

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

SALVATORE DELLIGATTI,)
)
) Petitioner,)
)
) v.) No. 23-825
)
) UNITED STATES,)
)
) Respondent.)
)

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SALVATORE DELLIGATTI,)

Petitioner,)

v.) No. 23-825

UNITED STATES,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, November 12, 2024

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(11:13 a.m.)

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

Mr. Kedem.

ORAL ARGUMENT OF ALLON KEDEM
ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

19 I would welcome the Court's questions.

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

1 having a heart attack?

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

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

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

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

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

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

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

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

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

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

3 MR. KEDEM: Sure.

4 JUSTICE SOTOMAYOR: I mean --

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

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

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

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

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

25 And, moreover, you haven't taken any

1 step to actively employ any force.

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

7 MR. KEDEM: Right.

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

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

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

24 JUSTICE BARRETT: So, if I take a
25 hostage and then just let the hostage starve,

1 which side of the line does that fall on for
2 you?

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

6 JUSTICE BARRETT: But physical force.
7 Just --

8 MR. KEDEM: Sure. So --

9 JUSTICE BARRETT: -- physical force.

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

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

24 MR. KEDEM: So, respectfully, I -- I
25 don't think Stokeling takes that position. In

1 fact, the whole discussion in Stokeling was how
2 much force do you need to apply, what's the
3 amount of force, to overcome resistance, which,
4 again, the Court wasn't focused on whether the
5 person was injured or not. It was can you do it
6 just sort of by gently grabbing it, or does it
7 need to be more -- more vigorous.

8 JUSTICE BARRETT: But the measure of
9 the force, if you're prying someone's fingers
10 off of a purse --

11 MR. KEDEM: Right.

12 JUSTICE BARRETT: -- I mean, the
13 measure of force --

14 MR. KEDEM: Yeah.

15 JUSTICE BARRETT: -- I wouldn't
16 describe that as severe or aggressive.

17 MR. KEDEM: So -- so that -- and that
18 was the back and forth. Everyone was focused on
19 that same question. So they were still focused
20 on how much force was involved.

21 You look also, for instance, at -- at
22 Castleman. So Castleman gives the example of a
23 squeeze of an arm that causes a bruise, which
24 the Court said would count as common law force
25 for purposes of domestic violence but would not

1 count as violent force for generic purposes,
2 which shows that even the direct application of
3 enough force that sometimes causes an injury, a
4 bruise, is not enough because it's still not a
5 high enough degree of force.

6 JUSTICE GORSUCH: Mr. Kedem, you know,
7 our intuition is that often omissions are just
8 as bad as acts and they are --

9 MR. KEDEM: Sure.

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

14 MR. KEDEM: Right.

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

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

23 MR. KEDEM: Mm-hmm.

24 JUSTICE GORSUCH: -- because this
25 person has animus toward little old ladies. Now

1 an extreme hypothetical. Justice Breyer might
2 be proud.

3 (Laughter.)

4 JUSTICE GORSUCH: That would be murder
5 in a -- in a state with a good Samaritan
6 statute. Physical force, I guess the gravity's
7 -- I mean, what -- what more powerful force in
8 the universe is there than that? Would that in
9 your view fall within the government's
10 understanding of what would qualify as -- as the
11 application of violent force?

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

23 JUSTICE GORSUCH: And if I might just
24 ask a slightly different question. This is one
25 that -- yeah, I don't know of any more powerful

1 force in the universe than gravity, but any -- I
2 wonder whether this statute is divisible between
3 acts and omissions, and that isn't something
4 either side explored.

5 MR. KEDEM: Mm-hmm.

6 JUSTICE GORSUCH: I know it won't help
7 your client, okay, but perhaps -- I'd welcome
8 your thoughts on whether --

9 MR. KEDEM: Sure.

10 JUSTICE GORSUCH: -- you think that
11 this statute is, in fact, divisible.

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

17 So we have the Wong case, where there
18 were two caregivers, one of whom shook the
19 child, the other of whom failed to render aid.

20 JUSTICE GORSUCH: Yes. And -- and
21 they're -- they're duty-of-care cases, classic
22 --

23 MR. KEDEM: Sure.

24 JUSTICE GORSUCH: -- common law
25 duty-of-care cases, so you have to prove a duty

1 and then the failure to fulfill it.

2 MR. KEDEM: That's right.

3 JUSTICE GORSUCH: Very different than
4 killing somebody or ordering a hit on somebody
5 by act. I mean, giving them a pistol in a brown
6 paper bag is a little different.

7 MR. KEDEM: It is. Presumably, if the
8 government thought that this statute was
9 divisible, they would have argued it, but I
10 think your question really highlights an
11 important point, which is it just so happens
12 that this murder statute can be satisfied either
13 by acts or omissions.

14 But the government's argument would
15 have to be the same even if New York had a
16 murder-by-omission statute that could only be
17 satisfied by a pure omission in which there was
18 no actus reus whatsoever, other than just having
19 a duty that you failed to satisfy. And the
20 government's argument would have to be, in every
21 single instance of that murder-by-omission
22 statute, violent physical force was involved.

23 JUSTICE JACKSON: And I take it your
24 argument is that when we look at the federal
25 statute and its definition of "crime of

1 violence," that really what is at issue here is
2 a -- is the conduct of the defendant?

3 MR. KEDEM: That's correct.

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

6 MR. KEDEM: That's correct.

7 JUSTICE JACKSON: -- to achieve a
8 certain result, but the plain text here seems to
9 suggest that we're looking for use, attempted
10 use, or threatened use of physical force and --
11 and that at least the common sense view of that
12 is that it's the defendant acting to use,
13 threaten to use, or attempting to use.

14 Is that -- is that the thrust of your
15 argument?

16 MR. KEDEM: It is, Your Honor. And I
17 would emphasize there are lots of criminal
18 statutes, including in 924, in fact, even in
19 924(c), that focus on outcomes.

20 So subsection (c)(5)(B) applies a
21 heightened penalty if death results. The
22 Elements Clause, by contrast, is, as you have
23 described it, focused on the method, a
24 particular way of committing an offense that
25 Congress associated with armed career criminal

1 behavior.

2 JUSTICE JACKSON: Well, in the --

3 JUSTICE KAGAN: I take the point that
4 ordinary understandings of what it means to use
5 violent force might not cover omissions, but so
6 too it wouldn't cover poison. And we have said
7 that it does cover poison.

8 MR. KEDEM: Right.

9 JUSTICE KAGAN: So we're not really
10 operating in a world in which it's completely
11 sort of ordinary Joe understandings of the
12 phrase.

13 MR. KEDEM: So, respectfully, Your
14 Honor, I agree poison is sort of the outer
15 limit, but I do think the Court was making a
16 point there, which is that in response to the
17 defendant's argument in Castleman that
18 essentially you had to apply the force directly
19 in order for it to count, the Court said no, if
20 you put poison in tea, it's very much like
21 pulling the trigger of a gun. It's a gentle
22 pull of the trigger. That's not the violent
23 force. The violent force is later, when the
24 bullet makes impact.

25 But still, in both of those instances,

1 you're still doing something to bring the victim
2 into contact with that force which may be wholly
3 absent in the case of a pure omission.

4 JUSTICE JACKSON: You're still using
5 something.

6 MR. KEDEM: You're still using
7 actively.

8 JUSTICE JACKSON: You're still using
9 actively. Let me ask you --

10 JUSTICE KAGAN: How about if, instead
11 of putting poison in, I knew that there was
12 something in the refrigerator which had gone
13 very bad and it was completely toxic.

14 MR. KEDEM: Mm-hmm.

15 JUSTICE KAGAN: And I said to my worst
16 enemy: Why don't you eat the cake in the
17 refrigerator. Where does that fall on your --
18 in your -- you know, which side of the line?

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

22 JUSTICE KAGAN: Correct. And so?

23 MR. KEDEM: And so it would count as
24 use of violent physical force.

25 JUSTICE KAGAN: Even though now you

1 haven't done anything really.

2 MR. KEDEM: Well, respectfully, you
3 have taken some step to bring them into contact
4 with it, without which, if you hadn't taken that
5 step, they wouldn't consume what was in the
6 fridge.

7 JUSTICE KAGAN: Well, I mean, in any
8 of these cases, including in the supposedly pure
9 omission cases, we can find some step. I mean,
10 when you're withholding medicine from the ailing
11 person, probably there's some step that you've
12 taken that prevents the ailing person from
13 getting that medicine herself or, you know,
14 there's some step that you've taken to put
15 yourself in a -- in a position of duty to that
16 person.

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

21 MR. KEDEM: So I think you have to ask
22 yourself two questions. One, is there even
23 violent physical force involved? In the
24 instance in which someone expires because they
25 don't have the right medication, usually you

1 would not describe that as involving violent
2 physical force.

3 So, if a septuagenarian slips into a
4 coma and then doesn't eat and as a result dies,
5 no one is going to describe that death as
6 involving violent physical force. So the
7 question is, would you describe it as involving
8 violent physical force because there was someone
9 who was supposed to be there feeding the
10 nutrition tube but failed to do so?

11 JUSTICE JACKSON: And is that because
12 the context is violent physical force because
13 we're in a statute that relates to firearms,
14 that Congress clearly was trying to get at a
15 certain category of person?

16 MR. KEDEM: That's correct.

17 JUSTICE JACKSON: The person who is of
18 the type that they would engage in these kinds
19 of crimes that present, you know, risks of
20 violence in this way?

21 MR. KEDEM: That -- that --

22 JUSTICE JACKSON: I mean, I thought
23 that was the sort of context. So all of these
24 --

25 MR. KEDEM: That's right.

1 JUSTICE JACKSON: -- hypotheticals
2 about inaction, you know, even though there
3 might be a step or not a step, you know, setting
4 that aside, the point is they're not even in the
5 realm of the kind of thing this statute was
6 about?

7 MR. KEDEM: That's right. We're
8 defining a felony crime of violence. And
9 Congress had a very specific theory.

10 JUSTICE ALITO: Well, pick -- picking
11 up on that, do you -- would you argue that your
12 client is not the kind of armed career criminal
13 that Congress was trying to get at when they
14 enacted this statute?

15 MR. KEDEM: We would not argue that,
16 Your Honor. We're focused here on the type of
17 offense, and that's because the Elements Clause
18 requires an assessment of the elements of the
19 offense and whether violent physical force is
20 present in all instances.

21 JUSTICE BARRETT: Well, counsel,
22 picking --

23 JUSTICE ALITO: But the question is
24 whether your client was convicted of a crime of
25 violence, right?

1 MR. KEDEM: That's correct.

2 JUSTICE ALITO: And some of the -- I
3 mean, these are fascinating legal arguments.
4 Some of the people who have come here to hear
5 this case may not know much about the facts of
6 the case. So what was the offense for which
7 your client was convicted?

8 MR. KEDEM: Hiring someone in order to
9 commit a murder.

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

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

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

16 MR. KEDEM: That's correct.

17 JUSTICE JACKSON: It's not -- you're
18 not talking about your client; you're talking
19 about the statute.

20 MR. KEDEM: That's -- that's correct,
21 Your Honor. Congress had a very specific theory
22 when it wrote the Elements Clause. It was not
23 aiming for all or even the most serious
24 offenses. It was aiming for a certain type of
25 offense, actively using violent physical force

1 against another, the character of which changes
2 when you add a gun to the mix.

3 JUSTICE BARRETT: But, counsel, we
4 also said in Castleman and Stokeling that we
5 look at the nature of the crime and that
6 influences the scope of the interpretation. And
7 so, if interpreting the statute a certain way or
8 interpreting violent force a certain way would
9 have the effect of excluding and making the
10 statute virtually inapplicable to most of the
11 statutes in the states, robbery or domestic
12 violence or, so here, I mean, murder?

13 MR. KEDEM: Yeah. So -- so a few
14 points on that.

15 First of all, Stokeling was an
16 instance where the Court was interpreting a
17 common law term of art, "force," that made an
18 appearance both in the federal statute and in
19 the state statute, so it made a lot of sense to
20 look at the states to see how they used that
21 term.

22 But, beyond that, the Court is not
23 convince -- it doesn't engage in a sort of
24 nose-counting exercise. And even with respect
25 to states that have murder statutes, it's not as

1 if they're all going to be in or all going to be
2 out. So take New York second degree murder as
3 an example. It's got five subdivisions. Two of
4 them are already out because of Borden because
5 they can be committed recklessly. There are two
6 others that can only be committed by an act, and
7 so they're going to stay in regardless at least
8 as we interpret them.

9 And that leaves just the one under
10 which Mr. Delligatti -- that served as the
11 predicate for Mr. Delligatti's arrest.

12 JUSTICE BARRETT: So you think there
13 would still be in many states many murder
14 convictions that would still qualify?

15 MR. KEDEM: Yes.

16 JUSTICE BARRETT: It just seems -- I
17 mean, you can understand why stepping back,
18 which is, I think, Justice Alito's --

19 MR. KEDEM: Right.

20 JUSTICE BARRETT: -- point to, you
21 know, those observing the argument in the
22 courtroom --

23 MR. KEDEM: Right.

24 JUSTICE BARRETT: -- to say that
25 murder isn't a crime of violence and will rarely

1 trigger -- trigger the provision here seems a
2 little counterintuitive.

3 MR. KEDEM: It -- it -- I understand
4 that because, if you were to ask someone is
5 murder a crime of violence, they would say of
6 course. In the vast majority of instances, the
7 way you commit murder is going to be violence,
8 which makes it a perfect fit for the Residual
9 Clause, the idea that under the Residual Clause
10 --

11 JUSTICE BARRETT: But you think that
12 Congress thought it was only covered by the
13 Residual Clause and that it wasn't an elements
14 offense, murder?

15 MR. KEDEM: So I think that if
16 Congress wanted us to do this sort of as a
17 category assessment, it would have enumerated
18 murder the way it did for some other offenses.
19 Instead, what it said is we want you to look at
20 whether their element of the offense involved
21 the use of violent physical force because,
22 again, if you add a gun to that sort of
23 offense -- so a robbery offense, for instance,
24 robbery is obviously dangerous enough, but when
25 you add a gun to the mix, the danger goes up

1 exponentially. It changes the character.

2 The same is not true for an omission
3 offense. Obviously, omission offenses can be
4 horrible and can be punished severely, but you
5 don't change anything about it when you add a
6 gun, and so it's not the sort of armed career
7 criminal behavior that Congress was aimed at.

8 JUSTICE JACKSON: And didn't Congress
9 really home in on this? I mean, you -- you talk
10 about at least some of the legislative history
11 for the Criminal Code Reform Act in 1981, and I
12 was struck by a particular example in a report
13 that Congress -- the Senate report, where the
14 report talks about a dam operator who threatens
15 to refuse to open the floodgates during a flood
16 and thereby places residents' lives in jeopardy.
17 And the report says, "Assuming the operator had
18 some legal duty to act, his threat would be to
19 engage in unlawful conduct dangerous to human
20 life, which is not a crime of violence since he
21 did not use or threaten to use physical force."

22 So it seems as though we had examples
23 in the record that Congress was aware of
24 omission and made pretty clear that when you
25 don't act, you know, you're not threatening to

1 use physical force in the way that they
2 intended.

3 MR. KEDEM: That's correct. It's
4 remarkably specific. And I understand that not
5 all members of the Court are taken with
6 legislative history, but we can rely on it just
7 as a sort of contemporaneous use of the relevant
8 terms in context.

9 One of the most remarkable things
10 about the government's brief is that they
11 haven't identified a single instance, and they
12 looked high and low, both in published opinions
13 and also in news articles. Every single one of
14 their examples was someone who had used
15 something actively, not passively, not the sort
16 of passive benefit theory. They were described
17 as, for instance, NASA using the moon's
18 gravitational field by shooting a rocket up into
19 space and then aiming their satellite at the
20 right point to make contact with the moon's
21 gravitational field.

22 This idea that you can use something
23 just by passively benefiting from it, the
24 government wasn't able to identify a single
25 real-world instance of it, in contrast to the

1 one that you -- you've just identified, Your
2 Honor.

3 CHIEF JUSTICE ROBERTS: How about I
4 use the rain as an excuse to stay indoors?

5 MR. KEDEM: So I think, first of all,
6 you can use the rain in that sort of conceptual
7 sense. It's very different from using something
8 in a physical sense like physical force. And
9 even in that instance, you don't have the
10 "against another" or "against the person or
11 property of another" phrase, which also is a
12 sort of physical phrase.

13 Again, in the government's brief, they
14 don't identify any instance other than one that
15 they make up themselves that uses "use" and
16 "against another" in combination. And the
17 example they come up with is he used the
18 victim's disease against her. But, there, it's
19 against her interests, not against her person.

20 So, again, the government presumably
21 spent a lot of time trying to come up with this
22 passive benefit sense of "use" in combination
23 with "against another." And if this is all that
24 they can come up with, I think we can conclude
25 it's not a normal way of speaking.

1 JUSTICE KAGAN: In most of our cases
2 where we've talked about what "use" is doing in
3 this phrase, we've talked about it as a
4 requirement of mens rea. In other words, to use
5 physical force means to have some understanding
6 in your head of what that physical force is
7 supposed to achieve.

8 MR. KEDEM: Right.

9 JUSTICE KAGAN: So we haven't
10 suggested that it really adds to the physical
11 force language with respect to the actus reus.

12 MR. KEDEM: So I think that's correct,
13 but let me just sort of trace it through, and I
14 think it actually comes out where we're asking
15 you to.

16 So the first appearance of
17 interpreting "use" in 924(c) is in Bailey, where
18 the word "use" is in combination with a firearm
19 in (c)(1), and the Court looks at dictionary
20 definitions and say they imply action and
21 implementation, and it adopts an active
22 employment sense of the word "use." And it
23 rejects the government's argument that you can
24 use a firearm even if it's just stashed in the
25 closet because you derive some benefit from it.

1 So it's -- it's an actus reus interpretation of
2 the word "use."

3 Then that was ported over to an
4 Elements Clause in Leocal and then again in
5 Borden. And you're right that Leocal and Borden
6 were both about the mental state. But they
7 adopted wholesale the active employment sense of
8 use, and that active employment sense came from
9 what Bailey said was the ordinary meaning of the
10 term.

11 So, unless somehow they ported over
12 just the mental state part of active employment,
13 even though mental state wasn't at issue in
14 Bailey, then I think you bring the whole thing
15 along with it.

16 JUSTICE GORSUCH: If we -- if we adopt
17 the government's view of "use" as not being
18 personally employing some instrument but
19 allowing the laws of physics to take their
20 course --

21 MR. KEDEM: Mm-hmm.

22 JUSTICE GORSUCH: -- what was the
23 point of us deciding that this statute is
24 different than the -- the -- the domestic
25 violence situation?

1 MR. KEDEM: Sure.

2 JUSTICE GORSUCH: Aren't we just back
3 to that?

4 MR. KEDEM: Yes. So --

5 JUSTICE GORSUCH: Because anybody who
6 wishes to use the laws of nature to harm another
7 is -- is convictable and -- I mean, this is just
8 a statutory enhancement. Your client's going to
9 spend a lot of years in jail. This is just how
10 many much more, how many more, right?

11 MR. KEDEM: That's correct, yes. So
12 -- and -- and I think there are some pretty --

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

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

16 JUSTICE GORSUCH: We're trying to get
17 the law right.

18 MR. KEDEM: I -- I -- I wouldn't
19 presume to speak for you. Obviously --

20 JUSTICE GORSUCH: Yeah.

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

23 JUSTICE GORSUCH: That's what we're
24 talking about. How many years is he already
25 spending?

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

4 JUSTICE GORSUCH: All right.

5 MR. KEDEM: Yeah.

6 JUSTICE GORSUCH: Back to my question.

7 MR. KEDEM: Yes. So the domestic
8 violence statute, very briefly, had a very
9 different function, which was to close a
10 loophole that made it lawful for certain
11 misdemeanor offenders to possess a gun, and the
12 Court was concerned that if it read the clause
13 narrowly, it would render that provision
14 inoperative in a number of states.

15 Here, there's no dispute that,
16 obviously, murder is going to stay very illegal
17 everywhere, and our reading would not render the
18 Elements Clause inoperative in any state.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 JUSTICE THOMAS: Are you really
23 talking about your --

24 MR. KEDEM: I apologize.

25 JUSTICE THOMAS: Oh, that's okay.

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: Thank you.

3 JUSTICE THOMAS: Are you really
4 talking about your client? We make this
5 distinction between action and omission. Are we
6 talking -- because we're in the world of theory
7 now, we're not really talking about what your
8 client did, as Justice Alito alluded.

9 MR. KEDEM: That's right. We're here
10 as a consequence of invalidation of the Residual
11 Clause.

12 JUSTICE THOMAS: So would your case be
13 different if we did not use the categorical
14 approach?

15 MR. KEDEM: I suppose it would, but,
16 although this Court has considered abandoning
17 the categorical approach for the Residual Clause
18 and at least one justice has for the elements --
19 for the enumerated offenses, I'm not aware that
20 any justice has considered it for the Elements
21 Clause because it requires as an element the use
22 of violent physical force.

23 JUSTICE THOMAS: But, I mean, we're --
24 we're -- I think it's fair to say, though, that
25 we are discussing something that bears no

1 factual relationship to your case.

2 MR. KEDEM: So I -- I accept that,
3 Your Honor, and would respectfully suggest you
4 essentially take the position you did in Borden,
5 which was to say whatever it is, criticism about
6 the categorical approach, but then to give the
7 Elements Clause its natural meaning.

8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 Justice Sotomayor?
10 Justice Jackson?
11 I mean, Justice Barrett?
12 Thank you, counsel.
13 Mr. Feigin.

14 ORAL ARGUMENT OF ERIC J. FEIGIN
15 ON BEHALF OF THE RESPONDENT

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

18 It's hard to believe that we're
19 actually here debating whether murder is a crime
20 of violence, as I think Petitioner just
21 acknowledged. This is one case where the law
22 already tracks common sense. Castleman tells us
23 that internal force, like a disease, can be
24 physical force. It also tells us that physical
25 injury must result from physical force. And the

1 Borden plurality recognizes that someone uses
2 force against the person of another when he
3 makes force his instrument to cause that person
4 harm through -- through force. I used "force"
5 twice there, but you -- I think you get the
6 point.

7 And there's really no basis in law or
8 logic to draw a distinction between the person
9 who gently sprinkles poison in the cup and the
10 person who, hating the victim, just withholds
11 the antidote.

12 By urging that distinction, Petitioner
13 is asking this Court to discard literally two
14 millennia of common law that treat acts of
15 omission just like other acts.

16 He's asking this Court to cut out any
17 number of canonically violent murder, robbery,
18 and assault offenses out of 924(c), the
19 definition of "violent felony" under the Armed
20 Career Criminal Act, and the definition of
21 "misdemeanor, crime of domestic violence" as
22 relevant to 922(g)(9).

23 And he would make all three of those
24 statutes -- he's asking this Court to make all
25 three of those statutes turn on distinctions so

1 arbitrary, unprecedented, and bizarre that it
2 would make application of those statutes --
3 again, Your Honor, I use this word with -- with
4 respect -- truly absurd.

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

8 JUSTICE THOMAS: Mr. Feigin, we
9 normally think, though, of -- think of force as
10 coming from the perpetrator, not from some
11 outside force, like gravity or some internal
12 disease. So how do we get from where you are to
13 where he is?

14 I -- I think his argument actually
15 does make -- does have a common-sense value to
16 it.

17 MR. FEIGIN: Well, Your Honor, I
18 think, as Castleman demonstrates, we know that
19 whatever force causes death can be an internal
20 force. It can be the action of -- whatever
21 action within the body is induced by poison. We
22 also know from Castleman one of the examples it
23 uses is a disease.

24 So the actual death-causing force can
25 be a purely internal force. If I know you have

1 a weak heart and I frighten you and you die,
2 your body is attacking itself. That's also true
3 if you intentionally and torturously starve a
4 child. That's -- the starvation causes the body
5 to attack itself. It starts eating itself away
6 because it has no other source of nourishment.

7 If you're asking me about whether that
8 force has to be in some way -- I think the words
9 Petitioner uses in the brief are "unleashed or
10 channeled in some way by the defendant" -- I
11 think that's somewhat of a gerrymandered
12 requirement.

13 He's trying to do it to catch things
14 like, you know, your -- the wind -- your -- the
15 wind catches your sail, or the example in our
16 brief where you're involuntary placed on a raft,
17 you see which way the current is going, and you
18 use the current to get you to shore without
19 doing anything.

20 But that channeling requirement is
21 equally satisfied in an omission case, where you
22 can stop -- force is going to occur. You can
23 stop it, you should stop it, and you don't stop
24 it because not stopping it accomplishes your
25 purpose.

1 JUSTICE GORSUCH: Mr. Feigin, on that
2 score -- and if we're going to talk about common
3 sense, that's a good place to start sometimes --
4 your view, I think, would capture the good
5 Samaritan example as well and make that subject
6 to an additional enhancement under ACCA, right?

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

9 JUSTICE GORSUCH: Why -- why -- why
10 not? Just to set the table again, we have
11 somebody, a passerby on the street who doesn't
12 like little old ladies and intentionally allows
13 someone to fall into and die, and the physical
14 force -- your -- your view is gravity's good
15 enough. I don't have to push her.

16 And now that would depart from the
17 common law, where there's normally a duty,
18 but -- a preexisting duty, but, here, we have a
19 good Samaritan statute. So that is an ACCA
20 offense in the government's view? And why
21 wouldn't that defy common sense, if it does?

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

25 It -- it turns on what -- it -- it

1 turns on how you interpret "use of physical
2 force against the person or property of
3 another." And we think --

4 JUSTICE GORSUCH: Yeah, but you -- you
5 use -- you use rivers and currents. And what --
6 what's wrong with gravity?

7 MR. FEIGIN: So gravity is fine. It's
8 the problem of you're postulating that some
9 state has some kind of aberrant duty --

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

13 MR. FEIGIN: So, Your Honor --

14 JUSTICE GORSUCH: -- impose affirmative
15 duties that didn't exist at common law.

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

20 JUSTICE GORSUCH: Sure, I got that.

21 MR. FEIGIN: -- that -- that's what
22 the Borden plurality tells us.

23 And, two, the common definitions have
24 used, like, "avail oneself of," we do think have
25 an element of causation in there and that's

1 what's causing --

2 JUSTICE GORSUCH: Yeah, no, I -- it --
3 it -- there's no doubt that my failure to act
4 caused this person's death. I've got causation
5 and I have intention. I have mens rea.

6 Now I understand that when there's a
7 common law duty, our intuition is that that's
8 really bad. When a parent doesn't feed a child,
9 when a doctor doesn't care for a patient,
10 that -- that's problematical.

11 I'm testing how far -- and I don't see
12 what line you would draw between that and a good
13 Samaritan statute, which, again, many states
14 have.

15 MR. FEIGIN: So causation includes
16 both cause and fact, which we have here, and
17 proximate cause. And I think the proximate
18 cause inquiry at --

19 JUSTICE GORSUCH: Let's say I have
20 that box checked too.

21 MR. FEIGIN: Well, Your Honor, I think
22 where we part ways is I don't think I
23 necessarily think you have that box checked in
24 your example, and here's why.

25 Proximate -- the proximate cause

1 that's built into the statute here, I think, can
2 be informed by the common law duty as of 1984.

3 JUSTICE GORSUCH: No. No, no, no.
4 No. Again, the -- I have a statute that's a
5 good Samaritan statute that imposes a higher
6 duty on ordinary people to be good Samaritans,
7 and so it creates a proximate cause test that's
8 different from a common law test.

9 MR. FEIGIN: So --

10 JUSTICE GORSUCH: You're just
11 resisting the hypothetical, and I can understand
12 why --

13 MR. FEIGIN: -- your --

14 JUSTICE GORSUCH: -- because the
15 consequence of your interpretation has its own
16 common-sense problem.

17 MR. FEIGIN: With --

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

20 MR. FEIGIN: With respect, Your Honor,
21 if I could just explain. I -- I don't think I'm
22 resisting the hypothetical. I think I'm just
23 explaining that, as we normally do in
24 interpreting these kinds of statutes with the
25 categorical approach, there is some concept of

1 generic federal law.

2 And, here, what federal law might mean
3 by "use," its concept of proximate cause would
4 be informed by the common law scope of duties as
5 of 1984.

6 JUSTICE GORSUCH: Where does that come
7 from? I didn't see that anywhere in your brief.
8 That's -- that's new here at the lectern. Where
9 does that come from?

10 MR. FEIGIN: Well, Your Honor, I think
11 that's just how we've been interpreting these
12 statutes. There's always -- it's always a
13 question of federal law.

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

16 MR. FEIGIN: Well, Your Honor, we
17 think "use" --

18 JUSTICE GORSUCH: Has any court ever
19 said that?

20 MR. FEIGIN: -- incorporates the
21 proximate cause requirement.

22 JUSTICE GORSUCH: Yeah, yeah, but --
23 but --

24 MR. FEIGIN: It hasn't -- Your Honor,
25 it hasn't come up because, until the

1 Third Circuit --

2 JUSTICE GORSUCH: Right. But it will
3 after this case.

4 JUSTICE JACKSON: Mr. Feigin, can I
5 ask you --

6 MR. FEIGIN: Yeah.

7 JUSTICE JACKSON: -- just piggybacking
8 on what Justice Gorsuch is saying.

9 I guess I'm just trying to understand
10 the government's position on what it means to
11 use physical force against the person of another
12 in an omission case.

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

21 MR. FEIGIN: Yes.

22 JUSTICE JACKSON: Okay. So how can
23 that possibly be? I mean, you're saying she
24 uses physical force, and that means no action
25 but an intention that this victim succumb to a

1 harm that she didn't put into place, that she
2 had really nothing to do with, but she sees it
3 happening?

4 MR. FEIGIN: So, Your Honor, she is
5 using physical force against the person of
6 another because, again, she could stop it, she
7 is legally required to stop it, and she doesn't
8 stop it because she wants the victim to die.

9 And to use a dictionary definition --

10 JUSTICE JACKSON: So it's her -- it's
11 only her mental state that is doing the work of
12 her using physical force?

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

15 Under just a plain dictionary
16 definition of "use," she has availed herself of
17 the force, she has had enjoyment of the force,
18 she's made the force the -- her instrument to
19 accomplish her purpose. She's --

20 JUSTICE JACKSON: All right. Let me
21 ask you about the other parts of the statute,
22 the attempt and threaten. Same situation.

23 How does it work in an omission case
24 for this lifeguard to threaten the -- the -- the
25 -- the use of physical force against this kid?

1 Is it because she says something to him that
2 would make it a threat?

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

5 MR. FEIGIN: Well, Your Honor, I -- if
6 I could depart from the lifeguard example, where
7 it might be -- I mean, I could --

8 JUSTICE JACKSON: No, no, I want the
9 lifeguard example.

10 MR. FEIGIN: You want an example of
11 the life --

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

19 MR. FEIGIN: Well, two points, Your
20 Honor.

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

1 force.

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

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

12 JUSTICE JACKSON: But is it a violent
13 --

14 MR. FEIGIN: -- I think it would also
15 constitute --

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

23 And I guess what I'm worried about is
24 the government's interpretation that has, you
25 know, lifeguards and caregivers and people who

1 very intentionally and perhaps even criminally
2 withhold their duties actually being put in the
3 bucket of violence even though they don't act.

4 MR. FEIGIN: Well, Your Honor, if you
5 look at page 550 of the Court's decision in
6 Stokeling, you'll see one dictionary definition
7 of "violence" that defines it in terms of the
8 causation of physical harm. And in these
9 cases -- I mean, let's not lose sight of it --
10 someone is using harm -- I mean, I realize --

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

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

23 The Borden plurality has an example of
24 use of physical force against the person of
25 another when someone is driving a car, sees

1 someone come in front of them, and keeps, in the
2 Court's words, plowing or -- sorry --
3 plurality's words, plowing ahead and hits them.

4 JUSTICE JACKSON: Action. Action.
5 They're moving, right?

6 MR. FEIGIN: Well, Your Honor, I --
7 this is all just a game of -- I -- I -- I think
8 this is what one might describe as just sort of
9 a terminological word game. I could also --

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

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

22 JUSTICE KAGAN: And then we'd say
23 you're playing word games, I mean, because I
24 think, when you push your foot on the
25 accelerator and drive your car into somebody,

1 that's not really such a hard case.

2 MR. FEIGIN: And --

3 JUSTICE KAGAN: But some of these are
4 hard cases, like the lifeguard example, where we
5 would say, you know, the lifeguard is just
6 sitting there. And this is not like what a
7 normal person would think of as a use of
8 physical force.

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

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

23 If you look at, for example, the Hall
24 -- the Hall treatise that we cite, that's from
25 1960 but still substantially predates the ACCA,

1 or you even want to go further back and you look
2 at the 1875 Wharton treatise, you'll see that
3 the Wharton treatise, for example, in Section 72
4 says even sleeping can be an affirmative act and
5 it can lead to liability when there's something
6 you're supposed to be doing but you're not doing
7 it.

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

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

18 MR. FEIGIN: I -- no, Your Honor. And
19 part of --

20 CHIEF JUSTICE ROBERTS: So she did
21 something that suddenly gravity was there?

22 MR. FEIGIN: Well, Your Honor, what
23 happened -- first of all, I don't think the
24 force here is the gravity. I think the force is
25 whatever --

1 CHIEF JUSTICE ROBERTS: I thought --

2 MR. FEIGIN: -- whatever happens
3 within the body to -- I mean, you -- you can
4 conceive of it in a number of ways. It could be
5 the force of the water. It could be the
6 gravity. It could be, as --

7 CHIEF JUSTICE ROBERTS: What is the
8 force of the water?

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

19 CHIEF JUSTICE ROBERTS: I mean, I --

20 MR. FEIGIN: -- eventually die.

21 CHIEF JUSTICE ROBERTS: It's the same
22 thing Justice Kagan said. The lifeguard's not
23 doing anything.

24 MR. FEIGIN: Well, Your Honor, to your
25 specific point, I could easily reframe it as the

1 lifeguard withholding to -- from the lifeguard's
2 duty to rescue the child. And, you know, if you
3 think of the -- I mean, again, I -- I -- I think
4 this is easier to see, and I'll translate the
5 lifeguard example in a second, but easier to see
6 in the -- in the Borden car plowing ahead
7 example. I mean, if I just --

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

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

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

22 MR. FEIGIN: Yes. I mean, under a
23 plain --

24 CHIEF JUSTICE ROBERTS: -- and the
25 force of the water.

1 MR. FEIGIN: -- under a plain
2 definition, he's taking advantage of the force,
3 he is availing himself of the force, he's
4 enjoying the force --

5 CHIEF JUSTICE ROBERTS: All right.

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

8 CHIEF JUSTICE ROBERTS: But he's not
9 doing anything.

10 JUSTICE GORSUCH: Mr. -- Mr. --

11 JUSTICE KAVANAUGH: Well, don't --

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

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

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

25 MR. FEIGIN: So, to answer your

1 specific question, I don't think every death
2 fits the -- involves the -- someone using
3 physical force against the person of another.

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

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

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

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

15 JUSTICE GORSUCH: Okay.

16 MR. FEIGIN: -- within the meaning of
17 Curtis Johnson.

18 JUSTICE GORSUCH: Okay. All right.
19 Got it. Got it.

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

23 JUSTICE GORSUCH: They're all violent
24 physical force, though?

25 MR. FEIGIN: Yes, Your Honor --

1 JUSTICE GORSUCH: Okay. All right.

2 MR. FEIGIN: -- because -- because
3 there is --

4 JUSTICE GORSUCH: All right. I've got
5 another question for you.

6 MR. FEIGIN: -- the --

7 JUSTICE GORSUCH: I got it. I got it.

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

9 JUSTICE GORSUCH: Sure.

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

15 JUSTICE GORSUCH: Yeah.

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

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

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

23 JUSTICE GORSUCH: Mm-hmm. Yeah, yeah.
24 Yeah. With the lifeguard, yeah.

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

1 JUSTICE GORSUCH: Okay. Okay.

2 JUSTICE SOTOMAYOR: And the mens rea.

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

4 JUSTICE GORSUCH: And the mens rea.

5 MR. FEIGIN: And the mens rea --

6 JUSTICE GORSUCH: Yeah, yeah.

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

8 JUSTICE GORSUCH: Yeah.

9 MR. FEIGIN: -- that I also mentioned
10 at that time.

11 JUSTICE GORSUCH: But -- all right.

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

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

23 MR. FEIGIN: And handed them the gun.

24 JUSTICE GORSUCH: And handed them a
25 gun in a paper bag and the whole nine yards.

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

10 Does that -- does that resonate to you
11 at all? It might help you.

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

19 JUSTICE GORSUCH: Well, if that's the
20 case, maybe we go back to Justice Kavanaugh's
21 question from the last case. Why wouldn't we
22 remand this to ask that -- we resolve that first
23 before we start talking about lifeguards and
24 every murder being encompassed within this?

25 MR. FEIGIN: Well, Your Honor --

1 JUSTICE GORSUCH: Every death.

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

9 JUSTICE GORSUCH: Well, omissions plus
10 duty of care is what they do.

11 MR. FEIGIN: Yes.

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

17 MR. FEIGIN: Well, Your Honor, we did
18 not make that argument --

19 JUSTICE GORSUCH: I know that.

20 MR. FEIGIN: -- below. It's a state
21 law argument that we don't think is
22 appropriately made in this Court. And we do
23 want to be --

24 JUSTICE GORSUCH: I agree with that.

25 JUSTICE KAGAN: What would a --

1 JUSTICE KAVANAUGH: Is --

2 JUSTICE KAGAN: -- divisibility
3 argument as to this statute look like, if I can
4 ask?

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

13 But there are cases, and we -- you
14 know, there are a couple of examples of them in
15 the briefs, where something like horrific child
16 neglect, the -- and also beating a child are
17 kind of charged together. So I think the
18 outcome of that would be a little bit in doubt.

19 And that's actually the only reason
20 why we've said that all the statutes listed in
21 our appendix are just at risk. It's the same
22 thing the Court said in *Voisine*. They're at
23 risk because we're not quite sure how the
24 divisibility analysis is going to shake out.

25 But there's no question that we have

1 already lost in the Third Circuit. There's no
2 question that that's going to affect charges
3 under the hate crimes statute in that circuit.

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

17 JUSTICE JACKSON: So is this just --

18 CHIEF JUSTICE ROBERTS: Are you
19 fighting the categorical approach?

20 JUSTICE JACKSON: Yes.

21 CHIEF JUSTICE ROBERTS: I mean, isn't
22 that the root of your problem? And I guess, I
23 mean, the divisibility argument has a lot going
24 for it, but is it -- how does it fit with the
25 categorical approach?

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

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

10 JUSTICE KAVANAUGH: Is --

11 MR. FEIGIN: -- fighting the
12 categorical statute.

13 CHIEF JUSTICE ROBERTS: Well, I'm just
14 wondering if you're trying to get it in the
15 backdoor.

16 MR. FEIGIN: No, Your Honor. The
17 point I'm making is I -- I think there's -- I
18 think that approaching this with some sort of
19 degree of common sense that is here informed by
20 two millennia of common law, and Voisine looked
21 at the common law to a certain extent in
22 interpreting what the term "use" meant.

23 JUSTICE KAVANAUGH: The other side
24 says that the common sense is really captured by
25 the Residual Clause.

1 MR. FEIGIN: Your Honor, let me make
2 several points about that.

3 JUSTICE KAVANAUGH: And let me just
4 finish.

5 MR. FEIGIN: Okay.

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

16 MR. FEIGIN: If I could have a second,
17 several points on that.

18 Number 1, I think he's trying to have
19 it both ways. He's arguing that Congress
20 wouldn't want -- have wanted this to be a crime
21 of violence at all, and he's relying on this
22 Residual Clause argument.

23 As to the Residual Clause argument,
24 this isn't a case about potential risks, which
25 is what the Residual Clause covers. This is a

1 case where we know somebody dies. I think the
2 Court has not relied on the Residual Clause in
3 other cases where it might have equally been
4 applicable under the kind of logic you're
5 suggesting, Justice Kavanaugh, like Stokeling.

6 I think that's because everybody
7 recognizes the Elements Clause has its own
8 specific function. I would also point you, not
9 just to 924(c)(3)'s Residual Clause, but to the
10 Armed Career Criminal Act's Residual Clause,
11 which is worded a little bit differently,
12 although no one thinks it affects the scope of
13 the Elements Clause.

14 It requires a serious potential risk
15 of physical injury. I don't know who could
16 think that that's the way you're capturing
17 murder. It doesn't have a serious potential
18 risk of physical injury. Somebody gets harmed.

19 JUSTICE JACKSON: Yes, but Mr. Feigin
20 --

21 MR. FEIGIN: And then finally -- I'm
22 sorry.

23 JUSTICE JACKSON: Oh, go ahead. Go
24 ahead. Sorry.

25 MR. FEIGIN: And, finally, I just

1 wanted to point out that Section 922(g)(9)'s,
2 the definition doesn't appear there. That's in
3 Section 921.33(a). The definition of
4 misdemeanor, crime of domestic violence, doesn't
5 even have a Residual Clause.

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

12 JUSTICE JACKSON: Yes. No,
13 Mr. Feigin, I appreciate that somebody died
14 here, and that we would ordinarily think of
15 murder in that situation.

16 But it's clear that the language of
17 this provision of the statute is not focused on
18 the outcome or the effect.

19 And I think the common sense reading
20 of this that cuts against you is the fact that
21 "physical force" has a common sense meaning.
22 "Use" has a common sense meaning. And that it
23 suggests that the defendant has to act, that
24 they have to do something.

25 And so Justice Gorsuch's point is

1 about divisibility, is kind of my thought, which
2 is at the beginning of this, it seems like we
3 have a bifurcation of Congress's view that you
4 have action by a defendant and you have omission
5 in a different column. And we're sort of in the
6 realm of action.

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

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

17 JUSTICE JACKSON: No, I'm just looking
18 at the text of the statute. If you're right --
19 if you're right that what Congress was trying to
20 capture with this is a defendant -- a -- a -- a
21 victim dying or a person being bodily -- you
22 know, injured bodily, Congress has said that
23 many other places, even in this very statute,
24 when that was the triggering thing.

25 What I'm worried about is interpreting

1 the words "use, attempted use, and threatened
2 use of physical force" to encompass a situation
3 in which a person is not acting. That seems
4 completely counterintuitive. It seems like it
5 has no bearing in the words of the statute.

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

14 MR. FEIGIN: Well, Your Honor, if I
15 could respond. I would have like three
16 principal points in response --

17 JUSTICE JACKSON: Yes.

18 MR. FEIGIN: -- to that. One of them
19 is you -- the premise of your argument -- not
20 argument -- the premise of your question was
21 that this statute doesn't look at results, but I
22 would respectfully point the Court to Castleman,
23 and as well as Justice Scalia's concurrence in
24 Castleman, which both point out that where you
25 have -- where you actually have physical injury,

1 it must have been caused by physical force.

2 JUSTICE JACKSON: But Castleman --
3 Castleman -- Castleman was dealing with a
4 different question, like how much force? What
5 is force? Is -- is putting the -- the poison in
6 the drink enough to be physical force?

7 I'm talking about a situation in which
8 a person does nothing.

9 MR. FEIGIN: Okay. The second point
10 I'd make, Your Honor, and I've been trying it
11 this morning, and I take it as part of your
12 question, you've kind of rejected this, but I do
13 think it fits squarely within the dictionary
14 definitions.

15 Again, if my car is just rolling down,
16 you know, a hill and I see some -- my enemy walk
17 in front of me and I let the car keep going and
18 just don't do anything, I think we'd all say I
19 used physical force. Now, maybe I got in the
20 car and turned the key and started the car, but
21 I certainly didn't have the intent to use
22 physical force against the person of another. I
23 only had it at the point I stopped doing
24 something.

25 And the third point I'd make -- if you

1 will indulge me one second longer --

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. FEIGIN: -- Mr. Chief Justice,
4 thank you -- is that I don't think this would
5 have defied common sense because, again, if you
6 look at all the common law sources, everyone
7 recognizes this is a word game.

8 Do I call it withholding? Do I call
9 it not acting, when I refuse to give someone
10 medicine? And the common law has always treated
11 doing something other than what you're supposed
12 to do, fiddling while Rome burns as an
13 affirmative act.

14 Thank you, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 Justice Sotomayor?

20 Justice Barrett?

21 Justice Jackson?

22 MR. FEIGIN: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Rebuttal, Mr. Kedem?

1 REBUTTAL ARGUMENT OF ALLON KEDEM
2 ON BEHALF OF THE PETITIONER
3 MR. KEDEM: Thank you, Your Honor.
4 Starting first with divisibility, when
5 this Court has asked whether a statute is
6 divisible for purposes of the categorical
7 approach, it is asking whether it is
8 linguistically divisible, whether the text of
9 the statute allows it to be divided into
10 separate offenses.
11 Sometimes there are a list of
12 different ways of committing an offense.
13 Sometimes they are different offenses. So you
14 could say that it involve -- burglary involves
15 breaking into a house or a houseboat or
16 whatever, and then the question is, is house a
17 different crime than houseboat? But it has to
18 be linguistically divisible. You don't look at
19 -- and you can look at state, common law, or
20 otherwise to figure out whether those are
21 different elements or means, but you don't look
22 at -- at -- at case law generally to ask whether
23 omissions are different offenses than not. That
24 is what my friend is asking you to do, something
25 this Court has never done.

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

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

16 We have cases in our brief, in our
17 reply brief, in, for instance, Louisiana, which
18 accepts the general principle but, nevertheless,
19 says that felony murder cannot be committed
20 except by an affirmative act because it is
21 written in a way that requires a killing. And
22 so you have a number of those statutes, even in
23 those effective states, that wouldn't
24 necessarily be excluded.

25 Going to the residual clause, the

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

12 The elements clause is not written
13 that way. It requires the use of violent
14 physical force as an element, which means in
15 absolutely every case. And my friend does not
16 dispute that there is no interpretive
17 significance to the fact that the residual
18 clause is no -- no longer operative.

19 Going to the word "use," my friend
20 says that "use" derives some meaning from the
21 common law. This Court in Bailey said "use"
22 must be given its ordinary meaning, which is
23 active employment. And you notice that when my
24 friend started talking about using things like
25 metabolism or the body's natural processes, he

1 lapsed into this sort of abstract concept speak,
2 rather than talking about something physical,
3 like physical force that you use against the
4 person of another.

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

15 Whether you describe, you know,
16 failing to feed someone as an act of withholding
17 or an omission, either way you are not bringing
18 them into contact with any force, much less
19 violent physical force.

20 My friend relied very heavily on the
21 common law, as their brief does as well. He
22 says that acts of omission are treated as other
23 acts. And that, as a general principle, makes
24 sense for liability. But the problem with the
25 government's argument on that is none of those

1 terms make their appearance in the elements
2 clause, which talks about the use of violent
3 physical force. That's the thing that has to be
4 present in each case.

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

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

25 But if that in a sort of normal

1 scenario is not a death involving violent
2 physical force, it doesn't suddenly become
3 violent physical force because there was someone
4 who had a legal duty to provide that nutrition.
5 It may be a very serious crime. It can be
6 punished severely, but it does not categorically
7 involve the use of violent physical force.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

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

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