























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.

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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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