

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 07-608

6 RANDY EDWARD HAYES. :

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8 Washington, D.C.

9 Monday, November 10, 2008

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11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:53 a.m.

14 APPEARANCES:

15 NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor

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

17 behalf of the Petitioner.

18 TROY N. GIATRAS, ESQ., Charleston, W.Va.; on behalf of

19 the Respondent.

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C O N T E N T S	
	PAGE
1	
2	ORAL ARGUMENT OF
3	NICOLE A. SAHARSKY, ESQ.
4	On behalf of the Petitioner
5	TROY N. GIATRAS, ESQ.
6	On behalf of the Respondent
7	REBUTTAL ARGUMENT OF
8	NICOLE A. SAHARSKY, ESQ.
9	On behalf of the Petitioner
10	
11	
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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 --

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 act 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 believe 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: But you've changed
2 the word. You read it as if it says "an offense that
3 committed." So either the "that" is out or you've got
4 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 modifies
13 both of them, and you're reading it that it's an offense
14 committed, and yet under the statute it has to be an
15 "offense that committed." So you've either got to leave
16 "that" out the second time but not the first or you've
17 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 -- 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 -- maybe I'm missing something. What
14 change would you have to make to the word "element" to
15 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 offense, and if it was doing that it would make no sense
16 at all for Congress to -- to have enacted a statute that
17 would such extremely limited application. And, of
18 course, Respondent's reading would make the "is a
19 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: -- the assault he was
7 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 came in later -- no,
13 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 other 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, to
23 make sure I understand the alternate reading. Is it
24 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 If -- now there is the element of "attempted use of
3 force" is one, is the second requirement; and the third
4 requirement is that it be committed by a current or
5 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 -- a serious violent
23 offense. Are there -- is there felony assault and
24 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 out, 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 look to the drafting history
7 just a bit, and I -- I think that, you know, every
8 indicia -- every indication in the drafting history,
9 both if you compare the first version of the bill with
10 the statute that was enacted and the discussion relating
11 to it, shows that this language "has as an element,"
12 which really only intended to get at how violent an
13 offense had to be, it -- it was never intended to get at
14 any kind of domestic relationship requirement. And, of
15 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 to the rule of lenity? I suppose, to get back to
15 Justice Kennedy's point, you're saying that the lawyer
16 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 their inaction and
2 the lack of words speak very loudly. And it was -- from
3 March of 1996, when the legislation was introduced, and
4 then it went over to the House after passing
5 significantly in the Senate, it was stalled, and it was
6 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 is a misdemeanor -- had

1 to involve a use of force, and that wasn't clear before,
2 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 -- 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. 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 it's the fine language
3 consistent with what he wanted. It requires putting in
4 an "is." I don't find that too awful. Okay. That's
5 your argument against you. What is it? Your argument
6 to rebut that.

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

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 as 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 proved by the President to continue the government
14 to run. And this bill was changed then in the House of
15 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 it language come over to the Senate from the
22 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: Making progress. And
14 you're saying that in the House there were some people
15 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 dying, and that there
5 are significant staunch opposition from certain forces
6 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 take two abusers? The conduct is
21 identical. And in state A there is one consequence to
22 bar on the possession of guns, and state B there isn't
23 for the identical conduct, why would Congress want these
24 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 parentheticals such
11 as assault and/or battery and also puts in
12 parentheticals 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: I don't understand what
22 you've said.

23 MR. GIATRAS: The ATF regulation is in
24 appendix F to your 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 are 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 to
17 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 gasping 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 it would
20 have been very simple and no one would have looked to
21 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? That's -- 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 relationships 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 he
6 -- that the bill, the new bill made it more precise and
7 broader. Which was a -- which was a quote from the
8 sponsor.

9 If there are no further questions --

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

12 MR. GIATRAS: Yes.

13 JUSTICE STEVENS: Yes.

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

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

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

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

25 MR. GIATRAS: The text of the statute as

1 enacted makes it more narrow.

2 JUSTICE SCALIA: Of course it does.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. GIATRAS: Thank you.

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

7 REBUTTAL ARGUMENT OF NICOLE A. SAHARSKY

8 ON BEHALF OF THE PETITIONER

9 MS. SAHARSKY: Thank you. In this case, the
10 Court has a choice between either reading the statute in
11 a way that uses the words very unnaturally and unusually
12 -- "committed by" to modify "use" and "element" --
13 treating a singular as plural, and the word "committed"
14 --

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

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

1 explained, treating the singular as plural would be
2 contrary to the purposes of the --

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

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

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

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

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

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

23 JUSTICE BREYER: For that, you'd have to
24 assume that the GS-12 who drafted this, or whoever the
25 equivalent was in the Senate, put the "that" in the

1 wrong place. If he had put the "that" after the (i)
2 when he broke it down, it would all read as a sentence.
3 The "that" would be for the first part, and you'd say
4 "felony committed" for the part that interests us. Does
5 that work?

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

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

10 MS. SAHARSKY: It would read --

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

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

23 And to get back to the point I opened with,
24 the way that you choose between the two constructions in
25 this case is to look at what Congress would achieve

1 under Respondent's construction of the statute, which is
2 a statute that applies only in 17 States, not --

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

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

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

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

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

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

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

25 I understand that the notice concerns you've

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

12 You should reverse the judgment below.

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

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

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A	<p>Alabama 44:2 ALITO 36:7 42:3 Allapattah 34:7 allow 41:18 alteration 26:22 alternate 15:23 ambiguity 12:25 amendment 45:8 amendments 21:20 amici 9:24 amicus 44:9 and/or 38:11 42:25,25 43:17 answer 43:19,22 anybody 18:15 anybody's 46:17 anyway 4:16 17:11 39:17 apologize 28:13 appeals 3:15 53:8 APPEARAN... 1:14 appears 8:11,17 49:9 appendix 28:10 38:24 application 4:4 12:17 applied 15:18,21 23:22 31:23 applies 9:14 51:2 apply 7:9,10 13:8 14:13 17:8 25:17 appropriations 27:11 approved 45:20 argument 1:12 2:2,7 3:3,6 11:10 22:6 26:3,8 31:5,5 31:24,24 47:7</p>	<p>arguments 22:12 Army 22:17 articulated 34:7 aside 25:14 53:10 asking 14:9 32:7 asks 46:15 assault 13:17 14:6 19:11,14 19:23 20:2 21:7,22 22:18 22:25 23:2 24:11 25:2,8 37:9 38:2,3,3 38:11,16,20 52:1,8,9 53:5,7 assaults 22:17 Assistant 1:15 assume 16:9 18:16,16 49:24 assurance 37:4 ATF 38:8,18,23 43:1,1 53:5,10 attempted 3:24 5:4 16:2 30:14 35:5 39:6 attorney 19:16 attorneys 14:14 attributed 28:17 attributes 29:21 author 27:20 36:3 awful 31:4 awkward 12:21 a.m 1:13 3:2 53:15</p>	<p>53:1 backdrop 6:9 ban 52:3,5 bar 36:22 Barnes 40:3 bases 22:17 basically 25:18 48:4 battering 3:10 battery 6:18 19:11,14,24 20:2,20 21:7 21:22 24:11 25:8 38:11 52:1 53:5,8 beat 51:4 beaten 14:4 beginning 22:5 50:12 begun 16:11 behalf 1:17,18 2:4,6,9 3:7 26:4 47:8 believe 7:1 10:9 15:20 24:25 29:14 41:4 42:1,14,21 44:21 best 32:6 40:2 better 50:6 beyond 35:15 bill 14:15 23:9 27:8,9,10,11 31:14 33:11,14 36:1,4,6,8 45:4 45:9,9,11,19 46:6,6 50:17 bit 22:5 23:7 body 20:11 box 37:21 break 8:20 40:24 49:12 breaks 30:17 39:3 Breyer 29:24 31:9,18 32:5 32:12,15 33:25</p>	<p>34:9,24 35:3 35:13,17 49:23 brief 11:5 28:11 28:11 38:24 43:25 44:9 49:8 51:4 bring 43:22 broad 30:9 45:3 broader 27:16 27:17 46:7,21 46:22 52:17 broke 12:8 50:2 brought 9:23 budget 14:15 33:11 burglary 25:11 25:12,13,17 buy 53:2</p>
			C	
			<p>c 2:1 3:1 41:13 41:14 California 15:9 15:12,13 44:10 51:6 call 20:6 21:12 21:13 card 30:10 46:24 care 23:23 Carolina 44:3 case 3:4 11:5 14:11,17 15:15 19:10,19 20:8 21:13,18 22:7 25:2,10 27:13 31:11 42:2 43:15,19 44:23 47:9 50:25 52:22 53:14,15 cases 19:17 24:22 38:5 category 18:21 cause 25:23 caution 13:9 certain 5:23,24 5:24 6:1,1,3</p>	

7:24,25 8:7,8 36:5,14 48:21 48:22 49:20,21 49:22 50:19,20 certainly 14:1,3 20:7 27:17 36:15 37:16 42:1,18 44:17 change 11:14 27:23 29:6 30:23 34:1,5 45:7 46:3,5 changed 8:1 30:7 32:10,11 33:14 changes 29:9 37:17 41:5 changing 31:17 character 7:24 8:7 48:22 50:19 charge 38:7 charged 20:13 20:13,17 21:4 21:6,14 22:18 charging 20:9 Charleston 1:18 check 37:21,23 37:25 Chief 3:3,8 7:13 8:1,9 9:2,4 11:8 12:1,20 15:4,9 16:8 22:23 23:3 24:13 25:1 26:1,5 29:15 39:9,14 43:23 44:4,8,13 47:3 47:5,15 48:3 51:3,16 53:13 choice 47:10 48:15 choose 50:24 circuit 43:18 circuits 43:8,9 clarify 31:21 class 11:22	classic 14:11 clause 5:15 9:10 10:9 12:10 clauses 8:23 12:9 48:24 clear 10:13,13 14:2,19 16:19 18:23,24 27:25 28:1 31:10 35:1,25 38:14 clearer 16:17 client 24:17 25:2 37:25 clients 13:19 closed 16:1 Code 47:17 48:9 come 4:15 5:8 9:10 14:12 32:19,22 34:10 34:17,18,21 49:2 comes 8:12 comma 3:21 11:2 40:18 comment 45:21 45:23,23 commit 3:24 21:1 30:3 51:21,22 commits 3:23 committed 3:21 3:22 5:15,23 5:24 6:1 7:19 7:24 8:3,8,14 8:15,21,22 9:9 9:9,16,17 10:2 10:2,7,12,19 11:3,7,11 12:2 12:5,6,11,11 15:19 16:1,4 16:21 18:6,12 19:18 28:19,20 28:21 29:2,12 29:16,19,22 30:5 37:10 38:12 39:4 40:16,18,23	41:1 47:12,13 47:22 48:12,16 48:17,22 49:7 49:20,22 50:4 50:20,22 committee 45:12,13,13 committing 9:20 common 3:23 25:17 commonly 25:7 common-law 25:12 compare 23:9 comparison 24:8 component 39:21 compromise 4:13,18 5:11 26:15,20 36:18 37:2 concept 3:20 11:22,23 concepts 11:18 11:20 concern 18:19 concerned 7:3,8 concerns 13:12 52:25 conclusion 31:18,19 condition 21:20 conduct 17:6,10 17:12 36:20,23 Congress 4:6,11 6:2,8,12,13,16 6:21 7:3,7 12:8 12:13,16 16:9 16:18,24,24 20:23 22:2,20 23:18,23 24:1 24:25 25:18 26:8,10,18 31:9,16,20 32:1 36:9,14 36:20,23 37:1	39:13 42:20 50:18,25 51:7 51:10 53:10 congressional 25:22 27:1 35:20 41:25 Congress's 3:14 24:7 40:13 48:13 consequence 36:21 consider 25:9 42:25 considered 5:1 5:22 26:9 50:18 considering 25:10 considers 44:24 consistent 31:3 51:10 constitutional 21:25 construction 22:10 49:13 51:1 constructions 50:24 contested 26:15 context 14:8 47:21 48:6 continue 33:13 contrary 3:13 48:2 control 4:10 convey 40:16 convicted 14:7 17:23 37:11,21 38:1,2 42:5,7 42:10 51:14 52:19 conviction 3:10 14:24 37:4,5,7 52:8 convictions 37:24 correct 10:14	39:7,10 44:15 45:5 48:5 correctly 45:3 counsel 7:13 13:15 26:1 43:6,10 47:3 50:17 53:2,13 count 20:20 course 12:18 15:20 23:15 24:2,4 47:2 court 1:1,12 3:9 4:12 6:7 13:1 24:21 25:9,10 26:6,16 34:6 43:18 44:23 46:15 47:10,19 courthouse 13:18 courts 3:15 53:8 Court's 25:15 cover 15:2 42:9 46:23 51:7 52:23 covered 14:20 14:21 22:11 24:11 52:16,18 52:18 53:5,8 covers 4:15 22:24 credit 30:10 46:23 crime 3:11 5:1 26:10 27:15 30:3,5,9,13,18 34:2 35:7 37:12,14,17,21 38:1 40:25 crimes 14:13 criminal 13:16 critical 12:3 criticizing 35:4 current 10:3 11:12 16:4 29:18 39:4 41:1 cutting 30:10
--	--	--	--	---

46:23,23	difficult 42:16	D.C 1:8,16	53:6	F 38:24
D	directly 24:10	E	enactment 6:24	face 14:23 20:10
D 3:1	disagree 33:23	E 2:1 3:1,1	43:17	52:10,13
dangerous	discuss 5:2	earlier 6:6 28:5	enacts 6:9	fact 14:25 20:18
21:13	discussing 5:7	28:5	ensure 14:10	23:25 24:22
dating 14:22	discussion 5:21	early 36:3	entered 39:21	27:7,14 31:14
52:23	20:23 23:10	easier 52:6	entire 27:23	31:22 32:9
dead 4:2,7,8	dissenting 40:3	easy 42:17	37:1	35:18 36:17
51:4	distinction 36:9	EDWARD 1:6	equivalent	38:17 48:13
deadly 5:5 15:25	disturbance	effect 6:11 16:22	49:25	53:8
34:3 35:6	19:10 21:12	17:2 22:13,22	errors 41:22	fair 13:12,14
deal 4:17 13:19	diverse 11:18	29:17 36:18	44:18	families 21:9
dealing 6:12	document 20:9	either 7:21 8:3	especially 6:11	family 7:6 12:3
17:6	doing 12:15	8:15 9:16	ESQ 1:15,18 2:3	12:6 19:4 21:2
decide 41:23	16:13 17:10	22:22 28:20	2:5,8	22:4 29:1 30:6
decies 31:12	21:24	47:10	essentially 11:5	39:6 51:12,23
defeat 3:14	domestic 3:11	elegant 9:21,25	establish 49:16	52:9
defendants	3:16,20 4:20	element 3:17,18	etcetera 14:23	father's 17:13
11:22	6:4,13,17,18	3:19 4:20 5:4	everybody 51:7	favor 13:5 22:9
define 25:11	7:4,5,8 12:14	5:18 6:3 8:22	evidence 26:21	favored 42:1
30:10	14:13,18,20	9:9 10:18 11:1	evident 47:24	favours 45:5
defined 26:10	15:2 16:25	11:3,9,11,12	exactly 20:22	Federal 4:4 7:11
defines 30:12	19:9,12,13	11:14,24,24	23:19 28:18	7:11 12:19
definition 25:12	20:16 21:4,12	12:3 16:2	29:11 32:24	14:21,25 15:21
25:13,17 29:6	22:17,19 23:5	23:11 25:7	37:4,13	22:15,17,18,21
37:17	23:14 25:7	26:12 28:23,23	example 8:10	22:24 23:2
denotes 38:19	26:11,12 27:15	28:25 29:21	24:23 25:9,10	37:23 38:7
41:13 44:1,1	30:3 35:8	30:13 39:5,16	25:21 52:23	52:15,19,23
Department	36:11 37:8,22	40:3,5,17,24	examples 9:22	fellow 17:13
1:16	38:2,3,15,15	41:2 45:25	49:8,9	felon 51:14
derived 13:1	38:17 42:9,11	47:12 48:7,10	Excuse 33:19	felonies 20:18
40:12	43:13 45:24,25	48:11,18 49:20	46:17	felons 21:3
describes 26:8	51:25 52:15,18	elements 11:17	exempt 7:5	felony 18:18
desire 36:7	52:20	11:19 12:4	exist 41:22	19:23 20:13
despite 15:21	double 16:10	39:20,22,25	43:21	50:4
23:25	29:22 41:16	40:3,5	expansive 25:13	filed 11:5 44:9
detail 6:2	drafted 38:25	eleventh 27:22	expect 16:24	fills 53:3
determine 45:1	39:1,9,11,12	emotionally	24:25	final 26:9 32:4
determined 3:15	41:21 49:24	21:14	explained 48:1	find 30:24 31:4
different 8:23	drafter 30:17	enact 7:9 17:1	explanation	34:16 37:7
9:12 11:23	33:20	enacted 4:2 5:14	45:19	fine 31:2
12:4,9 15:2	drafting 4:25	5:25 12:16	express 36:17	firearm 18:1,4
22:8 28:16	23:6,8 24:9,18	14:17 19:8	extend 35:15	18:13,17 21:15
33:3 34:15,17	drawing 36:10	23:10 35:10	extremely 12:17	21:23 37:20
36:24 38:10	drawn 36:9	40:15 45:15,20	22:13	51:13 52:15,22
45:15	dwelling 39:22	47:1 50:21	F	53:3
	dying 36:1,4			firearms 6:13

<p>17:1,15 18:7 19:20 21:3,9 22:2 42:12 first 3:12 4:12 6:8,21 8:10,16 10:7,9 19:7 22:10 23:9 24:5 29:25 30:1 47:16 50:3 five 17:15 flaw 26:7 floor 34:4,13 35:21,24 43:9 follow 17:3 48:4 following 11:9 16:8 footnote 43:25 44:1,10,14 51:4 force 3:25 5:4 9:20 11:11 16:3 27:25 28:1 29:1,18 29:19 30:14 34:3,25 35:6 39:6 40:18,24 40:25 41:3 forces 36:5 form 35:9,10 38:7 45:8,20 53:3,3,4 former 5:11 10:3 11:12 16:5 29:18 39:4 41:1 forth 9:23 29:6 found 17:16 free 42:12 43:12 friend 7:15 friends 39:10 friend's 12:21 front 28:9 frustration 25:22 fulfill 47:24 48:7 fundamental</p>	<p>26:7 funding 21:21 further 25:24 46:9,14</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 gasping 40:8 general 1:16 19:11,15 22:18 23:2 37:9,9 generic 6:18 Giatras 1:18 2:5 26:2,3,5,24 27:17 28:3,7 28:10,13,22 29:3,13,20 31:7 32:3,9,14 32:16,21,23 33:6,18,22 34:6,18,23 35:2,5,12,16 35:18 36:13,25 37:15 38:5,18 38:23 39:7,11 40:1,10,19 41:4,8,12 42:14 43:14 44:7,12 45:6 45:11,17,22 46:4,12,14,20 46:25 47:4 Ginsburg 6:15 20:15,23 27:24 36:19 40:14,23 43:6,14 51:22 give 6:16,22 48:19 49:15 gives 21:21 37:3 38:7,7 49:7 go 6:4 24:17 25:20 35:23 37:6 52:7 goes 37:22 going 6:10 7:19 17:8 31:14 38:20</p>	<p>good 13:19 31:24 42:7 51:17 governed 23:17 23:24,25 government 4:4 33:13 37:23 40:17 43:10 44:19 45:5 48:19 Government's 10:10,14 13:4 13:5 22:10 26:7,14 43:25 44:17 grammatical 8:24 41:22 44:18,19 grammatically 7:21 grandparents 14:22 grant 21:21 great 13:8 greater 37:3 grievous 12:25 group 30:2 49:20,22 50:20 GS-12 49:24 guess 40:13 guilty 13:24 19:2 gun 4:9 7:4 13:22 17:13,14 guns 13:20 30:2 36:22 gutted 36:2,4</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hand 26:17 49:4 handles 19:17 happened 38:3 happens 9:21 hard 10:12,17 10:19,20 16:21 49:12 Hayes 1:6 3:4</p>	<p>42:5,17 43:7 43:11,16,19 hear 3:3 heard 9:4 hearing 34:16 hearings 45:13 help 39:20 49:16 highly 43:11 hindsight 42:23 history 4:25 23:6,8 24:9,18 24:18 25:15 31:10 32:17 36:17 44:22 45:1,3 hit 20:9 home 17:16 37:10 42:12 43:12 Honor 7:23 8:19 10:6,21 12:8 14:1,16 19:7 27:1 35:12,16 37:2 39:7,14 45:6 hope 17:20 hopefully 49:16 horse 51:4 hour 27:22 33:15 house 13:20 26:22,25 27:4 27:19 31:13 32:25,25 33:2 33:3,9,14,17 34:19,22,25 35:8,11,14,21 45:8,10,21 hunt 13:22 hurt 7:6 22:3 51:12</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>identical 36:21 36:23 identify 52:7 ignores 26:14</p>	<p>ignoring 11:2 ii 5:20 8:12,20 8:25 9:15,15 28:17 29:23 48:24 49:18 50:12 iii 16:1,20 19:1,1 illegal 13:13 Illinois 44:10 51:6 illustrations 49:16 immediately 4:2 13:20 22:22 important 17:6 52:10 imposes 17:11 inaction 27:1 inartfully 41:21 incentive 6:16 incentives 6:23 incidentally 13:20 include 24:8 29:11,20,21 30:10 44:2 51:5 included 20:19 includes 44:13 47:18 including 35:7 increased 17:9 indication 23:8 indicia 13:4 22:6 23:8 24:6,7,8 48:11 indictment 52:10,14 infrequently 7:9 inquiry 17:4 inserted 15:25 insignificant 40:4,9 41:15 intended 16:9 23:12,13,18,23 24:1 25:19 31:15</p>
---	---	---	--	--

intending 51:10	16:15 17:3,4	kind 19:17	law 6:9,10 7:12	22:5 30:8
intent 16:19	17:18,22,25	23:14	12:19 13:16	42:21,22
24:7 40:13	18:8,10,15,23	knecapping	14:3 19:18	logical 10:10
intentional	19:22 20:1,5	17:9	22:21 23:17,18	48:20
26:21,22	20:12,15,22	know 4:16,22,23	23:23 25:17	long 33:9
interested 29:8	21:17 22:23	6:7 8:23 10:11	52:15,23	longer 46:24
29:9	23:3,16,19,21	14:3 15:11,14	laws 43:24	look 4:24 9:7
interesting 39:2	24:2,4,13,15	15:15 19:7	lawyer 18:25	15:11 16:14,21
interests 50:4	25:1 26:1,5,19	21:4,25 22:22	23:21 24:15	22:7 23:6 24:5
interpretation	27:12,24 28:4	23:6,7 24:24	25:1	24:6,7 25:16
13:2,5 39:24	28:8,12,14,24	25:3 26:20	leaps 44:19	29:5 32:3 37:6
interpreted	29:8,13,15,16	29:13 32:24	leave 8:15	37:7 42:1,23
22:14	29:24 31:9,18	35:4,17 37:9	leaves 41:23	42:25 44:24
interpretive	32:5,12,15,17	37:13,15,23	led 26:15	48:24 50:25
22:8	32:19,22 33:2	42:6 48:3,6	left 28:18 30:20	52:7
introduced	33:16,19,25	51:16,22	legal 6:9 13:25	looked 24:22
12:10 27:3	34:6,9,20,24	knowledge	legislated 43:5	25:21 43:7,20
31:8,16 33:7	35:3,9,13,17	19:17	legislation 15:17	44:8 50:15,17
45:4,9	36:7,19 37:3	known 25:5	27:3,20 31:7,8	looking 8:24,25
introduces 3:20	37:19 38:14,21	knows 6:9 14:4	31:12 32:4	25:14 48:23
invoke 22:9	38:25 39:9,14	17:10	39:13	lost 42:18
involve 28:1	39:15,19 40:7	<hr/> L <hr/>	legislative 21:6	lot 4:6,8 14:14
involved 13:18	40:14,20,23	lack 9:18 27:2	24:18 25:14	16:16 41:11
41:24,24	41:5,6,9 42:3	41:25	26:15,17 31:10	51:18
involves 48:12	43:6,14,23	lacks 41:14,16	32:17 36:16,18	loudly 27:2
48:23	44:4,8,13 45:2	language 5:3,12	42:24 44:22	lying 38:6
involving 14:22	45:7,15,18	5:18 6:4 7:12	45:3	<hr/> M <hr/>
irresponsible	46:1,2,10,13	9:22 10:7,13	lenity 12:23,24	main 13:12
43:11	46:17,22 47:2	10:20 18:1	13:7,10 14:9	Maine 44:2
issue 42:18	47:3,5,15 48:3	22:15,21 23:11	14:10 17:4,5,8	making 7:11
issues 43:21	49:1,14,23	26:16 27:14	22:9 24:14,20	35:13 48:17
<hr/> J <hr/>	50:8,11 51:3	30:1,1,7 31:2	25:21 42:2	malpractice
Jersey 15:17,19	51:16,22 52:6	33:8,16,21,24	letter 4:2,7,8	13:24
judge 40:2	52:12 53:13	34:21,25 35:7	let's 25:9	malum 17:7
judgment 46:16	Justice's 16:8	36:25	liked 43:4	manifest 16:19
53:12	<hr/> K <hr/>	late 36:3	Likewise 44:22	manipulation
judicial 21:21	Kansas 44:2,3	Laughter 9:6	limit 36:6	34:8
36:18	keep 7:19 22:2	39:18	limited 12:17	manner 38:6
Justice 1:16 3:3	keg 7:3 21:10	Lautenberg	17:2 22:13	March 27:3
3:8 4:5,13,22	KENNEDY	15:16 21:5	24:23	match 14:24
5:6,10 6:15	13:6,14 14:5,8	29:25 30:22	line 8:11	materials 24:19
7:13 8:1,9 9:2	39:15,19 40:7	31:21 32:2,20	linguists 11:5	28:8
9:4,13 10:5,15	Kennedy's 17:4	33:4,20,22	49:8	matter 1:11 8:24
11:8 12:1,20	24:15	34:1,11 35:24	list 15:12 44:5	21:19,25 22:12
13:6,14 14:5,8	kicked 20:10,11	Lautenberg's	44:11,12	27:7,19 30:15
15:4,9,22 16:7	killed 36:2	24:9 46:18	lists 51:5	32:18 38:17
			little 9:3 19:1,1	

<p>40:11 53:16 mean 4:16 7:16 9:13 15:24 17:7 20:3,7 26:23 34:20 40:7 41:9 46:23 meaning 13:4 22:7 28:17 40:16 48:11 means 28:25 member 12:3,6 19:4 29:1 39:6 52:9 members 7:6 21:2 22:4 51:13,23 mere 18:18,20 35:18 merits 43:25 mess 39:17 Michigan 44:10 51:6 minute 14:15 minutes 47:6 misdemeanor 3:11 7:11 8:22 9:8 10:18 12:19 18:10,11 18:12,18 19:5 20:1,6,14,19 20:20 22:20,24 26:10 27:15,25 30:5,9,18 34:2 35:7 36:11 37:5,12,18 42:5 49:19 51:15 misdemeanors 18:20,22 20:17 21:5 22:16 missing 11:13 Mississippi 44:3 Missouri 44:2 mode 3:19 modified 5:15 8:6 27:10</p>	<p>modifies 3:22 8:12 12:11 modify 8:23 47:12 48:25 Monday 1:9 move 27:6 multiple 24:22 murky 42:22,22</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 1:18 2:1,1,5 3:1 26:3 narrow 24:23 25:12,16 46:18 46:19 47:1 narrower 46:11 National 44:9 nationwide 6:12 16:25 51:11 natural 29:17 48:20 naturally 3:13 3:22 12:11 13:3 nature 42:13 Nebraska 44:2 necessarily 52:21 necessary 42:24 47:24 need 20:24 21:7 22:1 28:24 31:19 49:4 50:14 needed 4:19 needs 12:25 negotiated 13:16 Network 44:9 never 9:4 13:22 13:22 23:13 new 3:20 5:3 15:9,13,17,19 46:6 NICOLE 1:15 2:3,8 3:6 47:7 nine 3:15 53:9</p>	<p>North 44:3 notice 13:12,14 13:25 14:10,11 14:14 18:6 19:20 21:22 42:4 52:25 noticing 15:15 November 1:9 number 15:1,5 19:9 43:25 44:1,15 49:7,8 numeral 9:3</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objected 27:13 objection 7:14 objective 48:13 obligated 24:16 24:17 occur 25:22 occurring 36:1 odd 15:20 offender 7:4 26:13 offenders 7:5 offense 3:17,23 3:24 4:21 5:16 5:21,23,23,25 6:3 7:18,24 8:2 8:6,6,7,13,15 8:21,24 9:8,10 10:1,2,8 11:19 11:21 12:12,15 14:25 17:24 18:6,11,25 19:3,19,19,23 20:6,8 23:13 26:11 38:8,15 38:16,16 48:21 48:25 49:19,21 50:19,22 52:21 offenses 7:11 9:12 15:3,19 15:21 19:9,10 19:13 21:4,7,8 21:22 22:17</p>	<p>24:11 25:6,8 51:21 52:16 53:4,7 oh 9:3 11:25 38:25 Ohio 44:11 51:6 okay 8:9 11:25 30:21 31:4,23 32:15 old 27:15 29:24 omnibus 14:15 one-third 4:15 open 31:23 34:15 opened 50:23 opinion 25:16 40:3 opinions 43:18 opposed 18:18 29:19 40:5 43:4 opposition 31:13 36:5 oral 1:11 2:2 3:6 26:3 order 36:6 44:20 ordinary 38:16 original 5:13,22 29:7,7 39:12 originally 45:4 overcome 41:19 41:19 owning 18:1,17</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 28:10 28:11 38:24 43:24 44:9 51:5 parcel 40:21 paren 16:1 parenthetical 16:1 parentheticals 38:10,12 parse 9:17</p>	<p>parsing 9:18 part 9:15 10:8 28:22 39:5 40:21,22 41:13 41:14 50:3,4 particular 20:8 22:24 32:18 40:10 41:17 43:15 44:23 49:6 52:8 53:3 particularly 17:5 39:20 pass 23:18 26:9 39:13 passed 23:17 31:9 32:4 33:7 42:20 44:5,14 passes 6:8 passing 27:4 pause 28:14 penalty 17:11 people 4:6,8,14 9:25 13:21 14:3 20:24,25 21:8 22:3 23:17 30:2,3 30:14 35:14 48:22 51:18 52:3,4 period 33:9 35:25 41:16 42:15 perjuring 38:4 person 3:23 5:23 5:24 6:1 7:25 10:2 14:4 17:10 18:5 19:16,18 21:14 21:23 23:24,25 30:5 51:11 53:2 persons 49:20 49:22 50:20 51:20 Petitioner 1:4 1:17 2:4,9 3:7 47:8</p>
--	--	---	---	---

<p>physical 3:25 5:4 11:11 30:14 34:3,25 35:6 pick 25:11 place 9:11 34:15 34:17 50:1 53:6 plea 13:17 plead 19:2 pleads 18:25 please 3:9 26:6 pled 43:16 plural 11:1 40:4 47:13,18 48:1 48:19 point 9:19 10:23 12:2 21:16 24:10,15 31:25 32:6 41:17 42:19 49:17 50:23 51:17 53:1 pointed 51:22 points 6:6 13:5 22:9 police 21:11,12 policy 20:25 21:21 populous 15:5,8 15:8 position 41:5 43:8 positions 28:16 posits 17:9 possess 13:22 21:23 42:12 51:13 52:14,22 possessing 21:3 possession 19:20 36:22 52:3,4 possible 36:8 postal 27:10 powder 7:3 21:10 power 6:22 powerful 24:12</p>	<p>practical 21:19 22:12 practicing 13:15 precise 46:6,21 predicate 3:17 26:11 President 33:13 presumed 6:10 7:7 14:3 32:23 presumes 4:12 6:7 Pretty 52:10 prevent 18:17 previous 19:19 50:16,17 primarily 3:12 principal 27:20 prior 33:10,11 37:4,5 43:17 private 13:16 probably 42:22 problem 6:13 7:8,16 12:14 16:25 20:16 23:6 25:23 30:19 42:4 43:1 51:11,15 problematic 32:16 procession 18:7 profession 13:25 progress 35:13 prohibits 21:3 prosecute 19:14 prosecuted 19:9 25:8 38:6 51:24 52:1 proved 33:13 51:12 proven 7:5 21:1 providing 13:12 provision 5:11 25:4 39:5 punctuation 41:18 punishing 6:18 purchases 37:20</p>	<p>purpose 20:20 20:21 24:23,25 25:22 31:15 41:19 44:25 purposes 3:14 32:13 47:25 48:2,7 put 6:2 9:16 16:20 21:9,13 22:20 27:8 29:1,25 30:19 38:19 49:25 50:1,8,11 puts 38:10,11 putting 21:11 31:3</p> <hr/> <p style="text-align: center;">Q</p> <p>qualify 9:12 38:17 question 6:7 16:8 21:17 28:15 32:8 34:10 43:9 questions 25:24 43:23 46:9,15 quite 7:18 quote 46:7</p> <hr/> <p style="text-align: center;">R</p> <p>R 3:1 raised 53:1 RANDY 1:6 range 15:2,6 rationale 13:7 reaching 31:19 read 3:13 8:2 10:22 13:3 16:22 18:25 24:16,18 29:16 29:24,25 42:6 43:9 47:23 48:7 49:17 50:2,6,10,14 reader 41:23 reading 3:14 4:1 7:14 8:13 9:19</p>	<p>10:10,10,14,24 11:15 12:18 15:18,23 16:7 23:22 26:14 29:10 44:16,20 47:10 48:5,14 48:20 49:2,3 readings 12:21 reads 7:16 37:22 38:8,9,9 49:21 really 16:9 20:4 22:1,2,6 23:12 23:21 24:19 42:3 reason 13:9 18:3 21:24 27:13 30:24 34:12 36:9 43:15,19 reasonable 44:17,21 reasonably 16:23 reasons 3:12 6:21 47:25 rebut 31:6 REBUTTAL 2:7 47:7 record 21:6 27:1 35:20 41:25 42:24 records 37:24 red 28:10,11 38:24 refer 39:20 references 41:21 refers 8:19 10:7 50:22 reflects 20:9 regular 51:24 52:1 regulated 19:21 regulation 38:8 38:19,23 43:1 43:1 53:5 relate 24:14 related 3:20 relates 3:19 12:9</p>	<p>relating 23:10 36:11 relation 30:6 relations 19:12 relationship 3:16,21 4:20 6:5 14:18 19:13 23:5,14 25:7 26:12 52:16 relationships 14:20,22 45:25 52:18,24 relative 37:13 relied 53:11 remainder 25:25 removed 27:9 29:22 replaced 27:9 Representatives 26:23,25 27:19 32:25 33:9,15 34:19 35:22 require 3:16 12:22 21:20 26:11 required 11:19 28:23 requirement 14:19 16:3,4 19:13 23:5,14 requirements 12:13 requires 16:9 31:3 reserve 25:25 resign 49:5 resolve 12:22 resolved 21:18 respect 4:19,20 7:23 10:21 12:7 21:17,18 22:15 29:5 31:13,15 42:17 43:23 44:18,25 45:24 49:14,18</p>
--	---	--	---	--

<p>52:12 respond 21:12 Respondent 1:19 2:6 4:5 10:11 20:9 22:14 26:4 46:15 47:22 Respondents 7:2 11:6 Respondent's 3:10 4:1 10:24 12:18 15:17 16:23 19:19 48:14,18 50:16 51:1 53:2 responding 20:16,19 responses 10:4,6 responsible 33:4 restrict 31:22 result 37:2 results 34:8 36:24 return 10:12,17 10:19,20 16:21 reus 39:21 reverse 53:12 rewrite 26:16 41:11 re-authorizati... 6:25 ribs 20:11 right 7:23 12:13 14:24 18:8 20:3,22 23:3 23:19 25:20 28:2 33:11 44:5,11,12 47:19,23 51:20 rights 42:19 rise 38:7 ROBERTS 3:3 7:13 8:1,9 9:2 9:4 11:8 12:1 12:20 15:4,9 22:23 23:3 24:13 25:1</p>	<p>26:1 29:15 39:9 44:4,8 47:3,5,15 48:3 51:3,16 53:13 Roman 9:3 Romanette 5:19 5:20 8:20,25 9:2,5 16:20 48:23 Romanettes 49:18 routinely 19:14 rule 12:23,24 13:7,8,10 14:5 14:9,9 17:4,5,8 22:9 24:14,20 25:20 42:1 run 33:14</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Saharsky 1:15 2:3,8 3:5,6,8 4:11,18,24 5:9 5:13 6:20 7:22 8:5,18 9:3,7 10:4,6,21 11:16 12:7,24 13:11 14:1,6 14:16 15:6,11 16:6,12,18 17:15,20,23 18:5,9,14,19 19:6,25 20:3,7 20:22 23:1,4 23:19 24:2,5 24:21 25:5 47:5,7,9,19 48:10 49:14 50:6,10,13 51:9,20 52:12 sat 33:8,8 saying 24:15 33:25 35:1,14 35:24 48:4 says 4:5 8:2 12:24 24:10</p>	<p>27:12 30:4,7 30:18 36:3 47:17 53:4,7 Scalia 4:5,13,22 5:6,10 9:13 10:5,15 17:3 17:18,22,25 18:8,10,15,23 19:22 20:1,5 20:12 21:17 23:16,21 24:3 24:4 26:19 27:12 28:4,8 28:12 32:19,22 33:2,16,19 34:20 35:9 37:3,19 38:14 38:21,25 41:6 41:9 46:17,22 47:2 49:1,14 50:8,11 52:6 52:12 scope 31:22 se 17:7 second 3:13 5:3 6:10 7:1 8:11 8:16 10:23 11:22 16:3 section 11:3,3 18:22 25:15 47:17 48:5,8 sections 41:21 sector 13:16 secure 34:8 see 11:23,25 13:25 30:18,23 30:23 32:8 44:10 52:7 seeking 40:11 seizes 13:1 seizing 40:11 sell 17:14 Senate 27:5,21 33:4,7,12 34:4 34:13,21 35:11 35:24 45:5,19 49:25</p>	<p>Senator 15:15 15:16 20:18 21:5 24:9 29:25 30:22 31:8 32:1,20 33:19,22 34:1 34:11 35:23 sense 6:21 12:15 36:19 45:4 47:21 52:2 53:11 sent 33:12 Sentelle's 40:2 sentence 9:1,8 10:22 16:14 17:9 47:16 49:17,21 50:2 50:15,19 separate 12:10 12:13 25:15 39:5 41:2 43:13 45:9,11 separates 11:2 September 27:22 31:11 33:1,10 36:2,3 serious 6:12 13:24 16:25 17:24 19:18,22 20:5,8 set 29:6 settled 53:9 show 17:14 26:21 shown 22:3 shows 23:11 50:22 side 9:23 11:10 26:17 27:12 49:4,7 side's 9:19 significant 36:5 significantly 27:5 38:10 silent 32:18 35:22 simple 13:17</p>	<p>43:20 simply 43:12 single 49:4,11 49:12 singular 3:18 11:1,9,13,24 39:16 47:13,17 48:1,8,11,18 situation 7:4 17:21 21:10,11 21:14,15 six 47:5 skip 8:10 slightly 38:9 40:20 48:23 small 15:1,4,5 19:9 sold 17:17 Solicitor 1:15 solve 51:11 somebody 30:8 sorry 11:9 28:11 29:23 33:25 44:4 sort 7:15 SOUTER 46:2 speak 10:1 27:2 32:17 36:13 45:23,24 speaking 35:19 35:20 speaks 9:25 26:24 special 6:17 specific 18:21 22:19 36:10 42:8,11 51:25 52:20 specifically 14:13 18:22 21:5 30:11,12 34:10 53:4 spending 6:22 spoke 27:18,21 spoken 9:25 sponsor 15:16 23:15 27:21</p>
---	---	---	---	--

<p>31:12 39:12 45:24 46:8 spouse 11:12 13:17 16:5 29:19 37:12 39:4 41:1 stalking 27:8,9 stalled 27:5 state 14:23 36:21,22 42:10 42:13 43:12 52:13,16 statement 24:9 states 1:1,3,12 3:4 4:3,16 6:16 6:23 7:7,10 14:18,20 15:1 15:2,5,7,8 19:8 19:12 21:20 25:3,6 31:23 35:15 36:10,14 43:24 44:1 47:17 48:9 51:2,5,8,18,19 51:21 52:2,17 52:20 statute 4:1,9,10 4:12,14,15 5:2 5:14,22,25 6:8 6:19 7:9 8:14 10:25 12:16 14:12,17,21 15:13,18,24 16:22 17:1,8 19:8 20:16 21:2 22:12,18 23:2,10 24:22 26:8,17 28:25 29:10,11 30:4 32:7,10,11 37:9,16 38:8,9 38:9 39:1,15 39:17,25 40:14 41:11,13,14,21 42:8,11,13,21 43:13,17 44:16 44:20 46:25</p>	<p>47:10,23,25 49:3 50:21 51:1,2,25 52:19 53:6 statutes 6:17 14:18 19:11,15 36:11,12 44:5 52:1 statute's 3:18 4:25 20:21 24:24 26:9 statutory 3:12 13:2 14:2 31:10 staunch 31:13 36:5 step 13:18 Stevens 15:22 16:7,15 28:14 28:24 29:8,16 45:2,7,15,18 46:1,10,13 stop 47:16 strategic 34:8 straws 40:8 structure 5:7,13 5:14,19 16:14 32:10,10,19 44:25 48:24 50:21 stuff 17:11 stymied 27:6 48:13 subject 52:3,4 submitted 53:14 53:16 subparagraph 38:13 subsection 28:16 substantiate 44:20 substitute 30:16 45:13 substituted 5:3 5:6 sufficient 41:25</p>	<p>suggest 7:2 10:25 11:17 31:25 suggesting 8:18 48:20 suggestion 6:15 suggests 22:14 superfluous 7:12 12:19 22:16 28:21 48:17 support 11:6 supports 30:24 suppose 24:14 37:3,6 40:14 supposed 25:3 Supreme 1:1,12 sure 15:23 28:15 40:8 41:6 45:2 46:10 surely 43:7 surgery 12:22 surrendered 13:21 suspect 18:12 swelled 20:10</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 10:17 11:18 13:21 31:11 32:3,7 36:20 40:2 42:23,25 44:19,24 taken 27:8 41:20 takes 43:2,2 talk 9:20 talked 22:5 talking 10:25 11:2,4 18:20 18:21 48:21 50:16 talks 10:3 targeting 42:9 Taylor 25:9 tell 30:2,8 31:1 31:20 52:13</p>	<p>telling 34:14 ten 17:18 tended 20:17 term 5:1 39:16 terms 5:19 6:2 testimony 37:7 text 3:12,15,18 13:3 14:2 22:11 24:5,24 29:9 32:12 37:16 41:19,20 44:25 45:4,16 46:25 49:12 Thank 26:1 28:12 46:1 47:3,4,9 53:13 thing 4:8 15:14 15:20 30:17,17 42:7 things 4:12 6:8 6:23 14:21 24:8 31:25 41:23 47:20 think 6:20 7:2 7:22 8:5 9:15 10:11,22,23 11:16 12:8,20 13:3,8,9,11 14:2 15:6,7,12 16:6,12,13,23 17:5,12,24 18:3,5,15 19:16 22:1,11 23:7,16,16,22 23:24 25:5,18 36:8,13 40:1 40:12 42:3 43:10 44:24 47:21 50:6,7 50:13,14,14 53:11 third 16:3 38:13 thought 12:1 27:24 34:11,12 thoughts 19:6 threatened 5:5 34:3 35:2,6</p>	<p>threatening 30:14 three 17:16 time 5:8 8:16 14:17 19:7 25:3,6,25 27:7 33:9,11 35:25 42:15 43:2 today 5:8 told 30:8 tolerance 20:24 20:25 tool 24:12 tools 13:2 22:8 transferred 17:17 treat 52:3 treating 11:1 12:12 47:13 48:1,18 triple 16:10,11 TROY 1:18 2:5 26:3 true 5:17 6:8,11 16:15 47:20 trump 24:19 trying 12:14 25:11 35:1 twice 8:6 two 3:12 4:12,25 6:8,21 8:23 9:12 10:4,6 11:18,20 12:4 12:9,12,21 19:6 28:15,16 36:20,24 47:20 48:24 49:15 50:24 two-thirds 4:3 7:6 type 5:24 6:1,3 21:10,11 22:25 25:4 49:22 types 24:19 51:21 typical 25:2</p>
--	--	---	--	--

U	usual 9:20	voted 33:12	20:9	0
ultimately 35:10	usually 39:20	W	willing 7:6 21:1	07-608 1:5 3:4
37:1	U.S.C 47:17	wait 26:19	22:3 51:12	1
unable 26:18	48:4	walked 13:18	word 3:19,21,22	1 47:17,17 48:4
unavoidable	V	want 7:4 10:1	3:22 5:16 7:17	48:5,8
49:2	v 1:5 3:4	17:3 30:22	8:2,4,5,10,10	10 1:9
underlying	vague 40:20	31:21 32:12,13	8:17 11:1,14	10:53 1:13 3:2
11:19 13:7	variances 44:18	35:4,15 36:15	28:18,20,20	11th 33:15
understand 7:14	VAWA 6:24,24	36:23 41:9	29:12,16,22	11:50 53:15
15:23 18:19	21:19	42:2	30:24 38:12	12 38:24
28:15 37:19	verb 16:11 29:2	wanted 4:6,7,14	39:16 40:15	17 7:10 14:19,19
38:21 45:3,20	version 23:9	6:16 16:24	41:5 47:13,22	15:1 19:11
52:25	26:10 27:15	17:1 21:16	48:12,25 49:4	25:3,6 31:23
understanding	28:5,5 33:3,3,4	31:3,22 32:1	49:11	35:15 36:15
53:10	33:6 50:17	34:5 39:13	words 8:12	51:2,5,17
understood	versions 4:25	wants 6:22 22:2	15:25 22:25	52:17,20
11:10	victim 26:13	47:22 53:2	26:25 27:2	18 44:9
unheard 49:6,10	30:6	Washington 1:8	28:19,21 30:16	1993 42:15
uniform 43:8	victory 26:17	1:16	30:23 32:5,6	43:16
United 1:1,3,12	view 13:23	wasn't 4:19	34:1,2,10,11	1994 6:24 43:16
3:4 47:16 48:9	15:24 28:16,20	17:13 20:2,13	35:7 39:3	1996 27:3,22
universe 52:17	46:11,18,18	20:15,15 28:1	41:10 46:20	31:12 36:3
unlawful 17:12	48:18	way 3:13 7:16	47:11 48:16	43:24 44:6,14
18:2,2	violence 3:11	7:21 9:25 10:1	49:1,3	2
unnaturally	5:1 6:13,17 7:8	10:3,11 13:4	work 7:18,20	2005 6:25 21:19
47:11 48:16	10:24 12:2,5,5	16:12,16,23	50:5	2008 1:9
unusual 49:6,10	12:10 14:22	22:4,16 31:21	worse 9:18	23 51:5
unusually 47:11	16:25 19:3,5	39:1,9,12,12	worth 15:14	24 43:24
urging 40:17	22:19 26:11	41:12 43:10	wouldn't 4:3	26 2:6
43:10	27:16 30:3,5,9	47:11 50:7,24	7:10 10:15	28th 27:22 31:11
usage 3:23 9:22	34:2 35:8	44:11	14:14,24 15:18	33:1,10
11:6 49:5,10	36:11 37:6,8	ways 9:12 16:18	15:20 17:21	3
49:11	37:12,17,22	41:11	18:2 39:23	3 2:4
use 3:24,24 5:4,4	38:2,16 42:9	weak 44:23	41:1 42:11	4
5:5,17 8:9 9:20	42:11 43:13	weaken 36:8	50:12 51:7,9	4a 28:11
11:11 16:2	45:25 51:25	weapon 5:5	written 14:13	4473 53:3
24:19 27:25	52:21	15:25 30:15	wrong 50:1	47 2:9
28:1,25 29:18	violent 4:21 5:2	34:3 35:6	W.Va 1:18	5
29:19 30:13,14	5:21 11:21,25	39:22	X	5a 28:10
34:2,3 35:2,5,5	12:14 17:10,24	weird 11:6	Y	53 44:10,15
35:6 38:12	18:6,21 19:18	went 27:4 33:8	York 15:10,13	8
39:6 40:17,24	19:22 21:1	45:19	Z	8 51:4
40:24 41:2,5	23:12 48:21	West 42:8 44:13	zero 20:24,25	
47:12 49:7	51:23	We'll 3:3		
useless 51:7	Virginia 42:8	we're 34:9		
uses 3:18 6:22	44:13 51:6	we've 22:11,11		
39:16 47:11		wife 3:11 14:4,7		

9				
9 43:25 44:1				
911 21:13				
929(g)(9) 18:22				
94 42:15				