

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STEPHEN L. VOISINE AND :

4 WILLIAM E. ARMSTRONG, III, :

5 Petitioners : No. 14-10154

6 v. :

7 UNITED STATES. :

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9 Washington, D.C.

10 Monday, February 29, 2016

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:03 a.m.

15 APPEARANCES:

16 VIRGINIA G. VILLA, ESQ., St. Croix Falls, Wis.; on

17 behalf of Petitioners. Appointed by this Court.

18 ILANA H. EISENSTEIN, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of Respondent.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-10154, Voisine and
5 Armstrong v. United States.

6 Ms. Villa.

7 ORAL ARGUMENT OF VIRGINIA G. VILLA

8 ON BEHALF OF THE PETITIONERS,

9 APPOINTED BY THIS COURT

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

12 There are three reasons to exclude reckless
13 misdemeanors from the phrase "use... of physical force"
14 as occurs in 921(a)(33).

15 The first is that it's consistent with the
16 definition of use that this Court has implemented in
17 other cases. Second, it is consistent with the
18 common-law definition of battery. And, third, it is
19 consistent with the intentionality inherent in domestic
20 violence.

21 JUSTICE GINSBURG: But it's inconsistent
22 with the treatment of bodily injury. I mean, I think
23 you agree, because the Court so held, that either bodily
24 injury or offensive touching is the act -- satisfies the
25 act requirement. And you say if there's bodily injury,

1 then reckless is enough, but if it's only offensive
2 touching, then you need a higher mental state,
3 intentional or knowing? Why -- if -- if both acts
4 qualify equally, why shouldn't the same state of mind
5 attach to each?

6 MS. VILLA: The same state of mind should
7 attach to each, and that is why intentionality is the
8 state of mind that under the common law can attach to
9 each. Because intentional battery covered both the
10 offensive physical contact as well as the physical
11 injury, whereas recklessness covers only bodily injury.

12 JUSTICE SOTOMAYOR: I'm sorry.
13 Intentionality, in my mind, is misperceived, because you
14 think -- you're talking about intentionality as the act
15 of causing the injury. But I understood common-law
16 battery to be the intentional act that causes the
17 injury; i.e., if a husband threw a bottle at a wife,
18 doesn't intend to hit her, but the bottle smashes
19 against the wall and the glass embeds itself in her
20 face, under the common law that would have been a
21 battery because the act, the intentional act, was to
22 throw the bottle. It wasn't -- it wasn't to cause the
23 injury, but the act caused the injury.

24 MS. VILLA: I respectfully disagree, Your
25 Honor. Under --

1 JUSTICE SOTOMAYOR: I know. If we end up
2 disagreeing because the government points to many
3 examples where this is the case, how do you win?

4 MS. VILLA: That's only on injury cases, and
5 so you don't have that same confirmation or that same
6 organization of the law with respect to offensive
7 physical contact. And so my clients were convicted of
8 offensive physical contact under a -- under the
9 categorical approach. And so at that point, you can't
10 say that they were convicted of anything that caused
11 physical injury.

12 JUSTICE SOTOMAYOR: But -- but the point is
13 that the contact was in -- was -- some contact had to
14 have occurred.

15 MS. VILLA: Correct.

16 JUSTICE SOTOMAYOR: The question is whether
17 there was an act that caused that contact regardless of
18 whether it was intentional or reckless.

19 MS. VILLA: The problem under the common law
20 is that not all touches were considered to be illegal.
21 And so that is why in Johnson, this Court stated the
22 common law as being the intentional application of
23 unlawful force.

24 JUSTICE SOTOMAYOR: Well, we were talking
25 about common-law battery as it applied to -- definition

1 as it applied in a domestic setting. So I'm talking
2 only about a domestic setting --

3 MS. VILLA: This --

4 JUSTICE SOTOMAYOR: -- which this is.

5 MS. VILLA: This is serious but the problem
6 is, is that the government's formulation of any reckless
7 conduct satisfying use of physical force is that it's
8 not limited to batteries.

9 JUSTICE ALITO: But the mens rea of
10 recklessness could apply to the act of touching or to
11 whether the act is offensive. Now, under Maine law, to
12 which of those does it apply? It doesn't necessarily
13 have to apply to both.

14 MS. VILLA: Statutorily it does apply to
15 both.

16 JUSTICE ALITO: So if someone recklessly
17 touches another person and that is offensive, that's a
18 battery under Maine law?

19 MS. VILLA: Yes, Your Honor. And the
20 government cites a case exactly for that -- proposition,
21 and that's the Gantnier case.

22 JUSTICE ALITO: And what happened in that
23 case?

24 MS. VILLA: It was whether the defendant got
25 a -- an instruction on the simple battery rather than

1 the sexual offensive contact, and so that the Court
2 reversed it because it said that it was a proper
3 instruction.

4 JUSTICE ALITO: No, I mean what were the
5 facts? What did this person do that was -- involved a
6 reckless touching?

7 MS. VILLA: He went to wake in -- his
8 stepdaughter, I believe, who was asleep on a couch,
9 reached underneath a blanket and -- to shake her awake,
10 and touched her naked body.

11 JUSTICE ALITO: Well, that -- that seems
12 like the recklessness there goes to the -- the offensive
13 nature of the touching, not to the touching itself.

14 MS. VILLA: No.

15 JUSTICE ALITO: In other words, there's the
16 act of touching, so he -- he went to shake her but he
17 didn't intend to touch her?

18 MS. VILLA: It was -- there can be
19 recklessness as to result or recklessness as to
20 circumstance. And so that is an example of recklessness
21 as to circumstance by reaching underneath. If he had
22 touched her on top of clothing, it would not have been
23 the same offense that could have been charged. And so
24 it was the fact that he touched her naked body and could
25 not see that she was naked.

1 JUSTICE ALITO: I don't really understand
2 the -- the answer. He didn't intend to touch her at
3 all? That was his intent?

4 MS. VILLA: No, he did intend to touch her.

5 JUSTICE ALITO: Okay. Well, that's what I'm
6 saying. They are two different things. Did the -- does
7 the person intend to touch -- does the person intend to
8 touch in an offensive way?

9 MS. VILLA: Correct.

10 JUSTICE ALITO: And so then it seems like
11 your answer to my question is that it is in the latter
12 that has the mens rea of recklessness.

13 MS. VILLA: Under the Maine statute, it is
14 the latter that has the mens rea of recklessness. Under
15 the common law, it is the intent to have unlawful
16 contact. And so that is why not all touches qualify,
17 which is why you can't just have an intent to touch.
18 You also have to have an intent to touch unlawfully.

19 JUSTICE KAGAN: Can I --

20 JUSTICE KENNEDY: What is it that indicates
21 that the Federal statute tracks the common law? The
22 Federal statute gives its own definition.

23 MS. VILLA: Your Honor, the Federal statute
24 is the use of physical force, and so it is only because
25 of Castleman having adopted the common law for purposes

1 of force. But Your Honor is absolutely correct, that we
 2 are not construing the common law here. We are
 3 construing the phrase "use... of physical force." And
 4 the problem with the government's case is that that use
 5 of physical force can occur in reckless driving context.
 6 If I am driving a car and I have a family member that
 7 qualifies under 922 -- 921(a)(33) in with me and I get
 8 into an accident due to reckless conduct, that would
 9 qualify as a predicate under this statute according to
 10 the government's construction.

11 JUSTICE KAGAN: Ms. Villa, can I understand
 12 what you said? You said you're relying primarily, then,
 13 not on the common-law history but on the -- the -- just
 14 the language, "use... of physical force" and what that
 15 means, the ordinary meaning of those words, is that
 16 correct?

17 MS. VILLA: The Court has to deal with the
 18 ordinary meaning of those words. The Court can take --
 19 from the common law, it can take from many places, but
 20 the ordinary mean of use is to carry out an action or
 21 purpose by means of. In Castleman itself --

22 JUSTICE KAGAN: But why isn't -- any of
 23 these examples that people give about the reckless
 24 behavior? Why -- why couldn't that be a use of force?
 25 I mean, Justice Sotomayor said throwing a plate against

1 a wall. You say, well, I have a better example. It's
2 driving a car really fast in a way that will endanger
3 all the inhabitants. But, of course, we've said a
4 number of times -- I mean, we said it most recently in
5 the Sykes case that a car is -- is an instrument of
6 force when used recklessly in that way. So why aren't
7 all of these kinds of examples consistent with the
8 ordinary meaning of use of force?

9 MS. VILLA: There's a substantive
10 difference, though, between driving recklessly and not
11 intending to harm the person that is with you in the car
12 and throwing an object at a person. And so, really, the
13 example of throwing an object at a person is that
14 intentional use of force against that other person.
15 That defendant can testify all day and all night that I
16 didn't intend to --

17 JUSTICE KAGAN: Of course, you're -- you're
18 adding language to the statute now because you said
19 against another person, and that is indeed the language
20 in Leocal. But in Leocal, we said we're not going to
21 decide the question here, which is just the phrase "use
22 of physical force," not against another person, just the
23 phrase, "use... of physical force."

24 And tell me -- I mean, I guess your car
25 example doesn't move me very much, so see if you can

1 give me an example which would be reckless behavior
2 under a battery statute but which you think would not
3 involve the use of force.

4 MS. VILLA: I had a client once who pled
5 guilty to a misdemeanor where he was actually running
6 away from a guy who was trying to beat him up. And he
7 closed the door very forcefully behind him and caught
8 the guy's fingers in the -- in the door.

9 JUSTICE KAGAN: You just said it. He closed
10 the door very forcefully behind him.

11 MS. VILLA: He did.

12 JUSTICE KAGAN: That's the -- that's the use
13 of physical force.

14 MS. VILLA: It was the use of physical
15 force. But what he explained is that, I closed the
16 door. The door hit the guy. I didn't mean to hit the
17 guy. I knew he was behind me.

18 JUSTICE KAGAN: I know. And that's why it's
19 reckless and not knowing or whatever the other term is.
20 But -- but you're still using physical force. And
21 that's the -- that's the term that has to be interpreted
22 here, is the "use... of physical force."

23 MS. VILLA: But the Court has said, with all
24 due respect, that it is to -- carrying out an action or
25 purpose by means of force. The -- my client closing the

1 door, he didn't mean to hurt the other guy. He meant to
2 close the door. And so he was using force to close the
3 door, but he wasn't using force to hurt the other guy.

4 JUSTICE KAGAN: Well, quite right. But the
5 language -- I feel like I'm repeating myself a little,
6 so I'll just try it one more time. The language is just
7 the use of force. And what we are trying to decide is
8 whether that includes use of force that indeed is
9 carried out without an intent to harm, but is carried
10 out with an understanding that there is a risk of harm.
11 That's what recklessness is. And -- and, you know,
12 doing something like driving a car 200 miles an hour, or
13 throwing a plate, or slamming a door when somebody's
14 hand is in the vicinity, all of those things involve the
15 requisite risk and all of those things involve the use
16 of physical force.

17 MS. VILLA: But not in the sense that the
18 Court has construed "use" in the past. And so they have
19 in -- for instance, in Smith, which was decided in 1993,
20 that case was where it was "to carry out an action or
21 purpose by means of." And so it's not to carry out an
22 action, to close a door, by means of hurting somebody.
23 And so there is this disconnect, and that is inherent
24 because in the -- in recklessness, because what you're
25 doing is that you aren't looking to hurt it. There may

1 be a risk, but that's not your purpose.

2 And so the -- the whole difference between
3 purposeful, knowing behavior as opposed to reckless
4 behavior is -- is that you have a purpose that is
5 pointed someplace else with a risk that there might be a
6 collateral consequence, rather than actually seeking to
7 accomplish that collateral consequence.

8 JUSTICE SOTOMAYOR: Don't you have to look
9 at this in the domestic violence context? Because the
10 definition, "use of force" as put in terms of a
11 misdemeanor under Federal or State triable law, means --
12 so it means a domestic violence. And isn't it
13 prototypical in many of these domestic violence cases
14 where much of the violence employed is not direct
15 violence, not hitting some -- there's a lot of that, but
16 there's an awful lot of the examples I raised of
17 reckless conduct that leads to violence, either from
18 drunkenness or from other conditions.

19 You're using "use of force" as it's being
20 defined in other areas. Why does it fit into this
21 domestic violence case?

22 MS. VILLA: Because domestic violence,
23 according to the Castleman opinion was violence or
24 nonviolent conduct that's offensive, and is offensive --

25 JUSTICE SOTOMAYOR: That's the offensive

1 touching prong. That has nothing --

2 MS. VILLA: Excuse me?

3 JUSTICE SOTOMAYOR: That was the offensive
4 touching prong. I'm talking about, here, the use of
5 physical force prong --

6 MS. VILLA: Except for --

7 JUSTICE SOTOMAYOR: -- that causes injury in
8 some way.

9 MS. VILLA: But it's a singular definition.
10 It's "use... of physical force." Whether it is touching
11 or not, it is something that is intended to control
12 one's partner. And so if you have to use force to
13 control one's partner, or you do something that is
14 offensive to control one's partner, it is still the idea
15 that you are implementing any level of force in order to
16 achieve an end, and that end is the control inherent in
17 domestic violence.

18 JUSTICE GINSBURG: The government tells us
19 that this is -- heavy consequences ride on this, that
20 is, that many domestic violence situations would not be
21 subject to prosecution under this statute on your read,
22 if you require knowing or intentional, rather than
23 reckless, state of mind.

24 MS. VILLA: Yes, Your Honor.

25 JUSTICE GINSBURG: Do you agree with that?

1 MS. VILLA: I don't necessarily agree with
2 that. The reason I don't is because, as was noted in
3 footnote 8, courts have generally construed "use... of
4 physical force" to exclude reckless conduct.

5 And so there are -- for instance, in
6 Castleman itself, it falls in the Sixth Circuit. The
7 Sixth Circuit in Portela held "use of physical force
8 excludes reckless conduct." It was not construing
9 922(g), but I would note that the State prosecutor in
10 Castleman had a statute much like that in Maine that
11 disallowed knowing, purposeful, or reckless conduct.
12 And rather than charging all of them, that prosecutor
13 restricted it to "knowing purposeful conduct."

14 JUSTICE ALITO: Do you think that
15 prosecutors, when they are State prosecutors, when they
16 are charging these domestic violence offenses, are going
17 to be looking ahead to the consequences of the
18 particular charge for Federal firearms laws?

19 MS. VILLA: Yes, Your Honor.

20 JUSTICE ALITO: Do you think that's
21 realistic?

22 MS. VILLA: Yes, Your Honor. And that is
23 because there is a large part of the budget of -- for
24 domestic violence within the Federal government that
25 goes towards training and joint task force so that there

1 is an awareness on the part of State prosecutors exactly
2 for this purpose.

3 JUSTICE ALITO: Well, let me ask you this,
4 which is somewhat unrelated. So Congress passes this
5 statute, and they do not want a person who has been
6 convicted of a misdemeanor crime of domestic violence to
7 have a firearm. Okay? What was the year when that was
8 passed?

9 MS. VILLA: 1996, Your Honor.

10 JUSTICE ALITO: Okay. 1996.

11 That's what they want to do. And you agree
12 that a -- that the offense of battery falls within that
13 definition; am I right?

14 MS. VILLA: The offensive contact battery,
15 yes, Your Honor.

16 JUSTICE ALITO: All right. What reason is
17 there to think that when Congress did this, they wanted
18 common law battery only? They didn't want battery as it
19 is defined in general by a great many States.

20 MS. VILLA: Because of the --

21 JUSTICE ALITO: At -- at that time, am I
22 not -- is it not correct that by that time a majority of
23 the States had battery offenses that reached reckless
24 conduct?

25 MS. VILLA: You are correct that many States

1 did. But the problem with that scenario as to what
2 Congress intended is that it did not adopt battery as
3 the definition of a misdemeanor crime of domestic
4 violence for purposes of --

5 JUSTICE ALITO: Well, I under -- I
6 understand that, but I thought you agree that "battery"
7 in some sense falls within the definite -- falls within
8 the category of a misdemeanor crime of domestic
9 violence.

10 MS. VILLA: I have to, because of the
11 Castleman so ruled.

12 JUSTICE ALITO: Yeah. Okay. Well, if you
13 agree with that -- and then your argument is that they
14 just -- all they think about across the street is the
15 common law. So battery -- common law battery, they
16 don't care what the actual statutes are around the
17 country. They are just interested in the offense of
18 common law battery.

19 MS. VILLA: Your Honor --

20 JUSTICE ALITO: I mean, is that realistic?

21 MS. VILLA: Your Honor, that is not my
22 position. My position is, is that common law battery,
23 offensive physical contact could only be accomplished
24 through intentional conduct.

25 The term "use" had been construed already by

1 this Court prior to 1996 as being an affirmative,
2 purposeful conduct that you're taking an item and making
3 it your instrument, that you're accomplishing something
4 with that. And in this case, it would have been force.

5 And so then if you accompany that with the
6 idea of domestic violence as the intentional controlling
7 of a domestic partner, all of those ideas, each one of
8 them has intentionality at its core.

9 And so that when Congress used this phrase
10 as an element, not as a -- a generic crime of battery,
11 but as an element of any misdemeanor crime, it is the
12 intentional use of physical force, because
13 intentionality use, as well as physical force and
14 domestic violence, all share that.

15 JUSTICE ALITO: I think you're losing me. I
16 thought you were argue -- I thought you were
17 acknowledging that reckless conduct would be sufficient
18 when it is -- when physical injury as opposed to
19 offensive touching is involved; is that right or not?

20 MS. VILLA: Under the common law in about
21 the mid 1800s, there was a subset of batteries that did
22 adopt a negligent -- not a negligence, but a
23 recklessness factor. But that is not the definition
24 given in Johnson, and it is not the definition --

25 JUSTICE GINSBURG: What was that -- what was

1 that category? That was the category where bodily
2 injury resulted; is that right?

3 MS. VILLA: Yes, Your Honor.

4 JUSTICE GINSBURG: So the answer to Justice
5 Alito's question is, yes, that bodily injury does
6 trigger this statute.

7 It's the question I opened with. If the --
8 if the conduct is covered, whether it is touching or
9 bodily injury, why shouldn't the state of mind match?
10 Why shouldn't the same state of mind do for both bodily
11 injury and offensive touching?

12 MS. VILLA: Because it would be inconsistent
13 with the idea that when you adopt a common law term,
14 that you adopt all of the soil that went with that
15 common --

16 JUSTICE KENNEDY: Well, what's the common
17 law term?

18 MS. VILLA: The common law term is the
19 "battery" term as informing force. And so in
20 Castleman --

21 JUSTICE KENNEDY: Excuse me. Let me get the
22 statute. The statute talks about "use."

23 MS. VILLA: It is "use."

24 And so force was at issue in Castleman, and
25 that's where this Court identified the common law

1 battery -- the level of force involved in a common law
2 battery as being the level of force for purposes of the
3 statute.

4 JUSTICE KAGAN: But we wouldn't think that
5 the common law has some great definition of the word
6 "use," would we?

7 MS. VILLA: No, Your Honor. Which is why
8 that normal usage for use of physical force is the
9 intent -- also intentional, and --

10 JUSTICE KAGAN: Yeah.

11 MS. VILLA: -- so I'm just saying that --

12 JUSTICE KAGAN: I mean, I hear you today as
13 basically making an ordinary meaning argument, which I
14 think is a good thing because all the briefing on both
15 sides of this has been talking about the common law
16 until it's coming out of your ears, and it's not clear
17 to me why the common law makes any difference at all
18 here.

19 I mean, you know, Congress was operating
20 against a backdrop. It was not the backdrop of the
21 common law; it was the backdrop of 50 States having
22 battery statutes. There's no word in this statute which
23 is a defined -- you know, which is a -- a settled
24 common-law term.

25 So the question is, what was Congress doing?

1 Congress, we said in Castleman, wanted to basically
2 capture the set of battery statutes in which -- which
3 were used for people engaged in domestic violence.
4 Almost all of those statutes use "recklessness" within
5 them. Why isn't that the proper place to look rather
6 than the common law?

7 MS. VILLA: Because Congress used a narrower
8 definition than many battery statutes. And so it
9 couldn't have wholesale been adopting those battery
10 statutes as -- as meaning use of physical force.

11 JUSTICE KENNEDY: But Congress doesn't --
12 the -- the statute doesn't talk -- say -- say the word
13 "battery." It doesn't use it.

14 MS. VILLA: Does not use the word "battery."

15 JUSTICE KENNEDY: It defines it in -- in
16 this special way.

17 MS. VILLA: It defines it in a very special
18 way. And all of the parts, you have use of physical
19 force which this Court had defined as -- as having been
20 made the user's instrument which is that intentionality
21 part prior to Congress adopting this.

22 It had consisted of use of physical force in
23 other statutes where recklessness was excluded, and
24 it's -- it did not adopt -- again, it doesn't say
25 battery anywhere in the statute. And so saying that

1 they adopted "battery" may be a way of trying to think
2 about it, but it's not what they wrote.

3 And they also narrowed the idea of what does
4 constitute a -- an appropriate misdemeanor, because
5 again, as in Castleman, the court recognized that not
6 everything under the Tennessee statute would qualify
7 because there were threats but not threats of a deadly
8 weapon.

9 All of the -- the use of physical force, the
10 attempt, attempts are specific intent crimes, and so
11 that's also an intentional crime. And then threats are
12 usually very intentional. And so --

13 JUSTICE SOTOMAYOR: Can you please go back
14 to the question Justice Kagan asked you and not using
15 the shaking somebody, because I don't understand how
16 shaking someone doesn't constitute the use of physical
17 force. It may not be great force, but it's -- it's
18 touching.

19 What other example do you have of a reckless
20 act that wouldn't involve the use of physical force?
21 You're -- you're sort of saying --

22 MS. VILLA: It's --

23 JUSTICE SOTOMAYOR: -- it has to be
24 intentionally offensive.

25 MS. VILLA: Correct.

1 JUSTICE SOTOMAYOR: -- as opposed to --

2 MS. VILLA: And so if the government's
3 formulation were adopted, and I came up to somebody who
4 I thought was my husband and I patted him on the back
5 and say, hi, honey, and he turns around and it's like,
6 oh, my gosh, that isn't him.

7 I had -- I touched him. I intended to touch
8 him. I was mistaken as to who it was. And so that
9 person could take offense; that could be a reckless
10 touching that does not involve -- it involves touching
11 minimally. That could be an offense.

12 JUSTICE SOTOMAYOR: It always involves,
13 however, the touching.

14 MS. VILLA: It is --

15 JUSTICE SOTOMAYOR: And the use of force to
16 constitute the touching.

17 MS. VILLA: It could be by poisoning; it
18 could be by taking a pen out of somebody's hands.

19 JUSTICE SOTOMAYOR: So what difference does
20 it make whether it's intentional or reckless --

21 MS. VILLA: It --

22 JUSTICE SOTOMAYOR: -- in terms of the
23 culpability involved?

24 MS. VILLA: In terms of the culpability,
25 it's because it's not your intent to actually harm

1 somebody in closing a door.

2 JUSTICE SOTOMAYOR: But the --

3 MS. VILLA: And so --

4 JUSTICE SOTOMAYOR: -- use of force -- and
5 -- and we're giving examples that are not domestic
6 violence examples, but that has caused a sufficiently
7 offensive touching to constitute a crime. So that's
8 going to be prosecuted.

9 MS. VILLA: And it could be prosecuted for
10 many reasons, including must arrest. Some neighbor
11 hears a disturbance and so calls the police. The police
12 comes and say, well, did he touch you? She says, yeah,
13 he touched me, but it wasn't a big deal. Okay. You
14 have to be arrested. You go in. You go through the
15 process. You plead guilty because you get out and you
16 need to go to work the next day. Those are not the
17 types of scenarios that Congress had in mind --

18 JUSTICE GINSBURG: The example that you
19 gave, though, would never come under this statute,
20 because there isn't a relationship. You come up to a
21 stranger, walking behind the stranger, and you think the
22 stranger is your spouse. Doesn't -- that stranger is
23 not related to you in the way that the statute requires.

24 MS. VILLA: That is true. There are other
25 reasons, though, where interactions between people who

1 are related may not be -- that the touching may occur,
 2 but it may either not be wanting to be offensive such as
 3 just wanting to touch somebody to wake them up instead
 4 of wanting to offend them. And so that's the
 5 difference.

6 I would like to reserve the rest of my time
 7 for rebuttal, please.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
 9 Ms. Eisenstein.

10 ORAL ARGUMENT OF ILANA H. EISENSTEIN

11 ON BEHALF OF THE RESPONDENT

12 MS. EISENSTEIN: Mr. Chief Justice, and may
 13 it please the Court:

14 This Court has twice interpreted
 15 Section 922(g)(9) in *Hazen and Castleman*, and each time
 16 concluded that Congress intended to keep guns away from
 17 those convicted of assault and battery under generally
 18 applicable State and Federal and Tribal law.

19 Petitioner attempts to distinguish between
 20 offenses that cause bodily injury and those that involve
 21 offensive touching. But as this Court already decided
 22 in *Castleman*, that is a fallacy; that distinction is
 23 elusive. And that's because States, including those
 24 that prohibit the causation of bodily injury, even those
 25 offenses may include offenses that are similar in terms

1 of degree to offensive touching. In fact, that was what
2 was at issue at Castleman itself. It was the bodily
3 injury prong of the Tennessee statute, not the offensive
4 touching prong.

5 And -- and in that case, the bodily injury
6 could be committed in a way that involved only slight
7 injury. And yet, this Court refused to distinguish, by
8 degree of force, batteries that qualify Section
9 922(g)(9) predicates.

10 Keep in mind that States overwhelmingly
11 define battery as -- only as to the resulting injury.
12 Petitioners' role, which would limit misdemeanor crimes
13 of domestic violence to intentional conduct, would
14 require a prosecutor in those jurisdictions to prove in
15 the underlying offense not only that the contact and the
16 push, the hit, the grab was intentional, but that
17 prosecutor would also have to show that the abuser
18 intended the resulting injury in order to prove the
19 battery offense under the vast majority of State and
20 under Federal law.

21 CHIEF JUSTICE ROBERTS: What's so bad about
22 that? I mean, given her door example, for example, why
23 should the accidental or perhaps you would say she --
24 you know, he or she knew that the person was close, why
25 should that constitute misdemeanor crime of domestic

1 violence?

2 MS. EISENSTEIN: Well, in part because
3 Congress intended to cover batteries. And the way --
4 not only at common law, but also in modern -- under the
5 common and generic understanding of battery, define a
6 battery offense as -- only as to the causation of the
7 resulting harm.

8 And keep in mind, reckless conduct -- and
9 petitioner avoids the fact of what reckless conduct is.
10 A reckless conduct is not an involuntary or a negligent,
11 or even an accidental act. Reckless conduct is
12 voluntary conduct. It's conduct where an individual
13 chooses to act in conscious disregard of a substantial
14 and known risk of harm.

15 So if the -- if the person in your example,
16 Mr. Chief Justice, slammed the door not realizing the
17 fingers were there, that's not going to be reckless
18 conduct at all. That would be negligence at best.

19 CHIEF JUSTICE ROBERTS: Well, I mean, you
20 don't know; you're running away. What if it's a close
21 call? You don't pause to think, well, gosh, maybe he's
22 close enough or she's close enough that this will, you
23 know, hurt his fingers or something. I mean, is -- is
24 that recklessness?

25 MS. EISENSTEIN: I think to the degree to

1 which the -- the individual consciously disregards the
2 substantial --

3 CHIEF JUSTICE ROBERTS: Yeah. You don't
4 want to turn around and see how close the person chasing
5 you is, if you slam the door, oh, gosh, that's going to
6 pinch the fingers or something.

7 MS. EISENSTEIN: But -- but I think that
8 the -- what feels wrong about the hypothetical is not
9 the -- the degree of intent of the act or -- it's the
10 extent to which that person may be justified in the door
11 slamming, which was that this was an act, perhaps, of
12 self-defense.

13 I think the more prototypical examples are
14 situations where -- that this Court highlighted in
15 Castleman, where an individual takes intentional action
16 to make contact with their loved one and does so in a
17 way that is reckless as to whether, for example, if
18 there's a push, reckless as to whether his wife simply
19 stumbles backwards or falls down and injures herself.
20 And that's the way States overwhelmingly frame their
21 assault and battery statutes.

22 And that's what --

23 JUSTICE KENNEDY: Justice Ginsburg's example
24 of operating an automobile: A husband is arguing with
25 his wife and speeds through a stop sign and the wife is

1 injured. What results under the statute?

2 MS. EISENSTEIN: Well, Your Honor, I think
3 that under an assault, a general assault and battery
4 statute, it's theoretically possible that a person could
5 be convicted of battering his or her spouse under those
6 circumstances. I don't think that's problematic for two
7 reasons. One is I think it's an extremely narrow
8 category of offenses, and Petitioner has pointed to no
9 actual examples.

10 JUSTICE KENNEDY: Well, the -- the main
11 statute says "recklessly causes bodily injury."

12 MS. EISENSTEIN: So there -- and I agree
13 with Your Honor that in theory, that type of offense
14 could constitute a battery. But to the degree to which
15 that's prosecuted where -- in the real world that's
16 prosecuted where the -- a domestic family member is the
17 sole victim and that that is only a misdemeanor, that
18 there's not sufficiently severe injury or other factors
19 that rise to the level of a felony offense, which would
20 be disqualifying under its own right, I don't think that
21 that level of overbreadth is problematic under the
22 statute.

23 JUSTICE KENNEDY: I'm not talking about
24 overbreadth. I'm talking about interpretation of the
25 statute. The statute includes a misdemeanor, so that

1 disposes of that part of your answer. The statute
2 covers a misdemeanor.

3 MS. EISENSTEIN: Correct, Your Honor. But
4 what I'm -- but my point is that the type of scenario
5 that -- that is posited where both there would be a
6 reckless, sort of a generally reckless conduct, that the
7 victim happens to be, by -- by chance the family member,
8 as opposed to another member of the public, and thus
9 qualifying as a Section 922(g)(9) predicate is narrow
10 indeed.

11 And the converse of that is striking. While
12 the -- while the overbreadth of the hypothetical --

13 JUSTICE KENNEDY: It's narrow, but it seems
14 to qualify under the statute. I don't quite understand
15 your answer. You said, oh, well, it's narrow. But it's
16 still a violation under the meaning of the statute.

17 MS. EISENSTEIN: I think it's a violation
18 under the meaning of general assault and battery, but I
19 also think that there's nothing wrong with -- as Justice
20 Kagan suggested, with treating that type of offense as
21 disqualifying.

22 JUSTICE KENNEDY: So you're saying that the
23 example is covered by the statute.

24 MS. EISENSTEIN: Yes, Your Honor.

25 And I think, though, that to the extent to

1 which that raises a concern in terms of overbreadth, I
2 don't think this Court should be concerned about that,
3 because what Congress was worried about wasn't an
4 overbreadth of these prosecutions against family
5 members. Instead, they went to a real underreporting,
6 under prosecution and the low conviction rates of these
7 offenses. This was the problem that Congress addressed.
8 And the whole reason why they extended the firearms ban
9 from felony offenses --

10 CHIEF JUSTICE ROBERTS: Which of our --
11 which of our cases say that you don't have to worry if
12 the categorical approach covers conduct of the sort
13 Justice Kennedy was talking about because Congress meant
14 to cover other things?

15 MS. EISENSTEIN: Well, Your Honor, I think
16 that you're right that the categorical approach and its
17 strictures can cause real problems if there's any degree
18 of overbreadth in the statute. But that's exactly why,
19 in interpreting Section 922(g)(9) and what Congress's
20 purpose was is extremely important here. Because to the
21 extent to which Petitioner's view is adopted, which
22 would require only intentional conduct to qualify, any
23 degree of overbreadth such as Justice Kennedy's one
24 example in a State, of California of a driving offense
25 would exclude the entire statute, because --

1 CHIEF JUSTICE ROBERTS: I'm not sure
2 "overbreadth" -- I'm not sure overbreadth is the right
3 legal term.

4 So you think it's an appropriate defense
5 under a prosecution here that the type of conduct I was
6 charged with is really not what Congress had in mind?
7 Yes, it fits under the terms of the statute, but it's
8 not what Congress had in mind. And there's going to be
9 argument about that.

10 MS. EISENSTEIN: No, Your Honor. The -- my
11 argument is the opposite, which is that this Court
12 should effectuate Congress's purpose by giving
13 Section 922(g)(9) the meaning that Congress intended,
14 which is to cover generally applicable assault and
15 battery statutes regardless of whether, on a rare
16 instance, they may end up covering an individual who was
17 recklessly driving and injured a family member.

18 JUSTICE GINSBURG: I feel like your answer
19 was that the statute does cover it, but it's most
20 unlikely that a prosecutor would bring such a case. I
21 think that's what you started to say about it.

22 MS. EISENSTEIN: That's correct, Your Honor.
23 I think it's unlikely that those prosecutions would be
24 brought in the State offense on those -- under those
25 circumstances and that there's no reason to drastically

1 constrain the interpretation of Section 922(g)(9).

2 JUSTICE KENNEDY: Do we have precedent from
3 this Court saying it's okay, we can trust the
4 prosecutors to do the right thing? Can you cite me a
5 case that says that?

6 MS. EISENSTEIN: Your Honor, I -- I -- I do
7 not -- I do not represent that. But what I do suggest
8 is what we're looking at here is not what prosecutors
9 might do under the -- in the State -- the underlying
10 State prosecution, but what Congress intended to cover
11 under Section 922(g)(9). So in order to avoid a
12 hypothetical scenario where a family member may be
13 injured in a nondomestic context, the result of
14 requiring intentionality as to both the harm and the --
15 the touching would be to eliminate all of the statutes
16 that Congress, in fact, intended to cover.

17 CHIEF JUSTICE ROBERTS: I don't know how --

18 JUSTICE GINSBURG: What about the -- what
19 about the -- the rule of lenity? We are reviewing a
20 decision of a court that divided, and both judges wrote
21 very strong opinions. And we also have 18 U.S.C.
22 Section 16, where a crime of violence doesn't include
23 reckless -- a reckless state of mind. So putting those
24 together, the other statute, plus that this was a split
25 decision, why doesn't the rule of lenity apply?

1 MS. EISENSTEIN: Your Honor, the rule of
2 lenity only applies where there is grievous ambiguity in
3 the statute. And I respectfully submit that there is no
4 such grievous ambiguity. Congress's intent was clear,
5 and this Court already found as much, in Castleman and
6 in Hayes, which is that there was a class of offenses
7 that Congress intended to cover by the statute which
8 were generally applicable assault and battery statutes.

9 And the rule that Petitioner suggests would
10 exclude all of those offenses and would frustrate that
11 clear purpose of Congress, so lenity doesn't apply for
12 that reason. And there's no ambiguity, not only as to
13 the purpose, but as to -- as to what battery itself
14 encompasses. Petitioners have tried to argue that
15 battery, either at common law or in contemporary
16 practice, that there was some requirement of an intent
17 to do harm. And the overwhelming weight and universal
18 weight of authority points the opposite direction. Even
19 the sources cited by Petitioner establish that at common
20 law, there was no requirement for the intent to do harm.
21 And certainly States, in adopting their assault and
22 battery provisions, have modeled that -- that
23 formulation.

24 Another way to look at this is -- outside of
25 the common law, is the way that Taylor examined the

1 statute of burglary under the ACCA offense, which is
2 to -- rather than turning just to the common law, as to
3 view this as covering generic battery. And -- and when
4 looked at that way under the contemporary practice, the
5 Model Penal Code and the uniform opinion of the courts
6 of appeals and commentators all have concluded that
7 battery was not limited to a purpose to cause a
8 resulting harm, but included contact that could be
9 reckless.

10 In the face of Petitioner's hypotheticals,
11 Petitioner struggles to even conceive of a hypothetical
12 example of where there is a reckless battery that
13 would -- against a family member that would not
14 constitute a misdemeanor crime of domestic violence.

15 The converse is that Congress enacted
16 Section 19 -- 922(g)(9) to address a vital -- vital
17 public safety problem. It identified those who had been
18 convicted of battering their family members as posing a
19 dramatically increased risk of perpetrating future gun
20 violence against their family.

21 This Court should continue to interpret
22 Section 922(g)(9) in light of that compelling purpose.

23 If there are no further questions.

24 JUSTICE THOMAS: Ms. Eisenstein, one
25 question.

1 Can you give me -- this is a misdemeanor
2 violation. It suspends a constitutional right. Can you
3 give me another area where a misdemeanor violation
4 suspends a constitutional right?

5 MS. EISENSTEIN: Your Honor, I -- I'm
6 thinking about that, but I think that the -- the
7 question is not -- as I understand Your Honor's
8 question, the culpability necessarily of the act or in
9 terms of the offense --

10 JUSTICE THOMAS: Well, I'm -- I'm looking at
11 the -- you're saying that recklessness is sufficient to
12 trigger a violation -- misdemeanor violation of domestic
13 conduct that results in a lifetime ban on possession of
14 a gun, which, at least as of now, is still a
15 constitutional right.

16 MS. EISENSTEIN: Your Honor, to address --

17 JUSTICE THOMAS: Can you think of another
18 constitutional right that can be suspended based upon a
19 misdemeanor violation of a State law?

20 MS. EISENSTEIN: Your Honor, while I can't
21 think of specifically triggered by a misdemeanor
22 violation, other examples, for example, in the First
23 Amendment context, have allowed for suspension or
24 limitation of a right to free speech or even free
25 association in contexts where there is a compelling

1 interest and risks associated in some cases less than a
2 compelling interest under intermediate scrutiny.

3 JUSTICE THOMAS: I'm -- this is a -- how
4 long is this suspension of the right to own a firearm?

5 MS. EISENSTEIN: Your Honor, the right is
6 suspended indefinitely.

7 JUSTICE THOMAS: Okay. So can you think of
8 a First Amendment suspension or a suspension of a First
9 Amendment right that is permanent?

10 MS. EISENSTEIN: Your Honor, it's not
11 necessarily permanent as to the individual, but it may
12 be permanent as to a particular harm. And here Congress
13 decided to intervene at the first instance that an
14 individual is convicted of battering their family
15 members because it -- it relied on substantial and
16 well-documented evidence that those individuals pose
17 a -- a long-term and substantial --

18 JUSTICE THOMAS: So in each of these cases
19 had -- did any of the defendants, or in this case
20 Petitioners, use a weapon against a family member?

21 MS. EISENSTEIN: In neither case did they,
22 but these Petitioners --

23 JUSTICE THOMAS: So that the -- again, the
24 suspension is not directly related to the use of the
25 weapon. It is a suspension that is actually indirectly

1 related or actually unrelated. It's just a family
2 member's involved in a misdemeanor violation; therefore,
3 a constitutional right is suspended.

4 MS. EISENSTEIN: Yes, Your Honor, but I
5 believe that in terms of the -- the relationship between
6 Congress's decision to try to prevent domestic gun
7 violence and its means of doing so --

8 JUSTICE THOMAS: Even if that -- if even if
9 that violence is unrelated to the use -- the possession
10 of a gun?

11 MS. EISENSTEIN: Well, Your Honor, I think
12 the studies that Congress relied upon in formulating
13 the -- the misdemeanor crime of domestic violence ban
14 didn't -- were directly about the use of a gun because
15 what they showed is that individuals who have previously
16 been -- battered their spouses, pose up to a six-fold
17 greater risk of killing, by a gun, their family member.

18 JUSTICE THOMAS: Well, let's -- let's say
19 that a publisher is reckless about the use of children,
20 and what could be considered indecent displays and that
21 that triggers a violation of, say, a hypothetical law
22 against the use of children in these ads, and let's say
23 it's a misdemeanor violation. Could you suspend that
24 publisher's right to ever publish again?

25 MS. EISENSTEIN: Your Honor, I don't think

1 you could suspend the right to ever publish again, but I
2 think that you could limit, for example, the manner and
3 means by which publisher --

4 JUSTICE THOMAS: So how is that different
5 from suspending your Second Amendment right?

6 MS. EISENSTEIN: Your Honor, I think that in
7 terms of a -- the compelling purpose that was identified
8 here, which was the prevention of gun violence and the
9 individual nature of the -- of the underlying offense,
10 so here this isn't a misdemeanor crime directed at any
11 person at large. These are misdemeanor batteries
12 directed at members -- specified members of the -- of
13 that individual's family. Congress --

14 JUSTICE THOMAS: Would you have a better
15 case if this were a gun crime?

16 MS. EISENSTEIN: Your Honor, I think it
17 would be perhaps a better case, except that the evidence
18 that Congress relied on and -- and that the courts below
19 that have addressed the Second Amendment concerns that
20 Your Honor is highlighting have even gone into a more
21 robust analysis of the -- the evidence that ties initial
22 crimes of battery to future gun violence. That evidence
23 is extremely strong. And Congress recognized that this
24 was a recurring escalating offense.

25 Petitioners are good examples of this.

1 While they didn't reach, thankfully, the point where
2 they were able to reach for a firearm and were
3 prohibited from having a firearm under Federal law, they
4 have each been convicted multiple times of domestic
5 violence offenses and possess the firearms in close
6 proximity. So these aren't individuals who had long-ago
7 convictions and are suffering from that ban.

8 Congress also contemplated exactly the
9 lifetime nature of the ban that Your Honor suggested and
10 left it in States' hands to resolve that by allowing
11 States to expunge or pardon convictions in cases where
12 an individual either petitions to do so or in some
13 States as a matter of course.

14 So -- so I understand Your Honor's concern
15 that -- that this is a potential infringement of
16 individual's Second Amendment rights, but I believe that
17 Congress has identified a compelling purpose and has
18 found a reasonable means of achieving that purpose.

19 JUSTICE KENNEDY: I -- I suppose one answer
20 is -- just a partial answer to Justice Thomas's question
21 is SORNA, a violation of sexual offenders have to
22 register before they can travel in interstate commerce.
23 But that's not a prevention from traveling at all. It's
24 just a -- it's a restriction.

25 MS. EISENSTEIN: Well, Your Honor, it's a

1 prevention in requiring prophylactic measures in order
2 to prevent a substantial -- because Congress has
3 identified a substantial risk of harm from people
4 identified as committing those types of offenses.

5 JUSTICE BREYER: Do it -- what is it we
6 have -- they raised this in their brief. They say,
7 let's focus on the cases in which there is a misdemeanor
8 battery conducted without an intentional or knowing
9 state of mind.

10 Now, they say if this, in fact, triggers --
11 this is the question Justice Thomas asked -- if this, in
12 fact, triggers a lifetime ban on the use of a gun, then
13 do we not have to decide something we haven't decided?
14 And I think it would be a major question.

15 What constitutes a reasonable regulation of
16 guns under the Second Amendment given Heller and the
17 other cases with which I disagreed? But --

18 (Laughter.)

19 JUSTICE BREYER: -- the point is, she's
20 raised a question, and she wants us to answer that
21 question. Is this a reasonable regulation given -- you
22 just heard the argument, in part -- given the distance
23 and so forth? So what am I supposed to say, in your
24 opinion, in respect to that rather important question?

25 MS. EISENSTEIN: Your Honor, two answers to

1 that. First is this comes up only in the nature of
2 constitutional avoidance, not as a direct Second
3 Amendment challenge.

4 As we've already argued, this statute, in
5 the government's view, is clear that misdemeanor crimes
6 of domestic violence include batteries, whether they be
7 committed --

8 JUSTICE BREYER: Stop you at the first
9 point. Your argument on the first point is that she did
10 not raise the constitutional question. She said in
11 order to avoid a constitutional question, we should
12 decide it in thus such and such a way.

13 So one answer would be, well, maybe so. We
14 aren't facing the constitutional question. We are
15 simply facing the question of what Congress intended.
16 And if this does raise a constitutional question, so be
17 it. And then there will, in a future case, come up with
18 that question. So we -- or our point is, we don't have
19 to decide that here.

20 MS. EISENSTEIN: That's correct, Your Honor.

21 JUSTICE BREYER: Thank you.

22 MS. EISENSTEIN: If there are no further
23 questions.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Two minutes, Ms. Villa.

1 REBUTTAL ARGUMENT OF VIRGINIA G. VILLA
 2 ON BEHALF OF THE PETITIONERS,
 3 APPOINTED BY THIS COURT

4 MS. VILLA: Your Honor, Congress did not use
 5 the word "battery" in 921(a)(33). And so the question
 6 is, is whether, under the rule of lenity, the Court can
 7 then say battery is the standard that we are going to
 8 use in order to construe this. And it's a push me, pull
 9 you because it is the use of force, but that doesn't
 10 have to be a prior battery conviction. It could be any
 11 misdemeanor conviction that has a state of recklessness
 12 for the state of mind and results in any -- any
 13 involvement of a domestic partner.

14 And I think that there is enough play within
 15 the statute -- statute itself, as well as the extent of
 16 the common law, so -- to say that that is a reason for
 17 applying the rule of lenity.

18 There is also the underlying constitutional
 19 questions. And this Court, as in being able to abrogate
 20 a constitutional right indefinitely based on reckless
 21 conduct, I believe also presents extreme due process
 22 concerns. And for those reasons, I believe that the
 23 Court should conclude that under these circumstances, it
 24 is best to avoid that question and to construe the
 25 statute the way that is consistent with the words.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 10:55 a.m., the case in the
5 above-entitled matter was submitted.)

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