

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, it 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 involuntarily or a
11 negligent, or even an accidental act. Reckless conduct
12 is 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 that
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 felon 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 displace 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.

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Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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