No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Congress intended to disarm persons who commit misdemeanor domestic assault or battery by intentionally or knowingly causing bodily injury to a family member—here, the mother of respondent's child. To achieve that result, it defined "misdemeanor crime of domestic violence" as an offense having, as an element, the "use of physical force," thus tracking common-law battery and incorporating the common-law meaning. Respondent rejects the common-law meaning and advocates an unduly rigid definition of the "use of physical force" that ignores the statutory context and cannot be squared with congressional intent. Respondent's interpretation would nullify Section 922(g)(9) by excluding assault and battery crimes in almost all States—and thereby putting firearms back in the hands of thousands of domestic

abusers. None of respondent's arguments justifies that incongruous and dangerous result.

A. Assault Or Battery That Intentionally Causes Bodily Injury Necessarily Has, As An Element, The Requisite Level Of Force

Respondent contends (Br. 13-25) that Section 921(a)(33)(A) requires "violent" physical force for a crime to qualify as a "misdemeanor crime of domestic violence." And, he argues (Br. 25-27, 30-35), assault by intentionally causing bodily injury does not have, as an element, the use of such "violent" force. He is wrong at both steps of the analysis.

1. A "misdemeanor crime of domestic violence" must have, as an element, the use of "physical force," but that force need not be "violent" in nature.

a. Respondent begins (Br. 14-15) with dictionary definitions of "force" and "physical force," but that is the wrong starting point. This Court ordinarily gives a "common-law term of art * * * its established common-law meaning." *Johnson* v. *United States*, 559 U.S. 133, 139 (2010). In *Johnson*, the Court recognized that "'force' has a number of meanings" and that one of those "meanings" is the common-law definition. *Id.* at 138-139. As respondent concedes (Br. 16-17), the common-law definition of "force" includes the "slightest offensive touching" and does not require violence. *Johnson*, 559 U.S. at 138-139. So long as that meaning "fit[s]" and does not produce "nonsense" (*id.* at 139 (citation omitted)), that is the end of the analysis.

Although respondent asserts that the common-law definition does not "fit" (Br. 17), his reasons are conclusory and unpersuasive. He suggests (*ibid.*) that Congress could have "grafted the common-law defini-

tion of battery into federal law." But that is precisely what Congress did. "[C]ommon law battery was defined as the 'application of unlawful force against the person of another.'" *Id.* at 16 (quoting U.S. Br. 14). Similarly, a "misdemeanor crime of domestic violence" is defined as, *inter alia*, the "use of physical force." 18 U.S.C. 921(a)(33)(A)(ii).[1]

Respondent nevertheless insists that Congress intended to "narrow[] the field of eligible battery offenses." Br. 17; see *id.* at 16. But the fatal flaw in that argument is respondent's failure to identify any "narrower" category of battery *statutes* that satisfy his definition of "physical force." See Part C, *infra*. Congress plainly intended to identify a class of offenses that would include misdemeanor battery. See *United States* v. *Hayes*, 555 U.S. 415, 427 (2009); 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg). Rather than craft a definition that applies to at most a handful of state statutes, Congress logically defined a "misdemeanor crime of domestic violence," in a statute designed to protect battered women and children, by reference to the common and common-law misdemeanor crime of battery.

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[1] Respondent later suggests (Br. 39) that Congress "could have borrowed the generic language" of state assault and battery laws requiring the causation of bodily injury. But that definition would have been too narrow. It would have excluded, for example, common-law battery that did not require injury (but still merited prosecution), as well as other misdemeanor crimes of domestic violence (*e.g.*, harassment, Ala. Code §§ 13A-6-132(a), 13A-11-8(a) (2013) (including striking, shoving, or kicking)). Congress was not required to list all existing (and to anticipate all future) misdemeanor crimes, with their varying state-law definitions and the attendant risk of underinclusiveness, in order to cover assault and battery—the quintessential crime of domestic violence.

b. Respondent next relies on (Br. 18-22) this Court's decision in *Johnson*, but the "obvious relevance" (*id.* at 21) of *Johnson* points in the exact opposite direction of respondent's position. *Johnson* expressly left open the question presented here, but its analysis is a roadmap that shows why the words "physical force" should *not* have the same meaning when defining the phrase "misdemeanor crime of domestic violence" in Section 922(g)(9) as they do when defining the phrase "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B). In arguing otherwise, respondent glosses over three critical differences between the two statutes.

First, Section 922(g)(9) defines a "misdemeanor" crime of domestic violence, whereas Section 924(e)(2)(B) defines a violent "felony." Respondent contends (Br. 21-22) that the "misdemeanor-felony distinction" speaks only to the "*punishment*" and not to the "*nature*" of the offense. But that is not what the Court said in *Johnson*. This Court found it significant that the "adjective 'violent' is attached to the noun 'felony.'" 559 U.S. at 140. It declined to import the common-law definition of "force" into the ACCA because the term was being used to define a "felony," whereas common-law battery was (and still is) a "*misdemeanor*" offense. *Id.* at 141. And the Court left the question presented here open by emphasizing the difference between a "statutory definition of 'violent felony'" and a statutory definition of "*misdemeanor* crime of domestic violence." *Id.* at 143-144. Respondent's attempt to minimize the "misdemeanor-felony distinction" cannot be squared with the Court's actual analysis in *Johnson*.

Second, the term being defined is "misdemeanor crime of *domestic violence*," not "*violent* felony." "Domestic violence" carries a different connotation than the word "violence" standing alone or the adjective "violent" when used to modify the noun "felony." See U.S. Br. 19; see also Nat'l Network to End Domestic Violence (NNEDV) Amicus Br. 2-9, 27-29 ("'domestic violence' * * * denotes a spectrum of abusive behavior committed by intimate partners for purposes of coercion and control"); N.Y. State Ass'n of Chiefs of Police Amicus Br. 3-4. Respondent equates the two only by ignoring the modifier "domestic." See Br. 13, 15, 25, 26 (incorrectly suggesting "crime of violence" is the term being defined). And respondent's emphasis on the isolated word "violence" leads him to effectively concede (Br. 18 n.7) that the firearm prohibition would have been substantially broader (in his view) if Congress had only used the term "misdemeanor crime of domestic *abuse*." But legislators used "domestic violence" interchangeably with "domestic abuse" to identify the targeted crimes. See U.S. Br. 19.[2]

Third, Sections 922(g)(9) and 924(e)(2)(B) are not "closely related statutory sections" with "similar purposes." Resp. Br. 19-20. Section 922(g)(9) is "closely related" to Section 922(g)(1), the felon-in-possession provision. Indeed, Section 922(g)(9) was enacted to fill a gap left open by Section 922(g)(1), which applies

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[2] Respondent is wrong to suggest (Br. 18 n.7) that "domestic abuse" is inherently broader than "domestic violence." Like Congress, this Court has used the two terms interchangeably. See *Giles* v. *California*, 554 U.S. 353, 376-377 (2008); *Georgia* v. *Randolph*, 547 U.S. 103, 118-119 & n.7 (2006); *id.* at 126-127 (Breyer, J., concurring); *id.* at 138-141 (Roberts, C.J., dissenting).

to violent and nonviolent felons alike. See U.S. Br. 35-36; NNEDV Amicus Br. 21-22.

In contrast, the ACCA is a recidivist sentencing enhancement, not a firearm prohibition. It carries a 15-year statutory minimum term of imprisonment, not a ten-year maximum.[3] And while Section 922(g)(9) has similar language to the ACCA, it is embedded in an entirely different statutory scheme. Respondent's assertion that Congress intended to "cover the same range of conduct" (Br. 19) ignores an obvious reality: misdemeanor offenses are generally defined to cover less serious conduct (for example, "bodily injury" instead of "serious bodily injury").[4] As the government explained in its opening brief (at 20-22), the significant differences between the statutes make it incongruous to import the violent "physical force" definition from the ACCA into Section 922(g)(9).

c. The "statutory background" on which respondent relies (Br. 22-25) contradicts his interpretation. Respondent contends (Br. 22) that Congress intended to reach "violent conduct similar to that addressed by

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[3] Respondent states (Br. 12, 29) that Section 922(g)(9) carries a "ten-year prison term." The statutory *maximum* sentence is ten years in prison, 18 U.S.C. 924(a)(2), but the advisory Guidelines range for a defendant who pleads guilty to a Section 922(g)(9) violation and has a criminal history category of I is ten to 16 months. See Sentencing Guidelines §§ 2K2.1(a)(6), 3E1.1(a); *id.* Ch. 5, Pt. A (Sentencing Table).

[4] Respondent's reliance on "threatened use of a deadly weapon" (Br. 15-16) to heighten the severity of all predicate offenses is flawed for a similar reason. Section 922(g)(9) covers *only* misdemeanor offenses; it was specifically intended to fill a gap left by Section 922(g)(1)'s felon-in-possession prohibition; and "serious and violent offenses" (Br. 16) involving the use of a deadly weapon are not punished as misdemeanors.

Section 924(e)(2)(B)(i) that happened to be charged as a misdemeanor rather than a felony." What respondent fails to explain is *how* his interpretation would capture "serious and violent conduct" (Br. 23) when the perpetrator is charged as a misdemeanant. Husbands who "batter" their wives do not just plead to a "misdemeanor" in the abstract; they plead to a misdemeanor defined by state law. And, under respondent's view, precious few misdemeanor offenses qualify as "misdemeanor crime[s] of domestic violence"—even when the underlying abusive conduct is "serious" or "violent" under any conceivable definition. See Part C, *infra*.

Respondent also asserts (Br. 23-24) that the "use of physical force" language was a "legislative compromise" designed "to narrow the scope of the statute to convictions based on especially severe conduct." The legislative record does not support that speculation. The "use of physical force" language was a "last-minute insertion." *Hayes*, 555 U.S. at 428. The earlier version had defined a "crime involving domestic violence" as, *inter alia*, "a felony or misdemeanor crime of violence" committed by a family member. S. 1632, 104th Cong., 2d Sess. § 1 (1996). The legislative record identifies only one concern about the breadth of that definition: that it "could be interpreted to include an act such as cutting up a credit card with a pair of scissors." 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg). The revision eliminated that concern by adopting a more precise definition that did not include crimes against property. Cf. 18 U.S.C. 16(a) and (b) (defining "crime of violence" to include the use of physical force against

"property").[5] Beyond that specific narrowing, Senator Lautenberg viewed the revised definition as "broader" than the earlier version. 142 Cong. Rec. at 26,675; see Resp. Br. 23 n.9 (arguing that Senator Lautenberg's statements are "an authoritative guide to the statute's construction") (citation omitted). And whether his perception was correct, the "legislative compromise" certainly was not intended to narrow the statute out of existence.

2. Even if "violent" physical force is required, respondent's conviction for intentionally or knowingly causing bodily injury to a family member has, as an element, the use of such "violent" force. See U.S. Br. 23-28.

a. Respondent criticizes the "government's test" as "opaque" (Br. 25, 26), but the government is simply applying the definition of "violent" force expressly adopted by this Court in *Johnson*. The Court defined "violent" force as "force capable of causing physical pain or injury to another person." 559 U.S. at 140; see *id.* at 143 ("that degree of force necessary to inflict pain"). And the Court plainly assumed that the intentional causation of bodily injury has, as an element, the use of such "violent" force. U.S. Br. 25 n.9. That assumption was correct: a defendant can intentionally *cause* bodily injury only by knowingly using force *capable* of causing physical pain or injury.

Respondent does not contend otherwise. Indeed, he acknowledges (Br. 26) that "[a]n act that inflicts a

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[5] The fact that Section 921(a)(33)(A) does not have a residual clause (Resp. Br. 20-21 & n.8) is not illuminating for a similar reason. See *Begay* v. *United States*, 553 U.S. 137, 144 (2008) (Section 924(e)(2)(B)(ii) was added to include "certain physically risky crimes against property.").

stubbed toe or a paper cut doubtless causes pain and bodily injury." Respondent instead argues that to be "violent," the degree of force must be capable of producing "*serious* physical injury." Br. 25 (emphasis added) (quoting Pet. App. 17a). But the modifier "serious" appears nowhere in *Johnson*'s definition and respondent provides no reason why a heightened standard should apply to a "misdemeanor crime of domestic violence," when *any* physical injury (or pain) would suffice for a "violent felony."

Nor does *Flores* v. *Ashcroft*, 350 F.3d 666 (7th Cir. 2003), provide any assistance. Resp. Br. 26. Indeed, *Johnson* relied on *Flores* to define "violent" force in a way that does not require force capable of causing "serious" bodily injury. 559 U.S. at 140 (citing *Flores*, 350 F.3d at 672); see *Flores*, 350 F.3d at 672 ("force" that is "violent in nature" is the "sort that is intended to cause bodily injury, or at a minimum likely to do so"). The distinction *Flores* made based on the severity of the injury had to do with the "accidental" causation of bodily injury; the court readily acknowledged that "acts designed to injure" "may well" "deserve the appellation 'violent.'" 350 F.3d at 670, 671. And, in *De Leon Castellanos* v. *Holder*, 652 F.3d 762, 764-767 (2011), the Seventh Circuit applied *Flores* to hold that "intentionally causing bodily harm" has, as an element, the use of "violent" physical force.

Respondent was convicted of the "intentional[]" or "knowing[]" causation of bodily injury. J.A. 27, 29. That is all *Johnson* and *Flores* require. Because intentionally or knowingly causing any bodily injury requires the use of "violent" force, "physical force" is an "element" of respondent's offense of conviction.

b. Even if the Court were to reject the definition of "violent" force adopted in *Johnson*, and conclude that force capable of intentionally causing a "stubbed toe" or a "paper cut" is insufficient, that would not be the end of the analysis. Under this Court's decisions in *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183 (2007) and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013), it is not enough to imagine that someone might someday theoretically be prosecuted under the Tennessee bodily-injury domestic assault statute for intentionally giving his wife a paper cut. Respondent's factual and legal distinctions lack merit.

On the facts, respondent contends (Br. 32-33) that "prosecutions for conduct including nonviolent domestic assault are *not* hypothetical in Tennessee." The only case respondent identifies proves otherwise. In *State* v. *Wachtel*, No. M2003-00505, 2004 WL 784865, at *3-*4, *6, *12-*13 (Tenn. Crim. App. Apr. 13, 2004), the defendant was convicted on three counts of domestic assault for grabbing his estranged wife's "arm and twist[ing] it," forcing "her to her knees," causing her to "cr[y] out in pain," and leaving a "scratch" on her arm (all while he was holding their nine-month-old daughter); "swat[ting]" at, "slap[ping]," and "scratch-[ing]" his mother, causing "some scratches and bruises" (again, while holding the baby); and "repeatedly punch[ing] his father" and "choking" him, leaving his father with a "black eye" and a "red and bruised" face with "some swelling to his head." That is hardly a compelling example of a prosecution for "nonviolent" domestic assault akin to causing a paper cut.[6]

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[6] Respondent also cannot "point to his own case" as one where "the state courts in fact did apply the statute" to nonviolent conduct. *Duenas-Alvarez*, 549 U.S. at 193. Contrary to respondent's

Respondent also identifies (Br. 32-33) three people who were arrested for "less severe conduct." Section 922(g)(9), however, applies only to convictions, not arrests. The affidavits of complaint respondent relies on (see *ibid.*) identify the charge generally as "domestic assault," which is not limited to the intentional or knowing causation of bodily injury at issue here. Tenn. Code Ann. § 39-13-111(b) (Supp. 2013); see *id.* § 39-13-101(a)(2) and (3) (domestic assault includes "caus[ing] another to reasonably fear imminent bodily injury" and "caus[ing] physical contact with another [that] a reasonable person would regard * * * as extremely offensive or provocative"). And respondent's bare assertion that the underlying conduct was "nonviolent" is by no means apparent. Cf. NNEDV Amicus Br. 9-12 (domestic violence is characterized by recurring and escalating abuse).

On the law, respondent seeks to limit (Br. 33-35) *Duenas-Alvarez* to its facts. But just last Term, the Court described *Duenas-Alvarez* generally as a "qualification" to the categorical approach. See *Moncrieffe*, 133 S. Ct. at 1684-1685. And the Court relied on that "qualification" to reject the government's concern that the Court's decision would frustrate federal firearm statutes with "antique firearm" exceptions. *Id.* at 1693; see *id.* at 1686 (noting that "Georgia prosecutes" for possession with intent to distribute "when a de-

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suggestion (Br. 32) that the record is silent, the arrest report shows conduct that is anything but nonviolent. U.S. Mot. for Recons., Ex. 5, at 2 (May 4, 2010) (respondent allegedly "slapped" the mother of his child "in the face," "[d]r[a]g[ged] [her] in the house and slapped [her] in the face again," "knocked" her "on the ground," "grabbed [her] neck," and "said he was going to kill [her] and run off with [the] baby"—all while she had "the baby in [her] arms").

fendant possesses only a small amount of marijuana * * * and that 'distribution' does not require remuneration"). Just as a noncitizen "would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms," *id.* at 1693, respondent should have to demonstrate that Tennessee actually prosecutes misdemeanor domestic assault by intentionally causing bodily injury in cases involving a "paper cut" or a "stubbed toe."

B. The Intentional Causation Of Bodily Injury Requires The "Use" Of "Physical Force"

Respondent alternatively argues (Br. 35-42) that even if "violent" physical force is not required, assault by intentionally causing bodily injury still does not qualify as a "misdemeanor crime of domestic violence" because it does not require the "use" of *any* "physical force." The district court reached the same conclusion by relying principally on the term "physical force." Pet. App. 38a-41a. The court of appeals correctly rejected that reasoning (U.S. Br. 28), and respondent does not defend it. Respondent's alternative focus on the word "use," however, is equally unavailing.

1. In arguing that the intentional causation of bodily injury does not require the use of any physical force, respondent does not rely on the meaning of "physical force." As the government has explained, at common law "force" included "indirect[]" and "subtle" applications of force, such as administering a poison. U.S. Br. 29-30. And the common-law meaning of "force" fits comfortably within the "misdemeanor crime of domestic violence" definition. *Id.* at 31-32. Respondent does not dispute the common-law meaning of "force." Br. 40. And his only response to the government's argument that the Court should adopt

that meaning is a conclusory assertion that Section 922(g)(9) "*departs*" from the common law. *Ibid.* Congress, however, generally "incorporate[s] the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (citation omitted). And respondent (again) offers no reason to depart from that presumption here. See pp. 2-3, *supra*.

2. Respondent focuses instead on the word "use" in the context of the broader phrase "use of physical force." He argues (Br. 36-37) that the government's reading would "read the term 'use' out of the statute" by eliminating a requirement of direct or "active employment" of force. Respondent's claim is incorrect.

In *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004), the Court explained that the "use . . . of physical force against the person or property of another" requires "a higher degree of intent than negligent or merely accidental conduct." If, for example, a person "stumbl[ed]" and "f[e]ll" into his wife, "we would not ordinarily say" that he "use[d] . . . physical force." *Ibid.* But "a person would 'use . . . physical force against' another when pushing" his wife. *Ibid.* The word "use" in Section 921(a)(33)(A)(ii) plays the same role: it excludes offenses that require only "accidental or negligent conduct" and thereby requires the "intentional availment" or "active employ[ment]" of physical force. *Id.* at 9, 11 (emphasis omitted).

That requirement is readily met here. Respondent was convicted of "intentionally or knowingly" causing bodily injury. J.A. 27, 29. "Force" was not just "involved" in a passive sense (Resp. Br. 39); respondent necessarily "use[d]," or "active[ly] employ[ed]" "physical force" to accomplish his intended objective

(*i.e.*, the causation of bodily injury). A person who intentionally sprinkles poison into his wife's iced tea has "actively employed" (*i.e.*, "used") the forceful physical properties of the poison, just as a person who punches his wife has "actively employed" (*i.e.*, "used") the forceful physical properties of his fist. In both instances, the defendant is "convert[ing]" to his "service" the forceful physical properties of the "thing used." *Id.* at 37 (citations omitted). The relevant contrast is between conduct that is active and intentional, as opposed to passive and accidental—not between direct and indirect action.[7]

Contrary to respondent's contention (Br. 37), a defendant's active employment of force, see *Bailey* v. *United States*, 516 U.S. 137, 143 (1995), does not demand that the defendant's conduct be examined in isolation from its intended results. In every case, a finding that a defendant intentionally caused bodily injury necessarily includes a finding that the defendant used (*i.e.*, actively employed) physical force. The use of physical force is therefore an "element" of intentional bodily-injury assault. Any other approach makes no sense in the context of a statute aimed at taking dangerous weapons out of the hands of persons whose convictions show that they pose a danger to their families. Respondent cannot explain why Congress would want to prohibit a husband who pushes his wife out a window from possessing a firearm, but

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[7] Respondent's arguments to the contrary assume that "trickery" and "force" (Br. 36) are mutually exclusive concepts. They are not. A husband who convinces his wife to walk in front of a moving vehicle may use "trickery," but he is also actively employing (*i.e.*, using) the forceful physical properties of the approaching car to cause her physical harm.

not a husband who coerces his wife (without making physical contact) into jumping out that same window.

3. Respondent does not dispute that, under his interpretation, the crime of murder often would not have, as an element, the "use" of physical force because it would not require direct physical contact. U.S. Br. 33-34. He nevertheless finds no "anomal[y]" (Br. 41 (quoting U.S. Br. 11)) because murder is a felony and Section 922(g)(1) prohibits felons from possessing firearms. Respondent misses the point: his interpretation would exclude murder from the reach of other statutes that apply to felony offenses, require a use-of-force element, and do not contain any residual clause. See 18 U.S.C. 373(a), 521(c)(3); cf. 20 U.S.C. 1161w(b)(4), (f)(3)(A)(ii) and (4)(B); 28 U.S.C. 540A(a) and (c)(1).

For example, solicitation to commit a crime of violence under Section 373(a) applies only to "a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another." 18 U.S.C. 373(a). Contrary to respondent's assertion (Br. 41 n.15), that statute does not incorporate Section 16's "crime of violence" definition and it does not contain any independent residual clause. Many defendants have been prosecuted under 18 U.S.C. 373(a) for soliciting the commission of the quintessential violent crime—murder. See, *e.g.*, *United States* v. *Hinkson*, 585 F.3d 1247 (9th Cir. 2009), cert. denied, 131 S. Ct. 2096 (2011); *United States* v. *Stewart*, 420 F.3d 1007 (9th Cir. 2005). And, under respondent's interpretation of "use of physical force," all of those convictions were in error. That defies common sense.

C. Respondent's Interpretation Would Indisputably Render Section 922(g)(9) A Virtual Nullity At The Time Of Its Enactment And Today

Respondent acknowledges that, in enacting Section 922(g)(9), Congress intended to accomplish *something*—namely, to close a "dangerous loophole," to "keep[] firearms out of the hands of domestic abusers," and to "keep[] people who batter their wives * * * from having handguns." Br. 2-3 (citations omitted). What respondent does not (and cannot) explain is how any of those objectives could possibly be accomplished under his interpretation. Respondent's interpretation would indisputably render Section 922(g)(9) a virtual dead letter from the moment of its enactment and today. U.S. Br. 35-44. He offers three reasons why the Court should not be concerned about vitiating Section 922(g)(9)'s effect. None justifies respondent's position.

1. Respondent contends (Br. 52-54) that "[t]he government's concern about enforcement is overstated" because "several state misdemeanor domestic assault or battery statutes include use of violent force as an element" and others "may follow suit." The "several" States with statutes that purportedly meet respondent's preferred definition of "misdemeanor crime of domestic violence" total *six*: California, Colorado, Idaho, Iowa, Louisiana, and Utah. See Br. 52-53. The Court should not adopt an interpretation of Section 922(g)(9) that would have indisputably rendered it a virtual "dead letter" in the other 44 States and the District of Columbia. *Hayes*, 555 U.S. at 427 (rejecting interpretation of Section 922(g)(9) that would have rendered it a "dead letter" in "some two-thirds of the States") (citation omitted). And States

should not have to redefine their assault and battery laws in order to trigger Section 922(g)(9). Cf. *Descamps* v. *United States*, 133 S. Ct. 2276, 2293-2294 (2013) (Kennedy, J., concurring) ("This is an intrusive demand on the States.").

Respondent's reliance on those six States is largely misplaced in any event. When Section 922(g)(9) was enacted, Colorado did not have (and still does not have) a separate domestic assault or battery statute, and its generic misdemeanor assault statute prohibited the knowing causation of bodily injury. See Colo. Rev. Stat. Ann. § 18-3-204(1)(a) (West 1995).[8] California's misdemeanor battery and domestic violence statutes covered any "willful or unlawful use of force or violence upon the person of another," which includes "[a]ny harmful or offensive touching." Cal. Penal Code §§ 242, 243(e)(1) (West 1995); *People* v. *Pinholster*, 824 P.2d 571, 622 (Cal.) (brackets in original) (citation omitted), cert. denied, 506 U.S. 921 (1992).[9] Louisiana did not have a domestic assault or battery statute at the time of Section 922(g)(9)'s enactment. But its generic battery statute and its later-enacted "domestic abuse battery" statute define battery as "the intentional use of force or violence," which includes any "physical contact whether injuri-

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[8] The two definitions of "domestic violence" and "domestic abuse" respondent cites (Br. 52) govern sentencing (among other things) and civil protection orders, respectively. Neither defines a criminal offense that could give rise to a predicate conviction under Section 922(g)(9).

[9] The definition of "domestic violence" respondent cites (Br. 52) applies only to the family code, not the criminal code, which generally governs protection orders. See Cal. Fam. Code § 6201 (West 2013).

ous or merely offensive.'" La. Rev. Stat. Ann. § 14:33 (1995); *id.* § 14:35.3(A) (Supp. 2013); *State* v. *Schenck*, 513 So. 2d 1159, 1165 (La. 1987) (citation omitted).

The Idaho and Utah statutes also defined misdemeanor assault or battery (generic and domestic) to include, *inter alia*, the unlawful use of "force or violence." See Idaho Code Ann. § 18-903 (West 1995) (generic battery); *id.* § 18-918(3) (domestic battery); Utah Code Ann. § 76-5-102(1)(c) (West 1995) (generic assault); *id.* § 77-36-1(2) (domestic-violence sentencing enhancement). Because, unlike California and Louisiana, there is no authoritative interpretation of what constitutes "force or violence" under the respective statutes, the government classified them as "miscellaneous." See U.S. Br. App. B-D. But it is not at all clear that a conviction under those statutes would constitute a misdemeanor crime of domestic violence under respondent's interpretation, which requires the use of force *and* violence (*i.e.*, violent force), not "force *or* violence."

That leaves respondent's assertion that "[o]ther States have created 'aggravated misdemeanor' offenses, which *may* capture people who commit violent assaults but plead down to misdemeanors." Br. 53 (emphasis added). But the only statute respondent identifies is an Iowa statute that criminalizes domestic abuse by strangulation or suffocation—and that statute was not enacted until 2012. *Ibid.* (citing Iowa Code Ann. § 708.2A(2)(d) (West Supp. 2013)); see NACDL Amicus Br. 8 (citing two similar "specific conduct" statutes).[10] The suggestion that States would

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[10] NACDL also cites a New Mexico statute criminalizing a broader range of conduct as "aggravated battery against a house-

have to pass this "type of statute" to satisfy the "use of physical force" requirement proves the government's point. Congress intended to disarm domestic abusers nationwide, not only those abusers who choose to harm their victims by cutting off their air supply.

2. Respondent also suggests (Br. 50-51) that "there will not be 100,000 more potential abusers in possession of firearms" because "[m]any state laws bar domestic abusers from acquiring firearms." That is factually inaccurate and legally irrelevant.

Respondent identifies "thirty-three States" that purportedly bar domestic abusers from possessing a firearm. See Br. 51 & App. A, B. By respondent's own count, the vast majority of those States prohibit firearm possession only when the domestic abuser is subject to a civil protective order. Compare Br. App. A, with Br. App. B; see also N.H. Rev. Stat. Ann. § 173-B:5(I) (Supp. 2013) (incorrectly listed in Appendix A). Those state laws are analogous to the federal firearm prohibition in Section 922(g)(8), not Section 922(g)(9). Federal denials of firearm purchases based on a civil protection order are separately counted and are excluded from the more than 100,000 federal denials referenced in the government's opening brief (U.S. Br. 43)—they accounted for an additional 42,459 federal denials during the same time period. See Federal Bureau of Investigation, *National Instant Background Check System (NICS) Operations 2012*, http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report (last visited Jan. 7, 2014).

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hold member" that is punishable as a misdemeanor. See Amicus Br. 7-8 (citing N.M. Stat. Ann. § 30-3-16 (Supp. 2013)).

Of the States respondent identifies as prohibiting firearm possession by those convicted of domestic-violence offenses, few are comparable to Section 922(g)(9)—and most postdate the statute's enactment.[11] For example, Arizona's prohibition applies only during the "term of probation." Ariz. Rev. Stat. Ann. § 13-3101(A)(7)(d) (Supp. 2013). Delaware and Texas law is time limited. Del. Code Ann. title 11, § 1448(a)(7) (Supp. 2012); *id.* § 1448(d) (2007) (five years after date of conviction); Tex. Penal Code § 46.04(b) (West 2011) (five years after release from confinement or supervision). And Minnesota and Montana only prohibit possession if the firearm was actually used to commit the crime. Minn. Stat. Ann. § 609.2242(3)(b) (West 2009); Mont. Code Ann. § 45-5-206(7) (2013).

In any event, Congress plainly was not content to rely on a handful of (not yet enacted) state laws to fill what it perceived to be a "dangerous loophole" in federal law. Nor did it find the Section 922(g)(8) prohibition, which is temporary in nature and had been enacted two years prior, sufficient to keep guns out of the hands of domestic abusers. See Brady Center Amicus Br. 17-21; NNEDV Amicus Br. 20, 22-23. Even if "many" States had followed Congress's lead

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[11] Notably, the state firearm prohibitions listed in Appendix A of respondent's brief define the predicate domestic-violence convictions to include the very assault and battery statutes respondent would exclude from the reach of Section 922(g)(9). See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 13-1203(A) (2010); *id.* § 13-3101(A)(7)(d) (Supp. 2013); Del. Code Ann. title 11, § 601 (2007); *id.* § 1448(a)(7) (Supp. 2012). Indeed, if convicted today, respondent's offense (domestic assault) would disqualify him from possessing a firearm under Tennessee law. See Tenn. Code Ann. §§ 39-13-111(c)(6), 13-17-1307(f) (Supp. 2013).

and enacted comparable firearm prohibitions (and they have not), that would provide no reason to nullify Congress's clear intent to enact a comprehensive federal prohibition with independent effect.

3. Respondent falls back on (Br. 44-50) the "modified categorical approach." He does not dispute that the modified categorical approach will do nothing to mitigate the practical effect of his interpretation. U.S. Br. 41-43. Respondent instead argues (Br. 44) that confusion about the modified categorical approach at the time of Section 922(g)(9)'s enactment may have misled Congress into (wrongly) "believ[ing]" that courts could "look at the facts of predicate convictions" and "apply the firearms ban to persons who in fact engaged in domestic violence." That theory offers respondent no help here.

This Court has adopted (or rejected) a "formal categorical approach" and its "modified categorical" variant as a matter of statutory interpretation. See *Descamps*, 133 S. Ct. at 2282, 2287; *Nijhawan* v. *Holder*, 557 U.S. 29, 36-40 (2009); *Shepard* v. *United States*, 544 U.S. 13, 23 (2005); *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990). If the enacting Congress had wanted courts "to look at the facts of predicate convictions" under Section 922(g)(9) (Resp. Br. 44), then that is precisely what courts should do. Respondent, of course, disclaims that interpretation (Br. 50)—and this Court has rejected it as well. See *Hayes*, 555 U.S. at 421 ("the use of force" is "undoubtedly a required element"). But respondent cannot have it both ways. Either Congress adopted a fact-based approach that would allow courts to apply Section 922(g)(9) "to persons who in fact engaged in domestic violence." Resp. Br. 44. Or Congress adopted an element-based ap-

proach that (under respondent's reading) effectively renders Section 922(g)(9) a nullity. Because Congress could not have been surprised when courts dutifully applied the very categorical approach it enacted, and because Congress intended Section 922(g)(9) to have some meaningful effect, respondent's interpretation fails.

D. There Is No Reason To Resort To The Rule Of Lenity

1. The rule of lenity applies only "if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013) (citation omitted). A statute does not have a "grievous ambiguity" simply because it could "have been more meticulously drafted," *Abbott* v. *United States*, 131 S. Ct. 18, 31 n.9 (2010), because it "is not a model of the careful drafter's art," *Hayes*, 555 U.S. at 429, or because courts have disagreed as to its meaning, *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995).

There is no grievous ambiguity here. Section 922(g)(9) tracks common-law battery, and the common-law meaning of "force" readily encompasses both the slightest offensive touching and indirect uses of force. Respondent's interpretation departs from the common law without justification and "reflects 'an implausible reading of the congressional purpose.'" *Abbott*, 131 S. Ct. at 31 n.9 (citation omitted). "The text, context, purpose, and what little there is of drafting history all point in the same direction" (*Hayes*, 555 U.S. at 429): Congress intended to disarm domestic abusers convicted of intentionally or knowingly causing bodily injury to a family member.

2. Respondent also makes (Br. 28-30) a case-specific appeal to "fair warning." The Court's interpretation, however, will apply nationwide—not just to the idiosyncratic facts of this case. In any event, respondent unsuccessfully sought post-conviction relief based on the Tennessee court's purported failure to warn him of the federal firearm prohibition before pleading guilty to domestic assault. See *State* v. *Castleman*, No. W2009-1661, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011). Federal law required no such warning. Cf. *United States* v. *Mitchell*, 209 F.3d 319, 322, 323-324 (4th Cir.) (defendant's "conduct in assaulting his wife" provides "sufficient notice"), cert. denied, 531 U.S. 849 (2000); *Lewis* v. *United States*, 445 U.S. 55, 60-65 (1980) (foreclosing belated collateral attacks). And few people would be surprised to learn that a conviction for "misdemeanor domestic assault" constitutes a "misdemeanor crime of domestic violence."

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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