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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, 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). The question presented is:

Whether respondent's Tennessee conviction for misdemeanor domestic assault by intentionally or knowingly causing bodily injury to the mother of his child qualifies as a conviction for a "misdemeanor crime of domestic violence."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 695 F.3d 582. The order of the district court (Pet. App. 49a-50a) adopting the report and recommendation of the magistrate judge denying respondent's motion to dismiss (Pet. App. 51a-71a) is unreported, but is available at 2010 WL 711179. The orders of the district court granting respondent's motion to dismiss (Pet. App. 34a-42a) and denying the government's motion for reconsideration (Pet. App. 43a-48a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2012. A petition for rehearing was denied on December 19, 2012 (Pet. App. 72a-73a). On March 11, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to

and including April 18, 2013. On April 5, 2013, Justice Kagan further extended the time to May 18, 2013, and the petition was filed on that date. The petition was granted on October 1, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App. A, *infra*, 1a-9a.

STATEMENT

Respondent was indicted on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms, in violation of 18 U.S.C. 922(a)(6). Concluding that respondent's prior Tennessee conviction for misdemeanor domestic assault on the mother of his child was not a conviction for a "misdemeanor crime of domestic violence," the district court dismissed the Section 922(g)(9) counts of the indictment. The court of appeals affirmed. Pet. App. 1a-33a, 54a-55a.

1. Under federal firearms laws, it is unlawful for certain persons, including any person who has been convicted of a felony in any court, "[to] possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. 922(g); see *United States* v. *Hayes*, 555 U.S. 415, 418 (2009). In 1996, Congress expanded that prohibition to include persons who have been convicted in any court of a "misdemeanor crime of domestic violence." 18 U.S.C. 922(g)(9); see Treasury, Postal Service, and General Government Appropriations Act, 1997 (1997 Appropriations Act), Pub. L. No. 104-208, § 658(b)(2), 110 Stat. 3009-372. The term "misde-

meanor crime of domestic violence" is defined as a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, including "shar[ing] a child in common," that "has, 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); see *Hayes*, 555 U.S. at 420-421. A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 2001, respondent was charged in Tennessee state court with misdemeanor domestic assault in violation of Tenn. Code Ann. § 39-13-111(b) (West 2001),[1] which punishes any person "who commits an assault as defined in [Section] 39-13-101 against a person who is that person's family or household member." A "family or household member" includes "a person who has a child * * * in common with that person." *Id.* § 39-13-111(a). Section 39-13-101(a)(1), in turn, provides that a person commits assault by, *inter alia*, "[i]ntentionally, knowingly or recklessly caus[ing] bodily injury to another" or "[i]ntentionally or knowingly caus[ing] physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative." *Id.* § 39-13-101(a)(1) and (3). "Bodily injury" is defined as "a cut, abrasion, bruise, burn or disfigurement; physical pain

[1] Unless otherwise noted, citations to the Tennessee Code Annotated are to the 2001 version. The current version of the relevant Tennessee statutory provisions similarly punish any person "who commits an assault as defined in § 39-13-101 against a domestic abuse victim," and "domestic abuse victim" includes adults "who have or had a sexual relationship." Tenn. Code Ann. § 39-13-111(a)(3) and (b) (West Supp. 2013).

or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2). A first conviction for domestic assault under Section 39-13-111(b) is punishable as a Class A misdemeanor. See *id.* §§ 39-13-111(c), 39-13-101(b); see also *id.* § 40-35-111(e)(1) (authorizing a term of imprisonment not greater than 11 months and 29 days).

The state indictment alleged that respondent "did intentionally or knowingly cause bodily injury to [the victim], WHO HAS A CHILD WITH HIM, thereby committing the offense of DOMESTIC ASSAULT, in violation of T.C.A. 39-13-111(b)." J.A. 27. Respondent pleaded guilty pursuant to a plea agreement, and he was sentenced to supervised probation for 11 months and 29 days. J.A. 29; see Pet. App. 53a-54a.

3. In 2008, law enforcement agents discovered that respondent and his wife were buying firearms from dealers and selling them on the black market. Pet. App. 2a. In August 2009, respondent was charged in a superseding indictment on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) (Counts 4 and 5), and three counts of making false or fictitious statements to a federally licensed firearms dealer in order to purchase firearms on three separate occasions, in violation of 18 U.S.C. 922(a)(6) (Counts 1, 2, and 3). See J.A. 13-16.

Respondent moved to dismiss the indictment arguing, *inter alia*, that his Tennessee domestic assault conviction is not a "misdemeanor crime of domestic violence" because it does not "ha[ve], as an element, the use * * * of physical force." 18 U.S.C.

921(a)(33)(A)(ii).[2] The district court granted the motion and dismissed the two Section 922(g)(9) counts. Pet. App. 34a-42a.[3] The court concluded that "[a]n assault statute that requires the mere causation of bodily injury does not necessarily require the 'use of physical force' for [Section] 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim." *Id.* at 40a. The court explained that because a person could violate the Tennessee statute by "caus[ing] a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim," or by "coerc[ing] the victim into taking the drink," respondent's 2001 conviction "cannot serve as a qualifying misdemeanor crime of domestic violence under [Section] 922(g)(9)." *Id.* at 41a.

4. The United States appealed and a divided panel of the court of appeals affirmed in three separate opinions. Pet. App. 1a-33a.

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[2] Respondent also argued that he could not be convicted of violating Section 922(g)(9) because his domestic assault conviction had been set aside. See Pet. App. 60a-63a. After the indictment in this case, respondent sought state post-conviction relief, arguing that his 2001 guilty plea was not knowing and voluntary because he was not informed of the federal gun prohibition, as required by Tennessee law. Although a Tennessee trial court initially set aside respondent's conviction on that basis, see J.A. 17-26, the appellate court reversed and this Court denied certiorari. See *State* v. *Castleman*, No. W2009-01661, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011).

[3] The district court had initially adopted the report and recommendation of the magistrate judge and denied respondent's motion to dismiss based on a theory of judicial estoppel. Pet. App. 49a-71a.

a. The court of appeals first considered "the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence." Pet. App. 5a. The court explained that because the definition of "misdemeanor crime of domestic violence" largely "tracks" the "violent felony" definition in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), Congress presumably "intended them to capture offenses criminalizing identical degrees of force." Pet. App. 6a-7a. The court of appeals explained that, in *Johnson* v. *United States*, 559 U.S. 133 (2010), this Court had interpreted the "physical force" requirement in Section 924(e)(2)(B)(i) to require "'*violent* force . . . capable of causing physical pain or injury to another person' and 'strong physical force.'" Pet. App. 8a-9a (quoting *Johnson*, 559 U.S. at 140). The court then concluded that "the degree of force *Johnson* requires for a conviction under [Section] 924(e)(2)(B)(i) is [also] required of a misdemeanor crime of domestic violence." *Id.* at 9a-10a.

In so holding, the court of appeals rejected the government's argument that *Johnson* did not control. Pet. App. 12a-13a & n.3. The court recognized that, in *Johnson*, this Court had emphasized the operative phrase "*violent* felony," whereas Section 921(a)(33)(A) defines a "*misdemeanor* crime of domestic violence." *Id.* at 13a n.3 (emphases added). But the court understood "the relevant portion of *Johnson* [to] suggest[] that the misdemeanor-felony distinction is not a viable framework for determining the level of violence an offense must require to qualify as a violent felony." *Id.* at 14a. The court therefore concluded that the phrase "'[m]isdemeanor crime of domestic violence' is

most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor." *Id.* at 12a.

The court of appeals next considered whether respondent's Tennessee domestic assault conviction categorically qualifies as a "misdemeanor crime of domestic violence," so defined. Pet. App. 15a-17a. The court concluded that violation of a statute that makes it a crime to cause "bodily injury" "does not require the use of violent force"—but for reasons different than the district court. *Id.* at 16a. The Sixth Circuit had previously 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) (citation omitted). The court reasoned that the Tennessee domestic assault statute, which only required "bodily injury," was distinguishable because respondent "could have caused a slight, nonserious physical injury with conduct that cannot be described as violent," such as "a paper cut or a stubbed toe." Pet. App. 16a-17a. Accordingly, the court concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence and that the district court correctly dismissed the Section 922(g)(9) counts of the indictment.[4]

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[4] The court of appeals also concluded that respondent's conviction did not qualify as a misdemeanor crime of domestic violence under a modified categorical approach. Pet. App. 18a-20a. Though the court acknowledged that respondent's state indictment charged him with "intentionally or knowingly" causing bodily injury, the indictment did "not specify the type or severity of injury he caused." *Id.* at 18a.

b. Judge Moore concurred in a separate opinion. Pet. App. 21a-23a. She agreed that "the force requirement for a misdemeanor crime of domestic violence is identical to that specified under * * * the ACCA." *Id.* at 21a. Under *Johnson*, she explained, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." *Id.* at 22a. Because the Tennessee statute also "criminalizes reckless conduct," Judge Moore applied a modified categorical approach and concluded that respondent's conviction does not fall "within the confines of a misdemeanor crime of domestic violence." *Id.* at 21a, 23a.[5]

c. Judge McKeague dissented. Pet. App. 23a-33a. He argued that the majority erroneously applied *Johnson*'s "violent felony" standard to a "misdemeanor crime of domestic violence." *Id.* at 24a-26a. *Johnson*, he explained, "rejected the argument that the misdemeanor standard should control the felony definition" and, for the same reason, "the felony standard should not control the misdemeanor." *Id.* at 26a. Judge McKeague also concluded that respondent's conviction qualifies as a misdemeanor crime of domestic violence even under "the heightened *Johnson*

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[5] As Judge Moore noted, Tenn. Code Ann. § 39-13-101(a)(1) also punishes any individual who "recklessly" causes bodily injury to another. Because respondent was specifically charged with and convicted of the intentional or knowing causation of bodily injury (see J.A. 27-29), the question whether "reckless" conduct is included within the definition of a "misdemeanor crime of domestic violence" is not presented. See Pet. App. 18a; *id.* at 21a (Moore, J., concurring).

standard," because "violent physical force is a necessary element to intentionally or knowingly inflicting bodily injury." *Id.* at 27a. He explained that the majority's holding to the contrary "has the effect of making the 'misdemeanor crime of domestic violence' provision * * * a dead letter in Tennessee, as well as any other state using the Model Penal Code's definition of assault to punish domestic abusers." *Id.* at 31a.

SUMMARY OF ARGUMENT

Respondent's misdemeanor domestic assault conviction for intentionally or knowingly causing bodily injury to the mother of his child is a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9) and thereby disables him from possessing a firearm.

A. The definition of the phrase "misdemeanor crime of violence" requires a qualifying conviction to have, as an element, the use of physical force. But that force need not be "violent" in nature. In the context of common-law battery, the word "force" was understood to require only the slightest offensive touching. The presumption that Congress intends common-law terms of art to bear their common-law meaning directly applies here. And the statutory context only serves to confirm that common-law meaning.

The Court in *Johnson* v. *United States*, 559 U.S. 133 (2010), defined the term "violent *felony*" to require violent force for purposes of the ACCA, but it expressly left open the question whether "the phrase ['physical force'] has the same meaning in the context of defining a *misdemeanor* crime of domestic violence" under Section 922(g)(9). It does not. The stat-

utory term being defined is categorically different. There is nothing "peculiar" about defining a "misdemeanor crime of domestic violence" in light of the common-law definition of misdemeanor battery. *Id.* at 141. It is a natural fit. The broader statutory context, moreover, makes it both unnecessary and inappropriate to import the more restrictive "violent" physical force definition from the ACCA into Section 922(g)(9).

B. Even if "violent" physical force is required for an offense to qualify as a "misdemeanor crime of domestic violence," the intentional causation of bodily injury does have, as an element, the use of "violent" force. The court of appeals held otherwise because, in its view, a victim could have simply "stubbed [her] toe." Pet. App. 17a. That decision cannot be squared with the definition of "violent" force adopted in *Johnson*, which requires only a degree of force "capable" of causing "physical pain or injury." 559 U.S. at 140. Force that actually and intentionally *causes* bodily injury, by definition, is "capable" of causing "physical pain or injury." In any event, this Court has refused to rely on "legal imagination" to determine whether a prior conviction qualifies as a predicate offense under federal law. *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). The court of appeals' fanciful hypotheticals cannot take respondent's conviction "for causing bodily injury" outside the reach of Section 922(g)(9).

C. The Sixth Circuit agreed that intentionally causing bodily injury requires the use of some force, but the district court denied even that common sense proposition. In its view, no use of force is required to intentionally cause bodily injury since the victim could have been poisoned or otherwise tricked or coerced

into injuring herself. That is incorrect. The common-law meaning of "force" was not limited to direct physical contact; it included more subtle or indirect uses of force such as poisoning. The district court's reasoning is also flawed because it too rests on hypotheticals—and produces statutory anomalies. Intentional offensive touching plainly involves the use of force (albeit not "violent" force). And any rule that includes intentional offensive touching as a "misdemeanor crime of domestic violence," but excludes the greater offense (*i.e.*, intentionally causing bodily injury) cannot be correct.

D. The court of appeals' decision would render Section 922(g)(9) a virtual "dead letter" in all but (at most) a handful of States "from the very moment of its enactment." *United States* v. *Hayes*, 555 U.S. 415, 426, 427 (2009) (internal quotation marks omitted). Most domestic abusers are prosecuted under generic assault and battery laws or (in the States that have them) domestic assault and battery laws. That was true at the time of Section 922(g)(9)'s enactment and it is true today. All but a few of the state misdemeanor assault and battery laws punish either intentional offensive touching, the intentional causation of bodily injury, or both. See App. B-D, *infra*, 10a-29a. Under the court of appeals' decision, *none* of those statutes would give rise to a qualifying conviction under Section 922(g)(9). Such a drastic curtailment of the statute's scope directly contravenes Congress's intent to close what it viewed as a "dangerous loophole" and will put guns in the hands of "violent individuals who threaten their own families." *Hayes*, 555 U.S. at 426 (citation omitted).

E. The statutory history confirms that Congress understood that domestic abusers were often convicted of misdemeanor assault and battery offenses and that it intended such convictions to qualify as "misdemeanor crime[s] of domestic violence." And while it is true that Congress was concerned with violent conduct and serious domestic abuse, the decisions below thwart that very purpose by allowing indisputably violent offenders who are convicted of misdemeanor assault and battery offenses to arm themselves with a gun.

ARGUMENT

RESPONDENT'S MISDEMEANOR DOMESTIC ASSAULT CONVICTION QUALIFIES AS A "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE"

The Sixth Circuit held that respondent's conviction for misdemeanor domestic assault under Tennessee law for intentionally or knowingly causing bodily injury to the mother of his child did not qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). The court of appeals erred in both steps of its analysis. "Violent" force is not required for a conviction to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9). And, even if "violent" force were required, domestic assault by intentionally or knowingly causing bodily injury has, as an element, the use of "violent" physical force. The district court's more expansive reasoning (*i.e.*, that intentionally causing bodily injury does not require the use of *any* force) was rejected by the Sixth Circuit—and for good reason. Inherent in a person's causing bodily injury (as opposed to emotional or psychological injury) is the use of physical force to accomplish that end.

The reasoning of the decisions below should be rejected because, if applied nationwide, it would render Section 922(g)(9) a practical "dead letter" in nearly every State. That would contravene Congress's clear intent to "keep[] firearms out of the hands of domestic abusers." *United States* v. *Hayes*, 555 U.S. 415, 426, 427 (2009) (citation omitted).

A. Section 921(a)(33)(A) Does Not Require "Violent" Force For A Crime To Qualify As A "Misdemeanor Crime Of Domestic Violence"

Federal law makes it a crime for a person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. 922(g)(9). A "misdemeanor crime of domestic violence" is defined as a misdemeanor that "has, 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). In *Johnson* v. *United States*, 559 U.S. 133, 139 (2010), this Court interpreted "physical force" to require "violent" force in the context of defining a "violent felony" under the ACCA, which triggers a mandatory minimum of 15 years in prison. See 18 U.S.C. 924(e)(2)(B)(i). The Court should not apply *Johnson*'s interpretation of "physical force" in the "violent felony" context under the ACCA to the very different of "misdemeanor crime of domestic violence" context of Section 922(g)(9).

1. Section 921(a)(33)(A) does not define "physical force." In *Johnson*, the Court considered the meaning of "physical force" as used in the term "violent felony" in the ACCA. 559 U.S. at 138-143. The Court explained that the "adjective 'physical'" "plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intel-

lectual or emotional force." *Id.* at 138. As for the noun "force," the Court acknowledged that it has "a number of meanings," but it focused on two in particular. *Ibid.*; see *id.* at 146 (Alito, J., dissenting). The first, "more general usage," suggests "a degree of power that would not be satisfied by the merest touching." *Id.* at 139; see Black's Law Dictionary 717 (9th ed. 2009) (Black's) (defining "force" as "[p]ower, violence, or pressure directed at a person or thing"); *ibid.* (defining "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed at a robbery victim"). So understood, "force" requires "*violent* force," *i.e.*, "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 139, 140.

The second, "more specialized legal usage," comes from common-law battery. *Johnson*, 559 U.S. at 139. At common law, battery covered (among other things) the "application of unlawful *force* against the person of another." *Ibid.* (emphasis added); see 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 552 (2d ed. 2003) (LaFave); Model Penal Code § 211.1, cmt. 1(a), at 175 (1980); Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 120 (1946) (Perkins); Black's 173. The word "force" was understood to include "even the slightest offensive touching." *Johnson*, 559 U.S. at 139; see *id.* at 146 (Alito, J., dissenting) (noting that the "well-established meaning" of the term "force" at "common law" included "even the 'slightest offensive touching'") (citation omitted); Model Penal Code § 211.1, cmt. 1(a), at 175 (At common law, "the notion of force was not limited to actual violence but included any kind of offensive and unlawful contact."); Perkins 120

("'[V]iolence' and 'force' are synonyms" in this context and "include any application of force."). The common-law approach reflected a judgment that "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it." 3 William Blackstone, Commentaries *120 (1768) (Blackstone) (discussing battery as a private wrong); see 4 Blackstone *216-218 (noting that battery is also a public wrong, and referring to prior discussion of battery as a private wrong). Accordingly, under the common-law meaning, "force" does not require any particular degree or quantum of violence.[6]

Where (as here) there are two possible ways to define the word "force," the Court generally adopts the accepted common-law meaning. "It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (internal quotation marks and citation omitted); *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245, 2246 (2011); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). And, in *Johnson*, the Court recognized that "a common-law term of art should be given its estab-

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[6] Not all subjectively unwanted physical contact, however, qualifies as battery under the common-law approach. The law recognizes that, "in a crowded world, a certain amount of personal contact is inevitable, and must be accepted." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 9, at 42 (5th ed. 1984). To qualify as a battery, the contact must be objectively offensive, and "unwarranted by the social usages prevalent at the time and place at which it is inflicted." 1 Restatement (Second) of Torts § 19 cmt. a, at 35 (1965).

lished common-law meaning." 559 U.S. at 139 (citing *United States* v. *Turley*, 352 U.S. 407, 411 (1957)).

That general rule, however, is subject to exceptions. The Court will not "assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson*, 559 U.S. at 139. And the Court in *Johnson* concluded that the common-law meaning of the term "force" "d[id] not fit" in the context of the ACCA's definition of "violent felony." *Id.* at 139-142. Rather, in the Court's view, it was "a comical misfit with the defined term 'violent felony.'" *Id.* at 145. The Court explained that the word "violent," especially when "attached to the noun 'felony,'" connotes "strong physical force." *Id.* at 140-141. And the Court found it "significant" that battery was a crime punishable as a misdemeanor at common law and generally punishable as a misdemeanor today. *Id.* at 141. The Court thought it "unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." *Id.* at 141.

2. *Johnson* expressly reserved the question whether the phrase "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence." 559 U.S. at 143-144. The Court explained that it had "interpreted the phrase 'physical force' only in the context of a statutory definition of 'violent felony,'" and that it was not deciding whether "the phrase has the same meaning in the context of defining a *misdemeanor* crime of domestic violence." *Id.* at 143-144. This case presents the question left open in *Johnson* and the answer is: it does not.

a. Respondent relies on "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Br. in Opp. 9 (quoting *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993)). As this Court has repeatedly emphasized, however, that "rule" is neither "rigid" nor "absolute." *Barber* v. *Thomas*, 130 S. Ct. 2499, 2506 (2010); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932) (*Atlantic Cleaners*). "[M]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even the same section." *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (quoting *Atlantic Cleaners*, 286 U.S. at 433). Any presumption thus "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1360 (2012) (quoting *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 595 (2004)); see *Atlantic Cleaners*, 286 U.S. at 433 (meaning of the same words "well may vary to meet the purposes of the law"). As the Court expressly contemplated in *Johnson*, 559 U.S. at 143-144, the phrase "physical force" does not have the same meaning in the statutory context of a "misdemeanor crime of domestic violence" under Section 922(g)(9) as it does in the statutory context of a "violent felony" under the ACCA. Here, the accepted common-law meaning "fit[s]." *Id.*. at 139.

b. In *Johnson*, the Court's reasoning rested primarily on the term being defined: "violent felony." See 559 U.S. at 140 ("interpreting the phrase 'physical force' as used in * * * the statutory category of 'violent felon[ies]'") (brackets in original); *ibid.* (referring to "the context of a statutory definition of 'violent felony'") (emphasis omitted); *id.* at 141 (declining to "import" such meaning into "this definition of 'violent felony'"); *ibid.* (noting that term is being used to "defin[e] 'violent felony'"); *id.* at 142 (noting that term "physical force" is "contained in a definition of 'violent felony'"); *id.* at 143 (interpreting the phrase "[i]n the context of a statutory definition of 'violent felony'"); *id.* at 145 (focusing on "the defined term 'violent felony'"). The statutory term being defined here is a different animal. There is nothing peculiar about defining a "misdemeanor crime of domestic violence" in light of the common-law definition of misdemeanor battery. To the contrary, it is a natural fit.

Section 922(g)(9) is directed exclusively at misdemeanors, not felonies. The Court in *Johnson* found it "significant" that, at common law—and even today—battery was generally punishable as a misdemeanor. *Ibid.* And the Court declined to "import" a "meaning of 'physical force'" "derived from a common-law *misdemeanor*" into the "definition of 'violent *felony*.'" 559 U.S. at 141 (second emphasis added); see *ibid.* (finding it "unlikely that Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor"). Although the Court in *Johnson* thought it unreasonable to read "force" as having its common-law meaning in the context of the ACCA's definition of "violent *felony*,"

nothing is incongruous about that reading in the context of Section 922(g)'s definition of a "*misdemeanor* crime of domestic violence." The "specialized legal usage" of "force" for common-law misdemeanor battery comfortably "fit[s]" when defining the term "misdemeanor crime of domestic violence." *Id.* at 139, 140, 143-144.

The phrase "misdemeanor crime of domestic violence" also does not have the same "connotation" of "strong physical force" as the phrase "violent felony." See *Johnson*, 559 U.S. at 140. The Court found that connotation especially clear in *Johnson* because the "adjective 'violent'" was "attached to the noun 'felony.'" *Ibid.* That is not true here. The noun "violence" is modified by the adjective "domestic" and further limited by the noun "misdemeanor." 18 U.S.C. 921(a)(33)(A). "Domestic violence" is also synonymous with "domestic abuse." Black's 1705-1706; see *id.* at 10 (defining "abuse" as "[p]hysical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury"). Indeed, the legislative record refers to "domestic abuse" (including "child abuse" and "spousal abuse") interchangeably with "domestic violence." See, *e.g.*, 142 Cong. Rec. 21,438 (1996) (statement of Sen. Lautenberg), 22,986 (statements of Sens. Lautenberg & Wellstone), 25,001-25,002, 26,674 (statement of Sen. Lautenberg). Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of "misdemeanor crime[s] of domestic abuse." See, *e.g.*, Iowa Code Ann. § 708.2A (West 1995) ("domestic abuse assault"); Okla. Stat. Ann. tit. 21, § 644(C) (West 1996) ("domestic abuse"); Haw. Rev. Stat. § 709-906 (1995) ("abuse of family or household members"). Placing undue em-

phasis on the word "violence" in isolation ignores that larger statutory context.[7]

c. Other differences between the broader statutory contexts make it both unnecessary and inappropriate to import the "violent force" definition from the ACCA into Section 922(g)(9). The ACCA is a recidivist sentencing enhancement targeted at a subset of Section 922(g) offenders with relatively serious and significant criminal histories. Section 922(g) offenders generally are subject to a maximum term of ten years in prison, 18 U.S.C. 924(a)(2); but if an offender has a predicate offense that qualifies as a "violent felony" and two other qualifying predicate offenses, he is subject to a minimum prison term of fifteen years, 18 U.S.C. 924(e)(1). In that context, requiring "violent force" ensures that the enhanced punishment is reserved for "armed career criminal" recidivists. See *Begay* v. *United States*, 553 U.S. 137, 146 (2008) (declining to adopt an interpretation that would apply the "15-year mandatory minimum sentence" to "a host of crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals'").

Section 922(g)(9) is different in kind and in degree. It prohibits a class of persons thought to pose a heightened risk of danger (those with convictions for misdemeanor crimes of domestic violence) from

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[7] The victims of domestic violence or domestic abuse, moreover, are often referred to as "battered" women or children. Black's 172 (defining a "battered woman" as a "woman who is the victim of domestic violence; a woman who has suffered physical, emotional, or sexual abuse at the hands of a spouse or partner"). And, of course, "battered" is a derivative of "battery," which lends further support to the common-law battery understanding of "force."

possessing a firearm. Section 922(g) disables several other classes from possessing firearms as well, including convicted felons, fugitives from justice, addicts and unlawful users of controlled substances, persons adjudicated mentally defective or committed to a mental institution, illegal aliens and certain aliens admitted on non-immigrant visas, dishonorably discharged servicemen, persons who have renounced their U.S. citizenship, and persons subject to domestic-violence restraining orders. See 18 U.S.C. 922(g)(1)-(8); see also 18 U.S.C. 922(d) (making it unlawful to sell or transfer firearm to prohibited persons). The purpose of the firearms disability provisions is to "keep guns out of the hands" of "potentially irresponsible and dangerous" persons who "may not be trusted to possess a firearm without becoming a threat to society." *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 112 (1983) (internal quotation marks and citation omitted); *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). A narrow definition of "physical force" targeted to punish only the most violent criminals is out of place in a statute designed to prevent harms by restricting a wider group of untrustworthy persons from possessing firearms.

The adverse practical consequences of adopting a restrictive definition of "physical force" are also considerably more substantial in the context of Section 922(g)(9) than they were in *Johnson*. After *Johnson*, a state-law felony battery offense that reaches intentional offensive touching cannot categorically qualify as a "violent felony" under Section 924(e)(2)(B)(i) and the defendant may not be eligible for the fifteen-year mandatory minimum sentence under the ACCA. But

he is still categorically prohibited form possessing a gun. See 18 U.S.C. 922(g)(1).

The Court's holding in *Johnson* is also unlikely to substantially limit the scope of the ACCA. As this Court recognized in *Johnson*, "simple battery" is "generally" punishable as a misdemeanor, not a felony, and thus would often fail to qualify as a predicate offense under the ACCA for other reasons. 559 U.S. at 141; cf. *id.* at 136 (noting that Florida battery offense is "ordinarily" a misdemeanor, but was a felony because the defendant was a recidivist); *id.* at 150 & n.4 (Alito, J., dissenting) (listing victim-specific felony battery or sexual battery statutes). And a non-qualifying battery offense may still qualify as a "violent felony" under the "residual clause" for crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." See 18 U.S.C. 924(e)(2)(B)(ii); cf. *Johnson*, 559 U.S. at 145 (holding that the government had waived that issue and declining to decide it).

In contrast, a holding that common-law misdemeanor battery does not constitute a "misdemeanor crime of domestic violence" will drastically impair the scope and effectiveness of Section 922(g)(9). If an offender previously convicted of a misdemeanor common-law battery offense against a family member is not subject to Section 922(g)(9), he generally will *not* be prohibited from possessing a firearm. And, unlike the ACCA, Section 922(g)(9) is limited to misdemeanor offenses like common-law battery. No "residual clause" could otherwise capture non-qualifying convictions. And common-law battery convictions represent a significant portion of the domestic-violence offenses that would otherwise

qualify as "misdemeanor crime[s] of domestic violence." A reading of "physical force" that would eviscerate the statute's core purpose cannot be reconciled with Congress's intent. See Part D, *infra*.

B. Even If "Violent" Physical Force Is Required, An Assault That Intentionally Results In Bodily Injury Necessarily Has, As An Element, The Use Of "Violent" Force

Even if "violent" physical force is required for an offense to qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9), respondent's conviction for intentionally or knowingly causing bodily injury to a family member has, as an element, the use of "violent" force. The court of appeals held otherwise because, in its view, respondent could have been convicted under the Tennessee statute for causing "a slight, nonserious physical injury with conduct that cannot be described as violent," such as "a paper cut or a stubbed toe." Pet. App. 16a-17a. The court's reasoning does not withstand scrutiny.

1. 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 Court did not require a degree of force capable of causing "serious" physical pain or "serious" injury to another person. It required only force "capable" of causing some "physical pain or injury." As the Court explained, the spectrum of "physical force" ranges from the "merest touch" to force that "rise[s] to the level of bodily injury." *Johnson*, 559 U.S. at 143 (quoting 18 U.S.C. 922(g)(8)(C)(ii)). Interpreting "physical force" in the ACCA to exclude the "merest touch," the Court explained, does not mean that force "ris[ing] to the level of bodily injury" is required. *Ibid.* And the Court

ultimately adopted a meaning of "physical force" falling somewhere between the "merest touch" and "bodily injury," *i.e.*, "that degree of force necessary to inflict pain." *Ibid.*[8]

That definition plainly encompasses the intentional causation of bodily harm. Force that is merely "capable" of causing physical pain or injury is, by definition, a lesser quantum of force than what is needed to *actually* cause bodily harm. See *De Leon Castellanos* v. *Holder*, 652 F.3d 762, 766 (7th Cir. 2011). A defendant can intentionally *cause* bodily injury only by knowingly using force capable of causing physical pain or injury. That is all *Johnson* requires. Respondent's domestic assault conviction for intentionally causing bodily injury therefore qualifies as a "misdemeanor crime of domestic violence"—even if "violent" force

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[8] The Court's discussion of the different degrees of force occurred in the context of distinguishing the language in Section 922(g)(8)(C)(ii), which requires the "use, attempted use, or threatened use of physical force against [an] intimate partner or child *that would reasonably be expected to cause bodily injury*." 18 U.S.C. 922(g)(8)(C)(ii) (emphasis added). That distinction bears even more weight in this context. Section 922(g)(8) immediately precedes Section 922(g)(9); the two subsections are aimed at a similar subject matter (namely, keeping guns away from abusive or potentially abusive family members); and they were adopted two years apart. Compare Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c)(3), 108 Stat. 2014, with 1997 Appropriations Act § 658(b), 110 Stat. 3009-372. Yet, Section 922(g)(9) does not require a use of force "that would reasonably be expected to cause bodily injury." Compare 18 U.S.C. 922(g)(8)(C)(ii), with 18 U.S.C. 921(a)(33)(A)(ii). It logically follows that when the degree of force used *does* inflict bodily injury, it necessarily is sufficient for purposes of Section 922(g)(9).

(*i.e.*, something more than the "merest touch") were required.[9]

2. The court of appeals' reliance on fanciful hypotheticals (such as a "paper cut" or "stubbed toe" (Pet. App. 17a)) is also insufficient to take respondent's conviction outside the reach of Section 922(g)(9). In *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), this Court made clear that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language"; it requires a "realistic probability," and not just a "theoretical possibility," that the state statute would be applied in a "nongeneric" way. *Id.* at 193; see *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (explaining that the "focus on the minimum

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[9] Although the Court in *Johnson* did not decide that issue, it plainly assumed that the intentional causation of bodily injury has, as an element, the use of such "violent" force. Battery under the Florida statute at issue in *Johnson* could have been committed in "one of three ways": (i) by "[i]ntentionally caus[ing] bodily harm"; (ii) by "intentionally str[iking] the victim"; or (iii) by "[a]ctually and intentionally touch[ing] the victim." 559 U.S. at 136-137 (first, fourth & fifth sets of brackets in original). Because the record provided no basis to conclude that the defendant's conviction had "rested upon anything more than the *least* of these acts," the Court focused on whether "[a]ctually and intentionally touch[ing]" another person involves the "use of physical force." *Ibid.* (emphasis added; brackets in original; internal quotation marks omitted). That the greater offense (*i.e.*, the intentional causation of bodily harm) would have qualified as a "violent felony" is implicit in the Court's reasoning. *Id.* at 136-137, 144-145; see *Johnson*, 559 U.S. at 151 & n.3 (Alito, J., dissenting) (citing, as state statutes that "reach both the use of violent force and force that is not violent but is unlawful and offensive," statutes that include assault or battery by causing bodily injury); cf. App. B, *infra*, 10a-16a.

conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense"). To establish the requisite probability, the Court instructed that an offender "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Duenas-Alvarez*, 549 U.S. at 193; see *Moncrieffe*, 133 S. Ct. at 1693 (rejecting the government's reliance on an "antique firearm" exception because, "[t]o defeat the categorical comparison," the defendant "would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms").

The same reasoning applies here. Respondent has suggested that *Duenas-Alvarez* applies only in determining whether a state crime counts as an enumerated offense under federal law (for example, "theft" or "burglary"), not in determining whether a state crime has "as an element" the use of physical force as required by the federal definition. See Br. in Opp. 19-20. But no sound reason justifies declining to apply *Duenas-Alvarez*'s analysis to the "elements" clause. The starting point for each clause is to identify the elements of the prior offense. As this Court made clear in *Taylor* v. *United States*, a state crime counts as an enumerated offense if it has "all the *elements* of" the enumerated crime's generic definition. 495 U.S. 575, 599 (1990) (emphasis added); *id.* at 598 (identifying the elements of generic "burglary" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)); *Duenas-Alvarez*, 549 U.S. at 186-187 (discussing *Taylor*). Indeed, the Court in *Taylor* relied in part on the "as an element" language in Section 924(e)(2)(B)(i) to conclude that Congress *also* intended to focus on the

"elements of the statute of conviction" for the crimes enumerated in Section 924(e)(2)(B)(ii). *Taylor*, 495 U.S. at 600-601. And, just last Term, the Court again emphasized that the "central feature" of the "categorical approach" is a "focus on the elements" and that courts must "compare the elements of the crime of conviction * * * with the elements of the generic crime." *Descamps* v. *United States*, 133 S. Ct. 2276, 2281, 2285 (2013). Accordingly, a prior conviction qualifies as an enumerated offense and, thus, a "violent felony" under Section 924(e)(2)(B)(ii), "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* at 2281.

That Section 921(a)(33)(A)(ii) requires that the state law predicate offense have a use-of-force *element*, therefore, does not distinguish this case from *Duenas-Alvarez*. See *United States* v. *Laurico-Yeno*, 590 F.3d 818, 822 & n.2 (9th Cir.) (principles set forth in *Duenas-Alvarez* apply "with equal force" to use-of-force prong of "crime of violence" definition), cert. denied, 131 S. Ct. 216 (2010); see also *United States* v. *McGuire*, 706 F.3d 1333, 1337 (11th Cir.), cert. denied, 133 S. Ct. 1744 (2013). Even an "elements-centric" approach (*Descamps*, 133 S. Ct. at 2287) requires more than "legal imagination" (*Duenas-Alvarez*, 549 U.S. at 193). The court of appeals identified no evidence that anyone has been prosecuted under Tenn. Code Ann. § 39-13-101(a)(1) for causing a paper cut or a stubbed toe. And respondent does not suggest that his conviction rested on such a slight injury. That is not surprising. Criminal prosecutions are not costless and minor slights (like a paper cut) are unlikely to give rise to criminal convictions. See *Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (The defendant

"did not tickle his wife with a feather during a domestic quarrel * * * . That would not have led to a prosecution."); *id.* at 672 (Evans, J., concurring) ("[P]eople don't get charged criminally for expending a newton of force against victims."); *United States* v. *Hays*, 526 F.3d 674, 683 n.3 (10th Cir. 2008) (Ebel, J., dissenting) (noting that "only incidents that were sufficiently severe to require police intervention and ultimately support a criminal conviction" will lead to prosecution under Section 922(g)(9)).

C. The District Court's More Expansive Holding That The Intentional Causation Of Bodily Injury Does Not Require *Any* Use Of Force Was Correctly Rejected By The Sixth Circuit

The Sixth Circuit agrees that the intentional causation of bodily injury requires the use of *some* force. See *United States* v. *Anderson*, 695 F.3d 390, 400-401 & n.4 (2012) (quoting *De Leon Castellanos*, 652 F.3d at 766). Because "violent" force is not required (see Part A, *supra*), and because, even if it were, intentionally causing bodily injury satisfies that test (see Part B, *supra*), that should be the end of the matter.

The district court, however, adopted a more expansive reason to dismiss the Section 922(g)(9) counts in this case. In its view, intentionally causing bodily injury does not have, as an element, the use of *any* physical force (violent or otherwise) because it "may be violated through coercion or deception rather than through" direct physical contact with the victim. Pet. App. 40a. For example, the district court explained, a person could "cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind," or by "coerc[ing] the victim into taking the drink." *Id.* at 41a; see *Unit-*

ed States v. *Hagen*, 349 Fed. Appx. 896 (5th Cir. 2009), cert. denied, 131 S. Ct. 457 (2010) (per curiam).[10] That reasoning is flawed three times over.

1. First, it wrongly assumes that the intentional causation of bodily injury through poisoning, deceit, or other subtle or indirect means does not entail the use of "force."[11] That is incorrect. In the context of common-law battery, the word "force" was not limited to making direct physical contact with the victim. See LaFave § 16.2(b), at 554 ("The force used need not be applied directly to the body of the victim," such as the "usual case where one shoots at another or strikes him with a knife, club or fist."). It included "indirect[]"

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[10] Several courts of appeals have held likewise in the context of other statutes that require a use-of-force element. See, *e.g.*, *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 878-883 (5th Cir. 2006) ("crime of violence" definition under 18 U.S.C. 16(a)), cert. denied, 549 U.S. 1245 (2007); *United States* v. *Perez-Vargas*, 414 F.3d 1282, 1285-1287 (10th Cir. 2005) ("crime of violence" definition under Sentencing Guidelines §2L.12, comment. (n.1(B)(iii))); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 194-196 (2d Cir. 2003) ("crime of violence" definition under 18 U.S.C. 16(a)).

[11] In the context of a Sentencing Guidelines provision, the Tenth Circuit concluded that drugging a victim does not involve the use of "physical" force. See *United States* v. *Rodriguez-Enriquez*, 518 F.3d 1191, 1194 (10th Cir. 2008). Although the court acknowledged the possibility "that the adjective *physical* before the word *force* is being used to distinguish the described force from a force generated by emotion, psychology, religion, or rhetoric," it opted for a definition of "physical" that requires a "mechanical impact." *Ibid.* ("[I]t is the presence of [a] mechanical impact that defines when force is physical. In contrast, the effect of poison on the body is achieved by chemical action, not mechanical impact."). In *Johnson*, this Court disagreed, holding that "[t]he adjective physical * * * plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force." 559 U.S. at 138.

applications of force by the "aggressor himself" or "by some substance which he puts into motion." *Ibid.*; Perkins 122; see Model Penal Code § 211.1, cmt. 1(a), at 175 ("The requirement of force could be satisfied directly, as by a blow of the fist, or indirectly, as by the use of a mechanical agent."); see also *Lynch* v. *Commonwealth*, 109 S.E. 427, 428 (Va. 1921).

The requisite "force" could therefore be satisfied by "administering a poison," "by infecting [a victim] with a disease," or by "threatening sudden violence and thereby causing another to jump from a window" or from "a moving vehicle." Perkins 122; LaFave § 16.2(b), at 554-555; see *Smith* v. *Smith*, 9 S.E.2d 584, 589-590 (S.C. 1940) ("While the word 'force' suggests to the mind a physical power, nevertheless, in the case of battery, deception may be the equivalent of force."); *Carr* v. *State*, 34 N.E. 533, 534 (Ind. 1893) ("If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force.") (citation omitted).[12]

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[12] See also, *e.g.*, *State* v. *Monroe*, 28 S.E. 547, 548 (N.C. 1897) (druggist who sold candy laced with sufficient croton oil to cause injury, knowing that the candy would be administered to another as a trick, was guilty of assault); *Commonwealth* v. *Stratton*, 114 Mass. 303, 303-304 (1873) (defendant, who offered the victim figs that had been drugged without the victim's knowledge, was guilty of assault and battery); *State* v. *Snyder*, 172 P. 364, 364-365 (Nev. 1918) (defendant, who used "constructive force" to administer poison that rendered victim unconscious for purposes of taking his money, was guilty of robbery requiring use of "force"); cf. *State* v. *Dawson*, 985 S.W.2d 941, 951-952 (Mo. App. 1999) (finding "physical contact" element of assault statute satisfied when defendant placed semen in the victim's coffee mug which she ingested).

The common-law understanding of the word "force" fits comfortably within the "misdemeanor crime of domestic violence" definition. The statute speaks generally of the "use" or "attempted use" of "physical force." It does not require a "direct" use of physical force. Nor does it dictate that the "aggressor himself" actually apply physical force to the victim. Indeed, unlike the definition of "violent felony" in Section 924(e)(B)(2)(i), the "misdemeanor crime of domestic violence" definition does not even require the use of physical force "against the person of another." Compare 18 U.S.C. 924(e)(2)(B)(i), with 18 U.S.C. 921(a)(33)(A)(ii). Because "Congress intends to incorporate the well-settled meaning of the common-law terms it uses," *Sekhar*, 133 S. Ct. at 2724 (citation omitted); see Part A, *supra*, that common-law meaning should control here. See *United States* v. *Evans*, 699 F.3d 858, 864 (6th Cir. 2012) ("A defendant uses physical force under [Sentencing Guidelines] § 4B1.2(a)(1)" whenever he "knowingly sets in motion a series of events that the defendant knows will result in the application of 'a force capable of causing physical pain or injury to another person.'") (quoting *Johnson*, 559 U.S. at 140).

Whether a person directly injects poison into the arm of his victim or instead poisons his victim's food, he has intentionally used the forceful physical properties of the poison to achieve his objective. As the Ninth Circuit explained in a case involving threatened anthrax poisoning, "the bacteria's physical effect on the body is no less violently forceful than the effect of a kick or blow." *United States* v. *De La Fuente*, 353 F.3d 766, 771 (2003). Similarly, by "luring [a] person to an ocean undertow or placing deadly poison in his

drink," the defendant is using "physical force against that person"—whether in the form of "water suffocating lungs, or cyanide disrupting metabolism." *United States* v. *Calderon-Pena*, 383 F.3d 254, 271 (5th Cir. 2004) (en banc) (Smith, J., dissenting) (Those forces, "[h]owever remote, * * * were still directed to work according to his will, as surely as was a swung fist or a fired bullet."), cert. denied, 543 U.S. 1076 (2005). In sum, an intentional battery requiring the actual injury of the victim involves the use of physical force, even if committed by subtle or indirect means.

2. Even if Section 921(a)(33)(A) were read to exclude any assault crime capable of commission by indirect and subtle uses of force (such as poisoning), that would not disqualify the Tennessee domestic assault statute as a "misdemeanor crime of domestic violence." As explained above, this Court has declined to rely on such "legal imagination" in applying the categorical approach. See *Duenas-Alvarez*, 549 U.S. at 193; *Moncrieffe*, 133 S. Ct. at 1684-1685. Respondent does not dispute that his domestic assault conviction involved direct physical contact with the mother of his child. Moreover, neither respondent nor the district court has pointed to other cases in which the state courts have applied Tennessee's misdemeanor domestic assault (or misdemeanor generic assault) statutes to, for example, a husband who poisoned his wife or a father who tricked his child into jumping out of her bedroom window. Purely hypothetical applications of Tennessee's bodily-injury domestic assault statute are insufficient to demonstrate that respondent's conviction does not qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9).

3. A contrary conclusion would lead to untoward consequences. As an initial matter, it could lead to the differential treatment of two common ways of committing battery: intentional offensive touching and intentionally causing bodily injury. If the Court agrees that "violent" physical force is not required in this context (see Part A, *supra*), battery by intentional touching would qualify as a "misdemeanor crime of domestic violence." But, under the district court's reasoning, battery by intentionally causing bodily injury would *not*. That result cannot be reconciled with this Court's clear (and common sense) statement in *Johnson* that battery by intentional touching is the "le[sser]" of the two offenses. 559 U.S. at 136-137; see note X, *supra*.

Many states, moreover, define a range of crimes against a person, from simple assault to murder, by specifying a particular result (*e.g.*, the causation of "bodily injury" or "death"), without explicitly specifying the means by which an offender must have achieved that result. See, *e.g.*, Ala. Code § 13A-6-2(a)(1) (LexisNexis Supp. 2012) ("A person commits the crime of murder if * * * [w]ith intent to cause the death of another person, he or she causes the death of that person or of another person."); Alaska Stat. § 11.41.100(a)(1) (2012) (similar); Ariz. Rev. Stat. Ann. § 13-1105(A)(1) (2010) (similar); Colo. Rev. Stat. § 18-3-102(1)(a) (2012) (similar); Conn. Gen. Stat. Ann. § 53a-54a(a) (West 2012) (similar). Many such offenses can be committed by means of subtle and indirect uses of physical force, as well as direct physical contact between the offender and the victim. See LaFave § 14.2(c), at 433 ("While the method of producing an intentional death is usually some weapon in the hands

of the murderer, * * * sometimes more subtle means are used."). Yet, under the district court's reasoning (and that of other courts of appeals) even murder would not have, as an element, the use of physical force, since it can be accomplished through indirect means such poisoning or deceit.

Congress could not have intended that result. Many federal provisions, like Section 921(a)(33)(A), define predicate acts to include offenses that have, as an element, the use of physical force. See, *e.g.*, 18 U.S.C. 16(a) (defining "crime of violence"); *Leocal* v. *Ashcroft*, 543 U.S. 1, 7 (2004) (noting that Section 16 has been "incorporated into a variety of statutory provisions, both criminal and noncriminal"); 18 U.S.C. 373(a), 521(c)(2), 924(c)(3)(A), 924(e)(2)(B)(i); cf. 20 U.S.C. 1161w(f)(3)(A)(ii) (Supp. V 2011); 28 U.S.C. 540A(c)(1). For example, under the district court's reasoning, someone who solicits another person to commit murder could not be charged with "[s]olicitation to commit a crime of violence" under 18 U.S.C. 373(a), because murder would not qualify as a crime of violence. That the federal statutes define the predicate offense by focusing on the conduct of the assailant rather than the impact on the victim, does not suggest that Congress intended to exclude quintessential violent crimes such as murder. See *United States* v. *Nason*, 269 F.3d 10, 19-20 (1st Cir. 2001) (The fact that "two statutory schemes examine the same act from divergent perspectives does not mean that they are irreconcilable."). Any interpretation that excludes them is highly suspect.[13]

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[13] If the Court concludes that assault by intentionally causing bodily injury has, as an element, the use of "physical force"—however that term is defined—it could reverse the decision below

D. Interpreting Section 922(g)(9) To Require The Use Of "Violent" Force And To Exclude Bodily-Injury Assault Would Unduly Constrict The Scope Of The Statute

The court of appeals' interpretation of Section 921(a)(33)(A)(ii) not only conflicts with the terms of that provision, it undermines the effective application of Section 922(g)(9) in a manner that Congress could not have intended.

1. As this Court recognized in *Hayes*, "[f]irearms and domestic strife are a potentially deadly combination nationwide." 555 U.S. at 427. In enacting Section 922(g)(9), Congress sought to provide a nationwide solution to that nationwide problem by prohibiting the possession of firearms by those convicted of crimes against their families. Section 922(g)(9), a supplement to the federal felon-in-possession law, 18 U.S.C. 922(g)(1), was necessary because existing laws "were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. at 22,985 (statement of Sen.

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without deciding whether "physical force" requires "violent" force under Section 921(a)(33)(A). See Part A, *supra*. There are, however, good reasons for the Court to decide that predicate definitional question as well. More than half of the States and the District of Columbia have assault or battery laws that reach intentional offensive touching, see App. B, *infra*, 10a-16a, and whether those convictions qualify as "misdemeanor crime[s] of domestic violence" depends entirely on the meaning of the term "physical force." See *Johnson* v. *United States*, 559 U.S. 133, 136-145 (2010). That question has given rise to a significant and longstanding circuit split, see Pet. 20-22; it was squarely decided by the court of appeals below, see Pet. App. 5a-15a; and it is fully presented here.

Lautenberg)); see *id.* at 22,986 (statement of Sen. Wellstone) ("In all too many cases unfortunately, if you beat up or batter your neighbor's wife it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor."). Section 922(g)(9) was intended to "close this dangerous loophole" by "keeping firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426 (quoting 142 Cong. Rec. at 22,985, 22,986); see 142 Cong. Rec. at 22,986, 22,987 (statements of Sens. Lautenberg & Wellstone).

2. The Sixth Circuit's construction of Section 922(g)(9) "frustrate[s]" that manifest purpose" because it would have rendered Section 922(g)(9) a practical nullity in nearly every State "from the very moment of its enactment." *Hayes*, 555 U.S. at 426-427.

As the Court noted in *Hayes*, most "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws." *Hayes*, 555 U.S. at 427; see *Johnson*, 559 U.S. at 153 ("Cases of spousal and child abuse are frequently prosecuted under generally applicable assault and battery statutes"); Perkins 121 ("[W]life beating is merely a particular instance of a battery.").[14] Virtually all of those generally applicable misdemeanor assault or battery statutes fall into one of two categories. The first

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[14] The traditional distinctions between assault and battery have blurred in recent years. A number of States (like Tennessee) punish the traditional elements of battery as "assault" or "assault and battery." See App. B, *infra*, 10a-20a; Model Penal Code § 211.1, cmt. 1, at 174 (noting that while "common law dealt with these wrongs separately," it "more closely accords with modern understanding to deal with them under [the] single label" of "assault"); see also LaFave § 16.1 n.2, at 551.

group follows the common law and defines misdemeanor assault or battery (either by statute or by judicial construction) to include intentional offensive touching or the intentional causation of bodily injury. The Tennessee assault statute at issue here (see Tenn. Code Ann. § 39-13-101), the Florida battery statute at issue in *Johnson* (Fla. Stat. 784.03(1)(a)), and the West Virginia battery statute at issue in *Hayes* (W. Va. Code Ann. § 61-2-9(c)) all incorporate that common-law rule. And, at the time of Section 922(g)(9)'s enactment, 28 States (including the aforementioned), as well as the District of Columbia, had adopted that approach. See App. B, *infra*, 10a-16a; see also *Johnson*, 559 U.S. at 151 & n.3 (noting that "[a]lmost half of the States" have such statutes).

The second group follows the Model Penal Code and defines assault and battery to include the intentional causation of bodily injury. See Model Penal Code § 211.1(1)(a); *id.* § 211.1, cmt. 3, at 187 ("explaining that "bodily injury" includes "pain, illness, or physical impairment caused indirectly," such as "exposing another to inclement weather or by nontherapeutic administration of a drug or narcotic"). Under that approach, "[m]ere offensive contact" without more does not constitute simple assault or battery. *Id.* § 211.1, cmt. 2, at 185. At the time of Section 922(g)(9)'s enactment, 18 States had adopted the Model Penal Code rule. See App. B, *infra*, 17a-19a.[15]

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[15] Under the federal assault statute, "[a]ssault by striking, beating, or wounding" is punishable by "imprisonment for not more than 1 year." 18 U.S.C. 113(a)(4). "Simple assault" is punishable by "imprisonment for not more than six months." *Id.* § 113(a)(5); see *United States* v. *Delis*, 558 F.3d 177, 181-182 (2d Cir. 2009)

Several States have separately enacted domestic assault or battery laws that are punishable as misdemeanors. As the Court noted in *Hayes*, only a minority of States had such statutes when Section 922(g)(9) was enacted. 555 U.S. at 427. Most of the domestic statutes largely track their generic assault and battery counterparts. Seven incorporate a definition of assault or battery that follows the common-law rule, while seven others adopt the Model Penal Code approach. See App. C, *infra*, 21a-24a. In the years since Section 922(g)(9) was enacted, more States have adopted statutes that specifically proscribe domestic assault or battery as a misdemeanor offense. Those newer statutes too generally cover the intentional causation of bodily injury, intentional offensive touching, or both. See App. D, *infra*, 26a-28a.

Under the decisions below, *none* of those statutes would give rise to a qualifying conviction under Section 922(g)(9). A conviction for intentional offensive touching would not qualify as a "misdemeanor crime of domestic violence" because it would not have, as an element, the use of "violent" force, as the court of appeals required. See Pet. App. 5a-15a; cf. *Johnson*, 559 U.S. at 138-145 (battery by "intentionally touch[ing]" the victim under Florida law does not require the use of "violent" force).[16] And a conviction

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(simple assault includes common-law battery); *id.* at 183 (citing cases).

[16] See also *United States* v. *White*, 606 F.3d 144, 153 (4th Cir. 2010) (domestic assault and battery by intentionally touching the victim under Virginia law does not require the use of "violent" force); *United States* v. *Hays*, 526 F.3d 674, 675, 681 (10th Cir. 2008) (simple assault and battery by intentionally touching the victim under Wyoming law does not require the use of "violent" force); *United States* v. *Belless*, 338 F.3d 1063, 1065, 1067-1069 (9th

for intentionally causing bodily injury would not constitute a "misdemeanor crime of domestic violence" either because (under the Sixth Circuit's reasoning) it would not have, as an element, the use of "violent" force, or (under the district court's reasoning) it would have not have, as an element, the use of *any* force. See Pet. App. 15a-17a, 41a.[17] Accordingly, convictions under the generic or domestic misdemeanor assault and battery laws in all but (at most) a handful of States would not qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9).[18]

Cir. 2003) (simple assault and battery by intentionally touching the victim under Wyoming law does not require the use of "violent" force).

[17] See *Hagen*, 349 Fed. Appx. at 897 (assault of a family member by intentionally causing bodily injury under Texas law does not require the use of physical force); cf. *Villegas-Hernandez*, 468 F.3d at 878-883 (assault by intentionally causing bodily injury under Texas law does not require the use of physical force); *Perez-Vargas*, 414 F.3d at 1285-1287 (assault by knowingly causing bodily injury under Colorado law does not require the use of physical force); *Chrzanoski*, 327 F.3d at 192-196 (assault by intentionally causing physical injury under Connecticut law does not require the use of physical force).

[18] That is not to suggest that the misdemeanor assault and battery laws in the remaining few States would qualify as "misdemeanor crime[s] of domestic violence" under the Sixth Circuit's decision. See App. B, *infra*, 20a (listing miscellaneous statutes); App. C, *infra*, 25a (same); App. D, *infra*, 29a (same). In most cases, they would not. See, *e.g.*, Alaska Stat. § 11.41.230 (1995) ("A person commits the crime of assault in the fourth degree if," *inter alia*, "that person recklessly causes physical injury to another person."); Iowa Code Ann. § 708.1 (West 1995) ("A person commits an assault when, without justification, the person," *inter alia*, commits "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insult-

That cannot be the law. Such an interpretation would render Section 922(g)(9) a virtual "dead letter" in all but (at most) a handful of States "from the very moment of its enactment." *Hayes*, 555 U.S. at 426-427 (rejecting an interpretation of Section 921(a)(33)(A) that would have rendered Section 922(g)(9) "'a dead letter' in some two-thirds of the States from the very moment of its enactment") (citation omitted); see *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009) (rejecting a reading of 8 U.S.C. 1101(a)(43)(M)(i) that would leave the provision with little application, doubting "Congress would have intended (M)(i) to apply in so limited and so haphazard a manner"); *Taylor*, 495 U.S. at 594 (declining to construe the ACCA's reference to "burglary" as meaning "common-law burglary," explaining that such a construction "would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition"). Given the "paucity of state and federal statutes" that conform to the court of appeals' approach, it is "highly improbable that Congress meant to extend [Section] 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers prosecuted" under the laws of (at most) a couple of States. *Hayes*, 555 U.S. at 427.[19]

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ing or offensive to another, coupled with the apparent ability to execute the act.").

[19] Domestic-violence related offenses may be prosecuted under statutes other than generic assault and battery or domestic assault and battery laws. See, *e.g.*, Ala. Code § 13A-6-132(a) (West 2013) (later enacted domestic violence law defines domestic violence to include several additional offenses including, for example, harassment); Nev. Rev. Stat. Ann. § 200.485(1) (similar). But a number of those misdemeanor convictions would likewise fail to satisfy the Sixth Circuit's heightened standard and, in any event, the Court

2. The practical effect of the court of appeals' decision cannot be mitigated by resort to the "modified categorical approach." In *Descamps*, the Court explained that the modified categorical approach is available "when a prior conviction is for violating a so-called 'divisible statute,'" *i.e.*, a statute that "sets out one or more elements of the offense in the alternative." 133 S. Ct. at 2281. Accordingly, the modified categorical approach would be available (at least theoretically) if a statute of conviction defined assault and battery as either "intentional offensive touching" or "the use of violent physical force."[20] Similarly, it would theoretically be available if a state statute defined assault and battery as either "causing bodily injury by the use of violent physical force" or "causing bodily injury by poisoning the victim" or, perhaps, "causing bodily injury by deceit."

But *Descamps* also held that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a

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should not attribute to Congress an intent to close what it viewed as a "dangerous loophole" (*Hayes*, 555 U.S. a 426 (citation omitted)) in such a "limited" and "haphazard" manner (*Nijhawan*, 557 U.S. at 40)

[20] Even when the statute is divisible, the modified categorical approach may often be unavailable in practice because state and local records generally track the statutory language and do not specify which one (of several) disjunctive elements the defendant violated. And records from closed misdemeanor cases are often incomplete. See *Johnson*, 559 U.S. at 145 (acknowledging that it "may well be true * * * that in many cases state and local records from battery convictions will be incomplete"); *id.* at 152 (Alito, J., dissenting) (agreeing that it will "often be impossible" for the government "to produce documents" to satisfy the modified categorical approach because, *inter alia*, "charging documents frequently simply track the language of the statute").

single, indivisible set of elements." 133 S. Ct. at 2282. And in this context state statutes are generally written in an indivisible, rather than divisible, fashion. The type of force actually used will rarely be a disjunctive element of a domestic or generic assault or battery offense. And the particular means used to inflict bodily injury (by force or deceit, for example) will rarely appear as separate elements.[21] Thus, even if the charging documents or the jury instructions made clear that the defendant in fact beat his wife by punching her in the face (rather than "poison[ing]" her (Pet. App. 41a) or "tickl[ing]" her with a feather (*Flores*, 350 F.3d at 670)), those details could not convert an otherwise non-qualifying offense into a "misdemeanor crime of domestic violence."

The Court in *Johnson* suggested that the modified categorical approach would still have some role to play in determining whether the predicate offense involved the use of "violent" force for purposes of the ACCA. 559 U.S. at 144-145. That suggestion makes sense when read alongside the Court's assumption that the other ways of committing battery under Florida law (including by intentionally causing bodily harm) would have involved the use of "violent" force and, thus, would have qualified as a "violent felony." See *id.* at 136; pp. XX-XX, *supra*. But the Sixth Circuit's decision turned that assumption on its head. Under that decision, the vast majority (indeed, virtually all) misdemeanor assault and battery laws do *not* "contain[] statutory phrases that cover several different generic

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[21] A few state assault and battery statutes do separately prohibit the intentional administration of poison or other controlled substances. See, e.g., Ark. Code Ann. § 5-13-203 (West 2013); La. Rev. Stat. Ann. § 14:33 (2013).

crimes, *some of which require violent force* and some of which do not." *Johnson*, 559 U.S. at 144 (emphasis added). And in a world where neither intentional offensive touching nor the intentional causation of bodily injury are sufficient, the modified categorical approach has precious little work to do.[22]

4. The damaging impact of the court of appeals' decision is by no means limited to criminal prosecutions under Section 922(g)(9). Under the Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536 (primarily codified at 18 U.S.C. 922(s)-(t)), federally licensed firearms dealers must verify that individuals who wish to purchase firearms are not prohibited from doing so under state or federal law. See 18 U.S.C. 922(t)(1); 28 C.F.R. 25.1. That verification is performed using the National Instant Criminal Background Check System (NICS), a computer system maintained by the Federal Bureau of Investigation. See 28 C.F.R. 25.3, 25.4. NICS, in turn, advises the licensee whether that prospective purchaser is prohibited by law from possessing or receiving a firearm. See 63 Fed. Reg. 58,272 (Oct. 29, 1998). Between NICS's creation in November 1998 and December 2012, misdemeanor crime of domestic violence convictions have accounted for more than 100,000 federal denials—the second most common reason for denying firearms to a prospective purchaser. See Federal Bureau of Investigation (FBI), *National Instant Background Check System (NICS) Operations 2012*, http://www.fbi.gov/about-us/cjis/nics/

[22] The modified categorical approach would still have a role to play with respect to disjunctive intent elements, see note 5, *supra*, but that would be irrelevant if the force requirement could not be satisfied.

reports/2012-operations-report (last visited Nov. 14, 2013).[23]

Under the Sixth Circuit's decision, that will no longer be true. Many persons convicted of domestic-violence related offenses will now be able to legally purchase a firearm. A domestic abuser who is convicted of a misdemeanor assault and battery offense in most (if not all) of the 50 States and the District of Columbia will be able to arm himself—even though there can be no serious dispute that "the great majority of convictions under" those statutes are "based on the use of violent force," *Johnson*, 559 U.S. at 152 (Alito, J., dissenting). The court of appeals' interpretation thus frustrates (if not destroys) Congress's "manifest purpose" to "keep[] firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426-427.

E. The Statute's History Further Confirms That Only The Common-Law Meaning Of "Force" Can Effectuate Congress' Intent

1. Section 922(g)(9)'s "drafting history" is admittedly limited, *Hayes*, 555 U.S. at 429, but it reveals a general understanding that domestic abusers were often prosecuted under generic assault and battery laws—and that Congress intended such generic laws to qualify as "misdemeanor crime[s] of domestic violence" under the newly adopted statutory provision. As the Court explained in *Hayes*, Senator Frank

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[23] In 2013, misdemeanor crime of domestic violence convictions fell to the third spot—behind fugitives from justice. See FBI, *Federal Denials*, http://www.fbi.gov/about-us/cjis/nics/reports/federal-denials-100313.pdf (last visited Nov. 14, 2013).

Lautenberg, the sponsor of the provision, observed in a floor statement that "[c]onvictions for domestic violence-related crimes often are for crimes, *such as assault*, that are not explicitly identified as related to domestic violence." 555 U.S. at 428 (emphasis added) (quoting 142 Cong. Rec. at 26,675)); cf. 142 Cong. Rec. at 19,415 (statement of Sen. Lautenberg) ("Assault your ex-wife, lose your gun.").

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has read Section 921(a)(33)(A) in a manner consistent with Senator Lautenberg's interpretation. In 1998, ATF amended its regulations concerning commerce in firearms and ammunition to implement Section 922(g)(9). See *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,520 (June 30, 1998); cf. 18 U.S.C. 926. The regulations define the term "Misdemeanor crime of domestic violence" as an offense that, *inter alia*, "[h]as, as an element, the use or attempted use of physical force (e.g., assault and battery)." 27 C.F.R. 478.11; see 27 C.F.R. 478.32(a)(9). In promulgating the regulation, ATF explained that

> The definition of misdemeanor crime of domestic violence includes all offenses that have as an element the use or attempted use of physical force (*e.g.*, assault and battery) if the offense is committed by one of the defined parties. * * * For example, a person convicted of misdemeanor assault and battery against his or her spouse would be prohibited from receiving or possessing firearms or ammunition.

63 Fed. Reg. at 35,521.

Since the ATF promulgated its regulation, Congress has several times amended Sections 921 and 922. Congress has never, however, repudiated the ATF's clear understanding that "assault and battery" offenses are the quintessential example of the sort of misdemeanor offense that would have, as an element, the use of physical force. Indeed, in the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (18 U.S.C. 922 note (Supp. V 2011)), Congress incorporated the existing statutory definition of the term without change. *Id.* § 3, 121 Stat. 2561. That Congress has not altered the ATF's interpretation suggests that ATF has correctly interpreted the statutory language. See, *e.g.*, *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982).

2. In his brief in opposition, respondent argued that the "statutory background" confirmed that Congress was concerned with "*violent* conduct." Br. in Opp. 11-12. That is surely correct. Congress *was* concerned with "violent conduct" and "serious spousal or child abuse." 142 Cong. Rec. at 19,415 (statement of Sen. Lautenberg). 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. at 22,987 (statement of Sen. Lautenberg). 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 (statement of Sen. Lautenberg). But the decisions below that respondent defends thwart that undisputed purpose. As explained above (see Part D, *supra*), the vast majority of domestic-violence related misdemeanor offenses (including those from Senator Lautenberg's home state) would not qualify as "mis-

demeanor crime[s] of domestic violence" under the Sixth Circuit's approach—even when the underlying abusive conduct was "serious" or "violent" under any conceivable definition. Accordingly, the husband who "treat[s]" his wife "to a fist in the face" *will* have the opportunity to "come home with a gun and take" her life. The man who "beat his wife brutally" but "pleaded down to a misdemeanor" *will* be able to later "reach for the gun he keeps in his drawer." And the "dangerous loophole" (*Hayes*, 555 U.S. at 426 (citation omitted)) Congress sought to close would remain wide open. In contrast, applying Section 922(g)(9) to cover the classic assault and battery statutes that were and are commonly used to prosecute spousal abuse and domestic violence would fill the gap that Congress intended to address.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2013

APPENDIX A

1. 18 U.S.C. 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(33)(A) Except as provided in subparagraph (C)[2], the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[3] 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 current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was

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[2] So in original. No subparagraph (C) has been enacted.

[3] So in original. Probably should not be capitalized

entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

* * * * *

2. 18 U.S.C. 922 provides in pertinent part:

Unlawful Acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physi-

cal force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

3. 18 U.S.C. 924 provides in pertinent part:

Penalties

(e)(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

* * * * *

4. Tennessee Code Ann. § 39-13-101 (West 2001) provides:

Assault.—

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

(b) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor

5. Tennessee Code Ann. § 39-11-106 (West 2001) provides in pertinent part:

(a) As used in this title, unless the context requires otherwise:

* * * * *

(2) "Bodily injury" includes a cut, abrasion, bruise, burn or disfigurement; and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty;

6. Tennessee Code Ann. § 39-13-111 (West 2001) provides:

> (a) As used in this section, "family or household member" means spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person regardless of whether they have been married or resided together at any time.
>
> (b) A person who commits domestic assault who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member.
>
> (c) Domestic assault is punishable the same as assault in § 39-13-101.

7. Tennessee Code Ann. § 39-13-111 (West Supp. 2012) provides:

Domestic assault.

(a) As used in this section, "domestic abuse victim" means any person who falls within the following categories:

> (1) Adults or minors who are current or former spouses;
>
> (2) Adults or minors who live together or who have lived together;
>
> (3) Adults or minors who are dating or who have dated or who have or had a sexual relationship, but does not include fraternization between two (2) individuals in a business or social context;

(4) Adults or minors related by blood or adoption;

(5) Adults or minors who are related or were formerly related by marriage; or

(6) Adult or minor children of a person in a relationship that is described in subdivisions (a)(1)-(5).

(b) A person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim.

(c)(1) A first conviction for domestic assault and a second or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(2) and (a)(3) is punishable the same as assault under § 39-13-101, and additionally, as provided in subdivisions (c)(2) and (c)(3) and subsection (d) of this section.

(2) A second conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1) is punishable by a fine of not less than three hundred fifty dollars ($350) nor more than three thousand five hundred dollars ($3,500), and by confinement in the county jail or workhouse for not less than thirty (30) days, nor more than eleven (11) months and twenty-nine (29) days.

(3) A third or subsequent conviction for domestic assault committed in a manner prohibited by § 39-13-101(a)(1), is punishable by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand dollars ($5,000), and by confinement in the county jail or workhouse for not less than ninety (90) days, nor more than eleven (11) months and twenty-nine (29) days.

(4) For purposes of this section, a person who is convicted of a violation of § 39-13-111 committed in a manner prohibited by § 39-13-101(a)(1), shall not be subject to the enhanced penalties prescribed in this subsection (c), if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of § 39-13-111, committed in a manner prohibited by § 39-13-101(a)(1), that resulted in a conviction for such offense.

(5) In addition to any other punishment that may be imposed for a violation of this section, if, as determined by the court, the defendant possesses the ability to pay a fine in an amount not in excess of two hundred twenty-five dollars ($225), then the court shall impose a fine at the level of the defendant's ability to pay, but not in excess of two hundred twenty-five dollars ($225). The additional fine shall be paid to the clerk of the court imposing sentence, who shall transfer it to the state treasurer, who shall credit the fine to the general fund. All fines so credited to the general fund shall be subject to appropriation by the general assembly for the exclusive purpose of funding family violence shelters and shelter services. This appropriation shall be in addition to any amount appropriated pursuant to § 67-4-411.

(6) A person convicted of a violation of this section shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by § 36-3-625.

(d) As part of a defendant's alternative sentencing for a violation of this section, the sentencing judge

may direct the defendant to complete a drug or alcohol treatment program or available counseling programs that address violence and control issues including, but not limited to, a batterer's intervention program that has been certified by the domestic violence state coordinating council. Completion of a noncertified batterer's intervention program shall only be ordered if no certified program is available in the sentencing county. No batterer's intervention program, certified or noncertified, shall be deemed complete until the full term of the program is complete, and a judge may not require a defendant to attend less than the full term of a program as part of a plea agreement or otherwise. The defendant's knowing failure to complete such an intervention program shall be considered a violation of the defendant's alternative sentence program and the sentencing judge may revoke the defendant's participation in such program and order execution of sentence.

APPENDIX B

STATE MISDEMEANOR ASSAULT AND BATTERY STATUTES IN EFFECT WHEN SECTION 922(G)(9) WAS ENACTED

Bodily Injury or Offensive Touching Statutes:

Arizona: Ariz. Rev. Stat. Ann. § 13-1203(A) (1995) ("A person commits assault by," *inter alia*, "intentionally[] [or] knowingly * * * causing any physical injury to another person" or "[k]nowingly touching another person with the intent to injure, insult or provoke such person.").

California: Cal. Penal Code § 242 (West 1995) ("A battery is any willful and unlawful use of force or violence upon the person of another."); *People* v. *Pinholster*, 824 P.2d 571, 622 (Cal.) ("[A]ny harmful or offensive touching constitutes an unlawful use of force or violence.") (brackets in original; citation omitted), cert. denied, 506 U.S. 921 (1992).

Delaware: Del. Code Ann. tit. 11, § 601 (West 1995) ("One is guilty of offensive touching when one intentionally touches another person * * * knowing that one is thereby likely to cause offense or alarm to such other person."); *id.* § 611 ("A person is guilty of assault in the third degree when," *inter alia*, "[t]he person intentionally * * * causes physical injury to another person.").

District of Columbia: D.C. Code § 22-504(a) (1995) (setting out penalties for assault); *Ray* v. *United States*, 575 A.2d 1196, 1199 (D.C. 1990) ("[A]n assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no actual physical harm to the victim.").

Florida: Fla. Stat. Ann. § 784.03(1) (West 1995) ("A person commits battery if he" "[a]ctually and intentionally touches or strikes another person against the will of the other" or "[i]ntentionally causes bodily harm to an individual.").

Georgia: Ga. Code Ann. § 16-5-23(a) (West 1995) ("A person commits the offense of simple battery when he" "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another" or "[i]ntentionally causes physical harm to another."); *id.* § 16-5-23.1(a) ("A person commits the offense of battery when he intentionally causes substantial physical harm or visible bodily harm to another.").

Illinois: 720 Ill. Comp. Stat. Ann. § 5/12-3(a) (West 1995) ("A person commits battery if he intentionally or knowingly without legal justification and by any means" "causes bodily harm to an individual" or "makes physical contact of an insulting or provoking nature with an individual.").

Indiana: Ind. Code Ann. § 35-42-2-1(1)(a) (West 1995) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor."); *id.* § 35-42-2-1(1)(a)(1) (providing that battery is a "Class A misdemeanor if it results in bodily injury to any other person").

Kansas: Kan. Stat. Ann. § 21-3412 (West 1995) ("Battery is," *inter alia*, "[i]ntentionally * * * causing bodily harm to another person" or "intentionally causing physical contact with another person when done in a rude, insulting or angry manner.").

Louisiana: La. Rev. Stat. Ann. § 14:33 (1995) ("Battery is," *inter alia*, "the intentional use of force or violence upon the person of another."); *State* v. *Schenck*, 513 So.2d 1159, 1165 (La. 1987) ("An essential element of battery is 'physical contact whether injurious or merely offensive.'") (citation omitted).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207 (1995) ("A person is guilty of assault if he," *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury or offensive physical contact to another.").

Maryland: *Snowden* v. *State*, 583 A.2d 1056, 1059 (Md. 1991) ("Battery * * * is the unlawful application of force to the person of another."); *Kellum* v. *State*, 162 A.2d 473, 476 (Md. 1960) ("It is well settled that any unlawful force used against the person of another, no matter how slight, will constitute a battery.").[1]

Massachusetts: Mass. Gen. Laws Ann. ch. 265, § 13A (West 1995) (setting out penalties for assault and assault and battery); *Commonwealth* v. *Campbell*, 226 N.E.2d 211, 218 (Mass. 1967) ("An assault and battery is the intentional and unjustified use of force upon the person of another, however slight.") (citation omitted).

Michigan: Mich. Comp. Laws Ann. § 750.81(1) (West 1995) (setting out penalties for assault and assault and battery); *People* v. *Nickens*, 685 N.W.2d

[1] Maryland has now codified its common-law misdemeanor battery offense. Md. Code Ann., Crim. Law § 3-201(b) (West 2013) ("'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."); *Robinson* v. *State*, 728 A.2d 698, 701-702 (Md. 1999) (describing shift from common-law to statutory crimes).

657, 661 (Mich. 2004) ("[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.") (citation and internal quotation marks omitted).

Missouri: Mo. Ann. Stat. § 565.070(1)(1) and (5) (West 1995) ("A person commits the crime of assault in the third degree if," *inter alia*, the person "recklessly causes physical injury to another person" or "knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.").

Montana: Mont. Code Ann. § 45-5-201(1)(a) and (c) (1995) ("A person commits the offense of assault if" the person, *inter alia*, "purposely or knowingly causes bodily injury to another" or "purposely or knowingly makes physical contact of an insulting or provoking nature with any individual.").

Nevada: Nev. Rev. Stat. Ann. § 200.481(1)(a) (West 1995) ("'Battery' means any willful and unlawful use of force or violence upon the person of another."); *Hobbs* v. *State*, 251 P.3d 177, 180 (Nev. 2011) ("[B]attery is the intentional and unwanted exertion of force upon another, however slight.").

New Hampshire: N.H. Rev. Stat. Ann. § 631: 2-a(I)(a) (1995) ("A person is guilty of simple assault if" the person, *inter alia*, "[p]urposely or knowingly causes bodily injury or unprivileged physical contact to another.").

New Mexico: N.M. Stat. Ann. § 30-3-4 (West 1995) ("Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.").

North Carolina: N.C. Gen. Stat. Ann. § 14-33(a) (West 1995) ("Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor."); *State* v. *West*, 554 S.E.2d 837, 840 (N.C. Ct. App. 2001) (Battery is "the unlawful application of force to the person of another by the aggressor himself, or by some substance which he puts in motion," and "may be proved by evidence of any unlawful touching of [a] person.") (brackets in original; citation omitted).

Oklahoma: Okla. Stat. Ann. tit. 21, § 642 (West 1995) ("A battery is any willful and unlawful use of force or violence upon the person of another."); *Steele* v. *State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989) ("[O]nly the slightest touching is necessary to constitute the 'force or violence' element of battery.").

Rhode Island: R.I. Gen. Laws § 11-5-3(a) (West 1995) (setting out penalties for simple assault and battery); *State* v. *Coningford*, 901 A.2d 623, 630 (R.I. 2006) (Battery "refers to an act that was intended to cause, and does cause, an offensive contact with or unconsented touching of or trauma upon the body of another.") (citation and internal quotation marks omitted).

South Carolina: *State* v. *Mims*, 335 S.E.2d 237, 237 (S.C. 1985) (per curiam) ("Assault and battery is defined as 'any touching of the person of an individual in

a rude or angry manner, without justification.'") (citation omitted).[2]

Tennessee: Tenn. Code Ann. § 39-13-101(a)(1) and (3) (West 1995) ("A person commits assault" when the person, *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another" or "[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.").

Texas: Tex. Penal Code Ann. § 22.01(a)(1) and (3) (West 1996) ("A person commits an [assault] if the person," *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury to another" or "intentionally or knowingly causes physical contact with another person when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.").

Virginia: Va. Code Ann. § 18.2-57 (West 1995) (setting out penalties for simple assault and assault and battery); *Wood* v. *Commonwealth*, 140 S.E. 114, 115 (Va. 1927) ("A battery consists of the wilful or unlawful touching of the person of another by the assailant, or by some object set in motion by him.").

Washington: Wash. Rev. Code Ann. § 9A.36.041(1) (West 1995) ("A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."); *State* v.

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[2] South Carolina has now codified an assault and battery offense. S.C. Code Ann. § 16-3-600(E)(1) (2013) ("A person commits the offense of assault and battery in the third degree if the person," *inter alia*, "unlawfully injures another person.").

Stevens, 143 P.3d 817, 821 (Wash. 2006) ("The term assault itself is not statutorily defined so Washington courts apply the common law definition" which includes, *inter alia*, "an unlawful touching with criminal intent.").

West Virginia: W. Va. Code Ann. § 61-2-9(c) (West 1995) (defining battery as "unlawfully and intentionally mak[ing] physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally caus[ing] physical harm to another person").

Wyoming: Wyo. Stat. Ann. § 6-2-501(b) (West 1995) ("A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally[] [or] knowingly * * * causes bodily injury to another.").[3]

[3] Wyoming has since amended its simple assault statute in response to the Tenth Circuit's decision in *United States* v. *Hays*, 526 F.3d 674 (2008). See Wyo. Stat. Ann. § 6-2-501(b) (2013) ("A person is guilty of battery if he intentionally[] [or] knowingly * * * causes bodily injury to another person by use of physical force."); *id.* § 6-2-501(g) ("A person is guilty of unlawful contact if he," *inter alia*, "[t]ouches another person in a rude, insolent or angry manner without intentionally using sufficient physical force to cause bodily injury to another.").

Bodily Injury Statutes:

Alabama: Ala. Code § 13A-6-22(a)(1) (1995) ("A person commits the crime of assault in the third degree if," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes physical injury to any person.").

Arkansas: Ark. Code Ann. § 5-13-203 (West 1995) ("A person commits battery in the third degree" by, *inter alia*, "purpose[ly] * * * causing physical injury to another person.").

Colorado: Colo. Rev. Stat. Ann. § 18-3-204 (West 1995) ("A person commits the crime of assault in the third degree if he," *inter alia*, "knowingly * * * causes bodily injury to another person.").

Connecticut: Conn. Gen. Stat. Ann. § 53a-61(a) (West 1995) ("A person is guilty of assault in the third degree when," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person.").

Hawaii: Haw. Rev. Stat. § 707-712(1)(a) (West 1995) ("A person commits the offense of assault in the third degree if he," *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another person.").

Kentucky: Ky. Rev. Stat. Ann. § 508.030(1)(a) (West 1995) ("A person is guilty of assault in the fourth degree when," *inter alia*, the person "intentionally * * * causes physical injury to another person.").

Minnesota: Minn. Stat. Ann. § 609.224(1) (West 1995) (A person "commits an assault" when that per-

son, *inter alia*, "intentionally inflicts * * * bodily harm upon another.").

Mississippi: Miss. Code Ann. § 97-3-7(1)(a) (West 1995) ("A person is guilty of simple assault if he," *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury to another.").

Nebraska: Neb. Rev. Stat. § 28-310(1)(a) (West 1995) ("A person commits the offense of assault in the third degree if" the person, *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another person.").

New Jersey: N.J. Stat. Ann. § 2C:12-1(a)(1) (West 1995) ("A person is guilty of assault if" the person, *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury to another.").

New York: N.Y. Penal Law § 120.00(1) (McKinney 1995) ("A person is guilty of assault in the third degree when," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person.").

North Dakota: N.D. Cent. Code Ann. § 12.1-17-01 (West 1995) ("A person is guilty of a [simple assault] if that person," *inter alia*, "[w]illfully causes bodily injury to another human being.").

Ohio: Ohio Rev. Code Ann. § 2903.13(A) (West 1995) ("No person shall knowingly cause * * * physical harm to another.").

Oregon: Or. Rev. Stat. Ann. § 163.160(1)(a) (West 1995) ("A person commits the crime of assault in the fourth degree if the person," *inter alia*, "[i]ntent-

ionally[] [or] knowingly * * * causes physical injury to another.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 2701(a) (West 1995) ("A person is guilty of assault" if the person, *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury to another.").

South Dakota: S.D. Codified Laws § 22-18-1(5) (1995) ("Any person who," *inter alia*, "[i]ntentionally causes bodily injury to another which does not result in serious bodily injury[] is guilty of simple assault.").

Vermont: Vt. Stat. Ann. tit. 13, § 1023(a)(1) (West 1995) ("A person is guilty of simple assault if he," *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury to another.").

Wisconsin: Wis. Stat. Ann. § 940.19 (West 1996) (defining battery as "caus[ing] bodily harm to another by an act done with the intent to cause bodily harm to that person or another without the consent of the person so harmed").

Miscellaneous Statutes:

Alaska: Alaska Stat. Ann. § 11.41.230(a)(1) (West 1995) ("A person commits the crime of assault in the fourth degree if," *inter alia*, "that person recklessly causes physical injury to another person.").

Idaho: Idaho Code Ann. § 18-903 (West 1995) ("A battery is any" "[w]illful and unlawful use of force or violence upon the person of another," "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other," or "[u]nlawfully and intentionally causing bodily harm to an individual.").

Iowa: Iowa Code Ann. § 708.1(1) (West 1995) ("A person commits an assault when, without justification, the person," *inter alia*, commits "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.").

Utah: Utah Code Ann. § 76-5-102(1)(c) (West 1995) ("Assault is," *inter alia*, "an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.").

APPENDIX C

STATE MISDEMEANOR DOMESTIC VIOLENCE STATUTES IN EFFECT WHEN SECTION 922(g) WAS ENACTED

Bodily Injury or Offensive Touching Statutes:

California: Cal. Penal Code § 243(e)(1) (West 1995) (defining domestic violence as "a battery * * * committed against [a family or household member]"); *id.* § 242 ("A battery is any willful and unlawful use of force or violence upon the person of another."); *People* v. *Pinholster*, 824 P.2d 571, 622 (Cal.) ("[A]ny harmful or offensive touching constitutes an unlawful use of force or violence.") (brackets in original; citation omitted), cert. denied, 506 U.S. 921 (1992).

Illinois: 720 Ill. Comp. Stat. Ann. § 5/12-3.2(a) (West 1995) ("A person commits Domestic Battery if he intentionally or knowingly without legal justification by any means" "[c]auses bodily harm to" or "[m]akes physical contact of an insulting or provoking nature with any [enumerated] family or household member.").

Michigan: Mich. Comp. Laws Ann. § 750.81(2) (West 1995) ("[A]n individual who assaults or assaults and batters [a family or household member] is guilty of a misdemeanor."); *People* v. *Nickens*, 685 N.W.2d 657, 661 (Mich. 2004) ("[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.") (citation and internal quotation marks omitted).

New Mexico: N.M. Stat. Ann. § 30-3-15(A) (West 1995) ("Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner.").

Oklahoma: Okla. Stat. Ann. tit. 21, § 644(C) (West 1996) (defining domestic abuse as assault and battery against a family or household member); *id.* § 642 ("A battery is any willful and unlawful use of force or violence upon the person of another."); *Steele* v. *State*, 778 P.2d 929, 931 (Okla. Crim. App. 1989) ("[O]nly the slightest touching is necessary to constitute the 'force or violence' element of battery.").

Virginia: Va. Code Ann. § 18.2-57.2(A) (West 1995) ("Any person who commits an assault and battery against a family or household member shall be guilty of a Class 1 misdemeanor."); *Wood* v. *Commonwealth*, 140 S.E. 114, 115 (Va. 1927) ("A battery consists of the wilful or unlawful touching of the person of another by the assailant, or by some object set in motion by him.").

West Virginia: W. Va. Code Ann. § 61-2-28(a) (West 1995) ("If any family or household member unlawfully * * * makes physical contact of an insulting or provoking nature with another family or household member or unlawfully and intentionally causes physical harm to another family or household member, he or she is guilty of a misdemeanor.").

Bodily Injury Statutes:

Arkansas: Ark. Code Ann. § 5-26-305(a)(1) and (4) (West 1995) ("A person commits domestic battering in the third degree" by, *inter alia*, "purpose[ly] * * * caus[ing] physical injury to a family or household member.").

Georgia: Ga. Code Ann. § 16-5-23.1(f)(1) (West 1996) ("If the offense of battery is committed between [family or household members], then such offense shall constitute the offense of family violence battery and * * * [u]pon a first conviction of family battery, the defendant shall be guilty of and punished for a misdemeanor."); *id.* § 16-5-23.1(a) ("A person commits the offense of battery when he or she intentionally causes substantial physical harm or visible bodily harm to another.").[4]

Minnesota: Minn. Stat. Ann. § 609.2242(1)(2) (West 1996) (defining domestic assault as, *inter alia*, "intentionally inflict[ing] * * * bodily harm upon" a family or household member).

Montana: Mont. Code Ann. § 45-5-206(1)(a) (1995) ("A person commits the offense of partner or family member assault if the person," *inter alia*, "purposely

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[4] Georgia has since amended its misdemeanor domestic violence statute to encompass simple battery committed against a family or household member. Ga. Code Ann. § 16-5-23(f) (West 2013) ("If the offense of simple battery is committed between [family and household members,] the defendant shall be punished for a misdemeanor of a high and aggravated nature."); *id.* § 16-5-23(a) ("A person commits the offense of simple battery when he or she either" "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another" or "[i]ntentionally causes physical harm to another.").

or knowingly causes bodily injury to a partner or family member.").

Ohio: Ohio Rev. Code Ann. § 2919.25(A) (West 1995) ("No person shall knowingly cause * * * physical harm to a family or household member.").

South Carolina: S.C. Code 1976 § 16-25-20(1) (1995) ("It is unlawful to," *inter alia*, "cause physical harm or injury to a person's own household member.").

Vermont: Vt. Stat. Ann. tit. 13, § 1042 (West 1995) ("Any person who * * * willfully * * * causes bodily injury to a family or household member" is guilty of domestic assault.).

Miscellaneous Statutes:

Hawaii: Haw. Rev. Stat. § 709-906(1) (West 1995) ("It shall be unlawful for any person * * * to physically abuse a family or household member.").

Idaho: Idaho Code Ann. § 18-918(3) (West 1995) ("An adult household member who commits a battery, as defined in section 18-903, Idaho Code, against another adult household member is guilty of domestic battery."); *id.* § 18-903 ("A battery is any" "[w]illful and unlawful use of force or violence upon the person of another" or "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other" or "[u]nlawfully and intentionally causing bodily harm to an individual.").

Iowa: Iowa Code Ann. § 708.2A(1) (West 1995) ("'[D]omestic abuse assault' means an assault, as defined in section 708.1" against certain family or household members.); *id.* § 708.1 ("A person commits an assault when, without justification, the person," *inter alia*, commits "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act."); *id.* § 708.2A(2)(a) (Domestic abuse assault defined as simple misdemeanor.); *id.* § 708.2A(2)(b) (Domestic abuse assault is a serious misdemeanor if "committed without the intent to inflict a serious injury upon another, and the assault causes bodily injury or disabling mental illness."); *id.* § 708.2A(2)(c) (Domestic abuse assault is an aggravated misdemeanor if, *inter alia*, "committed with the intent to inflict a serious injury upon another.").

APPENDIX D

LATER ENACTED STATE DOMESTIC VIOLENCE STATUTES

Bodily Injury or Offensive Touching Statutes:

Kansas: Kan. Stat. Ann. § 21-5414(a) (West 2013) ("Domestic battery is," *inter alia*, "[k]nowingly * * * causing bodily harm by a family or household member against a family or household member" or "knowingly causing physical contact with a family or household member by a family or household member when done in a rude, insulting or angry manner.").

Louisiana: La. Rev. Stat. Ann. § 14:35.3(A) (2013) ("Domestic abuse battery is the intentional use of force or violence committed by one household member upon the person of another household member."); *State* v. *Schenck*, 513 So. 2d 1159, 1165 (La. 1987) ("An essential element of battery is 'physical contact whether injurious or merely offensive.'") (citation omitted).

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1) (2013) ("A person is guilty of domestic violence assault if" "[t]he person violates section 207 and the victim is a family or household member."); *id.* § 207 ("A person is guilty of assault if * * * [t]he person," *inter alia*, "intentionally[] [or] knowingly * * * causes bodily injury or offensive physical contact to another person.").

Missouri: Mo. Ann. Stat. § 565.074(1)(1) and (5) (West 2013) ("A person commits the crime of domestic assault in the third degree if the act involves a family or household member" and, *inter alia*, "[t]he person * * * recklessly causes physical injury to such

family or household member" or "[t]he person knowingly causes physical contact with such family or household member knowing the other person will regard the contact as offensive.").

Nevada: Nev. Rev. Stat. Ann. § 33.018(1)(a) (West 2013) (defining domestic violence as, *inter alia*, "[a] battery" committed against a family or household member); *id.* § 200.485(1) (setting out penalties for domestic battery); *id.* § 200.481(1)(a) ("'Battery' means any willful and unlawful use of force or violence upon the person of another."); *Hobbs* v. *State*, 251 P.3d 177, 180 (Nev. 2011) ("[B]attery is the intentional and unwanted exertion of force upon another, however slight.").

Tennessee: Tenn. Code Ann. § 39-13-111(b) (West 2013) ("A person commits domestic assault who commits an assault as defined in [Section] 39-13-101 against" a family or household member.); *id.* § 39-13-101(a)(1) and (3) ("A person commits assault who," *inter alia*, "[i]ntentionally[] [or] knowingly * * * causes bodily injury to another" or "[i]ntentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.").

Bodily Injury Statutes:

Alabama: Ala. Code § 13A-6-132(a) (West 2013) ("A person commits domestic violence in the third degree if the person," *inter alia*, "commits the crime of assault in the third degree pursuant to Section 13A-66-22 * * * and the victim is a [family or household member]."); *id.* § 13A-6-22(a)(1) ("A person commits the crime of assault in the third degree if," *inter alia*, "[w]ith intent to cause physical injury to another person, he causes physical injury to any person.").

Mississippi: Miss. Code Ann. § 97-3-7(3)(a)(i) (West 2013) ("A person is guilty of simple domestic violence who," *inter alia*, "purposely[] [or] knowingly * * * causes bodily injury" to a family or household member.).

Nebraska: Neb. Rev. Stat. § 28-323(1)(a) (2013) ("A person commits the offense of domestic assault in the third degree if he or she," *inter alia*, "[i]ntentionally and knowingly causes bodily injury to his or her intimate partner.").

North Dakota: N.D. Cent. Code Ann. § 12.1-17-01(2)(b) (West 2013) (simple assault is "[a] Class B misdemeanor for the first offense when the victim is" a family or household member); *id.* § 12.1-17-01(1)(a) ("A person is guilty of [simple assault] if that person," *inter alia*, "[w]illfully causes bodily injury to another human being.").

Miscellaneous Statutes:

Indiana: Ind. Code Ann. § 35-42-2-1.3(a) (West 2013) ("A person who knowingly or intentionally touches an individual who [is a family or household member] in a rude, insolent, or angry manner that results in bodily injury to [that] person * * * commits domestic battery, a Class A misdemeanor.").

Utah: Utah Code Ann. § 77-36-1(4)(b) (West 2013) (defining domestic violence as, *inter alia*, an assault under Section 76-5-102 "by one cohabitant against another"); *id.* § 76-5-102(1)(a) ("Assault is," *inter alia*, "an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another."); *id.* § 76-5-102(2) and 77-36-1.1(2)(b) (enhancing penalty for "domestic violence" assault to a class A misdemeanor).