IN THE SUPREME COURT OF THE UNITED STATES

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SAMUEL JAMES JOHNSON, :

Petitioner : No. 13-7120

v. :

UNITED STATES. :

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Washington, D.C.

Monday, April 20, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

KATHERINE M. MENENDEZ, ESQ., Minneapolis, Minn.; on behalf of Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear reargument today in Case 13-7120, Johnson v. United States.

Ms. Menendez.

ORAL ARGUMENT OF KATHERINE M. MENENDEZ

ON BEHALF OF THE PETITIONER

MS. MENENDEZ: Good morning, Your Honor. Mr. Chief Justice, and may it please the Court:

The residual clause of the violent felony definition of the Armed Career Criminal Act is unconstitutionally vague because its text and structure do not set out with clarity what predicate offenses fall within its coverage and what do not. Its vagueness is proven by this Court's inability after repeated efforts to discern a meaningful and replicable interpretive framework that will guide lower courts.

JUSTICE GINSBURG: Ms. Menendez, just to clarify, you are contesting only the residual clause, not the rest of the statute. So if the statute ending with -- it lists burglary, arson or extortion or involves the use of explosives, you're not attacking any of that. It's just the residual clause; is that

correct?

MS. MENENDEZ: That is correct, Your Honor.

And we believe, in fact, that the other portions of this statute shed some light onto why the residual clause is unconstitutionally vague. For instance, the other portions of the definition tie qualification for violent felony status directly to the elements of the offense in question.

The force clause requires that the use of force or the attempted use of force be an element of the offense. The burglary, arson, extortion, and use of explosives that Your Honor references are determined by reference to the elements of the offense. A categorical analysis.

JUSTICE ALITO: Now, I know that we are -- asked you to argue this vagueness issue, but when you were here before, you didn't think that the statute was vague as applied to your client. As I remember, your argument was it's clear that your client did not fall within the residual clause, largely because he was convicted. The offense that's at issue is a possession offense, and you argue that none of the specific offenses listed is -- is a possession offense.

MS. MENENDEZ: You're correct, Your Honor, that when -- when we were here last time, we argued that

it is plainly not included for the reasons you mention as well as others.

JUSTICE ALITO: So if it's not plainly included, why do we have to get to this issue at all? Why should we reach out to decide a constitutional question?

MS. MENENDEZ: Certainly, Your Honor. The fact that we believe it's clearly excluded seems to be at odds at the opinion -- of the opinion of the Solicitor General in the United States, the Eighth Circuit Court of Appeals and other courts. The fact that something that seems obviously not to fall within the plain definition but is still held to fall within the plain definition by numerous courts reveals the vagueness of the residual clause.

JUSTICE ALITO: But we get -- almost every case that comes here involves a dispute among the lower courts about what something means, about what the constitutional rule is or what the statutory interpretation should be.

So the mere fact that there's disagreement about this, that shows that it's unconstitutionally vague?

MS. MENENDEZ: This goes far beyond mere disagreement, Your Honor. I can think of no other

instance in which the Court has endeavored so many times in so few years to answer precisely the same question, not merely interpreting the same 14 words, but asking each time whether a single offense satisfies those 14 words.

JUSTICE ALITO: In -- in James, in 2007, we held that the residual clause -- we said the residual clause is not unconstitutionally vague. In Sykes, in 2011, we reaffirmed that.

Can you give me other examples of instances in which the Court has overruled a constitutional holding that has been twice reaffirmed within a period of 8 years? Has that happened frequently?

MS. MENENDEZ: Your Honor, I think -- I don't have a case at the ready for that question, but what I can say is what doesn't happen frequently, is that this Court has to grapple with such frequency and is still unable to create an interpretive framework. The heart of stare decisis is, in part, workability. Precedent that remains workable and useful that applies guidance to the lower court deserves greater deference. And with due respect to this Court's understandable hesitation to declare the statute unconstitutionally vague, that precedent is simply proven not to be workable.

JUSTICE ALITO: Well, do you think the issue is whether the statute is unconstitutionally vague or whether this Court's interpretations of the statute create the basis for a vagueness argument?

MS. MENENDEZ: Your Honor --

JUSTICE ALITO: Can -- can a statute be vague simply because this Court messes it up?

MS. MENENDEZ: Your Honor, that is not the case in this case. I don't know whether it's possible for a statute to be rendered vague by poor interpretation, but in this case the vagueness in here is in the text and operation itself. This Court's repeated efforts to discern a useful interpretive framework haven't caused the vagueness, but they prove the vagueness.

JUSTICE KENNEDY: Suppose that you had a State court meeting of judges for sentencing and they agreed that, within their discretion to impose a maximum, that they would impose a greater sentence if the defendant had a rap sheet, some previous offenses which created a serious potential risk of physical injury to another. Now, this is within their mandatory discretion, I understand that.

Would you say that's poor judging, that that's vague? That they'd be better off not -- not

saying it at all?

MS. MENENDEZ: Your Honor, I think that judges are tasked with deciding the individual case before them, so --

JUSTICE KENNEDY: No, no. My hypothetical is the judges say as a sentencing matter, as a matter of policy in this jurisdiction, we will increase your sentence if you committed an offense that categorically poses a serious potential risk of injury, physical injury to another.

MS. MENENDEZ: Your Honor --

JUSTICE KENNEDY: Do you think that's bad judging?

MS. MENENDEZ: I'm never going to presume to accuse a judge of judging poorly, but --

JUSTICE KENNEDY: No, it's a hypothetical. You can say it's bad; it's a hypothetical.

MS. MENENDEZ: I think that that goes beyond the task of judging, Your Honor, into the task of legislating. To decide that as a --

JUSTICE KENNEDY: Well, you -- you don't think judges should give reasons for what they do?

MS. MENENDEZ: Absolutely, Your Honor. I think the difference is --

JUSTICE KENNEDY: You absolutely do think

they should give reasons for what they do?

MS. MENENDEZ: Yes, Your Honor.

JUSTICE KENNEDY: And you say that this is a vague reason? This is -- this is bad reasoning, bad judging?

MS. MENENDEZ: The part of your hypothetical that troubled me, Your Honor, was the idea that the judges would get together and make policy decisions unfettered to an individual case.

JUSTICE KENNEDY: Well, judge -- judges meet all the time on sentencing policy. They -- they educate each other about what sentence is and they -- and they -- and they announce the policy to say in this court, we want all members of the bar to know that if there's a rap sheet, prior convictions that have a -- an offense which categorically is a serious risk of physical injury to another, we will up the sentence.

MS. MENENDEZ: Your Honor, I --

JUSTICE KENNEDY: Do you think that's bad judging?

MS. MENENDEZ: I think that's verging into legislating, and I think that that's --

JUSTICE SCALIA: Can -- can they -- can they do that, as a matter of law, not just as a matter of recommending to their fellow judges? Can they reverse

one of their fellow judges if -- if the fellow judge does not adhere to that -- I've -- I've never heard of such a thing.

JUSTICE KENNEDY: The hypothetical is that this --

JUSTICE SCALIA: I agree with you, it sounds like legislation to me. It's a hypothetical that's fanciful.

MS. MENENDEZ: I would certainly be --

JUSTICE KENNEDY: Do you think it's bad judging for a judge to say what his policy is going to be for future cases?

MS. MENENDEZ: Yes. I think that a judge should decide each case on the facts before them.

JUSTICE BREYER: Well, wait. There are a lot of States that have guidelines and they're legislated and there are committees that decide it; there are judges on the committees. So -- so I don't know that that's going to help us, or at least not me, too much.

I do -- I have counted up the number of splits and so forth in your briefs and the others presented to us, and adding in the cases, I -- I think generously on the basis of what's decided -- what you've presented to us, there are 14 splits. That's over a

period of 20 years, and -- or so, 15 years, anyway. And there are literally, really, there are hundreds of different crimes, thousands perhaps, by the time you get the --

So I can't -- I don't know how to decide whether 14 is a lot or a little. I -- I'm really, I'm genuinely -- I'm at sea on this, because maybe 14 is just a few. I mean, after all, every statute has uncertainty at the edges. Or maybe it's a lot. Help me.

MS. MENENDEZ: Yes, Your Honor. Two things, Your Honor. I think first of all that more than the number of splits is the fact that each of this Court's efforts seems to answer the question before the Court that has a very difficult time answering any of those 14 questions. I think even --

JUSTICE BREYER: Well, is there any example that you can think of where that was a basis for holding a statute unconstitutional?

MS. MENENDEZ: Your Honor, in the vagueness cases that we have cited, one of the things often discussed by the Court is that it isn't amenable to a useful interpretive framework, that it isn't being consistently applied by lower courts.

But the second --

JUSTICE BREYER: I've never heard of that as

a criterion. I mean, the common law had a method. I don't know -- and they even had crimes, you know. There were common law crimes. We -- we have statutes. The government cites many which use such words as "risk of harm" or "reckless" or -- they use words like we have here, "serious risk" or "risk of physical harm." They've cited a lot. There -- there are other statutes that involve words like that. Are we holding all those unconstitutional?

MS. MENENDEZ: Absolutely not, Your Honor.

JUSTICE BREYER: I know. I understand you think that. All I need is help.

MS. MENENDEZ: I'll answer your first question and then turn to the focus --

JUSTICE BREYER: No, that is only the question that I have. The first one is the one.

MS. MENENDEZ: Your Honor, in addition to the number of splits and whether 14 is a lot or a little, 14 is -- is an enormous amount of times for this Court to have to weigh in to resolve an unsettleable question. The exact same question, Your Honor; not variance on a question, but precisely the same question.

But I think that we should also take instruction from the lower courts and what they are saying about their struggle. We have cited half a dozen

circuits, and these are seasoned jurists who describe this as everything from a black hole to impossible -- impossible to meaningfully and consistently apply.

So we're not just talking about counting the number of disagreements. We're also talking about a completely unworkable framework that --

JUSTICE KAGAN: Well, Ms. Menendez, I -- I suppose this is connected to Justice Breyer's question. Do you think that there's some core that everybody, in fact, does agree upon? In other words, that there are some offenses which people just say, well, of course that fits within the residual clause. It's not the kind of thing that creates splits, it's not the kind of thing that creates controversy, that there's a core of agreement as to what it means and that all the trouble is occurring on the margins.

MS. MENENDEZ: Your Honor, the margins here are so much bigger than the core that even if we are able to agree on a small number of things that might clearly fall within the center, the fact is that the vast majority --

JUSTICE KAGAN: What do you think is in the core?

MS. MENENDEZ: Your Honor, I think kidnapping might be in the core. A kidnapping that

doesn't fall within the force clause, which many would do, might be in the core.

But, Your Honor, I think what's more instructive is the fact that so many things that the government even suggested are easy cases -- the examples that they give on pages 8 and 9 of their brief -- on closer examination, they're not that easy. For example, child abuse. Now it's true that one circuit or multiple circuits have held that child abuse counts, but the Spencer case, which examined a Florida statute of child abuse, found that it didn't account.

JUSTICE KAGAN: The government says that to declare a statute facially vague, all its applications have to be facially vague. And I guess you're contesting that standard because you're admitting that at least one thing that you can think of, kidnapping, that there -- that that application would be appropriate; is that right?

MS. MENENDEZ: Your Honor, I think that it's important to look at where the government's standard of has to be vague in every imagined application comes from. It comes from Flipside v. Hoffman Estates, which dealt with licensing and financial fines and, more importantly, where everyone agreed that the conduct in question there was clearly in the core.

This is different in all three respects. This deals not only with an onerous sentencing penalty, but a mandatory one where Congress has acted to take discretion away --

JUSTICE SCALIA: Well, you're not answering the question, though. The question is whether you agree with the government that so long as there is something that is clearly within the core, it's not vague. Do you agree with that or disagree with that?

MS. MENENDEZ: I do not agree with that, Your Honor. I think that that's unworkable.

JUSTICE SCALIA: I suppose you could have a statute that criminalized annoying conduct, right? And according to the government, that would not be unconstitutional, because there's some stuff that is clearly annoying, right?

MS. MENENDEZ: Yes, Your Honor.

(Laughter.)

JUSTICE SCALIA: So that's a perfectly good statute according to the government, yes?

JUSTICE GINSBURG: What do you do with all of the statutes that are cited in the appendix in the government's brief that they say uses such language as "serious risk of physical injury to another," the same words that are used here? Except this says "potential."

What do you -- the -- the government suggests that all of those statutes would be vulnerable under your reading.

MS. MENENDEZ: Thank you, Your Honor. The -- the term "serious risk" is not on trial here. None of those with the, perhaps, possible exception, we believe, of the two described on the first page come even close in operation or function to what the residual clause does. In almost every one of those cases, it's either part of a limiting definition, it's subject to an additional limiting definition, or it's one of several elements which help narrow the conduct.

JUSTICE KENNEDY: Or -- or is it also that in most of the statutes that were cited, it depends on the facts of the particular case? It's the opposite of the categorical approach.

MS. MENENDEZ: And that is a very important distinction, Your Honor, absolutely.

JUSTICE SCALIA: Which means it's up to the jury and juries, you know, don't -- don't have to be clear. They can be vague.

MS. MENENDEZ: Well, juries are routinely tasked with the question of something -- whether some individual conduct, not an abstract imagination of conduct, but actually what the defendant did constitutes

a serious risk. That, combined with the fact that it's usually part of a much narrower statute, prevents those from being vague.

In addition, Your Honor, with respect to your question, not one of those statutes, not one has given rise to the expressions of frustration from lower courts. The 14 disagreements --

JUSTICE BREYER: Yes. But then, look, that -- that's -- you've got -- you've got that. But it's not -- that can't be. There's something odd about this statute that's causing the problem and I can't put my finger on it. And what you've done is simply point out that courts have had difficulty with it. Well, that isn't enough, I don't think.

Why? The words seem clear enough. What is it about this that's led to this difficulty? It certainly isn't a problem to identify many cases where there is a serious risk of physical harm. But there's something that's given rise to this, and I haven't yet been able to articulate it to -- to myself. You've thought about it more than I.

MS. MENENDEZ: I've thought about it a lot, Your Honor. I think there's several things that give rise to the confusion.

One is the fact that it asks judges to

answer of -- an almost impossible-to-answer question. They have to imagine whether an offense in the abstract, and frankly, in its ordinary case, presents a substantial risk. How to even select the ordinary case is something the statute gives no guidance about. And what degree of risk is required, where to get the information regarding the risk; it's completely imaginary and subjective and it's the --

JUSTICE ALITO: Suppose the -- suppose the question of whether it's a serious potential risk of physical injury to another were a factual question submitted to the jury to be determined on the basis of what your client did. Would that be unconstitutionally vague?

MS. MENENDEZ: Your Honor, I think that would go some direction towards solving the problem because it would require fact-specific analysis by the jury.

JUSTICE ALITO: Is that a yes or a no?

MS. MENENDEZ: I think that if it still had the -- had the -- I think that would avoid the vagueness problem, Your Honor.

JUSTICE KAGAN: I mean, it would create other problems, wouldn't it? I mean, we'd be trying to do this based on 20-year-old convictions and -- and

often on questions that nobody had an incentive to argue or to litigate. Wouldn't that be -- I mean, that's the reason we went down this road, isn't it?

MS. MENENDEZ: And Your Honor points out a very good point about why I hesitate to think that that's a solution. It's an unworkable solution, but might get around the vagueness if the parties were entitled both to argue it to a jury and to relitigate the specific facts. But I don't think anyone is imagining that recidivist statutes could function that way in the courts.

JUSTICE ALITO: Well, I wasn't asking about a recidivist statute. I was asking about a statute that imposed a particular penalty for possession of -- of a sawed-off shotgun. And it says or it -- someone is convicted under a statute that has this language and the possession of the sawed-off shotgun was -- had just occurred.

Do you think you think that would not be unconstitutionally vague?

MS. MENENDEZ: If the jury was asked in this offense to decide whether that possession presented a substantial risk beyond a reasonable doubt, I don't think that would cause the same problems, Your Honor.

I think another thing that -- that is

inherent in other parts of the violent felony definition that's instructive about what's wrong with this one is that when it requires the question to be an element of the offense, as with the force clause or, for instance, burglary, you -- all you need to do is look at the elements of that predicate offense to determine whether it qualifies.

JUSTICE ALITO: Well, Congress was trying to do something here and some may think it's a good thing to do, some may thing it's not a good thing to do, it's a legitimate thing to do. And that is to impose an enhanced penalty for people who -- felons who possess firearms and have a record of prior convictions for certain category of offenses.

Now, if you don't use -- if -- if the -- the residual clause is held to be unconstitutionally vague, is there any other way that Congress could accomplish that end?

MS. MENENDEZ: Yes, Your Honor, I think there is. I think one solution would be to both tie the risk to the elements. So, for instance, you can keep the same 14 words, but add in "has as an element the pre" -- "creation of serious potential risk," and anything that didn't fall within that, Congress could simply add as an enumerated offense.

JUSTICE ALITO: Why does that solve the problem, has as an element the creation of a serious potential risk?

MS. MENENDEZ: Because then litigants, defendants and judges would only have to look at the criminal code of the State that has the predicate offense and see whether it has as an element the creation of risk.

JUSTICE ALITO: Well, an offense that prohibits the possession of a -- of a sawed-off shotgun has as an element the possession of a sawed-off shotgun. So you'd have to decide whether that element creates the risk. I don't see how that solves it.

MS. MENENDEZ: Under my solution, -- mere possession of a short-barrel shotgun would not count under Minnesota law because it doesn't require the possession in connection with behavior that creates a risk. But if I may --

JUSTICE SCALIA: But the jury would have found -- would have found the -- the fact of the risk, right --

MS. MENENDEZ: Precisely, Your Honor.

JUSTICE SCALIA: -- in the -- in the cases that you're describing?

MS. MENENDEZ: In my imagined solution, Your

Honor. But frankly, it's up to Congress.

JUSTICE KAGAN: So -- so what you're saying, essentially, is that all the statues in the back of the government's brief would count?

MS. MENENDEZ: Yes, Your Honor.

JUSTICE KAGAN: But nothing else would. In other words, you have to have it listed specifically, and this conduct created a serious risk of injury.

MS. MENENDEZ: If Congress chose that as a solution, yes, Your Honor. I think that this demonstrates why this needs to be left to Congress.

JUSTICE BREYER: Extortion doesn't have that.

MS. MENENDEZ: Extortion is an enumerated offense, and that would pose the additional solution, Your Honor. Anything that doesn't have --

JUSTICE BREYER: Is there any crime like that? What is the crime like that? I mean --

MS. MENENDEZ: There's 200 crimes like that.

JUSTICE BREYER: -- in the first one, use, attempted use, threatened use of physical force, and you're simply adding to those -- to those three categories, you'd say, or risk -- or serious risk of what?

MS. MENENDEZ: Has as an element the

creation of a serious risk or a serious potential risk.

JUSTICE BREYER: Of?

MS. MENENDEZ: Of injury to another. It's up to Congress how they would choose to define it, but if they wanted it --

CHIEF JUSTICE ROBERTS: But I thought --

MS. MENENDEZ: -- to hew closely to the residual clause -- I apologize, Your Honor.

CHIEF JUSTICE ROBERTS: No. No. Go ahead.

MS. MENENDEZ: If they want it to hew closely to the status quo, were Congress to choose that, then requiring that risk to be an element, the government has collected for us 200 examples of statutes that have risk as an element, they would presumably count. And if there were some left out of this solution that Congress wanted to -- to include, like, for instance, if extortion were not one of the enumerated offenses and they wanted to include it, all they have to do is list it. It's a perfect congressional function, Your Honors. They can hear data.

JUSTICE BREYER: I see.

MS. MENENDEZ: They can assess risk. They can hear testimony. They can decide what should and shouldn't count, but we shouldn't be imagining it every time.

JUSTICE KAGAN: Are you saying that this is something -- in response to Justice Alito's question -- that this is a way that Congress could fix the statute? Or are you saying that it's a way we could fix the statute? In other words, that it's an available savings construction that we should feel free to adopt.

MS. MENENDEZ: Your Honor, I -- I don't presume to tell the Court what it can and cannot do, but it has strived four -- and now the fifth time to create an interpretive framework that would solve the problem. I think that my suggestion is a good one, but far be it for me to say what Congress should --

JUSTICE SCALIA: Let me ask you something. Can you get -- can you get to your suggestion from the text of the statute?

MS. MENENDEZ: I do not believe so, Your Honor.

JUSTICE SCALIA: I don't think so either.

MS. MENENDEZ: If it were in the text, we probably wouldn't be in this place to begin with, Your Honor.

JUSTICE KENNEDY: It's -- it's important to me to evaluate your statement that most of the problems are at the margins, not at the core. How -- how do I do that? It -- it -- it's -- my assumption was the

opposite. I thought the margins were few and that the core was -- covered a vast amount of criminal conduct. Where -- where do I look to determine who's right on that?

MS. MENENDEZ: Your Honor, I think that we've grappled with that especially in our reply brief. You're exactly right. In a traditional statute, the core is large, the margins are gray, and the gray margins shouldn't lead to a conclusion of vagueness. But in this case, the fact that over, and over, and over again there's disagreement about things that should seem obvious, shows us that that core is smaller and smaller, if not extremely small, compared to the margins.

Look at the easy cases -- the easy cases that the government pointed to at pages 8 and 9 of their briefs. On closer examination, those give rise to disagreement. They're not uniformly settled in favor of inclusion or exclusion. Anything that seems easy at first blush really isn't. There's several splits pending right now, Your Honor. And I don't mean to just dismiss them as disagreements about outcome. Disagreements about how to apply this Court's tests that aren't going to be answered by this Court's decision in Johnson and won't be answered presumably by the next case down the road. The -- the question of whether

consensual sex offenses based on age should qualify, the question of how offenses with recklessness should be assessed, conspiracy to commit crimes of violence.

One of the easy cases that the government highlights is solicitation to commit murder, but it's really not that easy if conspiracy to commit a crime of violence has two petitions pending before this Court right now. So the veneer of ease and simplicity that the government attempts to create in their writing is belied by the reality on the ground.

JUSTICE KENNEDY: A -- a different question, and it's more for the government than for you. As you understand the government's position or is there common ground between the parties that because this is a mandatory increase, the standard for vagueness is precisely the same as the standard that we applied and determined whether or not a crime, in its definition, is itself vague.

In other words, is there a different vagueness standard for sentencing than for the -- a statement of what a crime is at the outset?

MS. MENENDEZ: I -- I don't think in this case it deserves a lesser scrutiny because it's a sentencing provision precisely because it's both mandatory and onerous in the extreme.

JUSTICE KENNEDY: It's as if there were a new crime.

MS. MENENDEZ: It's as if there were a new crime. And I'm not talking about for other aspects of this Court's jurisprudence, but for that question.

And I think frankly Flipside v. Hoffman Estates itself suggests that criminal statutes deserve greater scrutiny even though the licensing and mere fine statute that gave rise to that statement of vague in every application, they deserve greater scrutiny. And this is certainly one of the most onerous sentencing penalties that we as Federal defenders face in our practice.

JUSTICE GINSBURG: You say the congressional cure, as I understand your argument, could only be to add to the list of crimes, to add to arson, extortion, or to have whereas the -- an element of the crime is a serious risk. That's the only things that Congress could do. Nothing else.

MS. MENENDEZ: Oh, no, Your Honor. I don't mean to suggest that at all. Congress can fix this however they see fit, and that's why it's a better congressional function than asking one defense attorney to --

JUSTICE GINSBURG: But I asked what were the

routes that Congress could take. One is to list every crime that they think should get the enhanced penalty. Another is to say this -- this statute has to have as an element that the conduct creates a serious risk of injury to others. Sort of those two. What could Congress do?

MS. MENENDEZ: Well, Your Honor, I don't think listing them is that difficult. Other congressional enactments list a large number of things that --

JUSTICE GINSBURG: I'm just saying, is there anything else? Let's accept listing is okay. Saying that the crime has to have as an element the risk of danger to another.

MS. MENENDEZ: Your Honor, I'm not trying to avoid the question. I think it depends on what they want to accomplish. If they want this to apply very broadly to almost any sort of felony, they can say so. If they want it to apply more narrowly to things that are actually violent, they can say so. The problem is they didn't say much of anything when they wrote this statute. Those are the two ideas I have, but I'm sure there are more.

JUSTICE ALITO: I -- I don't want to take up your rebuttal time, but just this quick question.

If -- if Congress assigned a committee or a person to go through the criminal code of every single jurisdiction and identify those offenses that didn't fall within any other provision of ACCA, but met, in the judgment of those -- that individual or those individuals, the residual clause standard, how many do you think they would come up with?

MS. MENENDEZ: I -- I --

JUSTICE ALITO: Dozens? Hundreds? Thousands?

MS. MENENDEZ: Again, I think it -- it depends on whether Congress wants this to be a narrowly applied enhancement for the worst of the worst or broadly applied three strikes rule. And I think if they gave the commission that guidance instructed by this Court's previous cases that show the hard areas of questions, then the commission could decide.

I -- I don't think that it's necessary to look at every State's code. If they just specify the definitions like they did for burglary and robbery in the original 1984 enactment, that would save an enormous amount of question, and it would preclude them from having to look at each State's code.

And with the Court's permission, I'll save my last moments. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

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

The Armed Career Criminal Act states, as this Court noted in Sykes, a normative principle that can be applied to various crimes with a methodology that does not produce unconstitutional vagueness.

CHIEF JUSTICE ROBERTS: Well, we didn't say anything like that in Begay.

MR. DREEBEN: I think the Court didn't volunteer an opinion about the vagueness of the statute in Begay. It did comment on that in James, and it said that it was not unconstitutional. Sykes came later after Begay, and the Court continued to adhere to the idea that this statute can be applied as it has been applied four times by the Court and in numerous instances by lower courts without substantial difficulty.

Now, I'm not --

CHIEF JUSTICE ROBERTS: I didn't mean to suggest in Begay we specifically addressed vagueness, but the -- my -- my point was that Sykes provides a

particular test, but as your friend has pointed out, Begay, it seems to me, points in an entirely different direction.

MR. DREEBEN: What Begay did was conclude that the similarity of the offenses in the residual clause to the enumerated offenses had to be more than just similarity of risk; it also had to have a certain similarity in kind.

In Sykes, the Court noted that the phrase that the Court developed in Begay, "purposeful, violent and aggressive," wasn't precisely linked to the text of the statute, and it made clear that for offenses with a mens rea of knowingly or intentionally risk levels ordinarily provide the manageable test that courts can apply.

JUSTICE BREYER: That's true, but you see, Begay sort of points to the problem in my mind. There is no doubt that drunk driving does cause a risk of physical injury. But could it be that Congress really wanted to impose a 15-year mandatory minimum penalty to a person who has two drunk driving offenses prior? It seemed outside the ballpark of what they're actually interested in, and that's why I've had such a hard time, I think we've had such a hard time with this in part because of the sentence -- you know, a 15-year mandatory

minimum -- and in part, because there seems like they had something in mind, but it's very hard to figure out.

MR. DREEBEN: So I think, Justice Breyer, that it may have been a little bit too ambitious for the Court to try to develop a similarity-in-kind test from --

JUSTICE BREYER: Yeah.

MR. DREEBEN: -- as the Court did in Begay. That was the position of the government; four Justices agreed with that, five did not. We're not asking the Court to revisit that today.

But once the Court did develop it, it then considered in Sykes whether it provided a uniform, universally applicable test --

JUSTICE BREYER: And it doesn't.

MR. DREEBEN: -- and concluded that it was better to restrict it to crimes that involved negligence, strict liability, recklessness, potentially, so as not to allow it to basically subsume what's in the statute. And I think that having done that, the Court has given guidance to the lower courts, there has been some confusion that the Court, in its opinion in this case, could clear up about the relationship between Begay and the risk test.

JUSTICE SCALIA: Is that all it takes? I

mean, can we just patch up this statute in ways that have nothing to do with its text as -- as Begay didn't? I -- I thought we did not have any common law power to create crimes. And if that's the case, it seems to me it has to be Congress that's done that.

MR. DREEBEN: So I agree with --

JUSTICE SCALIA: And if Congress hasn't done it, and it hasn't done it, clearly, it seems to me our job is -- is over.

MR. DREEBEN: So I agree with you, Justice Scalia, that the Court does not have the power to create common law crimes, and I don't think that it has done that. It's engaged in statutory construction about which members of the Court may disagree.

Now, if the Court believes that a similar-in-kind limitation is appropriate for ACCA, there actually is a textual vehicle for getting there. It's the same vehicle that Your Honor used in the other Johnson case, the one about whether batteries involved strong force or simply offensive touching, and Your Honor looked to --

JUSTICE SCALIA: Other laws.

MR. DREEBEN: -- violent felony, the word being defined, and concluded that the word "violent" in that definition informed what kind of force would count.

And I think that that was the essential impulse of the Court in the Begay case to distinguish between injuries that are caused by regulatory type violations, like pollution, and injuries that are caused in the way that the statute specifies.

CHIEF JUSTICE ROBERTS: Well, but that -- that phrase, it seems to me, could just as clearly be viewed as adding confusion. And that's one -- the various hundreds whatever statutes you cite, I don't think -- certainly not many of them, I'm not sure any of them, involved that aspect of it. In other words, it's not just a question of whether it's serious potential risk, but otherwise, what is its relationship to the enumerated offenses.

MR. DREEBEN: So I think that that is not such a big problem if the Court applies that the way that it did in Sykes, and the way the lower courts predominantly do. It is not a precise statistical empirical analysis. Congress could not have envisioned that this Court and the lower courts have available to them statistics that for most crimes do not exist in order to gauge risk levels.

It instead intended a judgment exercise, based on experience, just like the Court did in Sykes. And I want to remind the Court that eight members of the

Court agreed in Sykes, that flight in a vehicle from a police officer in its ordinary case was sufficiently risky to trigger the residual clause. There was disagreement because of the particular structure of the Indiana statute, which had an enhanced offense that involved vehicular flight that posed a risk of something.

JUSTICE SCALIA: I don't know what you mean by a judgment exercised based on experience. What -- what experience do I have regarding these innumerable State crimes? I -- I've not heard any case involving any of those State crimes. What -- what experience are you asking me to apply?

MR. DREEBEN: I think the same kind of logical judgment that the lower courts have used, and let me give an example --

JUSTICE SCALIA: Well, that's not experience. I mean, logic is not an experience. You're asking me to apply logic or experience. Which is it?

MR. DREEBEN: Both.

JUSTICE SCALIA: Both. Well, what's the experience part?

MR. DREEBEN: Well, it may be a little bit easier if I start with the logic point, and I promise I will get to the experience point.

The logic point involves looking at the elements of the offense and asking, what does the conduct in this offense consist of? Let me take an example which my friend on the other side has not challenged: Solicitation of a child under the age of 14 to engage in sodomy.

Now, a court can look at that conduct and say what that requires is that an adult attempt to entice a child to a private place to engage in a sex act. Is that the kind of act that is likely, as a matter of logic and ordinary human experience -- adults are bigger than children, sodomy requires physical contact -- is it likely to produce a serious potential risk of physical injury to another?

Courts do not have very much difficulty answering that question. Similarly, in cases of kidnapping, you ask what does it mean? Somebody is --

JUSTICE SCALIA: I suggest they have not much difficulty because it's a horrific crime, not because they have any basis for saying, you know, what the degree of risk of serious -- potential -- a serious potential risk of injury is.

MR. DREEBEN: Well, I don't think that they have to say with precision what the degree of risk is. Congress gave four exemplar crimes to try to illustrate

what it had in mind. Two of them, burglary and extortion, involve conduct that's directed against property or potentially a threat of a person. And the danger that can arise is of confrontation; if the burglar encounters somebody at the home, if the extortionist attempts to realize the threat.

JUSTICE BREYER: All right, I see that. Now, wait, before -- because I want you to get back to the experience. The thing also that sticks in my mind was that Indiana case. Do you remember the one I'm talking about? Because -- because, in fact, you look at the words, but they're nested -- you see they're nested in a set of other crimes.

MR. DREEBEN: Yes.

JUSTICE BREYER: And really you'd like to know an empirical fact, how is this bit of a larger nest actually used in Indiana? It might be that it's really used against people who are involved in a violent kind of situation, or it might not be, because there are a whole lot of other ones around.

And now you turn to experience and say, use experience -- you know, I have no idea whatsoever. And Posner has suggested, I think I picked that up, go and do some empirical research; why doesn't the government do it? The Sentencing Commission has tried to do it.

It can't start. It doesn't know where to begin, there are so many statutes.

MR. DREEBEN: So I think, Justice Breyer, the very difficulty and unmanageability of the enterprise suggests that it's not what Congress had in mind.

JUSTICE BREYER: All right.

MR. DREEBEN: What Congress had in mind was identifying classes of offenses that judges are confident involve serious potential risks of physical injury to another, possibly the similarity-in-kind inquiry when the mens rea isn't satisfied. And what Congress expected courts to do was to analyze what the conduct is that's involved in it, compare it to the listed offenses, and see if the risks are similar. I --

JUSTICE GINSBURG: Does the --

JUSTICE KAGAN: But that -- that sounds --

JUSTICE GINSBURG: Does the Department of Justice do any of that? I mean, an ACCA sentence, as I understand it, is one that the prosecutor asks for. And is there any guidance coming from the Department of Justice, guidance to the U.S. attorneys who are going to be asking for ACCA sentences, when they should and when they shouldn't?

MR. DREEBEN: Yes, and the guidance keys,

Justice Ginsburg, off this Court's decisions. We use primarily an analysis that focuses on looking at the conduct that the elements of the crimes embrace, and logically analyzing what does it entail? Does it entail a risk of confrontation?

The other kind of risk that's subsumed --

JUSTICE GINSBURG: Is there -- is there written guidance --

MR. DREEBEN: Yes.

JUSTICE GINSBURG: -- from the Department of Justice to the U.S. attorneys?

MR. DREEBEN: Yes, there is, in the form of guidance memos that we regard as work product, but they involve analytical efforts to separate different offenses into different categories, based on the conduct.

And to the extent that statistics come into play, and I know that, Justice Breyer, your opinions have cited statistics, you've talked about the needs for statistics, we think that they play the -- exactly the role that the Court used them for in Sykes. First, the Court talked in Sykes about what happens when someone pleas -- flees from a police officer. What are the risks of --

JUSTICE BREYER: Yeah, but what about

extortion? I mean, extortion, that doesn't -- I mean, the other three I can see; burglary, arson, explosives, sure. But what about extortion? I thought the -- it's like Hobbs Act, and I would be amazed if many of those involve violence, but you would know. Do they -- are there --

JUSTICE SCALIA: Violence by the extortion -- extortee. I mean, it certainly is not the first --

JUSTICE BREYER: He's at the other end of a postal communication, or something. I mean, they say, if you don't give me some money, I will, you know -- and I'm in New York, you're in Hawaii, I'm going to reveal such and such.

MR. DREEBEN: Well, I think --

JUSTICE BREYER: What are the facts on that?

MR. DREEBEN: I think that what Congress had in mind was the kind of extortion where somebody threatens to inflict injury on a person or property. And if it's -- in order to achieve a demand. And Congress was concerned that the person who makes that threat poses a risk of carrying it out, which creates a degree of danger. It's the confront --

JUSTICE SCALIA: Is that the Justice Department's position, that other extortion is not

covered by the provision?

MR. DREEBEN: Well, I don't think --

JUSTICE SCALIA: If it's just blackmail, you threaten to reveal something about the person's life --

MR. DREEBEN: I --

JUSTICE SCALIA: -- that isn't covered.

MR. DREEBEN: We would argue that the generic definition of extortion is seeking to get some property from a person with his consent by the use of threats, force or fear.

JUSTICE SCALIA: Threat -- threats or force.

MR. DREEBEN: Yes, yes.

JUSTICE SCALIA: You add or fear.

MR. DREEBEN: Yes.

JUSTICE SCALIA: Well, I mean, fear includes being afraid that some events of your prior life will be --

MR. DREEBEN: That's right. And --

JUSTICE SCALIA: So -- so you -- you don't assert that extortion means only the extortion that -- that the mafia might -- you know, pay up or -- or we're going to hurt you.

MR. DREEBEN: I -- I think a normal method of statutory construction doesn't quite get you to the narrower view of extortion that you expressed in your

separate opinion in James I believe, but that is a legal question. I mean, the government might make that argument and this Court might conclude that under the principle that similar words should be construed similarly, extortion has a narrower meaning in this statute.

CHIEF JUSTICE ROBERTS: No. But the problem is -- the problem is not what the government argues when it gets into court. The problem is what the prosecutor threatens when he's entered into plea bargain negotiations. This is the point that Justice Ginsburg touched on. You are putting the defense counsel in a position where they have to interpret the vagueness in making the decision when -- whether they want to plead to five years or risk the mandatory minimum of -- of 15.

And your guidelines say a lot, but I thought one of the things your guidelines say is that you should prosecute the -- the maximum extent that you can, right? Isn't it you should charge the maximum if you -- if you charge and then the prosecutors go in and say, look, I could charge you this much and -- or I could -- or I could -- I mean, I could add this charge to what I've got and then you'd face 15 years. And defense counsel said, well, all right. Let me see if we're guilty of that. And he's going to read that and have no idea

whether they're covered by it or not.

MR. DREEBEN: I think no idea is not quite right.

CHIEF JUSTICE ROBERTS: No idea is an exaggeration, sure.

MR. DREEBEN: It is an exaggeration and this may not completely answer --

CHIEF JUSTICE ROBERTS: Not enough of an -- not enough of an idea to risk an extra ten years for their client.

MR. DREEBEN: Well, these aren't charges in the same way that a criminal charge is that's brought in the indictment. Typically, criminal history isn't even assembled until after the defendant has pleaded guilty and a presentence report is being prepared. And at that point the parties are more aware of whether the defendant might be exposed to the Armed Career Criminal Act or not. Sometimes ex ante analysis is done and can be done fairly reliably.

Again, this Court sees cases that really pose hard questions; that have generated circuit splits that result in legal questions that have divided the lower courts. There is a wealth of activity below the surface that doesn't get to this Court in which there isn't nearly as much difficulty in figuring it out.

Now, on pages 8 and 9 of our brief, which my friend referred to several times, we cited 17 examples of what we thought are easy cases. In the reply brief, the Petitioner came back and said, well, three of those really aren't easy because they're circuit splits. In two of them, the splits are really because the definitions, the offenses, the elements of the offenses were quite different. Child abuse meant something very different in one jurisdiction from another.

JUSTICE SCALIA: So you -- you take the position so long as there's some easy cases, the statute can't be vague.

MR. DREEBEN: I don't think the Court has to go nearly that far, Justice Scalia, because in this case you have four cases --

JUSTICE SCALIA: So you -- you don't take that position?

MR. DREEBEN: This Court's decision --

JUSTICE SCALIA: I thought your brief took that position.

MR. DREEBEN: This Court's decisions do suggest that.

JUSTICE SCALIA: Yes.

MR. DREEBEN: I don't think the Court has to go all the way to that position in order to conclude --

JUSTICE KAGAN: Well, what is the standard? And this goes back to what Justice Scalia was saying before. I mean, there's conduct that everybody agrees is annoying. There are rates that everybody agrees are just -- are unjust and unreasonable. So how much do we have to say that the core has shrunk and the margins have taken over before we're willing to do this?

MR. DREEBEN: So I think the starting point, Justice Kagan, is to look at whether the statute states something of an objective standard or a subjective standard. So in the instance of unreasonable rates, that is a standard that -- an administrative agency could -- could flesh that out. But for a court to do it would really just involve an -- an application of subjectivity.

JUSTICE KAGAN: But I feel as though it's really the same inquiry. I mean, even as you describe it, it's identify crimes where there -- you know, dangerous stuff, crimes that pose a risk of -- of danger.

How much danger? Well, as much danger as these four enumerated offenses. How much danger do they pose? Well, nobody's really sure. One of them seems only to pose that a lot of danger in a few select cases. So it's a really -- it just seems, even as you describe

it, as the kind of thing that Congress ought to be doing.

MR. DREEBEN: Well, let me add one thing, Justice Kagan, to your description of what courts should do when they apply this analysis. First, they're going to look to see if they can identify the ordinary case. Then they're going to try to determine whether the risk is essentially, I think, analogous to the burglary extortion risk of confrontation or the arson explosives risk of unleashing a direct -- a destructive force. And then finally there may be some cases where the Begay analysis applies.

But this is the really important point that I want Your Honor to think about in this context: If the Court is not satisfied that on any one of those issues, the government loses. Not because the statute is vague, but because if the Court is not confident that an offense fits within the -- a normative criteria that Congress has established, the tie goes to the defendant.

JUSTICE SCALIA: So there's no so much thing as a vague statute.

MR. DREEBEN: Well, no. I think --

JUSTICE SCALIA: You're saying whenever the statute is vague, the government loses on the Rule of Lenity; therefore, there's no such thing as a vague

statute.

MR. DREEBEN: I think the kinds of things that are vague statutes as reflected in this Court's opinions are either those where there's a tinge of First Amendment or other protected activity, like in the annoying example, or cases like L. Cohen where the standard is unreasonable rates. And sure, everybody would agree that some rates are unreasonable, but it's a -- it's a very subjective standard.

CHIEF JUSTICE ROBERTS: But what do you think --

JUSTICE SCALIA: The hardest -- the hardest part of this -- of this test is determining what is the typical case of -- of -- of this particular violation. What is the typical case of extortion? To take one of the four enumerated case-- what is the typical case of extortion? You seem to think the typical case is the -- you know, I'll break your leg unless you pay up. See, I would have thought the typical case is, you know, I'll -- I'll disclose something about your -- your life unless you pay up.

MR. DREEBEN: And I think that if the Court is faced with that kind of conundrum, it looks to reported decisions of convicted cases, as the Court indicated in James, and it attempts to determine whether

it can identify the ordinary convicted case. And if it cannot conclude that the ordinary case involves the greater degree of violence, then it will conclude that the government has not prevailed.

CHIEF JUSTICE ROBERTS: What about one that you think is easy, kidnapping? What if the statistics would ever show that in 40 percent of the cases, they're talking about the parent that does not have custodial rights, you know, taking the child from school and not -- not returning him or her, whatever. I mean, that doesn't pose, I would say, not a serious risk of potential violence. The parent is not going to harm -- harm -- harm the child. And yet you say that's an easy case.

MR. DREEBEN: Well --

CHIEF JUSTICE ROBERTS: Maybe it's easy if it's at the margin, if one percent of the cases are. I don't know whether kidnapping is prosecuted more often in a case like that or in another, you know, more, you know, violent case where it's extortion for money as opposed to just wanting more custody of the child.

MR. DREEBEN: So we -- we would have to undertake the effort to try to persuade a court of what we thought the ordinary case was. And if we failed, if we did not muster whatever the Court thought it needed

to understand that --

CHIEF JUSTICE ROBERTS: But how do you -- how do you do that? Do you look at every charged case of kidnapping in the State of Arkansas, if it involves a law from Arkansas?

MR. DREEBEN: We would look at the reported cases in Arkansas. We would look to see whether --

JUSTICE BREYER: The -- the reported cases. The problem is --

JUSTICE KAGAN: But you know -- you know, Mr. Dreeben --

JUSTICE BREYER: No. I want to just get to Justice Kagan's earlier question, if that's all right. Is it? Okay.

Because for the reasons that you've heard, I'd just like you spend now or sometime before you sit down, a minute on the suggestion of limiting it through the use of the -- your appendix, which you heard described a minute ago.

MR. DREEBEN: Yes.

JUSTICE BREYER: Because looking at the language, I think it is possible within the language to go to that interpretation.

MR. DREEBEN: So I don't really think that that interpretation is correct, because if you look at

the exemplar crimes --

JUSTICE SCALIA: I don't know what you're talking about.

MR. DREEBEN: I think it's --

JUSTICE BREYER: All right. What I'm talking about specifically --

JUSTICE SCALIA: What interpretation?

JUSTICE BREYER: -- is you read the words, "Otherwise involves conduct that presents a serious potential risk of physical injury to another." You look at the four examples. You say in each of the four examples there was a jury determination that it fell within one of the four, and we should read those words, too, as requiring a jury to make a determination that there's a serious potential risk. And the way you do that is that you insist that an element of the crime has the words, or the equivalent, of "serious potential risk."

Now, that's roughly what the suggestion was on the other side. I just didn't want you to sit down and -- at any point you'd like without -- without addressing that possibility.

MR. DREEBEN: Well, I -- I can address it quickly, Justice Breyer, because I don't think that it is a construction of the statute that really works. The

exemplar crimes like --

JUSTICE SCALIA: Excuse me. She didn't propose it as a construction of the statute. She said very clearly that this Court could not adopt that, but that Congress could. She was asked, you know, how Congress could fix this. That was her proposal about how Congress could fix it --

MR. DREEBEN: Yes Justice Scalia, I --

JUSTICE BREYER: I'm asking you as a saving construction.

MR. DREEBEN: I just wanted to -- I think we agree with Petitioner on this one, that the exemplar crimes, burglary, extortion, arson, and so forth, don't involve as an element characteristically serious potential risk of physical injury to another. It arises because of the elements of the crime. And the residual clause, which was originally where ACCA came from as a freestanding clause, and then the exemplars were added back in before it was passed --

JUSTICE BREYER: I see.

MR. DREEBEN: -- illustrates --

JUSTICE BREYER: Go back to Justice Kagan.

MR. DREEBEN: Yes. So that -- that I think is not really a viable solution to it, but I do think that the viable solution in this area is that for many

crimes, they -- they don't pose the empirical conundrums that can be hypothesized. And when they do and the government is not able to satisfy the Court or the Court isn't through its own research able to become satisfied that it is a fix on the ordinary case, that it can say with some degree of confidence that the risk is comparable to the exemplar crimes, the crime falls out.

And so you have in the ACCA world many crimes that no one ever contests are covered; mail fraud, gambling. And then you have crimes that we have listed that are not seriously contested. We listed 17 of them. They contested 3. I think two of the contests really have to be set aside but with --

JUSTICE KAGAN: But I think even --

MR. DREEBEN: -- are different -- please.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: I -- I think even in the ones that you think are easy, they're only easy in the abstract.

The vehicular flight one was a good example of that. In the abstract, everybody just has a sense that it's really dangerous if people flee from a police officer in a car. But then it turns out there are all kinds of degrees and we have zero idea what the charging is. And I think that that's not -- that was not a fluke

of that case. That's kind of every case, is that we don't have a sense of how all the statutes connect to each other and what statutes are used for the dangerous ones and what statutes are used for more minor variants of the same offenses, and that that's kind of an endemic problem in this. Is that not right?

MR. DREEBEN: Justice Kagan, I think what the Court is asking itself when it attempts to apply ACCA is not a question at that fine-grained level of empirical precision. Congress understood, for example, that in most burglaries, probably nobody is hurt. Many extortions, nobody realizes the threat. And yet, it regarded the kind of person who is willing to undertake a crime that could lead to that kind of confrontation as properly subject to an enhanced sentence when they have not just one, but two other convictions, and then they go out and use a gun. This --

JUSTICE KAGAN: Well, but then you're talking about a very different inquiry, it seems to me. Then you're talking about just a gut check. Do -- do, like, people that -- is this the kind of conduct that a bad person engages in?

MR. DREEBEN: No. I don't think that it's quite that amorphous. There is a much more specific inquiry into the risk, and the way the courts have

conducted it I think is really -- you know, in this Court's decision in Sykes was an exemplar, but there are many, many, many other cases where the lower courts look at the conduct, they examine the conduct, is this a sex crime that involves a minor and an adult? What is likely to ensue?

And I think that it's kind of critical to keep a perspective here that the idea of substantial risk is shot through criminal law. The very definition --

JUSTICE KENNEDY: That -- that brings me to the statutes in your appendix. It did -- it does seem to me that those statutes do require a case-by-case determination by the finder of fact that there was a danger in the particular case.

MR. DREEBEN: So there --

JUSTICE KENNEDY: And so -- and so that -- that's different from --

MR. DREEBEN: Yes.

JUSTICE KENNEDY: -- from a categorical approach.

MR. DREEBEN: Yes. And, Justice Kennedy --

JUSTICE KENNEDY: And most of those statutes, it seemed to me, would survive if -- if this Court ruled against you here.

MR. DREEBEN: It depends on the rationale, Justice Kennedy, because if the rationale were the concept of substantial risk is itself too amorphous to be grasped at all and to be applied in any kind of a consistent manner, I think that would raise serious questions.

JUSTICE SCALIA: We would never say that. We would never say that.

MR. DREEBEN: But I think as a logical matter, that's essentially what Petitioner is saying, that it's not possible to really get a fix on what those words mean.

JUSTICE SCALIA: No. He's saying -- she's saying that you can't tell what the typical crime is, and when you can't tell what the typical crime is, you can't tell what -- what -- what the risk is.

MR. DREEBEN: And my answer to that is --

JUSTICE SCALIA: Just as you can't do it for extortion.

MR. DREEBEN: If you can't tell what the typical crime is, the government loses. Once you can tell what the --

JUSTICE SCALIA: That's not really an answer. That sounds wonderful. The government loses because of the -- the -- the rule that the tie goes to

the defendant. That sounds wonderful, but the fact is one court will say, yes, the government loses. Another court, given the vagueness of it, will say the government wins.

MR. DREEBEN: Yes. I -- I don't think that's --

JUSTICE SCALIA: Are we going to have to review every one of these until the law is clear?

MR. DREEBEN: No. I think the Court does what it typically does, which is to review cases and establish general principles, and the lower courts make an effort to harmonize their rulings in light of them.

It's not unique that this statute has generated a lot of litigation. Section 924(c), for example, this Court has had three different cases interpreting the meaning of the word "use" and one interpreting the word "carry." I mean, that's a higher ratio of cases to words than this statute, but I think what it says is that when there's a lot at stake, when many years of prison time are at stake, people litigate hard.

JUSTICE KENNEDY: Is the test the same here for vagueness as when we're determining the validity of a statute that specifies a crime?

MR. DREEBEN: So I don't think that's so

clear, Justice Kennedy. This Court in Chapman indicated that there's a lesser degree of -- of clarity required for vagueness doctrine in the sentencing context.

JUSTICE GINSBURG: Why should that be when it's a mandatory -- this is mandatory, and has five years, no possibility -- and this case is such a good illustration because the judge said, If it were up to me, this person should get half or most -- what did he say -- two-thirds, that would more than suffice, but I'm locked into this by ACCA.

Shouldn't we demand from Congress, if it wants to have that kind of enhancement, a really clear statement?

MR. DREEBEN: Let me say two things about that, Justice Ginsburg. One is that this statue involves recidivism. There -- the -- there was never any question that Petitioner should have had about what conduct was prohibited and not prohibited. He knew or should have known that he could not possess a gun.

And the second thing is because this statute is applied as a matter of law by courts with de novo appellate review, it achieves a degree of clarity through the litigation process that, I think, is going to be sufficient to meet whatever heightened standard the Court might impose on it.

But I do want to come back --

CHIEF JUSTICE ROBERTS: Before you do, just -- because I disagree with the statement you made.

You said if there's -- because there are so many years involved, people will litigate hard. I think because there are so many years involved, people won't litigate at all. I mean, if -- if they're facing when -- if they go to trial such a large enhancement, I think they're going to be compelled -- it gives so much more power to the prosecutor in the plea negotiations which is, of course, where almost all of the cases are disposed of.

MR. DREEBEN: And not so much here for two reasons, Mr. Chief Justice. One is that section 922(g) prohibits possession of a weapon by a firearm. And I'm not going to say that there are no contested cases, but it's not the hardest crime to prove. If you're found in a car with a gun and the suppression motion fails, trial is not going to get you a lot.

The second thing is it's not totally up to the prosecutor. The presentence report will indicate the defendant's criminal history, and the judge is obligated to apply ACCA whether or not the government asks for it to be applied if, in fact, it is legally applicable. So I don't think that this context presents

quite the same plea bargaining pressure that Your Honor had in mind. But --

JUSTICE GINSBURG: How is the government going to know about the prior crimes unless the government -- and how is the judge supposed to know about the prior crimes unless the prosecutor tells the court?

MR. DREEBEN: The -- may I answer, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: Sure.

MR. DREEBEN: The -- the presentence report which is required to be prepared by the probation officer does a criminal history check, gathers that information, synthesizes it, makes recommendations to the sentencing court.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. DREEBEN: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Menendez, you have three minutes remaining.

REBUTTAL ARGUMENT OF KATHERINE M. MENENDEZ
ON BEHALF OF THE PETITIONER

MS. MENENDEZ: Thank you, Your Honor, Mr. Chief Justice. Just briefly, Your Honor.

First, I think lenity is an illusory solution in this case. After the government suggested

lenity is the answer, we looked through every opinion we could find from the courts of appeals and the district court. We did not find a single case nationwide where a court has applied lenity to find that a marginal case should not count under the residual clause. So if lenity is going to pose the solution that the government suggests, it needs substantial invigoration by this Court to be the -- the answer in the gray areas.

The second thought is that this suggestion that the Court can decide what the ordinary case is from reported decisions is actually also skewed in favor of the government. Consider a -- consider a standard offense where somebody commits a much less egregious case; resisting arrest where all they do is refused to be handcuffed versus resisting arrest where they kick and punch and fight the officer. This case is likely to get a higher sentence and more likely to lead to appeals and challenges and a reported decision. This case is perhaps more likely to be resolved with a suspended sentence and never to appear in the reported case law at all.

So if all we're doing is turning to the reported case law to try to determine what the ordinary case is, that's going to give an artificially skewed sense of the aggressive nature of those cases.

Finally, Your Honors, while it's true that this Court has grappled with things like 924(c) repeatedly, 924(c) provides an example of what's supposed to happen, which is when this Court points out a flaw in a statute, which they have -- Your Honors have now done four different times, Congress answered. Change 924(c) to try to address the Court's decision and address the Court's concerns from Bailey. And then that answer has led to additional questions.

That give and take, that discourse is missing in this case, where it's been clear for a long time that this statute needs help, and there's been inaction on the part of Congress. Your Honors, I think that the idea that the tie should go to the defendant is important, but it's just not happening, because of the subjective gut check that Your Honor has mentioned.

Judges substitute a feeling, boy, a sexual offense involving a minor sounds bad, and it sounds violent, so therefore, it must count. But I'd invite Your Honors to look at the footnote in our brief where we highlight that there's actually several cases that find that where the offense is -- or is unlawful because of the age of the victim, it doesn't count as a violent offense. So that gut check has to mean -- has to be more quantified, it has to be limited, it has to have

specific guidance.

The last point I'd like to make, Your Honors, is that whether this Court decides in favor of Mr. Johnson on the merits or an application of the Rule of Lenity, whether this Court decides that this statute is unconstitutionally vague as applied to possessory offenses, or as applied to mere possession of a short-barrel shotgun, or whether this Court takes the step that I think it's time for, and declares this clause unconstitutionally vague, in every instance, I think the appropriate result is for Mr. Johnson to win and be resentenced.

Thank you.

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

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)