

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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SALVATORE DELLAGATTI, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 23-825  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Pages: 1 through 74  
Place: Washington, D.C.  
Date: November 12, 2024

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5 v. ) No. 23-825

6 UNITED STATES, )

7 Respondent. )

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10 Washington, D.C.

11 Tuesday, November 12, 2024

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13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 11:13 a.m.

16

17 APPEARANCES:

18 ALLON KEDEM, ESQUIRE, Washington, D.C.; on behalf of  
19 the Petitioner.

20 ERIC J. FEIGIN, Deputy Solicitor General, Department  
21 of Justice, Washington, D.C.; on behalf of the  
22 Respondent.

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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 23-825, Delligatti versus United States.

Mr. Kedem.

ORAL ARGUMENT OF ALLON KEDEM  
ON BEHALF OF THE PETITIONER

MR. KEDEM: Mr. Chief Justice, and may it please the Court:

Using physical force against another requires taking some step to bring force into contact with the victim. That can happen directly, as with a kick or a punch, or indirectly, such as giving a gentle push to someone teetering on the edge of a cliff. But it does not involve an offense that can be committed by pure omission, such as failing to render aid to someone suffering from a natural disorder.

The government's attempt to reverse-engineer the use of force from the presence of injury is contrary to logic and plain meaning. It also runs counter to this Court's instructions that "use" means active

1 employment, that physical force is violent  
2 force, and that "against another" means making  
3 contact with another.

4           The government's appeal to practical  
5 consequences, in addition to being irrelevant to  
6 interpreting the statute's text, is similarly  
7 unpersuasive. At the time the Elements Clause  
8 was adopted, all or nearly all of the statutes  
9 identified by the government would have  
10 satisfied the Residual Clause, and, per the  
11 government's hedging here, many will satisfy the  
12 Elements Clause too regardless of whether crimes  
13 of omission are excluded.

14           A failure to counteract harm may be  
15 morally and legally culpable and it may merit  
16 severe punishment, but it does not categorically  
17 involve the use of violent physical force  
18 against another.

19           I would welcome the Court's questions.

20           JUSTICE THOMAS: So, in your thinking,  
21 if you poison someone and cause -- thereby cause  
22 the death of that person, the -- that is, in  
23 your argument, under your argument, treated  
24 differently from withholding critical, say,  
25 heart medicine when someone is in the process of

1 having a heart attack?

2 MR. KEDEM: That's correct, Your  
3 Honor. So this Court has described poison as  
4 having forceful physical properties that you  
5 would have put into contact with the victim by  
6 putting it in their drink. That's a very  
7 different situation than someone who potentially  
8 through natural causes slips into distress and  
9 you don't take any action to put them into  
10 contact with any force, and there may not be any  
11 force involved if, for instance, it's a  
12 congenital disorder.

13 So there's no force at all and you  
14 wouldn't have used that force actively.

15 JUSTICE SOTOMAYOR: I'm sorry, I don't  
16 know -- you almost seem to be talking proximate  
17 cause. There's no force in the poison itself in  
18 what you did. The force is in the nature of the  
19 substance that goes through the person's body.  
20 Similarly, there's no violent force in a gentle  
21 push of a 90-year-old down the stairs. You  
22 could probably do it with a finger. So there's  
23 no violent force there.

24 What you seem to be saying is, if I  
25 have a duty to act and I choose not to, I'm not

1 responsible for the force that I let work on  
2 this human being? That's your position,  
3 correct?

4 MR. KEDEM: No, Your Honor. So, in  
5 both the poisoning example and giving a gentle  
6 push to someone who falls down the stairs or off  
7 of a cliff, you are not directly applying  
8 violent physical force. It's a gentle touch or  
9 you're just letting the molecules of the poison  
10 fall from your hand. But there is still an  
11 application of violent physical force when they  
12 hit the ground at high speed.

13 JUSTICE SOTOMAYOR: Well, I -- I would  
14 tell someone who's freezing in the snow that  
15 there's an application of winter conditions to  
16 their body to kill them.

17 MR. KEDEM: Sure. And in that  
18 instance, again, you might describe the elements  
19 as involved -- involving violent physical force,  
20 which perhaps you could describe as using  
21 indirectly if, for instance, you throw them out  
22 into the snow.

23 But that's a very different situation  
24 than a pure omission, where someone, let's say,  
25 has an allergic reaction --

1 JUSTICE SOTOMAYOR: It's not a pure  
2 omission. It's an obligation to act.

3 MR. KEDEM: Sure.

4 JUSTICE SOTOMAYOR: I mean --

5 MR. KEDEM: It's -- it's --

6 JUSTICE SOTOMAYOR: -- I could be in a  
7 restaurant watching someone die, but I have no  
8 obligation even if I know the Heimlich  
9 remover -- maneuver to do it. However, if it's  
10 a child and my child, I have an obligation to  
11 try to save them.

12 MR. KEDEM: That's correct. And it is  
13 a serious offense --

14 JUSTICE SOTOMAYOR: So I'm letting  
15 nature use its force to kill that child.

16 MR. KEDEM: So it -- there's no  
17 dispute that it is criminally culpable behavior  
18 and can be punished severely. But the question  
19 is, is there violent force being applied to the  
20 victim and have you actively employed that  
21 force? And in a situation where, for instance,  
22 you just don't provide medicine or nutrition to  
23 someone and they slowly expire, there is no  
24 violent physical force of any sort. It's not  
25 like hitting the ground at high speed.

1                   And, moreover, you haven't taken any  
2                   step to actively employ any force.

3                   JUSTICE KAGAN: I guess I'm not sure I  
4                   get that. In the poison case, you're agreeing  
5                   that it's not my putting the poison into the  
6                   drink that's violent physical force; rather,  
7                   it's the way the poison acts on the body.

8                   MR. KEDEM: Right.

9                   JUSTICE KAGAN: And in the  
10                  withholding-of-medication situation, it's  
11                  similarly the way the disease acts against the  
12                  body, and -- and you're enabling that disease to  
13                  run.

14                  MR. KEDEM: Right. So I think this  
15                  Court has analogized poison to sort of like a  
16                  little explosive device that detonates when you  
17                  swallow it. I don't think the same is true, for  
18                  instance, to just the absence of chemical inputs  
19                  as necessary to keep your cells going. That's  
20                  not analogous to violent physical force.

21                  And even in the poisoning example, you  
22                  are still taking some step to bring the person  
23                  into contact with that poison, without which  
24                  they wouldn't have the force applied to them at  
25                  all, even indirectly.

1 JUSTICE BARRETT: So, if I take a  
2 hostage and then just let the hostage starve,  
3 which side of the line does that fall on for  
4 you?

5 MR. KEDEM: So putting aside that that  
6 would probably be a threat or, you know,  
7 attempted use of force --

8 JUSTICE BARRETT: But physical force.  
9 Just --

10 MR. KEDEM: Sure. So --

11 JUSTICE BARRETT: -- physical force.

12 MR. KEDEM: -- so let's say there was  
13 someone sleeping in a room and you lock them in  
14 the room and then they slowly expire. From our  
15 perspective, that would not involve a  
16 application of violent physical force, and you  
17 could say you used the locks, but you haven't  
18 actually used force against them.

19 JUSTICE GORSUCH: Mr. --

20 JUSTICE BARRETT: Well, what do you do  
21 with the fact that Stokeling especially seems to  
22 measure force not from the front end, like force  
23 applied, but from the back end on what does the  
24 force -- what -- what is its result? It seems  
25 to me that for murder, necessarily, the result

1 was pretty extreme.

2 MR. KEDEM: So, respectfully, I -- I  
3 don't think Stokeling takes that position. In  
4 fact, the whole discussion in Stokeling was how  
5 much force do you need to apply, what's the  
6 amount of force, to overcome resistance, which,  
7 again, the Court wasn't focused on whether the  
8 person was injured or not. It was can you do it  
9 just sort of by gently grabbing it, or does it  
10 need to be more -- more vigorous.

11 JUSTICE BARRETT: But the measure of  
12 the force, if you're prying someone's fingers  
13 off of a purse --

14 MR. KEDEM: Right.

15 JUSTICE BARRETT: -- I mean, the  
16 measure of force --

17 MR. KEDEM: Yeah.

18 JUSTICE BARRETT: -- I wouldn't  
19 describe that as severe or aggressive.

20 MR. KEDEM: So -- so that -- and that  
21 was the back-and-forth, but everyone was focused  
22 on that same question. So they were still  
23 focused on how much force was involved.

24 You look also, for instance, at -- at  
25 Castleman. So Castleman gives the example of a

1 squeeze of an arm that causes a bruise, which  
2 the Court said would count as common law force  
3 for purposes of domestic violence but would not  
4 count as violent force for generic purposes,  
5 which shows that even the direct application of  
6 enough force that sometimes causes an injury, a  
7 bruise, is not enough because it's still not a  
8 high enough degree of force.

9 JUSTICE GORSUCH: Mr. Kedem, you know,  
10 our intuition is that often omissions are just  
11 as bad as acts and they are --

12 MR. KEDEM: Sure.

13 JUSTICE GORSUCH: -- sometimes hard to  
14 distinguish. And, certainly, it can be murder  
15 when there's a preexisting duty of care that you  
16 then omit to fulfill.

17 MR. KEDEM: Right.

18 JUSTICE GORSUCH: All right. But  
19 there are some places where we have gone well  
20 beyond that common law rule and imposed a duty  
21 of care even for the good Samaritan.

22 So let's take a hypothetical. Someone  
23 comes across the street, sees that the manhole  
24 cover's open, doesn't rescue the little old lady  
25 who steps into it --

1 MR. KEDEM: Mm-hmm.

2 JUSTICE GORSUCH: -- because this  
3 person has animus toward little old ladies. Now  
4 an extreme hypothetical. Justice Breyer might  
5 be proud.

6 (Laughter.)

7 JUSTICE GORSUCH: That would be murder  
8 in a -- in a state with a good Samaritan  
9 statute. And physical force, I guess the  
10 gravity's of -- I mean, what -- what more  
11 powerful force in the universe is there than  
12 that? It -- it -- would that in your view fall  
13 within the government's understanding of what  
14 would qualify as -- as -- as the application of  
15 violent force?

16 MR. KEDEM: It would have to. The  
17 government's view essentially is anytime you  
18 have a bad result, you know that there must have  
19 been violent physical force, which means that  
20 not only would the death or other injury in your  
21 example be violent physical force, it would also  
22 be involved in literally every death since the  
23 beginning of time because, in every death,  
24 something bad happens because you either are  
25 injured or run out of the cellular inputs

1 necessary to sustain life.

2 JUSTICE GORSUCH: And if I might just  
3 ask a -- a slightly different question. This is  
4 one that -- yeah, I don't know of any more  
5 powerful force in the universe than gravity, but  
6 any -- I wonder whether this statute is  
7 divisible between acts and omissions, and that  
8 isn't something either side explored.

9 MR. KEDEM: Mm-hmm.

10 JUSTICE GORSUCH: I -- I know it won't  
11 help your client, okay, but perhaps -- I -- I'd  
12 welcome your thoughts on whether --

13 MR. KEDEM: Sure.

14 JUSTICE GORSUCH: -- you think that  
15 this statute is, in fact, divisible.

16 MR. KEDEM: So this statute is not.  
17 We have opinions from the court of appeals, New  
18 York's highest court, saying that the statute  
19 can be committed either by affirmative acts or  
20 by omissions, including pure omissions.

21 So we have the Wong case, where there  
22 were two caregivers, one of whom shook the  
23 child, the other of whom failed to render aid.

24 JUSTICE GORSUCH: Yes. And -- and  
25 they're duty-of-care cases, classic --

1 MR. KEDEM: Sure.

2 JUSTICE GORSUCH: -- common law  
3 duty-of-care cases, so you have to prove a duty  
4 and then the failure to fulfill it.

5 MR. KEDEM: That's right.

6 JUSTICE GORSUCH: Very different than  
7 killing somebody or ordering a hit on somebody  
8 by act.

9 MR. KEDEM: Yes.

10 JUSTICE GORSUCH: I mean, giving them  
11 a pistol in a brown paper bag is a little  
12 different.

13 MR. KEDEM: It -- it is. Presumably,  
14 if the government thought that this statute was  
15 divisible, they would have argued it, but I  
16 think your question really highlights an  
17 important point, which is it just so happens  
18 that this murder statute can be satisfied either  
19 by acts or omissions.

20 But the government's argument would  
21 have to be the same even if New York had a  
22 murder-by-omission statute that could only be  
23 satisfied by a pure omission in which there was  
24 no actus reus whatsoever, other than just having  
25 a duty that you failed to satisfy. And the

1 government's argument would have to be, in every  
2 single instance of that murder-by-omission  
3 statute, violent physical force was involved.

4 JUSTICE JACKSON: And I take it your  
5 argument is that when we look at the federal  
6 statute and its definition of "crime of  
7 violence," that, really, what is at issue here  
8 is a -- is the conduct of the defendant?

9 MR. KEDEM: That's correct.

10 JUSTICE JACKSON: That it's not  
11 whether force is operating in the universe --

12 MR. KEDEM: That's correct.

13 JUSTICE JACKSON: -- to achieve a  
14 certain result, but the plain text here seems to  
15 suggest that we're looking for use, attempted  
16 use, or threatened use of physical force and --  
17 and that at least the common sense view of that  
18 is that it's the defendant acting to use,  
19 threaten to use, or attempting to use.

20 Is that -- is that the thrust of your  
21 argument?

22 MR. KEDEM: It -- it is, Your Honor.  
23 And I would emphasize there are lots of criminal  
24 statutes, including in 924, in fact, even in  
25 924(c), that focus on outcomes.

1           So subsection (c)(5)(B) applies a  
2     heightened penalty if death results. The  
3     Elements Clause, by contrast, is, as you've  
4     described it, focused on the method, a  
5     particular way of committing an offense that  
6     Congress associated with armed career criminal  
7     behavior.

8           JUSTICE JACKSON: In some of the --

9           JUSTICE KAGAN: Well, I take the point  
10    that ordinary understandings of what it means to  
11    use violent force might not cover omissions, but  
12    so too it wouldn't cover poison. And we have  
13    said that it does cover poison.

14          MR. KEDEM: Right.

15          JUSTICE KAGAN: So we're not really  
16    operating in a world in which it's completely  
17    sort of ordinary Joe understandings of the  
18    phrase.

19          MR. KEDEM: So, respectfully, Your  
20    Honor, I agree poison is sort of the outer  
21    limit, but I do think the Court was making a  
22    point there, which is that in response to the  
23    defendant's argument in Castleman that  
24    essentially you had to apply the force directly  
25    in order for it to count, the Court said no, if

1 you put -- put poison in tea, it's very much  
2 like pulling the trigger of a gun. It's a  
3 gentle pull of the trigger. That's not the  
4 violent force. The violent force is later, when  
5 the bullet makes impact.

6 But still, in both of those instances,  
7 you're still doing something to bring the victim  
8 into contact with that force which may be wholly  
9 absent in the case of a pure omission.

10 JUSTICE JACKSON: You're still using  
11 something.

12 MR. KEDEM: You're still using  
13 actively.

14 JUSTICE JACKSON: You're still using  
15 actively. Let me ask you --

16 JUSTICE KAGAN: How about if, instead  
17 of putting poison in, I knew that there was  
18 something in the refrigerator which had gone  
19 very bad and it was completely toxic.

20 MR. KEDEM: Mm-hmm.

21 JUSTICE KAGAN: And I said to my worst  
22 enemy: Why don't you eat that cake in the  
23 refrigerator.

24 MR. KEDEM: Yeah.

25 JUSTICE KAGAN: Where does that fall

1 on your -- in your -- you know, which side of  
2 the line?

3 MR. KEDEM: Yeah. That sounds a lot  
4 like the food in the fridge is poison and you're  
5 just tricking them into consuming it.

6 JUSTICE KAGAN: Correct. And so?

7 MR. KEDEM: And so it would count as  
8 use of violent physical force.

9 JUSTICE KAGAN: Even though now you  
10 haven't done anything really.

11 MR. KEDEM: Well, respectfully, you  
12 have taken some step to bring them into contact  
13 with it, without which, if you hadn't taken that  
14 step, they wouldn't consume what was in the  
15 fridge.

16 JUSTICE KAGAN: Well, I mean, in any  
17 of these cases, including in the supposedly pure  
18 omission cases, we can find some step. I mean,  
19 when you're withholding medicine from the ailing  
20 person, probably there's some step that you've  
21 taken that prevents the ailing person from  
22 getting that medicine herself or, you know,  
23 there's some step that you've taken to put  
24 yourself in a -- in a position of duty to that  
25 person.

1           I mean, there's always something that  
2 we can look to if -- if you're going so far as  
3 to say that my telling the person to eat the  
4 cake in the refrigerator is an action.

5           MR. KEDEM: So I think you have to ask  
6 yourself two questions. One, is there even  
7 violent physical force involved? In the  
8 instance in which someone expires because they  
9 don't have the right medication, usually, you  
10 would not describe that as involving violent  
11 physical force.

12           So, if a septuagenarian slips into a  
13 coma and then doesn't eat and as a result dies,  
14 no one is going to describe that death as  
15 involving violent physical force. So the  
16 question is, would you describe it as involving  
17 violent physical force because there was someone  
18 who was supposed to be there feeding the  
19 nutrition tube -- tube but failed to do so?

20           JUSTICE JACKSON: And is that because  
21 the context is violent physical force because  
22 we're in a statute that relates to firearms,  
23 that Congress clearly was trying to get at a  
24 certain category of person?

25           MR. KEDEM: That's correct.

1 JUSTICE JACKSON: The person who is of  
2 the type that they would engage in these kinds  
3 of crimes that present, you know, risks of  
4 violence in this way?

5 MR. KEDEM: That -- that --

6 JUSTICE JACKSON: I mean, I thought  
7 that was the sort of context. So all of  
8 these --

9 MR. KEDEM: That's right.

10 JUSTICE JACKSON: -- hypotheticals  
11 about inaction, you know, even though there  
12 might be a step or not a step, you know, setting  
13 that aside, the point is they're not even in the  
14 realm of the kind of thing this statute was  
15 about?

16 MR. KEDEM: That's -- that's right.  
17 We're defining a felony crime of violence. And  
18 Congress had a very specific theory.

19 JUSTICE ALITO: Well, pick -- picking  
20 up on that, do you -- would you argue that your  
21 client is not the kind of armed career criminal  
22 that Congress was trying to get at when they  
23 enacted this statute?

24 MR. KEDEM: We would not argue that,  
25 Your Honor. We're focused here on the type of

1 offense, and that's because the Elements Clause  
2 requires an assessment of the elements of the  
3 offense and whether violent physical force is  
4 present in all instances.

5 JUSTICE BARRETT: Well, counsel,  
6 picking --

7 JUSTICE ALITO: But the question is  
8 whether your client was convicted of a crime of  
9 violence, right?

10 MR. KEDEM: That's correct.

11 JUSTICE ALITO: And some of the -- I  
12 mean, these are fascinating legal arguments.  
13 Some of the people who have come here to hear  
14 this case may not know much about the facts of  
15 the case. So what was the offense for which  
16 your client was convicted?

17 MR. KEDEM: Hiring someone in order to  
18 commit a murder.

19 JUSTICE ALITO: And that, in your  
20 submission, is not a crime of violence?

21 MR. KEDEM: It does not have as an  
22 element the use of violent physical force.

23 JUSTICE JACKSON: And that's a  
24 function of the categorical approach, right?

25 MR. KEDEM: That -- that's correct.

1 JUSTICE JACKSON: It's not -- you're  
2 not talking about your client; you're talking  
3 about the statute.

4 MR. KEDEM: That's -- that's correct,  
5 Your Honor. Congress had a very specific theory  
6 when it wrote the Elements Clause. It was not  
7 aiming for all or even the most serious  
8 offenses. It was aiming for a certain type of  
9 offense, actively using violent physical force  
10 against another, the character of which changes  
11 when you add a gun to the mix.

12 JUSTICE BARRETT: But, counsel, we  
13 also said in Castleman and Stokeling that we  
14 look at the nature of the crime and that  
15 influences the scope of the interpretation. And  
16 so, if interpreting the statute a certain way or  
17 interpreting violent force a certain way would  
18 have the effect of excluding and making the  
19 statute virtually inapplicable to most of the  
20 statutes in the states, robbery or domestic  
21 violence or, so here, I mean, murder?

22 MR. KEDEM: Yeah. So -- so a few  
23 points on that.

24 First of all, Stokeling was an  
25 instance where the Court was interpreting a

1 common law term of art, "force," that made an  
2 appearance both in the federal statute and in  
3 the state statute, so it made a lot of sense to  
4 look at the states to see how they used that  
5 term.

6 But, beyond that, the Court is not  
7 convince -- it doesn't engage in a sort of  
8 nose-counting exercise. And even with respect  
9 to states that have murder statutes, it's not as  
10 if they're all going to be in or all going to be  
11 out. So take New York's second degree murder as  
12 an example. It's got five subdivisions. Two of  
13 them are already out because of Borden because  
14 they can be committed recklessly. There are two  
15 others that can only be committed by an act, and  
16 so they're going to stay in regardless at least  
17 as we interpret them.

18 And that leaves just the one under  
19 which Mr. Delligatti -- that served as the  
20 predicate for Mr. Delligatti's arrest.

21 JUSTICE BARRETT: So you think there  
22 would still be in many states many murder  
23 convictions that would still qualify?

24 MR. KEDEM: Yes.

25 JUSTICE BARRETT: It just seems -- I

1 mean, you can understand why stepping back,  
2 which is, I think, Justice Alito's --

3 MR. KEDEM: Right.

4 JUSTICE BARRETT: -- point to, you  
5 know, those observing the argument in the  
6 courtroom --

7 MR. KEDEM: Right.

8 JUSTICE BARRETT: -- to say that  
9 murder isn't a crime of violence and will rarely  
10 trigger -- trigger the provision here seems a  
11 little counterintuitive.

12 MR. KEDEM: It -- it -- it -- I  
13 understand that because, if you were to ask  
14 someone is murder a crime of violence, they  
15 would say of course. In the vast majority of  
16 instances, the way you commit murder is going to  
17 be violence, which makes it a perfect fit for  
18 the Residual Clause, the idea that under the  
19 Residual Clause --

20 JUSTICE BARRETT: But you think that  
21 Congress thought it was only covered by the  
22 Residual Clause and that it wasn't an elements  
23 offense, murder?

24 MR. KEDEM: So I think that if  
25 Congress wanted us to do this sort of as a

1 category assessment, it would have enumerated  
2 murder the way it did for some other offenses.  
3 Instead, what it said is we want you to look at  
4 whether their element of the offense involved  
5 the use of violent physical force because,  
6 again, if you add a gun to that sort of  
7 offense -- so a robbery offense, for instance,  
8 robbery is obviously dangerous enough, but when  
9 you add a gun to the mix, the danger -- gets --  
10 goes up exponentially. It changes the  
11 character.

12           The same is not true for an omission  
13 offense. Obviously, omission offenses can be  
14 horrible and can be punished severely, but you  
15 don't change anything about it when you add a  
16 gun, and so it's not the sort of armed career  
17 criminal behavior that Congress was aimed at.

18           JUSTICE JACKSON: And didn't Congress  
19 really home in on this? I mean, you -- you talk  
20 about at least some of the legislative history  
21 for the Criminal Code Reform Act in 1981, and I  
22 was struck by a particular example in a report  
23 that Congress -- the Senate report, where the  
24 report talks about a dam operator who threatens  
25 to refuse to open the floodgates during a flood

1 and thereby places residents' lives in jeopardy.  
2 And the report says, "Assuming the operator had  
3 some legal duty to act, his threat would be to  
4 engage in unlawful conduct dangerous to human  
5 life, which is not a crime of violence since he  
6 did not use or threaten to use physical force."

7           So it seems as though we had examples  
8 in the record that Congress was aware of  
9 omission and made pretty clear that when you  
10 don't act, you know, you're not threatening to  
11 use physical force in the way that they  
12 intended.

13           MR. KEDEM: That -- that's correct.  
14 It's remarkably specific. And I understand that  
15 not all members of the Court are taken with  
16 legislative history, but we can rely on it just  
17 as a sort of contemporaneous use of the relevant  
18 terms in context.

19           One of the most remarkable things  
20 about the government's brief is that they  
21 haven't identified a single instance, and they  
22 looked high and low, both in published opinions  
23 and also in news articles. Every single one of  
24 their examples was someone who had used  
25 something actively, not passively, not the sort

1 of passive benefit theory. They were described  
2 as, for instance, NASA using the moon's  
3 gravitational field by shooting a rocket up into  
4 space and then aiming their satellite at the  
5 right point to make contact with the moon's  
6 gravitational field.

7           This idea that you can use something  
8 just by passively benefiting from it, the  
9 government wasn't able to identify a single  
10 real-world instance of it, in contrast to the  
11 one that you -- you've just identified, Your  
12 Honor.

13           CHIEF JUSTICE ROBERTS: How about I  
14 used the rain to -- as an excuse to stay  
15 indoors?

16           MR. KEDEM: So I think, first of all,  
17 you can use the rain in that sort of conceptual  
18 sense. It's very different from using something  
19 in a physical sense like physical force. And  
20 even in that instance, you don't have the  
21 "against another" or "against the person or  
22 property of another" phrase, which also is a  
23 sort of physical phrase.

24           Again, in the government's brief, they  
25 don't identify any instance other than one that

1 they make up themselves that uses "use" and  
2 "against another" in combination. And the  
3 example they come up with is he used the  
4 victim's disease against her. But, there, it's  
5 against her interests, not against her person.

6 So, again, the government presumably  
7 spent a lot of time trying to come up with this  
8 passive benefit sense of "use" in combination  
9 with "against another." And if this is all that  
10 they can come up with, I think we can conclude  
11 it's not a normal way of speaking.

12 JUSTICE KAGAN: In most of our cases  
13 where we've talked about what "use" is doing in  
14 this phrase, we've talked about it as a  
15 requirement of mens rea. In other words, to use  
16 physical force means to have some understanding  
17 in your head of what that physical force is  
18 supposed to achieve.

19 MR. KEDEM: Right.

20 JUSTICE KAGAN: So we haven't  
21 suggested that it really adds to the physical  
22 force language with respect to the actus reus.

23 MR. KEDEM: So I think that's correct,  
24 but let me just sort of trace it through, and I  
25 think it actually comes out where we're asking

1 you to.

2           So the first appearance of  
3 interpreting "use" in 924(c) is in Bailey, where  
4 the word "use" is in combination with a firearm  
5 on -- in (c)(1), and the Court looks at  
6 dictionary definitions and say they imply action  
7 and implementation, and it adopts an active  
8 employment sense of the word "use." And it  
9 rejects the government's argument that you can  
10 use a firearm even if it's just stashed in the  
11 closet because you derive some benefit from it.  
12 So it's -- it's an actus reus interpretation of  
13 the word "use."

14           Then that was ported over to an  
15 Elements Clause in Leocal and then again in  
16 Borden. And you're right that Leocal and Borden  
17 were both about the mental state. But they  
18 adopted wholesale the active employment sense of  
19 use, and that active employment sense came from  
20 what Bailey said was the ordinary meaning of the  
21 term.

22           So, unless somehow they ported over  
23 just the mental state part of active employment,  
24 even though mental state wasn't at issue in  
25 Bailey, then I think you bring the whole thing

1 along with it.

2 JUSTICE GORSUCH: If we -- if we adopt  
3 the government's view of "use" as not being  
4 personally employing some instrument but  
5 allowing the laws of physics to take their  
6 course --

7 MR. KEDEM: Mm-hmm.

8 JUSTICE GORSUCH: -- what was the  
9 point of us deciding that this statute is  
10 different than the -- the -- the -- the domestic  
11 violence situation?

12 MR. KEDEM: Sure.

13 JUSTICE GORSUCH: Aren't we just back  
14 to that?

15 MR. KEDEM: Yes. So --

16 JUSTICE GORSUCH: Because anybody who  
17 wishes to use the laws of nature to harm another  
18 is -- is -- is convictable and -- I mean, this  
19 is just a statutory enhancement. But your  
20 client's going to spend a lot of years in jail.  
21 This is just how many much more, how many more,  
22 right?

23 MR. KEDEM: That's correct, yes.

24 So -- and -- and I think there are some  
25 pretty --

1 JUSTICE GORSUCH: And -- and we don't  
2 really care about your client here, do we?

3 MR. KEDEM: Well, I can't --

4 JUSTICE GORSUCH: We're trying to get  
5 the law right.

6 MR. KEDEM: I -- I -- I wouldn't  
7 presume to speak for you. Obviously --

8 JUSTICE GORSUCH: Yeah.

9 MR. KEDEM: -- we do care about the  
10 extra 60 months that he would spend in prison.

11 JUSTICE GORSUCH: That's what we're  
12 talking about. How many years is he already  
13 spending?

14 MR. KEDEM: So, regardless of the --  
15 separate and apart from the (c) -- (c)(4) --  
16 (c)(3)(b) conviction, it's 240 months.

17 JUSTICE GORSUCH: All right.

18 MR. KEDEM: Yeah.

19 JUSTICE GORSUCH: Back to my question.

20 MR. KEDEM: Yes. So the domestic  
21 violence statute, very briefly, had a very  
22 different function, which was to close a  
23 loophole that made it lawful for certain  
24 misdemeanor offenders to possess a gun, and the  
25 Court was concerned that if it read the clause

1 narrowly, it would render that provision  
2 inoperative in a number of states.

3 Here, there's no dispute that,  
4 obviously, murder is going to stay very illegal  
5 everywhere, and our reading would not render the  
6 Elements Clause inoperative in any state.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Justice Thomas?

10 JUSTICE THOMAS: Are you really  
11 talking about your --

12 MR. KEDEM: Oh, I apologize.

13 JUSTICE THOMAS: Oh, that's okay.

14 (Laughter.)

15 CHIEF JUSTICE ROBERTS: Thank you.

16 JUSTICE THOMAS: Are you really  
17 talking about your client? We make this  
18 distinction between action and omission. Are we  
19 talking -- because we're in the world of theory  
20 now, we're not really talking about what your  
21 client did, as Justice Alito alluded.

22 MR. KEDEM: That's right. We're here  
23 as a consequence of invalidation of the Residual  
24 Clause.

25 JUSTICE THOMAS: So would your case be

1 different if we did not use the categorical  
2 approach?

3 MR. KEDEM: I suppose it would, but,  
4 although this Court has considered abandoning  
5 the categorical approach for the Residual Clause  
6 and at least one justice has for the -- for the  
7 enumerated offenses, I'm not aware that any  
8 justice has considered it for the Elements  
9 Clause because it requires as an element the use  
10 of violent physical force.

11 JUSTICE THOMAS: But, I mean, the --  
12 we're -- we're -- I think it's fair to say,  
13 though, that we are discussing something that  
14 bears no factual relationship to your case.

15 MR. KEDEM: So I -- I accept that,  
16 Your Honor, and would respectfully suggest you  
17 essentially take the position you did in Borden,  
18 which was to say whatever it is, criticism about  
19 the categorical approach, but then to give the  
20 Elements Clause its natural meaning.

21 CHIEF JUSTICE ROBERTS: Justice Alito?  
22 Justice Sotomayor?  
23 Justice Jackson?  
24 I mean, Justice Barrett?  
25 Thank you, counsel.

1 Mr. Feigin.

2 ORAL ARGUMENT OF ERIC J. FEIGIN

3 ON BEHALF OF THE RESPONDENT

4 MR. FEIGIN: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 It's hard to believe that we're  
7 actually here debating whether murder is a crime  
8 of violence, as I think Petitioner just  
9 acknowledged. This is one case where the law  
10 already tracks common sense. Castleman tells us  
11 that internal force, like a disease, can be  
12 physical force. It also tells us that physical  
13 injury must result from physical force. And the  
14 Borden plurality recognizes that someone uses  
15 force against the person of another when he  
16 makes force his instrument to cause that person  
17 harm through -- through force. I used "force"  
18 twice there, but you -- I think you get the  
19 point.

20 And there's really no basis in law or  
21 logic to draw a distinction between the person  
22 who gently sprinkles poison in the cup and the  
23 person who, hating the victim, just withholds  
24 the antidote.

25 By urging that distinction, Petitioner

1 is asking this Court to discard literally two  
2 millennia of common law that treat acts of  
3 omission just like other acts.

4 He's asking this Court to cut out any  
5 number of canonically violent murder, robbery,  
6 and assault offenses out of 924(c), the  
7 definition of "violent felony" under the Armed  
8 Career Criminal Act, and the definition of  
9 "misdemeanor, crime of domestic violence" as  
10 relevant to 922(g)(9).

11 And he would make all three of those  
12 statutes -- he's asking this Court to make all  
13 three of those statutes turn on distinctions so  
14 arbitrary, unprecedented, and bizarre that it  
15 would make application of the statutes -- again,  
16 Your Honor, I use this word with -- with  
17 respect -- truly absurd.

18 I would like to address a -- a couple  
19 of his points, but, if the Court has questions,  
20 I realize my light just flashed.

21 JUSTICE THOMAS: Yeah. Mr. Feigin, we  
22 normally think, though, of -- think of force as  
23 coming from the perpetrator, not from some  
24 outside force, like gravity or some internal  
25 disease. So how do we get from where you are to

1 where he is?

2 I -- I think his argument actually  
3 does make -- is -- does have a common-sense  
4 value to it.

5 MR. FEIGIN: Well, Your Honor, I  
6 think, as Castleman demonstrates, we know that  
7 whatever force causes death can be an internal  
8 force. It can be the action of -- of --  
9 whatever action within the body is induced by  
10 poison.

11 We also know from Castleman one of the  
12 examples it uses is a disease. So the actual  
13 death-causing force can be a purely internal  
14 force. If I know you have a weak heart and I  
15 frighten you and you die, your body is attacking  
16 itself. That's also true if you intentionally  
17 and torturously starve a child. That's -- the  
18 starvation causes the body to attack itself. It  
19 starts eating itself away because it has no  
20 other source of nourishment.

21 If you're asking me about whether that  
22 force has to be in some way -- I think the words  
23 Petitioner uses in the brief are "unleashed or  
24 channeled in some way by the defendant" -- I  
25 think that's somewhat of a gerrymandered

1 requirement.

2 He's trying to do it to catch things  
3 like, you know, your -- the wind -- your -- the  
4 wind catches your sail, or the example in our  
5 brief where you're involuntary placed on a raft,  
6 you see which way the current is going, and you  
7 use the current to get you to shore without  
8 doing anything.

9 But that channeling requirement is  
10 equally satisfied in an omission case, where you  
11 can stop it -- force is going to occur. You can  
12 stop it, you should stop it, and you don't stop  
13 it because not stopping it accomplishes your  
14 purpose.

15 JUSTICE GORSUCH: Mr. Feigin, on that  
16 score -- yeah, and if we're going to talk about  
17 common sense, that's a good place to start  
18 sometimes -- your view, I think, would capture  
19 the good Samaritan example as well and make that  
20 subject to an additional enhancement under ACCA,  
21 right?

22 MR. FEIGIN: I don't think that's  
23 necessarily true, Your Honor.

24 JUSTICE GORSUCH: Why -- why -- why  
25 not? Just to set the table again, we have

1 somebody, a passerby on the street who doesn't  
2 like little old ladies and intentionally allows  
3 someone to fall into and die, and the physical  
4 force -- your -- your view is gravity's good  
5 enough. I don't have to push her.

6 And -- and now that would depart from  
7 the common law, where there's normally a duty,  
8 but -- a preexisting duty, but, here, we have a  
9 good Samaritan statute. So that is an ACCA  
10 offense in the government's view? And why  
11 wouldn't that defy common sense, if it does?

12 MR. FEIGIN: Not necessarily, Your  
13 Honor, and let me explain why. I'll take just  
14 one second to unpack this.

15 It -- it turns on what -- it -- it  
16 turns on how you interpret "use of physical  
17 force against the person or property of  
18 another." And we think --

19 JUSTICE GORSUCH: Yeah, but you -- you  
20 use -- you use rivers and currents. And what --  
21 what's wrong with gravity?

22 MR. FEIGIN: So -- it -- gravity is  
23 fine. It's the problem of you're postulating  
24 that some state has some kind of aberrant  
25 duty --

1 JUSTICE GORSUCH: Oh, no, it's not  
2 aberrant. Some states do. And many in Europe  
3 have a good -- good Samaritan laws that --

4 MR. FEIGIN: So, Your Honor --

5 JUSTICE GORSUCH: -- impose  
6 affirmative duties that didn't exist at common  
7 law.

8 MR. FEIGIN: -- we -- we think that in  
9 order to use physical force against the person  
10 of another, there has to be, number one, a  
11 deliberate choice. That's the phrase --

12 JUSTICE GORSUCH: Sure, I got that.

13 MR. FEIGIN: -- that -- that's what  
14 the Borden plurality tells us.

15 And, two, the common definitions have  
16 used, like, "avail oneself of," we do think have  
17 an element of causation in there and that's  
18 what's causing --

19 JUSTICE GORSUCH: Yeah. No, I've --  
20 I -- it -- it -- there's no doubt that my  
21 failure to act caused this person's death. I've  
22 got causation and I have intention. I have mens  
23 rea.

24 Now I understand that when there's a  
25 common law duty, our intuition is that that's

1 really bad. When a parent doesn't feed a child,  
2 when a doctor doesn't care for a patient,  
3 that -- that's problematical.

4 I'm testing how far -- and I don't see  
5 what line you would draw between that and a good  
6 Samaritan statute, which, again, many states  
7 have.

8 MR. FEIGIN: So causation includes  
9 both cause and fact, which we have here, and  
10 proximate cause. And I think the proximate  
11 cause inquiry at --

12 JUSTICE GORSUCH: Let's say I have  
13 that box checked too.

14 MR. FEIGIN: Well, Your Honor, I think  
15 where we part ways is I don't think I  
16 necessarily think you have that box checked in  
17 your example, and here's why.

18 Proximate -- the proximate cause  
19 that's built into the statute here, I think, can  
20 be informed by the common law of duty as of  
21 1984.

22 JUSTICE GORSUCH: No. No, no, no.  
23 No. Again -- again, the -- I have a statute  
24 that's a good Samaritan statute that imposes a  
25 higher duty on ordinary people to be good

1 Samaritans, and so it creates a proximate cause  
2 test that's different from a common law test.

3 MR. FEIGIN: So --

4 JUSTICE GORSUCH: You're just  
5 resisting the hypothetical, and I can understand  
6 why --

7 MR. FEIGIN: -- your --

8 JUSTICE GORSUCH: -- because the  
9 consequence of your interpretation has its own  
10 common-sense problem.

11 MR. FEIGIN: With -- with --

12 JUSTICE GORSUCH: It would capture all  
13 omissions cases, wherever the duty comes from.

14 MR. FEIGIN: With respect, Your Honor,  
15 if I could just explain. I -- I don't think I'm  
16 resisting the hypothetical. I think I'm just  
17 explaining that, as we normally do in  
18 interpreting these kinds of statutes with the  
19 categorical approach, there is some concept of  
20 generic federal law.

21 And, here, what federal law might mean  
22 by "use," its concept of proximate cause would  
23 be informed by the common law scope of duties as  
24 of 1984 if --

25 JUSTICE GORSUCH: Where -- where does

1 that come from? I didn't see that anywhere in  
2 your brief. That's -- that's new here at the  
3 lectern. Where does that come from?

4 MR. FEIGIN: Well, Your Honor, I think  
5 that's just how we've been interpreting these  
6 statutes. There's always -- it's always a  
7 question of federal law.

8 JUSTICE GORSUCH: "Use" -- the term  
9 "use" depends upon common law duties in 1984?

10 MR. FEIGIN: Well, Your Honor, we  
11 think "use" --

12 JUSTICE GORSUCH: Has any court ever  
13 said that?

14 MR. FEIGIN: -- incorporates the  
15 proximate cause requirement.

16 JUSTICE GORSUCH: Yeah, yeah, but --  
17 but it --

18 MR. FEIGIN: It hasn't -- Your Honor,  
19 it hasn't come up because, until the Third  
20 Circuit --

21 JUSTICE GORSUCH: Right. But will  
22 after this case.

23 JUSTICE JACKSON: Mr. Feigin, can I  
24 ask you --

25 MR. FEIGIN: Yeah.

1 JUSTICE JACKSON: -- just piggybacking  
2 on what Justice Gorsuch is saying.

3 I -- I guess I'm just trying to  
4 understand the government's position on what it  
5 means to use physical force against the person  
6 of another in an omission case.

7 So let's -- let's take this  
8 hypothetical. Say you have a lifeguard, and she  
9 has a duty of care to rescue children in the  
10 pool. A kid who she hates, hates, gets into the  
11 pool entirely of their own volition -- is it  
12 your position that she uses physical force  
13 against this kid if she doesn't jump into the  
14 water when she sees him drowning?

15 MR. FEIGIN: Yes.

16 JUSTICE JACKSON: Okay. So -- how can  
17 that possibly be? I mean, you're saying she  
18 uses physical force, and that means no action  
19 but an intention that this victim succumb to a  
20 harm that she didn't put into place, that she  
21 had really nothing to do with, but she sees it  
22 happening?

23 MR. FEIGIN: So, Your Honor, she is  
24 using physical force against the person of  
25 another because, again, she could stop it, she

1 is legally required to stop it, and she doesn't  
2 stop it because she wants the victim to die.

3 And to use a dictionary definition --

4 JUSTICE JACKSON: So it's her -- it's  
5 only her mental state that is doing the work of  
6 her using physical force?

7 MR. FEIGIN: No, Your Honor. It's the  
8 combination of those things.

9 Under just a plain dictionary  
10 definition of "use," she has availed herself of  
11 the force, she has had enjoyment of the force,  
12 she's made the force the -- her instrument to  
13 accomplish her purpose. She's --

14 JUSTICE JACKSON: All right. Let me  
15 ask you about the other parts --

16 JUSTICE KAGAN: I --

17 JUSTICE JACKSON: -- of the statute,  
18 the attempt and threaten. Same situation.

19 How -- how does it work in an omission  
20 case for this lifeguard to threaten the --  
21 the -- the -- the use of physical force against  
22 this kid? Is it because she says something to  
23 him that would make it a threat?

24 Like, I don't understand how omission  
25 works with respect to the rest of the statute.

1                   MR. FEIGIN: Well, Your Honor, I --  
2                   if -- if I could depart from the lifeguard  
3                   example, where it might be -- I mean, I could --

4                   JUSTICE JACKSON: No, no, I want the  
5                   lifeguard example.

6                   MR. FEIGIN: You want an example of  
7                   the life --

8                   JUSTICE JACKSON: I -- I -- I want to  
9                   ask you -- I want to ask you: In the lifeguard  
10                  example, if she says, hey, kid, if you get into  
11                  the water but can't swim or start to drown, I'm  
12                  not coming to get you, is that a threat of use  
13                  of physical force in your view? Or how else  
14                  would you accomplish the threat part of this?

15                  MR. FEIGIN: Well, two points, Your  
16                  Honor.

17                  Number one, I think, if that were  
18                  generally considered a threat for purposes of  
19                  the substantive statute that the person also has  
20                  to violate under state or federal law, then  
21                  perhaps that would be the threatened use of  
22                  force.

23                  But it's easy to see threatened use of  
24                  force in omission cases in other examples.

25                  Suppose you're the caretaker for an

1 old, sickly man, and you tell him: Look, I'm  
2 not going to give you your medicine today, and  
3 you're going to die unless you give me a -- the  
4 combination to that safe over there, where you  
5 keep all your gold bars. That is threatening an  
6 omission. I think everyone would consider that  
7 threatening an omission. And it's --

8 JUSTICE JACKSON: But is it a  
9 violent --

10 MR. FEIGIN: -- I think it would also  
11 constitute --

12 JUSTICE JACKSON: -- is it a crime of  
13 violence? I mean, this was the point that  
14 Justice Gorsuch, I thought, was making before,  
15 that you may have culpable conduct under the  
16 law, but what we're looking for for the purpose  
17 of this enhancement is violent conduct, violent  
18 criminal conduct.

19 And I guess what I'm worried about is  
20 the government's interpretation that has, you  
21 know, lifeguards and caregivers and people who  
22 very intentionally and perhaps even criminally  
23 withhold their duties actually being put in the  
24 bucket of violence even though they don't act.

25 MR. FEIGIN: Well, Your Honor, if you

1 look at page 550 of the Court's decision in  
2 Stokeling, you'll see one dictionary definition  
3 of "violence" that defines it in terms of the  
4 causation of physical harm. And in these  
5 cases -- I mean, let's not lose sight of it --  
6 someone is using harm -- I mean, I realize --

7 JUSTICE JACKSON: But they're not  
8 using, Mr. Feigin. I mean, that's my -- my  
9 problem is I don't understand how you get use to  
10 inaction, how you get use out of inaction.

11 MR. FEIGIN: So, Your Honor, maybe a  
12 few examples. He accuses us of having no  
13 examples. I think, if you look at our brief,  
14 you'll see a number of them. But let me give  
15 you an example that comes basically straight  
16 from one of this Court's own opinions, which is  
17 let's take a look at the Borden plurality again.

18 The Borden plurality has an example of  
19 use of physical force against the person of  
20 another when someone is driving a car, sees  
21 someone come in front of them, and keeps, in the  
22 Court's words, plowing or -- sorry -- the  
23 plurality's words, plowing ahead and hits them.

24 JUSTICE JACKSON: Action. Action.  
25 They're moving, right?

1           MR. FEIGIN: Well, Your Honor, I --  
2           this is all just a game of -- I -- I -- I think  
3           this is what one might describe as just sort of  
4           a terminological word game. I could also --

5           JUSTICE KAGAN: I mean, when you  
6           ask -- answer these questions, Mr. Feigin,  
7           are -- are you thinking about the use of  
8           physical force as an ordinary meaning kind of  
9           question, or are you saying it has a specialized  
10          legal meaning?

11          MR. FEIGIN: I think it's an ordinary  
12          meaning that's informed by the common law. So,  
13          Your Honor, the -- to the ordinary meaning  
14          point, to -- on the Borden plurality example, I  
15          could easily describe that conduct as simply  
16          omitting to hit the brakes or omitting to turn  
17          the steering wheel.

18          JUSTICE KAGAN: And -- and then we'd  
19          say you're playing word games, I mean, because I  
20          think, when you push your foot on the  
21          accelerator and drive your car into somebody,  
22          that's not really such a hard case.

23          MR. FEIGIN: And --

24          JUSTICE KAGAN: But some of these are  
25          hard cases, like the lifeguard example, where we

1 would say, you know, the lifeguard is just  
2 sitting there, and this is not like what a  
3 normal person would think of as a use of  
4 physical force.

5           So it's almost as though we have to  
6 pick our absurdity. You started with one  
7 absurdity. We would say that murder is not a  
8 crime of violence. That seems pretty absurd.  
9 But here's another absurdity. The lifeguard is  
10 just sitting up there watching somebody, is  
11 using physical force. That seems pretty weird  
12 too.

13           MR. FEIGIN: So, Your Honor, I think  
14 your two questions, as Your Honor probably  
15 recognizes, really pair together here. And the  
16 reason that we have two millennia of law that  
17 don't draw this distinction is precisely because  
18 it is a word game.

19           If you look at, for example, the  
20 Hall -- the Hall treatise that we cite, that's  
21 from 1960 but still substantially predates the  
22 ACCA, or you even want to go further back and  
23 you look at the 1875 Wharton treatise, you'll  
24 see that the Wharton treatise, for example, in  
25 Section 72 says even sleeping can be an

1 affirmative act and it can lead to liability  
2 when there's something you're supposed to be  
3 doing but you're not doing it.

4 And the common law sources that we  
5 cite, both Hall and Territory against Manton,  
6 which is an 1888 case, have no trouble  
7 describing those kinds of omission cases as  
8 involving the use of force.

9 CHIEF JUSTICE ROBERTS: Counsel,  
10 getting -- I'd like to get back to the lifeguard  
11 also. You say the force she was -- she was  
12 using the force of gravity. And was she using  
13 it before the child jumped in the pool?

14 MR. FEIGIN: I -- no, Your Honor. And  
15 part of --

16 CHIEF JUSTICE ROBERTS: So she did  
17 something that suddenly gravity was there?

18 MR. FEIGIN: Well, Your Honor, what  
19 happened -- first of all, I don't think the  
20 force here is the gravity. I think the force is  
21 whatever --

22 CHIEF JUSTICE ROBERTS: I thought --  
23 I --

24 MR. FEIGIN: -- whatever happens  
25 within the body to -- I mean, you -- you can

1 conceive of it in a number of ways. It could be  
2 the force of the water. It could be the  
3 gravity. It could be, as --

4 CHIEF JUSTICE ROBERTS: What is the  
5 force of the water?

6 MR. FEIGIN: I mean, I don't know if  
7 she -- I guess the pool is probably not deep  
8 enough for her to get crushed in it, but it's --  
9 the gravity is dragging her down in the pool.  
10 There's an internal process going on in her body  
11 whereby her life is sucked away from her. I  
12 apologize I'm not a doctor. I couldn't quite  
13 tell you what happens with asphyxiation. But  
14 the body's going to be attacking itself there,  
15 gasping for air --

16 CHIEF JUSTICE ROBERTS: But I -- I  
17 mean --

18 MR. FEIGIN: -- eventually to die.

19 CHIEF JUSTICE ROBERTS: -- I -- it's  
20 the same thing Justice Kagan said. The  
21 lifeguard's not doing anything.

22 MR. FEIGIN: Well, Your Honor, to your  
23 specific point, I could easily reframe it as the  
24 lifeguard withholding to -- from the lifeguard's  
25 duty to rescue the child. And, you know, if you

1 think of the -- I mean, again, I -- I -- I think  
2 this is easier to see, and I'll translate the  
3 lifeguard example in a second, but easier to see  
4 in the -- in the Borden car-plowing-ahead  
5 example. I mean, if I just --

6 CHIEF JUSTICE ROBERTS: The car -- car  
7 plowing ahead is different than the lifeguard  
8 doing nothing?

9 MR. FEIGIN: Well, I don't think --  
10 well, okay, Your Honor, I think the lifeguard is  
11 using the force there because the lifeguard is  
12 using some physical force that causes the  
13 victim's death, and the lifeguard wants the  
14 victim to die. The lifeguard is availing --

15 CHIEF JUSTICE ROBERTS: The lifeguard  
16 wants the -- all that, that's beside the point.  
17 Your submission is that somebody who's just  
18 sitting there is using force, the force of  
19 gravity --

20 MR. FEIGIN: Yes. I mean, under a  
21 plain --

22 CHIEF JUSTICE ROBERTS: -- and the  
23 force of the water.

24 MR. FEIGIN: -- under a plain  
25 definition, he's taking advantage of the force,

1 he is availing himself of the force, he's  
2 enjoying the force --

3 JUSTICE GORSUCH: All right.

4 MR. FEIGIN: -- he's making the force  
5 his instrument. Oh, I don't have --

6 CHIEF JUSTICE ROBERTS: But he's not  
7 doing anything.

8 JUSTICE GORSUCH: Mr. -- Mr. --

9 JUSTICE KAVANAUGH: Well, don't --

10 JUSTICE GORSUCH: -- Mr. Feigin, if I  
11 might just follow up on this. Is there any  
12 death that's intended and caused by somebody  
13 doing nothing, like our lifeguard, that wouldn't  
14 involve the use of violent physical force  
15 because every death is going to be affected by  
16 gravity or water or -- and the body will fight  
17 itself in your terms? I mean, that's how death  
18 occurs, I guess --

19 MR. FEIGIN: It is.

20 JUSTICE GORSUCH: -- in the  
21 government's view.

22 MR. FEIGIN: So, Your Honor, to answer  
23 your --

24 JUSTICE GORSUCH: What -- what death  
25 wouldn't qualify?

1                   MR. FEIGIN: So, to answer your  
2 specific question, I don't think every death  
3 fits the -- involves the -- someone using  
4 physical force against the person of another.

5                   JUSTICE GORSUCH: Well, if the  
6 lifeguard can do it.

7                   MR. FEIGIN: But I do think that every  
8 death does involve physical force. The physical  
9 force requirement --

10                  JUSTICE GORSUCH: Right. Every death  
11 involves physical force. And why wouldn't it  
12 all be violent? Because it's all extremely  
13 unpleasant.

14                  MR. FEIGIN: We do think every death  
15 involves physical force and violent physical  
16 force --

17                  JUSTICE GORSUCH: Okay.

18                  MR. FEIGIN: -- within the meaning of  
19 Curtis Johnson.

20                  JUSTICE GORSUCH: Okay. All right.  
21 Got it. Got it.

22                  MR. FEIGIN: The -- not all of them  
23 are going to satisfy this statute because not  
24 all of them are going --

25                  JUSTICE GORSUCH: They're all violent

1 physical force, though?

2 MR. FEIGIN: Yes, Your Honor --

3 JUSTICE GORSUCH: Okay. All right.

4 MR. FEIGIN: -- because -- because  
5 there is --

6 JUSTICE GORSUCH: All right. I've got  
7 another question for you.

8 MR. FEIGIN: It -- the --

9 JUSTICE GORSUCH: I got it. I got it.

10 MR. FEIGIN: Sorry. Can I add --

11 JUSTICE GORSUCH: Sure.

12 MR. FEIGIN: Sorry. I just wanted to  
13 add the point that the physical force  
14 requirement of the statute is not to carve out  
15 things like murder and physical harm. It's to  
16 carve out, like, property crimes, fraud --

17 JUSTICE GORSUCH: Yeah.

18 MR. FEIGIN: -- that sort of thing.

19 JUSTICE GORSUCH: But all murders are,  
20 by definition, the use of violent physical  
21 force, I think. I think it has to be.

22 MR. FEIGIN: Subject to the proximate  
23 cause caveat I was discussing with you  
24 earlier --

25 JUSTICE GORSUCH: Mm-hmm. Yeah, yeah.

1 Yeah. With the lifeguard, yeah.

2 MR. FEIGIN: -- Justice Gorsuch, yes.

3 JUSTICE GORSUCH: Okay. Okay.

4 JUSTICE SOTOMAYOR: And the mens rea.

5 MR. FEIGIN: And it's going to be --

6 JUSTICE GORSUCH: And the mens rea.

7 MR. FEIGIN: And the mens rea --

8 JUSTICE GORSUCH: Yeah, yeah.

9 MR. FEIGIN: -- of course, that --

10 JUSTICE GORSUCH: Yeah.

11 MR. FEIGIN: -- that I also mentioned  
12 at that time.

13 JUSTICE GORSUCH: But -- all right.

14 It -- it -- kind of a little strange to think  
15 that Congress meant by this, if we want to talk  
16 about common sense, that every -- every death is  
17 encompassed so long as I can meet mens rea and  
18 causation.

19 But put that aside. I really think  
20 you're struggling to -- if I'm honest with you,  
21 to try and defend a position that just has  
22 nothing to do with this case, right? We've got  
23 a defendant over here who ordered a hit job. I  
24 mean, that's what everyone's -- the common sense  
25 on your side.

1 MR. FEIGIN: And handed them the gun.

2 JUSTICE GORSUCH: And handed them gun  
3 in a paper bag and the whole nine yards. It's  
4 like out of a movie. And here we are talking  
5 about lifeguards and omissions, and it makes me  
6 wonder whether, again, as I asked your friend on  
7 the other side, anybody considered whether this  
8 statute might be divisible because  
9 traditionally, traditionally, murder statutes  
10 encompass two very distinct things, acts  
11 ordering the hit job and omissions where there  
12 is a preexisting duty of care. Very different.

13 Is that -- is that resonate to you at  
14 all? It might help you.

15 MR. FEIGIN: Yeah, Your Honor, I think  
16 we might make divisibility arguments with  
17 respect to some statutes, perhaps including this  
18 one, if the Court were to rule against us.  
19 Obviously, we won in the Second Circuit and we  
20 didn't make a divisibility argument because we  
21 were already --

22 JUSTICE GORSUCH: Well, if that's the  
23 case, maybe we go back to Justice Kavanaugh's  
24 question from the last case. Why wouldn't we  
25 remand this to ask that -- we resolve that first

1 before we start talking about lifeguards and  
2 every murder being encompassed within this?

3 MR. FEIGIN: Well, Your Honor --

4 JUSTICE GORSUCH: Every death.

5 MR. FEIGIN: -- I think this is going  
6 to come up in any number of cases whether or not  
7 the Court resolves it here and -- because, as we  
8 point out in our brief, 35 states by statute  
9 include omission liability, and one common way  
10 to do that is just to define the word "act" to  
11 include omissions. That's the way you -- New  
12 York does it.

13 JUSTICE GORSUCH: Well, omissions plus  
14 duty of care is what they do.

15 MR. FEIGIN: Yes.

16 JUSTICE GORSUCH: And so, again, if --  
17 if you -- if you won here, you'd have a great  
18 precedent maybe that some of the others would be  
19 divisible too. I would have thought that would  
20 have been useful to you.

21 MR. FEIGIN: Well, Your Honor, we did  
22 not make that argument --

23 JUSTICE GORSUCH: I know that.

24 MR. FEIGIN: -- below. It's a state  
25 law argument that we don't think is

1 appropriately made in this Court. And we do  
2 want to be --

3 JUSTICE GORSUCH: I agree with that.

4 JUSTICE KAGAN: Well, what would a --

5 JUSTICE KAVANAUGH: Is --

6 JUSTICE KAGAN: -- divisibility  
7 argument as to this statute look like, if I can  
8 ask?

9 MR. FEIGIN: I think we would probably  
10 be relying on cases, and New York has some,  
11 where, because omission liability, as Justice  
12 Gorsuch just pointed out, requires a duty as  
13 well, there are cases where the jury  
14 instructions, for example, were found deficient  
15 because they didn't specifically allege the  
16 duty.

17 But there are cases, and we -- yeah,  
18 there are a couple of examples of them in the  
19 briefs, where something like horrific child  
20 neglect, the -- and also beating a child are  
21 kind of charged together. So I think the -- the  
22 outcome of that would be a little bit in doubt.

23 And that's actually the only reason  
24 why we've said that all the statutes listed in  
25 our appendix are just at risk. It's the same

1 thing the Court said in *Voisine*. They're at  
2 risk because we're not quite sure how the  
3 divisibility analysis is going to shake out.

4 But there's no question that we've  
5 already lost in the Third Circuit. There's no  
6 question that that's going to affect charges  
7 under the hate crimes statute in that circuit.

8 It's going -- and we think, if the  
9 Court were to rule against us, it would affect  
10 charges in the hate crime statute in other  
11 cases. The Buffalo supermarket shooter has  
12 raised this very argument and preserved it. And  
13 if we lose it here, then the hate crimes statute  
14 is not a crime of violence, killing somebody  
15 because you are biased against their race,  
16 because it could possibly be committed by the  
17 conduct of being a daycare worker and realizing  
18 that there's a bomb in the building and deciding  
19 you're only going to save the children of one  
20 race.

21 JUSTICE JACKSON: So is this just --

22 CHIEF JUSTICE ROBERTS: Are you  
23 fighting the categorical approach?

24 JUSTICE JACKSON: Yes.

25 CHIEF JUSTICE ROBERTS: I mean, isn't

1 that the root of your problem? And what -- I  
2 guess, I mean, the divisibility argument has a  
3 lot going for it, but is it -- how does it fit  
4 with the categorical approach?

5 MR. FEIGIN: Your Honor, not every  
6 statute is going to be -- be divisible by act  
7 versus omission. It's very common to define  
8 "act" as, you know, by -- to define it by  
9 omission. That's the model penal code  
10 definition in Section 1.137.

11 But, as to fighting the categorical  
12 approach, we had that fight a few years ago and  
13 we lost, so I am no longer --

14 JUSTICE KAVANAUGH: Is -- the other  
15 side --

16 MR. FEIGIN: -- fighting the  
17 categorical approach to the statute.

18 CHIEF JUSTICE ROBERTS: Well, I'm just  
19 wondering if you're trying to get in the  
20 backdoor.

21 MR. FEIGIN: No, Your Honor. The  
22 point I'm making is I -- I think there's -- I  
23 think that approaching this with some sort of  
24 degree of common sense that is here informed by  
25 two millennia of common law, and Voisine looked

1 at the common law to a certain extent in  
2 interpreting what the term "use" meant.

3 JUSTICE KAVANAUGH: The other side  
4 says that the common sense is really captured by  
5 the Residual Clause.

6 MR. FEIGIN: Your Honor, let me make  
7 several points about that.

8 JUSTICE KAVANAUGH: And let me just  
9 finish.

10 MR. FEIGIN: Okay.

11 JUSTICE KAVANAUGH: And the Residual  
12 Clause, of course, in Johnson and Davis was --  
13 was declared unconstitutional. And that -- the  
14 other side says what you're -- and -- and, by  
15 the way, it was pointed out that that would lead  
16 to absurdities, and here we are, and that you're  
17 trying to jam cases that would have naturally  
18 fit under the Residual Clause into the other  
19 clause. So that's what the other side is  
20 suggesting you're doing.

21 MR. FEIGIN: Alright. If I could have  
22 a second, several points on that.

23 Number one, I think he's trying to  
24 have it both ways. He's arguing that Congress  
25 wouldn't have want -- wanted -- wanted this to

1 be a crime of violence at all, and he's relying  
2 on this Residual Clause argument.

3 As to the Residual Clause argument,  
4 this isn't a case about potential risks, which  
5 is what the Residual Clause covers. This is a  
6 case where we know somebody dies. I think the  
7 Court has not relied on the Residual Clause in  
8 other cases where it might have equally been  
9 applicable under the kind of logic you're  
10 suggesting, Justice Kavanaugh, like Stokeling.  
11 I think that's because everyone recognizes the  
12 Elements Clause has its own specific function.

13 I'd also point you not just to  
14 924(c)(3)'s Residual Clause but to the Armed  
15 Career Criminal Act's Residual Clause, which is  
16 worded a little bit differently, although no one  
17 thinks it affects the scope of the Elements  
18 Clause. It requires a serious potential risk of  
19 physical injury. I don't know who could think  
20 that that's the way you're capturing murder. It  
21 doesn't have a serious potential risk of  
22 physical injury. Somebody gets harmed.

23 JUSTICE JACKSON: Yes, but,  
24 Mr. Feigin --

25 MR. FEIGIN: And then, finally -- I'm

1       sorry.

2                   JUSTICE JACKSON:  Oh, go ahead.  Go  
3       ahead.  Sorry.

4                   MR. FEIGIN:  And then, finally, I just  
5       wanted to point out that Section 922(g)(9), the  
6       definition doesn't appear there.  That's in  
7       Section 921.33(a).  The definition of  
8       "misdemeanor, crime of domestic violence,"  
9       doesn't even have a Residual Clause.

10                   And if you look at the appendix we  
11       submitted in Voisine, most of the assault  
12       statutes the Court was worried about there are  
13       defined in terms of causation of harm or  
14       causation of offense of touching.  I thank you  
15       for your indulgence, Justice Jackson.

16                   JUSTICE JACKSON:  Yes.  No,  
17       Mr. Feigin, I -- I appreciate that somebody died  
18       here and that we would ordinarily think of  
19       murder in that situation.

20                   But it's clear that the language of  
21       this provision of the statute is not focused on  
22       the outcome or the effect.

23                   And I think the common-sense reading  
24       of this that cuts against you is the fact that  
25       "physical force" has a common-sense meaning,

1 "use" has a common-sense meaning and that it  
2 suggests that the defendant has to act, that  
3 they have to do something.

4           And so Justice Gorsuch's point is --  
5 about divisibility is kind of my thought, which  
6 is, at the beginning of this, it seems like we  
7 have a bifurcation of Congress's view that you  
8 have action by a defendant and you have omission  
9 in a different column, and we're sort of in the  
10 realm of action.

11           So I guess my question is, how -- how  
12 could Congress have possibly written the words  
13 "use, attempted use, or threatened use of  
14 physical force" and meant that the defendant  
15 doesn't have to do anything at all?

16           MR. FEIGIN: Well, Your Honor, the --  
17 this goes back to the common-law backdrop  
18 against when -- and I -- I think the easiest way  
19 to see that, that there's some linguistic ways  
20 to see that to the dictionary definitions.

21           JUSTICE JACKSON: No, I'm just looking  
22 at the text of the statute. If you're right --  
23 if you're right that what Congress was trying to  
24 capture with this is a defendant -- a -- a -- a  
25 victim dying or a person being bodily -- you

1 know, injured bodily, Congress has said that  
2 many other places, even in this very statute,  
3 when that was the triggering thing.

4 What I'm worried about is interpreting  
5 the words "use, attempted use, and threatened  
6 use of physical force" to encompass a situation  
7 in which a person is not acting. That seems  
8 completely counterintuitive. It seems like it  
9 has no bearing in the words of the statute.

10 I've already talked with -- with --  
11 with your friend on the other side about the  
12 legislative history that actually shows that  
13 Congress wasn't talking about omissions, but  
14 how -- how do you get past this sort of  
15 conceptual concern that we're really talking  
16 about doing something here and you're suggesting  
17 that you don't have to?

18 MR. FEIGIN: Well, Your Honor, if I  
19 could respond, I -- I would have, like, three  
20 principal points --

21 JUSTICE JACKSON: Yes.

22 MR. FEIGIN: -- in response to that.

23 One of them is you -- the premise of  
24 your argument -- not argument -- the premise of  
25 your question was that this statute doesn't look

1 at results. But I'd respectfully point the  
2 Court to Castleman and as well as Justice  
3 Scalia's current -- concurrence in Castleman,  
4 which both point out that where you have --  
5 where you actually have physical injury, it must  
6 have been caused by physical force.

7 JUSTICE JACKSON: But Castleman was --  
8 Castleman -- Castleman was dealing with a  
9 different question, like how much force? What  
10 is force? Is -- is putting the -- the -- the  
11 poison in the drink enough to be physical force?

12 I'm talking about a situation in which  
13 a person does nothing.

14 MR. FEIGIN: Okay. The second point  
15 I'd make, Your Honor, and I -- I've been trying  
16 to make it this morning, and I take as part of  
17 your question you've kind of rejected this, but  
18 I do think it fits squarely within the  
19 dictionary definitions.

20 Again, if my car is just rolling down,  
21 you know, a hill and I see some -- my enemy walk  
22 in front of me and I let the car keep going and  
23 just don't do anything, I think we'd all say I  
24 used physical force. Now maybe I got in the car  
25 and turned the key and started the car, but I

1 certainly didn't have the intent to use physical  
2 force against the person of another. I only had  
3 it at the point I stopped doing something.

4 And the third point I'd make if -- if  
5 you'll indulge me one --

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. FEIGIN: -- second longer,  
8 Chief -- Mr. Chief Justice, thank you -- is that  
9 I don't think this would have defied common  
10 sense because, again, if you look at all the  
11 common-law sources, everyone recognizes this is  
12 a word game. Do I call it withholding, do I  
13 call it not acting when I refuse to give someone  
14 medicine? And the common law has always treated  
15 doing something other than what you're supposed  
16 to do, fiddling while Rome burns, as an  
17 affirmative act. And --

18 Thank you, Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas?

22 Justice Alito?

23 Justice Sotomayor?

24 Justice Barrett?

25 Justice Jackson?

1 MR. FEIGIN: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Rebuttal, Mr. Kedem?

5 REBUTTAL ARGUMENT OF ALLON KEDEM

6 ON BEHALF OF THE PETITIONER

7 MR. KEDEM: Thank you, Your Honor.

8 Starting first with divisibility, when  
9 this Court has asked whether a statute is  
10 divisible for purposes of the categorical  
11 approach, it is asking whether it is  
12 linguistically divisible, whether the text of  
13 the statute allows it to be divided into  
14 separate offenses.

15 Sometimes there are a list of  
16 different ways of committing an offense.  
17 Sometimes they are different offenses. So you  
18 could say that it involve -- burglary involves  
19 breaking into a house or a houseboat or  
20 whatever, and then the question is, is house a  
21 different crime than houseboat? But it has to  
22 be linguistically divisible. You don't look  
23 at -- and you can look at state, common law, or  
24 otherwise to figure out whether those are  
25 different elements or means, but you don't look

1 at -- at -- at case law generally to ask whether  
2 omissions are different offenses than not. That  
3 is what my friend is asking you to do, something  
4 this Court has never done.

5 And, at minimum, if you're going to  
6 start to engage in that kind of divisibility in  
7 an entirely new realm, I would want -- think  
8 that you'd want a case where that issue had been  
9 raised and briefed.

10 My friend also said that essentially  
11 the only question about whether all the statutes  
12 in it -- in its appendix are out is a question  
13 about divisibility. We respectfully disagree.  
14 States can agree with the general principle, as  
15 I think all of them do, that omissions can  
16 sometimes be liable. They can accept the  
17 common-law principle but still believe that  
18 certain specific offenses cannot be committed  
19 except by affirmative acts.

20 We have cases in our brief, in our  
21 reply brief, in, for instance, Louisiana, which  
22 accepts the general principle but nevertheless  
23 says that felony murder cannot be committed  
24 except by an affirmative act because it is  
25 written in a way that requires a killing. And

1 so you have a number of those statutes even in  
2 those effective states that wouldn't necessarily  
3 be excluded.

4           Going to the Residual Clause, the  
5 Residual Clause is a natural home for offenses  
6 like murder not because murder isn't always bad  
7 but precisely because it is usually bad. In  
8 other words, the vast majority of murders are,  
9 in fact, violent, which is why it makes sense to  
10 fall under a clause that talks about the risk in  
11 an ordinary case that physical force against  
12 another will be used during the course of  
13 commission. It allows for these sorts of edge  
14 cases, the difficult hypotheticals that we've  
15 been talking about.

16           The Elements Clause is not written  
17 that way. It requires the use of violent  
18 physical force as an element, which means in  
19 absolutely every case. And my friend does not  
20 dispute that there is no interpretive  
21 significance to the fact that the Residual  
22 Clause is no -- no longer operative.

23           Going to the word "use," my friend  
24 says that "use" derives some meaning from the  
25 common law. This Court in Bailey said "use"

1 must be given its ordinary meaning, which is  
2 active employment. And you notice that when my  
3 friend started talking about using things like  
4 metabolism or the body's natural processes, he  
5 lapsed into this sort of abstract concept speak  
6 rather than talking about something physical,  
7 like physical force that you use against the  
8 person of another.

9           Castleman. Castleman examples are all  
10 indirect force, poison, pulling the trigger of a  
11 gun, introducing a disease, by which I think the  
12 Court meant, if you infect someone with the  
13 Ebola virus, obviously, that's an indirect use  
14 of violent physical force. But they're all  
15 taking steps to bring someone into contact with  
16 the thing, without which, without the step you  
17 take to bring them into contact with it, there  
18 would be no harm whatsoever. So it's not a word  
19 game.

20           Whether you describe, you know,  
21 failing to feed someone as an act of withholding  
22 or an omission, either way, you are not bringing  
23 them into contact with any force, much less  
24 violent physical force.

25           My friend relied very heavily on the

1 common law, as their brief does as well. He  
2 says that acts of omission are treated as other  
3 acts. And that, as a general principle, makes  
4 sense for liability. But the problem with the  
5 government's argument on that is none of those  
6 terms make their appearance in the Elements  
7 Clause, which talks about the use of violent  
8 physical force. That's the thing that has to be  
9 present in each case.

10 And that's why, to your question,  
11 Justice Barrett, Stokeling is different because  
12 it was interpreting a common law term of art  
13 which appeared both in the federal provision and  
14 in the state provision. We're not here to --  
15 interpreting words, "act" or "omission." We're  
16 interpreting "use of violent physical force."

17 Finally, I want to end with a point  
18 about all these hard examples. You posed a lot  
19 of very difficult hypotheticals both to me and  
20 my friend from the government. And the thing is  
21 you don't have to agree with us on essentially  
22 any of them, except the pure omission scenario,  
23 where there's an octogenarian who falls into a  
24 coma and slowly expires because they are not  
25 being fed nutrition. No one would describe that

1 as a death involving violent physical force,  
2 except for perhaps the government, which thinks  
3 that literally every death involves violent  
4 physical force.

5 But, if that in a sort of normal  
6 scenario is not a death involving violent  
7 physical force, it doesn't suddenly become  
8 violent physical force because there was someone  
9 who had a legal duty to provide that nutrition.  
10 It may be a very serious crime. It can be  
11 punished severely, but it does not categorically  
12 involve the use of violent physical force.

13 Thank you.

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

16 (Whereupon, at 12:16 p.m., the case  
17 was submitted.)

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## Official

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