No. 14-10154

In the Supreme Court of the United States

STEPHEN L. VOISINE AND WILLIAM E. ARMSTRONG, III,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST 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 petitioners' Maine convictions for misdemeanor domestic assault by recklessly causing bodily injury or offensive physical contact qualify as "misdemeanor crime[s] of domestic violence" under Sections 922(g)(9) and 921(a)(33)(A).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 6-90) is reported at 778 F.3d 176. A prior opinion of the court of appeals in petitioner Armstrong's case is reported at 706 F.3d 1. A prior opinion of the court of appeals in petitioner Voisine's case is not published in the Federal Reporter but is reprinted at 495 Fed. Appx. 101.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2015. A petition for rehearing was denied on March 31, 2015 (J.A. 91-92). The petition for a writ of certiorari was filed on June 4, 2015. The petition was granted on October 30, 2015. 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.

STATEMENT

Following conditional guilty pleas in the United States District Court for the District of Maine, each petitioner was convicted of possessing firearms or ammunition, or both, after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Petitioner Voisine was also convicted of killing a bald eagle, in violation of 16 U.S.C. 668(a). Petitioner Armstrong was sentenced to three years of probation. Petitioner Voisine was sentenced to one year and one day of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed petitioners' convictions in separate opinions. 706 F.3d 1; 495 Fed. Appx. 101 (per curiam). This Court granted their joint petition for a writ of certiorari, vacated the judgments, and remanded to the court of appeals for further consideration in light of *United States* v. *Castleman*, 134 S. Ct. 1405 (2014). See 134 S. Ct. 1759 (2014). On remand, the court of appeals consolidated the cases and once again affirmed. J.A. 6-28.

1. a. 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 passed the "Lautenberg Amendment" to Section 922(g), which expanded the firearms prohibition to include any person "who has 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, Pub. L. No. 104-208, Div. A, Tit. I, § 101(f) [§ 658(b)(2)], 110 Stat. 2009-372. Section 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" as a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with 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)(i) and (ii); 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).

b. Maine's assault statute provides that "[a] person is guilty of assault if" he "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006) (Section 207). Section 207 thus "specif[ies] two independent types of simple assault, one where bodily injury results and another where there is merely an offensive physical contact without resulting bodily injury." *State* v. *Carmichael*, 405 A.2d 732, 735 (Me. 1979). Maine also has a specific provision addressing domestic assault, which punishes any person who "violates Section 207" if "the victim is a family or household member." Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1)(A) (Supp. 2015) (Section 207-A). See J.A. 9.

The Maine Supreme Judicial Court has defined "offensive physical contact" to require intentional contact that a reasonable person would find offensive. See *State* v. *Pozzuoli*, 693 A.2d 745, 747 (1997) (upholding jury instructions defining offensive physical conduct under Section 207 "as knowingly intending bodily

contact or unlawful touching done in such a manner as would reasonably be expected to violate the person or dignity of the victim"); *State* v. *Rembert*, 658 A.2d 656, 658 (1995) (defining offensive physical contact as "[u]npermitted and *intentional* contacts with anything so connected with the body as to be customarily regarded as part of the other's person" (quoting Restatement (Second) of Torts § 18 cmt. c (1965)) (emphasis added)). Under Maine law, the offensiveness of the contact is determined by asking whether "a reasonable person would find [the contact] offensive" and requires "something less than bodily injury * * * but * * * more than a mere touching of another." See *Pozzuoli*, 693 A.2d at 747. A defendant who intentionally makes contact with the victim may be liable for being reckless about doing so in an offensive manner. See *State* v. *Gantnier*, 55 A.3d 404, 410 (Me. 2012) (holding that evidence supported a lesser-included assault instruction based on defendant's claim that he "did recklessly touch the victim [in her genital area] and the touching was offensive, but it was not [the defendant's] purpose to engage in offensive or sexual contact" because his intent was to touch the victim's shoulder or her hip to wake her); see also *United States* v. *Nason*, 269 F.3d 10, 19 (1st Cir. 2001) (analyzing Maine's offensive physical contact offense).

The Maine Criminal Code provides that "[a] person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result," Me. Rev. Stat. Ann. tit. 17–A, § 35(3)(A) (Supp. 2015); or "recklessly with respect to attendant circumstances when the person consciously disregards a risk that such circumstances exist," *id.* § 35(3)(B). "[T]he dis-

regard of the risk * * * must involve a gross deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." *Id.* § 35(3)(C).

2. a. In 2008, petitioner Armstrong was convicted of assaulting his wife. J.A. 9-10. Armstrong was charged in Maine state court with misdemeanor domestic violence assault, in violation of Section 207-A. See J.A. 9. The state charging document alleged that Armstrong "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact" to his wife. J.A. 154-155. Armstrong pleaded guilty to that offense and was sentenced to 180 days of imprisonment, with all but 24 hours suspended, and one year of probation. J.A. 157-159, 161-162.

In May 2010, Maine police officers found six firearms and ammunition at Armstrong's home during a search for drug paraphernalia and marijuana. J.A. 9. Armstrong was charged with one count of possessing firearms and ammunition by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). J.A. 152-153.

b. In June 2003, petitioner Voisine was charged in Maine state court with simple assault, in violation of Section 207(1)(A). See J.A. 98. The state charging document alleged that Voisine "did intentionally knowingly or recklessly cause bodily injury or offensive physical contact to" his girlfriend and that "[t]he crime involved domestic violence." *Ibid.* Voisine pleaded guilty to the charged offense and was ordered to pay a $200 fine. J.A. 96. Voisine was again convicted of a Maine misdemeanor assault of his girlfriend in 2005. J.A. 10.

In 2009, officers arrested Voisine on the federal misdemeanor charge of killing a bald eagle, in violation of 16 U.S.C. 668(a). Voisine turned a rifle over to police in the course of that investigation. J.A. 10. After conducting a background check, however, officers discovered Voisine's prior misdemeanor assault charge. *Ibid.* In March 2011, the government filed an information charging Voisine with one count of possessing a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9), as well as with killing a bald eagle, in violation of 16 U.S.C. 668(a). J.A. 10, 93-94.

c. Each petitioner moved to dismiss his indictment, arguing that the Maine assault and domestic assault statutes did not constitute Section 922(g)(9) predicates because (1) those provisions may be violated by reckless as well as intentional conduct, and (2) "offensive physical contact" does not necessarily involve *violent* "physical force." J.A. 10-11. The district court denied the motions, J.A. 10, and each petitioner thereafter entered a conditional guilty plea reserving the right to appeal the denial of his motion to dismiss, J.A. 116, 164.

3. On appeal, petitioners renewed their argument that their convictions under Maine's simple assault statute, Section 207, or Maine's domestic assault statute, Section 207-A, do not categorically qualify as a misdemeanor crimes of domestic violence for purposes of Section 922(g)(9). The court of appeals affirmed petitioners' convictions in separate opinions.

a. The court of appeals affirmed Armstrong's conviction in a published decision. 706 F.3d at 1-8. The court explained that its prior decisions in *United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011), cert.

denied, 132 S. Ct. 1538 (2012), and *Nason*, 269 F.3d 10, established "that an offense with a mens rea of recklessness may qualify as a 'misdemeanor crime of domestic violence' under [Section] 922(g)(9)," and that the phrase "physical force" was "broad enough to encompass the 'offensive physical contact' variant of Maine's assault statute." 706 F.3d at 4 (quoting *Booker*, 644 F.3d at 21, and citing *Nason*, 269 F.3d at 16, 20-21). Accordingly, the court affirmed Armstrong's conviction.

b. The court of appeals affirmed Voisine's Section 922(g)(9) conviction in an unpublished, per curiam decision. 495 Fed. Appx. at 101-102. Finding "no pertinent factual differences distinguishing the instant case from *Armstrong*," the court "incorporate[d] its reasoning." *Id.* at 102.

4. On May 6, 2013, Armstrong and Voisine filed a joint petition for a writ of certiorari in this Court. While that petition was pending, this Court decided *Castleman* and held that the "physical force" element of Section 921(a)(33)(A) may be satisfied with a degree of force supporting common-law battery, including offensive touching. 134 S. Ct. at 1410. In March 2014, this Court granted certiorari, vacated the judgments in both petitioners' cases, and remanded to the court of appeals "for further consideration in light of * * * *Castleman*." 134 S. Ct. at 1759.

5. On remand, a divided panel of the court of appeals again affirmed petitioners' convictions. J.A. 6-28.

a. The court of appeals concluded that reckless domestic assault under Section 207 and 207-A constitutes a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9). J.A. 12-26.

The court of appeals focused on the "unique nature of [Section] 922(g)(9)." J.A. 7; see J.A. 13, 18. Section 922(g)(9), the court observed, is aimed at "domestic violence"—"a term of art that encompasses a range of force broader than that which constitutes 'violence' simpliciter, including acts that might not constitute 'violence' in a nondomestic context." J.A. 13, 15 (quoting *Castleman*, 134 S. Ct. at 1411 & n.4) (internal quotation marks omitted).

Section 922(g)(9)'s drafting history, the court of appeals stated, confirmed that the statute is "broader" than the definition of "crime of violence" under 18 U.S.C. 16. J.A. 16 (quoting *Booker*, 644 F.3d at 19). Unlike Section 16's definition of "crime of violence," which is incorporated into a broad range of statutory contexts, the court of appeals observed that "[Section] 922(g)(9) is a statute with a particular purpose: to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms." J.A. 19 (citing *Castleman*, 134 S. Ct. at 1408-1412); see J.A. 14-19.

Considering the recognition in *Castleman* and *Hayes* that "perpetrators of domestic violence are 'routinely prosecuted under generally applicable assault or battery laws,'" the court of appeals concluded that "Congress intended the firearm prohibition to apply to those convicted under typical misdemeanor assault or battery statutes," which "encompass[] assault statutes for those states that allow conviction with a mens rea of recklessness."[1] J.A. 19 (citation

[1] Given Section 922(g)(9)'s distinctive statutory context, the court of appeals distinguished other courts of appeals' decisions, cited in a footnote in *Castleman*, which had interpreted the phrase "use * * * of physical force" to exclude reckless conduct for

omitted). The court of appeals further explained that this "broader reading of [Section] 922(g)(9)'s mens rea requirement better ensures that a perpetrator convicted of domestic assault is unable to use a gun in a subsequent domestic assault." J.A. 20.

Turning to Maine law, the court of appeals emphasized that "Maine characterizes recklessness as a mens rea involving a substantial amount of deliberateness and intent," inasmuch as "[t]he statutory definition requires that a person '*consciously* disregard[] a risk that the person's conduct will cause' the result." J.A. 20 (quoting Me. Rev. Stat. Ann. tit. 17-A, § 35(3)(A) (Supp. 2015)). Because of the "volitional component" of the offense, the court concluded that "[r]eckless assaults in Maine" categorically constitute "misdemeanor crime[s] of domestic violence" under Section 922(g)(9). J.A. 22.

b. Judge Torruella dissented. J.A. 29-90. He "express[ed] no opinion" about "whether the 'use' of physical force is satisfied by either the reckless causation of bodily injury or the intentional or knowing causation of offensive physical contact," J.A. 33, and acknowledged that the common-law sources cited by the Government may suggest "that a common-law battery by 'bodily injury' or 'infliction of harm' can be committed recklessly." J.A. 72 (citing Model Penal Code § 211.1(1)(a) (1980) and 2 Wayne R. LaFave, *Substantive Criminal Law* §§ 16.2(a), 16.2(c)(2) (2d ed. 2003) (LaFave)).

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purposes of Section 16 or the "crime of violence" sentencing enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). J.A. 14-18 & n.3.; see *Castleman*, 134 S. Ct. at 1414 & n.8.

Nonetheless, because he found that the Maine assault statute's offensive physical contact prong did not require intentional contact with the victim, Judge Torruella concluded that the Maine statute was broader than the common-law definition of battery, which, in his view, consisted only of the "*intentional* application of unlawful force against the person of another." J.A. 34 (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010)). He therefore would have held that petitioners' Maine assault convictions were not "misdemeanor crime[s] of domestic violence" under Section 922(g)(9). J.A. 34 n.9; see J.A. 75-76.

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioners' convictions for misdemeanor domestic assault under Maine law for intentionally, knowingly, or recklessly causing bodily injury or offensive physical contact qualified as "misdemeanor crime[s] of domestic violence" under 18 U.S.C. 922(g)(9). Petitioners' exclusion of crimes with a mens rea of recklessness is unfounded, would conflict with Congress's intention to enact a nationwide ban on firearms possession by domestic abusers, and would frustrate enforcement of the statute.

A. Because Congress enacted Section 922(g)(9) to bar firearms possession by domestic abusers, who "were (and are) routinely prosecuted under generally applicable assault or battery laws," this Court in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), concluded that Congress intended "misdemeanor crime[s] of domestic violence" to encompass conduct that would satisfy the elements of common-law battery. *Id.* at 1411 (quoting *United States* v. *Hayes*, 555 U.S. 415, 427 (2009)). Common-law battery widely

proscribed reckless infliction of bodily injury or offensive touching. The majority of States' misdemeanor assault and battery statutes penalize reckless causation of bodily injury or offensive contact. Similarly, the courts of appeals have interpreted the federal misdemeanor assault statutes, 18 U.S.C. 113(a)(4) and (5), in accordance with the common-law definition of battery, uniformly concluding that it proscribes reckless conduct.

The Maine assault statute—which penalizes reckless causation of bodily injury and intentional contact that is reckless as to offensiveness—falls within the scope of the common-law battery offense. This Court should reject petitioners' contention that, at common law, battery by offensive touching required a different, higher level of mens rea than battery resulting in physical injury. Recklessness suffices for both.

B. In construing the term "misdemeanor crime of domestic violence," there is no incongruity in reading "use * * * of physical force" to encompass reckless infliction of harm. Rather, in this context, *Castleman* held that Congress used the phrase "use * * * of physical force" to invoke the elements of common-law battery, which included reckless conduct. See 134 S. Ct. at 1410-1415.

This interpretation, moreover, accords with *Castleman*'s conclusion that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." 134 S. Ct. at 1414. Both reckless and knowing conduct include an element of intentionality and volition, as the court of appeals correctly found. The only distinction between knowledge and recklessness is the degree of risk: knowledge may be satisfied if "a person is aware of a *high probability*" of

the existence of a fact, Model Penal Code § 2.02(7) (1985) (emphasis added), while recklessness requires the conscious disregard of a "substantial and unjustifiable risk that the material element * * * will result from his conduct," *id.* § 2.02(2)(c).

The definition of a "misdemeanor crime of domestic violence" under Section 922(g)(9) does not embody the same meaning as the term "crime of violence" under 18 U.S.C. 16. In *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), this Court reserved the question whether a "crime of violence" under Section 16 includes crimes that can be committed recklessly. And while many courts of appeals have extended *Leocal* to exclude reckless offenses from Section 16, important textual and contextual differences counsel against according Section 16 and Section 922(g)(9) the same meaning. Most prominently, Congress chose not to incorporate Section 16's definition into Section 922(g)(9), thereby suggesting that it intended those provisions to be interpreted differently. Moreover, while both provisions contain the phrase "use * * * of physical force," the misdemeanor crime of domestic violence definition omits the remainder of Section 16's definition—"against the person or property of another"—which was critical to *Leocal*'s determination that Section 16 required a "higher *mens rea*." 543 U.S. at 11; compare 18 U.S.C. 16 with 18 U.S.C. 921(a)(33)(A). *Leocal*, moreover, did not consider the phrase "use * * * of physical force" as a term of art in the context of domestic violence and common-law battery. See *Castleman*, 134 S. Ct. at 1410.

C. Petitioners' interpretation of Section 922(g)(9) would render its firearm prohibition inapplicable to a substantial majority of state misdemeanor assault and

batteries as a categorical matter, and could render Section 922(g)(9) a practical nullity on federal lands. Such a result would frustrate Congress's clear intent to prohibit firearms possession by "domestic abusers" prosecuted under the "generally applicable" misdemeanor assault and battery laws. *Hayes*, 555 U.S. at 426-427. Regardless of whether state assault and battery statutes are divisible as to mental state under *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), the practicality of obtaining and using state court records to differentiate the mens rea involved in any particular misdemeanor domestic violence conviction is doubtful: misdemeanors are frequently charged by tracking the statutory language; underlying records are scarce in misdemeanor cases; and the federal background check process, see 18 U.S.C. 922(s) and (t), provides only three business days to verify a person's eligibility for firearms purchase or transfer.

D. The other policy considerations petitioners identify do not support their position that reckless conduct should be excluded from Section 922(g)(9). Their concern that Section 922(g)(9) might apply to "minor" instances of domestic abuse results from Congress's decision to expand the firearms prohibition to *misdemeanor* crimes of domestic violence, not from the inclusion of statutes that may involve reckless infliction of harm. *Castleman*, moreover, rejected the view that Section 922(g)(9) was limited to convictions based on especially severe conduct. 134 S. Ct. at 1416.

E. The rule of lenity has no application here. Nor is petitioners' construction justified because of asserted constitutional doubts. Section 922(g)(9) is not grievously ambiguous, when construed in light of the relevant tools of statutory construction. And because

disarming persons with domestic violence convictions advances Congress's compelling interest in preventing domestic gun violence, inclusion of reckless battery raises no serious Second Amendment question.

ARGUMENT

PETITIONERS' MISDEMEANOR DOMESTIC ASSAULT CONVICTIONS QUALIFY AS "MISDEMEANOR CRIME[S] OF DOMESTIC VIOLENCE" UNDER SECTION 922(g)(9)

A. *Hayes* and *Castleman* Establish That A Misdemeanor Crime Of Domestic Violence Includes Offenses Equivalent To Common-Law Battery, Which Proscribed Reckless Conduct

This Court has twice interpreted the term "misdemeanor crime of domestic violence," first in *United States* v. *Hayes*, 555 U.S. 415 (2009), and again in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014). In each case, the Court confirmed that Section 922(g)(9) targets convictions for misdemeanor domestic assault and battery that satisfy the definition of common-law battery.[2] Longstanding common-law tradition defined battery to include the recklessness causation of bodily injury or offensive contact. This common-law tradition of proscribing reckless battery has been followed by a majority of States and the Model Penal Code, and it has been used by the courts of appeals to construe

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[2] This brief uses the terms "assault," "battery," or "assault and battery" interchangeably to connote a completed battery. Notwithstanding traditional distinctions between these terms, in modern parlance, the terms "assault" and "battery" are frequently used interchangeably. See *United States* v. *Delis*, 558 F.3d 177, 181 (2d Cir. 2009); see 2 LaFave § 16.1(a), at 551 & n.2; see also Model Penal Code § 211.1 Comment 1(a) and (b), at 175-180 (1980).

provisions of the federal assault statute, 18 U.S.C. 113(a), to penalize reckless causation of bodily injury. See Part C.1, *infra*. It follows from *Hayes* and *Castleman* that misdemeanor federal, state, and tribal battery statutes requiring a mens rea of recklessness qualify as misdemeanor crimes of domestic violence under Section 922(g)(9).

1. Section 922(g)(9) was intended to cover statutes that satisfy the elements of common-law battery

In *Hayes* and *Castleman*, this Court found that Section 922(g)(9) was enacted to bar firearms possession by domestic abusers, who "were (and are) routinely prosecuted under generally applicable assault or battery laws." *Hayes*, 555 U.S. at 427. For this reason, the Court explained, "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Castleman*, 134 S. Ct. at 1411.

Castleman considered the meaning of "use * * * of physical force" in Section 921(a)(33)(A)'s definition of misdemeanor crime of domestic violence—the identical phrase that is at issue here—and concluded that Section 921(a)(33)(A)'s definition incorporated the "common-law meaning of 'force'—namely, offensive touching." See 134 S. Ct. at 1410. *Castleman*, like *Hayes*, emphasized the "routine" use of "generally applicable assault or battery laws" to prosecute domestic abusers in concluding that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction." *Id.* at 1411 (citing *Hayes*, 555 U.S. at 427).

For that same reason, *Castleman* held that a requirement of "violent force" "would have rendered § 922(g)(9) inoperative in many States at the time of its enactment." 134 S. Ct. at 1413. The Court therefore rejected an interpretation of "misdemeanor crime of domestic violence" that would have made Section 922(g)(9) ineffectual in at least ten States, where the misdemeanor assault and battery statutes penalized offensive touching, but not the causation of bodily injury. *Ibid.* *Castleman*'s reasoning thus confirmed the conclusion in *Hayes* that generic misdemeanor assault and battery are the core offenses targeted by Section 922(g)(9), and that their inclusion in its scope is critical to effectuating Congress's purpose "to ensure that domestic abusers convicted of misdemeanors, in addition to felonies, are barred from possessing firearms." See J.A. 19.

2. Common-law battery encompasses the reckless causation of bodily injury or offensive contact

Although petitioners agree that *Castleman* "dictates that the common-law definition of battery must be used to interpret the phrase 'use * * * of physical force' in 18 U.S.C. 921(a)(33)(A)," Br. 13 (capitalization omitted), they contend that common-law battery—at least to the extent it involved offensive touching, rather than causation of bodily injury—must have been committed intentionally or knowingly, and thus "required a *mens rea* greater than recklessness," Br. 9, 15-17. But common law did not draw the distinction petitioners suggest between battery resulting in bodily injury and battery involving offensive touching. That distinction would also be inconsistent with this Court's reasoning in *Castleman*. In any event, a rule that required a higher mens rea only for offensive

touching would not assist petitioners because their argument is premised on an incorrect interpretation of offensive physical contact under Maine's assault statute. Contrary to petitioners' view, that statute requires a defendant to intentionally (not recklessly) make contact with the victim and allows for recklessness only as to the contact's offensive nature.

a. Common-law battery was satisfied with a mens rea of recklessness

Common law defined "battery" as generally including "the unlawful application of force to the person of another." 2 LaFave § 16.2, at 552. Battery included not only causation of bodily injury, but also offensive touching. See 3 William Blackstone, *Commentaries on the Laws of England* 120 (1768) (Blackstone) (defining battery as "the unlawful beating of another" and noting that "[t]he least touching of another's person wilfully, or in anger, is a battery"); see *Castleman*, 134 S. Ct. at 1410 ("[T]he element of force in the crime of battery was satisfied by even the slightest offensive touching.") (quoting *Johnson* v. *United States*, 559 U.S. 133, 139 (2010)) (internal quotation marks omitted).

Multiple sources agree that common-law battery proscribed reckless conduct. Rollin M. Perkins, *Non–Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 126 (1946); 6A C.J.S. *Assault* § 85 (2004); see 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 60, at 32 (rev. 6th ed. 1877) (Bishop) ("It is not necessary, in simple assault, that there should be the specific purpose to do a particular injury, but general malevolence or recklessness is sufficient."); see also Model Penal Code § 211.1 comment (n.62) (1980) (While "[t]here was some difference of

opinion in prior law as to whether reckless injuring could be prosecuted under then-prevailing battery statutes," "[m]ost courts held that it could."); see also, *e.g.*, *Commonwealth* v. *Hawkins*, 32 N.E. 862, 863 (Mass. 1893) (reckless shooting qualifies as a battery). Although some courts have spoken of criminal battery as requiring "intent" to injure, most have treated reckless or criminally negligent conduct as supplying the necessary intent. See 2 LaFave § 16.2(c)(2), at 556 & n.32; Perkins, *supra*, at 125-126; Model Penal Code § 211.1 comment (n.62) (The "necessary intent to injure could be inferred from recklessness.").[3]

Similarly, courts have often described battery as a "general intent" crime. See *United States* v. *Delis*, 558 F.3d 177, 180 (2d Cir. 2009) (citing authority). While there is some historic ambiguity to the term, compare *United States* v. *Bailey*, 444 U.S. 394, 403-404 (1980), with *Carter* v. *United States*, 530 U.S. 255, 268 (2000), "general intent" traditionally encompassed not only purposeful, but also knowing and reckless conduct. See Model Penal Code § 2.02(3) & explanatory note, at 226, 228 ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a

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[3] In *Johnson*, the Court described the element of "force" in common-law battery as "consist[ing] of the *intentional* application of unlawful force against the person of another." 559 U.S. at 139 (emphasis added); see also U.S. Br. at 11, 24, 32-33, *Castleman*, 134 S. Ct. 1405 (Nov. 15, 2013) (No. 12-1371) (arguing that intentional offensive touching or causation of bodily injury constitutes the "use * * * of force"). Nonetheless, neither the Court in *Johnson* nor the United States in its brief in *Castleman* considered directly the question presented here of whether reckless battery could also constitute the "use * * * of force" in the domestic violence context addressed by Section 922(g)(9).

person acts purposely, knowingly or recklessly * * * There is a rough correspondence between this provision and the common-law requirement of 'general intent.'").

Applying these principles, the courts of appeals have uniformly agreed that common-law battery penalized reckless causation of bodily injury or offensive contact. See *Delis*, 558 F.3d at 180 ("Common-law battery did not require any specific intent either to injure or to touch offensively, but rather only a more general intent to commit the unlawful act or, indeed, mere recklessness or criminal negligence."); *United States* v. *Zunie*, 444 F.3d 1230, 1234 (10th Cir. 2006) (holding that federal assault resulting in serious bodily injury "is a general intent crime," which, under the common law and the Model Penal Code, "encompasses crimes committed with purpose, knowledge, or recklessness"); *United States* v. *Loera*, 923 F.2d 725, 728 (9th Cir.) ("At common law a criminal battery was shown if the defendant's conduct was reckless.") (citing 2 F. Wharton, *Wharton's Criminal Law* § 178, at 296 (C. Torcia 14th ed. 1979)), cert. denied, 502 U.S. 854 (1991); see also *United States* v. *Williams*, 197 F.3d 1091, 1096 (11th Cir. 1999) ("The slightest willful offensive touching of another constitutes a battery at common law, regardless of whether the defendant harbors an intent to do physical harm."); *United States* v. *Recinos*, 410 Fed. Appx. 544, 548 (3d Cir. 2011) (not precedential opinion) ("There is no requirement under the common law that the actor have a specific intent to violate the law or to cause any particular type of harm. He need only intend to commit the act that results in the unconsented and harmful touching of another."); cf. *United States* v. *Bayes*,

210 F.3d 64, 69 (1st Cir. 2000) (Common-law battery "did not require an intent to cause or to threaten an injury as long as the defendant touched another in a deliberately offensive manner without a valid reason to do so."). Accordingly, those courts have interpreted the misdemeanor provisions of the federal assault statute, 18 U.S.C. 113(a)(4) and (5), which are silent as to mens rea, to include reckless causation of bodily harm or offensive contact.[4]

The authorities cited by petitioners (Br. 15-17) only further confirm that common-law battery—whether by offensive touching or causation of bodily injury—could be proven by reckless, or even criminally negligent, conduct. Petitioners rely on the dictionary definitions of the terms "battery" and "willfully," but they fail to provide the complete definitions of such terms, which define them to include reckless conduct.

First, petitioners seek support in *Black's Law Dictionary*'s definition of "battery," which states that battery involves "the intent to cause harmful or offen-

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[4] Section 113(a) currently contains eight subsections defining different forms of federal assault. The first three of those provisions, which establish felony offenses, contain an express intent requirement. See 18 U.S.C. 113(a)(1) (assault with intent to commit murder); 18 U.S.C. 113(a)(2) (assault with intent to commit any felony); 18 U.S.C. 113(a)(3) (assault with a dangerous weapon). One subsection, proscribing the felony of "[a]ssault of a spouse, intimate partner, or dating partner by strangling, suffocating," 18 U.S.C. 113(a)(8), expressly provides that it may be committed "intentionally, knowingly, or recklessly." The remaining subsections—including the misdemeanors of "[a]ssault by striking, beating, or wounding," 18 U.S.C. 113(a)(4), and "[s]imple assault," 18 U.S.C. 113(a)(5); and the felony offenses of "[a]ssault resulting in serious bodily injury," 18 U.S.C. 113(a)(6), and "assault resulting in substantial bodily injury" to a specified domestic relation, 18 U.S.C. 113(a)(7)—contain no mens rea requirement.

sive contact." Pet. Br. 16. But petitioners omit the remainder of the definition, which provides that the "mental state" for battery "may be an intent to kill or injure, or criminal negligence, or perhaps the doing of an unlawful act." *Black's Law Dictionary* 182 (10th ed. 2014). This definition, when read in full, therefore supports the view that common-law battery proscribed not only reckless conduct, but even criminally negligent conduct.[5]

Similarly, petitioners recite Blackstone's oft-cited description of battery as the "[t]he least touching of another's person wilfully, or in anger," and, again rely on *Black's Law Dictionary* to define "willfully" to be "stronger than *voluntary* or *intentional*" and "traditionally the equivalent of *malicious*, *evil*, or *corrupt*." Pet. Br. 16 & n.6 (quoting Blackstone, *supra*, at 120, and *Black's Law Dictionary* 1834). But *Black's Law Dictionary*'s complete entry for "willful" provides that willful acts include not only "conscious wrong or evil purpose on the part of the actor," but also "at least inexcusable carelessness."[6] Indeed, this Court has

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[5] Criminal negligence requires a "high[er] degree" of risk of injury than the "ordinary (tort)" standard. 2 LaFave § 16.2(c)(2), at 557 (noting that cases have left it unclear whether "the defendant must subjectively realize the risk."); see Model Penal Code § 2.02 Comment 4, at 241 (1985) (explaining, as to negligence, that culpability is typically judged "in terms of an objective view of the situation as it actually existed" and "not in terms of * * * the actor's perceptions"). The Maine law at issue here does not penalize criminal negligence. See Me. Rev. Stat. Ann. tit 17-A, § 207(1)(A) (2006) (covering assault when a person acts "intentionally, knowingly, or recklessly").

[6] Similarly, "[m]alicious" is defined as "substantially certain to cause injury" *or* "without just cause or excuse." *Black's Law Dictionary* 1101; *United States* v. *Doe*, 136 F.3d 631, 635 (9th Cir.

observed that, while the word "willfully" is sometimes said to be "a word of many meanings," the standard common-law usage of the term "willfully" for civil offenses—and battery was categorized in Blackstone's era as a private tort—"treated actions in 'reckless disregard' of the law as 'willful' violations." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57, (2007) (quoting *Bryan* v. *United States*, 524 U.S. 184, 191 (1998)); see Blackstone, *supra*, at 120.[7] Blackstone's use of the term "willful" is therefore fully consistent with battery's inclusion of reckless infliction of harm.

The cases cited by petitioners similarly fail to assist them. For example, in *Lynch* v. *Commonwealth*, 109 S.E. 427 (1921), the Supreme Court of Virginia noted that "not every * * * touching" is a battery and that determining whether a battery occurs depends

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1998) ("'[M]aliciously' means that state of mind which actuates conduct injurious to others without lawful reason, cause or excuse."), cert. denied, 526 U.S. 1041 (1999); *United States* v. *Gullett*, 75 F.3d 941, 947 (4th Cir.) ("At common law, one acted 'maliciously' if he or she acted intentionally *or with willful disregard* of the likelihood that damage or injury would result.") (emphasis added), cert. denied, 519 U.S. 847 (1996).

[7] This Court has further described the meaning of "willfully" at common law as follows:

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

United States v. *Murdock*, 290 U.S. 389, 394-395 (1933) (citations omitted). The term "willfully" at common law thus did not connote specific intent.

"upon the intent of the actor." *Id.* at 428. But the crucial intent in that case was not an intent to injure or offend—indeed, the defendant had professed that he "did not mean to insult [the victim]"—but rather an intent to "continue the conversation [with the victim] in the hope of overcoming her objection" to his sexual advances. *Ibid.* So long as the touching was intentional and offensive, it did not matter whether the resulting offense was intended. *Ibid.*

In *Razor* v. *Kinsey*, 55 Ill. App. 605 (1894)—an obscure intermediate state court decision that says little about the general practice at common law—the court found the trial court erred by allowing a plaintiff to recover in a civil action for assault and battery where his injuries were "unintentional and without negligence on the part of the defendant." *Id.* at 613. But the court added that "wantonness"—a term that "means reckless," *Smith* v. *Wade,* 461 U.S. 30, 40 n.8 (1983)—may supply the requisite intent for common-law battery. *Razor*, 55 Ill. App. at 614.

Finally, *Cluff* v. *Mutual Benefit Life Insurance Co.*, 95 Mass. (13 Allen) 308 (1866), merely stands for the proposition that someone guilty of common-law assault—which requires no actual touching, but only a threat or perceived threat of violence—must have intended to threaten or harm the victim. It says nothing about the requisite mens rea for battery.

In sum, even petitioners' selective citation to common law demonstrates that common-law battery encompassed reckless conduct, and did not require intent to injure or offend.

b. Petitioners draw a false distinction between the mental state required for assaults resulting in offensive touching and the mental state required for assaults resulting in bodily injury

Petitioners contend (Br. 17) that, even if reckless causation of bodily injury amounts to common-law battery, reckless offensive physical contact does not. Petitioners thus attempt to narrow the question presented by claiming that "unless [this] Court determines that reckless offensive touching qualifies as 'use . . . of physical force,' it must overturn petitioners' convictions." Br. 9. Contrary to petitioners' contentions, common law did not distinguish between batteries that result in physical injury from those that involve offensive contact, and therefore did not provide for a heightened mental state where only offensive touching was at issue. Rather "[a]t common law, battery—all battery, and not merely battery by the merest touching—was a misdemeanor, not a felony." *Johnson*, 559 U.S. at 141; accord Blackstone, *supra*, at 120; Bishop, *supra*, § 72, at 38. Reckless causation of bodily injury or offense sufficed in either case.

As a threshold matter, petitioners, like the dissent below, misconstrue the offensive physical contact prong of Maine's assault statute to include a defendant's "merely disregard[ing] a risk that his or her conduct will cause physical contact that a reasonable person would find [to] be offensive." J.A. 75; see Pet. Br. 12 (table). In fact, the Maine Supreme Judicial Court has held that the Maine assault statute prohibits *intentional* touching of another person where a reasonable person would be offended by that contact. See *State* v. *Pozzuoli*, 693 A.2d 745, 747 (1997) (approving jury instruction that offensive physical con-

tact requires "*knowingly intending* bodily contact or unlawful touching done in such a manner as would reasonably be expected to violate the person or dignity of the victim") (emphasis added); *State* v. *Rembert*, 658 A.2d 656, 658 (1995) (defining offensive physical contact as "[u]npermitted and *intentional* contacts with anything so connected with the body as to be customarily regarded as part of the other's person" (quoting Restatement (Second) of Torts § 18 cmt. c (1965)) (emphasis added). Nevertheless, recklessness is a permissible mens rea with respect to the offensiveness of the contact. See Me. Rev. Stat. Ann. tit 17-A, § 207(1)(A) (2006); see also *State* v. *Gantnier*, 55 A.3d 404, 410 (Me. 2012) (Offensive contact assault would be established by an intentional touching of a person on her shoulder or hip, but "recklessly touch[ing]" her genitals even though "it was not [the defendant's] purpose to engage in offensive or sexual contact."). To be convicted of assault under Section 207, therefore, a person must deliberately make contact with the victim, but may be held liable where he is reckless as to the resulting harm, *i.e.*, the offensiveness of the contact.

Petitioners, in any event, wrongly distinguish (Br. 17) the causation of bodily injury from offensive physical contact on the ground that the former causes "harm" while the latter does not. That argument incorrectly presumes that no harm results from offensive physical contact. To the contrary, the harm of such touching is not the touch itself, but rather the offense caused. See Blackstone, *supra*, at 120 ("The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence[,] * * * every man's

person being sacred, and no other having a right to meddle with it, in any the slightest manner."); see also *Johnson*, 559 U.S. at 146 (Alito, J., dissenting) ("[The common law] recognized that an offensive but nonviolent touching (for example, unwanted sexual contact) may be even more injurious than the use of force that is sufficient to inflict physical pain or injury (for example, a sharp slap in the face).").

Indeed, this Court's decision in *Castleman* rested on the common-law conception of battery to conclude that the *degree* of force is not determinative of whether conduct constitutes the "use * * * of physical force." This conclusion led the Court to hold that offensive touching qualifies as a "misdemeanor crime of domestic violence" under Section 922(g)(9). 134 S. Ct. at 1410 (quoting *Johnson*, 559 U.S. at 139; and citing Blackstone, *supra*, at 120); see also *United States* v. *Nason*, 269 F.3d 10, 20 (1st Cir. 2001) ("[Offensive physical contacts] invariably emanate from the application of some quantum of physical force, that is, physical pressure exerted against a victim."); *United States* v. *Smith*, 171 F.3d 617, 621 n.2 (8th Cir. 1999) ("[Insulting or offensive contact], by necessity, requires physical force to complete."). *Castleman* thus established that the distinction between causation of offensive physical contact and causation of bodily injury is immaterial—both involve "force" under Section 922(g)(9). As the court of appeals correctly observed, "[i]f the husband's knife grazes his wife or harms her grievously, it is an assault all the same." J.A. 24; see J.A. 19 ("[Petitioners] concede that reckless causation of bodily injury is use of physical force. We see no reasoned argument that offensive physical contact does not similarly entail the use of force simply be-

cause it is inflicted recklessly as opposed to intentionally."). As properly construed, the Maine assault statute—by including reckless causation of bodily injury or offensive physical contact—therefore fits comfortably within the common-law definition of battery.

B. Reckless Battery Satisfies The "Use Of Force" Requirement Under Section 921(a)(33)(A)'s Definition Of "Misdemeanor Crime Of Domestic Violence"

Petitioners argue that the phrase "use * * * of physical force" in the definition of "misdemeanor crime of domestic violence," 18 U.S.C. 921(a)(33)(A), requires "intentional and purposeful" rather than reckless conduct. See Br. 17. But petitioners' interpretation takes that phrase out of context. Common-law battery, *by definition*, has as an element the "use * * * of physical force" even where bodily injury or offensive contact was recklessly inflicted. And Section 921(a)(33)(A)'s definition of "misdemeanor crime of violence" is properly understood as a direct reference to the contemporary and common-law misdemeanor crime of battery.

*1. Common-law battery necessarily entailed the "use * * * of physical force" even where it involved reckless conduct*

Petitioners contend that the "plain meaning of the verb 'use' and the phrase 'use . . . of physical force'" requires "intentional and purposeful conduct—and thus does not extend to merely reckless conduct." Br. 17. That is incorrect. These terms must be interpreted as "common-law term[s] of art" and defined by the background rule of common-law battery that reckless infliction of harm is sufficient. See *Castleman*, 134 S.

Ct. at 1410 (defining the word "force" in the phrase "use * * * of physical force" according to its common-law meaning); see also Part A.2, *supra*.

Castleman declined to reach the question whether reckless causation of bodily injury constitutes the "use * * * of physical force," but the Court's reasoning compels the conclusion that it does. 134 S. Ct. at 1413-1414. *Castleman* explained that "the element of force in the crime of battery was 'satisfied by even the slightest offensive touching'" and that it is therefore "impossible to cause bodily injury without *applying force* in the common-law sense." *Id.* at 1410 (quoting *Johnson*, 559 U.S. at 139). Put another way, "[f]orce * * * describ[es] one of the elements of the common-law crime of battery." See *ibid.* (citation omitted). Seen in this light, when Congress incorporated the phrase "use * * * of physical force" into Section 921(a)(33)(A), it directly invoked the crime of common-law battery, including the reckless conduct that battery traditionally proscribed.

Castleman did not involve a conviction based on a mens rea of recklessness, 134 S. Ct. at 1414, and the Court therefore formally extended this reasoning only to "the knowing or intentional application of force," *id.* at 1415. But the same logic fully applies to reckless battery. That is especially true given the close kinship between reckless and knowing conduct in the criminal law. Reckless causation of bodily injury—like knowing causation of bodily injury—requires an intent to act and actual subjective knowledge that bodily injury may result from that action; the only difference is the degree of the known risk. Recklessness requires that the defendant "consciously disregard[] a substantial and unjustifiable risk that the material element * * *

will result from his conduct." Model Penal Code § 2.02(2)(c); see *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994) (Reckless conduct occurs when "a person disregards a risk of harm of which he is aware.").[8] In the case of knowing conduct, the result must be "practically certain," Model Penal Code § 2.02(2)(b)(ii)—but that is a degree of risk that still "includes a contingency factor," which can be satisfied if "a person is aware of a *high probability* of the existence of a fact, unless he actually believes that [the fact] does not exist," *id.* § 2.02(7) (emphasis added); *id.* § 2.02 comment (n.13) (emphasis added); see also 1 LaFave § 5.2(b), at 247-248.[9]

Accordingly, reckless conduct is not, as petitioners claim, "accidental conduct," which the term "use" may exclude. Pet. Br. 10; cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) ("[U]se * * * of physical force against the person or property of another" under 18 U.S.C. 16 "most naturally suggests a higher degree of intent than negligent or merely accidental conduct."). Rather, recklessness is akin to knowing conduct in all but the degree of risk. Thus, although "we would not ordinarily say a person 'use[s] * * * physical force against' another by stumbling and falling into him," "a person would 'use * * * physical force against' an-

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[8] Recklessness further requires that the disregard of the risk "involve[] a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation," "considering the nature and purpose of the actor's conduct and the circumstances known to him." Model Penal Code § 2.02(2)(c).

[9] Maine's definition of these mental states is substantively similar to the Model Penal Code formulation. Compare Me. Rev. Stat. Ann. tit. 17-A, § 35(3) (Supp. 2015) (defining "Recklessly"), with Model Penal Code § 2.02(2)(c).

other when pushing him." *Leocal*, 543 U.S. at 9. And that is true even if he did not intend to injure or offend him in doing so, but appreciated the substantial risk of injury or offense and disregarded it.

This interpretation further comports with *Castleman*'s description of commonplace acts of "[d]omestic violence" as including "pushing, grabbing, shoving, slapping, and hitting," or a "squeeze of the arm [that] causes a bruise." 134 S. Ct. at 1412 (citation and internal quotation marks omitted). All of these acts could be carried out in a manner that is reckless as to the infliction of bodily injury or offense. But to exclude reckless conduct would be to exclude exactly those familiar forms of domestic abuse from Section 922(g)(9). Congress could not have intended that result.

Here, the court of appeals correctly observed that "Maine's definition of 'recklessly,' like its definition of 'knowingly' [(and unlike negligence)], includes an element of intentionality and specificity." J.A. 21; see also *Elonis* v. *United States*, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part) ("Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway."); *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121, 1141 (9th Cir. 2006) (en banc) (Wardlaw, J., dissenting) ("Conscious disregard includes an element of volition: One must be aware of a substantial and unjustifiable risk and affirmatively choose to act notwithstanding that

risk.") (citation omitted).[10] In line with these principles, where a law is silent on the applicable mental state, "such element is established if a person acts purposely, knowingly, or recklessly." See Model Penal Code § 2.02(3).[11]

2. The term "misdemeanor crime of domestic violence" bears a different meaning than the definition of "crime of violence" under 18 U.S.C. 16

Petitioners contend (Br. 17-22) that this Court should adopt the same definition of "use"—to mean "active employment" for a particular purpose—that the Court applied in *Leocal*, 543 U.S. at 10, to construe the phrase "use * * * of physical force against the person or property of another" in the definition of

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[10] This Court thus has found reckless conduct to be morally culpable in a wide variety of contexts. *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part) (citing *Farmer*, 511 U.S. at 835-836 (deliberate indifference to an inmate's harm)); *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) (criminal libel); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964) (civil libel). Indeed, "reckless disregard for human life" is a "highly culpable mental state that may support a capital sentencing judgment." *Tison* v. *Arizona*, 481 U.S. 137, 157-158 (1987).

[11] Negligence, by contrast, is a wholly objective standard, which is established when a reasonable person would have been aware of the risk of harm, even if the perpetrator had no actual subjective knowledge of those risks. Model Penal Code § 2.02(2)(d). This Court "ha[s] long been reluctant to infer that a negligence standard was intended in criminal statutes," because that standard depends on the viewpoint of a "reasonable person," "regardless of what the defendant thinks," which "is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Elonis*, 135 S. Ct. at 2011 (citations omitted).

"crime of violence" under 18 U.S.C. 16.[12] *Leocal* held that the requirement that force be used "against" someone or something suggested that crimes of violence require "a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9. *Leocal* reserved the question whether a reckless application of force could constitute a "use" of force, 543 U.S. at 9, 13; but a footnote in *Castleman* cited decisions from the courts of appeals, which, after *Leocal*, held that certain reckless offenses did not qualify as "crimes of violence" under Section 16 or under the definition of felony "crime of violence" used in Sentencing Guidelines § 2L1.2.[13] 134 S. Ct. at 1414 n.8. Only one case cited in the footnote in *Castleman* interpreted Section 922(g)(9)—the First Circuit's opinion in *United States* v. *Booker*, 644 F.3d 12 (2011), cert. denied, 132 S. Ct. 1538 (2012)—and that case

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[12] Section 16 defines the term "crime of violence" to mean "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 16.

[13] Two courts of appeals, both circuits cited within the *Castleman* footnote, have found, after *Leocal*, that certain crimes with a recklessness mens rea may qualify as crimes of violence under Section 16. See *Aguilar* v. *Attorney Gen.*, 663 F.3d 692, 695-700 (3d Cir. 2011) (sexual assault with a mens rea of recklessness is a crime of violence under Section 16(b)); see also *Zunie*, 444 F.3d at 1235 n.2 (10th Cir.) (noting that the court of appeals' pre-*Leocal* holding—that assault resulting in serious bodily injury under Section 113(a)(6) is a crime of violence under Section 16(a)—was consistent with an interpretation of Section 113(a)(6) that includes reckless assault because *Leocal* excluded only negligent conduct from Section 16's crime of violence definition).

held that a misdemeanor crime of domestic violence *does* include reckless battery. See *Castleman*, 134 S. Ct. at 1414 & n.8.[14] Since *Castleman*, no court of appeals has held that reckless conduct is insufficient to establish a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9).[15]

Far from supporting petitioners, *Castleman* rejected petitioners' contention that "misdemeanor crime of domestic violence" under Section 922(g)(9) has the same meaning as "crime of violence" under Section 16. The Court declined to interpret the term "use * * * of physical force" in Section 16 and Section 922(g)(9) *in pari materia* as to the requisite de-

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[14] The remaining cases in *Castleman*'s footnote, 134 S. Ct. at 1414 n.8, addressed only the requisite mens rea for either an aggravated felony pursuant to immigration statutes that directly incorporate Section 16's definition of "crime of violence," see *Jimenez-Gonzalez* v. *Mukasey*, 548 F.3d 557, 559-563 (7th Cir. 2008); *United States* v. *Torres-Villalobos*, 487 F.3d 607, 613-617 (8th Cir. 2007); *Fernandez-Ruiz*, 466 F.3d at 1124-1132 (9th Cir.) (8 U.S.C. 1227(a)(2)(E)(i)); *Garcia* v. *Gonzales*, 455 F.3d 465, 467-469 (4th Cir. 2006); *Oyebanji* v. *Gonzales*, 418 F.3d 260, 263-265 (3d Cir. 2005); *Jobson* v. *Ashcroft*, 326 F.3d 367, 372-376 (2d Cir. 2003); *United States* v. *Chapa-Garza*, 243 F.3d 921, 924-928 (5th Cir. 2001), or the definition of a felony "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1), see *United States* v. *Palomino Garcia*, 606 F.3d 1317, 1334-1336 (11th Cir. 2010); *United States* v. *Zuniga-Soto*, 527 F.3d 1110, 1123-1125 (10th Cir. 2008); *United States* v. *Portela*, 469 F.3d 496, 498-499 (6th Cir. 2006).

[15] In *United States* v. *Vinson*, 805 F.3d 120 (2015), the Fourth Circuit held that North Carolina assault is not a misdemeanor crime of domestic violence because the assault statute at issue allowed for conviction based on "culpable negligence." 805 F.3d at 126. Under North Carolina law, "culpable negligence" includes conduct that shows "thoughtless disregard" of consequences and thus "is a lesser standard of culpability than recklessness, which requires at least 'a conscious disregard of risk.'" *Ibid.*

gree of force. See 134 S. Ct. at 1410-1414. The same distinction holds as to the applicable mens rea.[16]

Most notably, Congress could have easily defined "misdemeanor crime of domestic violence" by incorporating Section 16's definition of "crime of violence." See *Leocal*, 543 U.S. at 7 (noting that Section 16 has been "incorporated into a variety of statutory provisions, both criminal and noncriminal"); cf. 8 U.S.C. 1227(a)(2)(E)(i) (provision of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, defining "crime of domestic violence" as "any crime of violence (as defined in [18 U.S.C. 16])" committed against a qualifying relative). As the Court explained in *Castleman*, that Congress chose not to incorporate Section 16's definition of crime of violence "suggests, if anything, that it did not mean to." 134 S. Ct. at 1412 n.6. And *Castleman* further found that Section 922(g)(9)'s context confirmed that Congress intended a different meaning—one drawn from common law. *Id.* at 1410-1413.

Castleman reasoned that "domestic violence" is distinguishable from and broader than the terms "crime of violence" under Section 16 or "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1).[17] "[D]omestic violence,"

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[16] Because Section 922(g)(9)'s specific focus on misdemeanor domestic violence convictions differs significantly from Section 16's general definition of crimes of violence, it is unnecessary for this Court to decide whether reckless "use * * * of physical force" applies to other statutes, like Section 16, that include similar wording.

[17] The ACCA defines "violent felony" in pertinent part as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). In *Johnson*, this Court interpreted that language

the Court explained, is a "term of art" that "encompass[ed] a range of force broader than that which constitutes 'violence' *simpliciter*." 134 S. Ct. at 1411 & n.4; compare *Leocal*, 543 U.S. at 11 ("[W]e ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with [Section] 16's emphasis on the use of physical force against another person * * * suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."); see also *Booker*, 644 F.3d at 19 ("[T]he case for analogizing [Section] 922(g)(9) to [Section] 16 is particularly weak.").

The definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A) ("use * * * of physical force") also contains an important textual difference from Section's 16's definition of "crime of violence" ("the use * * * of physical force *against the person or property of another*") (emphasis added). As the Court explained in *Leocal*, "[t]he critical aspect of [Section] 16(a) is that a crime of violence is one involving the 'use * * * of physical force *against the person or property of another*.'" 543 U.S. at 9 (emphasis original). It was because of this precise formulation—which is absent from Section 921(a)(33)(A)—that *Leocal* held that Section 16 "requir[es] a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11. And some courts of appeals have similarly relied on the "against the person or property of another" language to exclude reckless acts from Section 16. See, *e.g.*, *United States* v. *Torres-Villalobos*, 487 F.3d 607, 616

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to require "violent force," which excludes mere offensive touching, and requires "that degree of force necessary to inflict pain." 559 U.S. at 139-143.

(8th Cir. 2007) ("*Leocal* focused on the precise wording of [Section] 16.").

Section 922(g)(9) also differs in its purpose and effect from the ACCA—where three qualifying "violent felonies" subject a defendant to a 15-year mandatory minimum sentence—or Section 16's definition of "crime of violence," which has been incorporated into a broad range of criminal, sentencing, immigration, and other provisions. See *Leocal*, 543 U.S. at 7 & n.4. By contrast, Section 922(g)(9)—like the other provisions of Section 922(g)—has a single specific purpose: to disable a class of persons thought to pose a heightened risk of danger from possession of a firearm. See *Castleman*, 134 S. Ct. at 1412.

These distinctions among the statutory schemes explain why this Court found that the definition of common-law battery would create a mismatch with the term "violent felony" under the ACCA, see *Johnson*, 559 U.S. at 142, but found "no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom [Section] 922(g) disqualifies from gun ownership," *Castleman*, 134 S. Ct. at 1412. The disqualified persons include those "addicted to any controlled substance," Section 922(g)(3); most people "admitted to the United States under a non-immigrant visa," Section 922(g)(5)(B); "anyone who has renounced United States citizenship, Section 922(g)(7); and anyone "subject to a domestic restraining order," Section 922(g)(8). *Castleman*, 134 S. Ct. at 1412.

The purpose of Section 922(g)'s firearms disability 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) (citation and internal quotation marks omitted); *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). It is entirely consistent with Section 922(g)(9)'s purpose to include those convicted of reckless domestic batteries in this group. See *Castleman*, 134 S. Ct. at 1412 ("Whereas we have hesitated * * * to apply [the ACCA] to 'crimes which, though dangerous, are not typically committed by those whom one normally labels 'armed career criminals,' * * * we see no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom [Section] 922(g) disqualifies from gun ownership.") (quoting *Begay* v. *United States*, 553 U.S. 137, 146 (2008)).[18]

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[18] The differences between Section 922(g)(9) and 18 U.S.C. 924(c)(1)—the statute at issue in *Smith* v. *United States*, 508 U.S. 223 (1993), and *Bailey* v. *United States*, 516 U.S. 137 (1995)—are even more stark. See Pet. Br. 17-18 (relying on those cases). The version of Section 924(c)(1) interpreted by *Smith* and *Bailey* required a five-year mandatory minimum sentence if a defendant "during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm." 18 U.S.C. 924(c)(1). In that context, the Court understood the term "use" to require "active employment," by virtue of that word's "placement and purpose in the statutory scheme," and "not only the bare meaning of the word." *Bailey*, 516 U.S. at 145, 150; see *Smith*, 508 U.S. at 228-234 (relying not only on the dictionary definition of "use," but also on Section 924(c)(1)'s entire statutory context to conclude that the phrase "uses * * * a firearm" in that statute proscribed the "use [of] a gun by trading it" for illegal drugs). For example, *Bailey* held that it was necessary to define "use" to mean active employment to avoid surplusage with the word "carries" in Section 924(c)(1). That definition of "use" was also consistent with the other subsections of Section 924 and was supported by the provision's legislative history, which suggested that Congress "intended

C. Exclusion Of Reckless Battery Would Undermine The Purpose Of The Statute

1. Petitioners' interpretation would prevent Section 922(g)(9)'s categorical application to a broad swath of statutes

Congress intended to define qualifying "misdemeanor crime[s] of domestic violence" to include generally applicable state, federal, and tribal assault and battery statutes. See *Castleman*, 134 S. Ct. at 1410-1414; *Hayes*, 555 U.S. at 427. In both *Hayes* and *Castleman*, this Court interpreted Section 922(g)(9) to effectuate that congressional purpose, and so declined to adopt contrary interpretations that would have rendered the provision a "practical nullity." See *Castleman*, 134 S. Ct. at 1418-1419. But under petitioners' interpretation, domestic batteries prosecuted under the federal misdemeanor assault provisions and a majority of state assault and battery statutes would fail to categorically qualify as "misdemeanor crime[s] of domestic violence" under Section 922(g)(9) because they prohibit reckless infliction of bodily harm or offensive contact.

Thirty-four States and the District of Columbia define misdemeanor assault to include the reckless causation of bodily injury. See App. B, *infra*; see 2 LaFave § 16.2(c)(2), at 557 ("In the modern codes, a substantial majority of the battery-type statutes expressly state that the crime [of battery] may be committed by recklessness—that is, where there is a subjective awareness of the high risk of physical inju-

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to reach the situation where the firearm was actively employed during commission of the crime." *Bailey*, 516 U.S. at 145-148. The text and context of Section 922(g)(9) bear none of those features.

ry.").[19] At the time of Section 922(g)(9)'s enactment, at least eight States had domestic violence assault provisions that proscribed reckless conduct expressly, or by incorporating the State's general assault and battery provision; and nine States have since added domestic assault and battery provisions that include recklessness.[20] See App. C, *infra.*

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[19] Not all States expressly define assault and battery to proscribe offensive touching, but two States have assault and battery provisions are similar to Maine's assault statute in that those states proscribe deliberate contact that is reasonably likely to cause offense, injury, or harm. See Tenn. Code Ann. § 39-13-101 (West 2015); Tex. Penal Code Ann. § 22.01(a)(3) (West 2015).

[20] In 2006, Congress amended Section 921(a)(33)(A) to expand its application to misdemeanor offenses under tribal law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat. 3083; 18 U.S.C. 921(a)(33)(A)(i). While tribal law varies, a number of tribes have assault and battery provisions that proscribe reckless causation of bodily injury. See, *e.g.*, White Mountain Apache Crim. Code § 2.4(A)(1) (defining assault as "[i]ntentionally, knowingly, or recklessly causing any physical injury to another person"); Pascua Yaqui Crim. Code § 130(A)(1) (same); Salt River Pima-Maricopa Indian Community Code of Ordinances § 6-51(a)(1) (same); Gila River Indian Community Ordinances tit. 5, § 5.602(A)(1) (similar); Sisseton-Wahpeton Oyate Codes of Law § 24-06-01(A) (similar); Confederated Tribes of Umatilla Indian Reservation Crim. Code § 4.74 (same as to mens rea, including "physical injury however slight"); see also Mississippi Choctaw Tribal Code tit. 3, § 3-10-2(1)(a) ("'Abuse/Domestic Violence' means the occurrence," "between family or household members who reside together or who formerly resided together," of "attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon."); Tohono O'Odham Criminal Code tit. 7, § 7.1(a)(4) ("A person commits the offense of assault if," *inter alia*, "recklessly or by negligence he or she causes bodily injury to another person.").

Petitioners' interpretation of Section 922(g)(9) therefore would exclude categorical coverage of the majority of state misdemeanor battery statutes, as well as a substantial number of state statutes specifically targeting domestic violence. As this Court recognized in *Hayes* and *Castleman*, Congress enacted Section 922(g)(9) to target domestic abusers, who are "routinely" convicted under the "generally applicable assault and battery laws." 555 U.S. at 427; 134 S. Ct. at 1411. Because the categorical approach looks to the *elements* of the statute rather than the underlying conduct, *Descamps* v. *United States*, 113 S. Ct. 2276, 2281 (2013), misdemeanor battery convictions in these jurisdictions for conduct this Court described as typifying domestic violence—"spitting, scratching, biting, grabbing, shaking, shoving, pushing, restraining, throwing, twisting, [or] slapping"—or worse, would be insufficient to trigger Section 922(g)(9). See *Castleman*, 134 S. Ct. at 1411 n.5. It would make little sense to adopt an interpretation of Section 922(g)(9) that would render it inapplicable to a substantial majority of such offenses.

Federal law also requires only recklessness for both simple and more serious assaults. The federal assault statute punishes as misdemeanors "assault by striking, beating, or wounding," 18 U.S.C. 113(a)(4), and "simple assault," 18 U.S.C. 113(a)(5). Neither provision specifies the required mens rea, but as discussed above, courts of appeals uniformly have held that specific intent to injure is not required.[21] See pp.

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[21] More recently, Congress added two felony provisions specifically proscribing domestic assaults: Section 113(a)(7), which penalizes "[a]ssault resulting in substantial bodily injury to a spouse or intimate partner"; and Section 113(a)(8), which penalizes "[a]s-

19-20, *supra*. Moreover, at least three courts of appeals have determined that felony assault resulting in serious bodily injury, prohibited by 18 U.S.C. 113(a)(6) (and predecessor statutes), requires proof only of recklessness. See *Zunie*, 444 F.3d at 1235 (10th Cir.) ("[A] finding of purpose, knowledge, or recklessness supports a conviction for assault resulting in serious bodily injury, in violation of 18 U.S.C. § 113(a)(6)."); *United States* v. *Ashley*, 255 F.3d 907, 911 (8th Cir. 2001) (affirming conviction under 18 U.S.C. 113(a)(6) for reckless conduct); *Loera* 923 F.2d at 728 (9th Cir.) (same as to predecessor of 18 U.S.C. 113(a)(6)); see also *United States* v. *Lewis*, 780 F.2d 1140, 1142-1143 (4th Cir. 1986) (assault resulting in serious bodily injury is a general intent crime). Petitioners' interpretation of Section 922(g)(9) would therefore render largely meaningless the statute's inclusion of offenses that are "misdemeanor[s] under Federal * * * law."[22] 18 U.S.C. 921(a)(33)(A)(i); but see Part C.3, *infra* (discussing the applicability of the modified categorical approach).

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sault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate." See 18 U.S.C. 113(a)(7) and (8). Congress expressly provided that "strangling" and "suffocating" include "intentionally, knowingly, or recklessly impeding" the victim's breathing or circulation, "regardless of whether * * * there is any intent to kill or protractedly injure the victim." See 18 U.S.C. 113(b)(4) and (5).

[22] State domestic-violence offenses occurring within the special maritime and territorial jurisdiction of the United States could be prosecuted under 18 U.S.C. 13. In addition, after Section 922(g)(9)'s enactment, Congress added two *felony* domestic-violence assault provisions, 18 U.S.C. 113(a)(7) and (8). If Sections 113(a)(4) and (5) were excluded from Section 922(g)(9), no other distinctly federal misdemeanor offense would qualify.

This Court should therefore follow the approach taken in *Hayes* and *Castleman* and decline to adopt an interpretation of Section 922(g)(9) that would render it effective in only a minority of States and would exclude the federal misdemeanors used to prosecute domestic violence. See *Hayes*, 555 U.S. 427 (finding it "highly improbable that Congress meant to extend [Section] 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers" prosecuted in States with domestic-violence specific statutes); *Castleman*, at 1413 (rejecting an interpretation of "misdemeanor crime of domestic violence" that would have made Section 922(g)(9) ineffectual in at least ten States, "encompassing 30 percent of the U.S. population").

2. Exclusion of reckless conduct would allow thousands of convicted domestic abusers to legally purchase and possess firearms

The damaging impact of petitioners' interpretation would not be limited to criminal prosecutions under Section 922(g)(9). Under the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (primarily codified at 18 U.S.C. 922(s)-(t)) (Brady Act), 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 (FBI). See 28 C.F.R. 25.3, 25.4. NICS, in turn, advises the licensee whether a 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 2014, misdemeanor crime of domestic violence convictions have accounted for more than 112,000 denials of firearms transfers—the third most common reason for denying firearms to a prospective purchaser. See FBI, *National Instant Criminal Back ground Check System (NICS) Operations 2014*, http://www.fbi.gov/about-us/cjis/nics/reports/2014-operations-report (last visited Jan. 14, 2016). If this Court were to adopt petitioners' interpretation of Section 922(g)(9), that would no longer be true. A domestic abuser who is convicted of a misdemeanor assault or battery offense against his family in the majority of States or under federal law would 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). Petitioners' interpretations thus frustrate (if not destroy) Congress's "manifest purpose" to "keep[] firearms out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426-427.

3. Resort to the modified categorical approach is of little assistance in the context of misdemeanor assault and battery

The practical effect of the interpretation petitioners advocate cannot be substantially mitigated by resort to the "modified categorical approach." In *Descamps* this 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." 113 S. Ct. at 2281.

Many state assault statutes enumerate alternative mental states in a single subsection, *i.e.*, proscribe "intentionally, knowingly, or recklessly" or "knowingly or recklessly" causing bodily injury. See App. B, *infra*. The courts of appeals are divided on whether a statute is divisible if it sets out, in the alternative, several forms of committing an offense, or whether instead a court may apply the modified categorical approach only if the court determines that state law would require jurors to be unanimous as to the form of the offense for which the defendant was convicted. See U.S. Br. at 17-20, *Mathis* v. *United States*, No. 15-6092 (Dec. 17, 2015) (describing courts of appeals' differing approaches to divisibility under *Descamps*).[23]

In addition, several States have found that their statutes prohibit reckless battery through judicial construction. See *e.g.*, *Commonwealth* v. *Porro*, 939 N.E. 2d 1157, 1162 (Mass. 2010) (holding that Massachusetts assault and battery statute includes reckless conduct in accordance with Massachusetts common law); *Vines* v. *United States*, 70 A.3d 1170, 1179-1181 (D.C. 2013) (simple assault under D.C. Code § 22-404(a)(1), which is silent as to mens rea, may be proven "based on purely reckless conduct"); cf. *United States v. Vinson*, 805 F.3d 120, 126 (4th Cir. 2015) (North Carolina assault statute requires intentional conduct, but intent may be proven by mere culpable negligence); see also App. B, *infra*. It is unsettled whether and how divisibility applies to such common-law elements. See *United States* v. *Hemingway*, 734 F.3d 323, 331 (4th Cir. 2013) (holding, as a matter of

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[23] On January 19, 2016, this Court granted the petition for a writ of certiorari in *Mathis* v. *United States*, No. 15-6092.

first impression, that offenses defined by State's common law were divisible under *Descamps*).

But even when the statute is divisible in theory, the modified categorical approach may often be unavailable in practice. State and local court charging documents typically track the statutory language and do not specify which mens rea is at issue, as was the case for each of the petitioners. J.A. 98, 154. Moreover, records from closed misdemeanor cases are often unavailable or incomplete. See *Johnson*, 559 U.S. at 145 (acknowledging it "may well be true * * * that in many cases state and local records from battery convictions will be incomplete").

The inaccessibility or unavailability of records thwarts not only criminal prosecution under Section 922(g)(9), but the ability of NICS to verify a person's ability to legally purchase a firearm. The Brady Act allows only a three-business-day waiting period for such verification to take place. 18 U.S.C. 922(t)(1)(B)(ii). If the firearms dealer does not receive notice that the transfer is unlawful (because of, for example, the person's prior conviction), the dealer may proceed with the transaction. *Ibid.* If reckless batteries were excluded as Section 922(g)(9) predicates, this verification process would frequently be unable to prevent firearms transfers to offenders convicted of misdemeanor domestic assault and battery under federal law and in the majority of States, which would then lack categorically qualifying assault offenses.

D. Section 922(g)(9) Is Not Limited To Only "Severe" Instances Of Domestic Abuse

Petitioners criticize (Br. 25-28) the court of appeals' view that prosecutorial discretion will prevent

Section 922(g)(9)'s application to "minor reckless acts." Petitioners contend (Br. 26-28) that changes in state law and the enactment of "mandatory arrest" and "no-drop" policies have resulted in "higher rates of minor conduct being swept into the criminal justice system." Br. 27-28. Petitioners' contentions provide no reason to truncate the application of Section 922(g)(9).

This Court in *Castleman* considered and rejected the view "that Congress * * * meant to narrow the scope of the statute to convictions based on especially severe conduct" concluding that "all Congress meant to do" in requiring prior offenses to have an element of "use * * * of physical force," "was address the fear that [Section] 922(g)(9) might be triggered by offenses in which no force at all was directed at a person." 134 S. Ct. at 1416 (citation and internal quotation marks omitted); see *id.* at 1412 ("If a seemingly minor act * * * draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a 'misdemeanor crime of domestic violence.'").

Petitioners' concern that assertedly "minor" domestic abuse may be prosecuted as assaults or batteries amounts to nothing more than a disagreement with Congress's policy judgment to expand the firearms prohibition to individuals with *misdemeanor* domestic abuse convictions. Even if domestic violence is prosecuted more readily now than twenty years ago, that does not mean that the Court should read Section 922(g)(9) to capture a narrower range of convictions by grafting onto the statute a mens rea for Section

922(g)(9) predicate offenses that Congress did not contemplate.

Similarly, petitioners' assertions (Br. 28-30 & n.11) about wrongful misdemeanor convictions or "constitutional abuses in the state misdemeanor court system" could apply to any misdemeanor offense and have nothing to do with Section 922(g)(9)'s inclusion of reckless domestic assaults.[24] Petitioners' complaint therefore is with the very premise of Section 922(g)(9), not with the inclusion of assault and battery statutes that encompass reckless conduct. See *Castleman*, 134 S. Ct. at 1408-1412; J.A. 19.

Petitioners are also incorrect that Section 922(g)(9) must be limited to intentional conduct because Congress had as one of its goals covering crimes that would have been treated as felonies "if the victim were a stranger" but resulted in misdemeanor convictions because of "[o]utdated or ineffective laws often treat domestic violence as a lesser offense." Br. 24 (quoting 142 Cong. Rec. 22,987 (1996) (statement of Sen. Feinstein)). Nothing about Section 922(g)(9)'s text, history, or context suggests that Congress meant to limit the statute to conduct that would also constitute a state-law felony, nor do petitioners provide support for the proposition that the dividing line between felonies and misdemeanors is necessarily mens rea.

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[24] While petitioners allege (Br. 29 & n.11) "widespread constitutional abuses in the state misdemeanor court systems," they do not contend there was any constitutional infirmity in their own convictions. Moreover, Section 921(a)(33)(B)(i) provides that, for any person to be considered to have been convicted of a Section 922(g)(9) predicate offense, the person must have been represented by counsel and afforded a jury trial, if he was entitled to a jury trial under the laws of the jurisdiction; or the person must have knowingly and intelligently waived such rights.

Moreover, petitioners offer no examples of "minor" convictions for domestic abuse that were not within Section 922(g)(9)'s intended scope, nor do they claim that the conduct underlying their own offenses was "minor."

E. Neither The Rule Of Lenity Nor Principles of "Avoidance Of Constitutional Doubt" Apply

1. No ambiguity in Section 922(g)(9) implicates the rule of lenity

Petitioners argue (Br. 31-36) that the rule of lenity counsels in favor of interpreting Section 922(g)(9) to require a mens rea higher than recklessness. But "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010) (citations and internal quotation marks omitted). No such grievous ambiguity exists in Sections 922(g)(9) and 921(a)(33)(A)—as this Court found in both *Hayes* and *Castleman*. See *Castleman*, 134 S. Ct. at 1416; *Hayes*, 555 U.S. at 429. Rather, the common-law definition of battery, as incorporated into Section 922(g)(9), makes clear that it covers predicate assault and batteries involving reckless conduct.

2. Including reckless assaults and batteries does not give rise to Second Amendment concerns

Petitioners also argue (Br. 32-36) that the Court should interpret Section 922(g)(9) to exclude reckless conduct because to do otherwise would raise "grave constitutional questions" about whether the statute violates the Second Amendment. Petitioners sought certiorari to address the question of whether Section

922(g)(9) violates the Second Amendment, but the Court declined to grant certiorari on that issue. Petitioners now seek to advance their Second Amendment arguments through the "doctrine of constitutional doubt." But to the extent this Court even entertains this argument, there is no doubt about the constitutionality of Section 922(g)(9).

The "doctrine of constitutional doubt," applies only "where a statute is susceptible of two constructions," one of which would avoid "grave and doubtful constitutional questions." *United States ex rel. Att'y Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Since this Court held in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), that the Second Amendment protects the right of law-abiding, responsible citizens to keep and bear arms for self-defense in the home, *id.* at 635, several courts of appeals have addressed the constitutionality of Section 922(g)(9) in published opinions, and none has held that the statute is unconstitutional. See *United States* v. *Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013) (upholding statute), cert. denied, 135 S. Ct. 187 (2014); *Booker*, 644 F.3d at 22-26 (same); *United States* v. *Skoien*, 614 F.3d 638, 641-642 (7th Cir. 2010) (en banc) (same), cert. denied, 562 U.S. 1303 (2011); *United States* v. *White*, 593 F.3d 1199, 1205-1206 (11th Cir. 2010) (same); cf. *United States* v. *Staten*, 666 F.3d 154, 162-163, 167-168 (4th Cir. 2011) (rejecting Second Amendment challenge after assuming *arguendo* that defendant was entitled to some degree of Second Amendment protection notwithstanding his conviction and relying on the degree of force required under the circuit's prior decision in *United States* v. *White*, 606 F.3d 144, 153 (4th Cir. 2010) ("violent force * * * capable of caus-

ing physical pain or injury") (citation and emphasis omitted)), cert. denied, 132 S. Ct. 1937 (2012).

Courts have also rejected Second Amendment challenges to 18 U.S.C. 922(g)(8), which prohibits possession of a firearm by a person subject to a domestic violence protective order. See *United States* v. *Chapman*, 666 F.3d 220, 224-231 (4th Cir. 2012); *United States* v. *Bena*, 664 F.3d 1180, 1182-1185 (8th Cir. 2011); *United States* v. *Reese*, 627 F.3d 792, 799-805 (10th Cir. 2010), cert. denied, 563 U.S. 990 (2011).

Whatever the level of scrutiny to be applied to a Second Amendment challenge to Section 922(g)(9), its firearms prohibition passes constitutional review. As the court of appeals below explained in its earlier decision in Armstrong's case, "a sufficient nexus exists * * * between the important government interest" in "preventing domestic gun violence" and disarming misdemeanants who engage in physical force of the sort proscribed by Maine's assault statutes. *Armstrong*, 706 F.3d at 7-8 (quoting *Booker*, 644 F.3d at 26). That conclusion is supported by a substantial body of empirical evidence that "[f]irearms and domestic strife are a potentially deadly combination." *Castleman*, 134 S. Ct. at 1408 (quoting *Hayes*, 555 U.S. at 427); see, *e.g.*, *id.* at 1409 (citing evidence that "[w]hen a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed"); see also *Staten*, 666 F.3d at 163-167; *Booker*, 644 F.3d at 25-26; *Skoien*, 614 F.3d at 642-644. Restrictions on firearm possession by persons convicted of abusing their domestic partners bear a clear connection to the important goals underlying Section 922(g)(9).

Petitioners argue (Br. 34) that reading Section 922(g)(9) to allow reckless causation of bodily harm or offensive physical contact "weakens the nexus between the prohibited conduct and the law's objectives." But the law's objective was to remove firearms from the hands of people who abuse their family members, even if that abuse results from "domestic arguments [that] 'get out of control,'" and assaults that a partner commits "'almost without knowing what he is doing.'" J.A. 20 (quoting 142 Cong. Rec. at 26,674). Individuals convicted of assaults and batteries under the common-law definition—reaching reckless as well as purposeful acts of domestic violence—fall within Congress's core concern of keeping guns out of the hands of those previously convicted of domestic violence crimes.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 18 U.S.C. 16 provides:

Crime of violence defined

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

2. 18 U.S.C. 113 provides:

Assaults within maritime and territorial jurisdiction

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder, by imprisonment for not more than twenty years.

(2) Assault with intent to commit any felony, except murder or a felony under chapter 109A, by a fine under this title or imprisonment for not more than ten years, or both.

(3) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both.

(b) As used in this subsection—

(1) the term "substantial bodily injury" means bodily injury which involves—

(A) a temporary but substantial disfigurement; or

(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and

(2) the term "serious bodily injury" has the meaning given that term in section 1365 of this title.

3. 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.

* * * * *

4. 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 physical

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.

* * * * *

5. 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[.]

APPENDIX B

STATE MISDEMEANOR ASSAULT AND BATTERY STATUTES IN EFFECT WHEN SECTION 922(g)(9) WAS ENACTED IN 1996 AND FOR WHICH RECKLESSNESS OR LESS SUFFICES[1]

Alabama: Ala. Code § 13A-6-22(a)(2) (LexisNexis 2005) ("A person commits the crime of assault in the third degree if * * * [h]e recklessly causes physical injury to another person."); *id.* § 13A-2-2(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Alaska: Alaska Stat. § 11.41.230(a)(1) (2014) ("A person commits the crime of assault in the fourth degree if, * * * that person recklessly causes physical injury to another person."); *id.* § 11.81.900(a)(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Arizona: Ariz. Rev. Stat. Ann. § 13-1203(A)(1) (2010) ("A person commits assault by * * * [i]ntentionally, knowingly or recklessly causing any physical injury to another person."); *id.* § 13-105(10)(c) (Supp. 2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk); *id.* § 13-105(9)(c) (1996) (same, but renumbered).

Arkansas: Ark. Code. Ann. § 5-13-203(a)(2) (2013) ("A person commits battery in the third degree if * * * [t]he person recklessly causes physical injury

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[1] The statutes in this appendix are cited to the current version. Pertinent statutory changes following Section 922(g)(9)'s 1996 enactment are noted.

to another person."); *id.* § 5-2-202(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Colorado: Colo. Rev. Stat. § 18-3-204(1)(a) (2015) ("A person commits the crime of assault in the third degree if * * * [t]he person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon."); *id.* § 18-1-501(8) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Connecticut: Conn. Gen. Stat. Ann. § 53a-61(a)(2) (West 2012) ("A person is guilty of assault in the third degree when * * * he recklessly causes serious physical injury to another person."); *id.* § 53a-3(13) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Delaware: Del. Code Ann. tit. 11, § 611(1) (2007) ("A person is guilty of assault in the third degree when * * * [t]he person intentionally or recklessly causes physical injury to another person."); *id.* § 601(a) ("A person is guilty of offensive touching when the person: (1) [i]ntentionally touches another person either with a member of his or her body or with any instrument, knowing that the person is thereby likely to cause offense or alarm to such other person; or (2) [i]ntentionally strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is thereby likely to cause offense or alarm to such other person."); *id.* § 231(e) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

District of Columbia: D.C. Code § 22-404(a)(1) (LexisNexis Supp. 2015) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both."); *id.* § 22-404(a)(1) (LexisNexis 1996) (fine amount amended); *Vines* v. *United States*, 70 A.3d 1170, 1180 (D.C. 2013) ("[R]eckless conduct * * * is enough to establish the intent to convict [a defendant] of simple assault."); *Tarpeh* v. *United States*, 62 A.3d 1266, 1270 (D.C. 2013) ("[A] 'person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and *unjustified* risk that the material element exists or will result from his conduct.'") (quoting Model Penal Code § 2.02(2)(c) (1985)); *Mahaise* v. *United States*, 722 A.2d 29, 30 (D.C. 1998) ("A battery is any unconsented touching of another person."); *Comber* v. *United States*, 584 A.2d 26, 50 (D.C. 1990) ("[S]imple assault * * * is designed to protect not only against physical *injury,* but against all forms of offensive touching.").

Hawaii: Haw. Rev. Stat. Ann. § 707-712(1)(a) (LexisNexis 2007) ("A person commits the offense of assault in the third degree if the person * * * [i]ntentionally, knowingly, or recklessly causes bodily injury to another person.").

Kansas: Kan. Stat. Ann. § 21-5413(a)(1) (Supp. 2013) ("Battery is * * * [k]nowingly or recklessly causing bodily harm to another person."); *id.* § 21-3412(a)(1) (1996) ("Battery is * * * [i]ntentionally or recklessly causing bodily harm to another person."); *id.* § 21-5202(j) (Supp. 2013) (defining recklessly to include conscious disregard of a substantial and unjusti-

fiable risk); *id.* § 21-3201(c) (1996) (previously providing that "[r]eckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger").

Kentucky: Ky. Rev. Stat. Ann. § 508.030(1)(b) (LexisNexis 2014) ("A person is guilty of assault in the fourth degree when: (a) [h]e intentionally or wantonly causes physical injury to another person; or (b) [w]ith recklessness he causes physical injury to another person by means of a deadly weapon or a dangerous instrument."); *id.* § 501.020(4) ("A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207(1) (2006) ("A person is guilty of assault if * * * [t]he person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person."); *id.* § 35(3) (Supp. 2015) (defining recklessly to include conscious disregard of a risk that attendant circumstances exist or that the conduct will cause a result).

Maryland: Md. Code Ann. Crim. Law § 3-203(a) (LexisNexis Supp. 2015) ("A person may not commit an assault."); *id.* § 3-201(b) (LexisNexis 2012) ("'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings."); *Johnson* v. *State*, 115 A.3d 668, 674 (Md. Ct. Spec. App.) ("Assault is causing offensive physical contact to another person" that "was the re-

sult of an intentional or reckless act of the defendant and was not accidental." (citation omitted)), cert. denied, 122 A.3d 975 (Md. 2015) (Tbl.); accord, *e.g.*, *United States* v. *Royal*, 731 F.3d 333, 341 (4th Cir. 2013), cert. denied, 134 S. Ct. 1777 (2014); *Elias* v. *State*, 661 A.2d 702, 709 (Md. 1995) ("[A] criminal battery is committed, in accordance with the prevailing view . . . if the contact was the result of [the defendant's] recklessness or criminal negligence." The "test is whether the [defendant's] misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe." (citations omitted)); *Snowden* v. *State*, 583 A.2d 1056, 1059 (Md. 1991) (pre-codification) ("Battery, another common law offense, is the unlawful application of force to the person of another.").

Massachusetts: Mass. Ann. Laws ch. 265, § 13A(a) (LexisNexis 2010) ("Whoever commits an assault or an assault and battery upon another shall be punished."); *id.* § 13A(b); *Commonwealth* v. *Porro*, 939 N.E.2d 1157, 1162 (Mass. 2010) ("A reckless assault and battery is committed when an individual engages in reckless conduct that results in a touching producing physical injury to another person; an unconsented touching is not sufficient."); *Commonwealth* v. *Walker*, 812 N.E.2d 262, 269-270 (Mass. 2004) ("Wanton or reckless conduct * * * is intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another. Even if a particular defendant is so stupid or so heedless that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless

conduct if an ordinary normal person under the same circumstances would have realized the gravity of the danger." (citation, brackets, and ellipses omitted)).

Mississippi: Miss. Code Ann. § 97-3-7(1)(a)(i) (West Supp. 2015) ("A person is guilty of simple assault if he * * * attempts to cause or purposely, knowingly or recklessly causes bodily injury to another."); *id.* § 97-3-7(1)(a) (West 1996) (same, but renumbered); cf. *Nix* v. *State*, 763 So. 2d 896, 900 (Miss. Ct. App. 2000) ("Reckless driving occurs when the driver commits conscious acts which a driver knows *or should know* would create an unreasonable risk of injury or damage." (emphasis added)); *Coleman* v. *State*, 45 So. 2d 240, 241 (Miss. 1950) ("[C]ulpable negligence should be defined as the conscious and wanton or reckless disregard of the probabilities of fatal consequences to others as a result of the wilful creation of an unreasonable risk thereof.").

Missouri: Mo. Ann. Stat. § 565.070.1(1) (West Supp. 2015) ("A person commits the crime of assault in the third degree if * * * [t]he person attempts to cause or recklessly causes physical injury to another person."); *id.* § 565.070.1(1) (West 1996) (same, but with male pronoun); *id.* § 562.016(4) (West Supp. 2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Montana: Mont. Code Ann. § 45-5-201(1) (2015) ("A person commits the offense of assault if the person * * * (a) purposely or knowingly causes bodily injury to another" or "(b) negligently causes bodily injury to another with a weapon."); see *id.* § 45-2-101(43) (2015) ("[A] person acts negligently with respect to a result or to a circumstance described by a

statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. 'Gross deviation' means a deviation that is considerably greater than lack of ordinary care."); *id.* § 45-2-101(42) (1996) (same, but renumbered).

Nebraska: Neb. Rev. Stat. Ann. § 28-310(1)(a) (LexisNexis 2015) ("A person commits the offense of assault in the third degree if he * * * [i]ntentionally, knowingly, or recklessly causes bodily injury to another person."); *id.* § 28-109(19) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk); *State* v. *Hoffman*, 416 N.W.2d 231, 237 (Neb. 1987) ("A reckless act involves a conscious choice in a course of action, made with knowledge of a serious danger or risk to another as a result of such choice of action or with knowledge of the attendant circumstances which, to a reasonable person, would indicate or disclose a serious danger or risk to another as a result of the course of action selected.").

New Hampshire: N.H. Rev. Stat. Ann. § 631:2-a(I)(b) (LexisNexis 2015) ("A person is guilty of simple assault if he * * * [r]ecklessly causes bodily injury to another."); *id.* § 626:2(II)(c) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

New Jersey: N.J. Stat. Ann. § 2C:12-1(a)(1) (West 2015) ("A person is guilty of assault if he * * * [a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another."); *id.* § 2C:2-2(b)(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

New York: N.Y. Penal Law § 120.00(2) (McKinney 2009) ("A person is guilty of assault in the third degree when * * * [h]e recklessly causes physical injury to another person."); *id.* § 15.05(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

North Carolina: N.C. Gen. Stat. § 14-33(a) (2013) ("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. *Coffey*, 259 S.E.2d 356, 357 (N.C. Ct. App. 1979) ("[I]ntent is an essential element of the crime of assault, including an assault with an automobile, but intent may be implied from culpable or criminal negligence."); *State* v. *Thompson*, 219 S.E.2d 566, 568 (N.C. Ct. App. 1975) ("A 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.").

North Dakota: N.D. Cent. Code § 12.1-17-01(1)(a) and (b) (2012) ("A person is guilty of an offense if that person * * * [w]illfully causes bodily injury to another human being; or * * * [n]egligently causes bodily injury to another human being by means of a firearm, destructive device, or other weapon, the use of which against a human being is likely to cause death or serious bodily injury."); *id.* § 12.1-02-02(1)(e) (1996) ("[A]

person engages in conduct * * * '[w]illfully' if he engages in the conduct intentionally, knowingly, or recklessly."); *id.* § 12.1-02-02(1)(c) (2009) (defining recklessly to include "conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks").

Ohio: Ohio Rev. Code Ann. § 2903.13(B) (LexisNexis 2014) ("No person shall recklessly cause serious physical harm to another or to another's unborn."); *id.* § 2903.13(B) (LexisNexis 1996); *id.* § 2901.22(C) (LexisNexis Supp. 2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk); *id.* § 2901.22(C) committee's cmt. (1974) ("A person is said to be reckless under the section when, without caring about the consequences, he obstinately disregards a known and significant possibility that his conduct is likely to cause a certain result or be of a certain nature, or that certain circumstances are likely to exist."); *Roszman* v. *Sammett*, 269 N.E.2d 420, 423 (Ohio 1971) ("Such proof must be of a nature that shows all absence of care or an absolute perverse indifference to the safety of others, knowing of a dangerous situation, yet failing to use ordinary care to avoid injury to others.").

Oregon: Or. Rev. Stat. § 163.160(1)(a) (2013) ("A person commits the crime of assault in the fourth degree if the person * * * [i]ntentionally, knowingly or recklessly causes physical injury to another."); *id.* § 161.085(9) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 2701(a)(1) (West 2015) ("[A] person is guilty of assault if he * * * attempts to cause or intentionally, knowingly or reck-

lessly causes bodily injury to another."); *id.* § 302(b)(3) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

South Carolina: S.C. Code Ann. § 16-3-600(D)(1) (2015) ("A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing."); *id.* § 16-3-600(E)(1) ("A person commits the offense of assault and battery in the third degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so."); see *United States* v. *McFalls*, 592 F.3d 707, 716 (6th Cir. 2010) (finding that South Carolina's "common-law crime" of assault and battery of a high and aggravated nature "applies not only to intentional conduct, but also to reckless conduct"); *State* v. *Sussewell*, 146 S.E. 697, 698 (S.C. 1929) (approving of jury instructions stating, "[t]he state must prove beyond a reasonable doubt gross carelessness or recklessness on the part of the defendant").

South Dakota: S.D. Codified Laws § 22-18-1(2) and (3) (Supp. 2015) ("Any person who * * * "[r]ecklessly causes bodily injury to another" or "[n]egligently causes bodily injury to another with a dangerous weapon * * * is guilty of simple assault."); *id.* § 22-1-2(1)(d) (defining recklessly to include "conscious and unjustifiable disregard of a substantial risk that the

offender's conduct may cause a certain result or may be of a certain nature").

Tennessee: Tenn. Code Ann. § 39-13-101(a)(1) (2014) ("A person commits assault who * * * [i]ntentionally, knowingly or recklessly causes bodily injury to another."); *id.* § 39-11-302(c) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Texas: Tex. Penal Code Ann. § 22.01(a)(1) (West Supp. 2015) ("A person commits an offense if the person * * * intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse."); see *id.*§ 6.03(c) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Utah: Utah Code Ann. § 76-5-102(1)(b) (LexisNexis Supp. 2015) ("Assault is * * * an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another."); *State* v. *Bird*, 345 P.3d 1141, 1147 (Utah 2015). ("[I]ntent, knowledge, or recklessness must 'be found to establish criminal responsibility' in the context of assault." (citation omitted) (citing Utah Code Ann. § 76-2-102) (LexisNexis 2012)); see also Utah Code Ann. § 76-5-109(3)(b) (LexisNexis Supp. 2015) ("Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of" a misdemeanor if the offense is "done recklessly."); *id.* at § 76-2-103(3) (LexisNexis 2012) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

Vermont: Vt. Stat. Ann. tit. 13, § 1023(a)(1) (2009) ("A person is guilty of simple assault if he or she * * * attempts to cause or purposely, knowingly or recklessly causes bodily injury to another."); *id.* § 1023(a)(1) (1996); *State* v. *Brooks*, 658 A.2d 22, 26 (Vt. 1995) (defining recklessly in accordance with Model Penal Code § 2.02(c) (1985), to include conscious disregard of a substantial and unjustifiable risk).

Virginia: Va. Code Ann. § 18.2-57(A) (Supp. 2015) ("Any person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor."); *id.* § 18.2-57 (1996) ("Any person who shall commit a simple assault or assault and battery shall be guilty of a Class 1 misdemeanor."); see *Gnadt* v. *Commonwealth*, 497 S.E.2d 887, 888 (Va. Ct. App. 1998) ("An assault and battery is an unlawful touching of another. It is not necessary that the touching result in injury to the person. Whether a touching is a battery depends on the intent of the actor, not on the force applied." (citing *Wood* v. *Commonwealth*, 140 S.E. 114, 115 (Va. 1927))); *Trent* v. *Commonwealth*, No. 1844-03-2, 2004 WL 1243037, at *1 (Va. Ct. App. June 8, 2004) (unpublished) ("[I]f the act was done with reckless and wanton disregard for the lives and safety of others, the law would impute to the defendant an intent to do bodily harm and he would be guilty of assault and battery.") (brackets in original) (quoting *Banovitch* v. *Commonwealth,* 83 S.E.2d 369, 374-375 (Va. 1954)); see, *e.g.*, *Holloway* v. *Commonwealth*, 696 S.E.2d 247, 254 (Va. Ct. App. 2010) ("[T]he required mental state may be inferred from the commission of a reckless act.") (citing *Davis* v. *Commonwealth*, 143 S.E. 641, 643 (Va. 1928)); *Davis*, 143 S.E. at 643 ("[A]n intention to injure * * * may be inferred in law from the con-

sequences that are naturally to be apprehended as the result of the particular act, the doing of which was intentional.").

Washington: Wash. Rev. Code Ann. § 9A.36.041(1) (West 2015) ("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."); see *id.* § 9A.36.031(1)(d) and (f) (felony) ("A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree * * * [w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm" or "[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering."); *id.* § 9A.08.010(1)(d) (defining "criminal negligence" to be where a person "fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation").

Wyoming: Wyo. Stat. Ann. § 6-2-501(b) (2015) ("A person is guilty of battery if he intentionally, knowingly or recklessly causes bodily injury to another person by use of physical force."); *id.* § 6-2-501(b) (1996) ("A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another."); *id.* § 6-1-104(a)(ix) (2015) (defining recklessly to include conscious disregard of a substantial and unjustifiable risk).

APPENDIX C

STATE MISDEMEANOR DOMESTIC VIOLENCE STATUTES REQUIRING RECKLESSNESS OR LESS

Statutes In Effect When Section 922(g)(9) Was Enacted[1]

Arkansas: Ark. Code Ann. § 5-26-305(a)(2) (Supp. 2015) ("A person commits domestic battering in the third degree if * * * [t]he person recklessly causes physical injury to a family or household member."); *id.* § 5-26-303(a)(2) (1996) (same, but renumbered).

Hawaii: Haw. Rev. Stat. Ann. § 709-906(1) (LexisNexis Supp. 2015) ("It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member."); *State* v. *Eastman*, 913 P.2d 57, 66 (Haw. 1996) ("[T]he prosecution must prove that a defendant acted intentionally, knowingly, or recklessly before he or she may be convicted of the offense proscribed in [Section] 709–906(1).").

Kentucky: Ky. Rev. Stat. Ann. § 508.032(1) (LexisNexis 2014) ("If a person commits a third or subsequent offense of assault in the fourth degree under [Ky. Rev. Stat. Ann. §] 508.030 within five (5) years, and the relationship between the perpetrator and the victim in each of the offenses meets the definition of family member or member of an unmarried couple, as defined in [Ky. Rev. Stat. Ann. §] 403.720, then the

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[1] The statutes in this appendix are cited to the current version. Pertinent statutory changes following Section 922(g)(9)'s 1996 enactment are noted.

person may be convicted of a Class D felony."); *id.* § 508.032(1) (LexisNexis 1996); see App. B, *supra*, (defining fourth-degree assault under Ky. Rev. Stat. Ann. § 508.030(1)(b) (LexisNexis 2014), to include reckless causation of physical injury by means of a dangerous weapon).

Montana: Mont. Code Ann. § 45-5-206(1)(b) (2015) ("A person commits the offense of partner or family member assault if the person * * * negligently causes bodily injury to a partner or family member with a weapon.").

Ohio: Ohio Rev. Code Ann. § 2919.25(B) (LexisNexis 2014) ("No person shall recklessly cause serious physical harm to a family or household member.").

South Carolina: S.C. Code Ann. § 16-25-20(A)(1) (Supp. 2015) ("It is unlawful to * * * cause physical harm or injury to a person's own household member."); *id.* § 16-25-20(1) (1996); *id.* § 16-25-20(C) and (D) (Supp. 2015) (denoting interplay between assault and battery and lesser-included violations of subsection (A)); see App. B, *supra* (defining assault under S.C. Code Ann. § 16-3-600(D)(1) (Supp. 2015) and citing decisions holding that the mental state for assault may include reckless conduct).

Vermont: Vt. Stat. Ann. tit. 13, § 1042 (2009) ("Any person who attempts to cause or wilfully or recklessly causes bodily injury to a family or household member; or wilfully causes a family or household member to fear imminent serious bodily injury shall be imprisoned not more than 18 months or fined not more than $5,000.00, or both."); *id.* § 1042 (1996) (not more than one year).

Virginia: Va. Code Ann. § 18.2-57.2(A) (2014) ("Any person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor."); see App. B, *supra* (defining assault and battery under Va. Code Ann. § 18.2-57(A) (Supp. 2015), and citing decisions holding that the offense may be committed recklessly).

Later-Enacted Statutes

Alabama: Ala. Code § 13A-6-132(a) (Supp. 2014) ("A person commits domestic violence in the third degree if the person commits * * * the crime of assault in the third degree pursuant to Section 13A-6-22 * * * and the victim is a current or former spouse, parent, child, any person with whom the defendant has a child in common, a present or former household member, or a person who has or had a dating or engagement relationship with the defendant."); *id.* § 13A-6-22(a)(2) (2005) ("A person commits the crime of assault in the third degree if, * * * [h]e recklessly causes physical injury to another person.").

Kansas: Kan. Stat. Ann. § 21-5414(a)(1) (Supp. 2013) ("Domestic battery is, * * * [k]nowingly or recklessly causing bodily harm by a family or household member against a family or household member.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 207-A(1) (Supp. 2015) ("A person is guilty of domestic violence assault if * * * [t]he person violates [Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006),] and the victim is a family or household member."); see App. B, *supra* (citing Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(A) (2006), which may be committed recklessly).

Mississippi: Miss. Code. Ann. § 97-3-7(3)(a)(i) and (ii) (West Supp. 2015) ("When the offense is committed against" a family or household member, "a person is guilty of simple domestic violence who * * * [a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another," or "[n]egligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.").

Missouri: Mo. Ann. Rev. Stat. § 565.074.1 (West Supp. 2015) ("A person commits the crime of domestic assault in the third degree if the act involves a family or household member * * * and: (1) [t]he person attempts to cause or recklessly causes physical injury to such family or household member; or (2) [w]ith criminal negligence the person causes physical injury to such family or household member by means of a deadly weapon or dangerous instrument."); see also *id.* § 565.070.4 ("A person who has pled guilty to or been found guilty of the crime of assault in the third degree more than two times against any family or household member * * * is guilty of a class D felony for the third or any subsequent commission of the crime of assault in the third degree when a class A misdemeanor.").

New Hampshire: N.H. Rev. Stat. Ann. § 631:2-b(I)(b) and (c) (LexisNexis Supp. 2015) ("A person is guilty of domestic violence * * * against a family or household member or intimate partner," if the person "[r]ecklessly causes bodily injury * * * by use of physical force" or "[n]egligently causes bodily injury to another by means of a deadly weapon.").

North Dakota: N.D. Cent. Code § 12.1-17-01(2)(b) (2012) (simple assault becomes "a class A misdemeanor for a second or subsequent offense," as opposed to a class B misdemeanor, "when the victim is an actor's family or household member"); see App. B, *supra* (defining assault to include "willful"—*i.e.*, intentional, knowing, or reckless—causation of bodily injury).

Tennessee: Tenn. Code Ann. § 39-13-111(b) (2014) ("A person commits domestic assault who commits an assault as defined in [Tenn. Code Ann.] § 39-13-101 against a domestic abuse victim."); *id.* § 39-13-101(a)(1) ("A person commits assault who * * * [i]ntentionally, knowingly or recklessly causes bodily injury to another.").

Utah: Utah Code Ann. § 77-36-1(4)(b) (LexisNexis Supp. 2015) (defining "[d]omestic violence" as an "assault, as described in [Utah Code Ann. §] 76-5-102" "by one cohabitant against another"); *id.* § 77-36-1.1(2) (enhancing the penalties for misdemeanor "domestic violence" assault); see *id.* § 76-5-109(3)(b) ("Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of" a misdemeanor if the offense is "done recklessly."); see App. B, *supra* (defining assault under Utah Code Ann. § 76-5-102(1)(b) as including reckless conduct).