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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case 12-1371, United
5 States v. Castleman.

6 Ms. Sherry.

7 ORAL ARGUMENT OF MELISSA ARBUS SHERRY

8 ON BEHALF OF THE PETITIONER

9 MS. ARBUS SHERRY: Mr. Chief Justice, and
10 may it please the Court:

11 Section 922(g)(9) was enacted to protect
12 battered women and children and to close a dangerous
13 loophole in Federal law that allowed domestic abusers to
14 possess firearms.

15 That loophole existed because many domestic
16 abusers were only convicted of misdemeanor offenses, and
17 the misdemeanor offenses they were most often convicted
18 of were assault and battery crimes.

19 Respondent asks this Court to adopt an
20 interpretation of 922(g)(9) that would indisputably
21 exclude the assault and battery laws of almost all of
22 the 50 States and the District of Columbia. That would
23 render the statute a virtual dead letter from the moment
24 of its enactment until today, and it would leave that
25 dangerous loophole wide open.

1 The statutory text does not compel that
2 implausible result. To the contrary, this Court
3 ordinarily presumes that common law terms of art bear
4 their common law meaning, and here, the common law
5 meaning of force is a natural fit.

6 It makes perfect sense to define a --

7 JUSTICE SOTOMAYOR: I -- I'm a little bit
8 concerned about going to that common law meaning. Why
9 don't you go to what the common law meaning of domestic
10 violence is? I thought that was your strongest
11 argument. Because isn't that different than just
12 violence?

13 MS. ARBUS SHERRY: Oh, it certainly is. Though
14 the connotation of the phrase "domestic violence" is
15 very different than the word -- the word "violence"
16 standing alone.

17 JUSTICE SOTOMAYOR: Exactly.

18 MS. ARBUS SHERRY: And it's certainly
19 different than "violent" when it's modifying the word
20 "felony." Domestic violence describes a broad spectrum
21 of abusive behavior --

22 JUSTICE SOTOMAYOR: Misdemeanor domestic
23 violence.

24 MS. ARBUS SHERRY: Misdemeanor crime of
25 domestic violence. So both the word "misdemeanor" and

1 the phrase "domestic violence," it's a broad spectrum of
2 abusive behavior. It's characterized by a pattern of
3 escalating abusive conduct.

4 It may start with something like emotional
5 abuse, include isolating the person from friends and
6 family, include threats of violence, threatening to take
7 away the kids. And it --

8 JUSTICE SCALIA: Are threats of violence
9 domestic violence?

10 MS. ARBUS SHERRY: They are, not in this --
11 not with respect to this particular statute.

12 JUSTICE SCALIA: I hope not. I hope not.

13 MS. ARBUS SHERRY: No, and in this particular
14 statute, Congress focused on a particular form of
15 domestic violence. It's well-accepted within the
16 community that threats are a form of domestic violence,
17 but Congress here --

18 JUSTICE SCALIA: Do we have to think that
19 domestic violence is different from violence? Wouldn't
20 the simple term "violence," without the "domestic"
21 adjective cover any physical abuse that causes harm?

22 MS. ARBUS SHERRY: It would, but, I mean,
23 domestic violence -- my point here is that domestic
24 violence has a different connotation, even if you were
25 to move away from the phrase "domestic violence," Your

1 Honor, this statute does talk about misdemeanor crimes
2 of domestic violence, and that's the term that we are
3 defining here.

4 In Johnson, this Court recognized that it
5 normally does presume that common law terms of art bear
6 their common law meaning, and if --

7 JUSTICE SCALIA: If I punch somebody in the
8 nose, is that violence?

9 MS. ARBUS SHERRY: I'm sorry, if you punch
10 somebody in the nose?

11 JUSTICE SCALIA: If I punch somebody in the
12 nose.

13 MS. ARBUS SHERRY: Yes, that is violence.

14 JUSTICE SCALIA: Okay. So do you have to
15 have a special rule for if I punch my wife in the nose?

16 MS. ARBUS SHERRY: No, and we're not
17 arguing --

18 JUSTICE SCALIA: Any physical action that
19 hurts somebody is violence, isn't it?

20 MS. ARBUS SHERRY: It certainly is, and we
21 are not arguing for a special rule here. What we're
22 saying is that --

23 JUSTICE SOTOMAYOR: How about pinching or
24 biting, hair pulling, shoving, grabbing, hitting,
25 slapping; would those be violence or would they be

1 domestic violence if you are doing it against a spouse?
2 Would they in all situations be violence?

3 MS. ARBUS SHERRY: If you are doing it
4 against a spouse it is domestic violence, but I'm not
5 sure it is any different. And the reason that domestic
6 violence is different is because it is different than
7 stranger-on-stranger violence.

8 These are not isolated instances. This is a
9 pattern of abusive behavior, and it may start with more
10 slight injuries. It may start even without any physical
11 violence at all.

12 CHIEF JUSTICE ROBERTS: I don't understand
13 that point. Are you saying the first episode of
14 domestic violence wouldn't qualify? You keep talking
15 about a pattern of behavior. I assumed your argument
16 would be the same if it is the very first incident of
17 misdemeanor domestic violence.

18 MS. ARBUS SHERRY: It -- it certainly would
19 be the same as long as it fit within the scope of that
20 statute.

21 CHIEF JUSTICE ROBERTS: Why are you talking
22 about -- why are you talking about patterns of domestic
23 violence?

24 MS. ARBUS SHERRY: Only to focus on what
25 Congress was doing here. Congress recognized what

1 domestic violence was and it wanted to intervene at an
2 early stage before the violence escalated and certainly
3 before it turned deadly, before the offender reached for
4 a gun.

5 And the fatal flaw in Respondent's argument
6 is it doesn't accomplish any of those objectives.
7 Respondent acknowledges that Congress passed a statute,
8 and it intended to accomplish something. It intended to
9 close the dangerous loophole.

10 It intended to take guns away from people
11 who beat and batter their wives. Respondent cannot
12 explain --

13 JUSTICE GINSBURG: I have no problem with
14 the description of what Congress had in mind, reaching
15 conduct that was prosecuted only as a misdemeanor. But
16 the -- the words that Congress used has, as an element,
17 the use of physical force.

18 Under the Tennessee statute, as I understand
19 it, you don't have to have physical force. You have to
20 cause bodily injury to another, which could be caused by a
21 means other than physical force.

22 MS. ARBUS SHERRY: And our view is that it
23 cannot be caused by a means other than physical force,
24 if you understand the definition of physical force at
25 common law. At common law, physical force included not

1 only direct uses of force by the aggressor himself, but
2 also indirect or subtle uses of force. So things like
3 poisoning, for example, were considered to involve the
4 use of physical force at common law.

5 Respondent doesn't dispute that
6 understanding of the common law at page 40 of their brief.
7 Instead, what they ask this Court to do is to depart
8 from that common law meaning with respect to the
9 statute. The Court normally does presume that common
10 law terms of art bear their common law meaning, and
11 there is no basis to depart here.

12 This case is quite different from Johnson in
13 that respect. In Johnson, the Court was defining a very
14 different term, violent felony, and it concluded that
15 because misdemeanor -- rather because battery was a
16 misdemeanor crime both at common law and today, that it
17 would be a comical misfit to adopt a definition of force
18 that was used in the context of a misdemeanor and apply
19 it to a felony offense.

20 JUSTICE SCALIA: Maybe I am missing
21 something here, but I thought Justice Ginsburg's
22 question was not addressed to the Federal statute, but
23 to the Tennessee statute.

24 JUSTICE GINSBURG: Yes.

25 JUSTICE SCALIA: And it's the Federal

1 statute that uses physical force, right? What does the
2 Tennessee statute say?

3 MS. ARBUS SHERRY: The Tennessee statute
4 talks about causing bodily injury --

5 JUSTICE SCALIA: Causing bodily injury.

6 MS. ARBUS SHERRY: -- but you cannot cause a
7 bodily injury without using physical force, and that is
8 our point. There are different gradations of force --

9 CHIEF JUSTICE ROBERTS: I'm sorry, you
10 cannot cause bodily injury without using physical force?

11 MS. ARBUS SHERRY: You cannot intentionally
12 cause bodily injury without using physical force.

13 CHIEF JUSTICE ROBERTS: So if the victim is
14 at the top of the stairwell and you go "boo," and he or
15 she falls down and is injured, is that physical force?

16 MS. ARBUS SHERRY: It is physical force.
17 It's not -- and I am talking about intentional conduct
18 here. It is not physical force from the aggressor
19 himself, but it is physical force when that individual
20 hits the ground at the bottom of the stairs, and that is
21 how common law understood the term.

22 If that were not the case, crimes like
23 murder, for example, would not have as an element the
24 use of physical force. Crimes like murder, crimes like
25 aggravated assault, that, like battery here, are defined

1 in terms --

2 JUSTICE KENNEDY: You take the position that
3 the person with the camera says, "Back up two steps," so
4 that the other person falls over the cliff, that's
5 physical force?

6 MS. ARBUS SHERRY: Instances where it is
7 intentional, absolutely, because it includes not only,
8 again, direct applications by the aggressor, but when
9 the aggressor sets something in motion and causes
10 physical force to act against the person of another.

11 CHIEF JUSTICE ROBERTS: So then it's not a
12 limiting term at all. Anytime anything happens, you
13 would say there is physical force involved.

14 MS. ARBUS SHERRY: If there is bodily
15 injury. And that's key here, the Tennessee statute
16 requires there to be bodily injury. Respondent here was
17 convicted --

18 CHIEF JUSTICE ROBERTS: So if I did the same
19 thing to two different people and one is injured and the
20 other isn't, I am using physical force one time but not
21 the other time?

22 MS. ARBUS SHERRY: You are using physical
23 force one time and not the other time because there is
24 the actual physical force being applied against the
25 person of another, and contrary --

1 CHIEF JUSTICE ROBERTS: Where is the actual
2 physical force being applied?

3 MS. ARBUS SHERRY: When the person is
4 injured, when the person hits the ground.

5 CHIEF JUSTICE ROBERTS: Okay. So if they
6 bump against the wall and that injures somebody but
7 doesn't injure another person, it's use of physical
8 force in one case but not the other?

9 MS. ARBUS SHERRY: I take that back, I
10 didn't realize they both hit the wall. If they both hit
11 the wall, yes, that involves the use of physical force,
12 but --

13 CHIEF JUSTICE ROBERTS: But only one was
14 injured.

15 MS. ARBUS SHERRY: And then they wouldn't be
16 covered by the Tennessee statute. The Tennessee statute
17 requires the intentional causation of bodily injury.
18 And if I could go back to the murder example, I think
19 that reveals why a contrary interpretation doesn't work
20 here. Crimes like murder are defined in terms of
21 results. It's an intentional killing, it doesn't matter how
22 that killing occurred.

23 And under Respondent's view, murder, the
24 quintessential violent crime, would not have as an
25 element the use of physical force. Now, Respondent

1 doesn't dispute that. He says it doesn't matter,
2 because murder is a felony and felons can't have guns
3 anyway.

4 CHIEF JUSTICE ROBERTS: I'm sorry. I -- I'm
5 having trouble grasping the concept. If somebody is
6 lying down and somebody goes behind them and says boo
7 and they have a heart attack and die, is that physical
8 force?

9 MS. ARBUS SHERRY: I -- I think that's --
10 that may be a bit different. The way the common law --
11 and we're going back to the common law on this. The way
12 the common law described it is it included direct force.
13 It included indirect force. It included any time that
14 the aggressor intentionally set something in motion that
15 caused force to be used; in other words, directed
16 something to act according to the -- the individual's
17 will.

18 And so at common law, for example, it would
19 not distinguish between a husband who hits his wife, a
20 husband who whips his wife with a belt, a husband who
21 poisons his wife, whether he shoots at his wife with a
22 gun or whether he lures her into the middle of the
23 street so she's -- so that she's hit by an oncoming bus.
24 At common law, all of those different -- all of those
25 different examples of conduct were forms of common law

1 battery.

2 CHIEF JUSTICE ROBERTS: But it might not
3 include scaring the person and the person having a heart
4 attack.

5 MS. ARBUS SHERRY: I'm not sure if the
6 common law would include that. And our argument here is
7 that if it was common law battery, that it would be
8 included within the scope of this statute, because the
9 common law defined battery as the unlawful use -- or
10 unlawful application of force and that's precisely how
11 Congress chose to define misdemeanor crime of domestic
12 violence.

13 JUSTICE SCALIA: So your position is
14 whenever -- whenever somebody is injured by reason of
15 the intentional act of somebody else, that has been an
16 application of violent force.

17 MS. ARBUS SHERRY: That has been an
18 application of violent force. That is our position.
19 That was the position at -- at common law, although
20 common law didn't require violent force.

21 JUSTICE SOTOMAYOR: Not violent force.

22 MS. ARBUS SHERRY: And we don't --

23 JUSTICE SOTOMAYOR: The statutory term is
24 physical force.

25 MS. ARBUS SHERRY: Right. And we -- we

1 obviously do not think violent force is required here,
2 but we think whether or not violent force is required,
3 that yes, the intentional causation of bodily injury
4 does require the use of force.

5 And if I could try again to go back to the
6 murder example. If you look at, for example, a Federal
7 statute, 18 USC 373(a), we cite this at page 15 of our
8 reply brief, it is solicitation to commit a crime of
9 violence and it uses language very similar to the
10 language we have here in that it requires the felony
11 that has as an element the use of physical force.

12 Now, we use that statute to prosecute
13 murder-for-hire cases, cases in which individuals
14 solicit the murder of Federal officials, of Federal
15 lawyers, of Federal judges.

16 Under Respondent's interpretation, those
17 offenses cannot be prosecuted under that statute because
18 murder would not have as an element the use of physical
19 force. That defies common sense. And it's not just
20 murder. Things like aggravated assault, aggravated
21 battery causing serious bodily injury would not count
22 under Respondent's view under a variety of different
23 statutes, including the Armed Career Criminal Act.

24 Violent acts like -- against a person like
25 murder, like aggravated assault, are precisely what

1 Congress intended to cover under the -- as an element
2 clause in a variety of different statutes, including the
3 Armed Career Criminal Act.

4 In coming back to this particular statute,
5 922(g)(9) again was intended to accomplish something,
6 and Respondent's interpretation would read all meaning
7 out of its statute. It would be inoperative nationwide.

8 Respondent does not dispute that. He comes
9 up with perhaps 6 States that may have assault and
10 battery laws that may be covered under his definition.
11 On further inspection, most of them are not covered
12 under his definition. But even accepting that a few
13 States remain, Congress did not pass this statute to
14 ensure that domestic abusers are disarmed in Idaho, in
15 New Mexico, in Utah and those that happen to strangle
16 their wives in Iowa.

17 Congress was trying to solve a nationwide
18 problem, a serious problem. As the Court recognized in
19 Hayes, domestic strife and guns are deadly nationwide,
20 and Congress wanted to solve that problem with a
21 nationwide solution.

22 JUSTICE SCALIA: Wait. Domestic strife? I
23 mean, my goodness. All we have to find is domestic
24 strife?

25 MS. ARBUS SHERRY: No, that's not what

1 I'm --

2 JUSTICE SCALIA: Whenever there's domestic
3 strife, guns are dangerous?

4 MS. ARBUS SHERRY: That -- that is not what
5 I'm saying. What I'm saying is --

6 JUSTICE SCALIA: Clearly, that's not what
7 Congress had in mind.

8 MS. ARBUS SHERRY: Congress certainly had in
9 mind assault and battery offenses.

10 JUSTICE SCALIA: Okay.

11 MS. ARBUS SHERRY: The quintessential
12 domestic violence --

13 JUSTICE SCALIA: I don't know why you have
14 to tie this to domestic -- domestic violence. Why do
15 you -- it's no different from physical abuse of anybody
16 else.

17 MS. ARBUS SHERRY: In this statute, Congress
18 was focused specifically on people who harm their family
19 members, the very people that they're supposed to
20 protect. And the problem that Congress was trying to
21 solve is because these were family members, these
22 individuals were often not prosecuted as felons, they
23 were prosecuted and convicted of misdemeanors offenses;
24 and that is why they were able to get a gun.

25 When Congress passed this statute, it sought

1 to close that loophole. It was well accepted that
2 assault and battery offenses are the types of offenses
3 that domestic abusers are most often convicted of.

4 JUSTICE ALITO: And one of Respondent's
5 arguments is that Congress may have enacted this on the
6 assumption that we were not going to go off with this
7 modified categorical approach that we have created. Is
8 that correct?

9 MS. ARBUS SHERRY: I don't think it can be,
10 because I think the Court has adopted both the
11 categorical approach and its modified categorical
12 variant, largely at least starting in Taylor, as a means
13 of statutory interpretation. And so it seems odd to me
14 to say that the enacting Congress would have been
15 surprised when a court actually interprets the statute
16 according to Congress's intent. It chose element
17 language in the statute.

18 And Respondent certainly does not argue that
19 courts should be plying -- applying a fact-based
20 approach. That's not what this Court said in Hayes.
21 And so if you think Congress didn't enact a fact-based
22 approach, it seems a little bit odd to say that Congress
23 may have thought that is actually what it did in this
24 case. And Respondents do not dispute that the modified
25 categorical approach wouldn't mitigate any of the

1 practical harms here.

2 Respondent's argument is not specific to
3 offensive touching statutes and includes the statute we
4 have here, which is a bodily injury statute. If you
5 look at the laws of all -- nearly all 50 States, it's
6 one of the two variants. It's either offensive touching
7 or bodily injury, and in most cases both. And
8 Respondent's --

9 JUSTICE KAGAN: Can I ask you about that Ms.
10 Sherry? If -- I mean, suppose we accepted your argument
11 as to bodily injury, but offensive touching just went
12 too far. What happens? How are the laws of the 50
13 States constructed? Are we going to have -- are you
14 going to have, a terrible difficulty prosecuting real --
15 you know, punch-in-the-nose kinds of incidents of
16 physical violence, because there are indivisible
17 statutes that apply to both?

18 MS. ARBUS SHERRY: We are you're going to
19 have real difficulty prosecuting in about 28 States and
20 the District of Columbia. 28 States and the District of
21 Columbia define their assault and battery laws with
22 reference to common law battery.

23 And in those States, there will -- the first
24 question will be whether or not the statutes are
25 divisible. Some of them are codified in the statute;

1 some are still common law crimes that are defined by the
2 courts in those States. So --

3 JUSTICE KAGAN: Well, presumably, if they're
4 divisible, you don't have a problem. The only time
5 you're going to have a problem -- and, again, I'm
6 assuming that the Court will say physical touching goes
7 too far, that that's not included under 922.

8 So you'll have a problem as to any State
9 statute that indivisibly makes illegal both -- both
10 offensive touching and more violent forms of activity.
11 How many statutes are like that?

12 MS. ARBUS SHERRY: It -- it depends on what
13 you mean by -- by divisible. And I think that's going
14 to depend in part on -- on case law in those States as
15 to whether they treat them as separate crimes, in other
16 words, separate elements, or whether they treat them of
17 different -- different means of --

18 JUSTICE SCALIA: Well, how many -- how many
19 include? Just how many include mere touching as --

20 MS. ARBUS SHERRY: 28 States and the
21 District of Columbia include mere touching. And even if
22 the statutes were divisible, we would still have a
23 serious problem, because in a lot of those States, the
24 State record is not going to make it clear the basis for
25 the conviction.

1 That was true in Johnson. Florida was a
2 statute that had different prongs, including bodily
3 injury and offensive touching. The reason the court in
4 Johnson focused on offensive touching was because the
5 State court record there did not make clear the basis
6 for conviction. It was true in Hayes with respect to
7 the West Virginia statute.

8 And if you look at most of the court of
9 appeals decisions that have dealt with this issue, it is
10 true in many of those cases as well. It is certainly
11 common for States to charge the least common
12 denominator. Now, just because someone --

13 JUSTICE SCALIA: Well --

14 JUSTICE KAGAN: Of the 28 States, if I could
15 just understand this --

16 MS. ARBUS SHERRY: Sure.

17 JUSTICE KAGAN: Of the 28 States, how many
18 separated out on the face of the statute as between --

19 MS. ARBUS SHERRY: I believe --

20 JUSTICE KAGAN: -- offensive touching and
21 bodily injury?

22 MS. ARBUS SHERRY: I think there's 14 that
23 separated out on the face of the statute, and 14 that
24 are -- are common law. Whether those -- those --
25 whether those States actually separated out in terms of

1 the case law, I'm not entirely sure.

2 JUSTICE SCALIA: What do you want us to do
3 with those 14 that don't separate it out? And let's
4 assume the case law doesn't -- what do you want us to
5 do? Are they covered by this statute or not?

6 MS. ARBUS SHERRY: Well, we -- yes. We
7 think they are -- we think they are all covered by this
8 statute, because we think that violent force is not
9 required, which is our -- our first argument in this
10 case.

11 JUSTICE SCALIA: Just touching. Just
12 touching, is it --

13 MS. ARBUS SHERRY: Just touching is. And
14 we -- and the reason just touching is, as this Court
15 recognized in Johnson, is that was the common law
16 meaning of force. In this statute, common -- Congress
17 did track the common law and adopted the common law
18 definition of battery.

19 And in a statute that's designed to protect
20 battered women, in a statute that's dealing with
21 domestic abusers who are routinely prosecuted under
22 assault and battery laws, and in a statute that does
23 track the common law definition of battery, it makes
24 perfect sense to adopt the common law meaning.

25 JUSTICE ALITO: Well, I realize that in this

1 area we're supposed to forget anything about what we
2 might actually know about the real world, but are there
3 really a lot of cases in which one spouse is convicted
4 for offensive touching of another spouse? If I search
5 the books, will I find these?

6 MS. ARBUS SHERRY: I think you will find
7 cases in which that's what the statute says. I do not
8 think you will find --

9 JUSTICE ALITO: Where the facts --

10 MS. ARBUS SHERRY: I do not think --

11 JUSTICE ALITO: -- are that there is nothing
12 more than an offensive touching?

13 MS. ARBUS SHERRY: No, I don't think you
14 will find cases where a husband tickled his wife with a
15 feather or tapped his wife on the shoulder for a
16 couple --

17 JUSTICE KAGAN: How does marital rape figure
18 in this? In a -- is a marital rape considered a bodily
19 injury, or is that actually -- could that fall under the
20 offensive touching?

21 MS. ARBUS SHERRY: I don't know the
22 answer -- I don't know the answer to that. I don't know
23 whether they're prosecuted under these particular
24 statutes, or whether they would be prosecuted under rape
25 statutes. Either -- I'm not entirely sure which it

1 would be, but I think it certainly is true that if you looked
2 at the case law in terms of the facts, you're not going
3 to find examples of someone tapping their wife on the
4 shoulder. You're not going to find examples of someone
5 tickling their wife with a feather.

6 I mean, these are wife beaters. These are
7 people who are abusing, who are battering, who are
8 violently injuring those people that they are supposed
9 to care for, that they're supposed to protect, that
10 they're supposed to love.

11 I think it's telling that Respondent can
12 only cite to one case in Tennessee that was prosecuted
13 under the bodily injury assault statute, and he says
14 that that is the one case that shows that Tennessee
15 prosecutes nonviolent offenses.

16 There, the man punched his father, strangled
17 him, swatted at, scratched at his mother, twisted his
18 wife's arm, knocked her to the ground, all the while
19 holding their baby in his arms. If that is the example
20 of the nonviolent conduct that is being prosecuted under
21 Tennessee domestic assault, I think it proves Congress's
22 point and it explains why Congress did not want that
23 individual to have a gun at the ready so that he could
24 pick it up in the middle of a domestic dispute and pull
25 the trigger.

1 JUSTICE KENNEDY: It's strictly background
2 information, but if you have a case of domestic violence
3 of the aggravated sort, and there's a plea -- an offer
4 to plead guilty in the State court, as you understand
5 it, does the State court have the obligation to say that
6 if you plead guilty to this crime, you cannot buy a
7 weapon? Does the State court have the obligation to
8 give that advice?

9 MS. ARBUS SHERRY: Not as a matter of
10 Federal law, but if I can give two qualifications on
11 that. In 2005, VAWA passed an amendment that, as a
12 condition of funding, said that States need to adopt a
13 judicial policy to provide that notice. So it's not as
14 a matter of Federal law. It's not required, but States
15 are encouraged to do so under VAWA to adopt those --
16 those provisions. And I believe that all 50 States have
17 now done that.

18 The other thing I would point out is that
19 when an individual goes in to purchase a weapon, he
20 fills out a form, an ATF form, 4473. And on that form,
21 he has to check off whether or not he has been convicted
22 of a misdemeanor crime of domestic violence. And the
23 form contains a definitional section, and in that
24 section it defines a misdemeanor crime of domestic
25 violence as a crime that has as an element the use or

1 attempted use of physical force, and then in parentheses
2 it says, e.g., assault and battery.

3 And so any individual who goes to purchase a
4 weapon -- Respondent here, had he gone to purchase the
5 weapons himself instead of having his wife do it, would
6 have seen that form and certainly would have been on
7 notice that his misdemeanor domestic assault offense is
8 a misdemeanor crime of domestic violence.

9 And Respondent --

10 CHIEF JUSTICE ROBERTS: But doesn't that
11 assume the conclusion of the case?

12 MS. ARBUS SHERRY: I'm not suggesting that
13 that's how -- that the Court should decide that legally,
14 but in terms -- if there is any concerns about notice,
15 what I'm saying is that the ATF form that individuals
16 fill out when they go to purchase a weapon specifically
17 refers to assault and battery, and there's a good reason
18 for that. It's because assault and battery are the
19 quintessential domestic violence crimes, and they're
20 allowed --

21 JUSTICE SCALIA: How do we get to the common
22 law meaning of "force"? I mean, the statute does --
23 Federal statute doesn't say that, right? The Federal
24 statute says convicted of a misdemeanor crime of
25 domestic violence, right?

1 MS. ARBUS SHERRY: And it -- and it defines
2 what that means. So it defines a misdemeanor crime of
3 domestic violence, and this is at 921(a)(33)(A). It's
4 on 1A of the government's brief.

5 And the way it defines misdemeanor crime of
6 domestic violence is, "A misdemeanor under Federal,
7 State, or tribal law and has as an element the use or
8 attempted use of physical force, or the threatened use
9 of a deadly weapon."

10 JUSTICE KAGAN: Of course, that's the same
11 language as was in Johnson, but you would be asking us
12 to apply it differently here.

13 MS. ARBUS SHERRY: It is very similar
14 language to Johnson. Certainly the use of physical
15 force language is the same. And yes, we would be asking
16 for an interpret -- a different interpretation here.
17 Johnson expressly left this question open.

18 In Johnson, the government argued that an
19 interpretation requiring violent force would be a real
20 problem with respect to enforcement of 922(g)(9). And
21 when we said it would be a real problem there, it was
22 with respect to the offensive touching states.

23 JUSTICE SOTOMAYOR: Johnson relied on a
24 number of things, but the two were the use of felony and
25 the use of the word "violent force," which is not what

1 this statute does. It just -- it uses a common law
2 term, the use of physical force. That's why you are
3 asking us to import the common law in this context.

4 MS. ARBUS SHERRY: In Johnson, ACCA does
5 also use "physical force." This Court read physical
6 force to mean violent physical force, but the reason it
7 read that to mean violent physical force was the two
8 reasons Your Honor mentions, the fact that it was a
9 felony definition there, and the fact that it included
10 the word "violent," not only standing alone, but violent
11 defining the word "felony."

12 JUSTICE SOTOMAYOR: You're asking us to use
13 the terms in their common law sense because of the
14 nature of this -- of this provision.

15 MS. ARBUS SHERRY: Because of the nature of
16 this provision. Because of the term that is being
17 defined in Johnson, the Court relied heavily on the fact
18 that the term being defined there was "violent felony."
19 And when it --

20 JUSTICE SCALIA: Yes, of course. In
21 interpreting the meaning of a term in the definition,
22 you take into account the term that that definition is
23 defining. And in Johnson we did that, and we always
24 ought to do it.

25 And here the term that the definition which

1 uses the term "physical force" is defining is "domestic
2 violence." And to give "force" in that context its
3 common law meaning, which would include the mere
4 touching, it seems to me is -- is an abuse of the
5 principle that the defining term must be -- must be
6 interpreted in the context of the term that is being
7 defined.

8 MS. ARBUS SHERRY: Your Honor, if I could
9 answer quickly, and then reserve the balance of my time,
10 I'd point out two different things. In addition to the
11 phrase "domestic violence," which we think does have a
12 different connotation, it is referring to a misdemeanor
13 crime of domestic violence, and a misdemeanor is quite
14 distinct from a felony when you're talking about a
15 definition that was used as misdemeanor at common law.

16 And the last --

17 JUSTICE SCALIA: It distinguishes Johnson,
18 but it doesn't get rid of the word "violence," which
19 is -- which is what is being defined.

20 MS. ARBUS SHERRY: And I think it does --

21 JUSTICE SCALIA: You are saying violence is
22 being defined as a mere touching. I think that's a
23 stretch.

24 MS. ARBUS SHERRY: Again, I think domestic
25 violence has a different connotation, and it's also a

1 fundamentally different statutory scheme. This is not
2 ACCA. This is a gun prohibition.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Rothfeld.

5 ORAL ARGUMENT OF CHARLES A. ROTHFELD
6 ON BEHALF OF THE RESPONDENT

7 MR. ROTHFELD: Thank you.
8 Mr. Chief Justice, and may it please the Court:

9 I think the central point is one which was
10 raised by Justice Scalia's last question. The
11 government simply pays no attention to the language of
12 the statute that's at issue here. The statute is a
13 crime of violence.

14 The government says that this act of
15 violence, this crime of violence, can be committed
16 without someone actually --

17 JUSTICE SOTOMAYOR: You're suggesting that
18 you can commit a crime of violence because you have to
19 use violent force. You could commit it simply by using
20 an automatic weapon that requires no force to pull the
21 trigger. You're suggesting poisoning isn't covered.
22 You're suggesting that anything -- that the force has to
23 be how we defined it in Johnson, which is a given.

24 But when the misdemeanor -- when the -- when
25 the State -- when this exemption uses the words or this

1 requirement uses the word "misdemeanor domestic
2 violence," why should we stray from the common law
3 there?

4 MR. ROTHFELD: Well, there are a couple of
5 things there, and let me try to unpack it. First of
6 all, there are two separate textual problems with the
7 government's approach here. One is it is ignoring the
8 ordinary meaning of the word "violent" and "force."

9 Second is it's ignoring the ordinary meaning
10 of the word "use," and when you raise the question of
11 poisoning someone, the government suggests that if
12 someone is -- if poison is sprinkled on their food, you
13 have used force because at the molecular level, the
14 poison is going to --

15 JUSTICE SOTOMAYOR: It certainly causes
16 injury.

17 MR. ROTHFELD: There's no question it causes
18 injury. But --

19 JUSTICE SOTOMAYOR: Pushing someone lightly
20 over a cliff causes a lot of injury. Do you seriously
21 think that Congress didn't intend to include that common
22 law meaning of the use of force in their definition of a
23 misdemeanor for domestic violence?

24 MR. ROTHFELD: Well, again, let me focus
25 on -- there are two separate arguments. The question of

1 whether use of force -- whether force was used in the
2 ordinary sense is a separate question. The question of
3 whether or not physical force, violent physical force,
4 has a ordinary meaning and whether -- as opposed to -- to
5 the common law meaning of battery is a separate
6 question.

7 Focusing on that first, clearly, we think
8 Congress intended to adopt in this statute the same
9 definition of physical force and of violent force as it
10 did in the Armed Career Criminal Act, which is before
11 this court in Johnson, because it used almost exactly
12 the same language.

13 Something that the government really doesn't
14 talk about at all is that the language in this statute
15 is based directly on the language used in ACCA and the
16 language previous to that, which is used in 18 USC
17 Section 16, the generic definition of crime of violence.
18 Congress took that definition and it put it in the
19 statute.

20 It modified it in one respect, in a way
21 which I think is quite helpful to us. It -- it -- it
22 narrowed the category of crimes that are covered here.
23 Under the -- the ACCA definition, it -- a violent felony
24 is a crime that involves the use, attempted use, or
25 threatened use of physical force. Our statute says the

1 use, attempted use of physical force or a threatened use
2 of --

3 JUSTICE BREYER: Excuse me. If you look at
4 the history of it, it's certainly true that Congress did
5 intend to get misdemeanor domestic felonies. That's
6 what they said. And as it works out in the States, if
7 you take the same definition in, there would be very,
8 very few States misdemeanor of domestic violence
9 that would be covered.

10 MR. ROTHFELD: Well, let me say --

11 JUSTICE BREYER: I can't believe that
12 Congress wanted to write a statute that did so little.

13 MR. ROTHFELD: Well, first --

14 JUSTICE SCALIA: It wouldn't be the first
15 mistake of course, right? It wouldn't be the first
16 mistake Congress has made.

17 JUSTICE BREYER: Some people who don't read
18 legislative history don't know that, but if you did read
19 the legislative history, you would see that they do want
20 to have an effect with this statute.

21 MR. ROTHFELD: Well, I -- I will agree with
22 sort of both of those -- that Congress does make
23 mistakes. But Congress certainly intended to accomplish
24 something here. Let me say --

25 JUSTICE BREYER: Well, on your reading, what

1 would it have accomplished?

2 MR. ROTHFELD: First of all, what Congress
3 meant to accomplish here is -- I have to take issue with
4 my friend Ms. Sherry. I don't think what Congress meant
5 to accomplish here was to incorporate the common law
6 definition of assault.

7 What -- Congress was quite clear, if you do
8 look at the legislative history, what they were
9 concerned about was that people who engaged in violent
10 conduct, and every member of Congress who spoke to this
11 talk about stopping violent people from getting --
12 getting guns, people who were wife beaters, who are batterers,
13 and --

14 JUSTICE BREYER: I agree with you. I agree
15 with you on the tough -- what they were thinking. But
16 now what I want to know, and you've read all these
17 briefs and -- and you've actually done a lot of work on
18 this.

19 So -- so if you adopt your definition -- you
20 know, making them parallel, how many State domestic
21 violent misdemeanor statutes, in how many States would
22 this cover it, in your opinion.

23 MR. ROTHFELD: Well, if I can, let me finish
24 my answer to your -- to your prior question.

25 JUSTICE BREYER: Please.

1 MR. ROTHFELD: It's exactly what Congress
2 had in mind here, and I think we do agree with the
3 government on this, that Congress perceived a loophole
4 in the law at the time because the firearm restriction
5 at the time applied only to felons and people who
6 engaged in violent conduct, as Senator Lautenberg, the
7 principal sponsor said, that because of the outdated
8 thinking by prosecutors, people who engaged in violent
9 conduct that would be prosecuted against as a felony, if
10 committed against somebody else, was prosecuted as a
11 misdemeanor because a family member was the victim.

12 And so Congress wanted to close that
13 loophole by saying people who engage in this kind of
14 violence against a family member could not escape. And
15 so violent misdemeanors were directed -- were defined
16 here. And -- and as Senator Wellstone very graphically
17 put it, if you beat your neighbor's wife or batter your
18 neighbor's wife, that's a felony. If you beat or
19 battery your wife or your child, that's a misdemeanor,
20 and we have to get past that.

21 So that's what they were trying to do. They
22 were not trying to broaden the category of conduct that
23 was made criminal. They were trying to say that if you
24 engaged in violent conduct that would be -- would be
25 treated as a felony if committed against somebody else,

1 you don't get off the hook because you did it against a
2 family member.

3 As to which statutes are affected by --
4 which State statutes remain as predicates, I think it's
5 not entirely clear. The government focuses in its
6 statutory appendices on the generic definitions of
7 assault.

8 I think even as to some of those, under a
9 modified categorical approach some of them would --
10 would satisfy the statutory standard. And for
11 example --

12 JUSTICE SCALIA: Even if they wouldn't, once
13 again, Congress may have miscalculated. It may have
14 thought that this language, which it -- which intended,
15 as you have described, would cover a lot of State
16 statutes.

17 And as it turns out, it didn't. And that
18 wouldn't be the first congressional statute that didn't
19 achieve what it thought it was going to achieve, right.

20 MR. ROTHFELD: That -- that is absolutely
21 right and even if that were the
22 case -- and I'll get back to you specifically, Justice
23 Breyer, but if -- but if that were the case, the answer
24 cannot be that -- that we solve this problem by
25 extending Federal criminal penalties to people who lie

1 outside the plain terms of the statute that Congress
2 enacted and who engaged in conduct --

3 JUSTICE GINSBURG: So in your view, and I
4 think you said this in your brief, but what constitutes
5 violent conduct? So you said not scratching, not
6 bruising, not slapping.

7 MR. ROTHFELD: Well, it -- I wouldn't
8 categorically say that those things do not qualify.
9 What I would say, in Johnson, this Court did not define
10 specifically what violent force means.

11 And the Court did say that the same language
12 that appears in this statute was construed in Johnson
13 and the court there said it required violent force,
14 substantial force, as to what --

15 JUSTICE KAGAN: Mr. Rothfeld, I thought that
16 what Johnson said, it defined physical force as force
17 capable of causing physical pain or injury to another
18 person. It didn't say anything about serious pain or
19 grievous injury. It just said force capable of causing
20 physical pain or injury to another person. That's what
21 Johnson said. Why would we adopt a different approach?

22 MR. ROTHFELD: Well, I think Johnson had no
23 occasion to -- to specify what level of force was
24 necessary, what level of pain. Johnson --

25 JUSTICE KAGAN: No. I mean, it specified it

1 is not involving any level, that -- that there was no
2 inquiry into level. It's force capable of causing
3 physical pain or injury to another person.

4 MR. ROTHFELD: But --

5 JUSTICE KAGAN: That's the clear standard in
6 the holding.

7 MR. ROTHFELD: I guess I would have to
8 respectfully suggest that the way I read Johnson is
9 to -- is to say that it was enough for the Court to
10 decide that case to say that offensive touching, that
11 mere touching was not enough, that something more than
12 that is required.

13 And violent force, substantial force is
14 required, and force requiring -- having the effect of
15 some level of pain and injury satisfies that. I don't
16 think the Court focused specifically on what level, if
17 any level were required.

18 And what Johnson did focus on was the
19 meaning of the word "violence." The Court italicized
20 violence as it appeared. And if we look at the dictionary, violence is
21 an extreme use of force, especially severe, especially
22 powerful use of force. And it seems to me that if you
23 get soap in someone's eyes that stings, that causes
24 pain, I don't think anybody would say in the ordinary
25 meaning of the term "violence," that's violent force.

1 CHIEF JUSTICE ROBERTS: Mr. Rothfeld, you
2 still owe Justice Breyer an answer.

3 MR. ROTHFELD: Thank you, Mr. Chief Justice.

4 I think there are several categories of
5 statutes we can look at. One is -- is the generic
6 assault statute that -- that the government focuses on.
7 Some of those -- and look at the Tennessee statute at
8 issue here, for example. The Tennessee statute makes
9 causing bodily injury a violation.

10 It defines bodily injury to include a number
11 of specific types of harms, which are listed
12 disjunctively; among them, for example, burning, causing
13 disfigurement. It's things like that seem to me would
14 be violent and if properly charged in an indictment
15 under a modified categorical approach, I think would be
16 sufficient to --

17 JUSTICE BREYER: That's true, and that's
18 what I was trying to get at because it seems to me that
19 some of the -- quite a few, actually, of the statutes
20 that they cite have different categories and some of the
21 categories would escape being covered by offensive
22 touching and others wouldn't. So I thought you might --
23 on that assumption, if you win this case, then how many
24 States would be -- how many States would have written
25 their statutes so generally that it wouldn't fall within

1 the scope of the provision we are talking about in your
2 opinion?

3 MR. ROTHFELD: I can't give you a precise
4 number to that. I think it's a substantial number of --

5 JUSTICE BREYER: When you say "substantial,"
6 I mean, you've read all these and do you have he an idea
7 of --

8 MR. ROTHFELD: I --

9 JUSTICE BREYER: You've thought about this
10 question, so you must have some rough idea. You could
11 put a range on it.

12 MR. ROTHFELD: I think at least some dozens
13 of States that have use of force, that have causing
14 bodily injury, defined bodily injury to include a list of things
15 that one can do --

16 JUSTICE BREYER: Yes.

17 MR. ROTHFELD: -- and some of those things
18 are going to be necessarily violent things, and so in
19 all of those cases, if the injury is inflicted in that
20 respect and it's properly charged, it --

21 JUSTICE SOTOMAYOR: Can you give me an
22 example of that? I mean, I think most statutes I know
23 just say causing physical injury.

24 MR. ROTHFELD: Well, the Tennessee statute,
25 which is at issue here says "causing bodily injury" and

1 defines separately "bodily injury," and this appears
2 in --

3 JUSTICE SCALIA: So he was convicted of
4 causing violent injury?

5 MR. ROTHFELD: He was convicted of causing
6 bodily injury, but there was no specific indication.

7 JUSTICE SCALIA: So we sort of have two
8 extreme positions here. The government is arguing that
9 the statute covers mere touching. That's one extreme.
10 And you're arguing that the statute doesn't cover all
11 bodily injury, but only what, severe bodily injury?

12 MR. ROTHFELD: We are saying it covers
13 bodily injury which --

14 JUSTICE SCALIA: Why isn't there something
15 in the middle? It doesn't cover touching but it covers
16 bodily injury?

17 MR. ROTHFELD: That would be an approach the
18 Court could take. We think that --

19 JUSTICE SCALIA: Yes, but you would lose,
20 right?

21 (Laughter.)

22 MR. ROTHFELD: We think that's
23 inconsistent --

24 JUSTICE BREYER: Let's assume, just to help
25 for a change -- I mean, not for a change, you help a

1 lot. But the question in my mind is, can you imagine
2 losing this case, hypothetically, just on a
3 hypothetical, and that the Court were to say, just what
4 Justice Scalia said, and the offensive touching does not
5 fall within the definition of physical force, but
6 touching that produces violent injury does.

7 Now, were we to say that, then can you give
8 me a rough answer to my numerical question?

9 MR. ROTHFELD: Several dozens of States --
10 well, I think -- it may well be that --

11 JUSTICE BREYER: See, what we do is where
12 it's -- where it's separable, where it comes in two
13 separate clauses, then modified categorical approach
14 applies. And -- and that being so, the only States
15 where domestic violence wouldn't be included would be
16 those that have a crime and use general language that
17 you can't divide in the statute and cover both bodily
18 injury and offensive touching. And are -- are there
19 some such States? There must be some --

20 MR. ROTHFELD: I -- I believe there are some
21 States that use a common law standard, as -- as
22 Ms. Sherry said, and -- but --

23 JUSTICE KAGAN: Ms. Sherry said 14. And is
24 that your view, too?

25 MR. ROTHFELD: I -- I think that that's

1 right. I don't take issue with the government's
2 categorization in their appendix of the statutes. I do
3 take issue with what the individual statutes mean
4 in some circumstances, such as the Tennessee statute
5 that we're talking about here.

6 I guess to -- to respond to Justice Scalia,
7 we disagree with a rule that would say that any degree
8 of pain or injury necessarily is violent because we
9 think that's simply inconsistent with the meaning of the
10 word.

11 JUSTICE SOTOMAYOR: It doesn't say any level
12 of pain. It says any level of physical injury. So
13 assume physical injury has been caused. We can argue on
14 the margins of what -- what qualifies as physical
15 injury. But assuming somebody, like here, pled guilty
16 to it, we know something happened that was physical
17 injury. So assume that.

18 MR. ROTHFELD: Well, the Tennessee
19 statute -- I have to take issue with that, Justice
20 Sotomayor. The Tennessee statute says bodily injury,
21 but it defines bodily injury to include pain. And so --

22 JUSTICE SCALIA: Soap in the eyes.

23 MR. ROTHFELD: Soap in the eyes. You know,
24 shampooing a child and I get soap in their eyes and it
25 causes them to sting. That -- that would be --

1 JUSTICE SOTOMAYOR: You think causing the
2 pain was intentional there?

3 MR. ROTHFELD: In -- in this case, the
4 allegation --

5 JUSTICE SOTOMAYOR: And you don't think that
6 if -- have you ever had soap in your eye, that somebody
7 threw the soap in to cause you pain intentionally? That
8 wouldn't be physical injury to you?

9 MR. ROTHFELD: I think that that would be
10 bodily injury within the meaning of the statute.

11 JUSTICE SCALIA: How about soap in the
12 mouth? I've had that.

13 (Laughter.)

14 MR. ROTHFELD: I'll leave that one alone,
15 Justice Scalia.

16 JUSTICE KAGAN: Mr. Rothfeld, how serious do
17 you think the injury has to be? What -- what counts as
18 serious enough injury?

19 MR. ROTHFELD: I -- I would -- serious
20 injury is a -- a recognized standard in the law.
21 Aggravated battery statutes, many of which are felonies
22 but not some of which are misdemeanors, use that
23 standard.

24 JUSTICE GINSBURG: When I asked you the
25 question, you -- you were hesitant about scratching,

1 bruising, slapping.

2 MR. ROTHFELD: I would -- I would -- my own
3 view is that a slap in the face, which was something
4 that the Court in Johnson used as an example, would be
5 violent.

6 The difficulty is that because there is no
7 statutory -- State statutory standard saying what has to
8 be found, so long as the we have sort of a -- pain in a
9 generic sense was caused, it could be the pinch, it
10 could be the soap in the eyes, it could be the stubbed
11 toe or the paper cut that the Sixth Circuit described.
12 We simply don't know.

13 JUSTICE SCALIA: Well, none of those things
14 would be done intentionally, so they -- they don't scare
15 me. But -- but I do think of a -- you know, a parent
16 washing out a child's mouth with soap for -- for
17 improper speech or a -- a mother pinching a child
18 in -- you know, to bring the child under control in
19 public.

20 And that inflicts pain. It inflicts injury.
21 And I worry about that being covered by -- by this
22 Federal statute.

23 MR. ROTHFELD: There is no question that
24 those would be covered under the terms of the test that
25 the government is adding.

1 JUSTICE BREYER: Well, how -- now, just
2 drawing on your criminal justice experience, say whether
3 my sentence I'm about to utter is true or false. That's
4 what I'd like to know.

5 The -- the many statutes, which include in
6 the same section, the physical injury and the offensive
7 touching, such as Arizona, you intentionally or
8 knowingly cause physical injury or knowingly touching
9 another person with intent to injure, insult, et cetera.

10 What we will find when we look back at the
11 record of the prior convictions, it will say charge
12 Arizona revised statute 13-1203(a), pled guilty. And
13 we'll have no idea which it was. And -- and that is a
14 general problem with this area. We'll have no idea.

15 Now, is that generally true what I've just
16 said, or false?

17 MR. ROTHFELD: I think it is generally true.
18 Not always true, but generally true. But that is a --
19 is a -- to the extent that is a problem, it's a
20 problem --

21 JUSTICE BREYER: Then I don't see -- I think
22 it is generally true, too, and I can't work this out. I
23 mean, we'll work it out, I'm sure. But look, on the --
24 on the one hand, if you just can't know, as is often
25 true, then on the one hand, you're not really picking up

1 serious domestic violence. You see where there was
2 serious domestic violence.

3 And -- and although it was under a general
4 charge and so the person has a gun. Even did he really
5 beat the spouse up and so forth. Or on the other hand,
6 you pick up the offensive touching, too.

7 MR. ROTHFELD: Well, it's --

8 JUSTICE BREYER: So what do we do?

9 MR. ROTHFELD: It is a consequence -- the
10 problem you identified of the categorical --

11 JUSTICE BREYER: Yes, yes. So what is your
12 view after all this practice in this area? What would
13 you recommend?

14 MR. ROTHFELD: Our -- our view is that if
15 the Court states as a standard what we believe the
16 language of the statute requires, that there be violent
17 force used, that people will charge crimes with
18 sufficient specificity in the indictments so that it
19 will allow for that to be picked up and qualified as a
20 predicate offense as appropriate.

21 I think the answer, as I suggested earlier
22 to Justice Scalia and the Chief Justice, the answer
23 cannot be that because we have practical problems in the
24 application of this in some states, that we're going to
25 apply significant Federal criminal penalties to people

1 who lie outside the plain terms of the statutory text
2 and who did things that Congress did not intend to
3 criminalize. It is, I think, quite clear, and this
4 returns to the question that Justice Sotomayor --

5 JUSTICE GINSBURG: But on you reading, it
6 seems that one thing that Congress really wanted to
7 cover, it didn't; that is, the -- the defendant has
8 brutally beaten the mother of his child. But under the
9 Tennessee statute, you would say that that doesn't
10 qualify as a misdemeanor crime of domestic violence.

11 MR. ROTHFELD: I would say that if someone
12 who did that is prosecuted under a generic assault
13 statute that does not have as an element the use of
14 force and the relevance that is violent force, then
15 that -- that is true.

16 JUSTICE GINSBURG: So that means that on
17 your interpretation, we leave out the one thing that we
18 know Congress wanted to cover.

19 MR. ROTHFELD: Well, I -- I would take issue
20 with that, Your Honor. I think that we know Congress
21 wanted to cover is what it said in the statutory text.
22 It wanted to cover violent crimes, and it wanted to
23 cover people who use simple force to commit these violent
24 crimes. It had in mind that many people who did this
25 kind of thing were being prosecuted for misdemeanors.

1 Some of those misdemeanors -- I think I,
2 here again, take issue with the government that both the
3 generic assault statutes and other kinds of both
4 aggravated assault statutes and specific kinds of
5 criminal acts that are addressed by individual statutes
6 could be invoked in situations like that.

7 And it may well be, as Justice Scalia
8 suggested, that when Congress enacted this statute, it
9 had a -- it had a sense that -- it certainly was aware
10 that people were being prosecuted by misdemeanors. I
11 think it may well Congress really was not thinking --
12 did not have a clear sense of how the language that it
13 used would interact with modified categorical and
14 categorical approaches as squared against the state
15 statute, how that would apply.

16 JUSTICE GINSBURG: Would it make any
17 difference in your view if instead of domestic violence,
18 misdemeanor crime of domestic violence, the statute said
19 misdemeanor crime of domestic abuse?

20 MR. ROTHFELD: It -- it would make quite a
21 difference. The fact -- the fact is, I think it is
22 crucial to this case and something the government
23 ignores, that Congress used the language virtually
24 identical to language that it had used in prior statutes
25 like ACCA, adopting the language of "violence" as it had

1 done in ACCA, as it did in 18 USC Section 16 in the
2 definition of -- the generic definition of crime of
3 violence.

4 And I -- I guess this returns to a question
5 that Justice Sotomayor asked at the outset of Ms.
6 Sherry's argument. Did Congress mean something
7 different when it said domestic violence? The answer to
8 that is no.

9 The Congress used -- defined a specific
10 crime with elements that are identical to other generic
11 crimes of violence to the generic crime of violent
12 felony, to the generic crime of violence in 18 USC 16.

13 JUSTICE KAGAN: But Mr. Rothfeld, this might
14 go back to our difference on what Johnson said. But
15 you're asking us to apply a higher standard than
16 Johnson, which just said force capable of causing
17 physical pain or injury to another person without any
18 notion of seriousness or grievousness or whatnot.

19 And -- you know, I -- I can see an argument
20 that says we should apply the exact same standard as
21 Johnson. I can see an argument that says actually, we
22 should apply a lower standard because this is
23 misdemeanors rather than felonies, but I guess I can't
24 see an argument about why we should apply a higher
25 standard than Johnson.

1 MR. ROTHFELD: Well, I -- I do not suggest
2 that you should apply a higher standard than Johnson. I
3 will say two things about that. First, in fact, the
4 definition in our statute is a stricter definition. It
5 covers a narrower category of crimes, as I said before,
6 than -- than the ACCA definition does because when we
7 reach threats ACCA addresses -- you know, any threat of
8 use of force, and this statute addresses only a threat
9 of use of a deadly weapon, a much more serious and
10 narrower category.

11 So it clear -- it is clear that Congress
12 thought about the definition it was using here; it
13 didn't sort of mindlessly take the definition that
14 appeared in ACCA and in 18 USC Section 16 and just kind
15 of plop it in there.

16 It actually thought about it, decided that
17 it wanted to use that definition, and then decided that
18 it wanted to -- type in that definition. So I think for
19 those reasons the government's suggestion that we
20 somehow depart from what the Court said was the
21 definition in Johnson --

22 JUSTICE SCALIA: But I -- really you have no
23 answer to Johnson, except that -- that statement was
24 dictum. And it was -- the case did not have to define
25 the precise amount of injury necessary, right?

1 MR. ROTHFELD: I -- I took that statement to
2 say that absent some infliction of pain and injury,
3 that's not enough. That can't be a crime of violence
4 and --and not going any further than that. The Court
5 then did go on to say in response to other arguments by
6 the government that a slap in the face could be a crime
7 of violence. A slap in the face I think is a painful
8 thing.

9 It is not -- it's not a soap in the eyes;
10 it's not a stubbed toe, it's not -- it's not a pinch.
11 So I did not take Johnson. And of course the Court will
12 tell us what it meant. But I did not take Johnson to be
13 meaning to define definitively a crime of violence as
14 being anything which causes any de minimis level of pain
15 or injury, which again is not consistent with the ordinary meaning of the
16 word
17 of violence, which is extreme, unusual, very powerful
18 force.

19 I guess a couple of other small points. If
20 the Court were to adopt the government's standard,
21 because the language that is used here is identical
22 in -- in our statute and in ACCA, I think it would have
23 to be a case that whatever the Court says about the
24 nature of the injury that is inflicted that is
25 sufficient to be violent force in this statute applies
26 in the violent felony context as well.

1 I think it would be quite extraordinary to
2 think that -- you know, soap in the eyes, which triggers
3 a -- a State battery prosecution would be sufficient to
4 qualify as a violent felony, and -- and make someone
5 subject to a 15-year mandatory Federal prison sentence.
6 I mean, that is quite a remarkable outcome.

7 And because Congress did use exactly the
8 same language in -- in these two statutes, that would be
9 the consequence of adopting the government's position
10 here. That it's not that -- that what they are saying
11 would be limited to the statute.

12 It's not -- unless one assumes that Congress
13 meant radically different things, using the same
14 language in closely related statutes several years
15 apart -- unless one -- one takes Congress to have meant that then the
16 consequence
17 of the government's reading here, kind of, washes back into the
18 violent felony definition in ACCA, and the mandatory 15-year
19 sentence. I think that can't possibly be what Congress
20 had in mind.

21 In response to a point that Ms. Sherry made
22 about the Wachtel decision from the Tennessee courts
23 that we cite, we do not cite that as an example of
24 something which is not violent, not serious crime. We
25 are simply citing it for the standard, the legal
26 standard that Tennessee courts stated for application of

1 their assault statute, and the nature of the level of
2 force that was necessary and the court here said pushing
3 somebody, scratching somebody would be sufficient to a
4 working crime of -- that inflicts bodily injury.

5 It is not theoretical, I should add, that
6 people are prosecuted for things like this across the
7 country. In our brief and the National Association of
8 Criminal Defense Lawyers briefs cite examples of people
9 who are prosecuted for nonserious conduct, clearly
10 nonviolent conduct. People -- for spitting , for pushing
11 people's hands away.

12 In Tennessee, I can't cite cited cases --
13 reported cases that involve conduct of that type in a
14 domestic context. I can say that people are arrested in
15 Tennessee with some frequency for domestic assault, in
16 contexts where the allegation is that they pushed, that
17 they spit, that they pushed somebody's arm away.

18 So you have to assume that some number of
19 these people are prosecuted and as in this case, they plead
20 guilty to make the case go away. Having done that, they
21 are under now the government's reading subject to a
22 lifetime ban on ownership of firearms. It seems to me
23 that that was not what Congress had in mind.

24 Congress, again if one looks at what the
25 members said as they debated this legislation, they were

1 concerned with people who engage in acts of violence,
2 wife beaters, with batterers who are escaping
3 application of the firearms limitation they manage to
4 plead down, their crime wasn't taken seriously. Crimes
5 involving offensive touching are not what Congress had
6 in mind.

7 JUSTICE ALITO: Well, if you want to send
8 Congress back to the drawing board, what could they do?
9 I mean, they are stuck, because they have the laws of
10 the States that are framed the way the laws of the
11 States are.

12 And how are they going to -- and they
13 can't -- and if they can't, if they are stuck with this
14 modified categorical approach, how could they identify
15 those State prosecutions that fall within the parameters
16 that you just outlined.

17 MR. ROTHFELD: Well -- they could modify the
18 modified categorical approach. I mean that is what the
19 Court -- as the government says.

20 JUSTICE ALITO: Other than that, what could
21 they do?

22 MR. ROTHFELD: I think they could identify
23 particular types of -- of violence that would qualify.
24 And --

25 JUSTICE ALITO: How would you -- how would

1 you identify those without changing the assault and
2 battery statutes of the -- of the 50 States?

3 MR. ROTHFELD: Well, I don't think that
4 Congress could -- could do it by simply absorbing the
5 assault statutes as they are written, because they are
6 overbroad. They reach well beyond what Congress has --

7 JUSTICE ALITO: So all the States would have
8 to go back and change their statutes in order to -- to
9 segregate the cases that within the parameters that
10 you --

11 MR. ROTHFELD: Well, no, I --

12 JUSTICE ALITO: -- that you think are
13 required.

14 MR. ROTHFELD: I think that is not so,
15 Justice Alito. I think that if -- if cases were charged
16 with sufficient specificity in the indictments, both as
17 I said even -- even under the generic assault statutes, like
18 Tennessee, which lists types of injury, I think that
19 would be sufficient to, in a case involving conduct of
20 that kind, to trigger the predicate --

21 JUSTICE BREYER: Can you remind me of
22 something which I -- if you interpret this broadly, to
23 include battery, suppose you do offensive touching. Then one
24 consequence is that the person cannot later carry a gun,
25 is that right?

1 MR. ROTHFELD: That is correct.

2 JUSTICE BREYER: Is it also the case that
3 there would flow ineluctably an extra year 15-year
4 prison sentence, or not?

5 MR. ROTHFELD: No, it would not.

6 JUSTICE BREYER: No. The only consequence
7 is that he couldn't carry a gun.

8 MR. ROTHFELD: The consequence of this
9 conviction in this --

10 JUSTICE BREYER: I mean, if you'd say yes,
11 contrary to your argument, the same words do mean
12 something differently in the two sentence -- in the two
13 sections. Physical force means one thing for this
14 purpose; the other for the other. I'm not saying I
15 would do that. I just say if that happened.

16 MR. ROTHFELD: Well --

17 JUSTICE BREYER: And if that happened, and
18 you defined the physical force in the misdemeanor
19 section as much broader, would in fact there be a
20 consequence for anyone, other than not being able to
21 carry a gun? I just want to have every possible
22 consequence in my mind.

23 MR. ROTHFELD: Well, I think to the extent
24 that that definition flowed back to the --

25 JUSTICE BREYER: No, no. It's different

1 definitions for the same word in the two
2 provisions. And that's what I want to be absolutely
3 sure; there is no consequence other than the fact that
4 he would not be able to carry a gun.

5 MR. ROTHFELD: Well, and if he did carry a
6 gun, and --

7 JUSTICE BREYER: Yes. There would be a
8 penalty, but would it be an enhanced penalty?

9 MR. ROTHFELD: It would be a -- up to a
10 10-year Federal --

11 JUSTICE BREYER: It wouldn't be the extra
12 15 years you would get for violent felonies.

13 MR. ROTHFELD: That -- that is true if the
14 Court said that the identical language meant different
15 things.

16 JUSTICE SCALIA: I -- I assume that your
17 point is it's a trap for the unwary, that -- that
18 someone who has not really been guilty of violent action
19 would not expect that he's covered by the -- by the
20 prohibition on carrying a gun. He is not a violent
21 person.

22 MR. ROTHFELD: If I may, just for very
23 briefly. That -- that -- that -- that is correct. It
24 is as in this case; it is a trap for the unwary, and it
25 has the additional consequence of reaching well beyond

1 what Congress wanted to reach. It identifies people who
2 it did not want to reach and it subjects them to this
3 penalty and this prohibition. Thank you very much.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Rothfeld.

6 Ms. Sherry, 5 minutes.

7 REBUTTAL ARGUMENT OF MELISSA ARBUS SHERRY

8 ON BEHALF OF THE PETITIONER

9 MS. ARBUS SHERRY: I have four points.
10 Number one, Justice Breyer, you are exactly right and it
11 does mean something different in this statute. Justice
12 Kagan, it is a lesser definition of physical force.

13 There is -- this is a misdemeanor offense,
14 it's not a felony offense. Common law misdemeanor,
15 understanding of physical force applies directly here.
16 It's a perfect fit, unlike in Johnson.

17 Also this is a fundamentally different
18 statute. This is not ACCA; we're not talking about a
19 15-year mandatory minimum sentence. A consequence in
20 ACCA of saying it's not a violent felony means there's
21 no mandatory minimum, but the individual still cannot
22 possess a gun, and a sentence in court can still take
23 prior convictions into consideration. This is a gun
24 prohibition that applies equally to nonviolent felons,
25 to drug addicts, to the mentally ill, to and other classes of

1 individuals that Congress thought could not be trusted
2 to possess a gun.

3 The second point, we're talking about
4 criminal convictions here. These are events that are
5 serious enough to require police intervention and to
6 have someone prosecuted to a successful conviction. And
7 so if you look through the cases, these are not examples
8 of husbands tapping their wives or giving them a paper
9 cut or stubbing their toe. These are cases of real
10 domestic abuse.

11 And the third point is one of the fatal
12 flaws in Respondent's argument, he acknowledges the
13 legislative history. He acknowledges that Congress was
14 trying to get guns away from violent individuals. But
15 these violent individuals who are convicted of
16 misdemeanors are not convicted of misdemeanors in the
17 abstract.

18 They're actually convicted of violating
19 certain State laws. And the State laws that exist, the
20 State laws that are on the books do not qualify as
21 misdemeanor crimes of domestic violence in his -- under
22 his interpretation.

23 And the fourth point is I would encourage
24 the Court to look at the State statutes that we do cite
25 in the appendix. And I would disagree, I do not think

1 they can be broken down in the way that Respondent
2 suggests.

3 Certainly, in their brief, they don't point
4 to any examples where any of those State statutes would
5 qualify under their definition, which would exclude not
6 only offensive touching, but would also exclude bodily
7 injury cases like the one at issue here.

8 And we're not talking about just the generic
9 assault and battery laws. In Appendix C and D of our
10 brief, we also cite domestic-specific -- domestic
11 violence laws, domestic assault, and domestic battery
12 laws.

13 And it is quite perverse to think that
14 Congress adopted a statute that was designed to take
15 guns away from domestic abusers and chose to define
16 misdemeanor crime of domestic violence in a way that not
17 only excludes generic assault and battery laws, but also
18 excludes most domestic assault and battery laws.

19 The practical effect here is far worse than
20 in Hayes. In Hayes, it would have been a dead letter in
21 two-thirds of the State. Here we are talking about
22 virtually the entire country. Maybe a few States
23 survive, but at best, that is all that survives. The
24 modified categorical approach is no help here with
25 respect to all of those States.

1 Now, with respect to the offensive touching
2 issue, I just want to -- I don't want to leave the Court
3 with the impression that we're arguing just for bodily
4 injury assault here. We do not think the Johnson
5 definition applies here. We think a different
6 definition of physical force should apply, and we think
7 the consequences of adopting the Johnson definition are
8 significant. It's 28 States. It's the District of
9 Columbia. Maybe they're divisible; maybe they are not.

10 And even if they are, Justice Breyer, you're
11 absolutely correct that if you looked at the State court
12 records in this case -- these cases, in most cases, it
13 is not going to identify the actual crime of conviction.

14 And so in those cases, it is going to be a
15 virtual dead letter, in the same way that it was in
16 Hayes. In Hayes, it wasn't nationwide; one-third of the
17 States had domestic violence laws on the books. So it's
18 similar to Hayes. It's similar to Nijhawan. It's
19 similar to what this Court said in Taylor when it
20 rejected the common law definition of "burglary."

21 And the last point is that this Court has a
22 choice. It can either embrace the common law meaning of
23 force and ensure that people who harm those that they
24 are supposed to protect do not have guns, or it can
25 depart from the common law, which it does not normally

1 do, and render 922(g)(9) a virtual dead letter.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Counsel.

4 The case is submitted.

5 (Whereupon, at 12:07 p.m., the case in the
6 above-entitled matter was submitted.)

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