

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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 UNITED STATES,)
) Petitioner,
) v.) No. 18-431
 MAURICE LAMONT DAVIS AND)
 ANDRE LEVON GLOVER,)
) Respondents.
 - - - - -

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-431,
5 United States versus Davis.

6 Mr. Feigin.

7 ORAL ARGUMENT OF ERIC J. FEIGIN

8 ON BEHALF OF THE PETITIONER

9 MR. FEIGIN: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 In order to render Section 940 --
12 924(c)(3)(B) unconstitutional, Respondents need
13 to show that the only plausible construction is
14 one in which a defendant's guilt or innocence
15 hinges on a judge's imagination about how an
16 ordinary defendant might act rather than a
17 jury's finding about how a particular defendant
18 acted.

19 That's a very unusual way to draw a
20 line between criminal and non-criminal conduct
21 in the context of a jury trial, and I don't
22 think lower courts would readily have accepted
23 it if Section 924(c) were the only or the first
24 context to present a choice between a
25 categorical approach and a

1 circumstance-specific one.

2 The operative language of the
3 statute --

4 JUSTICE SOTOMAYOR: Mr. Feigin, what
5 do you think Congress intended in 1986?

6 MR. FEIGIN: I -- I think Congress in
7 1986 probably didn't focus on this question --

8 JUSTICE SOTOMAYOR: I -- I --

9 MR. FEIGIN: -- particularly heavily.

10 JUSTICE SOTOMAYOR: -- I understand it
11 didn't.

12 MR. FEIGIN: But I think if Congress
13 had thought about it --

14 JUSTICE SOTOMAYOR: No. I didn't ask
15 "had," because that's rewriting their intent.
16 Given the circumstances in 1986, that 16(b) had
17 been read in the categorical approach, that
18 they adopted it for the Bail Reform Act, and
19 you're not challenging that that's a
20 categorical approach, that for decades you have
21 been saying that 16(b) is better read as the
22 categorical approach, what do you think
23 Congress intended in 1986?

24 MR. FEIGIN: Well, a couple of points,
25 Your Honor. First --

1 JUSTICE SOTOMAYOR: Without reference
2 to our later holding.

3 MR. FEIGIN: Yeah. A couple points,
4 Your Honor. First of all, we -- we don't agree
5 about the Bail Reform Act necessarily, but --
6 and I also -- this was not -- the ordinary case
7 categorical approach or any categorical
8 approach was not well established in 1986.

9 They've identified a single decision
10 that was a per curiam decision of the Second
11 Circuit that had applied a form of categorical
12 approach to hold that drug-trafficking crimes
13 were not covered by the then existing version
14 of 924(c). Congress clearly repudiated that
15 when it added the definition of drug --

16 JUSTICE SOTOMAYOR: Well, you thought
17 for --

18 MR. FEIGIN: -- trafficking crime.

19 JUSTICE SOTOMAYOR: -- over -- you
20 thought for a very long time that the language
21 was best read as applying the categorical
22 approach?

23 MR. FEIGIN: Well, Your Honor, so, as
24 far as the government's role in this, after a
25 few fits and starts, there were briefs we filed

1 that urged the circumstance-specific approach.
2 And I'd also note the Sentencing Commission
3 read the language in a circumstance-specific
4 way from 1987 to 1989. After a few fits and
5 starts, we settled into the categorical
6 approach because that's where courts seemed to
7 be going, particularly after the ACCA's
8 residual clause and the rest of the Armed
9 Career Criminal Act were enacted, and because
10 it appeared to be workable, it appeared to be
11 constitutional.

12 Now I know you didn't want me to
13 reference this Court's decisions, but after
14 *Dimaya* and *Johnson*, it's clear that it is
15 neither workable nor constitutional, so we've
16 gone back and taken a fresh look.

17 And I think if you take a fresh look
18 at the statute, you'll see that it's better
19 read or at least reasonably read, as the canon
20 of constitutional avoidance would demand, to
21 have a circumstance-specific approach.

22 JUSTICE GINSBURG: But the case --

23 MR. FEIGIN: The operative --

24 JUSTICE GINSBURG: -- this case was
25 not adjudicated on a circumstance-specific

1 approach, right?

2 MR. FEIGIN: That's correct, Your
3 Honor. So there was --

4 JUSTICE GINSBURG: So you would -- you
5 would have to have at least a redoing of the
6 trial?

7 MR. FEIGIN: Well, Your Honor, we
8 think that the error could be found harmless,
9 but we would be -- if the Court doesn't agree
10 with us on that, it could send it back to the
11 court of appeals and possibly there could be a
12 retrial.

13 But, if you -- if you look at the
14 operative language of the statute here, it
15 clearly uses the term "crime of violence" in a
16 context-specific way. It prohibits a defendant
17 from using or carrying a firearm during or in
18 relation to a crime of violence.

19 And I think the subsection specific
20 definition of "crime of violence" in Section
21 924(c)(3) is best understood and certainly
22 reasonably understood to have that same
23 circumstance-specific meaning. That's a very
24 logical thing for Congress to have wanted to do
25 because it captures precisely the set of

1 defendants who are committing crimes in violent
2 ways.

3 JUSTICE GINSBURG: Well, when -- if we
4 accepted your -- your theory, who -- you say it
5 would have to be a jury finding. And what
6 would the jury have to find with respect to the
7 predicate offense? Would they take account
8 that there was use of firearms, or you skip the
9 use of firearms and just look at the predicate
10 offense without the firearms?

11 MR. FEIGIN: So the use of a firearm
12 could be a factor, but it couldn't be the only
13 factor that renders a crime violent. I think
14 that is one of the things that the phrase, by
15 its nature, does in the statute.

16 So, for example, if you had a crime
17 where a defendant simply had a gun in his
18 jacket while he was in the front of a store
19 doing some criminal business, if the criminal
20 business were that he was selling cocaine, that
21 would be a crime of violence -- sorry, wouldn't
22 be a crime of violence; it would be a 924(c)
23 violation because he has the gun, he's carrying
24 it in furtherance of a drug trafficking crime.
25 If all he's doing in the front of the store is

1 selling counterfeit handbags in a perfectly
2 non-violent way, that would not be a 924(c)
3 violation.

4 This kind of inquiry, I think, is the
5 kind of inquiry that the Court made clear in
6 both *Dimaya* and *Johnson* as the kind of thing
7 that juries can figure out. Juries are well
8 acquainted with figuring out degrees of risk,
9 looking at courses of conduct, and, of course,
10 in the context of 924(c), the jury is already
11 finding the underlying offense conduct that is
12 at issue.

13 So it -- what the categorical approach
14 would do here is get away from the whole idea
15 of sending things to juries and would
16 substitute a judge's categorical judgment about
17 the ordinary case of the crime for the facts
18 that the jury has right in front of it, to
19 which it can easily apply a readily applicable
20 standard of the sort that the Anglo-American
21 system has entrusted to juries for centuries.

22 JUSTICE GORSUCH: Mr. Feigin, looking
23 at the language of (c)(3), the word "offense"
24 is in a prefatory clause before (A) and (B).
25 And as I understand the government's position,

1 (A), we will continue to read "offense" to mean
2 the offense charged on the books and look at
3 the elements.

4 But, with respect to (B), you'd like
5 us to look at the facts and treat the word
6 "offense" there to mean what did the defendant
7 actually do.

8 We don't normally read prefatory
9 language to mean two different things in two
10 clauses that follow. And, in fact, the
11 government earlier this year in -- I -- I don't
12 know how to pronounce it, Cochise, I think it
13 is, argued precisely this point, that normally
14 a single word is given a single construction,
15 at least throughout the same paragraph.

16 So what do we do about that problem?

17 MR. FEIGIN: Well, Your Honor, I think
18 we are giving it a single construction, and let
19 me explain why.

20 First of all, the term "offense" has
21 always been understood, particularly if you
22 look at this Court's double jeopardy
23 jurisprudence, which interprets the term
24 "offense" as the framers used it, to mean
25 transgression of a law, and that encompasses

1 both the acts that the defendant committed and
2 the elements of the statute that the defendant
3 violated. It means both those things at the
4 same time, and you look at both of those things
5 to see whether there's been a double jeopardy
6 violation.

7 In more recent times, this Court has
8 understood "offense" to work exactly the way
9 we're urging here in its decisions in *Nijhawan*,
10 *Kawashima*, and *Hayes*. I think *Hayes* is
11 particularly instructive. If you look at the
12 statute the Court construed there, it was even
13 more of a difficult linguistic lift than this
14 one for two reasons that I'll get to in a
15 second.

16 But, if I can paraphrase that statute
17 only slightly for the Court, the Court there
18 was interpreting misdemeanor --

19 JUSTICE GORSUCH: I'm -- I'm sorry,
20 we're running a little far afield for me. If
21 we could just return to this language.

22 MR. FEIGIN: Sure.

23 JUSTICE GORSUCH: As I understand it,
24 in (A), you would have us read "offense" to
25 mean the offense of -- that's charged on the

1 books. But, when we get to (B), you'd have us
2 look at the facts actually committed. Is that
3 -- is that right? Can we agree on that much?

4 MR. FEIGIN: Yes, Your Honor --

5 JUSTICE GORSUCH: Okay.

6 MR. FEIGIN: -- but if I can qualify
7 that?

8 JUSTICE GORSUCH: All right. No, no,
9 no, no --

10 MR. FEIGIN: Okay.

11 JUSTICE GORSUCH: -- you can qualify
12 it in a minute.

13 MR. FEIGIN: Okay.

14 JUSTICE GORSUCH: But we agree -- we
15 agree on that much?

16 MR. FEIGIN: Well, let me just -- let
17 me just make one --

18 JUSTICE GORSUCH: We can't agree on
19 that much?

20 MR. FEIGIN: I would just make one
21 thing clear. I think both of these do hinge on
22 the jury findings. It's just, in the first
23 case, the jury findings necessarily incorporate
24 an element that has a use of force. So, in
25 that case, the jury is still finding use of

1 force, and the jury is finding something in
2 both cases.

3 JUSTICE GORSUCH: I guess I'm not
4 tracking you at all. As I understand in (A),
5 we would look at the offense on the books.
6 Does the offense have an element of force? And
7 all that requires a judge to do is to look at a
8 law on the books, classic categorical approach
9 analysis.

10 And in (B), you're asking us to eschew
11 that same analysis and look at what actually
12 happened. And, again, I just would like you to
13 address that and not run too far afield to
14 other -- other cases or other statutes, but
15 maybe just focus on this one and explain to me
16 how we might give that same word two different
17 constructions.

18 MR. FEIGIN: Well, Your Honor, I
19 guess -- I guess my answer to you is that I
20 don't think we are giving that same word two
21 different constructions. And the reason I was
22 going to other cases and other examples is to
23 show --

24 JUSTICE GORSUCH: Let's not -- let's
25 not -- let's just stick --

1 MR. FEIGIN: -- how -- how the term
2 has been understood to work both ways.

3 JUSTICE GORSUCH: Help me where I am,
4 okay?

5 MR. FEIGIN: Okay.

6 JUSTICE GORSUCH: I'm on this statute,
7 all right?

8 MR. FEIGIN: So let me -- so "offense"
9 means a transgression of a law. And (A) and --
10 and a transgression of a law has multiple
11 components to it. One is the set of acts that
12 the defendant committed, and another is the
13 legal prohibition that the defendant violated.

14 The Court has -- with apologies, Your
15 Honor, the Court has said that in the double
16 jeopardy context and it said that it --

17 JUSTICE GORSUCH: Well, in double
18 jeopardy --

19 MR. FEIGIN: -- adopted that same
20 approach in Hayes.

21 JUSTICE GORSUCH: -- in Blockburger --
22 and I -- I'll let you go in a second. I
23 promise. I know you want to run off to some
24 other stuff and that's fine.

25 But, in Blockburger, we look at the

1 elements of the claim on the books. And so,
2 when you keep saying double jeopardy, I say,
3 well, that's what -- what you want us to do in
4 (A) but not what you want us to do in (B).

5 MR. FEIGIN: Well --

6 JUSTICE GORSUCH: So I don't -- I'm
7 not sure that helps me. That's why I'm asking
8 you to focus on this statute.

9 MR. FEIGIN: So, Your Honor,
10 Blockburger is only one part of the double
11 jeopardy test. Obviously, if a defendant
12 commits two different murders, you would look
13 to the specific acts that he -- the specific
14 act that he committed each time.

15 JUSTICE GORSUCH: Uh-huh, uh-huh.

16 MR. FEIGIN: But the way in which
17 we're --

18 JUSTICE GORSUCH: But we're not
19 talking about that here. They're not two
20 different crimes being charged, right?

21 MR. FEIGIN: So if we talk about -- if
22 we talk about --

23 JUSTICE GORSUCH: It's the same crime.

24 MR. FEIGIN: -- a transgression of the
25 law, I think it's perfectly natural to talk

1 about both the elements and the particular way
2 in which it was committed. So let me just try
3 this in a sentence.

4 I don't think anyone would look askew
5 if someone were to say that a youthful crime --
6 a youthful gun crime is defined as an offense
7 that has as an element the use of a gun and is
8 committed by someone under the age of 21.

9 In that sentence, we'd understand
10 offense to encompass both the elements of the
11 statutory prohibition and the manner in which
12 the offense was committed, which is, again,
13 exactly how this Court interpreted the phrase
14 "offense that is a misdemeanor" in the context
15 of Hayes. So --

16 JUSTICE GORSUCH: Off you go. Go
17 ahead.

18 MR. FEIGIN: Your Honor, I'm happy to
19 take further questions if I haven't satisfied
20 you.

21 JUSTICE KAGAN: Well, Mr. Feigin, can
22 I -- can I ask you further questions about the
23 language of the statute? And I guess I want to
24 do it by comparing it to this bill that's
25 currently pending in Congress which is meant to

1 change this provision in order to make it
2 fact-specific.

3 And so this bill, rather than says --
4 rather than saying an -- an -- an offense that
5 by its nature involves a substantial risk that
6 physical force may be used, instead says an
7 offense that by -- excuse me, an offense that
8 based on the facts underlying the offense -- so
9 they substitute "by its nature" for "based on
10 the facts underlying the offense" -- and then
11 they change the tense and they say involved a
12 substantial risk that force may have been used,
13 right?

14 So "by its nature" versus "based on
15 the facts" and changing the tense to make it
16 clear that what we're looking at is something
17 that has occurred and that we're able,
18 actually, to make a fact-specific determination
19 about it.

20 Now that's the way you would write a
21 provision of the kind that you want. This is
22 not the way you would write a provision of the
23 kind that you want. "By its nature" clearly is
24 like, what is this offense ordinarily about?

25 And then the use of the present tense

1 is -- is inconsistent with this notion that the
2 jury in this case is having to look back to
3 determine the particular facts of a particular
4 crime.

5 MR. FEIGIN: Well, Your Honor, just as
6 a prefatory matter, the first thing I'd say is
7 if that language is clear to you, I think
8 that's another answer to Justice Gorsuch's
9 question, because even that clarifying
10 construction that Congress might be considering
11 also uses offense to --

12 JUSTICE KAGAN: That -- that
13 language --

14 MR. FEIGIN: -- have an elements
15 clause portion --

16 JUSTICE KAGAN: -- in its -- in -- in
17 that particular portion, which it tried to
18 solve, yes.

19 MR. FEIGIN: Now -- now, to your --
20 well, so I'd just point out that that is
21 another place in which everyone agrees that
22 "offense" could be used in -- in both ways.
23 But --

24 JUSTICE KAGAN: Yeah, you're not
25 answering Justice Gorsuch's question anymore,

1 Mr. Feigin.

2 MR. FEIGIN: Fair enough, Your Honor.
3 To go to your question, I think that language
4 is clearer. I think there are a couple of
5 issues with that language as well.

6 First of all, I wouldn't put any
7 weight on the change in tenses because, of
8 course, Section 924(c), like other crimes that
9 are defined in Title 18, speaks in the present
10 tense. It talks about a defendant who uses or
11 carries a firearm. And the switch to the past
12 tense is something kind of odd.

13 Again, this is the language Congress
14 constructed because it's worried about this
15 Court potentially construing the language in a
16 manner that would render it constitutionally
17 invalid.

18 So it's -- I don't think it's a fair
19 representation of what Congress might have
20 thought in -- in 1986. Also, with reference to
21 the term "by its nature," I do think the term
22 "by its nature" can be used and was used in
23 Section 924(c)(3)(B) in a circumstance-specific
24 way.

25 If I were to tell someone, don't bring

1 your gun to a situation that by its nature is
2 violent, I think that would be understood as
3 having the kind of limiting feature that "by
4 its nature" has in --

5 JUSTICE KAGAN: Well, that's
6 because --

7 MR. FEIGIN: -- the current version of
8 Section 924(c)(3)(B).

9 JUSTICE KAGAN: -- you prefaced it
10 with the word "situation". You know, you can
11 preface it with the word facts, but this is not
12 prefaced with that word. As Justice Gorsuch
13 said, it's prefaced with the word "offense,"
14 which we know from Section (a) is something
15 about the statutory context.

16 And then it's -- you know, the crime
17 that by its nature, the -- the offense that by
18 its nature.

19 MR. FEIGIN: Well --

20 JUSTICE KAGAN: I mean, tell me how
21 that's fact-specific.

22 MR. FEIGIN: Well, Your Honor, I -- I
23 -- I would --

24 JUSTICE KAGAN: Murder by its nature
25 --

1 MR. FEIGIN: -- I guess I would say --

2 JUSTICE KAGAN: -- robbery by its
3 nature, burglary by its nature?

4 MR. FEIGIN: So let me start with "by
5 its nature" and I -- I would like to get back
6 to offense. So by it -- "by its nature" in
7 this -- in the statute as a
8 circumstance-specific -- on a
9 circumstance-specific reading serves some
10 limiting functions.

11 First of all, it focuses on the
12 offense conduct rather than the offender. You
13 know, Tony Soprano is prone to fly into
14 murderous rages at the drop of a hat, but that
15 doesn't make that every crime that Tony Soprano
16 commits a crime of violence.

17 JUSTICE KAGAN: Yeah. Mr. Feigin,
18 what does "murder by its nature" mean? How
19 would you say to somebody what -- what does
20 that phrase mean, "murder by its nature"?

21 MR. FEIGIN: Well, Your Honor, then I
22 would want to know whether you were talking
23 about murder in the abstract or a particular
24 murder.

25 JUSTICE KAGAN: But I'm -- I'm just

1 repeating the language of the statute with a
2 particular offense. Robbery by its nature.

3 MR. FEIGIN: Well, Your Honor, that's
4 not how we interpret "offense" here. We
5 interpret "offense" to mean the offense conduct
6 of a particular defendant. Whether that
7 conduct by its nature --

8 JUSTICE KAGAN: Well, that goes back
9 --

10 CHIEF JUSTICE ROBERTS: Well, that's
11 the --

12 JUSTICE KAGAN: -- to Justice
13 Gorsuch's example, because you clearly can't
14 mean it that way because then Section (a) would
15 be incoherent.

16 MR. FEIGIN: Your Honor, that's
17 exactly the interpretation the Court gave in
18 Hayes, if I could just explain that for a
19 second. The Court there was faced with a
20 statute that had misdemeanor crime of domestic
21 violence. It was defined, and I'm paraphrasing
22 only slightly here, as an offense that is a
23 misdemeanor that has as an element the use of
24 force committed by a domestic companion.

25 The Court interpreted the "has as an

1 element" part -- even though "offense as a
2 misdemeanor" applied to the whole thing, the
3 Court interpreted the "has as an element" part
4 to have a categorical approach and the
5 "committed by" part to have a
6 circumstance-specific approach.

7 So I don't think the words "offense
8 that is a felony" can be the words that are
9 doing the work here.

10 JUSTICE KAGAN: But -- but, Mr.
11 Feigin, you're pointing to a statute where
12 there was something else in addition to the
13 language that's in this provision. And that's
14 -- it was true in Nijhawan and it was true in
15 Hayes, and what the Court pointed to was the
16 something else in addition, the committed by
17 specified persons or the fraud involving over
18 \$10,000, and saying that that peculiar -- you
19 know, that that particular language made it
20 clear that somebody had to look to what had
21 actually happened.

22 But there's no such language in this
23 statute.

24 MR. FEIGIN: Well, Your Honor, if
25 you're with me -- if that is the question

1 you're now raising, then we've gotten past
2 offense that is a felony. Then we're all
3 agreed that offense that is a felony could have
4 a categorical approach --

5 JUSTICE KAGAN: Well, it could if
6 there's other language --

7 MR. FEIGIN: -- and a
8 circumstance-specific approach.

9 JUSTICE KAGAN: -- that suggests that.

10 MR. FEIGIN: And then -- and then
11 we're just on the question of whether Section
12 924(c)(3)(B) read in light of the canon of
13 constitutional avoidance can reasonably be read
14 to invoke a circumstance-specific approach.

15 And I think "by its nature" there does
16 both what I said about the offense offender and
17 also captures the idea of essentially the word
18 "otherwise". As this Court said in Rosemond,
19 what this statute is going after is it's trying
20 to prevent a defendant from "upping the ante"
21 by bringing a firearm to a situation that would
22 otherwise present risks.

23 It can't just be --

24 JUSTICE ALITO: Mr. Feigin, if I --

25 MR. FEIGIN: Yeah. I'm sorry.

1 JUSTICE ALITO: Oh. Finish your
2 sentence, please. I was just a little
3 concerned I would be able to squeeze in some
4 question during your presentation, but go
5 ahead.

6 MR. FEIGIN: I'm sorry, Justice Alito.
7 As I was saying earlier, it can't just be that
8 the firearm itself creates the risk. It's
9 bringing the gun to a situation that already
10 has it. Without "by its nature," I don't think
11 that would be as clear. I'm sorry, Justice
12 Alito.

13 JUSTICE ALITO: No, no, no.

14 So I'm interested in the practical
15 implications of our decision in this case. How
16 many contemporaneous crime statutes would be
17 put in jeopardy if we rule in -- if we affirm
18 here?

19 MR. FEIGIN: Well, Your Honor, very
20 few of them have their own subsection-specific
21 definition of "crime of violence." So I think
22 the Court's decision here is going to
23 certainly -- would certainly -- if the Court
24 held that the ordinary case categorical
25 approach applies, would certainly invalidate

1 Section 924(c)(3)(B). It would also call into
2 question the Bail Reform Act.

3 But I think, if the Court did that,
4 there would be a couple of other very important
5 consequences. For one, if the Court does so
6 based on Respondents' argument that juries
7 can't possibly figure this kind of thing out
8 because it's too complicated for them, it would
9 call into question a host of other federal and
10 state statutes that call into question matters
11 of degree.

12 Second, we know from Johnson exactly
13 what the fallout of invalidating a provision
14 like this is going to be. And we're going to
15 have the -- hundreds and thousands of very
16 violent offenders, some of the worst offenders
17 in the criminal system, federal criminal
18 system, challenging their -- if they're still
19 on direct review, challenging their convictions
20 or challenging their current prison terms.

21 The other thing it's going to do is
22 increase the amount of litigation under Section
23 924(c)(3)(A) because it will call into question
24 whether some very violent crimes that Congress
25 would undeniably, I think, have wanted to

1 include as Section 924(c) --

2 CHIEF JUSTICE ROBERTS: Well, you keep
3 --

4 MR. FEIGIN: -- predicates actually
5 can serve as Section 924(c) predicates.

6 CHIEF JUSTICE ROBERTS: The government
7 in all of these cases keeps upping the ante,
8 even though they continue to lose hands. I
9 mean, in these prior cases, you say, well, if
10 you rule this way, all these other ones are
11 going to fall. And then we do read that rule
12 that way, and then you've got to come back and
13 you've already given up all those other ones,
14 case after case.

15 I would have thought you'd be more
16 interested in saying that there are plausible
17 distinctions in these other cases so that you
18 don't automatically, you know, stack the odds
19 against you when that next case comes up.

20 MR. FEIGIN: Well, Your Honor, the
21 only federal statute I think we would see next,
22 if it came up, is the Bail Reform Act. We
23 might have some discussion of that.

24 But I think the main concern we have
25 here is going to be the practical concern that

1 I was just mentioning with all the defendants
2 who are going to seek release. And these are
3 -- I -- I don't want to be dramatic about it,
4 but these are violent offenders. This is a
5 case that is of tremendous importance to --

6 JUSTICE GORSUCH: Well --

7 MR. FEIGIN: -- the entire U.S.
8 attorney community and the Department of
9 Justice.

10 JUSTICE GORSUCH: -- on that -- on
11 that, what do you say to your friend's argument
12 on the other side that, while resentencing may
13 be required for a large number of persons, the
14 likelihood of significant changes in prison
15 sentences is low, given that this is usually
16 thrown in as an additional charge, one among
17 many stacked on top of others.

18 MR. FEIGIN: Well, I -- I don't think
19 that's correct, Your Honor. So, for example,
20 although a court is entitled to consider the
21 fact that there's going to be a 924(c)(3)
22 sentence added on to a defendant's sentence,
23 courts will lower sentences if the 924(c)(3) --
24 excuse me, the 924(c) conviction is vacated.
25 We didn't see in the ACCA context every

1 defendant get the maximum non-ACCA sentence and
2 some of them were released.

3 JUSTICE GORSUCH: But, just to be
4 clear, do we have any -- we have this very
5 impressionistic argument, you tell us the end
6 of the world is near, or maybe now after the
7 Chief Justice, it's not quite so close as we
8 thought, and then your friend's going to argue,
9 well, it's not going to really change much at
10 all. But we don't seem to have a lot more than
11 these very rhetorical arguments. We don't have
12 a lot of empirics before us on this.

13 MR. FEIGIN: Well, fortunately, Your
14 Honor, this -- we haven't faced this amount of
15 collateral litigation yet because most of those
16 cases are on hold. But I can tell you that
17 numerous defendants and numerous federal
18 prisoners are filing for relief. And we do
19 expect that quite a few of them,
20 notwithstanding our urging of courts to impose
21 the same sentence if they can, which won't be
22 possible in every case, but if they can, to
23 impose the same sentence, we do think some of
24 them will be let out.

25 This is also going to increase

1 litigation in the lower courts under the
2 categorical approach under Section 924(c)(3)(A)
3 if the Court rules against us in this case.

4 JUSTICE KAVANAUGH: I -- I thought one
5 of your --

6 MR. FEIGIN: So I'm not --

7 JUSTICE KAVANAUGH: -- excuse me --
8 one of your points was that this was going to
9 significantly lower the sentences of many
10 violent criminals.

11 MR. FEIGIN: So there are going to be
12 cases in which we can't -- that that is --
13 there are going to be cases we cannot get under
14 924(c)(3)(A). And for those defendants, their
15 924(c) convictions are going to be wiped out
16 and they're going to get lower --

17 JUSTICE KAVANAUGH: Right.

18 MR. FEIGIN: -- probably lower
19 sentences.

20 JUSTICE KAVANAUGH: And then -- and I
21 think the length of sentences is one of the
22 concerns you have to confront squarely here
23 when dealing with 924(c), and so your response
24 to that and what Congress was thinking about in
25 1986 with respect to why they wanted -- why

1 Congress wanted long sentences for these kind
2 of violent crimes?

3 MR. FEIGIN: Well, I think it is
4 crystal-clear in the legislative history that
5 Congress wanted additional -- and, frankly, in
6 the text of the statute, that Congress wanted
7 additional terms on top of the sentences that
8 the defendants would receive for any underlying
9 crime of violence that was also charged for the
10 924(c) offense.

11 And I think what Respondents' approach
12 here would do is essentially eradicate that
13 judgment, whereas adopting our approach, the
14 only defendants who are going to -- eradicate
15 their judgment as to anyone who would have
16 fallen under 924(c)(3)(B), and I don't think
17 that's the right approach to take when
18 924(c)(3)(B) can at least plausibly be read to
19 have a circumstance-specific approach.

20 Whereas, under a circumstance-specific
21 approach, the only defendants who are going to
22 be able to obtain relief are the ones who
23 actually committed their crimes nonviolently.
24 I think that is exactly the result that
25 Congress would have wanted, had it understood,

1 as the canon of constitutional avoidance
2 presumes, that its choice of an ordinary case
3 categorical approach, had it even imagined one
4 in 1986, would be held unconstitutional.

5 If I could reserve --

6 JUSTICE SOTOMAYOR: Mister --

7 MR. FEIGIN: -- the balance. I'm
8 sorry, Justice Sotomayor.

9 JUSTICE SOTOMAYOR: No, no, go ahead.

10 MR. FEIGIN: If I could reserve the
11 balance of my time.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Beck.

15 ORAL ARGUMENT OF BRANDON E. BECK

16 ON BEHALF OF THE RESPONDENTS

17 MR. BECK: Mr. Chief Justice, and may
18 it please the Court.

19 Your Honors, this case is about
20 following the text of a statute where it leads
21 and, when necessary, requiring Congress to
22 speak more clearly on what is prohibited.

23 And there are three reasons why the
24 924(c) residual clause should suffer the same
25 fate as Section 16(b). First, they contain the

1 same language that gives rise to an ordinary
2 case categorical approach.

3 Second, they share a common history,
4 suggesting similar treatment under the law.

5 And, third, a conduct-based approach
6 lies beyond the reach of constitutional
7 avoidance.

8 Before I move to my first --

9 JUSTICE KAVANAUGH: Those cases --
10 those cases were concerned about the jury,
11 protecting the right of the jury to find the
12 facts. That concern, which undergirded all of
13 those cases, that Sixth Amendment concern, as
14 well as the practical concern of trying to
15 relitigate what had happened many years ago,
16 that is totally absent in this case, right?

17 MR. BECK: Your Honor, the
18 constitutional concern is absent in this case.
19 Of course, there may be --

20 JUSTICE KAVANAUGH: And that -- and
21 you agree with me that that concern undergirded
22 Taylor, it undergirded Johnson, it undergirded
23 Dimaya?

24 MR. BECK: I disagree with you that
25 that played a central role in the decision in

1 Taylor versus United States. Your Honor, the
2 best evidence --

3 JUSTICE KAVANAUGH: It's specifically
4 identified -- it's specifically identified in
5 Taylor as a concern on page 601 of the opinion
6 --

7 MR. BECK: Yes.

8 JUSTICE KAVANAUGH: -- where the Court
9 talks about abridging the right to a jury
10 trial.

11 MR. BECK: And, Your Honor, my reading
12 of that portion of Taylor is it's raising a
13 question of judicial economy. It's within the
14 paragraph dealing with practical and
15 workability concerns.

16 JUSTICE KAVANAUGH: Right.

17 MR. BECK: And it's simply raising the
18 question, are we now going to be faced with the
19 problem of every defendant appealing saying
20 they were denied a jury trial?

21 JUSTICE KAVANAUGH: And I -- I raise
22 this because I think the prior cases
23 interpreted language in a way to avoid a
24 constitutional problem, namely, the Sixth
25 Amendment problem when you're focusing on prior

1 convictions, but that reason to stretch the
2 language in one direction is not -- not present
3 here as I see it.

4 This is -- the jury was all -- the --
5 all those cases were about the jury, and the
6 jury would be able to find the facts here.

7 MR. BECK: And Your Honor, I want to
8 be able to answer your question clearly. In
9 Taylor, when this Court first raised the
10 question of whether to apply a categorical
11 approach or conduct-based approach, the very
12 first statement was we were persuaded by all of
13 the circuits below that reached a categorical
14 approach.

15 In not one of those cases is there a
16 mention of a constitutional concern or the
17 application of constitutional avoidance. The
18 conclusion in Taylor was there's only one
19 plausible --

20 JUSTICE SOTOMAYOR: If there are other
21 interests, why don't you list them. You talk
22 about them generically. So what are the other
23 interests that you think --

24 MR. BECK: Your Honor, Tay --

25 JUSTICE SOTOMAYOR: -- the categorical

1 approach endorsed?

2 MR. BECK: Your Honor, Taylor began
3 with the text, then went to the history, and
4 then noted practical and workability concerns.

5 But Leocal versus Ashcroft in 2004
6 didn't discuss practical or constitutional
7 concerns at all. It relied solely on the text
8 when construing Section -- Section 16 in
9 reaching the singular conclusion that that
10 language, offense plus by its nature, with the
11 absence of conduct-specific language, requires
12 a categorical approach.

13 JUSTICE ALITO: Well, let me ask this
14 question about the text. Let's say that a
15 statutory provision comes before us and it's
16 possible to read the language of this provision
17 in two different ways, and one may argue about
18 which is more -- which is more strongly
19 supported by ordinary textual analysis,
20 disregarding any practical consequences.

21 But we know that one reading is
22 entirely workable and the other one is
23 absolutely unworkable and would we presume
24 that -- would we not think that Congress is
25 likely to have chosen the -- the -- the

1 interpretation -- likely to have meant the
2 interpretation that is workable as opposed to
3 the one that is absolutely unworkable?

4 MR. BECK: And, Your Honor, I'm -- I'm
5 aware of the presumption of constitutionality,
6 but I'm not sure --

7 JUSTICE ALITO: I'm not talking about
8 the presumption of constitutionality. I'm
9 talking about the -- the presumption of
10 rationality.

11 MR. BECK: I think that's relevant
12 when construing a statute. I would agree with
13 you on that.

14 The question here ultimately --

15 JUSTICE ALITO: So, if the language
16 can be read in the workable way as opposed to
17 the way that's completely unworkable, we would
18 choose the way that's workable. We would think
19 that's what Congress meant, not something that
20 was -- that was dead on arrival.

21 MR. BECK: Your Honor, we -- we must
22 begin with the text when trying to determine
23 what Congress meant. Workability has to be a
24 secondary or tertiary consideration.

25 Here, the government has proposed a

1 new reading, a conduct-based approach, that
2 cannot be reached by constitutional avoidance
3 simply because it's not a plausible reading.

4 JUSTICE ALITO: Well, let me ask you
5 this textual question then, and look -- this is
6 looking at subsection (B). When -- under your
7 understanding of the categorical approach, when
8 the Court is determining whether an offense by
9 its nature involves the requisite risk, is it
10 not asking do the elements in themselves
11 involve that risk? Isn't that what it boils
12 down to?

13 MR. BECK: I disagree under this
14 language, Your Honor.

15 JUSTICE ALITO: So what would the --
16 what does the Court look to besides the
17 elements to determine what is the -- the
18 typical case?

19 MR. BECK: Well, as this language
20 been -- has been construed, this Court would
21 imagine the crime's imagined ordinary case, and
22 we get there from this Court's opinion in James
23 versus United States, noting the dual
24 inherently probabilistic language that's
25 present here.

1 JUSTICE ALITO: Yeah, okay. But let's
2 take burglary, the classical definition.
3 Unlawful entry of a dwelling with the intent to
4 commit a felony.

5 So now I want to think of the -- the
6 ordinary case of burglary, and that's what I
7 think of. What do I think of beyond that?

8 MR. BECK: You think of how burglary
9 is often or ordinarily or typically committed,
10 and you then ask the question is -- what is the
11 risk associated with that.

12 JUSTICE ALITO: Okay. So what --

13 MR. BECK: Now that's if it's
14 constitutional.

15 JUSTICE ALITO: -- what is typically
16 done in a burglary beyond the elements of
17 burglary?

18 MR. BECK: The problem with this is we
19 can't answer that question. Justice Scalia
20 explained, for example, with possession of a
21 short-barreled shotgun in Johnson, as many
22 times as we try, even with these common
23 offenses, ultimately, it becomes an impossible
24 question.

25 JUSTICE ALITO: Well, I understand --

1 JUSTICE BREYER: Why is it impossible?

2 JUSTICE ALITO: -- that, but if I
3 could just -- I'm sorry, Justice Breyer, go
4 ahead, please.

5 JUSTICE BREYER: Go. Finish.

6 JUSTICE ALITO: If -- if you can't
7 tell me what beyond the elements of burglary
8 one would take into account under (B) in
9 determining the typical burglary, I think that
10 what we're talking about there under your
11 categorical approach is the risk that's
12 inherent in the elements of burglary.

13 And if that's the case, why is there
14 no reference to elements in (B) when there is a
15 reference to elements in -- in (A)? Doesn't
16 that tell you we want to look at something
17 other than merely the elements of the offense?

18 MR. BECK: I would agree, Your Honor,
19 but not conduct. Here -- and -- and this kind
20 of goes back to Justice Gorsuch's question to
21 the government, how do we construe this when
22 the word "offense" is the subject phrase for
23 both subsection (A) and subsection (B)?

24 This Court answered that question in
25 Clark versus Martinez that words cannot be

1 treated as a chameleon, meaning one thing for
2 one purpose and another for another subsection.

3 JUSTICE BREYER: I -- I understand
4 that. I have -- I have a different question
5 which perhaps is puzzling only me. But both
6 you and the government assume that without this
7 case-specific interpretation, the statute would
8 be unconstitutional. Why?

9 MR. BECK: Because --

10 JUSTICE BREYER: Now I -- but let me
11 tell you why not, and then you tell me why I'm
12 wrong.

13 (Laughter.)

14 JUSTICE BREYER: What we had in
15 Johnson was a statute that said, in defining
16 the relevant crime, burglary, which is
17 sometimes violent; arson, probably a lot of
18 violence; extortion, hardly ever violent;
19 explosives, often violent; or otherwise
20 involves conduct that presents a serious risk,
21 potential risk of physical injury.

22 And it's that last phrase that the
23 Court sort of, with Justice Scalia writing,
24 threw up their hands in that context. And both
25 Judge Posner in a lower court opinion and I

1 think I've said the same thing, there's no
2 problem here, let the government go look at the
3 pre-sentence reports and let them discover how
4 often these crimes do involve violence and then
5 categorize.

6 Now that's very tough to do with the
7 Johnson case because, with the Johnson case,
8 you're talking about state crimes that are
9 phrased in 4,000 different ways.

10 But it's sure not tough to do here.
11 This is a federal crime-based statute. The
12 government has all the pre-sentence reports it
13 wants, and it could go through and categorize
14 which are violent and which crimes are not.

15 And if that's so -- I don't see why it
16 couldn't. If that's so, this would not be a
17 difficult statute to interpret. It would not
18 be very ambiguous. And, therefore, you win,
19 but you lose because, in fact, it isn't
20 unconstitutional.

21 Now, if I think that, which I do --
22 (Laughter.)

23 JUSTICE BREYER: -- is there -- is
24 there some absolute -- you know, is there some
25 killing argument against it, which there may

1 well be, which should tell me I'm really either
2 alone or out of my mind or et cetera. You
3 understand?

4 MR. BECK: I understand, Your Honor.

5 One of the reasons we have the void
6 for vagueness doctrine is to support the
7 separation of powers by not delegating to
8 judges and prosecutors the authority to define
9 the contours of a criminal statute,
10 particularly a criminal statute that takes
11 sentencing discretion away from judges and
12 imposes harsh mandatory minimums, in this case,
13 25 years.

14 JUSTICE KAVANAUGH: But the --

15 MR. BECK: But I want to tell you --

16 JUSTICE KAVANAUGH: Keep going.

17 MR. BECK: I want to tell you why this
18 is like Johnson. And, of course, we shouldn't
19 forget about Sessions versus Dimaya, which
20 looked at the same language.

21 The same two features in Johnson that
22 conspired to render the residual clause void
23 for vagueness are also present here. First, a
24 lack of guidance on how to imagine the crime's
25 ordinary case, coupled with an indeterminate

1 risk threshold.

2 And stare decisis finds its greatest
3 strength in questions of statutory --

4 JUSTICE KAVANAUGH: The risk -- the
5 risk threshold --

6 MR. BECK: -- interpretation.

7 JUSTICE BREYER: Wait, let me follow
8 up for a second, because the words are
9 "substantial risk," okay? Substantial risk of
10 physical force.

11 So what the Court writes -- I'm not
12 saying we should -- is, in clause A, it is --
13 it's an offense that is a felony, has an
14 element, the use, attempted use, or threatened
15 use to physical force, right?

16 So we get the pre-sentence reports,
17 and we see what the average risk of those
18 crimes is in terms of physical force, and then
19 we say (B) means the same.

20 Those crimes that have the same risk
21 of physical force in respect to (B) as the
22 crimes in respect to (A) are what this language
23 is referring to. That would be clear.
24 Nobody's tried that. I've suggested it.

25 So what do I do? I guess you would

1 like me just to say the government's conceded
2 it's unconstitutional, that's the end of it.

3 MR. BECK: Well, to address your
4 proposed solution, Your Honor, at that point,
5 we'd be delegating to United States probation
6 the authority to define this. Well, we're
7 looking -- who -- who writes the pre-sentence
8 reports? U.S. probation.

9 JUSTICE BREYER: Well, they write the
10 pre-sentence reports according to the facts and
11 anybody who wants at trial as to any fact in
12 respect to a pre-sentence report and have a
13 jury to find it or the judge, if it's
14 inappropriate, can do it.

15 MR. BECK: And then we run into the
16 same problem in Johnson and Dimaya. What
17 statistics do we use? What other sources do we
18 use? And this Court has never been able to
19 answer that question.

20 And I think appropriately --

21 JUSTICE KAVANAUGH: But it --

22 MR. BECK: -- because it's an
23 unanswerable question.

24 JUSTICE KAVANAUGH: But on -- in
25 Johnson, we said -- we distinguished cases

1 about prior convictions where you're looking at
2 risk from this case and said, "more
3 importantly, almost all of the cited laws
4 require gauging the riskiness of conduct in
5 which an individual defendant engages on a
6 particular occasion." So that was to say --
7 and then went on to say "as a general matter,
8 we do not doubt the constitutionality of those
9 laws."

10 So why would a law that refers to
11 substantial risk be unconstitutional when the
12 Court in Johnson said that's not an issue?

13 MR. BECK: Well, it's certainly not
14 always the case, Your Honor.

15 JUSTICE KAVANAUGH: But it's usually
16 the case. We, the Court said, do not doubt the
17 constitutionality --

18 MR. BECK: Yeah.

19 JUSTICE KAVANAUGH: -- of all those
20 laws.

21 MR. BECK: Oh, no, I would agree with
22 you that most of the time a jury is capable of
23 making a risk assessment. The question here is
24 not whether the jury is capable of doing but if
25 that's what Congress intended.

1 JUSTICE KAVANAUGH: Right. I --

2 MR. BECK: Here --

3 JUSTICE KAVANAUGH: -- I take your
4 point on that. On your vagueness point,
5 vagueness is born in a conception of fair
6 notice. You would agree with that, right?

7 MR. BECK: A combination of fair
8 notice and the support of separation of powers,
9 Your Honor.

10 JUSTICE KAVANAUGH: And hasn't --
11 Congress in 1986 was concerned about the
12 enormous problem of gun violence, violent
13 crimes committed with guns, which was, bad as
14 it is now, extremely bad, worse, much worse, in
15 19 -- in the 1980s.

16 MR. BECK: No question.

17 JUSTICE KAVANAUGH: And every -- put
18 everyone on notice, on notice, fair notice: If
19 you commit a crime with a gun, you're going
20 away for a long time. That was Congress's
21 obvious intent, overwhelming intent, because of
22 the problem.

23 And the idea that -- I mean, I guess
24 I'm not seeing the notice problem, given that
25 that has been crystal-clear since 1986 for

1 everyone in this country.

2 MR. BECK: Well, if that's what the
3 statute said, I would certainly agree with you,
4 Your Honor, but if we look to how Congress was
5 thinking about these things when it passed the
6 Comprehensive Crime Control Act in 1984, which
7 created the Armed Career Criminal Act, Section
8 16, as well as the first definition of "crime
9 of violence" here, Congress was thinking about
10 the predicate offenses categorically, as
11 categories of traditionally violent crimes.

12 JUSTICE ALITO: Well, on the question
13 of what Congress was thinking, maybe we could
14 just take a -- a glimpse at what actually
15 happened in this case, which is that the
16 defendant conspired to commit and then
17 committed a series of robberies of convenience
18 stores, where they put a sawed-off shotgun to
19 the head of a clerk and then robbed cigarettes.

20 Now you really think Congress would
21 say, well, that's not really a crime of
22 violence?

23 MR. BECK: The defendants in this case
24 are guilty of every offense you just described,
25 and we're not challenging any of those

1 convictions.

2 The difference here today, if we were
3 to win and remove one of the six counts that
4 they were convicted under, is that either they
5 would die in prison or be released as very old
6 men.

7 JUSTICE ALITO: But that's not my
8 question. If Congress had in mind this kind of
9 crime, do you think Congress would say, no,
10 that's not a crime of violence?

11 MR. BECK: As to the robbery,
12 certainly, I would agree with you. As to the
13 conspiracy --

14 JUSTICE ALITO: As to the conspiracy
15 -- as to the conspiracy, they would say that's
16 not a crime of violence?

17 MR. BECK: Congress has not spoken
18 clearly on that question, not with the language
19 it chose.

20 JUSTICE ALITO: Do you have any doubt
21 what they would say?

22 MR. BECK: I certainly do have doubt
23 about what -- whether Congress included --
24 intended to include conspiracy when it was
25 thinking about traditionally violent crimes

1 simply because conspiracy is an inchoate
2 offense.

3 JUSTICE GORSUCH: Counsel, looking at
4 what Congress actually wrote, in terms of
5 canons of construction --

6 MR. BECK: Yes, Your Honor.

7 JUSTICE GORSUCH: -- we sometimes
8 consult, one we've heard about so far and
9 talked a little bit about is the canon of
10 constitutional avoidance, that this Court will
11 attempt, when possible, sometimes, to avoid a
12 construction that renders Congress's work null.

13 MR. BECK: Yes.

14 JUSTICE GORSUCH: We also have,
15 though, the canon of construction on the rule
16 of lenity, that we don't typically construe
17 statutes to be as grievous as they could
18 possibly be read and -- and for the notice
19 problems you've talked about and the separation
20 of powers problems, if Congress wants to act
21 more grievously, it needs to speak more clearly
22 before it deprives a person of his liberty.

23 Usually, those two canons point in the
24 same direction. This is an unusual case where
25 they point in opposite directions. Have you

1 done any study or examined how historically
2 those two canons, when they compete, are
3 reconciled?

4 MR. BECK: It's a difficult question
5 to answer, Your Honor. We know, for example,
6 from Clark versus Martinez that we resolve all
7 textual canons before reaching avoidance.

8 Dealing with another normative canon
9 like lenity, it's not clear -- I couldn't cite
10 a case, for example. It certainly makes sense
11 that constitutional avoidance --

12 JUSTICE GORSUCH: Well, before we get
13 to what makes sense --

14 MR. BECK: Yeah.

15 JUSTICE GORSUCH: -- we -- we hear a
16 lot about what makes sense in this room.

17 (Laughter.)

18 JUSTICE GORSUCH: I'm curious about
19 what the law is.

20 MR. BECK: Okay, okay.

21 JUSTICE GORSUCH: Have you done any
22 examining of historical sources? You know, I
23 don't know, Joseph Story, you know, a pretty
24 good source; The Commentaries of the
25 Constitution or Blackstone; something you could

1 point me to that's law --

2 MR. BECK: Okay.

3 JUSTICE GORSUCH: -- about how those
4 two get reconciled? And if the answer's no,
5 that's a perfectly fine answer. I'll go look
6 myself. I just thought you might save me a
7 little time.

8 MR. BECK: I'd like to start with no,
9 but I would --

10 JUSTICE GORSUCH: Okay.

11 MR. BECK: -- like to take another
12 attempt at answering your question. The rule
13 of lenity serves multiple purposes.

14 JUSTICE GORSUCH: I -- all right. Now
15 go on to another question.

16 MR. BECK: Okay.

17 JUSTICE GORSUCH: You'll do -- you'll
18 do better work elsewhere.

19 JUSTICE KAVANAUGH: Well, I thought we
20 had said the rule of lenity only kicks in after
21 you've done all the other tools of statutory
22 interpretation, which would include
23 constitutional avoidance.

24 MR. BECK: And, your Honor, that --
25 that --

1 JUSTICE KAVANAUGH: I thought we said
2 that many times.

3 MR. BECK: I've read it inconsistently
4 in -- in application there. Certainly, they
5 exist in the same sphere. They're both
6 triggered by a concern over ambiguity. They
7 both are used with a plausibility standard.

8 But the reason the government's
9 proposed conduct-based approach is not
10 plausible really comes down to the rule of
11 lenity, but, in -- in addition to that, and
12 perhaps more importantly, it's irreconcilable
13 with the plain text of the statute. It
14 conflicts with how this Court has already
15 interpreted identical language, and it offends
16 the separation of powers.

17 JUSTICE ALITO: Well, can I come back
18 to the question about the meaning of the word
19 "offense," which you addressed -- I'm sorry --
20 which Mr. Feigin addressed extensively earlier.
21 Does that same problem exist under ACCA? And
22 if it doesn't, are you --

23 MR. BECK: Certainly.

24 JUSTICE ALITO: -- saying we should --
25 it does? The problem exists under ACCA?

1 MR. BECK: The -- the problem in the
2 sense of the crime has to mean the same thing
3 for purposes of both subsections because it has
4 the same subject. And that's consistent with
5 our argument. The government, in fact, is
6 trying to change that. So the government, for
7 example --

8 JUSTICE ALITO: All right. Let me ask
9 it a different way. Do you think that the
10 residual clause in ACCA can be objected to on
11 the same ground that you are using to object to
12 the use of the case-specific approach, the
13 fact-specific approach to the residual clause
14 here?

15 MR. BECK: I think so, Your Honor,
16 absolutely.

17 JUSTICE ALITO: Well, could you just
18 explain how that is?

19 MR. BECK: Sure. And if I can refer
20 to precedent while doing so, but I'll do it
21 without mentioning Taylor, for example.

22 JUSTICE ALITO: Well, I -- I though --
23 I prefer if you can do it with the language.
24 If you don't have the language in mind, then
25 I'll just leave the question.

1 MR. BECK: I -- I have the language.
2 The same problem exists in both. The lack of
3 guidance on imagining the ordinary case of the
4 crime and the indeterminate risk threshold,
5 those are present here as well as there.

6 You also have the dual inherent
7 probabilistic language that gives rise to the
8 ordinary --

9 JUSTICE ALITO: No, but what I'm
10 getting at is this -- your argument that the
11 provision here under the government's reading
12 interprets the word "offense" to mean two
13 different things, element at one point and
14 facts at the other.

15 The way ACCA is worded, that problem
16 doesn't arise. It says -- it talks about a
17 crime, and then in subsection (I), has an
18 element, subsection (2), presents a potential
19 serious risk. So you don't have that problem
20 there, do you?

21 MR. BECK: We do have the same problem
22 because what's modifying "crime" is not
23 "presents" but "involves" conduct. So it --
24 it's a parallel reading here.

25 And, of course, if we look to Sessions

1 versus Dimaya, it's the same language. But
2 going back to 19 --

3 JUSTICE ALITO: So you don't think
4 there's an important distinction in this
5 respect between the language of this provision
6 and the provision of ACCA?

7 MR. BECK: Certainly not, Your Honor.
8 And I think the plurality of this Court
9 answered that question in Sessions versus
10 Dimaya just last term.

11 JUSTICE ALITO: So, if I don't think
12 that there is that problem under ACCA, then I
13 shouldn't think there is that problem under
14 this provision?

15 MR. BECK: I -- I would agree with
16 that, Your Honor.

17 JUSTICE ALITO: Okay, good.

18 MR. BECK: If we go back to 1984 when
19 Congress created both Section 16 and for the
20 first time narrowed the application of 924(c)
21 from all felonies to just crimes of violence,
22 there was -- they were conjoined with a
23 cross-reference.

24 At that time, even if we didn't know
25 what Section 16 and Section 924(c) meant, we

1 know Congress intended them to mean the same
2 thing.

3 JUSTICE KAVANAUGH: But they changed
4 it in '86. They changed the cross-reference.

5 MR. BECK: They removed the
6 cross-reference, but what they did --

7 JUSTICE KAVANAUGH: Doesn't that
8 defeat your whole point there?

9 MR. BECK: It does not, your Honor,
10 because they used the same language. So the
11 truth is neither the government nor Respondents
12 know exactly why Congress chose to copy and
13 paste the language from Section 16 into 924(c),
14 but we know they used the same language.

15 So it makes better sense that they
16 were doing so for convenience because it was at
17 that time that they were also adding a
18 definition of drug trafficking crime.

19 In *Rasom versus United States*, I
20 believe in 2007, this Court dealt with a
21 similar situation where two provisions used the
22 same language at inception. And the way
23 Congress intended a different meaning there, is
24 it changed the language in one but kept the
25 language in the other the same.

1 Yet here we're faced with 30 years of
2 a categorical interpretation from circuit
3 courts. We have three different instances
4 where Congress has changed the language of
5 924(c) in that time, and not once has it
6 changed the language that gives rise to this
7 categorical approach.

8 So I think that gives us some insight
9 in -- into congressional intent through this
10 amendment history. Just last term, this Court
11 stated in *Jennings versus Rodriguez*, "Spotting
12 a constitutional issue does not give the Court
13 the authority to rewrite the text of a statute,
14 and the government's proposed conduct-based
15 approach, would effectively be asking this
16 Court to do just that."

17 One of the big limitations on the
18 application of constitutional avoidance is the
19 separation of powers. Congress alone is the
20 law-making authority and a conduct-based
21 approach would offend that in the truest sense.

22 JUSTICE BREYER: Suppose you -- so
23 this -- the basic question we're asked is the
24 question of whether it's too vague. That's why
25 I'm in my dilemma. And certainly the

1 conduct-based approach is one effort to escape.
2 All right?

3 MR. BECK: That's correct, Your Honor.

4 JUSTICE BREYER: Well, so what -- what
5 do -- what do I do if I think -- do you see
6 these words here, "a substantial risk that
7 physical force against the person"? What they
8 mean is the same risk of physical force as in
9 (a). And, therefore, it isn't vague.

10 I -- I mean -- maybe there's some
11 obvious answer to this. But -- but it's
12 gnawing at me.

13 MR. BECK: Yeah.

14 JUSTICE BREYER: See, if you -- if you
15 were to do that, it would be very specific and
16 it wouldn't really be like Johnson because
17 Johnson put a lot of weight on the fact that
18 they have three examples which cut -- four
19 examples cutting in different directions and
20 there are state crimes and suppose I just wrote
21 that and said, that hasn't been argued.

22 MR. BECK: Here is the difference --

23 JUSTICE BREYER: What -- what -- what
24 would you do if you were -- unless you see some
25 obvious problem, what is --

1 MR. BECK: Here's the difference.
2 Subsection (a) is asking the question, does it
3 have an element of force? Subsection (b) is
4 asking a different question, what is the risk
5 of force posed by the nature of the offense?

6 Those are two very different
7 questions, although I would agree with you that
8 subsection (b) sweeps more broadly.

9 JUSTICE BREYER: Maybe that is --
10 maybe that's right. I'll think about it.
11 Thank you.

12 MR. BECK: I'd like to address the
13 government's use of Nijhawan and Hayes. In
14 Nijhawan and Hayes, this Court did identify a
15 statute that is a hybrid statute that involves
16 both a categorical inquiry as well as a
17 fact-based inquiry.

18 Both what was present there is a clear
19 indication from Congress that we were to look
20 at fact-specific conduct using the language in
21 which or using the language committed by.

22 And it's important to note that one of
23 the reasons this Court ruled the way it did in
24 Nijhawan is because the provision right above
25 it clearly called for a conduct-based approach

1 and it had identical structure.

2 If we were to apply that same
3 reasoning to this case, it would require a
4 categorical approach because drug trafficking
5 crime is categorical conceded by the
6 government, the elements clause is categorical
7 effectively conceded by the government.

8 And why would Congress intend to treat
9 subsection (b) any differently without clear
10 intent based on the language it chose?

11 Two other provisions that are also
12 categorical in nature that apply to present
13 offenses that are cited by the government,
14 Section 929 and Section 931, one dealing with
15 body armor in connection with a crime of
16 violence, one dealing with the use of
17 armor-piercing bullets.

18 If the government is correct here
19 today, those would be treated differently than
20 924(c) use of a gun. And I think that really
21 calls into question the internal coherence of
22 the body of law.

23 I think this Court does have some
24 obligation to seek a harmonious interpretation
25 of the body of law and many of the points

1 raised by the government today would destroy
2 not only the internal coherence of 924(c), but
3 also -- also its external coherence with the
4 way this Court has interpreted Section 16.

5 And so it's for these reasons that we
6 ask this Court to affirm the judgment of the
7 court of appeals for the Fifth Circuit and hold
8 the 924(c) residual clause void for vagueness.

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Feigin, you have four minutes
13 remaining.

14 REBUTTAL ARGUMENT OF ERIC J. FEIGIN

15 ON BEHALF OF THE PETITIONER

16 MR. FEIGIN: Thank you, Mr. Chief
17 Justice.

18 I just have, I think, four points.
19 One is I think my friend agreed in a number of
20 points that our burden is simply to show that
21 this is a plausible interpretation of the
22 statute.

23 Second, I think it's helpful in that
24 respect to think about whether this particular
25 self-contained provision, if it were to have

1 come before the Court as the first time anyone
2 is ever urging a categorical approach, and a
3 criminal defendant were coming before this
4 Court and saying, no, you should apply the rule
5 of lenity for me because I want a
6 circumstance-specific approach.

7 I understand that an ordinary
8 defendant who commits commercial sex
9 trafficking with a minor does so by threatening
10 the minor with force, but that's not the way my
11 crime was committed, and I want to prove that
12 to a jury.

13 And I were arguing the other side, I
14 were arguing for the government that that
15 didn't matter, it just matters what an ordinary
16 defendant does, you have no right to show the
17 jury what you did.

18 I don't think anyone would think that
19 that was a slam dunk case for the government
20 that the court should apply an ordinary case
21 categorical approach.

22 Third, I think that shows why the rule
23 of lenity shouldn't have any application here
24 because it cuts both directions. A defendant
25 who committed his actual crime in a manner that

1 is non-violent would invoke the rule of lenity
2 in favor of the very circumstance-specific
3 approach we're urging.

4 There is no reason to apply the rule
5 of lenity to favor defendants who committed --

6 JUSTICE SOTOMAYOR: Mr. Feigin --

7 MR. FEIGIN: -- a string --

8 JUSTICE SOTOMAYOR: Mr. Feigin --

9 MR. FEIGIN: Excuse me.

10 JUSTICE SOTOMAYOR: The reason that
11 you seem to be touting this reading is that
12 it's going to expand -- has to be -- over the
13 categorical approach the number of defendants
14 that this statute now will apply to. Otherwise
15 you wouldn't be fighting so hard.

16 If it was really a draw, and your
17 brief sort of walks this line in saying there's
18 no empirical evidence to support how large the
19 difference is, but logically speaking, the use
20 of a gun in the vast majority of cases -- I
21 spot you that there's a few where this wouldn't
22 happen -- is itself always going to provide a
23 substantial risk of violence.

24 So I -- I -- I'm not buying that there
25 isn't lenity because, for a very large number

1 of people under your reading, they are going to
2 have this statute now applied to them.

3 MR. FEIGIN: Well, Your Honor, let me
4 --

5 JUSTICE SOTOMAYOR: If we accept your
6 reading.

7 MR. FEIGIN: Let me answer that in --
8 in two ways. Then I think I'd -- my rebuttal
9 will be complete at that point.

10 The first thing I'd say is I don't
11 think this will dramatically expand the scope
12 of crimes.

13 There are going to be very few crimes
14 that we would think about as ordinarily
15 non-violent but are going to become non-violent
16 just because there's a gun. And let me give
17 you a specific example of a set of crimes that
18 are now 924(c) crimes that are going to at the
19 very least be jury questions under our
20 approach, which are these stash house sting
21 cases that have come up in some of the amicus
22 briefs where defendant enters into a conspiracy
23 with an undercover agent to rob a drug stash
24 house -- the stash house that doesn't really
25 exist.

1 Those cases obviously get to the jury
2 because the defendant can claim that the
3 situation was so under control that there was
4 actually no risk that there would be a use of
5 force, and we might lose a lot of those cases.
6 And in some cases, judges might prevent those
7 from coming to the jury.

8 But the other thing I'd say is, and
9 this was going to be my fourth point, we're not
10 urging this approach because we want to broaden
11 Section 924(c). It's going to, of course,
12 limit it to only a subset of Hobbs Act
13 conspiracies.

14 We're urging this because we want the
15 statute to remain constitutional and implement
16 Congress's intent, and because there are a lot
17 of offenses that we're going to lose.

18 Kidnapping, conspiracies to commit
19 murder, rape, these are the kinds of things
20 Congress would certainly have wanted to
21 categorize as crimes of violence.

22 And there are a number of other
23 offenses that are going to be called into
24 question because it's not clear we're going to
25 be able to get them in under Section

1 924(c)(3)(A), which is going to spawn a whole
2 new cottage industry of litigation on this
3 issue.

4 I'm not making up these examples.
5 They include assault, manslaughter, material
6 support of terrorism for defendants who've gone
7 and trained at terrorist training camps --

8 JUSTICE SOTOMAYOR: Mr. Feigin --

9 MR. FEIGIN: -- and --

10 JUSTICE SOTOMAYOR: -- with all of
11 those cases, nothing about our ruling will
12 affect the discretion of district court judges
13 if they choose to give the same sentence and
14 even more because once a defendant opens up a
15 sentence, a judge has the discretion to go up,
16 down, or stay the same.

17 MR. FEIGIN: May I answer --

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. FEIGIN: -- Chief Justice?

20 Your Honor, it's not always going to
21 be possible to impose the same sentence. And
22 Congress clearly made the judgment that it
23 wanted additional sentences for people who used
24 firearms, for example, in furtherance of civil
25 rights crimes that cause physical injury.

1 This issue has come up, for example,
2 in the Dylann Roof prosecution in Charleston.
3 This is -- we -- I don't think it's correct to
4 say that all these defendants are going to get
5 the same sentences no matter what.

6 Thank you.

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

9 (Whereupon, at 11:05 a.m., the case
10 was submitted.)

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