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P R O C E E D I N G S

(10:53 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-608, United States v. Hayes.

Ms. Saharsky.

ORAL ARGUMENT OF NICOLE A. SAHARSKY

ON BEHALF OF THE PETITIONER

MS. SAHARSKY: Mr. Chief Justice, and may it please the Court:

Respondent's conviction for battering his wife is a misdemeanor crime of domestic violence primarily for two reasons: First, the statutory text is most naturally read that way. Second, a contrary reading would defeat Congress's purposes. Nine courts of appeals have determined that the text does not require a domestic relationship to be an element to the predicate offense. That's because the statute's text uses only one element, using the singular word "element," which relates to mode of aggression. It then introduces a new concept related to domestic relationship, using a comma and the word "committed." The word "committed" naturally modifies the word "offense." In common usage, a person commits an offense; he doesn't commit a use or attempted use of physical force.

1 Under Respondent's reading of the statute, when it was  
2 enacted it would have become immediately a dead letter  
3 in two-thirds of the States, and it wouldn't have any  
4 application to the Federal Government. And then --

5 JUSTICE SCALIA: Well, Respondent says that  
6 may be because a lot of people in Congress wanted it to  
7 be a dead letter. They would have wanted the whole  
8 thing to be a dead letter. There are a lot of people  
9 who didn't like this statute because it was a gun  
10 control statute.

11 MS. SAHARSKY: But Congress did enact this  
12 statute, and this Court presumes two things: First --

13 JUSTICE SCALIA: Well, if it's a compromise  
14 with the people who wanted no statute at all and you  
15 come out with a statute that covers one-third of the  
16 States anyway, I mean that's, you know -- that's the  
17 deal.

18 MS. SAHARSKY: There was a compromise made,  
19 but it wasn't with respect to whether there needed to be  
20 a domestic relationship element. It was with respect to  
21 how violent the offense had to be.

22 JUSTICE SCALIA: How do we know -- how do we  
23 know that?

24 MS. SAHARSKY: Well, if you look at the  
25 statute's drafting history, there were two versions

1 considered. One used the term "crime of violence" to  
2 discuss how violent the statute had to be, and then the  
3 second substituted in the new language: "...has as an  
4 element the use or attempted use of physical force or  
5 threatened use of a deadly weapon."

6 JUSTICE SCALIA: But it also substituted  
7 this structure that we are -- that we are discussing  
8 today. Didn't that come in at the same time?

9 MS. SAHARSKY: The --

10 JUSTICE SCALIA: So, why -- why say it's  
11 only the former provision that was the compromise and  
12 not the addition of this later language?

13 MS. SAHARSKY: Both the original structure  
14 and the statute as enacted had the same structure in  
15 that they had a "committed by" clause that modified the  
16 word "offense."

17 Now, it's true that the use -- "has as an  
18 element language" that came in added some additional  
19 structure in terms of the Romanette (i) and the  
20 Romanette (ii), but that all came in because there was a  
21 discussion about how violent the offense had to be, both  
22 -- in the original statute that was considered, you have  
23 an offense committed by a certain person, an offense of  
24 a certain type committed by a certain person, and in the  
25 statute that was enacted you have an offense of a

1 certain type committed by a certain person. Now,  
2 Congress put more detail in, in terms of what that  
3 certain type of offense is. This has as an "element"  
4 language, but it just didn't go to domestic  
5 relationship.

6           And to get back to one of the earlier points  
7 in your question, you know, this Court presumes when  
8 Congress passes a statute two things are true: First,  
9 it knows the legal backdrop on which it enacts the law;  
10 and second, that it's presumed that its law is going to  
11 have effect. And that should be especially true here  
12 where Congress was dealing with a serious nationwide  
13 problem of domestic violence using firearms. Congress  
14 --

15           JUSTICE GINSBURG: The suggestion was that  
16 Congress may have wanted to give an incentive to States  
17 to have special domestic violence statutes instead of  
18 punishing domestic abusers under a generic battery  
19 statute.

20           MS. SAHARSKY: I don't think that makes  
21 sense for two reasons: First, because when Congress  
22 wants to do that, it uses its spending power to give the  
23 States incentives to do things like that, and it did  
24 that in the VAWA enactment in 1994 and in VAWA  
25 re-authorization in 2005.

1           And, second, because if you believed what  
2 Respondents suggest, you would have to think that a  
3 Congress that was very concerned about the powder keg  
4 situation of a domestic offender with a gun would want  
5 to exempt domestic offenders who have proven that they  
6 are willing to hurt family members in two-thirds of the  
7 States, a Congress that was presumed -- that was  
8 concerned with the problem of domestic violence would  
9 enact a statute that would apply so infrequently, to at  
10 most these 17 States, and wouldn't apply at all to  
11 Federal offenses, making that "misdemeanor under Federal  
12 law" language superfluous.

13           CHIEF JUSTICE ROBERTS: Counsel, I  
14 understand your objection to the reading that your  
15 friend would have us adopt, but you have the same sort  
16 of problem. I mean, you've got a -- if it reads the way  
17 you would have it, then the word "that" after "an  
18 offense that" doesn't quite work, and have you to add  
19 "is" before "is committed," if you're going to keep the  
20 "that." So it seems to me that this doesn't work  
21 grammatically either way.

22           MS. SAHARSKY: I don't think that that's  
23 right, with respect, Your Honor, because you have an  
24 offense that is of a certain character committed by a  
25 certain person.

1 CHIEF JUSTICE ROBERTS: Okay, but you've  
2 changed the word. You read it as if it says "an  
3 offense that committed." So either the "that" is out  
4 or you've got to add the word "is."

5 MS. SAHARSKY: I think that the word  
6 "offense" is twice modified. There is an offense that  
7 is of a certain character and there is an offense  
8 committed by a certain --

9 CHIEF JUSTICE ROBERTS: Okay. You use the  
10 word "that" in the first example, but you skip the word  
11 "that" in the second. "That" appears in the line and  
12 then comes (i) and (ii). In other words, "that"  
13 modifies both of them, and you're reading it that it's  
14 an offense committed, and yet under the statute it has  
15 to be an "offense that committed." So you've either got  
16 to leave "that" out the second time but not the first or  
17 you've got to add the word "is" as it appears in (i).

18 MS. SAHARSKY: What I'm suggesting, Your  
19 Honor, is that the "that" refers to everything that is  
20 in Romanette (i) and (ii) up to the break with  
21 "committed by." So that it is an offense that is a  
22 misdemeanor and has as an element "committed by." You  
23 know, these -- these two different clauses both modify  
24 "offense," just as a grammatical matter, not looking at  
25 this Romanette (i) and (ii), but just looking at that

1 sentence.

2 CHIEF JUSTICE ROBERTS: Romanette?

3 MS. SAHARSKY: Oh, little Roman numeral.

4 CHIEF JUSTICE ROBERTS: I've never heard  
5 that before. That's good. Romanette.

6 (Laughter.)

7 MS. SAHARSKY: If you just look at this as a  
8 sentence, you have "an offense that is a misdemeanor and  
9 has as an element committed by." Now, that "committed  
10 by" clause, it could have come after "offense" or it  
11 could be in the place where it is now. There are just  
12 these two different ways that offenses qualify.

13 JUSTICE SCALIA: You can't. I mean, you  
14 have the "that," and the "that" applies to both (i) and  
15 (ii), and this is part of (ii). I think you've got to  
16 either say "that committed" or -- or put in an "is" --  
17 "that is committed." It just doesn't parse, and that  
18 lack of parsing is much worse than the one that you --  
19 you point to in the other side's reading. Yes, it's not  
20 usual to talk about committing a use of force, but it  
21 happens sometimes. It's -- it's not the most elegant  
22 language, but there are many examples of such usage that  
23 have been brought forth by the other side and by some of  
24 the amici. So they have something that -- it's not  
25 elegant, but people have spoken that way. Nobody speaks

1 the way you want us to speak: "An offense that  
2 committed by a person or an offense that" -- "committed  
3 by a current or former..." Nobody talks that way.

4 MS. SAHARSKY: Two responses.

5 JUSTICE SCALIA: Nobody.

6 MS. SAHARSKY: Two responses, Your Honor.  
7 First, the "committed by" language refers back to  
8 "offense" and the "that" is just part of this -- this  
9 first clause, but -- and we believe that the  
10 Government's reading is the most logical reading. And  
11 think of it this way: You know, Respondent agrees that  
12 if there were a hard return before the "committed by"  
13 language, that it's clear -- that it would be more clear  
14 that the Government's reading is correct.

15 JUSTICE SCALIA: I wouldn't agree with that.  
16 You'd still have the "that" up above. You would have to  
17 have a hard return and take out the "that" or -- or that  
18 (A) is a misdemeanor, "has as an element" and then a  
19 hard return, and you have to add "and is committed."  
20 You still have to add language besides the hard return.

21 MS. SAHARSKY: With respect, Your Honor, we  
22 think this can be read as all one sentence. But just to  
23 make my second point, which is: I think that it would  
24 do much more violence, Respondent's reading of the  
25 statute, than you suggest because you're talking about

1 treating the singular word "element" as plural. You're  
2 talking about ignoring the comma that separates the "has  
3 as an element" section from the "committed by" section,  
4 and then you're talking about taking what even the  
5 linguists who filed a brief in this case essentially in  
6 support of Respondents say is a very weird usage of  
7 "committed."

8 CHIEF JUSTICE ROBERTS: How do you -- I'm  
9 sorry. I'm not following why "element" is singular.  
10 The argument on the other side, I understood, is that  
11 the element is the use of physical force committed by a  
12 current or former spouse. So "element" is still  
13 singular. I don't -- maybe I'm missing something. It's  
14 -- why -- what change would you have to make to the word  
15 "element" to adopt their reading?

16 MS. SAHARSKY: We think that you'd say --  
17 you'd have to say "has as its elements" to suggest that  
18 you would take two very diverse concepts and make them  
19 both required elements of the underlying offense.

20 There are two concepts here: One is how  
21 violent the offense has to be, and then there's the  
22 second concept, which is a class of defendants, and  
23 that's a very different concept. But if you just see  
24 the singular "element," "has as an element," and then  
25 you see, "oh, okay, it has to be violent."

1 CHIEF JUSTICE ROBERTS: Well, but I thought  
2 the whole point of this was to get at violence committed  
3 by a family member, and if that's the critical element,  
4 you don't have to have two different elements,  
5 "violence" and then "committed." It's violence  
6 committed by a family member.

7 MS. SAHARSKY: Well, with respect, Your  
8 Honor, we think that because Congress broke these up  
9 into these two different clauses -- one that relates to  
10 violence and then a separate clause that's introduced by  
11 "committed by" where "committed" naturally modifies  
12 "offense" -- that it was treating -- that these were two  
13 separate requirements. And you're right that Congress  
14 was trying to get at the problem of violent domestic  
15 offenses, and if it was doing that it would make no  
16 sense at all for Congress to -- to have enacted a  
17 statute that would such extremely limited application.  
18 And, of course, Respondent's reading would make the "is  
19 a misdemeanor under Federal law" superfluous.

20 CHIEF JUSTICE ROBERTS: If we think that  
21 there are two awkward readings, yours and your friend's,  
22 and both of them require surgery, don't we resolve that  
23 under the rule of lenity?

24 MS. SAHARSKY: No. The rule of lenity says  
25 that there needs to be a grievous ambiguity after this

1 Court seizes aid -- any aid which can be derived from  
2 the tools of statutory interpretation. So even though  
3 we think that the text here is most naturally read in  
4 the Government's way, every other indicia of meaning  
5 here points in favor of the Government's interpretation.

6 JUSTICE KENNEDY: What -- what -- what's  
7 been the underlying rationale for the rule of lenity,  
8 which is a rule I think we should apply with great  
9 caution? But if we think -- what's the reason for the  
10 rule of lenity?

11 MS. SAHARSKY: I think one of the -- the  
12 main concerns is providing fair notice of what's  
13 illegal.

14 JUSTICE KENNEDY: Fair notice. It -- it --  
15 it seems to me that if I were counsel practicing  
16 criminal law in the private sector, and I negotiated a  
17 plea for simple assault, but there was a spouse that was  
18 involved, and then I walked down the courthouse step  
19 with my clients, said we got a good deal, and  
20 incidentally, all guns in your house must immediately be  
21 surrendered to other people, you must take them all out,  
22 you may never hunt, you may never possess a gun.

23 And under your view, if I don't say that I'm  
24 guilty of, it seems to me, serious malpractice. I just  
25 don't see that there is notice to the legal profession.

1 MS. SAHARSKY: Well certainly, Your Honor,  
2 we think that the statutory text is clear, and that's  
3 because people are presumed to know the law. Certainly  
4 a person who has beaten his wife knows that --

5 JUSTICE KENNEDY: Well, but the rule --

6 MS. SAHARSKY: -- you know, the assault he  
7 was convicted of is one against his wife.

8 JUSTICE KENNEDY: No. Where the context is,  
9 we are asking why the rule of lenity and the rule of  
10 lenity is to ensure notice. And it seems to me this is  
11 a classic case where there has to be notice. You could  
12 come back and say that even if the statute had been  
13 written as to apply specifically to domestic crimes, a  
14 lot of attorneys wouldn't have had notice on it when it  
15 was an omnibus budget bill added at the last minute.

16 MS. SAHARSKY: Your Honor, it was at the  
17 time that this statute was enacted the case that very  
18 few States had statutes with a domestic relationship  
19 requirement, only 17. And to be clear, in those 17  
20 States those all covered more domestic relationships  
21 than the Federal statute. They covered things like  
22 dating relationships, violence involving grandparents,  
23 etcetera. So that even from the face of your State  
24 conviction, you wouldn't be able to just match it right  
25 up with this Federal offense. And the fact that those

1 17 States -- A, that there was such a small number; and  
2 B, that those States cover a different range of domestic  
3 offenses --

4 CHIEF JUSTICE ROBERTS: There was a small, a  
5 small number. Were they populous States?

6 MS. SAHARSKY: I think it was a range of  
7 States. I don't think I could say it was all the most  
8 populous or all the least populous States.

9 CHIEF JUSTICE ROBERTS: California, New  
10 York?

11 MS. SAHARSKY: You know, I'd have to look at  
12 the list. I think that California's came in later --  
13 no, California did have one statute; New York did not.

14 But you know, one thing that's worth  
15 noticing in this case is that, you know, the Senator --  
16 Senator Lautenberg, who was the sponsor of this  
17 legislation, was from New Jersey; and under Respondent's  
18 reading of this statute it wouldn't have even applied to  
19 offenses committed in New Jersey. And that seems like  
20 an odd thing to believe. And of course, it wouldn't  
21 have applied to Federal offenses despite the --

22 JUSTICE STEVENS: May I ask -- may I ask,  
23 just to be sure I understand the alternate reading. Is  
24 it your view that the statute does mean the same as if,  
25 after the words "deadly weapon," there had been inserted

1 a parenthetical (iii), closed paren, "is committed by"?  
2 In other words, is the element of "attempted use of  
3 force" is one -- is the second requirement; and the  
4 third requirement is that it be committed by a current  
5 or former spouse.

6 MS. SAHARSKY: Yes. I think --

7 JUSTICE STEVENS: So your -- your reading --  
8 I'm just following up on the Chief Justice's question --  
9 requires us to assume that Congress really intended  
10 there to be a triple "i" as well as a double "i", and  
11 the triple "i" would have begun with the verb "is."

12 MS. SAHARSKY: I think that that's one way  
13 of doing it, but I don't think that you have to do that,  
14 because if you look at the structure of this sentence --

15 JUSTICE STEVENS: But it is true, is it not,  
16 that if you did do it that way, it would have been a lot  
17 clearer than it is now?

18 MS. SAHARSKY: There are ways that Congress  
19 could have made its manifest intent even more clear. It  
20 could have added that Romanette (iii); it could put a  
21 hard return before "committed by." But if you look at  
22 the effect that the statute would have, if you read it  
23 Respondent's way, I don't think that we can reasonably  
24 expect that Congress -- a Congress that wanted to get at  
25 the serious nationwide problem of domestic violence

1 using firearms, would have wanted to enact a statute  
2 that would have such limited effect.

3 JUSTICE SCALIA: I want to follow up on  
4 Justice Kennedy's inquiry about the rule of lenity.  
5 Don't you think the rule of lenity is particularly  
6 important when you're dealing with conduct that is not  
7 malum in se? I mean, to say that, well, we are not  
8 going to apply the rule of lenity to a statute that  
9 posits an increased sentence for kneecapping or for some  
10 violent conduct, the person knows he shouldn't be doing  
11 that stuff anyway. But this imposes a -- a -- a penalty  
12 for conduct that no one would think is unlawful.

13 This fellow is -- wasn't it his father's gun  
14 he was taking to sell at a gun show or something?

15 MS. SAHARSKY: There were five firearms.  
16 There was one found in his home, three that he  
17 transferred and one that he sold.

18 JUSTICE SCALIA: Well, he could have ten,  
19 couldn't he?

20 MS. SAHARSKY: Well, we would hope that he  
21 wouldn't in this situation. But --

22 JUSTICE SCALIA: Why?

23 MS. SAHARSKY: Because he has been convicted  
24 of a serious violent offense, and I think that's --

25 JUSTICE SCALIA: But -- but for this

1 language that you say makes his owning of a firearm  
2 unlawful, it wouldn't be unlawful at all, would it? He  
3 would have no reason to think he couldn't have a  
4 firearm.

5 MS. SAHARSKY: I think that a person who has  
6 been committed of a violent offense should be on notice  
7 that their procession of firearms --

8 JUSTICE SCALIA: Should be. Is that right?

9 MS. SAHARSKY: Yes.

10 JUSTICE SCALIA: A misdemeanor -- a  
11 misdemeanor offense. And -- and -- and he should  
12 suspect that because he committed a misdemeanor, he  
13 cannot have a firearm?

14 MS. SAHARSKY: When --

15 JUSTICE SCALIA: I don't think anybody would  
16 assume that. Indeed, there are some who assume that  
17 you -- you cannot prevent the owning of a firearm for a  
18 mere misdemeanor, as opposed to a felony.

19 MS. SAHARSKY: I understand that concern.  
20 We are not talking about mere misdemeanors here. We are  
21 talking about a specific category of violent  
22 misdemeanors, Section 929(g)(9); specifically --

23 JUSTICE SCALIA: Make it clear.

24 Make it clear, so that when -- when his  
25 lawyer pleads to the offense, he doesn't have to read in

1 a little (iii) where there is not a little (iii). And  
2 he -- well, you did not plead guilty or you are not  
3 accused of the offense of using violence against a  
4 family member. You're just -- just accused of -- of  
5 using violence, a misdemeanor.

6 MS. SAHARSKY: Two thoughts on that, Your  
7 Honor. The first is, you know, at the time that this  
8 statute was enacted almost all of the States except for  
9 this small number prosecuted offenses that were domestic  
10 disturbance offenses like the one in this case under  
11 general assault and battery statutes, and even the 17  
12 States that have those with the domestic relations --  
13 offenses with the domestic relationship requirement,  
14 still prosecute them routinely as assault and battery  
15 under those general statutes.

16 So I think a person -- A, an attorney who  
17 handles those kind of cases would have knowledge of that  
18 law; and B, a person who has committed a serious violent  
19 offense like Respondent's previous offense in this case  
20 should be on notice that his possession of firearms  
21 might be regulated.

22 JUSTICE SCALIA: What do you mean a serious  
23 violent offense? Are there - isn't there felony assault  
24 and battery?

25 MS. SAHARSKY: Yes.

1 JUSTICE SCALIA: And this was misdemeanor  
2 assault and battery, wasn't it?

3 MS. SAHARSKY: Yes, that's right. I mean, I  
4 really --

5 JUSTICE SCALIA: So it's not that serious an  
6 offense. That's why we call it a misdemeanor.

7 MS. SAHARSKY: Well, I mean, certainly the  
8 offense is this particular case was serious. The  
9 charging document reflects that Respondent hit his wife  
10 all around the face until it swelled up, kicked her all  
11 around her body, kicked here in the ribs --

12 JUSTICE SCALIA: Then he should have been  
13 charged with a felony, but he wasn't. He was charged  
14 with a misdemeanor.

15 JUSTICE GINSBURG: Wasn't the -- wasn't the  
16 statute responding to just that problem, that domestic  
17 abuse tended to be charged as misdemeanors rather than  
18 felonies? And it was that fact that the Senator was  
19 responding to when he included misdemeanor. The whole  
20 purpose of this was to make a misdemeanor battery count  
21 for the statute's purpose.

22 MS. SAHARSKY: That's exactly right, Justice  
23 Ginsburg. All of the discussion of this in Congress  
24 said we need to have a zero tolerance towards people --  
25 zero tolerance policy towards people who are -- have

1 proven that they are willing to commit violent acts  
2 against family members; and we already have a statute  
3 that prohibits felons from possessing firearms, but we  
4 know that sometimes these domestic offenses get charged  
5 as misdemeanors. And Senator Lautenberg specifically  
6 said in the legislative record they are often charged as  
7 offenses like assault and battery, and we need to get at  
8 these offenses because these people should not have  
9 firearms. They should not put their families in that  
10 type of powder keg situation, and they -- we should not  
11 be putting police in that type of situation, where  
12 police who respond to a domestic disturbance call like  
13 the 911 call in this case are put in a dangerous  
14 situation with a person -- an emotionally charged  
15 situation -- who would have a firearm.

16           One other point that I wanted to make with  
17 respect to your question, Justice Scalia -- and this is  
18 not with respect to how this case should be resolved,  
19 but just as a practical matter -- that the VAWA 2005  
20 amendments do require States, for a condition of their  
21 grant funding, to have a judicial policy that gives  
22 notice for offenses like assault and battery that a  
23 person would not be able to possess a firearm.

24           And the reason that they are doing that is  
25 not because, you know, as a constitutional matter we

1 think that they need to, but because they really --  
2 Congress just really wants to keep firearms away from  
3 people who have shown that they are willing to hurt  
4 family members in this way.

5           Now, I talked a little bit in the beginning  
6 of argument about how really every -- every indicia of  
7 meaning in this case -- and we do look to -- to each of  
8 those different interpretive tools before we would  
9 invoke the rule of lenity -- points in favor of the  
10 Government's construction. First of all, you've got the  
11 text, and I think we've -- we've covered those  
12 arguments. But just as a practical matter, this statute  
13 would have an extremely limited effect if it didn't --  
14 if it were interpreted as Respondent suggests.

15           The language with respect to Federal  
16 misdemeanors would be superfluous because the way that  
17 Federal offenses like domestic assaults on Army bases  
18 are charged is under a general Federal assault statute.  
19 There isn't one that's specific to domestic violence.  
20 So Congress would have put this "misdemeanor under  
21 Federal law" language in there, and it -- it would have  
22 immediately had no effect either. You know, the --

23           CHIEF JUSTICE ROBERTS: Well, it seems there  
24 is no Federal misdemeanor that covers this particular  
25 type of assault, in other words?

1 MS. SAHARSKY: There is -- there is a  
2 general Federal assault statute.

3 CHIEF JUSTICE ROBERTS: Right.

4 MS. SAHARSKY: But it doesn't have a  
5 domestic relationship requirement, and that's the  
6 problem. You know, we also looked to the drafting  
7 history just a bit, and I -- I think that, you know,  
8 every indicia -- every indication in the drafting  
9 history, both if you compare the first version of the  
10 bill with the statute that was enacted and the  
11 discussion relating to it, shows that this language "has  
12 as an element," which really only intended to get at how  
13 violent an offense had to be, it -- it was never  
14 intended to get at any kind of domestic relationship  
15 requirement. And, of course, the -- the sponsor --

16 JUSTICE SCALIA: I think -- I think that  
17 people are governed by the law that is passed, not by  
18 the law that Congress intended to pass.

19 MS. SAHARSKY: That's exactly right, Justice  
20 --

21 JUSTICE SCALIA: So, really, if a lawyer  
22 reading this would not think that it applied, I don't  
23 care what Congress intended. If -- if the law doesn't  
24 say that, the person is not governed by it. You think a  
25 person could be governed by it despite the fact that it

1 doesn't say that because Congress intended it?

2 MS. SAHARSKY: Of course not, Justice  
3 Scalia.

4 JUSTICE SCALIA: Of course.

5 MS. SAHARSKY: We look to the text first,  
6 but we also look to other indicia -- many of us also  
7 look to other indicia of Congress's intent. And some of  
8 those indicia include things like a comparison of the  
9 drafting history and Senator Lautenberg's statement,  
10 which is directly on point here, which says that  
11 offenses like assault and battery would be covered.  
12 This is a -- a powerful tool.

13 CHIEF JUSTICE ROBERTS: Well, how does that  
14 relate with the rule of lenity? I suppose, to get back  
15 to Justice Kennedy's point, you're saying that the  
16 lawyer would not only be obligated to read this, but in  
17 advising his client would be obligated to go back and  
18 read the drafting history and the legislative history.  
19 Do we really use those types of materials to trump the  
20 -- the rule of lenity?

21 MS. SAHARSKY: This Court has in -- in  
22 multiple cases looked to the fact that the statute, for  
23 example, would have such a narrow, limited purpose, in  
24 addition to the statute's text, to say, you know, we  
25 can't believe Congress would expect that purpose --

1 CHIEF JUSTICE ROBERTS: So the lawyer  
2 advising his client in the typical assault case is  
3 supposed to know at the time that only 17 States had  
4 this type of provision?

5 MS. SAHARSKY: I think it was well known at  
6 the time that these offenses, even in the 17 States that  
7 had the domestic relationship element, were commonly  
8 prosecuted as assault and battery offenses. And this  
9 Court has -- for example, let's consider the Taylor  
10 case, where this Court was considering the example of  
11 burglary and trying to define: Should we pick this  
12 narrow, common-law definition of "burglary," or a more  
13 expansive definition of "burglary"?

14 And, aside from looking at the legislative  
15 history, there is a separate section of the Court's  
16 opinion where you said: Look, if we took this narrow,  
17 common law definition of "burglary," it would apply  
18 basically nowhere and we just can't think that Congress  
19 intended that.

20 And you didn't go right to the rule of  
21 lenity there. You looked at, for example, how that  
22 frustration of congressional purpose would occur and the  
23 problem that that would cause.

24 If there are no further questions, I'd like  
25 to reserve the remainder of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Mr. Giatras.

3 ORAL ARGUMENT OF TROY N. GIATRAS  
4 ON BEHALF OF THE RESPONDENT

5 MR. GIATRAS: Mr. Chief Justice, may it  
6 please the Court:

7 The fundamental flaw in the Government's  
8 argument is that it describes a statute that Congress  
9 considered but did not pass. In the statute's final  
10 version Congress defined the "misdemeanor crime of  
11 domestic violence" to require that the predicate offense  
12 have as an element a domestic relationship between the  
13 offender and the victim.

14 And the Government's reading ignores the  
15 legislative compromise that led to the contested  
16 language; and, if adopted by this Court, would rewrite  
17 the statute and hand one side the legislative victory  
18 that they were unable to achieve in Congress.

19 JUSTICE SCALIA: Well, wait. You say that  
20 that was the compromise. I don't know that you have any  
21 evidence to -- to show that that was an intentional --  
22 an intentional alteration made in the House of  
23 Representatives. Do you? I mean --

24 MR. GIATRAS: There is nothing that speaks  
25 to the words in the House of Representatives in the

1 Congressional Record, Your Honor, but it is -- their  
2 inaction and the lack of words speak very loudly. And  
3 it was -- from March of 1996, when the legislation was  
4 introduced, and then it went over to the House after  
5 passing significantly in the Senate, it was stalled, and  
6 it was stymied, and it did not move.

7 As a matter of fact, it had to at one time  
8 be taken from a -- and put into the stalking bill and  
9 then removed from the stalking bill and replaced back in  
10 then to a postal bill, which was then modified into the  
11 appropriations bill.

12 JUSTICE SCALIA: But the other side says  
13 that the reason that was the case was that they objected  
14 to the fact that -- what was its language -- the -- the  
15 old version did not say a "misdemeanor crime of domestic  
16 violence." It was -- it was broader.

17 MR. GIATRAS: It certainly was broader, but  
18 there was nothing -- and there was no one that spoke in  
19 the House of Representatives on that matter. And there  
20 was only one -- the principal author of the legislation,  
21 the sponsor, spoke in the Senate. And it was not until  
22 the eleventh hour on September 28th of 1996 that this  
23 entire change was made.

24 JUSTICE GINSBURG: I thought it was that the  
25 use of force -- to make it clear that the misdemeanor --

1 had to involve a use of force, and that wasn't clear  
2 before, right?

3 MR. GIATRAS: The --

4 JUSTICE SCALIA: Where -- where is the  
5 earlier version? Do we have the earlier version  
6 anywhere --

7 MR. GIATRAS: Yes.

8 JUSTICE SCALIA: -- in the materials in  
9 front of us?

10 MR. GIATRAS: Appendix B, page 5a of the red  
11 brief -- I'm sorry. It's page 4a of the red brief.

12 JUSTICE SCALIA: Thank you.

13 MR. GIATRAS: I apologize.

14 JUSTICE STEVENS: While we pause, can I just  
15 ask you one question to make sure I understand the two  
16 -- two different positions? Your view of the subsection  
17 ii is that the meaning you attributed to it is -- would  
18 be exactly the same if you left out the word  
19 "committed"? In other words, it seems to me under your  
20 view the word -- either the word "committed" or the  
21 words "committed by" is superfluous?

22 MR. GIATRAS: No. That is part of the  
23 element -- the one element that is required.

24 JUSTICE STEVENS: Why would you need that in  
25 there if the statute means -- if the element is the use

1 of force by a family member? Why do you have to put in  
2 another verb, "committed"?

3 MR. GIATRAS: Well, because that's who --  
4 that's who it would -- that's who it would address to.  
5 And that would be with respect to -- when you look at  
6 the definition that's set forth, it was to change from  
7 the original -- the original --

8 JUSTICE STEVENS: Well, I'm not interested  
9 in changes. I'm just interested in the text before us.  
10 And it seems to me that your reading of the statute is  
11 exactly what the statute would say if it did not include  
12 the word "committed."

13 MR. GIATRAS: I -- I don't know, Justice. I  
14 don't believe so, though.

15 CHIEF JUSTICE ROBERTS: Well, I agree with  
16 Justice Stevens. Read it without the word "committed."  
17 It not only has the same effect, but it's more natural,  
18 because it's "use of force by a current or former  
19 spouse," as opposed to "use of force committed by."

20 MR. GIATRAS: It would still include -- it  
21 would still include both attributes into the one element  
22 even if the word "committed" were removed from double  
23 ii, yes. And I'm -- I'm sorry about that.

24 JUSTICE BREYER: As I read this old one --  
25 as I read the first one, Senator Lautenberg put in the

1 language, and his language in the first one was to say  
2 I'll tell you a group of people who shouldn't have guns.  
3 The people who commit a crime of domestic violence.

4 Now what's that? In the statute he says it  
5 is a misdemeanor crime of violence committed by a person  
6 in a family relation with the victim.

7 Then he says after, I changed that language  
8 a little. I'll tell you why. Because somebody told me  
9 misdemeanor crime of violence is too broad. It could  
10 include cutting up a credit card. So I'll define it  
11 more specifically.

12 And he defines it more specifically to say  
13 that it is a crime that has as an element the use or  
14 attempted use of physical force or threatening people  
15 with a weapon. End of the matter.

16 They substitute those words and they did  
17 another thing the drafter as he breaks out the thing it  
18 says: It is a crime that is a misdemeanor and, you see,  
19 and that's where the problem is, because if you put in a  
20 "that," then you have to have an "is." So he left out  
21 the "is." Okay.

22 So I say what did Senator Lautenberg want  
23 with these words? I see. How did he change it? I see.

24 I can't find a word that supports the reason  
25 that you have. Now, maybe they are there. That's what

1 you'll tell me.

2           And then I say: is the final language  
3 consistent with what he wanted? It requires putting in  
4 an "is." But, I don't find that too awful. Okay.  
5 That's your argument against you. What is it? Your  
6 argument to rebut that.

7           MR. GIATRAS: The legislation that the  
8 Senator introduced was not the legislation that was  
9 passed by Congress. It is -- and, Justice Breyer, it is  
10 very clear from the statutory and legislative history in  
11 this case from - if you just take up through September  
12 28th of 1996, that the sponsor of the legislation  
13 decries with respect to the staunch opposition that was  
14 in the House, and the fact that his bill was going  
15 nowhere. This may have been his intended purpose with  
16 respect to what was introduced, but it was then the will  
17 of Congress with changing --

18           JUSTICE BREYER: That's the conclusion.  
19 You're reaching that conclusion. What I need from you  
20 is something that would tell me, no, Congress didn't  
21 just want to clarify in the way Lautenberg said. What  
22 they wanted to do was, in fact, restrict the scope of  
23 this so it only applied in 17 states. Okay. I'm open  
24 to that argument. It could be a good argument. Just  
25 point me to the things that suggest that that is what

1 Congress wanted to do, rather than by what Senator  
2 Lautenberg said.

3 MR. GIATRAS: By take -- by taking a look at  
4 the final passed legislation.

5 JUSTICE BREYER: No, I've got the words. If  
6 the best you can do is point me to the words of the  
7 statute, I'll take that into account. I'm asking the  
8 question to see if there is anything at all more?

9 MR. GIATRAS: Other than the fact that the  
10 structure of the statute also changed, and the structure  
11 of the statute changed --

12 JUSTICE BREYER: I don't want the text. I  
13 want something for my purposes.

14 MR. GIATRAS: What we have --

15 JUSTICE BREYER: Okay.

16 MR. GIATRAS: And what is problematic here,  
17 Justice, is that the legislative history does not speak  
18 on this particular matter. It is silent on this.

19 JUSTICE SCALIA: Did this structure come  
20 from Senator Lautenberg?

21 MR. GIATRAS: No, it did not.

22 JUSTICE SCALIA: Where did it come from?

23 MR. GIATRAS: It is -- it has to be presumed  
24 that it came from -- we don't know exactly where, but it  
25 came out of the House, and the House of Representatives

1 on September 27th --

2 JUSTICE SCALIA: It came out of the House  
3 version. The House version had this which was different  
4 from the Senate version that Lautenberg was responsible  
5 for?

6 MR. GIATRAS: No. This was a version that  
7 was passed in the Senate; it is the "as introduced"  
8 language. It then went and it was sat -- it sat in the  
9 House of Representatives for a long period of time.

10 It was not until September 28th, prior --  
11 right prior to the time that the budget bill had to have  
12 been sent back to -- to the Senate to be voted on and  
13 then approved by the President to continue the  
14 government to run. And this bill was changed then in  
15 the House of Representatives on -- at the 11th hour --

16 JUSTICE SCALIA: So this language came from  
17 the House?

18 MR. GIATRAS: Yes, it did.

19 JUSTICE SCALIA: Excuse me, Senator  
20 Lautenberg would not have been the drafter of this  
21 language.

22 MR. GIATRAS: The -- Senator Lautenberg does  
23 not disagree that he came to an agreement on this  
24 language.

25 JUSTICE BREYER: I'm sorry. Are you saying

1 that Senator Lautenberg did not change the words  
2 "misdemeanor crime of violence" to the words "use of  
3 physical force" or "threatened use of deadly weapon"?  
4 That's what he got up on the floor of the Senate and  
5 said that he wanted to change.

6 MR. GIATRAS: Justice, as this Court has  
7 articulated in Allapattah, that sometimes there can be a  
8 strategic manipulation to secure results.

9 JUSTICE BREYER: I'm not -- we're in -- the  
10 question specifically is where did the words come from?  
11 I thought that the words came from Senator Lautenberg.  
12 The reason I thought that is because he got up on the  
13 floor of the Senate and said that's what he did.

14 Now, if you're telling me they came from a  
15 different place, what is there in anywhere, I'm open to  
16 hearing it, but I couldn't find anything that said they  
17 had come from a different place.

18 MR. GIATRAS: They would have come from the  
19 House of Representatives.

20 JUSTICE SCALIA: What do you mean would  
21 have? Did this language come over to the Senate from  
22 the House or not?

23 MR. GIATRAS: Yes.

24 JUSTICE BREYER: So the -- the -- the  
25 language on physical force came from the House? That's

1 what you're saying? I'm just trying to be clear.

2 MR. GIATRAS: Threatened use of --

3 JUSTICE BREYER: It might have. I'm not  
4 criticizing. I want to know.

5 MR. GIATRAS: The use or attempted use of  
6 physical force or the threatened use of a deadly weapon  
7 language, including the words "misdemeanor crime of  
8 domestic violence" came over from the House.

9 JUSTICE SCALIA: This very form that was  
10 ultimately enacted was the form that came over from the  
11 House to the Senate?

12 MR. GIATRAS: Yes, Your Honor.

13 JUSTICE BREYER: Alright. Making progress.  
14 And you're saying that in the House there were some  
15 people who didn't want it to extend to beyond 17 States?

16 MR. GIATRAS: Yes, Your Honor.

17 JUSTICE BREYER: And how do we know that?

18 MR. GIATRAS: Well, by the mere fact that  
19 they -- we don't have them speaking to it, because there  
20 was no actual congressional record of them speaking to  
21 it or someone taking to the floor in the House of  
22 Representatives. It's absolutely silent.

23 We have to, instead, go back to what Senator  
24 Lautenberg was saying on the floor of the Senate during  
25 this period of time, where he made very clear that what

1 was occurring to his bill that it was dying, that it was  
2 being killed and it was being gutted in September of --  
3 early to late September of 1996, the author says that  
4 his bill is being gutted and it's being -- it's dying,  
5 and that there are significant staunch opposition from  
6 certain forces in order to limit the bill.

7 JUSTICE ALITO: Other than a desire to  
8 weaken this bill as much as possible, can you think of  
9 any reason why Congress would have drawn the distinction  
10 that you're drawing between States that have specific  
11 statutes relating to domestic violence misdemeanor  
12 statutes and those that don't?

13 MR. GIATRAS: I don't think we can speak why  
14 certain States did or did not or why Congress would only  
15 want there to be 17. But, certainly, there is  
16 nothing -- and there is nothing in the legislative  
17 history to express other than the fact that it was the  
18 effect of a judicial -- of a legislative compromise.

19 JUSTICE GINSBURG: What sense would it make  
20 for Congress to say we'll take two abusers? The conduct  
21 is identical. And in state A there is one consequence  
22 to bar on the possession of guns, and state B there  
23 isn't for the identical conduct, why would Congress want  
24 these two different results?

25 MR. GIATRAS: It was -- the language that

1 was ultimately agreed upon by the entire Congress, Your  
2 Honor, was as a result of a compromise. And -- that --

3 JUSTICE SCALIA: I suppose it gives greater  
4 assurance of what exactly the prior conviction was. If  
5 there is just a prior conviction of misdemeanor  
6 violence, you have to go back, I suppose, and look at  
7 the conviction, look at the testimony to find out  
8 whether indeed it was domestic violence. It was just a  
9 general -- general assault statute. You don't know it  
10 was committed in the home or not.

11 Whereas if you're -- if you're convicted of  
12 the crime, the misdemeanor of violence against a spouse  
13 or a relative like this, you know exactly what the --  
14 what the crime is.

15 MR. GIATRAS: You will know that.  
16 Certainly. And by even the -- the text of the statute,  
17 it changes from a crime of violence to the definition of  
18 misdemeanor.

19 JUSTICE SCALIA: I understand that -- that  
20 when someone purchases a firearm, they have to affirm,  
21 check a box, I have been convicted of a crime of  
22 domestic violence. Is that how it reads? And that goes  
23 to, you know, to the Federal Government and they check  
24 the records of convictions.

25 How -- how would your client check that? I

1 have been -- I have been convicted of a crime of  
2 domestic violence, if he had been convicted of assault  
3 and the assault happened to be domestic assault would --  
4 would he be perjuring himself if he said no?

5 MR. GIATRAS: There are -- there are cases  
6 that are prosecuted in that manner where also lying on  
7 the form gives charge -- gives rise to a Federal  
8 offense. And the ATF regulation is -- reads the statute  
9 slightly -- reads the statute -- it reads the statute  
10 significantly different and puts in parentheses such  
11 as assault and/or battery and also puts in  
12 parentheses how -- they use the word "was committed"  
13 in a -- in a third subparagraph.

14 JUSTICE SCALIA: Does -- does it make clear  
15 whether the offense has to be domestic -- a domestic  
16 violence offense or whether an ordinary assault offense  
17 will qualify if as a matter of fact it was domestic?

18 MR. GIATRAS: Well, it -- it -- the ATF  
19 regulation denotes that you should even put it down if  
20 it's going to be an assault and --

21 JUSTICE SCALIA: You -- I don't understand  
22 what you've said.

23 MR. GIATRAS: The ATF regulation is in  
24 appendix F to our red brief, page 12 A.

25 JUSTICE SCALIA: Oh, and it's drafted the

1 way the statute should have been drafted. Isn't that  
2 interesting.

3 In other words, it breaks out the "was  
4 committed by a current or former spouse" and makes that  
5 a separate provision, rather than a part of the element  
6 "use of attempted force against a family member."

7 MR. GIATRAS: That is correct, Your Honor,  
8 but that --

9 CHIEF JUSTICE ROBERTS: It's drafted the way  
10 it should have been if your friends were correct.

11 MR. GIATRAS: That -- it's drafted the  
12 way -- it's drafted the way the original sponsor of the  
13 legislation would have wanted it to pass Congress, Your  
14 Honor -- or Chief Justice.

15 JUSTICE KENNEDY: The -- the -- the statute  
16 uses the word "element" in the term singular. It seems  
17 to me that although this statute is a mess anyway --

18 (Laughter).

19 JUSTICE KENNEDY: -- that that -- that that  
20 doesn't particularly help you. Elements usually refer  
21 to each component of the actus reus -- you entered a  
22 dwelling with a weapon. You would say "elements" for  
23 that, wouldn't you?

24 And it seems to me under your interpretation  
25 the statute should say "elements."

1                   MR. GIATRAS: Well, I think that the -- the  
2 best advice is to take that of judge Sentelle's  
3 dissenting opinion in Barnes where element or elements  
4 is insignificant, the plural of it. Instead it's what  
5 is the element as opposed to how many elements there  
6 are.

7                   JUSTICE KENNEDY: Well, I mean when we are  
8 grasping for straws I'm not sure anything is  
9 insignificant.

10                  MR. GIATRAS: Well -- and in this particular  
11 matter, when in seeking -- if after seizing everything  
12 from which the aid can or may be derived, I think we can  
13 only guess as to Congress's intent.

14                  JUSTICE GINSBURG: But suppose this statute,  
15 the one that was enacted, had the word "if" before  
16 "committed." Would that then convey the meaning that  
17 the Government is urging? Has as an element use of  
18 force, comma, "if" committed.

19                  MR. GIATRAS: Well, that may make it  
20 slightly even more vague, Justice, because then it's  
21 whether or not it's even part or parcel or whether it is  
22 or isn't part of it. Here at least what they --

23                  JUSTICE GINSBURG: "If committed" would  
24 break from "use of force." The element is the use of  
25 force, but then the crime would have to have been

1 committed by a current or former spouse; so wouldn't an  
2 "if" separate what is the element, that is, use of  
3 force?

4 MR. GIATRAS: I don't believe that to  
5 use the word "if" changes our position, Justice --

6 JUSTICE SCALIA: Well, sure it would. Just  
7 as an "is" --

8 MR. GIATRAS: Well, "was," if --

9 JUSTICE SCALIA: I mean, if you want to add  
10 words you can add "if," you can add "as is," you could  
11 rewrite the statute a lot of ways.

12 MR. GIATRAS: Well -- and one way is that  
13 this statute denotes that there is a part (c), of which  
14 there is no part (c). This statute also lacks -- even  
15 though it's very insignificant in and of itself -- by  
16 itself -- it lacks a period at the very end of double i.

17 Again, no one particular point can be --  
18 would say that we would allow that punctuation to  
19 overcome the purpose, or overcome the text, but when  
20 taken as a whole, when you have the text and an  
21 inartfully drafted statute that references sections that  
22 don't exist, that has grammatical errors in it and that  
23 leaves things up to the reader to have to decide whether  
24 something is involved or not involved; and you also then  
25 have a lack of sufficient congressional record, then I

1 believe that it certainly is favored to look at the rule  
2 of lenity in this case. I do want to also --

3 JUSTICE ALITO: Do you really think there is  
4 a notice problem here? If you had been advising  
5 Mr. Hayes after he was convicted of this misdemeanor,  
6 and you read this, would you say well, you know, you're  
7 -- it's a good thing that you were convicted of this in  
8 West Virginia, where there isn't a specific statute  
9 targeting domestic violence, because it doesn't cover  
10 you. If you had been convicted in another State under a  
11 specific domestic violence statute then you wouldn't be  
12 able to possess firearms but you're home free because of  
13 the nature of the statute in your State?

14 MR. GIATRAS: I believe it would have  
15 been -- in 1993 - '94 time period, it would have been  
16 very difficult -- it would have been, it should have  
17 been very easy to -- to advise Mr. Hayes with respect to  
18 that issue. Certainly. That he would not have lost his  
19 rights at that point.

20 Thereafter when Congress passed this  
21 statute, then I believe that -- does it become a little  
22 murky? It probably does become a little murky. After  
23 you have the hindsight of being able to one, take a look  
24 at the legislative record if that's the necessary,  
25 and/or consider that, and/or if you take a look at the

1 ATF regulation, the only problem is the ATF regulation  
2 takes it -- takes us back in time to what they would  
3 have -- what would have been or what they would have  
4 liked it to have been as opposed to what was actually  
5 legislated.

6 JUSTICE GINSBURG: But if -- counsel  
7 advising Mr. Hayes surely would have looked at what was  
8 the uniform position in all the circuits. All the  
9 circuits that had this question before the floor read it  
10 the way the Government is urging. So counsel I think  
11 would have been highly irresponsible to advise Mr. Hayes  
12 that he would be home free, simply because his own State  
13 didn't have a separate domestic violence statute.

14 MR. GIATRAS: And Justice Ginsburg, the only  
15 reason I say that in this particular case, is because  
16 Mr. Hayes was in 1993 -- and was pled in 1994, which was  
17 prior to enactment of this statute and/or any of the  
18 circuit court opinions. So that was my -- that was the  
19 reason for my answer that in Mr. Hayes' case that it  
20 would have been very simple and no one would have looked  
21 to those issues because those didn't exist.

22 To bring to the -- to answer one of the  
23 questions from the Chief Justice with respect to what  
24 States may have had these laws in 1996, on page 24 of  
25 the Government's merits brief, the footnote number 9

1 denotes -- footnote number 9 denotes the States, which  
2 include Alabama, Kansas, Missouri, Nebraska, Maine,  
3 North Carolina and the like. Kansas, and Mississippi.

4 CHIEF JUSTICE ROBERTS: I'm sorry. Is that  
5 the right list? I -- that's statutes passed after  
6 1996.

7 MR. GIATRAS: Yes.

8 CHIEF JUSTICE ROBERTS: I looked at the  
9 amicus brief filed by the National Network, page 18  
10 footnote 53, and I see California, Illinois, Michigan,  
11 Ohio. Which is the right list?

12 MR. GIATRAS: And that is the right list,  
13 Chief Justice, and that includes West Virginia in the  
14 1996, that was passed. And that is there on footnote  
15 number 53, just so it's correct.

16 Our reading of the statute is more  
17 reasonable than the Government's. Certainly with  
18 respect to the variances of the grammatical errors and  
19 the grammatical leaps that the Government must take in  
20 order to substantiate its reading of the statute, we  
21 believe that ours is more reasonable.

22 Likewise, the legislative history in this  
23 particular case is very weak, and if this Court even  
24 considers it, then I think you can take a look with  
25 respect to the text, the structure, the purpose and the

1 history and determine --

2 JUSTICE STEVENS: Let me be sure I  
3 understand the legislative history correctly in a broad  
4 sense. The text of the bill as originally introduced in  
5 the Senate favors the Government. Is that correct?

6 MR. GIATRAS: Yes, Your Honor.

7 JUSTICE STEVENS: And there was a change  
8 made in the House in the form of an amendment to that  
9 bill? Or was it a separate bill introduced in the  
10 House?

11 MR. GIATRAS: It was not a separate bill.  
12 There was -- there no committee -- there was no  
13 committee substitute, there was no committee hearings.  
14 It just --

15 JUSTICE STEVENS: They enacted a different  
16 text.

17 MR. GIATRAS: Yes, they did.

18 JUSTICE STEVENS: And then -- without  
19 explanation. And then the bill went back to the Senate.  
20 As I understand it, it was approved in the form enacted  
21 by the House without -- with only that one comment.

22 MR. GIATRAS: That is with only -- yes. And  
23 that -- and that comment did not speak -- the comment of  
24 the sponsor did not speak with respect to the domestic  
25 violence -- the domestic relationship element.

1 JUSTICE STEVENS: Thank you.

2 JUSTICE SOUTER: But he did say that he  
3 agreed to the change.

4 MR. GIATRAS: He did say that he agreed with  
5 the change, and that he also said, though, that the  
6 bill, the new bill made it more precise and broader.  
7 Which was a -- which was a quote from the sponsor.

8 If there are no further questions --

9 JUSTICE STEVENS: Let me be sure. But under  
10 your view, it actually made it narrower?

11 MR. GIATRAS: Yes.

12 JUSTICE STEVENS: Yes.

13 MR. GIATRAS: If there are no further  
14 questions, Respondent asks that the Court affirm the  
15 judgment of the --

16 JUSTICE SCALIA: Excuse me. Under anybody's  
17 view, it made it narrow. Under Lautenberg's view, it  
18 made it narrow.

19 MR. GIATRAS: Other than he said the words  
20 that it made it more precise and broader.

21 JUSTICE SCALIA: How did it make it broader?  
22 I mean, it used to cover cutting -- cutting a credit  
23 card. Now, it no longer does.

24 MR. GIATRAS: I believe the text of the  
25 statute as enacted makes it more narrow.

1 JUSTICE SCALIA: Of course it does.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. GIATRAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Ms. Saharsky, six  
5 minutes.

6 REBUTTAL ARGUMENT OF NICOLE A. SAHARSKY

7 ON BEHALF OF THE PETITIONER

8 MS. SAHARSKY: Thank you. In this case, the  
9 Court has a choice between either reading the statute in  
10 a way that uses the words very unnaturally and unusually  
11 -- "committed by" to modify "use" and "element" --  
12 treating a singular as plural, and the word "committed"  
13 --

14 CHIEF JUSTICE ROBERTS: Well, if I could  
15 stop you there. The very first sentence in the United  
16 States Code, 1 U.S.C. section 1, says the singular  
17 includes the plural.

18 MS. SAHARSKY: Right, and this Court has  
19 said that you do that only when two things are true:  
20 When it makes sense in context, and we think it doesn't  
21 because of the word "committed," which Respondent wants  
22 to read right out of the statute, and also because you  
23 do it when it's necessary to fulfill the evident  
24 purposes of the statute. And here, for the reasons we  
25 explained, treating the singular as plural would be

1 contrary to the purposes of the --

2 CHIEF JUSTICE ROBERTS: I know, but  
3 basically what you're saying is we don't follow 1 U.S.C.  
4 section 1 because our reading is correct. If they said,  
5 well, it doesn't -- you know, in context it doesn't  
6 fulfill the purposes and therefore we read "element" as  
7 singular only rather than according to section 1 of the  
8 United States Code.

9 MS. SAHARSKY: It's because the element --  
10 the singular "element" has other indicia meaning it  
11 involves the word "committed" and then also this -- the  
12 fact that Congress's objective would be stymied if you  
13 took Respondent's reading.

14 So you've got a choice between just using  
15 the words unnaturally -- "committed by," taking  
16 "committed" and just making it superfluous, as in  
17 Respondent's view, or treating the singular "element" as  
18 plural, or you can give, what as the Government is  
19 suggesting, the words a natural and logical reading that  
20 you're talking about an offense of this certain violent  
21 character committed by these certain people. And, yes,  
22 that involves looking slightly past the Romanette (i)  
23 and (ii) structure to look at this being two clauses  
24 that both modify the word "offense." The way that --

25 JUSTICE SCALIA: You have to add words. It

1 is unavoidable. To come to your reading, you must add  
2 words to the statute. To adopt the reading of the other  
3 side on the other hand, you need not add a single word.  
4 You just have to resign yourself to the -- to the usage  
5 that is unusual but not unheard of, that a particular  
6 use was committed. And the other side gives a number of  
7 examples, as does the brief by -- by linguists, a number  
8 of examples where that appears.

9           So it's an unusual usage but not an unheard  
10 of usage. They don't have to add a single word or a  
11 single hard break in the text. You have to, to get to  
12 your construction.

13           MS. SAHARSKY: With respect, Justice Scalia,  
14 we don't agree with that, and I'll give you two  
15 illustrations that hopefully would help establish that  
16 point: One, if you just read this all as a sentence  
17 without respect to the Romanettes (i) and (ii), you have  
18 an offense that is a misdemeanor and has, as an  
19 element, committed by a certain group of persons. That  
20 reads as a sentence. There is an offense of a certain  
21 type committed by a certain group of persons.

22           JUSTICE BREYER: For that, you'd have to  
23 assume that the GS-12 who drafted this, or whoever the  
24 equivalent was in the Senate, put the "that" in the  
25 wrong place. If he had put the "that" after the (i)

1 when he broke it down, it would all read as a sentence.  
2 The "that" would be for the first part, and you'd say  
3 "felony committed" for the part that interests us. Does  
4 that work?

5 MS. SAHARSKY: I think it would read better  
6 that way. I think that it would --

7 JUSTICE SCALIA: You'd would have to put a  
8 "that" --

9 MS. SAHARSKY: It would read --

10 JUSTICE SCALIA: You'd have to put a "that"  
11 at the beginning of (ii) as well, wouldn't you?

12 MS. SAHARSKY: Again, I think if you just --  
13 I don't think you need to. I think you can just read  
14 through this all as one sentence. And we looked at that  
15 previous -- while were you talking with Respondent's  
16 counsel, you looked at that previous version of the bill  
17 Congress considered, and it just had it all as one  
18 sentence. It said "an offense of this certain character  
19 committed by this certain group of persons." And that  
20 same structure is in the statute as enacted, and that  
21 shows that the "committed by" refers back to "offense."

22 And to get back to the point I opened with,  
23 the way that you choose between the two constructions in  
24 this case is to look at what Congress would achieve  
25 under Respondent's construction of the statute, which is

1 a statute that applies only in 17 States, not --

2 CHIEF JUSTICE ROBERTS: And, again, just not  
3 to beat a dead horse, but it's footnote 8 of your brief  
4 on page 23 that lists the 17 States. They include  
5 California, Illinois, Michigan, Ohio, Virginia. That  
6 wouldn't be a useless act by Congress to cover everybody  
7 in those States.

8 MS. SAHARSKY: No, but it wouldn't be  
9 consistent with what Congress was intending, which is to  
10 solve the nationwide problem that every person who  
11 proved that they were willing to hurt their family  
12 members should not be able to possess a firearm, whether  
13 they're a felon or whether they were convicted of a  
14 misdemeanor. And that was the problem that --

15 CHIEF JUSTICE ROBERTS: I know, but your  
16 point was this doesn't do any good because it's only 17  
17 States. Those are -- there are a lot of people in those  
18 States.

19 MS. SAHARSKY: Right, but some persons in  
20 those States who commit the same types of offenses, as  
21 Justice Ginsburg pointed out -- you know, they commit  
22 the same violent acts against family members. Some of  
23 them would be prosecuted under the regular -- under a  
24 specific domestic violence statute, but some would be  
25 prosecuted under regular assault and battery statutes.

1 And it doesn't make any sense, in those same States, to  
2 treat some people as being subject to the possession ban  
3 and some people as not being subject to that possession  
4 ban.

5 JUSTICE SCALIA: It makes it easier to  
6 identify it. You don't have to go back and look to see  
7 whether this particular assault conviction was an  
8 assault on a family member or not. It's there on the  
9 face of the indictment. Pretty important, it seems to  
10 me.

11 MS. SAHARSKY: With respect, Justice Scalia,  
12 you can't just tell from the face of the State  
13 indictment whether you would not be able to possess a  
14 firearm under Federal law, because the domestic  
15 relationships covered by the State offenses, it is a  
16 broader universe in each of those 17 States. More  
17 domestic relationships are covered than are covered by  
18 the Federal statute. So you could have been convicted  
19 in one of those 17 States of a specific domestic  
20 violence offense, and still that would not necessarily  
21 be the case that you couldn't possess a firearm under  
22 Federal law, because they cover, for example, dating  
23 relationships.

24 I understand that the notice concerns you've  
25 raised but just to get back to one other point that came

1 up with Respondent's counsel, when a person wants to buy  
2 a firearm, he fills out this particular form, Form 4473,  
3 and that form specifically says on it that offenses like  
4 assault and battery are covered. The ATF regulation  
5 that has been in place since this statute was enacted  
6 says that those -- that offenses such as assault and  
7 battery are covered. In fact, all the courts of appeals  
8 up until recently, nine of them had this settled  
9 understanding. Aside from the ATF having it, Congress  
10 relied upon it. And we think that it makes sense.

11 You should reverse the judgment below.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 The case is submitted.

14 (Whereupon, at 11:50 a.m., the case in the  
15 above-entitled matter was submitted.)

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