No. 11-662

In the Supreme Court of the United States

DELROY FISCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for assault in the third degree in violation of Nebraska law qualifies as a "misdemeanor crime of domestic violence" within the meaning of 18 U.S.C. 922(g)(9), which prohibits the possession of firearms by persons who have previously been convicted of a misdemeanor crime of domestic violence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 641 F.3d 1006. The opinion of the district court (Pet. App. 13a-18a) is not published but is available at 2009 WL 5034007.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2011. A petition for rehearing was denied on August 29, 2011 (Pet. App. 19a). The petition for a writ of certiorari was filed on November 21, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a conditional guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted of possession of a firearm after hav-

ing previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). He was sentenced to five months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1a-12a.

1. Under 18 U.S.C. 922(g)(9), it is unlawful for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence" to "possess in or affecting commerce[] any firearm." In pertinent part, the term "misdemeanor crime of domestic violence" is defined to mean an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by * * * a person with whom the victim shares a child in common.

18 U.S.C. 921(a)(33)(A).

2. In January 2006, petitioner was charged by complaint in Nebraska state court with "Assault in the Third Degree Domestic," in violation of Neb. Rev. Stat. § 28-323 (2005). Pet. App. 2a; 8:08 cr. 00471 Docket entry No. 26, at 3 (D. Neb. Jan. 5, 2006) (Docket entry No.). The affidavit supporting the arrest warrant alleged that petitioner assaulted the mother of his children by striking her in the face and biting her nose. Pet. App. 2a; Docket entry No. 26, at 4-5.

At the plea hearing on February 16, 2006, petitioner's counsel informed the court that the parties had entered into a plea agreement in which petitioner would enter a "no contest" plea to an amended complaint charging petitioner with attempted third-degree assault "with no domestic allegation." Docket entry No. 26, at

10. As a result, the complaint was amended to allege that petitioner "[u]nlawfully, did * * * intentionally and knowingly attempt to cause bodily injury to or place, by physical menace, his intimate partner * * * in fear of imminent bodily injury," in violation of Neb. Rev. Stat. § 28-310. Docket entry No. 26, at 3. The court read the amended complaint to petitioner, *id.* at 11, and petitioner entered a no-contest plea to the charge, *id.* at 13. Defense counsel stipulated that the court could "take notice of [the arrest warrant affidavit] for the factual basis" for the plea. *Id.* at 14. The court accepted the stipulation as the factual basis for the plea and entered a judgment of conviction. *Ibid.*

3. In September 2008, petitioner was involved in a disturbance with his girlfriend, who reported the incident to law enforcement. When the police interviewed petitioner, he told them that he had "grabbed a shotgun and began shooting at things because he was angry." Gov't C.A. Br. 4. A federal grand jury indicted petitioner on one count of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of Section 922(g)(9). Pet. App. 3a.

Petitioner moved to dismiss the indictment on the ground that his prior assault conviction did not qualify as a misdemeanor crime of domestic violence under Section 922(g)(9). Petitioner argued that, notwithstanding the wording of the amended criminal complaint, his conviction for attempted third-degree assault in violation of Neb. Rev. Stat. § 28-310 could have rested on either of the two prongs of the statutory definition of that offense: "(a) intentionally, knowingly, or recklessly caus[ing] bodily injury to another person," or "(b) threat[ening] another in a menacing manner." Neb.

Rev. Stat. § 28-310(1) (2005). Petitioner argued that a defendant could be found guilty under the second prong of that statutory definition "without using or attempting to use physical force and without threatening use of a deadly weapon." Br. in Supp. of Def. Mot. to Dismiss 3.

The district court referred the matter to a magistrate judge, who recommended that the motion be denied. 3/26/09 Tr. 13. The district court adopted the magistrate judge's report and recommendation. The district court noted that, in the state court proceedings, defense counsel "agreed that the court could take judicial notice of both the affidavit and the warrant" as the factual basis for the plea, and that both documents make clear "that the defendant bit and hit the victim." 5/14/09 Order 5. The district court therefore ruled that the state offense contained an element of physical force, as required under Section 921(a)(33)(A)(ii). *Id.* at 5-6.

Following the district court's order, petitioner obtained a nunc pro tunc order from a Nebraska state court clarifying petitioner's 2006 conviction. The order stated that:

> 1. [Petitioner] pled to, and was convicted of, violating *Neb. Rev. Stat. § 28-310*, which does not require a finding of assault or attempted assault on an "intimate partner";
>
> 2. [T]he conviction in this case did not involve any factual findings that any domestic assault or attempted domestic assault occurred;
>
> 3. [I]nsofar as the record in this case may involve allegations of domestic assault or attempted domestic assault, any and all allegations are hereby stricken from the record.

Pet. App. 3a. On the basis of that order, petitioner again moved to dismiss the indictment. The magistrate judge concluded that the nunc pro tunc order did not affect the previous recommendation. The district court agreed and denied the motion. *Id.* at 13a-18a; see *id.* at 17a.[1]

Petitioner subsequently entered a conditional guilty plea, reserving the right to appeal the district court's denial of his second motion to dismiss the indictment. Pet. App. 4a. He was sentenced to five months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 1a-12a.

The court of appeals first rejected petitioner's argument that his conviction is not "an adequate predicate offense because it is impossible to tell whether he was convicted under § 28-310(1)(a) or (b)." Pet. App. 6a. The court explained that, to determine which prong of the third-degree assault statute formed the basis of petitioner's conviction, a court may review judicial records including "the written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented." *Ibid.* (quoting *United States* v. *Howell*, 531 F.3d 621, 623 (8th Cir. 2008), and *Shepard* v. *United States*, 544 U.S. 13, 16 (2005)). The court of appeals noted that petitioner stipulated to the state court's taking of judicial notice of the allegations in the arrest warrant and supporting affidavit, which "indicate that [petitioner] physically assaulted

[1] Petitioner "does not dispute that he had a domestic relationship with the victim in the incident which gave rise to his state court conviction." Pet. App. 5a; see *United States* v. *Hayes*, 555 U.S. 415, 418, 426 (2009) (under Section 921(a)(33)(A), the required domestic relationship between the defendant and the victim need not be an element of the predicate offense).

the victim, striking her face and biting her nose." *Id.* at 6a-7a. The court concluded that those documents made clear "that [petitioner] was convicted under § 28-310(1)(a)," for "an intentional act causing bodily harm and not merely a threatening act." *Id.* at 7a.

The court of appeals next rejected petitioner's contention, raised for the first time on appeal, that Section 28-310(1)(a) "does not contain the requisite force element because a hypothetical defendant could cause bodily injury to another person without using physical force." Pet. App. 7a. The court concluded that petitioner's argument was foreclosed by its prior decision in *United States* v. *Amerson*, 599 F.3d 854 (8th Cir. 2010) (per curiam). In *Amerson*, the court considered whether a conviction under Neb. Rev. Stat. § 28-323 qualified as a misdemeanor crime of domestic violence. The court in that case explained that, because Section 28-323 "reaches a broad range of conduct (including 'intentionally and knowingly caus[ing] bodily injury')," the court could consider judicial records "to determine which part of the statute [the defendant]" violated. 599 F.3d at 855. The court in *Amerson* noted that, at the defendant's state-court plea hearing, "the state judge adopted the factual recital that he and his girlfriend 'got into an argument over the child and the defendant slapped her and pushed her head into the wall,'" and that defense counsel did not object. *Ibid.* The court therefore concluded that the defendant "assented to factual findings that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *Ibid.* In light of *Amerson*, the court of appeals concluded that "the district court did not err in concluding that [petitioner's] previous conviction qualified as a misdemeanor crime of domestic violence." Pet. App. 7a.

Finally, the court of appeals concluded that the state court's nunc pro tunc order did not alter the analysis because it merely clarified that the offense of conviction did not require proof of a domestic relationship between the defendant and the victim. Pet. App. 7a-8a; see note 1, *supra*.

Judge Colloton concurred. Pet. App. 8a-12a. He agreed that the judicial record established that petitioner was convicted for "intentionally and knowingly attempting to 'cause[] bodily injury to another person.'" *Id.* at 9a (quoting Neb. Rev. Stat. § 28-310(1)(a) (2005)). He also concluded that the Eighth Circuit's prior decision in *Amerson* compelled the conclusion that petitioner's conviction under Section 28-310(1)(a) qualifies as a misdemeanor crime of domestic violence, but criticized *Amerson* as "probably wrong." *Id.* at 8a. Judge Colloton explained that a court may rely on "the judicial record of the defendant's prior conviction in state court only to determine *which offense* under state law was the offense of conviction," but then "must focus on the elements of that offense." *Id.* at 9a. While the judicial record in this case establishes that petitioner was convicted of assault by causing bodily injury, Judge Colloton took the view that bodily-injury assault "does not appear to have, *as an element*, the use or attempted use of physical force," because bodily injury can be caused, by, for example, "intentionally signaling to the driver of a vehicle that a roadway is clear while knowing that the driver is likely to cause an accident and suffer injury by proceeding." *Id.* at 9a-10a.

ARGUMENT

1. Petitioner contends (Pet. 6-13, 17-25) that the court of appeals erred by consulting the factual basis for

his plea to determine that his Nebraska conviction for assaulting his girlfriend qualifies as a misdemeanor crime of domestic violence—that is, an offense that has, as an element, the use of physical force. 18 U.S.C. 921(a)(33)(A)(ii). Petitioner contends that, in so doing, the court "confused factual conduct with legal element." Pet. 6. Petitioner's contention lacks merit and does not warrant this Court's review.

a. The statutory definition of "misdemeanor crime of domestic violence" provides that a predicate offense must "ha[ve], *as an element*, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(ii) (emphasis added). The Eighth Circuit, like other courts of appeals, has concluded that "[w]hen statutory language dictates that predicate offenses contain enumerated elements," the court "must look only to the predicate offense rather than to the defendant's underlying acts to determine whether the required elements are present." *United States* v. *Smith*, 171 F.3d 617, 620 (1999); see Pet. 9-10 (citing cases).

To determine whether the defendant's offense of conviction has the required use-of-force element, courts ordinarily apply what this Court has called a "formal categorical approach," which looks to the statutory definition of the offense to determine its elements. See *Taylor* v. *United States*, 495 U.S. 575, 600-602 (1990). But when the prior conviction is for an offense that may be committed in multiple ways—some of which would trigger the federal statute and some of which would not—a court may "go beyond the mere fact of conviction" to determine the elements of the offense of which the defendant was actually convicted. *Id.* at 602; see *Johnson* v. *United States*, 130 S. Ct. 1265, 1273 (2010). Under the

latter approach, known as the "modified categorical approach," *ibid.*, courts may look "to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information," *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

The decision below is consistent with these well-established principles. Applying the modified categorical approach, the court of appeals examined the factual basis for petitioner's plea to determine that petitioner's third-degree assault conviction rested on having "caus[ed] bodily injury to another person," Neb. Rev. Stat. § 28-310(1)(a) (2005), rather than having "threaten[ed] another in a menacing manner," *id.* § 28-310(1)(b), and thus concluded that petitioner was convicted of an offense that "has, as an element, the use * * * of physical force," 18 U.S.C. 921(a)(33)(A)(ii). See Pet. App. 6a-7a.

Petitioner contends (Pet. 6-8) that the court of appeals erred in relying on "factual findings," Pet. 7-8, to establish the nature of his assault conviction. But this Court has made clear that a court may consult the charging document and any "transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant" in order to determine the elements of the offense of which the defendant was convicted. *Shepard*, 544 U.S. at 26; see also *id.* at 25 (plurality opinion) (court may consult the "defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea"). Petitioner in this case stipulated to the arrest warrant and supporting affidavit as establishing the factual basis for his

plea. See Pet. App. 6a-7a. The court's reliance on those materials is thus consistent with that court's previous recognition that the existence of a use-of-force element is to be determined by reference to the elements of his offense of conviction, as opposed to "the defendant's underlying acts." *Smith*, 171 F.3d at 620. In any event, even if the court's decision in this case were unclear on the issue, any intracircuit conflict would not warrant this Court's review. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

b. Petitioner ultimately concedes that the court of appeals correctly concluded, based on its consultation of the factual basis for his plea, that he "had been charged with violating subsection 1(a) of the Nebraska statute by 'caus[ing] bodily injury to another person.'" Pet. 7; see Pet. 24. He contends, however, that the court erred in applying the modified categorical approach to determine that his bodily-injury assault offense involved the use of physical force. Pet. 7.

Petitioner's argument rests on the assumption that the court of appeals could not have concluded that he had committed a misdemeanor crime of domestic violence based solely on the fact of his conviction for assault by causing bodily injury. But Eighth Circuit law is to the contrary: that court's cases establish that the offense of assault by causing bodily injury categorically has, as an element, the use of physical force, without need for further inquiry under the modified categorical approach. In *Smith*, *supra*, after consulting charging documents to determine that the defendant had been convicted under the portion of the Iowa assault statute prohibiting an act "intended to cause pain, injury, or offensive or insulting physical contact," the court concluded that the defendant's offense involved the use of

physical force within the meaning of Section 921(a)(33)(A)(ii). 171 F.3d at 620-621 (citing Iowa Code Ann. § 708.1(1) (West 1993)). Similarly, in *United States* v. *Amerson*, 599 F.3d 854 (8th Cir. 2010) (per curiam), the court consulted the factual basis for the defendant's plea in order to narrow the basis for his assault conviction under Neb. Rev. Stat. § 28-323, which, as the court noted, "reaches a broad range of conduct (including 'intentionally and knowingly caus[ing] bodily injury')." 599 F.3d at 855. Because the factual basis for the plea indicated that the charge was based on the defendant's having slapped his girlfriend and pushed her head into a wall, *ibid.*, the court concluded that the defendant had been convicted under a portion of Section 28-323 that has, as an element, the use of physical force. See *ibid.*[2] The court has reached a similar conclusion in other contexts. See *United States* v. *Salean*, 583 F.3d 1059, 1060-1061 (8th Cir. 2009) (concluding that the offense of assaulting a correctional officer by intentional infliction of bodily harm is a "violent felony" that categorically "has as an element the use * * * of physical force against

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[2] The dissenting judge below criticized *Amerson* for its statement that the defendant "assented to factual findings that satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *Amerson*, 599 F.3d at 855; see Pet. App. 9a (Colloton, J., dissenting). But the *Amerson* court made clear that it was consulting the factual basis for the defendant's plea for the purpose of "determin[ing] which part of the statute Amerson violated," not for the purpose of determining whether his underlying conduct involved the use of physical force. *Amerson*, 599 F.3d at 855 (citing *Smith*, 171 F.3d at 620). The court's reference to the factual basis for petitioner's plea is properly understood in context as confirming that petitioner's conviction fell under the portion of the Nebraska statute that proscribed "intentionally and knowingly caus[ing] bodily injury"—a portion of the statute that "satisf[ies] the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *Ibid.*

the person of another" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)), cert. denied, 130 S. Ct. 1566 (2010).

Because circuit precedent establishes that the offense of assault by causing bodily injury categorically involves the use of physical force, once the court of appeals in this case established that petitioner's conviction rested on Neb. Rev. Stat. § 28-310(1)(a), the court had no need to consult any additional materials to determine that petitioner's offense qualifies as a misdemeanor crime of domestic violence. To the extent the court again consulted the factual basis for petitioner's plea for that purpose, it merely confirmed what was already clear, as a matter of circuit precedent, from the fact of petitioner's conviction under Neb. Rev. Stat. § 28-310(1)(a): petitioner was convicted of an offense that has, as an element, the use of physical force.

c. Even if the court of appeals had agreed with petitioner's premise that assault by causing bodily injury does *not* categorically involve the use of physical force, but see pp. 15-20, *infra*, this Court's cases do not, as petitioner contends (Pet. 24-25), preclude a court from employing the modified categorical approach to determine whether a defendant in a particular case was convicted of an assault offense that had a use-of-force element.

Although petitioner does not say so explicitly, his argument to the contrary appears to assume that the modified categorical approach can be used only to narrow the basis for convictions under statutes that contain multiple subparts, to determine which subsection or statutory phrase in a list formed the basis for the defendant's conviction, and not to narrow the basis for a defendant's conviction under a unitary phrase like "intention-

ally * * * caus[ing] bodily injury to another person," Neb. Rev. Stat. § 28-310(1)(a) (2005). Although the Court has sometimes described the modified categorical approach as applicable to so-called "divisible" statutes, see, *e.g.*, *Johnson*, 130 S. Ct. at 1273, it has never held that the modified categorical approach is limited to such statutes. See *United States* v. *Aguila Montes de Oca*, 655 F.3d 915, 924, 931 (9th Cir. 2011) (en banc).

In its first decision describing the modified categorical approach, the Court illustrated its use with an example of a state statute that defined the offense of burglary more broadly than the elements of the generic, federal definition. *Taylor*, 495 U.S. at 602. The Court explained that "if the indictment or information and jury instructions show that the defendant was charged only with" the elements of the generic, federal crime, and "that the jury necessarily had to find [those elements] to convict," then the offense qualifies as generic "burglary" within the meaning of federal law. *Ibid.* On that understanding of the modified categorical approach, even if the offense of assault by "caus[ing] bodily injury" could hypothetically be committed without the use of physical force, a court may consult judicial records to determine whether the trier of fact in the case had to find that the defendant did in fact use physical force in order to convict (or, as here, in order to conclude that there was a sufficient basis for accepting the defendant's plea). See *Aguila-Montes*, 655 F.3d at 936-937.

The courts of appeals have not taken consistent approaches to question whether the modified categorical approach is limited to so-called divisible statutes, although few have devoted significant attention to the question. See *Aguila-Montes*, 655 F.3d at 931 (describing the state of the law in the courts of appeals as "a bit

of a jumble"). Some courts have, for example, appeared to rely on divisibility analysis in declining to consider judicial records indicating that a defendant was charged with or admitted to using physical force in the course of conviction under an assertedly overbroad assault statute. See *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 882-883 (5th Cir. 2006) (holding that assault by causing bodily injury is categorically not a crime of violence under 18 U.S.C. 16(a), and declining to rely on a charging document or plea-colloquy admission indicating that the defendant in that case had been charged with and admitted to hitting a family member), cert. denied, 549 U.S. 1245 (2007); see also *United States* v. *Griffith*, 455 F.3d 1339, 1340 (11th Cir. 2006) (holding that battery by "mak[ing] contact of an insulting and provoking nature" is not categorically a misdemeanor crime of domestic violence, and declining to rely on state court records indicating that the petitioner was charged with hitting his wife and dragging her across the floor), cert. denied, 549 U.S. 1343 (2007); Br. for Appellee, *Griffith*, *supra* (No. 05-12448) (noting that criminal information charged the defendant with battery by hitting his wife and dragging her across the floor). On the other hand, in its recent decision in *Aguila-Montes*, the en banc Ninth Circuit, after undertaking a comprehensive survey of the authorities, concluded that the modified categorical approach can be used to narrow the basis for a defendant's conviction under a non-divisible statute like Neb. Rev. Stat. § 28-310(1)(a). See *Aguila-Montes*, 655 F.3d at 937; see *id.* at 927 (noting that divisible statutes, which explicitly list alternative bases for conviction, are not "meaningfully different" from non-divisible statutes; a statute that proscribes "harmful contact" is "indistinct from a list of all the possible ways an individ-

ual can commit harmful contact ('harmful contact with a vehicle, harmful contact with a gun, harmful contact with an axe, harmful contact with a utensil, and so on.')").

This Court recently declined to review the divisibility issue in *Alvarez-Cordova* v. *United States*, 132 S. Ct. 574 (2011) (No. 10-777), and there is no reason for a different result in this case. Because few courts other than the Ninth Circuit have devoted sustained attention to the question, it would benefit from further ventilation in the courts of appeals. This case would not, in any event, be an appropriate vehicle for its resolution, because, as noted above, the court of appeals' reference to the modified categorical approach was unnecessary to the court's judgment that petitioner's bodily-injury assault offense qualifies as a misdemeanor crime of domestic violence.

3. Finally, petitioner renews his contention (Pet. 13-15) that bodily-injury assault is not categorically a misdemeanor crime of domestic violence because that offense lacks a use-of-force element. Petitioner is incorrect.

a. As a matter of ordinary usage, assault by bodily injury has, as an element, the "use" of "physical force" because physical force is the means by which injury is necessarily produced. As the First Circuit reasoned in *United States* v. *Nason*, 269 F.3d 10 (2001), "to cause *physical* injury, force necessarily must be *physical* in nature." *Id.* at 20. A person who intentionally or knowingly causes injury to another must "use," or "actively employ," physical force to achieve that result. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004). To convict a defendant of bodily-injury assault, the prosecution must therefore prove that the defendant used physical force against the victim.

Petitioner does not dispute that a person employs physical force against another when he causes bodily injury by making direct physical contact with his victim—for example, by striking her with his hand. But the same is true in petitioners' hypothetical cases (Pet. 13-14), in which the assailant causes physical harm without making direct physical contact. "If someone lures a poor swimmer into waters with a strong undertow in order that he drown, or tricks a victim into walking toward a high precipice so that he might fall," for example, the offender "has at least attempted to make use of physical force against the person of the target, either through the action of water to cause asphyxiation or by impact of earth on flesh and bone." *United States* v. *Calderon-Pena*, 383 F.3d 254, 270 (5th Cir. 2004) (en banc) (Smith, J., dissenting), cert. denied, 543 U.S. 1076 (2005). "However remote these forces may be in time or distance from the defendant, they were still directed to work according to his will, as surely as was a swung fist or a fired bullet." *Ibid.* (Smith, J., dissenting). A contrary conclusion would, moreover, lead to the absurd conclusion that even murder—an offense defined in many States as the intentional causation of the death of another person, see, *e.g.*, Ala. Code § 13A-6-2(a)(1) (LexisNexis Supp. 2011)—is not a crime of violence as that term is commonly defined in federal law. See *Calderon-Pena*, 383 F.3d at 270-271 (Smith, J., dissenting) (noting that "the defendant need never lay a finger on his victim" to commit murder); see, *e.g.*, 18 U.S.C. 16 (defining "crime of violence" as, *inter alia*, an offense that has a use-of-force element); see generally 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.2(c) at 433 (2d ed. 2003) (LaFave) ("While the method of producing an intentional death is usually some weapon in the hands

of the murderer, * * * sometimes more subtle means are used.").

b. The conclusion that assault by causing bodily injury categorically involves the use of physical force is, moreover, consistent with the "more specialized legal usage" of the phrase "use . . . of physical force" to describe the common-law crime of battery. *Johnson,* 130 S. Ct. at 1270-1271. Battery is defined, in language that tracks the definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A), as "the intentional application of unlawful force against the person of another." *Id.* at 1270. At common law, that phrase was understood to reach conduct resulting in either "a bodily injury or an offensive touching." 2 LaFave § 16.2, at 553; see *Johnson*, 130 S. Ct. at 1271. And as particularly relevant here, battery was understood to reach indirect as well as direct uses of force against the body of the victim. See 2 LaFave § 16.2, at 554; see also 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 72 *a* (John M. Zane & Carl Zollman eds., 9th ed. 1923). A person thus committed a battery when, for example, he "administer[ed] a poison" or "[told] a blind man walking toward a precipice that all is clear ahead." 2 LaFave § 16.2, at 554-555; see also Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 122 (1946) (explaining that battery, "an application of force to the person of another," may be committed by, *inter alia*, "threatening sudden violence and thereby causing another to jump from a window or a moving vehicle or other place").

This Court has recognized that, when Congress uses a term having an established common-law meaning, it ordinarily intends the term to bear that common-law meaning. See, *e.g.*, *Johnson*, 130 S. Ct. at 1270 (citing

United States v. *Turley*, 352 U.S. 407, 411 (1957)). Here, where Congress has employed the common-law definition of misdemeanor battery to define the term "misdemeanor crime of domestic violence," the most natural conclusion is that Congress intended to describe generic, common-law battery crimes, including crimes involving the causation of bodily injury, whether by means of direct physical contact or employment of subtle and indirect uses of force. Cf. *id.* at 1271-1272.[3]

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[3] In *Johnson*, the Court considered whether the Florida felony offense of recidivist battery, defined in part as intentionally touching or striking another person against her will, qualified as a "violent felony" under the provision of the ACCA that covers crimes that "ha[ve] as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). The Court acknowledged that, at common law, the "force" element of battery was "satisfied by even the slightest offensive touching." *Johnson*, 130 S. Ct. at 1270. The Court concluded, however, that the common-law meaning of the term "force" was not controlling because that meaning "does not fit" in the context of the ACCA's definition of the term "violent felony." *Ibid.* The Court reasoned that the term "violent," particularly when "attached to the noun 'felony,'" connotes "strong physical force." *Id.* at 1271. The Court also considered it "unlikely" that Congress would employ the common-law definition of battery—a crime punishable as a misdemeanor at common law, and still generally punishable as a misdemeanor today—in defining the term "violent *felony*." *Id.* at 1271-1272 (emphasis added).

The Court in *Johnson* reserved the question whether the term "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence." 130 S. Ct. at 1273. The two courts of appeals to consider the question since *Johnson* have reached different conclusions. Compare *United States* v. *White*, 606 F.3d 144, 154-156 (4th Cir. 2010), with *United States* v. *Booker*, 644 F.3d 12, 17-18 (1st Cir. 2011), cert. denied, No. 11-6765 (Feb. 21, 2012). This case provides no occasion to consider that question, since the Nebraska bodily-injury assault offense at issue in this case categorically involves "violent force" as this Court interpreted the term in *Johnson*: that is, "force capable of causing physical pain or

c. In any event, even if Section 921(a)(33)(A) were read to exclude any assault crime capable of commission by indirect and subtle uses of physical force, petitioner's argument falters fails because it rests on the "application of legal imagination" to the language of Neb. Rev. Stat. § 28-310(1)(a), *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007), rather than on evidence of how the Nebraska assault statute has been applied in practice. Petitioner identifies no evidence that Nev. Stat. Rev. § 28-310(1)(a) has been or would be applied in the manner he hypothesizes.[4]

d. The First Circuit, like the Eighth Circuit, has held that misdemeanor assault or battery by causing bodily injury qualifies as a misdemeanor crime of domestic violence for purposes of Section 922(g)(9). See *Nason*, 269 F.3d at 12, 20 (holding that the provision of the Maine assault statute that prohibits "intentionally, knowingly, or recklessly caus[ing] bodily injury . . . to another," "unambiguously involves the use of physical

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injury to another person." 130 S. Ct. at 1271; see Neb. Rev. Stat. § 28-109(4) (2005) (defining the term "bodily injury" to mean "physical pain, illness or any impairment of physical condition").

[4] Petitioner cites (Pet. 15) *State* v. *Bachkora*, 427 N.W.2d 71 (1988), in which the Nebraska Supreme Court observed that Neb. Stat. Rev. § 28-310 "makes, among other things, recklessly caused bodily injury an assault in the third degree." *Id.* at 73. The question whether Nebraska courts have applied the assault statute to reckless conduct (*e.g.*, the reckless handling of a firearm, see Pet. 15) is different from the question whether they have applied the statute to conduct not involving use of "physical force" in the artificially narrow sense in which petitioner appears to understand that term. This case provides no occasion to consider whether the reckless causation of bodily injury qualifies as a misdemeanor crime of domestic violence; petitioner was charged with and convicted of intentional and knowing conduct. See Docket entry No. 26, at 3; Pet. App. 7a.

force" within the meaning of Section 921(a)(33)(A)(ii)); accord *Smith*, 171 F.3d at 620-621 (holding that the provision of the Iowa assault statute that prohibits "[a]ny act which is intended to cause pain or injury to * * * another," Iowa Code Ann. § 708.1(1) (West 1993), has a use-of-force element within the meaning of Section 921(a)(33)(A)); see pp. 10-11, *supra*.

As petitioner notes (Pet. 14), other courts of appeals have concluded that assault or battery by causing bodily injury does not contain a use-of-force element for purposes of other federal crime-of-violence definitions. See *Villegas-Hernandez*, 468 F.3d at 879 (holding that assault by causing bodily injury is not a crime of violence under 18 U.S.C. 16(a)); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 194-196 (2d Cir. 2003) (same); see also *United States* v. *Perez-Vargas*, 414 F.3d 1282, 1285-1287 (10th Cir. 2005) (holding that assault by causing bodily injury is not a crime of violence under Sentencing Guidelines § 2L1.2). This Court has, however, made clear that the phrase "use * * * of physical force" does not necessarily bear the same meaning in every statute in which it appears, regardless of context. See *Johnson*, 130 S. Ct. at 1273; see note 3, *supra*.

In an unpublished, nonprecedential decision, the Fifth Circuit relied on *Villegas-Hernandez* to conclude that assault by causing bodily injury is not a misdemeanor crime of violence for purposes of 18 U.S.C. 922(g)(9). See *United States* v. *Hagen*, 349 Fed. Appx. 896 (2009) (per curiam), cert. denied, 131 S. Ct. 457 (2010). The government sought this Court's review in *Hagen* to resolve the conflict among the courts of appeals. This Court denied the petition for a writ of certiorari. *Ibid.* The circuit conflict has not widened since that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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