21 like recreational vehicles, sleeper vans, and
22 boats that have sleeping quarters that have
23 always been in the vehicle category, and the
24 reason why is because the principal purpose of
25 those objects is transportation.

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

14 That's the hypothetical that both
15 Tennessee and Arkansas sweep in. I'll turn
16 later to the specific provision of Arkansas
17 law, the lives-in provision, which is even
18 broader. But that's the hypothetical the
19 government has to answer. Justice Kagan --

20 JUSTICE ALITO: There are a lot of --
21 there are a lot of vacation homes that are
22 occupied for only a short period of time and
23 a -- somebody contemplating a burglary can look
24 at them and determine pretty easily that place
25 is not occupied at the -- at the present time.

1 But what about, say you have a house,
2 and then next to it you have a self-propelled
3 vehicle that is designed or adapted for the
4 overnight accommodation of persons and is
5 actually occupied at the time of the initial
6 entry by the defendant.

7 Is there any reason why the -- the
8 burglary of the house should be treated
9 differently from burglary of this vehicle?
10 Isn't the risk exactly the same?

11 MR. FISHER: Well, Justice Alito, I'm
12 going to answer that question, but just allow
13 me to preface it.

14 I don't have -- I don't have to win
15 that hypothetical because the hypothetical the
16 government has to win is the person not being
17 in and it not being near a house. But to
18 answer your question directly, I would still
19 say --

20 JUSTICE ALITO: Well, why don't you
21 have to win that? That's the Arkansas statute.
22 What I read you is exactly what the Arkansas
23 statute says.

24 MR. FISHER: No, no, no, the Arkansas
25 -- well, the Arkansas statute says --

1 JUSTICE ALITO: I'm sorry, the
2 Tennessee statute.

3 MR. FISHER: The Tennessee statute
4 does not require it -- it does require the
5 person to be there, yes, Justice Alito.

6 JUSTICE ALITO: Right.

7 MR. FISHER: But it does not require
8 it to be sitting right by a house. So it could
9 be --

10 JUSTICE ALITO: No, no. I'm just
11 saying, this is the contrast, why would -- why
12 is one you would concede burglary and the
13 other -- and the other is not? I don't see any
14 possible reason why the law should treat those
15 two situations differently.

16 MR. FISHER: I think because the
17 criminal law, we've heard a lot about notice
18 this morning, and a core concept of criminal
19 law is providing fair notice.

20 And so, for the same reason that a
21 vacation home is inside burglary because it is
22 a home, it is a dwelling, and so you would
23 expect it to be occupied as a residence, even
24 if it happens to be somebody's second home,
25 that is in.

1 The same objective characteristics of
2 a vehicle, even a recreational vehicle adapted
3 for occasional overnight accommodation, fall
4 outside. And so the criminal law has to draw
5 lines. You can't simply do it in that
6 fine-grained of a basis.

7 And the government's argument, Justice
8 Alito, I would add, does not depend on the
9 person being inside the vehicle at the time of
10 the crime. The government doesn't make that
11 argument. And that's the only way the
12 government could sweep in even the -- even the
13 customary use prong of the Arkansas statute.

14 But, Justice Kagan, you asked --

15 JUSTICE KAVANAUGH: But I notice if --
16 if you're convicted three times of burglary for
17 burglarizing an RV, you're on notice,
18 presumably, if you look at the federal statutes
19 and you then possess a firearm, that -- that
20 those burglaries were of a structure, as Taylor
21 said. I don't understand the notice point.

22 MR. FISHER: Well, Justice Kavanaugh,
23 I think that, if I may, it begs the question a
24 little bit whether the RV is, in fact, a
25 structure.

1 JUSTICE KAVANAUGH: But you would look
2 at Taylor and you would see it's citing the
3 model -- Taylor's the case, right, focus on
4 Taylor. It's a long time ago. It talks about
5 other structures. It doesn't limit it to the
6 '84 definition, cites the Model Penal Code,
7 cites the LaFave Treatise, points out all the
8 state statutes, and I think if you're convicted
9 three separate times of breaking into an RV and
10 look at that, those sources, you would be on
11 some notice that you shouldn't be possessing a
12 firearm under federal law.

13 MR. FISHER: Well, Justice -- Justice
14 Kavanaugh, there are many, many pieces of
15 Taylor, so there is the state law piece that my
16 friend is focused on.

17 But Taylor also says on the very same
18 page that Congress in 1986 intended the
19 practical, identical definition of burglary as
20 in the '84 Act. Remember, the '84 Act covered
21 only buildings.

22 JUSTICE KAVANAUGH: But Taylor --
23 Taylor does not do that, though, when it says
24 other -- or other structures. Quite clearly,
25 Taylor departs from the '84 statute in what it

1 describes there, don't you agree, when it says
2 "or other structures"?

3 MR. FISHER: I think it departs from
4 the '84, but that's why -- that's why the court
5 --

6 JUSTICE KAVANAUGH: Because the '84
7 Act only says building.

8 MR. FISHER: That's right. I think
9 that's why the court said practically identical
10 and not identical.

11 JUSTICE KAVANAUGH: And one of the --
12 I'm sorry to interrupt. And one of the reasons
13 it departed, as I read the opinion, which is
14 quite thorough, is it did a full excavation of
15 the Model Penal Code, of the treatises, of the
16 state statutes, and said the '84 definition
17 does not reflect common understanding, as Judge
18 Sutton described in detail in his opinion, of
19 the common understanding at the time of what
20 burglary entailed.

21 MR. FISHER: Right. The Court did
22 look to state law in Taylor, but, as I said, it
23 also looked to legislative intent and the
24 drafting history and the like.

25 And I think Taylor was correct insofar

1 as it went at that time that you still would
2 have covered a majority of the states, even if
3 Taylor covered vehicles adapted for overnight
4 accommodation. The switch happened in Mathis.

5 That's when the government came to the
6 Court and said, if you have an aggressive
7 divisibility jurisprudence, that's going to
8 leave aside many state laws because of
9 divisibility reasons. So the answer to the
10 state law concern is in Mathis. And that's the
11 bridge the Court has already crossed and that
12 the government doesn't ask the Court to -- to
13 -- to revisit.

14 If we're talking about Congressional
15 intent, I think there's one other important
16 thing to put on the table in the text of the
17 law, and that's the residual clause. I know
18 the Court obviously has invalidated that
19 clause, but we think the text is relevant in
20 terms of Congressional intent.

21 And the text of that clause, remember,
22 reads as follows. After the enumerated crimes,
23 it says any other crime that "otherwise
24 involves" -- I'm sorry, I'm reading at page
25 10-A of the government's appendix -- "that

1 otherwise involves conduct that presents a
2 serious potential risk of physical injury."

3 And so the word "otherwise" tells us
4 that when Congress defined burglary -- in fact,
5 it didn't define it -- but when Congress used
6 the word "burglary," it must have assumed that
7 the version of burglary it had in mind
8 "involved conduct that presents a serious
9 potential risk of physical injury."

10 Now, if you look at the NAFD amicus
11 brief -- and this is responsive also to Justice
12 Breyer's questions about statistics -- there
13 actually have been quite a lot of studies
14 conducted about burglary law. And what they
15 find is that when there's a burglary of a home
16 or somebody's residence, there is a real
17 possibility that you could have a violent
18 confrontation or physical injury, something in
19 the range of 2 to 7 percent of the time.

20 By contrast, when it's burglary of a
21 non-residential structure, the percentage goes
22 down to .17 percent, which translates to one
23 out of every 700 crimes that involve what a
24 state would expansively call burglary of a
25 non-residential structure.

1 JUSTICE BREYER: Which category does
2 this case belong in?

3 MR. FISHER: So this case belongs in
4 the latter.

5 JUSTICE BREYER: Why?

6 MR. FISHER: Because we're talking
7 about things that are not primary residences.
8 They're not --

9 JUSTICE BREYER: But they're -- I
10 mean, they're residences, they're inhabited by
11 people, and so I don't know why it would be a
12 lower statistic if it's, say, a car or a
13 trailer or -- or some kind of motorized vehicle
14 that a person uses as his home.

15 MR. FISHER: Well, I think, Justice
16 Breyer, the typical usage of something like a
17 sleeper van or recreational vehicle is not as a
18 residence. A person has a home, and then they
19 have a second vehicle that they use for trips
20 and weekends and vacations and the like.

21 And so, if you ask somebody that has a
22 house and a sleeper van, where is your
23 residence, they would point to their house, not
24 the sleeper van.

25 JUSTICE KAVANAUGH: What are you --

1 what are you --

2 MR. FISHER: And I think that's the
3 way the statistics work.

4 JUSTICE KAVANAUGH: What are you --
5 what are you basing that assertion on?

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

9 JUSTICE KAVANAUGH: Are these
10 assertions about RVs?

11 MR. FISHER: The customary usage
12 assertion?

13 JUSTICE KAVANAUGH: Yes.

14 MR. FISHER: Well, we -- we do cite --
15 we cite a statistic in our brief from a -- from
16 a trade association, Justice Kavanaugh, if you
17 want to look at that as a pretty thorough study
18 done out of the University of Michigan. And
19 what they found is that the typical owner of a
20 recreational vehicle uses it only 19 nights a
21 year. That's 5 percent of the time.

22 JUSTICE KAGAN: Your position, Mr.
23 Fisher, is that mobile homes are included, but
24 RVs are excluded, is that correct?

25 MR. FISHER: I think -- I think it's

1 probably correct as to mobile homes. It's not
2 at issue in front of the Court. But I think
3 that would be --

4 JUSTICE KAGAN: Yeah, but that's --
5 that's what I understood you to be saying in
6 your brief. Does any state make that
7 distinction in its law?

8 MR. FISHER: Well, Tennessee does,
9 just to start with Tennessee. Subsection (a)
10 of the Tennessee law on page 14(a) has --
11 covers structures, which it includes in the
12 definition of structure a mobile home.

13 Subsection (b) talks about vehicles.
14 And vehicles is the subsection in front of the
15 Court, and so you don't have to look any
16 further than the government's appendix in this
17 case. And you find it in other state laws too.
18 Illinois, the Smith case, which the government
19 itself cites and, in fact, asks this Court to
20 follow, distinguishes between motor homes on
21 the one hand and things that are -- that are
22 less -- less commonly used for overnight
23 accommodation on the other.

24 JUSTICE KAGAN: Could you give your
25 view of where, if -- if we accepted your

1 position, what that would mean in terms of how
2 many states' laws qualified?

3 MR. FISHER: Yes. And I want to -- I
4 think I can give you a thorough typology, if
5 you let me, which is we -- we do agree with the
6 government that -- that only about 12 states
7 would be within the definition if you were to
8 hold both Tennessee and Arkansas law fall
9 outside of it. So the "adapted" clause would
10 bring in -- would bring in many states.

11 But, on the other hand, the government
12 hasn't told you that, on the back end, you have
13 about 20 other states that are broad even under
14 the government's -- overbroad even under the
15 government's definition.

16 So what this -- what this case boils
17 down to, Justice Kagan, is a delta between the
18 parties of something about between 15 and 19
19 state -- states. And even in those states, you
20 have states like Tennessee --

21 JUSTICE KAGAN: I'm sorry, you said
22 that in a way that --

23 MR. FISHER: I'm sorry.

24 JUSTICE KAGAN: The delta, what --
25 what you're fighting about --

1 MR. FISHER: Yes.

2 JUSTICE KAGAN: -- is in the high
3 teens?

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

6 JUSTICE KAGAN: I mean, that's
7 significant. That's a lot.

8 MR. FISHER: I -- I don't dispute that
9 that's somewhat significant. Even among those
10 states, though, there are many states like
11 Tennessee that would have a separate provision
12 that it's divisible, that it would still
13 qualify as -- as burglary. So it's even, I
14 think, less than the high teens.

15 And I understand that the government
16 keeps harping on the number of states because
17 that is certainly the -- the strongest version
18 of their argument. But even if this were a
19 case about first principles and not about stare
20 decisis where the Court had already said that
21 vehicles are out, we think there's three
22 countervailing forces that -- that, as a matter
23 of first principles, should leave the kind of
24 vehicles we have at issue here out.

25 First, we have the broader context of

1 the law that I've described, which is the 1984
2 Act and the -- and this Court's understanding
3 that Congress didn't intend to significantly
4 expand upon the definition there, as well as
5 the residual clause and what that tells you
6 about Congressional intent, trying to get only
7 those burglaries that had a significant risk of
8 violent acts or physical injury.

9 Secondly, we have the purpose of ACCA,
10 which is laid out at great length in the Taylor
11 opinion, where, again, the Court said, in much
12 the same words as the residual clause, what
13 Congress was worried about were particular
14 crimes where there's a risk of -- inherent risk
15 of physical injury and not only the inherent
16 risk but a awareness on the fact of the
17 perpetrator that that risk was present. And
18 this -- this speaks to some of the conversation
19 earlier.

20 And then, thirdly, we haven't yet
21 talked about administrability. And I think the
22 Court got a preview into the difficulty in
23 terms of administrability when you asked Ms.
24 Ross about what the word "adapted" means.

25 Now our definition, Justice Kagan --

1 this brings me back to the conversation we just
2 had -- is well-grounded in federal, state, and
3 local law. There's a definition that runs
4 throughout every level of law that separates
5 stationary structures that can be moved, like a
6 mobile home or a floating home on the one hand,
7 and things that are essentially vehicles on the
8 other.

9 The "adapted" definition that the
10 government gives you they readily admit is not
11 easily defined. And I still, as I stand here,
12 just to be candid, don't know whether a
13 physical adaptation is required. Is a mattress
14 in the back of a station wagon enough? Is, as
15 the government suggests at page 18 of its
16 brief, simply hanging a T-shirt in the window
17 like a curtain to block a light enough?

18 Different states are going to answer
19 that question differently. And not only does
20 the Stitt brief point out a couple of examples,
21 but the NACDL brief points out examples at
22 pages 13 to 15 of its brief.

23 So "adapted" is going to be a very,
24 very difficult line to draw, and I don't know
25 how -- how many cases the Court wants to have

1 come back to it on that.

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

6 MR. FISHER: Well, Justice Kavanaugh,
7 it's true that many states have statutory
8 language that says adapted for overnight
9 accommodation. But what I'm telling you is
10 different states will interpret that
11 differently, which is my -- why Ms. Ross
12 couldn't give you --

13 JUSTICE KAVANAUGH: I understand, but
14 that's always going to be the case that there
15 will be some slight differences, right? I
16 mean --

17 MR. FISHER: That may be true. But I
18 think when you don't have a firm grounding
19 throughout other areas of law like our rule
20 does, you're more likely to have variation in
21 problems. I think that's what I would tell
22 you.

23 JUSTICE KAVANAUGH: And you don't
24 think "adapted" has a firm grounding, even
25 though it's been around in most state statutes

1 for -- or many state statutes?

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

6 I would ask you also, in -- as you
7 look sort of as a matter of first principles,
8 if you have any doubt as to how to resolve this
9 case, we think this is a case that really cries
10 out for the rule of lenity.

11 Another important aspect of notice, of
12 course, is for defendants to have fair
13 understanding of what conduct would qualify for
14 a given sentencing enhancement.

15 And, if nothing else, the fact that
16 this Court has said on so many occasions that
17 vehicles are out, without any qualifications,
18 without any reservations, and that structures
19 and buildings are in, would have told the
20 ordinary person that -- that vehicles, even
21 like sleeper vans, recreational vehicles, were
22 outside of the definition of generic burglary.

23 If I may, I'd like to spend a few
24 minutes on the specific provision of Arkansas
25 law that was also spoke -- talked about at the

1 beginning of the argument.

2 As I understand the government's
3 position, it's not disputing that an ordinary
4 car would be outside the locational element of
5 burglary.

6 Now the first thing the government
7 said was they didn't think that was before the
8 Court. But I just don't see how that could be
9 the case, given that it's within the question
10 presented.

11 The question presented that the
12 government itself drafted says "adapted or
13 used." And so "used" has to mean something
14 different than "adapted." And we think it
15 quite obviously covers things like the Arkansas
16 statute, which is an ordinary vehicle in which
17 somebody lives.

18 And the government's only answer to
19 that statutory language is, well, every single
20 time somebody lives in a car, it will, in fact,
21 be adapted. Now Justice Gorsuch already
22 pointed out one problem with that, which is
23 surplusage. If that were the case, you
24 wouldn't need anything other than an "adapted"
25 clause.

1 JUSTICE ALITO: But we're talking
2 about a state statute that could well be
3 interpreted in lots of different ways by the
4 state courts. You want us to provide a -- a
5 definitive interpretation of the Arkansas
6 statute here?

7 MR. FISHER: I think if it were
8 ambiguous, Justice Alito, that might be
9 something you wouldn't want to do. But, when
10 the plain language so obviously covers an
11 ordinary car, we don't think there's any reason
12 to flinch from that. In Mellouli --

13 JUSTICE GORSUCH: Well, this was --
14 this was raised pretty late in the day, this
15 argument about the Arkansas statute and "living
16 in." And given that -- and given our decision
17 in Duenas, why don't we do exactly what Justice
18 Alito is suggesting and just remand it and let
19 -- let the lower courts figure it out? Maybe
20 they can certify it to the Arkansas Supreme
21 Court and figure this out.

22 MR. FISHER: So for -- so for two
23 reasons, one procedural and one substantive,
24 Justice Gorsuch. The procedural reason is it's
25 squarely within the government's question

1 presented. It's within the rule the government
2 is asking the Court to adopt. The government's
3 header in the argument section to its rule says
4 vehicles that are adapted or used for overnight
5 accommodation.

6 So I don't know how you --

7 JUSTICE GORSUCH: I'll spot you all of
8 that.

9 MR. FISHER: Okay.

10 JUSTICE GORSUCH: I'm -- I'm with you.
11 (Laughter.)

12 MR. FISHER: So --

13 JUSTICE GORSUCH: But it -- the -- the
14 Eighth Circuit didn't have a chance to consider
15 this particular argument about living in. And
16 it's a -- it's a -- it's a nifty little
17 argument, but maybe we'd benefit from being a
18 court of review rather than first view on it.

19 MR. FISHER: Well, I'd encourage the
20 Court to do exactly -- this is my substantive
21 answer -- to do exactly what it did in Mellouli
22 when the -- we had a controlled substances law
23 in front of you and the question was whether
24 that state law from Kansas was overbroad into
25 the categorical approach. The government

1 argued in its brief that because there were no
2 state court decisions actually applying that
3 state law in the broader way, that the Court
4 shouldn't accept that under Duenas-Alvarez.
5 But the Court --

6 JUSTICE BREYER: The obvious -- I
7 mean, the obvious interpretation the other way
8 is that what they mean by "used" is used
9 regularly or used more than once or used in
10 some other way. And we don't know -- I mean, I
11 can't believe that they'd mean used once --

12 MR. FISHER: But --

13 JUSTICE BREYER: -- and the person
14 left his briefcase or something in the car.
15 They can't mean that.

16 MR. FISHER: No, I agree it doesn't
17 mean that, Justice Breyer. What we say it
18 means is what Justice Sotomayor was describing
19 earlier, which is somebody who uses the car as
20 their home and sleeps in the car every night.

21 And -- and this is the empirical
22 answer to the government's assertion, which is
23 just it is empirically untrue that every time
24 somebody sleeps in a car, they will adapt it
25 for that overnight accommodation. In fact,

1 quite to the contrary, many people would be
2 embarrassed to be using their car as a home.
3 Or they would be concealing that fact because
4 they would be looking to evade local zoning
5 laws that would prohibit sleeping overnight in
6 parking lots or the like.

7 So we cite in our -- in our red brief,
8 Justice Breyer, an article from The New York
9 Times in a footnote of a whole collection of
10 studies and articles that explain this
11 phenomenon. And it is just not true, as an
12 empirical matter, that a car in which somebody
13 lives will be necessarily adapted for overnight
14 use.

15 JUSTICE ALITO: But if you were
16 representing a defendant before the Arkansas
17 Supreme Court and the person had been convicted
18 under this statute, a person lived in the car
19 but every morning cleaned up the car so there
20 was no way that anybody could tell that anybody
21 had been living there, wouldn't -- would you
22 rule out the possibility of arguing to the
23 Arkansas Supreme Court that there might -- that
24 maybe there should be some additional
25 requirements read into this provision?

1 MR. FISHER: Well, Justice Alito, if I
2 were appointed to that case, I might make that
3 argument, but I think I would have a pretty
4 lousy argument. And the reason why is because
5 the plain text of the law would be directly
6 against my argument.

7 Remember, the -- there's already --
8 there's a separate prong of Arkansas law that
9 covers customary usage, and I think I heard Ms.
10 Ross say that covers the kinds of vehicles that
11 are designed for that purpose or physically
12 adapted to that purpose.

13 So the only thing the other clause can
14 mean under standard tools of statutory
15 construction is the other -- is some other kind
16 of car, in which somebody lives. And so I
17 think, even if somebody were to make that
18 argument to the Arkansas Supreme Court, we cite
19 in our brief cases from the State of Arkansas
20 that says we follow ordinary statutory
21 construction principles. And it would just be
22 a flat loser of an argument.

23 And even if the plain text arguments
24 weren't enough, we outline in our red brief in
25 the Sims case the numerous other reasons why

1 the plain language of the state statute ought
2 to control for categorical approach purposes.
3 And those -- and those are two general
4 categories.

5 First the efficiency, predictability,
6 and fairness that undergird the categorical
7 approach. And, secondly, the Sixth Amendment
8 concerns that undergird the categorical
9 approach, all of which coalesce to amount to if
10 the state law is clear on its face that it's
11 broader than the federal counterpart that --
12 that the prior conviction under the state law
13 simply can't be a qualifying offense. And so
14 we think that's enough to decide the case on
15 the Arkansas side.

16 There were some questions earlier
17 about how the Court should think about the
18 categorical approach, more generally. And so
19 let me say a couple words about that because I
20 do think it is a fair observation from the
21 Court that part of what's dwindling down the
22 number of states covered by the government's
23 approach in -- in our case is the nature of the
24 categorical approach.

25 Now, the Court had fair notice of

1 that. The government told you this in Mathis,
2 and it told you even in Taylor that if you go
3 down these roads, you're going to start to
4 dwindle the number of states.

5 And The Court, I think, had good
6 reasons to do that because when you turn to the
7 categorical approach, it's not just about
8 congressional intent, it's about these
9 predictability, fairness, and Sixth Amendment
10 constitutional concerns that have to be in
11 play. So it's not purely a question of
12 congressional intent. It's also a question of
13 workability. But -- as workability and
14 constitutional jurisprudence.

15 But -- but regardless of how different
16 members of the Court think about those
17 undergirding principles, there is, in fact, as
18 Justice Kagan mentioned, there's a -- there's a
19 bill before Congress right now that would adopt
20 a totally different approach.

21 And this is something Attorney General
22 Sessions spoke about in August. And so it is
23 very much on the table in Congress right now to
24 take a different approach. And I'd return the
25 Court, if I may, to Taylor.

1 In Taylor, there was actually a bill
2 pending at the time of that decision. And the
3 Court, for whatever reason, went ahead and
4 issued its opinion in Taylor and then sort of
5 owned this jurisprudence ever since.

6 And one thing that you might think
7 about here is there's a bill pending in
8 Congress right now. We think the safer path is
9 for the Court to continue down its -- its prior
10 precedent. They have good -- you have good
11 reasons for what you've done.

12 I understand some of you are
13 frustrated with it. And maybe Congress is
14 frustrated with it. But the best thing the
15 Court, I think, can do is follow its own
16 jurisprudence in this case, which is -- which
17 means two things:

18 One is apply the categorical approach
19 as you've outlined it, all the way up through
20 Mathis, and even apply it as to burglary, as
21 you've put structures and buildings, on the one
22 hand, and vehicles on the other.

23 And if Congress is dissatisfied with
24 the outcome, it is obviously fully able to pass
25 the law that's pending, and the Department,

1 even if it hasn't taken a firm position, can
2 take a position and get something done.

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

8 The reason these cases are in front of
9 you, you may know this already, but the reason
10 these cases are in front of you are because
11 after the invalidation of the residual clause
12 the government is going around and making a
13 bunch of arguments that it didn't make before,
14 trying to get in various prior state
15 convictions that it wasn't arguing for under
16 the enumerated clauses or under the use of
17 force clauses. That's why you have this new
18 explosion of ACCA cases.

19 And so I think the better thing is for
20 the Court to follow its own cases, its own
21 precedent, leave it to Congress to adjust if it
22 wants, but not feel like it has to solve every
23 single problem as it arises.

24 JUSTICE SOTOMAYOR: Mr. Fisher, if we
25 accept the government's adapted, and I

1 understand all its problems, would the
2 Tennessee statute survive?

3 MR. FISHER: It it's --

4 JUSTICE SOTOMAYOR: And if it's not,
5 why not?

6 MR. FISHER: If you accept the
7 government's -- if you accept the government's
8 definition of adapted, then the Tennessee
9 statute would -- would fall within it, but it
10 would be also -- there -- there would be -- so,
11 yeah, I think the answer to that is yes, if you
12 accept the government's argument on adapted,
13 then Tennessee is within it.

14 But we ask, for all the reasons I've
15 asked before, not to accept the government's
16 argument to adapted.

17 The only thing the government has to
18 say for itself, Justice Sotomayor, and I may be
19 repeating myself here, is the state-by-state
20 count. We think the state count is answered by
21 the flow of this Court's jurisprudence and the
22 other things in Taylor, things like adhering to
23 the '84 congressional intent, adhering to the
24 most important thing perhaps, which is just
25 sweeping in violent offenders.

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

11 And in those kinds of cases, we don't
12 think Congress would have expected a state law
13 to -- to be swept up into ACCA. And I would
14 hasten to add that I think this is also
15 responsive, Justice Breyer, you asked about how
16 these cases are charged.

17 When there are the kinds of
18 altercations that Justice Alito, for example,
19 was -- was hypothesizing, somebody is in inside
20 and there is a violent altercation, those cases
21 aren't charged as burglary. They are charged
22 as things like carjacking, robbery, assault.

23 So the burglary convictions, and this
24 is what the Sentencing Commission found when it
25 backed burglary out of even the crime of

1 violence provisions in the Sentencing
2 Guidelines, it found that when burglary is
3 charged, it's in the cases where nothing
4 happened but the entry.

5 And so that may well still satisfy the
6 categorical definition of burglary under ACCA,
7 the residential entry, because of the awareness
8 and because of the inherent risk, but once you
9 go beyond primary residences and talk about
10 things that are hardly ever occupied and that
11 people are going to target specifically because
12 they're hardly ever occupied, walking down to
13 the -- to the -- to the marina with a sleepy
14 sailboat on the dock and rummaging through the
15 contents, those are the kinds of things that
16 Congress I don't think would have expected to
17 be swept up and any sensible definition of ACCA
18 wouldn't trigger the harsh consequences that
19 follow.

20 If there are no more questions, I'll
21 submit the case.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Five minutes, Ms. Ross.

25

1 REBUTTAL ARGUMENT OF ERICA ROSS
2 ON BEHALF OF PETITIONER

3 MS. ROSS: Thank you, Mr. Chief
4 Justice.

5 I just want to make a few points. The
6 first is that Justice Gorsuch suggested that
7 perhaps my friend on the other side would
8 quibble with our numbers with respect to how
9 many states would have ACCA burglary and how
10 many wouldn't under our view and under
11 Respondent's view.

12 And my friend has not actually
13 quibbled with those numbers. He agrees that at
14 most we're looking at 12 states with ACCA
15 burglary under his view.

16 And I think that that is itself, if
17 not dispositive, very close to it because,
18 again, we -- we don't think that's a statute
19 that Congress would have passed.

20 Now, my friend has a couple of reasons
21 why Congress might have done that. He says,
22 well, really the delta is only 20 or so cases
23 -- or 20 or so states, but those 20 states make
24 the difference between the definition of ACCA
25 burglary, satisfying what this Court said four

1 times over in Taylor, that it was trying to get
2 at the way that the states used the term
3 "burglary," the majority of states. It said
4 that with respect to the 1984 statute, with
5 respect to the 1986 statute, as a reason for
6 rejecting the common law definition, and when
7 it introduced the categorical approach and said
8 that a few state statutes might be broader than
9 the definition that it was adopting.

10 So those 20 state statutes, I think,
11 really cannot be underestimated here.

12 The other reason that my friend gave
13 for why the numbers are so low is that Mathis
14 changed everything, but Mathis didn't change
15 everything. As Mathis itself would explain,
16 Mathis interpreted this -- the ACCA as it
17 always stood.

18 And so I don't think that Congress
19 when it enacted the statute in the first
20 instance would have expected about 12 state
21 laws to come in as burglary.

22 Another thing that my friend mentioned
23 was the residual clause. Again, I don't think
24 that when Congress enacted a statute with the
25 word "burglary" and then with the residual

1 clause, which we know was an attempt to expand
2 the scope of the statute to reach other crimes,
3 that it, in fact, would have meant for most
4 burglary statutes or a substantial number of
5 burglary statutes to come in through the
6 residual clause while narrowing the point or
7 the -- the word "burglary" to essential
8 obsolescence.

9 So given the way that the state
10 statutes play out here, we think that our
11 reading is the one that is consistent with what
12 Congress was -- was trying to do and with
13 Taylor itself.

14 Now speaking in terms of Taylor, my
15 friend mentioned that Taylor said that the
16 definition that it was taking on was
17 practically identical to the 1984 definition,
18 and that that definition only included
19 buildings.

20 What I think -- I apologize, I don't
21 remember exactly who said it -- someone had
22 mentioned, one of the Justices had mentioned
23 that, in fact, the practical difference may
24 make up for the fact -- I believe it was
25 Justice Kavanaugh -- that really the difference

1 between buildings and structures. And that
2 might well be true.

3 I also think that Taylor itself was
4 looking at a definition of building. And
5 Congress in 1984 was looking at a definition of
6 building that had taken on its own very broad
7 meaning in burglary law.

8 If you a look at the appendix to our
9 brief in this case, most if not all of the
10 states that actually defined building did no in
11 terms of vehicles, other structures, et cetera.

12 So they had a very broad definition
13 that might not make sense in ordinary English
14 but was what state burglary statutes used. And
15 so when this Court comes along in Taylor and
16 says building or structure, it's really just
17 explicating that.

18 Another way to look at this is through
19 the LaFave treatise that we obviously rely on
20 in the briefs, which similarly makes clear that
21 those -- that both building and structure were
22 often broadly construed.

23 Another point that I just wanted to
24 clear up with respect to the government's
25 position in Mathis. I don't think it is true

1 that the government said that all of the
2 statutes that it noted would, in fact, be out,
3 if Mathis came out the way it did. It said it
4 would raise some questions.

5 And many of those statutes, in fact,
6 are broader than the statutes that we're
7 talking about here today.

8 In closing, we heard a lot about
9 numbers this morning, both on our side and --
10 and from my friend. I think the thing that we
11 -- there are two things, really, of the core at
12 this case that can't be denied:

13 One is that burglary has always
14 protected the core of dwellings. And the
15 second is that, on Respondent's view, ACCA
16 burglary takes a step back from that and
17 includes far fewer dwellings, eliminates the
18 majority of state statutes precisely because
19 they cover exactly what courts for centuries
20 have thought of as the core of burglary.

21 We don't think that's what Congress
22 intended. We don't think that's what this
23 Court intended in Taylor. And we would,
24 therefore, ask that the decisions below be
25 reversed.

1 JUSTICE KAGAN: Sorry, Ms. Ross. Do
2 you agree that if a statute covers just regular
3 cars, that that falls outside?

4 MS. ROSS: Regular cars meaning no --
5 nobody's living there?

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

8 MS. ROSS: Yes, Your Honor, I think it
9 would be difficult in light of this Court's
10 cases, even though actually a large number of
11 states covered those, I think it would be very
12 difficult in light of Mathis and -- and
13 Duenas-Alvarez and all the other cases in which
14 this Court said --

15 JUSTICE KAGAN: So -- so you are
16 accepting that those are out?

17 MS. ROSS: Yes, Your Honor, you're
18 right.

19 JUSTICE KAGAN: And how about the --
20 the ones that say vehicles that are used for
21 business activities, commercial activities, are
22 those in or out?

23 MS. ROSS: So, Your Honor, we haven't
24 taken a position on that. In this Court it's
25 not raised in these cases. That is not sort of

1 the considered view of the Justice Department
2 at this point. We are not using either of
3 those statutes at this point.

4 If the -- if the Court has no further
5 questions, we'd ask that you reverse in both
6 cases. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:08 p.m., the case
10 was submitted.)

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1	<p>accepted ^[1] 45:25</p> <p>accepting ^[1] 70:16</p> <p>accommodation ^[17] 6:22 8:2 13:2,3 14:25 16:9,17 18:20 32:15 35:2 36:4 38:3 41:4 45:23 50:9 54:5 55:25</p> <p>acknowledged ^[1] 4:1</p> <p>across ^[1] 23:5</p> <p>Act ^[9] 3:15 12:8 13:22 27:25 28:14 39:20,20 40:7 48:2</p> <p>actions ^[1] 18:3</p> <p>activities ^[2] 70:21,21</p> <p>acts ^[1] 48:8</p> <p>actually ^[29] 4:12,16 6:12 11:1 12:1 14:7,16 15:5,17,18,19 18:19 20:22 23:22 24:4 25:19 26:6 27:17,18 29:24 32:11 33:6 36:5 42:13 55:2 60:1 65:12 68:10 70:10</p> <p>adapt ^[1] 55:24</p> <p>adaptation ^[2] 16:6 49:13</p> <p>adaptations ^[1] 18:8</p> <p>adapted ^[35] 5:13 6:4 8:1,16 13:2 15:2,21,24 16:2,8,16 17:17 18:19 19:2 32:14 36:3 38:2 41:3 46:9 48:24 49:9,23 50:8,24 52:12,14,21,24 54:4 56:13 57:12 61:25 62:8,12,16</p> <p>add ^[4] 23:18 32:22 38:8 63:14</p> <p>added ^[3] 23:17 24:13 28:18</p> <p>additional ^[1] 56:24</p> <p>addressed ^[1] 33:18</p> <p>adhering ^[2] 62:22,23</p> <p>adjust ^[1] 61:21</p> <p>administrability ^[2] 48:21,23</p> <p>admit ^[1] 49:10</p> <p>admits ^[1] 9:9</p> <p>adopt ^[3] 33:2 54:2 59:19</p> <p>adopted ^[1] 3:14</p> <p>adopting ^[1] 66:9</p> <p>affirm ^[1] 30:24</p> <p>aggravated ^[3] 29:25 30:6,9</p> <p>aggressive ^[1] 41:6</p> <p>ago ^[1] 39:4</p> <p>agree ^[5] 14:6 40:1 46:5 55:16 70:2</p> <p>agreed ^[2] 20:19 33:14</p> <p>agrees ^[1] 65:13</p> <p>ahead ^[2] 7:17 60:3</p> <p>ALITO ^[19] 25:5,8,12 26:11,15 35:20 36:11,20 37:1,5,6,10 38:8 53:1,8,18 56:15 57:1 63:18</p> <p>Alito's ^[1] 19:21</p> <p>allow ^[1] 36:12</p> <p>almost ^[1] 21:1</p> <p>already ^[8] 11:21 12:12 41:11 47:20 50:4 52:21 57:7 61:9</p> <p>altercation ^[1] 63:20</p> <p>altercations ^[1] 63:18</p> <p>ambiguous ^[2] 28:25 53:8</p> <p>Amendment ^[5] 31:15,18 34:9 58:7 59:9</p> <p>amicus ^[1] 42:10</p> <p>among ^[3] 24:12 47:5,9</p> <p>amount ^[1] 58:9</p>	<p>analysis ^[1] 4:15</p> <p>announced ^[1] 31:16</p> <p>anomalous ^[1] 11:2</p> <p>another ^[7] 15:20 28:19 31:6 51:11 66:22 68:18,23</p> <p>answer ^[15] 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2	<p>2 ^[1] 42:19</p> <p>20 ^[6] 27:19 46:13 65:22,23,23 66:10</p> <p>2000s ^[1] 4:12</p> <p>2018 ^[1] 1:16</p>		
3	<p>3 ^[1] 2:4</p> <p>30 ^[1] 2:7</p> <p>31 ^[1] 29:14</p>		
4	<p>42 ^[1] 33:1</p> <p>44 ^[5] 4:19 12:24 22:6,17 29:13</p>		
5	<p>5 ^[1] 44:21</p>		
6	<p>65 ^[1] 2:10</p>		
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