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IN THE SUPREME COURT OF THE UNITED STATES

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SAMUEL JAMES JOHNSON, :

Petitioner : No. 13-7120

v. :

UNITED STATES. :

- - - - - x

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.

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

2 (10:04 a.m.)

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

6 Ms. Menendez.

7 ORAL ARGUMENT OF KATHERINE M. MENENDEZ

8 ON BEHALF OF THE PETITIONER

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

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

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

1 correct?

2 MS. MENENDEZ: That is correct, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

6 JUSTICE ALITO: In -- in *James*, in 2007, we  
7 held that the residual clause -- we said the residual  
8 clause is not unconstitutionally vague. In *Sykes*, in  
9 2011, we reaffirmed that.

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

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

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

5 MS. MENENDEZ: Your Honor --

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

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

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

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

1 saying it at all?

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

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

11 MS. MENENDEZ: Your Honor --

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

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

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

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

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

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

25 JUSTICE KENNEDY: You absolutely do think



1 they should give reasons for what they do?

2 MS. MENENDEZ: Yes, Your Honor.

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

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

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

18 MS. MENENDEZ: Your Honor, I --

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

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

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

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

4 JUSTICE KENNEDY: The hypothetical is that  
5 this --

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

9 MS. MENENDEZ: I would certainly be --

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

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

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

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

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

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

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

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

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

24 But the second --

25 JUSTICE BREYER: I've never heard of that as

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

10 MS. MENENDEZ: Absolutely not, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17          MS. MENENDEZ:           Yes, Your Honor.

18          (Laughter.)

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

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

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

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

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

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

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

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



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

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

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

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

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

25 One is the fact that it asks judges to

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

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

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

19 JUSTICE ALITO: Is that a yes or a no?

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

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

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

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

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

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

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

25 I think another thing that -- that is

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

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

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

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

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

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

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

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

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

22 MS. MENENDEZ: Precisely, Your Honor.

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

25 MS. MENENDEZ: In my imagined solution, Your

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

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

5 MS. MENENDEZ: Yes, Your Honor.

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

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

12 JUSTICE BREYER: Extortion doesn't have  
13 that.

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

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

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

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

25 MS. MENENDEZ: Has as an element the

1 creation of a serious risk or a serious potential risk.

2 JUSTICE BREYER: Of?

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

6 CHIEF JUSTICE ROBERTS: But I thought --

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

9 CHIEF JUSTICE ROBERTS: No. No. Go ahead.

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

21 JUSTICE BREYER: I see.

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

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

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

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

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

18 JUSTICE SCALIA: I don't think so either.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: But I asked what were the

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

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

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

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

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

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

8           MS. MENENDEZ:           I -- I --

9           JUSTICE ALITO:           Dozens?   Hundreds?  
10           Thousands?

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Dreeben.

3 ORAL ARGUMENT OF MICHAEL R. DREEBEN  
4 ON BEHALF OF THE RESPONDENT

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

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

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

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

22 Now, I'm not --

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

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

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

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

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

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

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

7 JUSTICE BREYER: Yeah.

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

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

15 JUSTICE BREYER: And it doesn't.

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

25 JUSTICE SCALIA: Is that all it takes? I



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

6 MR. DREEBEN: So I agree with --

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

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

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

22 JUSTICE SCALIA: Other laws.

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

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

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

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

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

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

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

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

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

20 MR. DREEBEN: Both.

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

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

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

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

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

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

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

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

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

14 MR. DREEBEN: Yes.

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

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

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

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

7 JUSTICE BREYER: All right.

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

16 JUSTICE GINSBURG: Does the --

17 JUSTICE KAGAN: But that -- that sounds --

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

25 MR. DREEBEN: Yes, and the guidance keys,

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

6 The other kind of risk that's subsumed --

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

9 MR. DREEBEN: Yes.

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

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

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

25 JUSTICE BREYER: Yeah, but what about

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

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

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

15 MR. DREEBEN: Well, I think --

16 JUSTICE BREYER: What are the facts on that?

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

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



1 covered by the provision?

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

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

5 MR. DREEBEN: I --

6 JUSTICE SCALIA: -- that isn't covered.

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

11 JUSTICE SCALIA: Threat -- threats or force.

12 MR. DREEBEN: Yes, yes.

13 JUSTICE SCALIA: You add or fear.

14 MR. DREEBEN: Yes.

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

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

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

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

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

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

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

1 whether they're covered by it or not.

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

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

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

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

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

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

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

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

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

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

18           MR. DREEBEN:           This Court's decision --

19           JUSTICE SCALIA:           I thought your brief took  
20 that position.

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

23           JUSTICE SCALIA:           Yes.

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

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

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

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

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

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

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

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

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

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

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

1 statute.

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

10 CHIEF JUSTICE ROBERTS: But what do you  
11 think --

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

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

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

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

15 MR. DREEBEN: Well --

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

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



1 to understand that --

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

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

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

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

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

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

20 MR. DREEBEN: Yes.

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

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

1 the exemplar crimes --

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

4 MR. DREEBEN: I think it's --

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

7 JUSTICE SCALIA: What interpretation?

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

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

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

1 exemplar crimes like --

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

8 MR. DREEBEN: Yes Justice Scalia, I --

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

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

20 JUSTICE BREYER: I see.

21 MR. DREEBEN: -- illustrates --

22 JUSTICE BREYER: Go back to Justice Kagan.

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

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

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

14 JUSTICE KAGAN: But I think even --

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

16 CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

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

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

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

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

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

16 MR. DREEBEN: So there --

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

19 MR. DREEBEN: Yes.

20 JUSTICE KENNEDY: -- from a categorical  
21 approach.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

1           But I do want to come back --

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

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

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Sure.

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. DREEBEN: Thank you.

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

20 REBUTTAL ARGUMENT OF KATHERINE M. MENENDEZ

21 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

1 specific guidance.

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

13           Thank you.

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

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

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