No. 17-2132

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SARAH M. NIXON,
Defendant-Appellant.

Appeal From The United States District Court
For the Central District of Illinois
Case No. 15-CR-20057
The Honorable Colin S. Bruce

REPLY BRIEF OF SARAH M. NIXON

Bluhm Legal Clinic
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Sarah O'Rourke Schrup
Attorney
Kayla H. Doyle
Senior Law Student
Armando R. Méndez
Senior Law Student
John L. Wolf
Senior Law Student

Counsel for Defendant-Appellant,
Sarah M. Nixon

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I. The government cannot show that Congress intended to limit § 1204(c)(2)'s affirmative defense to physical violence and any remaining ambiguity inures to Nixon's benefit.

The government concedes that Congress left the term "domestic violence" undefined in § 1204(c)(2). In defending its preferred interpretation, the government relies primarily on dictionary definitions written nearly a decade after § 1204's enactment and drafts left on the congressional cutting room floor. Perhaps recognizing that those do not quite work, the government quickly pivots to what it calls the "criminal context" in the form of after-enacted legislation. Although context matters in statutory construction, it does so hand-in-hand with purpose. *King v. Burwell*, 135 S. Ct. 2480, 2489–90, 2492–93 (2015). The government's oft-cited criminal statutes serve a very different purpose than § 1204(c)(2) and the IPCKA as a whole. In fact, the government assiduously avoids the most salient analogue to the IPCKA's context and purpose (that Congress expressly cited): the Hague Convention and its enacting legislation, the ICARA.[1]

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[1] The government's suggestion that Nixon has waived any challenge to the court's jury instruction on this issue, Gov't Br. 16, is incorrect. The defense objected to the court's pretrial ruling that adopted the "only physical violence" definition months earlier. (R.25.) Nearly every subsequent pretrial ruling implicated this early decision. *See*, *e.g.*, (R.33.) It would have done defense counsel no good to make a pro-forma objection to a jury instruction after an entire case had been built around an earlier decision. *See United States v. Schalk*, 515 F.3d 768, 776 (7th Cir. 2008) ("A definitive, unconditional ruling *in limine* preserves an issue for appellate review, without the need for later objection.").

A. The government's fleeting discussion of contemporaneous sources does not aid the inquiry into "domestic violence," except to show ambiguity.

The government relies on several contemporaneous sources, including the State Justice Institute Act of 1984, whose primary purpose is to establish a nonprofit organization. Gov't Br. 17 (citing 42 U.S.C. § 10701(8)). Section 10701's reference to "domestic violence" does virtually no work here; it is not an affirmative defense and it explicitly defines "domestic violence" while § 1204—which also contains a definitional section—does not. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (Congress's use of similar language in contemporaneous statutes is instructive when they share the same purpose).

Next, the government argues § 1204's legislative history "indicates that Congress had physical violence in mind." Gov't Br. 19. Not so. The government cites prior iterations of the statute, both attached to larger bills—the first without a domestic violence affirmative defense, the other with one. *Id.* at 19–20. (citations omitted). Neither defines "domestic violence" in the pertinent section; instead, the government cites to unrelated provisions narrowly defining the term. *Id.*

When Congress later passed § 1204 as a standalone bill in 1993, it provided no definition for "domestic violence" despite defining other terms. That Congress previously defined the term narrowly in failed legislative proposals and subsequently dropped that definition in the legislation it passed demonstrates Congress's intent not to construe the term narrowly. "There could hardly be a clearer indication of congressional agreement" with a view than Congress

"specifically consider[ing] and reject[ing]" the alternative view. *Runyon v. McCrary*, 427 U.S. 160, 174–75 (1976).

Finally, the government admits no dictionary defined "domestic violence" when Congress adopted § 1204, but subsequently cites definitions from 1999 and 2000, concluding without explanation that "Congress likely had in mind a definition" similar to these. Gov't Br. 17 (citations omitted). Yet the government never explains how Congress could contemplate definitions not yet written.

B. The government's invention of a "criminal context" to distinguish unfavorable interpretations of "domestic violence" ignores both the context and purpose of § 1204(c)(2)'s affirmative defense.

As noted, both context and purpose matter. The government looks only to context and chooses the wrong one (what it calls the "criminal context") when pivoting to its examination of after-enacted legislation. Gov't Br. 18–20. The government shoehorns § 1204(c)(2)'s affirmative defense into a bevy of statutes criminalizing conduct that also mention "domestic violence" alongside physical force. And it dismisses as the "lone exception" an FDIC statute prohibiting discrimination by insurers against victims of domestic violence, defined as including emotional distress and psychological trauma. *Id.* at 18–19 (citing 12 U.S.C. § 1831x(e)(3)). The pertinent context is not criminal statutes that use the term "domestic violence" in order to imprison offenders. Rather, the proper context, informed by the statute's purpose, is statutes that seek to protect victims, like those fleeing domestic violence in § 1204(c)(2)'s affirmative defense. When viewed through the proper lens, the government's blind adherence to penological definitions of

"domestic violence" and its avoidance of the clear, explicit connections between § 1204's affirmative defense and its civil and international analogues (the ICARA and the Hague Convention) leads to untenable results.

1. Misguided by its focus on the "criminal context," the government compares inapposite statutes to § 1204(c)(2)'s affirmative defense.

The government's fundamental proposition is that many statutes enacted after the IPCKA define "domestic violence" as requiring "physical force," often by incorporating the definition of "crime of violence" provided by 18 U.S.C. § 16. Gov't Br. 18. As a threshold matter, the Supreme Court ruled last week that § 16's "crime of violence" definition is unconstitutionally vague. *Sessions v. Dimaya*, 584 U.S. ____ (2018). The Court's decision shows exactly why the government's "criminal context" theory is irretrievably flawed: elements of a criminal offense must be written with precision and particularity, "guarantee[ing] that ordinary people have 'fair notice' of the conduct a statute proscribes" and "guard[ing] against arbitrary or discriminatory law enforcement[.]" *Id.* at *4–5 (citations omitted). Affirmative defenses neither proscribe conduct nor are they administered by law enforcement. Consequently, Congress runs no risk in drafting (deliberately or inadvertently) a vague affirmative defense. In fact, Congress may choose to be vague on purpose. *See generally* Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in *Research Handbook on Public Choice and Public Law*, 285–297 (Daniel A. Farber & Anne Joseph O'Connell eds. 2010) (discussing congressional delegation of interpretive authority to agencies and courts through legislative imprecision).

The government's cited statutes are distinguishable on other grounds. First, many define different terms. *See, e.g.*, 18 U.S.C. § 921(a)(33)(A) ("misdemeanor crime of domestic violence"); 18 U.S.C. § 2261(a)(1) ("interstate domestic violence"); 18 U.S.C. § 3561(b) ("domestic violence crime"); 8 U.S.C. § 1227(a)(2)(E)(i) ("crime of domestic violence"). Notably, none are affirmative defenses.

Second, many of the statutes refer to other sources that define "domestic violence" broadly. For instance, one cited statute, 18 U.S.C. § 3561(b) is cross-referenced in another, § 3563(a)(4), which mandates "consultation with a State Coalition Against Domestic Violence." One such coalition is the National Network to End Domestic Violence, which defines "domestic violence" to include emotional, psychological, and financial abuse. *What is DV?*, https://nnedv.org/about-dv/what-is-dv/ (visited Apr. 11, 2018).

2. The government also misreads Supreme Court precedent.

The government regularly confuses sufficient conditions with necessary ones. *See* Gov't Br. 20 (citing *United States v. Bryant*, 136 S. Ct. 1954, 1958 (2016); 18 U.S.C. § 117(a)) (observing the Supreme Court's construal of a prohibition of "domestic assault" as a method of preventing "domestic violence"). *Bryant* simply demonstrates that physical "domestic assault" is a form of "domestic violence," not that physical assault is the sole form of "domestic violence." Worse, the government misunderstands *United States v. Castleman*, 134 S. Ct. 1405 (2014). Relying solely on the fact that "*Castleman* was interpreting a statute that defined domestic violence to require physical force," Gov't Br. 22, the government ignores the Court's

extended discussion of what "domestic violence" means more generally. *Castleman* could not have been clearer that "the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,' . . . that is not true of 'domestic violence.' 'Domestic violence' is not merely a type of 'violence'; it is a term of art encompassing acts that one might not characterize as 'violent' in a nondomestic context." 134 S. Ct. at 1411 (citation omitted). The *Castleman* firearm-possession statute's use of a narrower term of art with a physical-force requirement reflects the constitutional limitations there. *See* Emily J. Sack, United States v. Castleman*: The Meaning of Domestic Violence*, 20 Roger Williams U. L. Rev. 128, 150 (2015) (discussing "[w]hether the statute serves an important enough state interest and is strongly enough related to that interest"). It does not mean that every use of "domestic violence" in the U.S. Code is defined in the same narrow fashion.

The government asserts that Nixon's "reading would strip nearly all meaning from the word 'violence'." Gov't Br. 23. Justice Scalia's *Castleman* concurrence disagrees. 134 S. Ct. at 1420 (characterizing the majority's decision as holding that "an act need not be violent to qualify as "domestic violence") (citing the same 1999 and 2000 dictionary definitions found at Gov't Br. 17). The government dismisses Nixon's citation to "definitions of domestic violence in non-legal literature." Gov't Br. 23. The *Castleman* majority, however, credited "social-science definitions" from "the organizations most directly engaged with the problem and thus most aware of its dimensions." 134 S. Ct. at 1412.

3. The government avoids the context that truly matters: the IPKCA's relationship with the ICARA.

Not only is § 1204(c)(2)'s status as an affirmative defense (as opposed to an element of an offense) of paramount importance, but Congress's explicit reference to the Hague Convention is another significant contextual key mishandled by the government.

The government is correct that the IPKCA is "designed to punish and deter abduction" while the Hague Convention—via its enacting legislation, the ICARA—"seek[s] return of the child." Gov't Br. 25. However, the government's reading produces a conflict, despite clear indications that Congress intended the two statutes to be read in concert. *See* 18 U.S.C. § 1204(d) (The IPKCA "does not detract from The Hague Convention"); Pub. L. No. 103–173, § 2, 107 Stat. 1998 (1993) ("[The Hague Convention] should be the option of first choice for a parent who seeks the return of a child") (congressional note accompanying the IPKCA).

The government argues the IPKCA does not incorporate The Hague Convention's "psychological harm" affirmative defense even while admitting the ICARA does. Gov't Br. 25–26. But under this interpretation, the fleeing parent of a psychologically abused child *would not be* required to return the child under the ICARA, but *would be* subject to criminal prosecution under the IPKCA. This reading is unnatural and should be rejected. It is odd that the government argues that § 1204 should be read in concert with other randomly selected statutes but not with the statute that it directly references.

C. The government's approach creates absurd results and ignores that the rule of lenity counsels a different result.

The government recognizes that both children and parents may be victims § 1204 seeks to protect. Gov't Br. 24. Yet, the Government's narrow construction of § 1204(c)(2)'s domestic violence defense puts both at risk. Under the government's physical-harm theory, abused parents would have to wait until they or their children are physically assaulted before §1204 allows them to flee and ignores that § 1204 typically arises in the context of custody disputes between divorced or separated parents—where physical contact is unlikely.

The government's misunderstanding of domestic violence does not end there. In rejecting broad definitions of "domestic violence," the government argues, "Congress cannot have meant . . . to absolve parental kidnappers of criminal liability based simply on cutting remarks or unkind words[.]" Gov't Br. 24. Not only is it premature to characterize the abuse Nixon suffered before she has been afforded an opportunity to present her evidence, but dismissing the abuse as "cutting remarks or unkind words" does a disservice to victims the statute seeks to protect. In fact, non-physical abuse typically precedes physical abuse, Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. Rev. 397, 406–07 (2015) (characterizing verbal and emotional abuse as the first of "three predictable and distinct phases" of domestic violence occurring before an "explo[sive] acute battering incident in which the batterer inflicts serious physical injury upon the victim"), and can by itself be extremely harmful, Joseph Spinazzola, *Childhood Psychological Abuse as Harmful as Sexual*

or Physical Abuse, American Psychological Association, (Oct. 8, 2014), http://www.apa.org/news/press/releases/2014/10/psychological-abuse.aspx.

Congress's silence on what "domestic violence" means in § 1204 favors a broad reading. Even if this Court is unmoved by the forgoing arguments, what remains is ambiguity. At its best, the government's argument renders this fight a tie, which goes to the defendant. *United States v. Santos*, 553 U.S. 507, 514 (2008).

D. The district court's error is not harmless.

The government argues that evidence of G.G.'s emotional, psychological, and financial abuse of Nixon "would have done little to support her affirmative defense" because Nixon was able to introduce evidence of G.G.'s abuse of S.N.-G. Gov't Br. 28. When considering the issue below, the district court treated Nixon's argument as constituting two separate affirmative defenses: (1) that Nixon's daughter was sexually abused; and (2) that Nixon herself was emotionally, psychologically, and financially abused. (R.25 at 2, 12.) In categorically denying Nixon's motion to admit any evidence of her second affirmative defense, the district court deprived Nixon of a right prescribed by statute and prejudiced her.

II. The district court inaccurately instructed the jury and erroneously denied Nixon's motion for a judgment of acquittal.

A. A specific unanimity instruction was required because the government charged Nixon with two distinct offenses enveloped into one count.

The government does not and cannot answer this question: If "remove" and "retain" are "simply two means of satisfying the jurisdictional element," Gov't Br. 30, then what is § 1204's *actus reus*?

The government's "jurisdictional hook" argument rests on three flawed assumptions. First, it assumes that federal statutes must contain an explicit jurisdictional element, which they do not. *See* Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 Tex. L. Rev. 1203, 1206 (2006).

Second, the government presumes that statutory language has a single purpose, when in fact it can serve dual roles. Courts that have considered the question have recognized that jurisdictional language is present within § 1204, and that that language is separate from the "retain" and "remove" elements. *See United States v. Cummings*, 281 F.3d 1046, 1051 (9th Cir. 2002) (recognizing that the "IPKCA inherently contains a jurisdictional element" and retention, though not explicitly tied to the jurisdictional element, implicitly satisfies it); *see also United States v. Homaune*, 898 F. Supp. 2d 153, 159 (D.D.C. 2012) (holding that the Commerce Clause authorized Congress to proscribe "that the defendant 'retains a child (*who has been in the United States*) outside the United States'" because of the "parenthetical jurisdictional hook") (emphasis in original).

Third, the government assumes that jurisdictional elements, when included, are treated exactly the same as substantive elements. In fact, whereas a defendant must possess *mens rea* as to every element of an offense even if the statute does not spell out that requirement, this is not true of jurisdictional elements. *Torres v. Lynch*, 136 S. Ct. 1619, 1630–31 (2016) (noting where Congress has not spoken regarding the *mens rea* requirement pertaining to a jurisdictional element, courts

should view "the commerce element as distinct from, and subject to a different rule than, the elements describing the substantive offense."); *see United States v. Yermian,* 468 U.S. 63, 68 (1984) ("Jurisdictional language need not contain the same culpability requirement as other elements of the offense").

The government cannot simply write out the two *actus rei* from the statute by calling them "means" of satisfying a jurisdictional hook. Section 1204 has no other *actus reus*;[2] to accept the government's interpretation is to accept that Congress wrote § 1204 without the requisite *actus reus*—an unsupportable assertion. In contrast, the government's two cases only examine jurisdiction. *See United States v. Renteria*, 557 F.3d 1003, 1008 (9th Cir. 2009); *United States v. Verbitskaya*, 406 F.3d 1324, 1334 (11th Cir. 2005). When, as here, the applicable language is serving as the *actus rei*, or at least serving dual purposes alongside a jurisdictional element, the unanimity requirement persists.

The government attempts to brush away Congress's amendment of § 1204 to include a separate "attempts" crime for "remove" but not "retain," contending it would make no sense to bar an attempted retention because any attempted retention "would have occurred entirely outside the United States" and because the goal of §1204 was "to prevent international abductions before they occur." Gov't Br. 31. But if prosecution of exterritorial conduct were not permitted under the statute,

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[2] The government's sole example is one where the *actus reus* is wholly separate from the jurisdictional element. *See* Gov't Br. 30 (citing 18 U.S.C. § 1201(a)(1), which has as its *actus rei* conduct that "seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away" and "holds for ransom or reward" a victim, and its jurisdictional element comes immediately after: the victim must be "transported in interstate or foreign commerce").

the "retain" element itself (a crime that takes place entirely outside of the United States) would be superfluous. *See United States v. Shalhoub*, 855 F.3d 1255, 1264 (11th Cir. 2017) (finding that "it makes no sense to say that the *International* Parental Kidnapping Crime Act—which makes it a crime to 'remove[ ] a child from the United States . . . or retain[ ] a child . . . outside the United States,' 18 U.S.C. §1204(a)—does *not* apply to conduct that occurs in another country") (emphasis in original). Finally, the government conflates §1204's aspirational goals with its actual text. Gov't Br. 31. Section 1204's deterrence goal may explain why Congress chose to amend "retain" and "remove" differently but does not suggest they are anything other than separate elements.

B. The lack of a specific unanimity instruction was not harmless.

The government must show beyond a reasonable doubt that the instructional error did not impact the outcome of the trial. *United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000) (citing *Neder v. United States*, 527 U.S. 1, 15 (1999) (internal citations and quotations omitted)). If the "record contains evidence that could rationally lead to a contrary finding with respect to that omitted element," the error is not harmless beyond a reasonable doubt. *Neder,* 527 U.S. at 19; *see also United States v. Brown,* 202 F.3d 691, 701 (4th Cir. 2000) ("if the element was genuinely contested, and there is evidence upon which a jury could have reached a contrary finding, the error is not harmless").

Nixon presented evidence challenging both removal and retention. First, although Nixon concedes she "removed" her daughter to Canada, she disputes she

did so with the *intent to obstruct the parental rights* of G.G. *See, e.g.,* (12/16/16 Trial Tr. 77–78) (Nixon acknowledging that her lawyer filed papers for supervised visitation in January 2015 and the court entered a no-contact order against G.G.); (12/16/16 Trial Tr. 174–75 (Nixon testimony that she did not believe that the Illinois courts had jurisdiction over the custody matter);[3] (12/16/16 Trial Tr. 126, 128) (Nixon testifying that she did not actually know that G.G. had gained custody of S.N.-G. until after 8:30 p.m. on July 14, when she arrived at her friend's home and received an email from her lawyer). Nixon's evidence contested the government's narrative, showing instead that she chose to return to Canada, to a court that she believed had proper jurisdiction, before an invalid forum delivered her daughter to a man who had been stripped of his physical custody because of suspected abuse. The government simply cannot prove beyond a reasonable doubt that a rational jury would have convicted Nixon of the removal with intent to obstruct.

The same evidence cited above shows that Nixon also contested the government's charge that she "retained" her daughter in order to obstruct the parental rights of G.G. The government repeatedly highlights that "Nixon went further into Canada," Gov't Br. 2, 33, 38, which supposedly shows that she retained S.N.-G. in violation of §1204. But that fact was in dispute. Nixon testified that she

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[3] Nixon had learned that custody claims cannot lie in Illinois unless the parties have resided in there for six months. (12/16/16 Trial Tr. 188–89.) At the time that G.G. opened the custody proceedings, Nixon and S.N.-G. had been living in Canada for two years and had returned to Urbana in August 2014; G.G. opened the custody proceedings in November, three months after their return and well before six-month residency requirement had been satisfied. (12/15/16 Trial Tr. 30.)

did not definitively learn about the state court custody order until after 8:30 p.m. on July 14 when she had stopped at her friend's home for the night. (12/16/16 Trial Tr. 125–28.) And the police arrived to retrieve S.N.-G. the next morning while Nixon was still at her friend's house. (12/16/16 Trial Tr. 135.) Nixon thus did not "retain" S.N.-G under the government's own definition—she hadn't moved "farther into Canada" in the 10 or 12 hours after learning of the order; she was, in fact, on the telephone with an attorney trying to figure out her options when the police arrived. (12/16/16 Trial Tr. 135); *see also* 18 U.S.C. §1204(c)(3) (suggesting a 24-hour grace period for contacting the other parent following the expiration of a visitation). Thus, it cannot be said that the trial court's failure to give a specific unanimity instruction had no substantial effect on the jury verdict, much less that it was harmless beyond a reasonable doubt.

C. The government concedes that the district court erred in taking an element away from the jury; the resulting failure to prove each element beyond a reasonable doubt means the government educed insufficient evidence of Nixon's guilt.

"Criminal convictions [must] rest upon a *jury determination* that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 505, 510 (1995) (emphasis added). The government apparently agrees, Gov't Br. 38 (suggesting that the district court's analysis of the issue would have yielded the same result "if the jury had been properly instructed"), as it did below, (R.89 at 15) (government objection to defense jury instructions acknowledging "[t]he government does not dispute that it is required to prove the existence of lawful parental rights at the time of removal or

retention"). Under the guise of harmless-error analysis, the government then spends the rest of its argument urging this Court to do exactly what the district court did: determine as a matter of law this jury question. Gov't Br. 35–38 ("The district court correctly concluded that G.G. had parental rights when Nixon removed S.G. . . . [because] the January 2015 order cannot reasonably be construed as terminating G.G.'s parental rights . . . [so] [i]f the jury had been properly instructed on the meaning of 'parental rights,' it would have concluded that G.G. had them.").

The government engages in pure speculation. As a threshold matter, the district court's legal error caused it to exclude nearly all evidence regarding the impact of the no-contact order, so the jury simply did not have the information it needed to adequately decide the question even if it had been allowed to do so. This alone warrants reversal. And the couple of bits of testimony that Nixon was able to utter before the government's vocal objections was enough to render it contested in the eyes of the jury, *see supra* pages 12–13 (detailing Nixon's testimony that she believed G.G. did not have parental rights due to the no-contact order and infirm state-court jurisdiction). *See Brown*, 202 F.3d at 701.

Regardless, the many legal errors surrounding these instructional missteps are entwined such that the government cannot meet its burden of showing harmlessness beyond a reasonable doubt. The failure to give a unanimity instruction means that one cannot know the basis on which the jury found Nixon guilty. Second, the district court's pretrial ruling on this question forced the defense

to walk a fine line in its arguments regarding insufficiency because they all had to conform to the district court's determination that this was a question of law. Had defense counsel not been so constrained, Nixon's case could have unfolded much differently. For example, because the court held pretrial that the defense could not argue in front of the jury that G.G. did not have parental rights, the defense was not able to even publish the order to the jury[4] or allude to its contents in any detail. Nor could Nixon introduce the motions and other papers demonstrating her long-fought efforts to challenge the state trial court's jurisdiction. True, Nixon had her own testimony, but only that, and her credibility was seriously battered by the government at every turn; the impact of the district court's repeated limitations on her defense cannot be understated. Finally, because the district court wholly removed from the jury's consideration the question of parental rights and did so based on an erroneous interpretation of the statute, it relieved the government of its burden of proving every element of the offense, and Nixon should be awarded a judgment of acquittal.

Even if this Court were to decide to weigh in on the district court's legal definition of "parental rights" in the wake of the government's concession that the very giving of the instruction was wrong, it should find that the district court's statutory interpretation was in error. Section 1204 defines "parental rights" in a

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[4] Even worse, after boxing Nixon into this position with its insistent complaints about and objections to Defense Exhibit #1, (R.89 at 17–18, R.94 (motion to exclude exhibit)), the government turned around and suggested as a basis for denying Nixon's Rule 29 motion the fact that it had not been published to the jury, (12/16/16 Trial Tr. 151).

specific way, within a specific context. The government, once again ignoring this critical context, grafts notions of state-law parental-rights termination onto §1204 and thereby runs roughshod over congressional intent. Gov't Br. 35–36. The statute defines "parental rights" as "the right to *physical custody* of the child*."* 18 U.S.C. §1204(b)(2) (emphasis added). The statute then elaborates that physical custody can be "joint or sole" and can include "visiting rights," but the government ignores that the operative phrase in the statute is "custody" so the subsequent modifiers (joint, sole, visiting) must adhere to that fundamental definition. The common dictionary definition of the term "custody" is "care or control exercised by a person or authority over something or someone" or "care and maintenance of a child that includes the right to direct the child's activities and make decisions regarding the child's upbringing—compare the legal definitions of 'visitation.'" Merriam-Webster Online Dictionary 2018, http://www.merriam-webster.com, (last accessed 19 Apr. 2018).

It is significant that the dictionary expressly distinguishes the term "visitation" and that the core of the definition revolves around control and authority. Even the government has not argued that G.G. had "control" or the right to "make decisions" regarding S.N.-G. It simply argues that he had visiting rights and that his parental rights writ large had not been formally terminated under Illinois law. But the visiting rights G.G. possessed during that time were so strictly curtailed in terms of their scope and his right to assert authority over the child that they cannot satisfy Congress's intentional custodial requirement. In any event, Nixon could hardly have obstructed these visitation rights because they had ended

when Dr. Appleton finished her work on July 6, 2015, (R. 98 at 5 n.1)—a week before Nixon left for Canada. Finally, to the extent that the relationship between these two terms, "physical custody" and "visitation," is ambiguous, the rule of lenity should apply in Nixon's favor. *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015).

III. The district court crippled Nixon's affirmative defense through a series of erroneous evidentiary rulings.

The government argues Nixon is dressing her evidentiary rulings in the cloak of constitutional violations. Gov't Br. 39–40. But where the exclusion of critical evidence so fundamentally impacts a defendant's ability to assert her defense, it denies her the constitutional right to a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *De novo* review applies because that is exactly what happened here. But even under abuse-of-discretion review, the district court's exclusion of Nixon's witnesses constitutes reversible error. It applied the rules of hearsay mechanistically and relied on misinterpretations of both precedent and the affirmative defense. As a result, the district court excluded:

1. Dr. Buetow's lay testimony;
2. Murphy's lay testimony;
3. Poblano's lay testimony;
4. Dr. Loring's expert testimony;
5. Chow's expert testimony.

And severely limited:

6. McKean's lay testimony;
7. Dr. Buetow's expert testimony; and

8. Murphy's expert testimony.

Without these witnesses Nixon was forced to hang her defense on her own credibility—the very heart of this case. Was she a desperate mother fleeing an abusive ex-husband who she believed had molested and physically harmed her daughter or was she—as the government repeatedly argued to the jury—a manipulative divorcee trying to make an end run around a bad custody decision? Although the jury heard a litany of government witnesses testifying to Nixon's villainy, *see* Br. 12, it never heard from the very people most qualified to testify on everything supporting Nixon's belief that her daughter had been abused and the reasonableness underlying that belief.

A. The government misunderstands the affirmative defense and attempts to sweep the worst of the district court's errors under the rug.

The government relies on rote repetition of the district court's flawed reasoning. *Compare, e.g.,* A.18–19, 45–46 with Gov't Br. 57. This reply brief focuses on instances where the government directly engages with Nixon's arguments. When the government has done so, however, it lays bare the fundamental inconsistencies of the district court's rulings, its misapplication of caselaw, and its failure to fulfill its duties before excluding evidence under Rule 403. Each of these errors, singly or taken together, is reversible.

1. The government perpetuates the district court's misunderstanding of the affirmative defense.

Below, the government endorsed "reasonable belief" as the standard for the affirmative defense (R.52 at 30); now, on appeal, it retreats.[5] Gov't Br. 52–53 ("that was not the correct standard"). Although the district court accepted this standard, (R.91), it later failed to actually apply it when making evidentiary rulings. Had it done so, most of its decisions should have come out the other way.

Stuck with the standard it initially (and correctly) offered and tasked with defending the district court's (conflicting) rulings, the government presents an incoherent approach that volleys between an objective and subjective reasonable-belief standard. For example, the government repeatedly asserts Nixon's PTSD witnesses' sole utility was to show Nixon's subjective belief, which it claims is irrelevant to reasonable belief. Gov't Br. 47. Then, with respect to Nixon's sexual-abuse witnesses, the government turns an abrupt 180, claiming that this objective evidence does nothing to show Nixon's subjective state of mind. Gov't Br. 56 ("it was Nixon's reasonable belief, not theirs, that mattered"). The government curiously finds Nixon's knowledge and perception both relevant and irrelevant at different times—apparently favoring whichever excluded her evidence.

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[5] *Musacchio v. United States* does not require a different approach on appeal because it merely asked how "a court should assess a sufficiency challenge when a jury instruction adds an element to the charged crime and the Government fails to object." 136 S. Ct. 709, 715 (2016). Here, the Government did not "fail to object." It affirmatively asserted the reasonable belief standard, which the district court accepted. (R.91 at 4; R.52 at 30.)

Even putting aside this inconsistency, the government's treatment of the PTSD evidence misses the mark. As numerous courts have held, PTSD is relevant to subjective *and* objective reasonable belief. *See, e.g., State v. Hines*, 696 A.2d 780, 787 (N.J. Super. Ct. App. Div. 1997). The government attempts to distinguish these cases because they address reasonable belief in the context of physical self-defense. Gov't Br. 47–49. But fleeing an abusive situation is just another form of self-defense; nothing in these cases suggests that the availability of this important evidence turns on such a narrow distinction. Nixon's witnesses would have shed light on her mental state, which informed her perception that this defensive action was necessary.

The government then claims Dr. Loring's use of the word "irrationality" in her *Daubert* hearing meant the PTSD evidence would be incompatible with reasonable belief. Gov't Br. 50. Loring's point was that a reasonable person with PTSD—that is, a person in Nixon's shoes—would perceive and respond to abuse allegations in a categorically different way than others who did not suffer from that condition. But the operative inquiry was into the range of perceptions and behaviors that define the heartland of PTSD sufferers, not whether others would view them as extreme or irrational. *Com. v. Pitts*, 740 A.2d 726, 733 (Pa. Super. Ct. 1999) (reasonable belief "must be reasonable in light of the facts as they appeared to [the defendant]"). For someone with PTSD, Loring said, Nixon's reactions would be perfectly within that heartland and thus reasonable.

2. The district court's repeated misinterpretations of relevant caselaw is an abuse of discretion.

The government tries to explain away the district court's most egregious misuse of cases but in so doing highlights the gravity of these errors. Most extreme among them, the government concedes the district court quoted and relied on a vacated panel opinion, but asserts that the *en banc* opinion did not actually contradict the panel opinion. Gov't Br. 61. It is, however, difficult to interpret the quote (on which the district court relied) followed by "we do not agree" (which the district court omitted) any other way. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 704 (7th Cir. 2008).

Similarly, the government defends the exclusion of Dr. Buetow under Rule 803(4) ignoring the fact that the district court specifically relied on cases holding the opposite of what it ultimately ruled. Gov't Br. 56. For example, the district court devoted over a page to *United States v. Peneaux*—which found that such statements are reasonably pertinent to diagnosis and treatment—before holding precisely the opposite on facts virtually indistinguishable. (A.44–45) (citing 432 F.3d 882, 893–94 (8th Cir. 2005)). The district court likewise chose a rule and did not follow it when it found that Buetow and Murphy could only testify to generalizations, with no mention of S.N.-G. specifically. *See* Br. 50.

3. By not examining the probative value of Nixon's evidence the district court failed to engage in even a perfunctory Rule 403 analysis.

Despite the government's protests, this Court has consistently found a failure to perform more than a "pro-forma" recitation of a Rule 403-balancing test may,

standing alone, be reversible error. *See United States v. Loughry*, 660 F.3d 965, 972 (7th Cir. 2011); *see also United States v. Miller*, 688 F.3d 322, 327 (7th Cir. 2012); *United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir. 2010).[6] As the government noted, the district court issued a 41-page opinion, Gov't Br. 59, but never once expressly weighed in on the probativeness of Nixon's proposed evidence. The furthest the district court goes—in two brief remarks—is characterizing some of Nixon's evidence as confusing or cumulative, a characterization the government echoes. Gov't Br. 58 (citing A.42, A.47.) Yet confusing or cumulative goes to the evidence's prejudicial effect, a "competing interest[]" of probative value, not a proxy for it. *McGeshick v. Choucair*, 9 F.3d 1229, 1236 (7th Cir. 1993).

Even if cumulativeness and confusion could properly serve as proxies for probativeness, the evidence Nixon sought to introduce is neither. The government argues that this evidence would have only fomented confusion by showing that other adults believed S.N.-G. had been abused, not that Nixon herself believed this. Under an objective reasonable-belief analysis, however, such evidence directly demonstrates how Nixon came to believe that S.N.-G. had been abused. Nor does the government explain how evidence that never came before the jury can be deemed cumulative (Nixon herself was prevented from testifying about her conversations with each these professionals). (A.42 n.4.) Any possible confusion

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[6] The government chose to distinguish only one of the many cases cited in the opening brief: *United States v. Miller.* And it did so by claiming *Miller* dealt with a different rule: 404(b). Gov't Br. 58. But 404(b) invokes 403 balancing, and had the government mentioned the remaining cited cases, which exclusively involved Rule 403, it could not have ignored that they all reject "pro-forma recitations." *Loughry*, 660 F.3d at 972.

could not outweigh—much less substantially outweigh—the testimony's probative value.

B. Because this evidence was so critical to Nixon's affirmative defense, these errors cannot be harmless.

This Court has found "reason to be wary about invoking the doctrine of harmless error . . . with regard to evidentiary rulings in jury cases." *United States v. Cerro*, 775 F.2d 908, 916 (7th Cir. 1985) (citations omitted). In part this is because "there is an asymmetry between the prosecutor's being allowed to put in more evidence of guilt than he should have and the defendant's being prevented from putting on a defense." *Id.* As detailed in Section IV, the government was afforded virtually free rein in its presentation of evidence, while Nixon's case, including her affirmative defense, was cut to the quick by the district court's evidentiary rulings. Without the PTSD evidence, the jury could not fully understand the context of Nixon's belief of domestic violence, and Loring, Chow and McKean would have added much-needed back-up to Nixon's own testimony. *See Hines*, 696 A.2d at 788 (finding expert testimony on PTSD would have "lent additional credibility to defendant's allegations").

Then, without either lay or comprehensive expert testimony regarding S.N.-G.'s abuse the jury could not have understood the origin and development of Nixon's reasonable belief that it had occurred. The government brushes off the import of this evidence to Nixon's case by pointing to its own theory: that Nixon had coached S.N.-G. Gov't Br. 57–58. On the contrary, Buetow and Murphy specifically found that S.N.-G. had not been coached (A.19, A.40), and Poblano so believed S.N.-G.'s

accounts that she called DCFS (A.18). Given that whether Nixon coached her daughter was clearly probative to whether she reasonably believed S.N.-G. had been abused, the exclusion of medical professionals who determined S.N.-G. had not been coached can hardly be considered harmless—especially in light of the government's unrelenting emphasis of it during trial. *See*, *e.g.,* (12/19/16 Trial Tr. 131.) All of this evidence struck at the heart of Nixon's case and when the district court excised it, she was left with virtually no defense beyond her own testimony.

IV. These errors cumulatively denied Nixon a fair trial.

Cumulative error is grounds for reversal so long as "the case was not so completely one-sided against [a defendant]" that even an "avalanche of errors" was harmless. *United States v. Santos*, 201 F.3d 953, 965 (7th Cir. 2000). If the jury "might have acquitted her" absent the "litany of errors," this Court reverses. *Id.* Here, Nixon was crushed by such an avalanche. But it was not harmless. At each stage of Nixon's case, the district court erred, chipping away her defense bit by bit until she was left with almost nothing.

The mistakes began with Nixon's duplicitous indictment. (R.7.) She then immediately lost half of her affirmative defense when the court excluded emotional, psychological, and financial abuse from the definition of domestic violence. (R.25.) What remained of her affirmative defense was then whittled down more when the district court prevented her from calling both expert and lay witnesses who had heard, believed, and reported S.N.-G.'s abuse allegations. (R.33.) Left with little more than her own testimony, Nixon was told she could not fully explain the context

of her belief by introducing evidence of her PTSD. (R.66.) Before her trial even began, Nixon's affirmative defense had been slashed to nothing.

Then, at trial, the court constrained Nixon's ability to show that G.G. did not have "physical custody" as defined by the IPCKA when she fled with S.N.-G. (12/14/16 Trial Tr. 170.) The repeated skirmishes over G.G.'s parental rights, *see* (12/14/16 Trial Tr. 160–68; 12/16/16 Trial Tr. 78–81, 151) forced Nixon into the narrow argument that G.G. did not have parental rights as a matter of law, (12/16/16 Trial Tr. 152). And so the jury, instructed that G.G. had parental rights, never had to decide this question, relieving the government of proving every element of its case. (R.106 at 21.) The court likewise relieved the jury of its duty to reach a unanimous decision on whether Nixon had retained or removed her daughter with intent to obstruct those rights. (R.100; 12/19/16 Trial Tr. 251.) Without having to reach these difficult questions and having heard barely a fraction of the story, it is little wonder that the jury opted to convict her. Though well-intentioned, and despite its pronounced belief, the district court simply did not "rule[] in favor of the defendant" anytime "there [was] a tie" (12/19/16 Trial Tr. 213); it did the opposite. This Court should reverse.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate Nixon's conviction and remand with instructions to enter a judgment of acquittal or, at a minimum, remand for a new trial.

Respectfully Submitted,

Sarah M. Nixon
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney
KAYLA H. DOYLE
Senior Law Student
ARMANDO R. MÉNDEZ
Senior Law Student
JOHN L. WOLF
Senior Law Student

Bluhm Legal Clinic
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant,
SARAH M. NIXON

No. 17-2132

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Sarah M. Nixon, Defendant-Appellant.	Appeal From The United States District Court for the Central District of Illinois Case No. 15-CR-20057 The Honorable Colin S. Bruce

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Sarah O'Rourke Schrup
Attorney
Kayla H. Doyle
Senior Law Student
Armando R. Méndez
Senior Law Student
John L. Wolf
Senior Law Student
Bluhm Legal Clinic
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: April 23, 2018

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Plaintiff-Appellant, Sarah M. Nixon, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on April 23, 2018, which will send notice of the filing to counsel of record.

/s/ Sarah O'Rourke Schrup
Attorney
Kayla H. Doyle
Senior Law Student
Armando R. Méndez
Senior Law Student
John L. Wolf
Senior Law Student

Bluhm Legal Clinic
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: April 23, 2018