No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES ALVIN CASTLEMAN

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

REPLY BRIEF FOR THE UNITED STATES

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The Sixth Circuit held that a person convicted of misdemeanor domestic assault by intentionally and knowingly causing bodily injury to a family member has not been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). That decision is incorrect; it implicates two distinct (but related) conflicts among the courts of appeals; and, if allowed to stand, it (and decisions like it) will seriously impede enforcement of Section 922(g)(9). Respondent's arguments to the contrary lack merit.

1. Respondent primarily contends (Br. in Opp. 7-21) that further review is not warranted because the court of appeals' decision is correct. Several circuits disagree, see Pet. 20-23; pp. 7-11, *infra*, and that disagreement alone warrants the Court's review. Respondent's defense of the fractured decision below is flawed in any event.

Respondent relies heavily (Br. in Opp. 7-10) on this Court's decision in *Johnson* v. *United States*, 559 U.S. 133 (2010), and argues that "physical force" should have the same meaning in the context of Section 921(a)(33)(A)(ii)'s definition of "misdemeanor crime of domestic violence" as it has in Section 924(e)(2)(B)(i)'s definition of "violent felony." As respondent acknowledges (Br. in Opp. 9), however, the Court expressly reserved that question in *Johnson* and, in doing so, necessarily contemplated that the essentially identical language at issue here could bear two different meanings because of the surrounding statutory context. See 559 U.S. at 143-144. And a critical part of the Court's reasoning, which respondent does not address, relied on the "felony" nature of the term "violent felony." See *id.* at 140-142. Although the Court in *Johnson* thought it unreasonable to read "force" as having its common-law misdemeanor meaning in the definition of "violent *felony*," see 18 U.S.C. 924(e)(2)(B)(i) (emphasis added), in a statute defining "*misdemeanor* crime of domestic violence" the ordinary rule should apply: the "common-law term of art" should be "given its established common-law meaning." 559 U.S. at 139 (citation omitted).

Respondent next suggests (Br. in Opp. 10-11, 12-13) that Congress could have "simply grafted the common law definition of battery into federal law." But that is precisely what Congress did. In *Johnson*, this Court described common-law battery as a "misdemeanor" that "consisted of the intentional *application of unlawful force* against the person of another." 559 U.S. at 139, 141 (emphasis added). And, in Section 921(a)(33)(A)(ii), Congress defined "misdemeanor crime of domestic violence" as a "misdemeanor" that has, as an element, the "*use of physical force*." 18 U.S.C. 921(a)(33)(A)(ii) (em-

phasis added). Respondent's further contention (Br. in Opp. 12) that common-law battery "require[d] proof neither of violence nor of physical injury" misses the point because it still required "force," *Johnson*, 559 U.S. at 139—and the meaning of that term in this context is the very question before the Court.

Respondent contends (Br. in Opp. 15-18) that even domestic assault by intentionally and knowingly causing bodily injury does not constitute a "misdemeanor crime of domestic violence" because the "use of physical force" is not an element of the offense. That, however, was not the basis for the decision below. The court of appeals did not dispute that domestic assault causing bodily injury has, as an element, the use of *some* force. Indeed, the Sixth Circuit has expressly held that aggravated assault by causing "serious physical harm * * * necessarily requires proof that the defendant used 'force capable of causing physical pain or injury.'" *United States* v. *Anderson*, 695 F.3d 390, 400 (2012); see *United States* v. *Evans*, 699 F.3d 858, 862-864 (2012) (assault by knowingly causing "physical harm" to peace officer "necessarily requires proof that a defendant knowingly used, or attempted to use, physical force capable of causing physical pain or injury").

Instead, the court of appeals held that respondent's bodily-injury domestic assault conviction does not constitute a "misdemeanor crime of domestic violence" because the crime does not have, as an element, the use of "violent" force. Pet. App. 15a-17a. Respondent's defense of that reasoning (Br. in Opp. 18-19) runs aground on this Court's decision in *Johnson*. In *Johnson*, the Court defined "violent force" as "force capable of causing physical pain or injury to another person." 559 U.S. at 140. The Tennessee domestic assault statute

criminalizes "caus[ing] bodily injury." See Tenn. Code Ann. §§ 39-13-101(a)(1), 39-13-111(b) (West 2001). If force "capable" of causing physical pain or injury is "violent," as *Johnson* made clear, then so is force that actually *causes* bodily injury.

2. Respondent suggests (Br. in Opp. 11-12) that the "statutory background" supports the court of appeals' decision. That is incorrect; the court of appeals' holding would defeat the purposes of the statute revealed in its background. Congress *was* concerned with "*violent* conduct" and "*serious spousal or child abus*e." *Id.* at 11 (citation omitted). It did not want a husband who "first treated" his wife "to a fist in the face" to later "come home with a gun and take" her "life." 142 Cong. Rec. 22,987 (1996). And Congress did not want someone who "beat his wife brutally" but "pleaded down to a misdemeanor" to later "reach for the gun he keeps in his drawer." *Id.* at 26,674. But the court of appeals' decision, which respondent endorses, thwarts that undisputed purpose.[1]

The majority of domestic-violence related misdemeanor offenses would not qualify as "misdemeanor crime[s] of domestic violence" under the Sixth Circuit's approach—even where the underlying abusive conduct was "serious" or "violent" under any conceivable definition. When Congress enacted Section 922(g)(9) in 1996, "domestic abusers were (and are) routinely prosecuted

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[1] The legislative record, moreover, often refers to domestic "abuse" interchangeably with domestic "violence." See, *e.g.*, 142 Cong. Rec. at 21,438, 22,986, 25,001-25,002. And Senator Lautenberg, the amendment sponsor, refers specifically to "assault" as an example of a qualifying "domestic violence-related crime[]." *Id.* at 26,675; see Br. in Opp. 11 n.2 (describing Senator Lautenberg's statements as "an authoritative guide").

under generally applicable assault and battery laws." *United States* v. *Hayes*, 555 U.S. 415, 427 (2009). And, as explained in the petition (at 24), the majority of generic, misdemeanor assault and battery statutes prohibit either the causation of bodily injury, offensive physical contact, or both. The same is generally true of the *domestic*, misdemeanor assault and battery laws on the books at the time of Section 922(g)(9)'s enactment. See, *e.g.*, 720 Ill. Comp. Stat. Ann. 5/12-3.2 (West 1996) (domestic battery); Minn. Stat. Ann. § 609.2242 (West 1996) (domestic assault); Vt. Stat. Ann. title 13, § 1042 (1996) (domestic assault). Under the court of appeals' reasoning, however, no conviction under any of those statutes would qualify as a "misdemeanor crime of domestic violence." An interpretation that would render Section 922(g)(9) close to meaningless—and that would exclude the sort of offenders Congress indisputably intended to cover—cannot be correct. See *Hayes*, 555 U.S. at 426-427.[2]

Respondent has no substantive response. He acknowledges that Congress intended to close a "huge" and "dangerous" "loophole," Br. in Opp. 11 (citations omitted), but he does not explain how the court of appeals' interpretation would achieve that objective.[3] Likewise, respondent contends that Congress intended

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[2] The practical consequences also distinguish this case from *Johnson*. Many crimes still qualify as "violent felon[ies]" because they have, as an element, the use of "violent" physical force; very few crimes will qualify as "misdemeanor crime[s] of domestic violence" if respondent's view prevails.

[3] Section 922(g)(1) already prevented persons who had been convicted of *felony* crimes of domestic violence from possessing a firearm; Section 922(g)(9) was added to capture those charged with or convicted of *misdemeanor* crimes of domestic violence.

to "narrow[] the field of eligible battery offenses" (*id.* at 10), but he does not identify a single state or federal battery statute that would qualify under his preferred definition. Instead of explaining how the statutory definition would work in practice, respondent falls back on the "modified categorical approach," arguing that courts should look to "record material to identify the type of force actually used by the defendant." *Id.* at 13-14. That is no answer at all.[4]

Although the petition suggests that a modified categorical approach "may theoretically remain available" to identify instances of "violent force," Pet. 14 n.6 (citing *Johnson*, 559 U.S. at 144-145), that is no longer the case after the Court's decision in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). That decision makes clear that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282. The "type of force actually used" will rarely, if ever, be a disjunctive element of a domestic assault or battery offense.[5] Thus, even if state prosecutors (implausibly) would "take care" to include extraneous de-

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[4] The petitioners in *Armstrong* v. *United States*, petition for cert. pending, No. 12-10209 (filed May 6, 2013), concede as much. See Reply Br. at 4.

[5] The modified categorical approach would still have a role to play with respect to disjunctive elements, such as the intent requirement here. See Pet. 10 n.4. And if a state statute (like the Tennessee domestic assault statute) were to define misdemeanor assault as offensive physical contact *or* assault causing bodily injury, a court could theoretically employ a modified categorical approach to determine the defendant's crime of conviction. But where neither divisible offense qualifies as a "misdemeanor crime of domestic violence" under the governing law, the modified categorical approach adds nothing.

tails when charging domestic assault or battery offenses (Br. in Opp. 13-14), those details could not convert an otherwise non-qualifying offense into a "misdemeanor crime of domestic violence."[6]

3. The court of appeals' decision implicates two distinct, but related, conflicts. Respondent's attempt to minimize and conflate the division among the courts of appeals is unavailing.

a. Seven circuits have considered what degree of force is necessary to conclude that a crime has, as an element, the use of "physical force" for purposes of qualifying as a "misdemeanor crime of domestic violence" under Section 922(g)(9). Four circuits (two before *Johnson* and two after) have held that "violent" physical force is required. See Pet. 20-22. Three circuits (two before *Johnson* and one before *and* after) have held that "any" physical force will suffice. *Ibid.*

Respondent acknowledges the conflict (Br. in Opp. 22-23), but contends that this Court's review would be "premature" because the First Circuit may "reconsider its pre-*Johnson* precedent." That prediction is unfounded for at least three reasons. First, the First Circuit has already declined to reconsider its pre-*Johnson* precedent on no less than four occasions. See *United States* v. *Pettengill*, No. 10-2024 (1st Cir. Aug. 19, 2013); *United States* v. *Armstrong*, 706 F.3d 1 (1st Cir. 2013), petition for cert. pending, No. 12-10209 (filed May 6, 2013); *United States* v. *Voisine*, 495 Fed. Appx. 101 (1st

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[6] Respondent's suggestion (Br. in Opp. 14) that States should "amend" their assault and battery statutes to conform to the federal definition of "misdemeanor crime of domestic violence" is an "intrusive" and unreasonable "demand," *Descamps*, 133 S. Ct. at 2293-2294 (Kennedy, J., concurring), and it cannot be what Congress anticipated when it enacted a nationwide loophole-closing statute.

Cir. 2013), petition for cert. pending, No. 12-10209 (filed May 6, 2013); *United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011), cert. denied, 132 S. Ct. 1538 (2012). Second, the First Circuit is not an "outlier." Br. in Opp. 23. The Eighth and Eleventh Circuits have also held that "violent" physical force is not required, see *United States* v. *Smith*, 171 F.3d 617, 621 & n.2 (8th Cir. 1999); *United States* v. *Griffith*, 455 F.3d 1339, 1343-1345 (11th Cir. 2006), cert. denied, 549 U.S. 1343 (2007), and neither court has reconsidered its decision in light of *Johnson*. Third, the circuit split should not be resolved by "follow[ing] the Fourth and Sixth Circuit's" *mis*application "of *Johnson*." Br. in Opp. 23. Because the circuit split is unlikely to resolve itself, and because any resolution in favor of the decision below would be incorrect, this Court's review is warranted.

b. Seven circuits have also considered whether assault by causing bodily injury necessarily involves the use of "physical force"—and four have considered that question in the context of Section 922(g)(9). See Pet. 22-23; cf. *United States* v. *Martinez-Flores*, 720 F.3d 293, 300 n.9 (5th Cir. 2013) (reaffirming that "causing bodily injury" does not mean "that the statute has as an element the use of force"). Three circuits (two in the context of Section 922(g)(9)) have held that it does; four circuits (two in the context of Section 922(g)(9)) have held that it does not. See Pet. 22-23. Respondent suggests that this circuit conflict is no different than the first and that it is, in any event, overstated. Neither contention withstands scrutiny.

The two circuit conflicts, though related, are in fact distinct. The first focuses on whether "violent" physical force is required for an offense to qualify as a "misdemeanor crime of domestic violence" under Section

922(g)(9). The second focuses on whether assault by causing bodily injury has, as an element, the use of physical force—violent or otherwise. The answer to the first question does not dictate the answer to the second, and vice versa. For example, a court could conclude (contrary to the government's position) that "violent" physical force is required, but also conclude (consistent with the government's position) that assault by causing bodily injury has, as an element, the use of such "violent" physical force. Cf. Pet. 20-21, 22-23 (citing Seventh Circuit cases adopting that approach with respect to statutes other than Section 922(g)(9)). Both questions (and conflicts) are implicated by the decision below.

Respondent's attempt to minimize the second conflict (*i.e.*, whether assault by intentionally causing bodily injury includes a use-of-force element) is unpersuasive. As respondent notes (Br. in Opp. 24), the First Circuit in *United States* v. *Nason* cited a Maine Supreme Court decision describing the bodily-injury provision of Maine's assault statute as reaching the "use of unlawful force against another causing bodily injury." 269 F.3d 10, 20 (2001) (quoting *State* v. *Griffin*, 459 A.2d 1086, 1091 (Me. 1983)). The court in *Griffin* did not, however, suggest that bodily-injury assault under Maine law is limited to some acts involving the intentional or knowing infliction of bodily injury but not others, and the Maine Supreme Court has repeatedly described the "elements" of bodily-injury assault without mention of the "use of unlawful force." See, *e.g.*, *State* v. *Gantnier*, 55 A.3d 404, 408 (Me. 2012); *State* v. *Filler*, 3 A.3d 365, 373 (Me. 2010); cf. Reply Br. at 4-5, *Armstrong*, *supra* (No. 12-10209). The conclusion that all such acts necessarily involve the "use of unlawful force" is consistent with the prevailing use of that phrase in describing the common-

law crime of battery and with the government's argument here. See Pet. 12, 17.

Respondent also observes (Br. in Opp. 25) that the Eighth Circuit's analysis in *Smith* is brief. That is true, but the court's holding is still clear: assault by intentionally causing bodily injury necessarily involves the use of physical force within the meaning of Section 921(a)(33)(A)(ii). See *Smith*, 171 F.3d at 620-621; see also *United States* v. *Amerson*, 599 F.3d 854, 855 (8th Cir. 2010) (per curiam) (relying on *Smith* and holding that the portion of Nebraska's domestic-assault statute prohibiting "intentionally and knowingly caus[ing] bodily injury" satisfies "the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)") (alteration in original).

In the end, assault by intentionally causing bodily injury will satisfy the use-of-force element in the First, Seventh, and Eighth Circuits, but not in the Second, Fifth, Sixth, or Tenth Circuits. This Court's intervention is needed to resolve that conflict.

c. Respondent also suggests (Br. in Opp. 22, 25-26) that the Court should not review the two existing circuit conflicts because the government opposed review of the first conflict in *Booker*, and this Court denied review of the second in *United States* v. *Hagen*, 131 S. Ct. 457 (2010). In *Booker*, however, the government recognized that "the [first] conflict may merit review in an appropriate case." U.S. Br. in Opp. at 9, *Booker*, 132 S. Ct. 1538 (2012) (No. 11-6765). Since then, the Sixth Circuit has addressed both conflicts in the fractured decision below and the First Circuit has again reaffirmed its pre-*Johnson* precedent. This petition is also a better vehicle than both *Booker* and *Hagen*. Unlike *Booker*, this case does not present the question whether "reckless" conduct is included within the definition of a "misdemeanor

crime of domestic violence." Pet. 10 n.4. That question does not independently warrant review. And unlike *Booker* and *Hagen*, this case presents two related and important circuit conflicts involving state statutes criminalizing "bodily injury" assault, as well as those criminalizing "offensive physical contact." See also U.S. Br. at 18-19, *Armstrong*, petition for cert. pending (No. 12-10209) (making the same observations).

4. Finally, respondent halfheartedly suggests that the state court's failure to set aside respondent's domestic assault conviction counsels against review. It does not. After the indictment in this case, respondent sought state post-conviction relief, arguing that his 2001 guilty plea was not knowing or voluntary because he was not informed of the federal gun prohibition, as required by Tennessee law. The Tennessee appellate court denied respondent's claim as untimely and this Court denied certiorari. See *State* v. *Castleman*, No. W2009-1661, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011). The state court conviction, moreover, had not been set aside at the time respondent possessed the firearms underlying his Section 922(g)(9) conviction and any belated collateral attack would be foreclosed by *Lewis* v. *United States*, 445 U.S. 55, 60-65 (1980). See Pet. App. 61a. Further review of that issue is not warranted.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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