

No. 07-608

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

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

PETITION FOR A WRIT OF CERTIORARI

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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 question presented is whether, to qualify as a “misdemeanor crime of domestic violence” under 18 U.S.C. 921(a)(33)(A), an offense must have as an element a domestic relationship between the offender and the victim.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 482 F.3d 749. The order of the district court denying respondent's motion to dismiss the indictment (App., *infra*, 33a-39a) is reported at 377 F. Supp. 2d 540.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2007. A petition for rehearing was denied on July 20, 2007 (App., *infra*, 40a). On October 9, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 7, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 41a-42a.

STATEMENT

Following a conditional guilty plea, respondent was convicted in the United States District Court for the Western District of West Virginia of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). He was sentenced to five years of probation, including six months of home detention with electronic monitoring. The court of appeals reversed, holding that the indictment must be dismissed because it failed to allege that respondent's state misdemeanor battery conviction was based on an offense that has, as an element, a domestic relationship between the offender and the victim. App., *infra*, 1a-32a.

1. Under 18 U.S.C. 922(g)(9), it is "unlawful" for any person "who has been convicted in any court of a misdemeanor crime of domestic violence * * * [to] possess in or affecting commerce, any firearm or ammunition."

Section 921(a)(33)(A) defines “misdemeanor crime of domestic violence” as:

an offense that—

(i) is a misdemeanor under Federal, State or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a 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.

18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005). A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 1994, respondent pleaded guilty in the magistrate court of Marion County, West Virginia, to battery in violation of W. Va. Code § 61-2-9(c). That statute provides: “If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor.” *Ibid.* The victim named in the criminal complaint was, at the time of the offense, respondent’s wife, with whom respondent lived and with whom he had a child in common. App., *infra*, 2a; 7/5/05 Plea Hr’g Tr. 30-31. Respondent was sentenced to one year of probation. App., *infra*, 2a.

3. In 2004, law enforcement officials in Marion County, West Virginia, were summoned to respondent's home in response to a domestic violence 911 call. Respondent consented to a search. The search revealed a Winchester rifle belonging to respondent. A subsequent investigation showed that respondent had possessed at least four other rifles following his 1994 state battery conviction. App., *infra*, 2a & n.2; 7/5/05 Plea Hr'g Tr. 28-29.

Respondent was indicted on three counts of possessing firearms after being convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). After respondent filed a motion to dismiss the indictment, the grand jury returned a superseding indictment that alleged that respondent's 1994 state battery conviction qualified as a misdemeanor crime of domestic violence because it was a misdemeanor offense; the offense had, as an element, the use and attempted use of physical force; and the victim was respondent's wife, who cohabited with respondent and with whom he had a child in common. App., *infra*, 2a-3a.

Respondent's motion to dismiss the superseding indictment argued that his 1994 state battery conviction was not a misdemeanor crime of domestic violence within the meaning of 18 U.S.C. 921(a)(33)(A), because W. Va. Code § 61-2-9(c) does not have, as an element, the existence of a domestic relationship between the offender and the victim. The district court denied the motion, relying on the Fourth Circuit's unpublished decision in *United States v. Ball*, 7 Fed. Appx. 210, cert. denied, 534 U.S. 900 (2001). App., *infra*, 33a-39a. In *Ball*, the court held that Section 921(a)(33)(A) requires only that the predicate offense have as an element the

use or attempted use of force; a domestic relationship need not appear in the formal definition of the offense if the evidence shows that there was in fact a domestic relationship between the offender and victim. 7 Fed. Appx. at 213.

Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, respondent entered a conditional plea of guilty to one count of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Respondent reserved the right to appeal the denial of his motion to dismiss the indictment on the ground that his 1994 state battery conviction was not a misdemeanor crime of domestic violence under federal law. App., *infra*, 3a-4a.

4. On direct appeal, a divided panel of the court of appeals reversed. App., *infra*, 1a-32a. The court acknowledged that “several of our sister circuits have ruled that the predicate offense need not, in order to be a [misdemeanor crime of domestic violence], contain a domestic relationship element.” *Id.* at 22a n.12. The court also acknowledged that the Fourth Circuit had previously reached the same conclusion in its unpublished decision in *Ball*. *Id.* at 5a n.7. But the court ruled, in conflict with these decisions, that 18 U.S.C. 921(a)(33)(A) requires that a predicate offense have, as an element, “commi[ssion] 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,” 18 U.S.C. 921(a)(33)(A)(ii). The court reasoned that, because the “committed by” phrase appears in the second clause of the definition, and immediately follows the phrase, “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,” the “committed by” phrase does not modify the noun “offense,” but rather the phrase beginning “has, as an element.” App., *infra*, 5a-10a. Therefore, the court concluded, a domestic relationship constitutes a required element of the predicate misdemeanor offense. *Id.* at 5a. The court rejected arguments based on the grammar and legislative history of Section 921(a)(33)(A), and it resolved any doubts about the meaning of the statute by reliance on the rule of lenity. *Id.* at 10a-23a.

Judge Williams dissented. App., *infra*, 23a-32a. In her view, the language of the statute, “read in its natural and obvious sense, * * * unambiguously requires that only that the mode of aggression, and not the relationship status between the perpetrator and the victim, be included in the formal definition of the predicate misdemeanor offense.” *Id.* at 26a. Judge Williams found it “significant” that Congress had used the word “element” in the singular, reasoning that, had Congress intended to make both the use of force and a domestic relationship required elements of the predicate offense, it would have used the word “elements,” in the plural. *Ibid.*

The dissent also noted that the majority’s interpretation is inconsistent with the statute’s purpose and history. When 18 U.S.C. 922(g)(9) was enacted in 1996, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b), 110 Stat. 3009-372, most States prosecuted domestic violence offenders under their general assault statutes, and fewer than half the States had enacted misdemeanor assault statutes containing a do-

mestic-relationship element. App., *infra*, 27a-28a. The dissent considered it “unlikely” that Congress would “enact[] legislation that would immediately become a dead letter in a majority of the states.” *Id.* at 28a. The dissent also observed that the drafting history of the legislation and contemporaneous statements of its sponsor supported the conclusion that the prohibition on gun possession applies to persons “convict[ed] for domestic violence-related crimes * * * that are not explicitly identified as related to domestic violence.” *Id.* at 29a (quoting 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg)).

REASONS FOR GRANTING THE PETITION

The court of appeals in this case concluded that, under 18 U.S.C. 922(g)(9), persons who are convicted of misdemeanor crimes of violence against their spouses or children are barred from possessing a firearm only if they were convicted under a statute that includes the domestic relationship between perpetrator and victim in the formal definition of the offense. If the offender was convicted in a jurisdiction that had no such statute, or if state authorities chose for other reasons to prosecute the crime as, or accept a guilty plea for, simple battery, assault, or a similar offense, then, according to the court of appeals, the federal prohibition on firearm possession has no application.

The court of appeals’ interpretation of the statute conflicts with the decisions of all nine other courts of appeals that have addressed this issue. The decision is incorrect, and, if left unreviewed, it will substantially impede enforcement of 18 U.S.C. 922(g)(9). This Court’s review is therefore warranted.

A. The Decision Below Conflicts With The Decisions Of Nine Other Courts Of Appeals

In ruling that a misdemeanor crime of domestic violence that disqualifies a person from possessing firearms under 18 U.S.C. 922(g)(9) must have, as an element, a domestic relationship between offender and victim, the court of appeals acknowledged that its decision conflicts with the decisions of other circuits, and that it is “in the minority” on this issue. App., *infra*, 22a n.12. Specifically, all nine other courts of appeals to address the question have rejected the interpretation that the court below adopted. See *United States v. Heckenliable*, 446 F.3d 1048, 1049 (10th Cir.), cert. denied, 127 S. Ct. 287 (2006); *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White v. Department of Justice*, 328 F.3d 1361, 1364-1367 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 561-562 (5th Cir.), cert. denied, 540 U.S. 916 (2003); *United States v. Kavoukian*, 315 F.3d 139, 142-144 (2d Cir. 2002); *United States v. Barnes*, 295 F.3d 1354, 1358-1361 (D.C. Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000); *United States v. Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 619-621 (8th Cir. 1999). As Judge Williams noted in her dissent, the Fourth Circuit is not “in the minority on this issue”; the Fourth Circuit *is* the minority. App., *infra*, 23a.

Because the Fourth Circuit denied the government’s petition for rehearing en banc in this case, there is little prospect that the Fourth Circuit will alter its position. The division in authority is enduring, and it is unlikely to be resolved without this Court’s intervention. It is also of practical significance because it means that a convicted individual’s ability to possess firearms consis-

tent with federal law will depend on the State in which he resides. If, for example, respondent were to move from West Virginia to Georgia, the same battery conviction held insufficient in the Fourth Circuit would trigger the firearms prohibition in the Eleventh Circuit. The national prohibition on firearms possession by prohibited persons should not operate in such a patchwork and haphazard manner.

B. The Decision Below Incorrectly Constricts The Scope Of 18 U.S.C. 922(g)(9)

The decision below not only stands alone among court of appeals decisions addressing the question presented, it is also incorrect. The text, purpose, and history of the statute all support the majority rule: Although the government in a 18 U.S.C. 922(g)(9) prosecution must establish, as a matter of fact, that the defendant had a domestic relationship with the victim of the predicate offense, nothing in the statute requires the government to establish that a domestic relationship was included in the formal definition of the predicate offense.

1. Section 922(g)(9) extends the federal prohibition on firearm possession by felons, 18 U.S.C. 922(g)(1), and persons subject to domestic restraining orders, 18 U.S.C. 922(g)(8), to persons convicted of “misdemeanor crime[s] of domestic violence.” Congress defined the term “misdemeanor crime of domestic violence” to mean an offense that is a misdemeanor under state, federal, or tribal law;¹ and that “has, as an element, the use or at-

¹ The inclusion of misdemeanors under tribal law was added by the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat. 3083.

tempted use of physical force, or the threatened use of a deadly weapon, committed by” a person with a specified domestic relationship with the victim. 18 U.S.C. 921(a)(33)(A).

As a number of courts of appeals have correctly concluded, Congress’s use of the singular noun “element” preceding the physical-force language indicates that Congress required only one element: the use or attempted use of force. Given the conceptual distinction between the mode of aggression (*e.g.*, the use of physical force) and the relationship between aggressor and victim (*e.g.*, current or former spouse), the statute is not naturally read to mean that those two ideas must have been subsumed within a single “element.” See *Heckenliable*, 446 F.3d at 1050-1051; *Belless*, 338 F.3d at 1066; *Barnes*, 295 F.3d at 1362-1364; *Meade*, 175 F.3d at 218-219; *Smith*, 171 F.3d at 620. When Congress has sought to identify offenses with more than one distinct, unrelated attribute, it has used the word “elements,” in the plural. See *Barnes*, 295 F.3d at 1363.

Moreover, under the most logical reading of the statutory definition, the phrase “committed by” a person with a domestic relationship to the victim modifies the earlier reference to the defendant’s criminal offense; it does not modify the “use of force” element. A person does not “commit” an “element” or a “use of force.” A person does, however, “commit” a criminal offense. See *Oxford English Dictionary* 559 (2d ed. 1989) (defining “commit” as “[to] do (something wrong or reprehensible), to perpetrate, be guilty of (a crime or offence, etc.)”); *Webster’s Third New International Dictionary* 457 (1993) (defining “commit” as “do, perform,” and giving as an example, “convicted of *committing* crimes against the state”); *Webster’s New International Dic-*

tionary of the English Language 539 (2d ed. 1958) (defining “commit” as “[t]o do; perpetrate, as a crime, sin, fault, folly, or error”); *Random House Dictionary of the English Language* 412 (2d ed. 1987) (defining “commit” as “to do; perform; perpetrate,” and giving as examples, “to commit murder; to commit an error”); *American Heritage Dictionary* 381 (3d ed. 1992) (defining “commit” as “[t]o do, perform, or perpetrate,” and giving as an example, “commit a murder”); see also *Barnes*, 295 F.3d at 1360-1361. Interpreting the language of the statute according to its ordinary meaning, a “misdemeanor crime of domestic violence” is an offense that is a misdemeanor; that has, as an element, the use of force; and that was committed by a person having a domestic relationship with the victim.

2. In reaching its contrary conclusion, the court of appeals focused on three features of the statutory definition of “misdemeanor crime of domestic violence.” None of these features, standing separately or together, provides sufficient reason to disregard the ordinary meaning of the words Congress used to define the scope of the federal prohibition on firearm possession for persons convicted of misdemeanor crimes of domestic violence.

First, the court of appeals relied on the punctuation of the statute’s definitional provision. App., *infra*, 7a-9a. The court concluded that, because Congress placed a semicolon at the end of clause (i) of Section 921(a)(33)(A), but failed to place a corresponding semicolon between the “has, as an element” phrase and the “committed by” phrase in clause (ii), Congress meant to treat “commiss[ion] by” a person with a domestic relationship with the victim as an element of the predicate offense. *Ibid.* Such reliance on Congress’s deployment of semicolons is misplaced. See *United States Nat’l*

Bank v. Independent Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1993) (“[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute’s true meaning.”). Although punctuation is useful when it confirms conclusions drawn from the words of the statute, courts may disregard punctuation to give effect to the statute’s purpose and meaning. See, e.g., *Barrett v. Van Pelt*, 268 U.S. 85, 91 (1925).

Second, the court of appeals relied on the fact that the “committed by” language was included in clause (ii) rather than placed in a separate clause. App., *infra*, 9a (noting that, had the phrase been placed in a separate clause, “we might very well accept the Government’s contention”). But while Congress might have made its intent more clear by inserting a (iii) or a “hard return” before “committed by,” the possibility that Congress could have made its manifest intent even more clear, is no excuse for refusing to give meaning to the words that Congress did employ.

Finally, the court of appeals invoked the “rule of the last antecedent,” according to which a limiting clause or phrase is “ordinarily * * * read as modifying only the noun or phrase that it immediately follows.” App., *infra*, 9a (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). Applying this rule, the court of appeals concluded that, because the “committed by” phrase immediately follows the “use of force” phrase, both phrases must define elements of the offense. *Id.* at 9a-13a. But a literal application of the last antecedent rule would require that both the use of force and the domestic relationship be part of a single element, which makes almost no sense. More-

over, as this Court has observed, the rule of the last antecedent, while sensible as a grammatical matter, it is “not an absolute and can assuredly be overcome by other indicia of meaning.” *Thomas*, 540 U.S. at 26.

In this case, the court of appeals’ focus on semicolons, its reliance on the absence of a separate subdivision, and its employment of the rule of the last antecedent, result in an interpretation of the statute that is contrary to both Congress’s customary usage of the singular noun “element,” and the ordinary usage of the verb “commit.” The features of the statute on which the court of appeals focused cannot overcome the plain meaning of the words Congress used to define a predicate misdemeanor under 18 U.S.C. 922(g)(9).

3. The interpretation of the statute adopted by the court of appeals would also, as a number of other courts have noted, render the law inapplicable to much of the country’s domestic violence-related misdemeanor convictions upon its passage. See *Heckenliable*, 446 F.3d at 1051-1052; *Barnes*, 295 F.3d at 1364-1365; *Meade*, 175 F.3d at 218-221. When 18 U.S.C. 922(g)(9) was enacted in 1996, no more than 17 states and Puerto Rico had enacted domestic-violence misdemeanor laws that included domestic-relationship status as an element of the offense. See *Barnes*, 295 F.3d at 1364 n.12. It is unlikely that Congress would have enacted a statute that would immediately be a dead letter with respect to more than half of the States’ misdemeanor laws.

Moreover, because no federal misdemeanor has as its elements the use of force against a spouse, child, or other person similarly situated, the court of appeals’ decision would largely render meaningless the statute’s inclusion of offenses that are “misdemeanor[s] under

Federal * * * law.”² 18 U.S.C. 921(a)(33)(A)(i); see *Barnes*, 295 F.3d at 1364-1365; cf. *Chavez*, 204 F.3d 1305, 1313-1314 (concluding that 18 U.S.C. 922(g)(9) applies to a person convicted of misdemeanor violation of 18 U.S.C. 113(a)(4), assault by striking, beating or wounding within the maritime and territorial jurisdiction of the United States, for assaulting his wife on a military base).

While failing to acknowledge that its construction of the statute would render 18 U.S.C. 922(g)(9) a nullity with respect to much of the country’s domestic violence-related misdemeanor convictions upon its passage, the court of appeals found “more than a thread of wisdom” in requiring that the predicate offense have a domestic-relationship element, since such a requirement would avoid an evidentiary debate at trial over whether the defendant had a domestic relationship with the victim. App., *infra*, 20a n.11. But in many cases, including this one, no one can reasonably dispute that the defendant had a domestic relationship with the victim. See *ibid.*; see also, *e.g.*, *Shelton*, 325 F.3d at 556; *Barnes*, 295 F.3d at 1359. Moreover, Congress did not consider an inquiry into the existence of a domestic relationship as imposing an unreasonable burden in the analogous context of restraining orders. See 18 U.S.C. 922(g)(8). More fundamentally, as the First Circuit noted in *Meade*, “[f]ederal criminal trials typically involve proof and differential factfinding, and the issue of relationship status is by no

² 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. But no distinctly federal misdemeanor offense would qualify.

means outside a jury’s competence.” 175 F.3d at 222 n.1. And nothing suggests that Congress regarded whatever practical difficulties may be associated with assembling documentary and testimonial proof of a domestic relationship as more significant than providing a nationwide solution to the problem it had in mind: the possession of firearms by those convicted of violent misdemeanors in a domestic context.

4. The legislative history of Section 922(g)(9) provides further support for the majority rule. The bill originally introduced in the Senate defined a predicate offense as a “crime of violence * * * committed by” a person with a domestic relationship with the victim. S. 1632, 104th Cong., 2d Sess. 1 (1996); see 142 Cong. Rec. at 5840.³ The phrase “has, as an element, the use

³ As part of the Omnibus Consolidated Appropriations Act, 1997, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which included a provision making commission of a “crime of domestic violence” a basis for deportation, Pub. L. No. 104-208, Div. C, Tit. III, § 350(a), 110 Stat. 3009-639 (8 U.S.C. 1227(a)(2)(E)). That provision, like the original draft of Senate Bill 1632, defines the term “crime of domestic violence” as a “crime of violence” that is “committed by” a person with a specified domestic relationship with the victim. The statute reads:

[T]he term “crime of domestic violence” means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the

or attempted use of physical force, or the threatened use of a deadly weapon” was substituted for the phrase “crime of violence” shortly before the provision was enacted into law. Senator Lautenberg, the sponsor of the legislation, explained that the substitution was designed to respond to concerns that the term “crime of violence” was “too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors.” *Id.* at 26,675.

Senator Lautenberg’s remarks also made clear that the addition of the physical-force phrase was not designed to alter the effect of the statute’s domestic-relationship language. Noting that federal law requires law enforcement officials to make a “reasonable effort” to ensure that persons seeking to purchase handguns are not prohibited from doing so under federal law, see 18 U.S.C. 922(s)(2), Senator Lautenberg stated:

[C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone’s criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.

* * * * *

In my view, the reasonable effort requirement should not be interpreted * * * so narrowly that it would allow law enforcement agencies to routinely

United States or any State, Indian tribal government, or unit of local government.

18 U.S.C. 1227(a)(2)(E)(i).

ignore misdemeanor convictions for violent crimes, without further exploration into whether these crimes involved domestic violence.

142 Cong. Rec. at 26,675-26,676. Senator Lautenberg's remarks indicate Congress's awareness that domestic-violence offenses were generally prosecuted under state laws that do not contain a domestic-relationship element. The remarks also indicate that Senator Lautenberg, as the sponsor of the legislation and the author of its operative language, intended for the firearm prohibition to apply without regard to whether an offender's domestic-violence misdemeanor was prosecuted under a statute specifically targeting domestic violence. See, e.g., *Barnes*, 295 F.3d at 1365; *Kavoukian*, 315 F.3d at 143-144. While the court of appeals noted that those remarks are "not controlling," App., *infra*, 19a (citing *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980)), they are nonetheless highly relevant.

5. Because the text, background, and purpose of Section 921(a)(33)(A) demonstrate that the statute unambiguously reaches misdemeanor convictions that have, as an element, the use of force, when the government can prove the required domestic relationship, the court of appeals' invocation of the rule of lenity is unwarranted. See App., *infra*, 20a-22a. Contrary to the court of appeals' view, "[t]he simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule." *Muscarello v. United States*, 524 U.S. 125, 138 (1998). Rather, the rule applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Id.* at 138-139. Because it is clear that Congress intended that a predicate mis-

demeanor would qualify when it has, as an element, the use of force, and it can be proved that the offense was committed by a person having a domestic relationship with the victim, the rule of lenity has no role to play in this case.

C. The Question Presented Is Of Recurring Importance

Review is also warranted because, as the volume of reported decisions on the issue indicates, the question is one of recurring importance in federal prosecutions. If left unreviewed, the court of appeals' decision will substantially impede enforcement of Section 922(g)(9). A large number of acts of domestic violence are either charged as misdemeanor battery, assault, or other similar offenses, or charged as felonies but resolved through plea bargaining that results in a misdemeanor battery or assault conviction. Congress's objective of taking guns out of the hands of persons convicted of these crimes would be frustrated in significant measure if the government were deprived of the opportunity to prove, beyond a reasonable doubt, that the defendant's conviction arose from domestic violence, even if the misdemeanor statute of conviction did not require proof of that fact.

The question presented is also relevant to administration of the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t) (2000 & Supp. V 2005), which requires federal officials to maintain a national system of records to determine whether a potential firearm buyer or recipient is disqualified under federal law from possessing a firearm. The division of authority created by the decision below will create substantial practical burdens in the administration of the federal background-check system. Federal officials reviewing the lawfulness of certain firearms purchases by out-of-state buyers

with possible misdemeanor convictions of domestic violence will now have to consider not only whether the transaction complies with the law of the State in which the transaction occurs, but also whether buyers are permitted to possess firearms under the interpretation of Section 921(a)(33)(A) prevailing in their State of residence—an interpretation that may or may not be consistent with the interpretation prevailing in the State in which the transaction occurs. See 18 U.S.C. 922(a)(3) and (b)(3).

In her dissent, Judge Williams noted that four of the five States within the Fourth Circuit’s jurisdiction, including West Virginia, have now enacted misdemeanor domestic-violence statutes that contain domestic-relationship elements, and that the only Fourth Circuit State that has not done so is Maryland. See App., *infra*, 28a n.3. These statutes do not, however, diminish the effect of the court of appeals’ decision, either with respect to convictions predating their enactment, or with respect to post-enactment convictions. Even in States that have enacted misdemeanor domestic-violence statutes, prosecutors may nonetheless choose to charge or accept guilty pleas from domestic-violence offenders under laws that contain fewer elements. And defendants with convictions entered in any of the 50 States may choose to reside, and possess firearms in, States within the Fourth Circuit’s jurisdiction. The decision below is also likely to prove a source of confusion for defendants whose possession of firearms cannot be prosecuted when they live in the jurisdiction of the Fourth Circuit but who later move to a State where their conduct can be prosecuted under federal law.

Accordingly, the court of appeals’ decision, if left unreviewed, will result in the inconsistent application of

a firearms prohibition intended to apply uniformly nationwide. This Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4087

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.
RANDY EDWARD HAYES, DEFENDANT-APPELLANT

Argued: Oct. 27, 2006
Decided: April 16, 2007

Before: WILLIAMS, MICHAEL, and KING, Circuit Judges.

Reversed and remanded by published opinion. Judge KING wrote the majority opinion, in which Judge MICHAEL joined. Judge WILLIAMS wrote a dissenting opinion.

KING, Circuit Judge.

Randy Edward Hayes appeals from the district court's denial of his motion to dismiss an indictment charging him with three counts of possessing firearms after having been convicted of the predicate offense of a "misdemeanor crime of domestic violence" (an "MCDV"), in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). *See United States v. Hayes*, No. 1:05cr03 (N.D. W. Va. June 24, 2005) (the "Order").¹ Hayes was

¹ The Order is found at J.A. 108-15. (Citations herein to "J.A.—" refer to the contents of the Joint Appendix filed by the parties in this appeal.)

convicted in the Northern District of West Virginia after he entered a conditional guilty plea to one of the indictment's three counts. He maintains on appeal that his predicate offense was not an MCDV as that term is defined in 18 U.S.C. § 921(a)(33)(A) (the "MCDV Definition"), and that the charges in the indictment thus fail as a matter of law. As explained below, we agree with Hayes and reverse.

I.

In 1994, Hayes pleaded guilty to a misdemeanor battery offense under West Virginia law, in the magistrate court of Marion County, West Virginia (the "1994 State Offense"). The victim of the 1994 State Offense was Hayes's then wife, Mary Ann (now Mary Carnes), with whom he lived and had a child. As a result of the 1994 State Offense, Hayes was sentenced to a year of probation.

Ten years later, on July 25, 2004, the authorities in Marion County were summoned to Hayes's home in response to a domestic violence 911 call. When police officers arrived at Hayes's home, he consented to a search thereof, and a Winchester rifle was discovered. Hayes was arrested and, on January 4, 2005, indicted in federal court on three charges of possessing firearms after having been convicted of an MCDV, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2).² Hayes filed a motion challenging the validity of the indictment and, on May 4, 2005, the grand jury returned a superseding indictment

² The Winchester rifle found in Hayes's home was the subject of Count Three of the indictment. Hayes had sold a Marlin rifle in January or February 2004, and it was the subject of Count One of the indictment. Three additional rifles were the underpinnings of Count Two of the indictment.

against him. The superseding indictment included the same three charges contained in the initial indictment, plus a “Notice of Additional Factors,” alleging that Hayes had been convicted in West Virginia state court in 1994 on a misdemeanor battery offense that satisfied the definition of an MCDV.³

Hayes sought dismissal of the superseding indictment, maintaining that it was legally flawed because his 1994 State Offense was not an MCDV under federal law. On June 11, 2005, the district court, by a bench ruling, denied Hayes’s motion to dismiss. On July 5, 2005, Hayes entered a conditional guilty plea to Count One of the superseding indictment,⁴ pursuant to Rule 11(a)(2)

³ The Notice of Additional Factors in the superseding indictment alleged, in relevant part:

Defendant Randy Edward Hayes’ February 24, 1994 Battery conviction, as referenced in . . . this Superseding Indictment, constituted [an MCDV] because: (a) Battery is a misdemeanor under State law in West Virginia; (b) Battery has, as an element, the use and attempted use of physical force; (c) Defendant Randy Edward Hayes committed the offense of Battery against the victim: (i) who was his current spouse; and (ii) who was a person with whom he shared a child in common; and (iii) who was cohabiting with and had cohabited with him as a spouse.

J.A. 19.

⁴ Count One of the superseding indictment, on which Hayes pleaded guilty, alleged in pertinent part as follows:

On or about January or February 2004, [in] Marion County, West Virginia, . . . Randy Edward Hayes, having been convicted in a court of [an MCDV], that is to say, on or about February 24, 1994, [he] was convicted in the Magistrate Court of Marion County of Battery; did knowingly possess in and affecting interstate commerce a firearm. . . .

J.A. 16.

of the Federal Rules of Criminal Procedure, thus reserving his right to appeal the denial of his motion to dismiss.⁵ Hayes thereafter filed a timely notice of appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We are presented in this appeal with a pure question of statutory interpretation: whether the MCDV Definition set forth in § 921(a)(33)(A) requires that the predicate offense underlying a § 922(g)(9) conviction have as an element a domestic relationship between the offender and the victim. We review *de novo* the district court's ruling on this question of law. *See United States v. Segers*, 271 F.3d 181, 183 (4th Cir. 2001).

III.

A.

Hayes maintains on appeal that the district court erred in denying his motion to dismiss the superseding indictment, in that his 1994 State Offense did not have as an element a domestic relationship, and it was thus not an MCDV. Pursuant to § 922(g)(9) of Title 18, under which Hayes was convicted, it is unlawful for any person who has been “convicted in any court of [an MCDV]” to possess a firearm. 18 U.S.C. § 922(g)(9) (the “Possession Statute”). The 1994 State Offense on which Hayes was convicted was that of simple battery, in violation of

⁵ Rule 11(a)(2) of the Federal Rules of Criminal Procedure provides that “[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty . . . , reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.”

West Virginia Code section 61-2-9(c) (the “WV Statute”).⁶ Importantly, the WV Statute does not have as an element a domestic relationship between the offender and his victim. *See* W. Va. Code § 61-2-9.

In resolving this appeal, we must determine whether the MCDV Definition in § 921(a)(33)(A) requires that an MCDV have as an element a domestic relationship between the offender and the victim. The district court rejected Hayes’s contention on this point, relying primarily on our unpublished decision in *United States v. Ball*, 7 Fed. Appx. 210 (4th Cir. 2001).⁷ In *Ball*, we deemed the MCDV Definition to require a predicate offense to have only “one element—the use or attempted use of physical force; the relationship between the perpetrator and victim need not appear in the formal definition of the predicate offense.” *Id.* at 213. As explained below, however, the MCDV Definition plainly provides, in its clause (ii), that the predicate offense must have as an element one of certain specified domestic relationships between the offender and the victim.

The statutory reading we adopt with respect to the MCDV Definition is compelled for multiple reasons. First of all, the text and structure of the MCDV Definition plainly require that a predicate offense have as an

⁶ The WV Statute provides that “[i]f any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor.” W. Va. Code § 61-2-9(c).

⁷ *Ball* is not controlling precedent in this case. *See* 4th Cir. R. 32.1 (citations to unpublished decisions issued prior to January 1, 2007, are disfavored). In any event, we are convinced, on the basis of the position explained herein, that *Ball* was not correctly decided.

element one of the specified domestic relationships between the offender and the victim. This reading is also supported by the rule of the last antecedent and is not inconsistent with Congress’s use of the singular term “element” in the MCDV Definition. Second, the statutory language of the MCDV Definition is not demonstrably at odds with the legislative intent underlying its adoption by Congress. Finally, even if the MCDV Definition could be deemed ambiguous, the rule of lenity mandates that any such ambiguity be resolved in Hayes’s favor. Because the WV Statute has no domestic relationship element, and because such an underpinning is essential to the existence of an MCDV, Hayes’s motion to dismiss the superseding indictment should have been granted.

B.

1.

It is elementary, of course, that the starting point for an issue of statutory interpretation is the language of the statute itself. *See United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003). In that regard, “[w]e must first determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute . . . [and] our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *Id.* (internal quotation marks omitted). We assess whether statutory language is plain or ambiguous through our “reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). “The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal

application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989) (internal quotation marks omitted).

In this situation, the MCDV Definition mandates that a predicate offense be a misdemeanor and have as an element the use of force committed by a person in a domestic relationship with the victim. *See* 18 U.S.C. § 921(a)(33)(A). More specifically, the MCDV Definition provides:

(33)(A) Except as provided in subparagraph (C), the term “misdemeanor crime of domestic violence” means an offense that-

(i) is a misdemeanor under Federal or State 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[.]

Id. As is readily apparent, the MCDV Definition is structured as a statement of what is being defined, followed by a parallel list of two essential attributes. After identifying the term “misdemeanor crime of domestic violence” as the thing being defined, the MCDV Definition splits into two separate clauses. First, clause (i)

provides that an MCDV must be “a misdemeanor under Federal or State law.” *Id.* § 921(a)(33)(A)(i). Next, clause (ii) of the MCDV Definition—the crux of the dispute here—provides that an MCDV must have “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.” *Id.* § 921(a)(33)(A)(ii).

It is significant that a semicolon has been placed at the end of the MCDV Definition’s clause (i), indicating that the attribute contained therein is to be separate and distinct from the attribute contained in clause (ii). *See United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979) (recognizing that punctuation is not always decisive, but finding significant “the use of separate numbers to introduce each subsection, and the fact that the phrase . . . was set off solely as part of [a separate] subsection”). Of even greater significance, there is no corresponding semicolon in the structure or text of clause (ii), and thus no indication that the second of the two attributes in the MCDV Definition somehow terminates before the words “committed by,” or sets the “committed by” phrase apart from the “have, as an element” language, thereby creating a third statutory attribute. *See* 18 U.S.C. § 921(a)(33)(A). Rather, the structure of the MCDV Definition makes it clear that the “committed by” phrase is part of the second attribute, that is, clause (ii). *See* 73 Am. Jur. 2d *Statutes* § 143 (“[T]he collocation of the words and phrases in a statute is sometimes an aid in the construction therein, and should not be arbitrarily disregarded [unless] the intention of the legislature requires it to be disregarded.”).

If Congress, in drafting the MCDV Definition, had seen fit to place the second half of clause (ii)—that is, the words “committed by a current or former spouse, parent, or guardian of the victim”—in a separate clause, we might very well accept the Government’s contention. However, that is not the statutory provision we are called upon to assess. Here, the “committed by” phrase in clause (ii) was not set apart by Congress, and the MCDV Definition thus does not restrict the clause’s “has, as an element” language to only the first half thereof, that is, the “use or attempted use of physical force, or the threatened use of a deadly weapon.”

2.

As further support for our conclusion here, the reading explained above is compelled by the longstanding “grammatical rule of the last antecedent.” *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). As the Supreme Court recently explained, pursuant to that rule “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *See id.*; *see also* 73 Am. Jur. 2d *Statutes* § 138 (“Qualifying words, phrases, and clauses are ordinarily confined to the last antecedent, or the words and phrases immediately preceding.”). The most important phrase of the MCDV Definition for our analysis, that is, the “committed by” phrase in the second half of clause (ii), must be read to modify its last antecedent, that is, the phrase in the first half of that clause, “use or attempted use of physical force, or the threatened use of a deadly weapon.” That phrase—not the noun “offense”—is the language the “committed by” phrase immediately follows. *See* 18 U.S.C. § 921(a)(33)(A). Not only is the noun “offense” not the noun or phrase imme-

diately preceding the “committed by” phrase; the noun “offense” does not even appear in the same clause as the “committed by” phrase. *See id.* Instead, the noun “offense” appears at the beginning of subparagraph (A) of the MCDV Definition, and it is separated from the “committed by” phrase by both clause (i) and the first half of clause (ii). *See id.* Thus, under the grammatical rule of the last antecedent, the “committed by” phrase cannot be limited to modifying only the noun “offense.”

In *United States v. Barnes*, the D.C. Circuit faced the issue we address today, and it did not find the rule of the last antecedent to be controlling. *See* 295 F.3d 1354, 1360 (D.C. Cir. 2002). It instead held that the MCDV Definition does not require that a predicate offense have as an element a domestic relationship between the offender and his victim, relying on its conclusion that the rule of the last antecedent is “not an inflexible rule, and is not applied where the context indicates otherwise.” *See id.* (citing *United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972)). After so concluding, the court observed that one does not commit a “use of force”; rather, one commits an “offense.” *See id.* According to the *Barnes* majority, because offenses are committed, and the use of force is not, the second half of clause (ii), the “committed by” phrase, could modify the noun “offense,” and does not necessarily modify the “use of force” phrase. *See id.*; *see also United States v. Belless*, 338 F.3d 1063, 1066 (9th Cir. 2003) (“[T]o read the ‘committed by’ phrase as modifying the phrase that immediately precedes it . . . would be grammatically unsound.”).⁸

⁸ In *Barnes*, Judge Sentelle spelled out, in a well-reasoned dissent, the view of the MCDV Definition that we adopt today. *See* 295 F.3d at

The explanation relied on by the *Barnes* court is, to us, a grammatically labored and erroneous reading of the MCDV Definition. *See* 73 Am. Jur. 2d *Statutes* § 140 (“[S]tatutes are generally not to be construed by strict and critical adherence to technical grammatical rules.”). We are not, in these circumstances, authorized to somehow disregard the rule of the last antecedent, which requires us to read the “committed by” phrase as modifying the “use of force” phrase.

We acknowledge, of course, that our Court has heretofore recognized that compliance with the rule of the last antecedent is not always necessary or appropriate. *See In re Witt*, 113 F.3d 508, 511 (4th Cir. 1997). In *Witt*, Judge Michael observed that a particular reading is not compelled by application of the rule of the last antecedent where it is “quite plausible as a matter of common sense” that a phrase could modify more than one term or phrase. *See id.*; *see also* 73 Am. Jur. 2d *Statutes* § 138 (“The rule [of the last antecedent] is not applicable where a further extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by the entire act.”). That is not the

1368-70 (Sentelle, J., dissenting). In so doing, he relied on the plain language of the MCDV Definition to conclude that it requires a predicate offense to have as an element a domestic relationship. *See id.* at 1368-69. In addressing Congress’s use of the singular rather than the plural of “element,” Judge Sentelle deemed the distinction “largely meaningless,” aptly observing that “the argument . . . is not how many elements are involved, but what the singular element is.” *Id.* at 1369. He then concluded that the rule of lenity should also apply, and rejected the contention that the statute’s legislative history evinces a clear congressional intent that precludes application thereof. *See id.* at 1369-70.

situation we face, however, and our conclusion on this point is not at all inconsistent with *Witt*.⁹ As we have explained, it is entirely implausible for the “committed by” phrase of clause (ii) of the MCDV Definition to modify a noun (“offense”) not even appearing in that clause, to the total exclusion of the phrase immediately preceding it. *Cf. United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979) (observing that placement of phrase in separate subsection indicates phrase was not intended to modify earlier subsections).

The difference between a reading that is compelled by the rule of the last antecedent, on the one hand, and one that is not so compelled, on the other, is readily illustrated in the context of the MCDV Definition. If the Government had contended, for instance, that the rule of the last antecedent required a reading that the “committed by” phrase modifies only the words “threatened use of a deadly weapon,” and not the entire phrase “use or attempted use of physical force, or the threatened use of a deadly weapon,” we would reject that contention. It

⁹ In *Witt*, a bankruptcy case, we were asked to interpret the statutory provision “the plan may provide for the *payment* of the *claim as modified pursuant to [the statute]*” to determine whether the phrase “as modified pursuant to [the statute]” described the noun “payment” or the noun “claim.” See 113 F.3d at 510-11. We concluded, in favor of the creditor, that although the last antecedent was the noun “claim,” the noun “payment” was the noun modified by the phrase “as modified pursuant to the statute.” See *id.* at 512. In so ruling, we decided that the rule of the last antecedent was not controlling. See *id.* at 511. First, the noun “claim” was part of the prepositional phrase “of the claim,” which modified the noun “payment.” See *id.* Second, the rule of the last antecedent did not compel the debtor’s proposed reading because it would have rendered the noun “payment” superfluous. See *id.* at 511-12.

is “quite plausible as a matter of common sense” that the “committed by” phrase modifies the words “use or attempted use of physical force” as well as the words “the threatened use of a deadly weapon.” As a result, we could swiftly dismiss any contention that the Government is only required to prove a domestic relationship where the predicate offense involved the use of a deadly weapon. Such a reading would not be compelled because the “committed by” phrase is plausibly read to modify the entire phrase “use or attempted use of physical force, or the threatened use of a deadly weapon.” Conversely, it defies common sense to accept the proposition that the “committed by” phrase does not modify the phrase immediately preceding it, but does, on the other hand, modify the term “offense.” Such a reading cannot be reached without ignoring the distance separating the noun “offense” from the “committed by” phrase, as well as the structural segregation of the noun “offense” from its purported modifier. Because the reading Hayes espouses *is* compelled by the rule of the last antecedent, the “committed by” phrase must be read to modify the phrase “use or attempted use of physical force, or the threatened use of a deadly weapon,” and as not modifying the noun “offense.”

3.

Contrary to the position of the Government, Congress’s use of the singular term “element” does not support its contention that a domestic relationship need not be an element of a predicate offense to constitute an MCDV. In *United States v. Belless*, the Ninth Circuit decided that the singular term “element” supports the proposition that the MCDV Definition requires that the predicate offense have only the single element of “the

use of physical force.” 338 F.3d 1063, 1066 (9th Cir. 2003); accord *United States v. Heckenliable*, 446 F.3d 1048, 1050 (10th Cir. 2006); *United States v. Meade*, 175 F.3d 215, 218-19 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999). We are not convinced, however, that Congress’s use of the singular term “element” is of any significance to our interpretation of the MCDV Definition. Whether a thing is an element does not depend simply upon its label. See *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000) (“[I]t does not matter [how] the required finding is characterized . . . , because labels do not afford an acceptable answer.” (internal quotation marks omitted)). Rather, a thing is an element if it is necessary to a claim or offense. See *Black’s Law Dictionary* 559 (8th ed. 2004) (defining element as “[a] constituent part of a claim that must be proved for the claim to succeed”); see also Model Penal Code § 1.13 (“[An] ‘element of an offense’ means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as . . . is included in the description of the forbidden conduct in the definition of the offense.”).

There are multiple examples of statutory provisions that contain an “element” requiring that discrete facts be established to sustain an offense. For example, a “crime of violence”—defined by statute as an offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another”—has three essential components: (1) that one uses, threatens, or attempts to use force (2) that is physical (3) against another person or his property. See, e.g., 18 U.S.C. §§ 16(a), 924(c)(3)(A). Likewise, even under the Government’s proposed reading here, the MCDV Definition contains an example of an “element” that possesses discrete factual requirements. See

18 U.S.C. § 921(a)(33)(A)(ii). The words “threatened use of a deadly weapon” in clause (ii) of the MCDV Definition have three essential components: (1) that one has threatened to use (2) a weapon (3) that is deadly. *See id.* Thus, we readily agree with Judge Sentelle’s *Barnes* dissent, where he aptly characterized Congress’s use of the singular rather than the plural form of “element” as “largely meaningless,” and framed the argument in terms of “not how many elements are involved, but what the singular element is.” *See United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002) (Sentelle, J., dissenting); *see also supra* note 8.

C.

The Government’s effort to rely on legislative history to support its position on the MCDV Definition is also unavailing. The natural reading of the MCDV Definition requires that the predicate offense have as an element a relationship component, and we are obliged to apply the statute as it is written, unless the “literal application of [the] statute will produce a result demonstrably at odds with the intentions of its drafters.” *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989) (internal quotation marks omitted). As explained below, the literal application of the plain language of the MCDV Definition is not “demonstrably at odds” with congressional intent.

In analyzing legislative history, it is proper to conduct a thorough examination of the entire history of the legislation, from introduction to passage. *See Regan v. Wald*, 468 U.S. 222, 238 (1984) (conducting “full examination of the legislative history—the Subcommittee hearings, markup sessions, floor debates, and House and Senate Reports”—to determine legislative intent). The

legislative history of the Possession Statute and the MCDV Definition relied on by the Government (and certain of our sister circuits), however, highlights one congressional speaker only, and consequently fails to account for the full history of the legislation. See *United States v. Barnes*, 295 F.3d 1364 [sic], 1365 (D.C. Cir. 2002) (limiting legislative history analysis to remarks of bill’s sponsor in support of legislative intent determination); *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999) (“[The] statements, made by the principal architect of the bill before final passage, clearly demonstrate Congress’s threshold understanding that ‘misdemeanor crimes of domestic violence’ would not be limited to those in which the relationship status was included as a formal element of the statute of conviction.”); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999) (limiting legislative history analysis to remarks of bill’s sponsor). The Supreme Court has recognized that, “ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); see also *Roy v. County of Lexington*, 141 F.3d 533, 539 (4th Cir. 1998) (“The remarks of individual legislators, even sponsors of legislation . . . are not regarded as a reliable measure of congressional intent.”). Thus, we are not at liberty, in analyzing congressional intent, to ignore the Court’s direction that we must go beyond the remarks of the legislation’s sponsor and consider the enactment’s entire legislative history.

The Possession Statute, under which Hayes was convicted, was enacted on September 30, 1996, and it amended the 1968 Gun Control Act to prohibit firearm possession by any person previously convicted of an

MCDV. *See* 18 U.S.C. § 922(d)(9), (g)(9). According to the bill's sponsor, Senator Lautenberg of New Jersey, the Possession Statute was intended to place domestic violence misdemeanants, who had avoided the felon-firearm prohibitions of the Gun Control Act by virtue of state statutes that typically classified domestic violence offenses as misdemeanors, on an equal footing with convicted felons, who were already prohibited by the Act from possessing firearms. *See* 142 Cong. Rec. S10377-01 (1996) (statement of Sen. Lautenberg). When introducing his bill, Senator Lautenberg stated:

Under current Federal law, it is illegal for persons convicted of felonies to possess firearms. Yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors.

Id. at S10377-78. Other legislators reiterated the view that the aim of the Possession Statute was to make domestic misdemeanants subject to the same firearm prohibitions as felons, regardless of the classification of domestic violence offenses as misdemeanors under state law. *See id.* at S10379 (statement of Sen. Wellstone) (“We do not let people who have been convicted of a felony purchase [a] firearm. What [Senator Lautenberg] is trying to do is plug this loophole and prohibit someone convicted of domestic abuse, whether felony or misdemeanor, [from] purchasing a firearm.”); 142 Cong. Rec.

S10379-01, 10380 (statement of Sen. Feinstein) (“[W]e already prohibit . . . felons from possessing a firearm. . . . [I]t is an unfortunate fact that many domestic violence offenders are never convicted of a felony. Outdated or ineffective laws often treat domestic violence as a lesser offense. . . . [P]lea bargains often result in misdemeanor convictions for what are really felony crimes.”).

The relevant legislative history thus reveals that these lawmakers were focused on eliminating the loophole created by the state statutes that classified domestic violence offenses as misdemeanors, rather than as felonies. None of these congressional statements, however, directly addresses the question posed here, whether a “crime of domestic violence”—either felony or misdemeanor—would require such an offense to have, as an element, a domestic relationship between the offender and the victim. The only statement arguably on point was made by Senator Lautenberg, addressing the implementation of the enactment:

Mr. President, convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone’s criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law. . . . I would strongly urge law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant’s criminal record to ensure that none involves domestic violence, before allowing the sale of a handgun.

142 Cong. Rec. S11872-01, S118788 (1996) (statement of Sen. Lautenberg).¹⁰ Other than the foregoing statement, which is not controlling on this point, *see GTE Sylvania*, 447 U.S. at 118, there is no indication of any legislative intention that, despite the MCDV Definition's explicit terms to the contrary, a predicate offense need not have a domestic relationship element to qualify as an MCDV.

Additionally, there are, in this instance, clear indicia that the available legislative history is an unreliable guide to Congress's intent. As the First Circuit observed in *United States v. Hartsock*, “[b]ecause the Lautenberg Amendment was ultimately passed as a part of a last minute series of congressional maneuvers, *the legislative history concerning the statute is sparse. Indeed, neither the House nor the Senate held hearings on the statute.*” 347 F.3d 1, 5 n.4 (1st Cir. 2003) (emphasis added) (citations omitted). There is thus no reliable indication in the legislative history that we should disregard the plain language of the MCDV Definition. In the face of that language, “the wisdom of Congress’ action . . . is not within our province to second-guess.” *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).¹¹ We are

¹⁰ Senator Lautenberg prefaced the foregoing statement by observing that his proposal “incorporates this new category of offenders into the Brady law, which provides for a waiting period for handgun purchases [and requires] local law enforcement authorities to make reasonable efforts to ensure that those who are seeking to purchase a handgun are not prohibited under Federal law from doing so.” 142 Cong. Rec. S11872-01, S118788 (1996).

¹¹ Indeed, there is more than a thread of wisdom in requiring that the predicate offense, in order to be an MCDV, have as an element a domestic relationship. Requiring a domestic relationship element will

thus unable to read the MCDV Definition, as the Government would have us do, without rewriting it to eliminate the text and structure that Congress used, and we are not permitted to rewrite the MCDV Definition to say what *we think* Congress meant. We are instead obliged to apply its plain language. We must therefore reject the Government’s contention that the legislative history evinces a clear congressional intent which excuses us from applying the plain language of the MCDV Definition.

D.

Although this appeal can be readily disposed of on the basis of the foregoing analysis, one additional point warrants our attention, that is, the rule of lenity. If we were to accept the proposition that some ambiguity exists in the MCDV Definition, the well-settled rule of lenity would require us to resolve any such ambiguity in favor of Hayes. As the Supreme Court has observed, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Cleveland v.*

avoid debate years later—in these circumstances, a full ten years later—about the nature of the relationship between an offender and his victim. Here, there is no dispute that Hayes and Mary Carnes were married and had a child at the time of his 1994 State Offense. In other cases, however, the relationship between the offender and his victim will likely be a subject of dispute. *See, e.g., White v. Dep’t of Justice*, 328 F.3d 1361, 1369 (Fed. Cir. 2003) (considering whether substantial evidence supported finding that offender had cohabitated with victim as a spouse or been a person similarly situated to a spouse but ultimately finding cohabitation “overwhelmingly supported” by evidence). *But see United States v. Meade*, 175 F.3d 215, 222 n.1 (1st Cir. 1999) (“Federal criminal trials typically involve proof and differential fact finding, and the issue of relationship status is by no means outside a jury’s competence.”).

United States, 531 U.S. 12, 25 (2000) (internal quotation marks omitted). “The rule of lenity is premised on two ideas: First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed; second, legislatures and not courts should define criminal activity.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (internal quotation marks omitted); *see also* 73 Am. Jur. 2d *Statutes* § 197 (“[The rule of lenity] protects the individual against arbitrary discretion by officials and judges, and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.”).

Thus, even if we were unable to conclude, on the basis of the plain language of the MCDV Definition, that a predicate offense must have as an element a domestic relationship in order to constitute an MCDV, we would be obliged by the rule of lenity to resolve any such ambiguity in favor of Hayes. Contrary to the assertions of some courts, *see, e.g., United States v. Meade*, 175 F.3d 215, 222 (1st Cir. 1999), there is simply no clear congressional intent that permits us to disregard the rule of lenity and its commendable aims. As Judge Sentelle aptly observed on this very point:

That a snippet of legislative history is more consistent with the less lenient application of a criminal statute hardly erodes the laudable principles of the rule of lenity. . . . [I]t seems to me most inconsistent with fundamental fairness and certainly with the rule of lenity to suppose that for a defendant to understand that his conduct is illegal, he must read not

only the words of the statute, but find and construe the abstruse comments of a single senator on a single day.

United States v. Barnes, 295 F.3d 1354, 1370 (D.C. Cir. 2002) (Sentelle, J., dissenting). To read the MCDV Definition as the Government suggests would subject individuals to prosecution and possible conviction under the Possession Statute without fair warning, and would be a usurpation of the congressional function. In sum, were there ambiguity in the MCDV Definition, we would nonetheless be obliged, by virtue of the rule of lenity, to rule as we do today, that is, that a predicate offense must, in order to qualify as an MCDV, have as an element a domestic relationship.¹²

IV.

Pursuant to the foregoing, we reverse the denial of the motion to dismiss the superseding indictment and remand for such further proceedings as may be appropriate, including the withdrawal of Hayes's guilty plea

¹² In ruling as we do today, we recognize that we are in the minority on this issue, in that several of our sister circuits have ruled that the predicate offense need not, in order to be an MCDV, contain a domestic relationship element. See *United States v. Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006); *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White v. Dep't of Justice*, 328 F.3d 1361, 1367 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999).

on Count One, *see* Fed. R. Crim. P. 11(a)(2), and dismissal of the superseding indictment.¹³

REVERSED AND REMANDED.

WILLIAMS, Circuit Judge, dissenting:

I would affirm the district court. Respectfully, I disagree with the majority that our sister circuits have erred in concluding that 18 U.S.C.A. § 921(a)(33)(A) (West 2000 & 2006) plainly requires that only the mode of aggression, and not the relationship status between the perpetrator and the victim, must be an element of the predicate misdemeanor offense. In addition, I find no merit in Hayes's contention that the Government may not prove the existence of a domestic relationship through evidence other than the state court's charging papers and record of his guilty plea.

In ruling as we do today, we are not *in* the minority on this issue, we *are* the minority. The nine circuits that have considered the question in a published opinion have uniformly rejected the interpretation advanced by the majority. *See United States v. Heckenliable*, 446 F.3d 1048, 1049 (10th Cir. 2006); *United States v. Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White v. Dept. of Justice*, 328 F.3d 1361, 1364-67 (Fed. Cir. 2003); *United States v. Shelton*, 325 F.3d 553, 562 (5th Cir. 2003); *United States v. Barnes*, 295 F.3d 1354, 1358-61 (D.C. Cir. 2002); *United States v. Kavoukian*, 315 F.3d 139, 142-44 (2d Cir. 2002); *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Meade*,

¹³ Hayes also maintains on appeal that the Government was not entitled to use extrinsic evidence to prove the 1994 relationship between him and Mary Carnes. Because we agree with his contention on the MCDV issue, we need not reach and address his additional contention.

175 F.3d 215, 218-21 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 619-21 (8th Cir. 1999).¹ Accordingly, I respectfully dissent.

I.

Section 921(a)(33)(A) defines a “misdemeanor crime of domestic violence” (“MCDV”) as follows:

Except as provided in subparagraph (C), the term “misdemeanor crime of domestic violence” means an offense that—

(i) is a misdemeanor under Federal or State 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 cohabitating with or has cohabited with the victim as a spouse, parent, or guardian, or by a

¹ A panel of this court has likewise refuted the majority’s interpretation, albeit in an unpublished opinion. *See United States v. Ball*, 7 Fed. App’x. 210, 213 (4th Cir. 2001) (unpublished) (concluding that “[s]ection 921(a)(33)(A) requires the predicate offense to have only one element—the use or attempted use of physical force; the relationship between perpetrator and victim need not appear in the formal definition of the predicate offense”). Unpublished decisions, of course, lack precedential value, and I reference *Ball* simply to illustrate the overwhelming consensus that existed prior to the majority’s decision in the case before us. *See* 4th Cir. R. 32.1 (citations to unpublished decisions issued prior to January 1, 2007 are permitted, but disfavored).

person similarly situated to a spouse, parent, or guardian of the victim[.]²

18 U.S.C.A. § 921(a)(33)(A). Thus, the statutory definition divides the term into two separately defined components—subsection (i) explains what Congress meant by “misdemeanor,” and subsection (ii) defines “crime of domestic violence.” My colleagues derive their interpretation of the MCDV definition from the following observations: (1) Congress employed this bifurcated approach; (2) the “committed by . . .” phrase forms part of the second subsection; and (3) the two sentence fragments in § 921(a)(33)(A)(ii) are not separated by a semicolon. With all due respect, however, observation is not analysis. For, the reasons that follow, I believe the structure of § 921(a)(33)(A)(ii) cannot support the weight the majority would have it bear.

“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Questions concerning the plainness or the ambiguity of the statutory language are resolved “by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Id.* at 341.

As explained above, the statute bifurcates the MCDV definition into two separately defined components. Section 921(a)(33)(A)(i) defines “misdemeanor” and § 921(a)(33)(A)(ii) sets forth the criteria necessary for an

² Interestingly, Congress did not place a period at the end of this sentence.

offense to qualify as a “crime of domestic violence.” The language of § 921(a)(33)(A)(ii), read in its natural and obvious sense, supports only one interpretation—that § 921(a)(33)(A)(ii) requires the predicate offense to have, as, an element, the use or attempted use of physical force (or the threatened use of a deadly weapon), and to have been committed by a person who has one of the enumerated relationships with the victim. Thus, the statute unambiguously requires that only the mode of aggression, and not the relationship status between the perpetrator and the victim, be included in the formal definition of the predicate misdemeanor offense.

It is significant that Congress used the singular noun “element” immediately preceding the first of two conceptually distinct attributes. *See, e.g., Meade*, 175 F.3d at 218-19. The use of force and the relationship between the aggressor and the victim “are two very different things, and thus would constitute two different elements.” *Belless*, 338 F.3d at 1066. Had Congress intended that both requirements be mandatory elements of the predicate offense, it would have used the plural word “elements,” or employed its often-used phrase “has as its elements,” to encompass both requirements. *See Barnes*, 295 F.3d at 1363; *accord Meade*, 175 F.3d at 219; *Belless*, 338 F.3d at 1066; *Heckenliable*, 446 F.3d at 1050.

The majority’s narrow focus on the placement of punctuation marks distorts the plain meaning of the statutory language and rests ultimately on a misconstruction of Supreme Court precedent. In *United States v. Naftalin*, 441 U.S. 768 (1979), the Supreme Court simply noted that “matters like punctuation are not decisive of the construction of a statute,” but “where they reaf-

firm conclusions drawn from the words themselves they provide useful confirmation.” 441 U.S. at 774 n.5 (internal quotation marks and alteration omitted). The majority draws no conclusions from the words themselves (other than deeming the use of the singular word “element” insignificant), basing its decision instead on the placement of the “committed by” phrase in the second of two subsections separated by a semicolon.

My colleagues’ reliance on the rule of the last antecedent is likewise misguided. As the majority acknowledges, “a particular reading is not compelled by application of the rule of the last antecedent where it is ‘quite plausible as a matter of common sense’ that a phrase could modify more than one term or phrase.” *Ante* at 9 (citing *In re Witt*, 113 F.3d 508, 511 (4th Cir. 1997)); see also *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (stating that the rule of the last antecedent “is not absolute and can assuredly be overcome by other indicia of meaning”). The majority asserts that an interpretation consistent with the rule of the last antecedent is compelled by the distance separating the “committed by” phrase from the word “offense.” The opinion cites no support for this proposition, however, and I can conceive of none. As discussed above, to determine whether reliance on the rule of the last antecedent is appropriate, we look to whether *other indicia of meaning* suggest that a syntactically disfavored construction is plausible, not to the distance between words.

In addition, I note that the majority’s approach creates a significant practical anomaly that undermines Congress’s goals in enacting 18 U.S.C.A. § 922(g)(9) (West 2000). When Congress enacted § 922(g)(9), fewer than half of the states had misdemeanor statutes that

formally included relationship status as an element of a misdemeanor domestic assault offense; most states charged domestic violence offenders under their general assault statutes. *See e.g., Heckenliable*, 446 F.3d at 1051-52. In my view, it is unlikely that Congress sought to address a nationwide issue by enacting legislation that would immediately become a dead letter in a majority of the states.³

II.

Because the statute has a plain and unambiguous meaning with regard to the particular dispute at issue in this case, and the statutory scheme is coherent and consistent, resort to the legislative history is unnecessary. *See Robinson*, 519 U.S. at 340 (“Our inquiry must cease if the statutory language is unambiguous and the statu-

³ Although four of the five states within our jurisdiction—North Carolina, South Carolina, Virginia, and West Virginia—have misdemeanor domestic assault statutes that include both the mode of aggression and the relationship status between the perpetrator and the victim within the formal definition of the offense, *see* N.C. Gen. Stat. § 14-33(d) (2005); S.C. Code Ann. § 16-25-20 (2003 & Supp. 2006); Va. Code Ann. § 18.2-57.2 (2004 & Supp. 2006); W. Va. Code § 61-2-28 (Lexis Nexis 2005 & Supp. 2006), Maryland does not. Although Maryland has enacted a domestic violence statute, its primary focus is preventative, not punitive. Maryland Code §§ 4-501 through 5-516 of the Family Law Article authorizes courts to issue civil protective orders to victims of domestic violence and “provides for a wide variety and scope of available remedies designed to separate the parties and avoid future abuse.” *Katsenelenbogen v. Katsenelenbogen*, 775 A.2d 1249, 1256 (Md. Ct. App. 2001) (internal quotation marks omitted). Perpetrators of domestic violence, of course, remain “subject to prosecution for their conduct—for assault, rape and other sexual offenses, criminal homicide, kidnapping—and, indeed, for failing to comply with relief provided in a protective order.” *Id.* at 1256 n.2.

tory scheme is coherent and consistent” (internal quotation marks omitted)). Accordingly, I do not fault the majority’s decision not to rely on the statute’s legislative history.

I am forced, however, to take issue with my colleagues’ unwillingness to concede that the available legislative history is more than “arguably” on point. My colleagues assert that “[t]he only statement arguably on point was made by Senator Lautenberg, addressing the implementation of the enactment [.]” *Ante* at 14. Senator Lautenberg explained that because

convictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence [,] . . . it will not always be possible . . . to determine from the face of someone’s criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law. . . .

142 Cong. Rec. S11872-01, S11878 (1996). Contrary to my colleagues’ characterization, I believe this comment *directly* addresses the issue of whether crimes that do not include a domestic relationship as an element qualify as MCDVs “as defined in [§ 921(a)(33)(A)].” *Id.* In addition, the legislative history reveals that § 921(a)(33)(A)(ii), as originally proposed, defined a crime of domestic violence as a “crime of violence” committed against an individual with whom the perpetrator had a domestic relationship. Some members of Congress, however, expressed concern that “crime of violence” was potentially “too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors.” 142 Cong. Rec. S11872-01, *S11877. As a result, shortly before the statute was en-

acted, Congress replaced “crime of violence” with “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.” *See id.*

III.

Having explained the basis for my disagreement with the majority’s interpretation of § 921(a)(33)(A), I now turn to the arguments advanced by Hayes. Hayes contends that the district court erred in refusing to dismiss the Superseding Indictment because the Government lacked “judicially noticeable evidence of a domestic relationship.” (Appellant’s Br. at 8.) This argument reflects Hayes’s belief that the Government may not prove the existence of a domestic relationship through evidence other than the state court’s charging papers and record of his guilty plea.⁴ The district court rejected this contention, reasoning that because the MCDV definition does not require that the relationship between the victim and the perpetrator appear in the formal definition of the offense, there existed no basis for confining the Government’s method of proof to state court records. The district court went on to conclude that, because the indictment tracked the language of 18 U.S.C.A. § 922(g)(9) and properly alleged each element of the

⁴ Hayes’s argument stems from a somewhat puzzling misinterpretation of *United States v. Nobriga*, 408 F.3d 1178 (9th Cir. 2005), *withdrawn by* 433 F.3d 1090 (9th Cir. 2006). *Nobriga* held only that (1) a conviction under the “physically abuse” prong of Hawaii’s “Abuse of a Family or Household Member” (“AFHM”) statute was not categorically a conviction for an MCDV, because the Hawaii statute encompassed a broader range of relationships than those enumerated in § 921(a)(33)(A)(ii), and (2) because the relationship between Nobriga and the victim of his Hawaii AFHM conviction was not included in § 921(a)(33)(A)(ii), the Government had failed to prove that Nobriga had been previously convicted of an MCDV. *Id.* at 1182-83.

offense, the indictment was valid on its face. *See United States v. Wills*, 346 F.3d 476, 488 (4th Cir. 2003) (“An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits.” (internal quotation marks and alteration omitted)). I find no fault with this analysis and agree with the district court that, as a result, whether the Government had sufficient evidence to prove Hayes guilty of the crime charged was a matter for the jury to decide and not a proper basis on which to challenge the indictment itself. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (stating that “[o]nly a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried”).

Hayes’s second argument on appeal parallels his first. He contends that the district court erred in admitting “extrinsic evidence” of a domestic relationship, because under *Shepard v. United States*, 544 U.S. 13 (2005), and *United States v. Washington*, 404 F.3d 834 (4th Cir. 2005), the charging documents, the terms of the plea agreement, the transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented constitute the only acceptable means to prove a prior conviction.

I agree with the district court that the evidentiary limits in *Shepard* and *Washington* apply only to *judicial* fact-finding. The restrictions safeguard a defendant’s Sixth Amendment right “to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged,” *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995), and “any particular

fact that the law makes essential to his punishment,” *United States v. Booker*, 543 U.S. 220, 232 (2005) (internal quotation marks omitted). There exists no logical or precedential basis for the extension of the same limitations to the range of evidence that is admissible when the Government is being put to its burden of proof at trial.

IV.

In sum, I would hold that § 921(a)(33)(A) plainly requires that only the mode of aggression, and not the relationship status between the perpetrator and the victim, must be an element of the predicate misdemeanor offense. The Government, of course, remains obligated to prove the existence of a domestic relationship as defined in § 921(a)(33)(A)(ii) to a jury beyond a reasonable doubt, using “extrinsic evidence” admissible under the Federal Rules of Evidence if necessary. Accordingly, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

Criminal No. 1:05CR03
(JUDGE KEELEY)

UNITED STATES OF AMERICA, PLAINTIFF

v.

RANDY EDWARD HAYES, DEFENDANT

**ORDER DENYING DEFENDANT'S MOTION TO
DISMISS SUPERSEDING INDICTMENT**

The Court held a hearing on June 15, 2005 to take up the defendant's "Motion to Dismiss Superseding Indictment." For the following reasons, the Court **DENIES** the defendant's motion (docket no. 56).

I. INTRODUCTION

In 1994, the defendant, Randy Edward Hayes ("Hayes") pled guilty in West Virginia magistrate court to the misdemeanor offense of battery. According to Hayes, the identity of the victim of this crime does not appear in any judicially recognized document from the magistrate court.

On January 4, 2005, a federal grand jury indicated Hayes and charged him with three counts of knowingly possessing firearms after having been convicted of a

misdemeanor crime of domestic violence, in violation of Title 18 United States Code, Sections 922(g)(9) and 924(a)(2). Subsequently, on May 4, 2005, the Grand Jury returned a superseding indictment that included a “Notice of Additional Factors” to the three counts alleged in the original indictment. The “Notice of Additional Factors” charges that Hayes has a 1994 battery conviction which meets the definition of a “misdemeanor crime of domestic violence.” Hayes has moved to dismiss the superseding indictment, arguing that the Government cannot prove he violated § 922(g)(9).

II. LEGAL ANALYSIS

“An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits.” *United States v. Wills*, 346 F.3d 476, 488 (4th Cir. 2003) (quoting *United States v. Mills*, 995 F.2d 480, 487 (4th Cir. 1983)). See *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) (“only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried”). Hayes argues that the superseding indictment should be dismissed because, pursuant to *United States v. Shepard*, 25 S. Ct. 1254 (2005), the Sixth Amendment bars the introduction of any evidence that the defendant has been convicted of a “misdemeanor crime of domestic violence” outside of the statute of conviction, charging document, plea agreement, plea transcript and any explicit factual finding by the trial judge to which the defendant assented. Thus, he contends, because the victim of his 1994 battery conviction has not been identified in any judicially recognized document from the West Vir-

ginia magistrate court, the United States may not proceed with its prosecution.

A. Misdemeanor Crime of Domestic Violence

To secure a conviction under § 922(g)(9), the Government must prove three elements beyond a reasonable doubt: (1) that the accused possessed, shipped, or transported a firearm; (2) that the firearm had traveled in or affected interstate commerce; and (3) that the accused had been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(g)(9). *United States v. Bethurum*, 343 F.3d 712, 716 (5th Cir. 2003). Whether a predicate offense qualifies as a “misdemeanor crime of domestic violence” pursuant to 18 U.S.C. § 921(a)(33) is a question of law rather than a separate and essential element of a violation of § 922(g)(9) which must be proved to the jury beyond a reasonable doubt. *Id.* at 716-17; see also *United States v. Artis*, 2005 U.S. App. LEXIS 9847 (4th Cir. May 27, 2005) (unpublished).

Section 921(a)(33) defines the term “misdemeanor crime of domestic violence” as an offense that

- (i) is a misdemeanor under Federal or State 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.

In *United States v. Ball*, 7 Fed. Appx. 210 (4th Cir. 2001) (unpublished), a panel of the Fourth Circuit concluded that this section only requires that the predicate offense have “one element—the use or attempted use of physical force; the relationship between the perpetrator and victim need not appear in the formal definition of the predicate offense.” *See also White v. Dep’t of Justice*, 328 F.3d 1361 (Fed. Cir. 2003). However, the prosecutor is in no way relieved of the burden of proving “to a jury beyond a reasonable doubt that a criminal defendant had a domestic relationship as defined in 921(a)(33)(A)(ii) in order to win a conviction under 992(g)(9).” *White*, 328 F.3d at 1361.

B. The Sixth Amendment

Under the Sixth Amendment of the United States Constitution,

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This provision “gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt to every element of the crime with which he is charged.” *United States v. Gaudin*, 115 S. Ct. 2310, 2320 (1995), and “any particular fact that the law makes

essential to his punishment.” *United States v. Booker*, 125 S. Ct. 738, 749-50 (2005).

In *United States v. Shepard*, 125 S. Ct. 1254 (2005), the United States Supreme Court held that, in the context of the enhanced sentencing provisions of the Armed Career Criminals Amendment Act of 1986, 18 USC §924(e), the Sixth Amendment requires a sentencing court to limit itself to examining the statute of conviction, charging document, plea agreement, plea transcript and any explicit factual finding by the trial judge to which the defendant assented in determining whether a prior offense is a felony for enhancement purposes.

Following *Shepard*, in *United States v. Washington*, 404 F.3d 834 (4th Cir. 2005), the Fourth Circuit found that a defendant’s sixth amendment right to a trial by jury had been violated when the district court, at sentencing, relied on facts outside the indictment to determine that his prior state law breaking and entering conviction had been a “crime of violence.” Further, in a case with facts similar to this one, the Ninth Circuit held that a district court had plainly erred when it relied on a police report and a plea colloquy to determine that a misdemeanor crime of domestic violence had been committed. The Government had also failed to prove that, under Hawaiian law, a “domestic” relationship existed between the defendant and his victim. *United States v. Nobriga*, 2005 U.S. App. LEXIS 9220 (9th Cir. May 20, 2005).

C. DISCUSSION

Hayes argues that *Shepard*, *Washington* and *Nobriga* stand for the proposition that the only evidence the Government may introduce to prove that he commit-

ted a misdemeanor crime of domestic violence is the statute of conviction, charging document, plea agreement, plea transcript and any explicit factual finding by the trial judge to which the defendant assented. The evidentiary limits in those cases, however, apply to *judicial* fact-finding, not findings of fact made by a jury. They do not apply where, as here, the Government is being put to its burden of proof at trial. *White v. Dep't of Justice*, 328 F.3d 1361 (Fed. Cir. 2003) (holding that prosecutor has “burden to prove to a jury beyond a reasonable doubt that a criminal defendant had a domestic relationship as defined in 921(a)(33)(A)(ii) in order to win a conviction under 992(g)(9)”; *see also Ball* at 214 (stating that “district court’s finding, as a matter of law, that simple battery meets the definition of misdemeanor crime of domestic violence” did not deprive the defendant of the right to have the jury decide every element of the offense because, “after hearing the evidence presented at trial, the jury found that the evidence established that Ball had been convicted of a misdemeanor crime of domestic violence—he was convicted of battering his wife in May of 1995”).)

Moreover, because the indictment tracks the language of 18 U.S.C. § 922(g)(9) and properly alleges each element of the statute, the indictment is valid on its face. *Wills*, 346 F.3d at 488. Thus, whether the Government is able to prove that the defendant is guilty of the crime charged is a matter for the jury to decide and is not a proper basis on which to challenge the indictment itself.

IV. CONCLUSION

Because the indictment is valid on its face and does not violate the defendant’s Sixth Amendment rights, the Court **DENIES** the defendant’s motion (docket no 56).

39a

It is **SO ORDERED**.

The Clerk is directed to transmit copies of this Order to the defendant, counsel of record and all appropriate agencies.

DATED: June 24, 2005.

/s/ IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

40a

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4087
1:05-cr-3-IMK-ALL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RANDY EDWARD HAYES, DEFENDANT-APPELLANT

[Filed: July 20, 2007]

On Petition for Rehearing and Rehearing En Banc

Appellee filed a petition for rehearing and rehearing en banc.

Chief Judge Williams voted to grant panel rehearing. Judges Michael and King voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge King for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D

1. 18 U.S.C. 922(g)(9) provides:

It shall be unlawful for any person—

* * * * *

(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.

2. 18 U.S.C. 921(a)(33) (2000 & Supp. V 2005) provides:

(A) Except as provided in subparagraph (C), the term “misdemeanor crime of domestic violence” means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a 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 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.