No. 14-10154

IN THE

Supreme Court of the United States

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

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Title 18 of the United States Code § 922(g)(9) prohibits a person who has previously been convicted of a "misdemeanor crime of domestic violence" from engaging in certain actions, including possessing a firearm that has traveled in interstate commerce. 18 U.S.C. § 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" as one 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" persons who share specified relationships.

The question presented is:

Does a misdemeanor crime with the *mens rea* of recklessness qualify as a "misdemeanor crime of domestic violence" as defined by 18 U.S.C. §§ 921(a)(33)(A) and 922(g)(9)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 778 F.3d 176 and is reproduced in the Joint Appendix (J.A.) at J.A. 6–90. The First Circuit's order denying rehearing en banc is unreported, and it is reproduced at J.A. 91–92. The First Circuit's earlier opinion in petitioner Armstrong's case is reported at 706 F.3d 1 and reproduced at J.A. 186–99. The First Circuit's earlier opinion in petitioner Voisine's case is unpublished and reported at 495 F. App'x 102. J.A. 145–146. The First Circuit's prior orders denying rehearing en banc are unreported. This Court's order vacating the First Circuit's earlier opinion is reported at 134 S. Ct. 1759 (2014). The opinions of the United States District Court for the District of Maine are unreported.

JURISDICTION

The Court of Appeals issued its decision after remand from this Court on January 30, 2015. J.A. 6. A timely petition for rehearing and rehearing en banc was denied on March 30, 2015. The petition for certiorari was timely filed and granted on October 30, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a–7a.

STATEMENT OF THE CASE

This case presents a narrow question of statutory interpretation: Whether the "use or attempted use of

physical force" under 18 U.S.C. § 921(a)(33)(A) extends to merely reckless (as opposed to intentional) offensive physical contact. Under the Gun Control Act, those who have a prior misdemeanor conviction involving the "use or attempted use of physical force" against a domestic relation become prohibited persons who cannot possess a firearm and who are subject to a felony charge with a maximum of 10 years imprisonment if they do. See 18 U.S.C. § 922(g)(9). Petitioners' prior misdemeanor convictions came under a state statute that prohibits reckless as well as intentional conduct and, under the categorical approach, those convictions must be assumed to be for reckless offensive physical contact.

Canons of statutory construction and prior decisions from this Court dictate that "use . . . of physical force" requires intentional or knowing conduct. Last Term, in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), the Court held that this same statutory provision must be construed in accordance with the common-law definition of battery. That holding resolves the instant case as well: At common law, mere recklessness was not sufficient to support a criminal battery charge. Thus, petitioners' prior misdemeanor convictions do not fall within § 921(a)(33)(A).

Here, the First Circuit reached a contrary conclusion only by eschewing the common-law meaning of the statutory language in contravention of *Castleman*. Instead, the First Circuit favored its own unique assessment of the "context" of § 922(g)(9) and the policy considerations it perceived as underlying the statute. That reasoning, however, leapt over the well-established analytical steps the Court has adopted precisely to avoid subjective

assessments of policy in interpreting complex statutory language.

District Court Proceedings Involving Petitioner Voisine

In 2004, petitioner Stephen L. Voisine pleaded guilty in Maine state court to a misdemeanor simple assault conviction pursuant to Me. Stat. tit. 17-A, § 207(1)(A).[1] See App. at 5a. Under § 207(1)(A), a person is guilty of assault if he or she "intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person." The charging document alleged the crime in generic terms, stating that he "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact" to another person. The state court plea colloquy, which comprises one transcript page, reflects that Mr. Voisine entered his plea pursuant to a negotiated settlement that would result in him paying a $200 fine.

In 2009, Mr. Voisine came to the attention of federal authorities through an anonymous tip that he had shot a bald eagle. During the federal investigation, Mr. Voisine turned a rifle over to authorities. Federal authorities examined Mr. Voisine's criminal history and noticed his 2004 conviction. In 2011, the United States charged Mr. Voisine in a two-count federal information. Pertinent here, Count 1 charged unlawful possession of a firearm by a prohibited person in violation of 18

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[1] Maine is one of several states in which the crime of assault "is defined to include what is usually classified as a battery." Wayne R. LaFave, 1 Substantive Criminal Law § 16.1 n.2 (2d ed. 2003).

U.S.C. § 922(g)(9), predicated on the 2004 state conviction.

Mr. Voisine moved to dismiss Count 1 on the same grounds asserted here: namely, that a prior charge presumptively predicated on reckless conduct was insufficient to render him a prohibited person under § 921(a)(33)(A)'s "use . . . of physical force" language. He attached to his motion the generic charging document and plea colloquy from his 2004 simple assault conviction. See J.A. 98.

The federal district court denied the motion to dismiss. Thereafter, Mr. Voisine pleaded guilty to both counts, but reserved the right to appeal the denial of the motion to dismiss. The district court sentenced him to imprisonment of a year and a day.

District Court Proceedings Involving Petitioner Armstrong

In 2008, petitioner William E. Armstrong pleaded guilty in Maine state court to a misdemeanor domestic violence assault in violation of Me. Stat. tit. 17-A, § 207-A(1)(A), which, like the statute at issue in Mr. Voisine's case, permits conviction for reckless conduct. The charging document tracked the language of the simple assault statute, alleging that Mr. Armstrong "did intentionally, knowingly or recklessly cause bodily injury or offensive physical contact to" a family or household member. The plea colloquy transcript reflects that Mr. Armstrong's guilty plea was in response to an offer from the state to recommend a time-served sentence, one year of probation, and a $10 fine. Mr. Armstrong returned home after pleading guilty.

In May 2010, during an unrelated investigation, Maine State Police obtained a search warrant for Mr.

Armstrong's residence. While executing the warrant, state officers noticed firearms and ammunition in the residence. Because the state warrant did not allow the seizure of weapons, the state officers reported the presence of the firearms and ammunition to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). After receiving the state report, ATF agents learned of Mr. Armstrong's 2008 misdemeanor assault conviction and obtained and executed a federal search warrant on Mr. Armstrong's residence. Federal officers recovered ammunition and, later, with Mr. Armstrong's help, discovered firearms belonging to him at the residence of a family friend. Federal prosecutors filed a one-count indictment charging Mr. Armstrong with a violation of 18 U.S.C. § 922(g)(9), predicated on his 2008 state assault conviction.

Like Mr. Voisine, Mr. Armstrong moved to dismiss the federal charge, raising the same argument asserted here, and attached the underlying charging document and transcript of his state court plea colloquy. The district court denied the motion, citing the First Circuit's then-recent decision in *United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011). *Booker* considered the same Maine simple assault statute at issue here, holding that a prior misdemeanor conviction premised on reckless conduct is sufficient to constitute the "use . . . of physical force" for purposes of defining a "crime of domestic violence" in § 922(g)(9). *Id.* at 13–14.

Mr. Armstrong pleaded guilty to the § 922(g)(9) charge, conditioned upon his right to appeal the denial of his motion to dismiss. The district court sentenced him to three years probation and levied a $2,500 fine.

The Initial First Circuit Decision

The First Circuit affirmed in both appeals based upon its *Booker* precedent. See J.A. 145–146, 186–199. Mr. Voisine and Mr. Armstrong filed a joint petition for a writ of certiorari to this Court.

This Court's *Castleman* Decision And Order Remanding Petitioners' Cases To The First Circuit

In *Castleman*, the Court considered the *actus reus* necessary to constitute a "use . . . of physical force" for purposes of 18 U.S.C. § 921(a)(33)(A). The Court held that Congress had intended that phrase to reflect the type of conduct needed to support a common-law charge of battery—that is, conduct causing bodily injury or offensive physical contact. Thus, relying on the common-law definition of battery, the Court held that § 921(a)(33)(A)'s *actus reus* element extended to the causation of offensive physical contact. *Castleman*, 134 S. Ct. at 1410–13.

Castleman further noted that the Court previously had "reserved the question whether a reckless application of force could constitute a 'use' of force," but that "the Courts of Appeals have almost uniformly held that recklessness is not sufficient." *Id.* at 1414 n.8. The Court observed that the First Circuit stood alone on the other side of the question, holding that recklessness was sufficient. See *id.* (citing *Booker*, 644 F.3d at 19–20).

Thereafter, this Court granted petitioners' joint petition for a writ of certiorari, vacated the First Circuit's decision, and remanded petitioners' cases to the First Circuit for further consideration in light of *Castleman*. *Armstrong* v. *United States*, 134 S. Ct. 1759 (2014).

The First Circuit Decision On Remand

The First Circuit recognized on remand that *Castleman* had adopted the common-law definition of battery in holding that the phrase "use . . . of physical force" in § 921(a)(33)(A) could be satisfied by offensive touching.[2] But it nevertheless declined to apply the common-law meaning when analyzing whether a *mens rea* of recklessness could establish a "use . . . of physical force" under § 921(a)(33)(A). It also rejected the cases *Castleman* noted as holding that the reckless application of force was not a "use . . . of physical force" as required to establish a crime of violence (discussing *Castleman's* recognition that the First Circuit was an outlier on this issue), on the ground that those cases interpreted the phrase "use . . . of physical force" in different statutory definitions and different contexts. J.A. 12–16. It deemed Maine's definition of "recklessness" to include "an element of intentionality and specificity" sufficient to bring reckless assault within the scope of offenses constituting a "misdemeanor crime of domestic violence" under § 922(g)(9) and found no distinction between recklessly causing physical

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[2] *Castleman* addressed a Tennessee conviction for knowingly and intentionally causing bodily injury. *Castleman*, 134 S. Ct. at 1413. The Court recognized that in addition to proscribing intentionally, knowingly, or recklessly causing bodily injury to another, the statute also proscribed intentionally or knowingly causing another to fear imminent bodily injury, and intentionally or knowingly causing offensive physical contact. *Id.* While the Court noted that not every type of assault must involve the use of physical force, the Court found it unnecessary to decide whether a domestic assault conviction in Tennessee was categorically a misdemeanor crime of domestic violence, because the parties did not contest that the statute was divisible and application of the modified categorical approach established the use of physical force. *Id.* at 1414.

injury and recklessly causing offensive physical contact. *Id.* at 21–23.

Applying the categorical approach, the dissent focused on reckless causation of offensive physical contact, the least culpable combination of *actus reus* and *mens rea* constituting an offense under the Maine assault statute, and concluded that such a crime did not involve the requisite use of physical force. *Id.* at 39–46, 88–90 (Torruella, J., dissenting). The dissent argued that Maine's definition of recklessness did not connote the substantial amount of deliberateness and intent found by the majority. *Id.* at 65–68. The dissent further noted that § 921(a)(33)(A) had nearly identical language to that of statutes held by ten other circuit courts to require a *mens rea* greater than recklessness, and concluded that § 921(a)(33)(A)'s "use . . . of physical force" requirement can be satisfied by offensive touching only if that touching is intentional rather than merely reckless. *Id.* at 86–90.

SUMMARY OF ARGUMENT

The Maine statute under which petitioners were convicted proscribes "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact to another person." Under *Castleman*, if petitioners had been convicted of knowingly or intentionally causing either bodily injury or offensive physical contact, their state convictions would be federal § 922(g)(9) predicates. *Castleman*, however, did not expressly decide whether *reckless* misdemeanors fit within the scope of § 922(g)(9).

Because petitioners' charging documents make it impossible to tell which variant of assault (*i.e.*, which combination of *mens rea* and *actus reus*) they pleaded

guilty to under the Maine statute, the Court must apply the categorical approach set forth in *Taylor* v. *United States*, 495 U.S. 575, 600–02 (1990). Under that approach, the Court must assume that they were convicted of the statutory violation least likely to qualify as a § 922(g)(9) predicate offense. Thus, unless the Court determines that reckless offensive touching qualifies as a "use . . . of physical force," it must overturn petitioners' convictions.

Castleman held that the *actus reus* of causing offensive physical touching fit within the definition of a "misdemeanor crime of domestic violence" in § 922(g)(9). In reaching that result, the Court concluded that Congress had intended to adopt the definition of "force" used in the common-law crime of battery; therefore, any offensive physical contact would be sufficient to satisfy the "use . . . of physical force" requirement of § 921(a)(33)(A).

Castleman's holding necessitates that reckless misdemeanors cannot constitute § 922(g)(9) predicate convictions. By adopting the common-law battery definition of "use . . . of physical force," Congress adopted the cluster of elements that compose that definition. Offensive-contact battery (that is, battery that does not cause bodily injury) at common-law required not only the *actus reus* of offensive contact, but also the *mens rea* of intent. Thus, one could not commit common-law battery through offensive touching with *any* state of mind, but only through *intentional* offensive touching.

Construing "use . . . of physical force" to reach only the knowing or intentional use of force not only comports with the common-law definition of an offensive-contact battery, but also with the plain meaning of the phrase as this Court has interpreted

it. In *Smith* v. *United States*, 508 U.S. 223, 229 (1993), the Court considered the dictionary meaning of the verb "to use," determining that it meant to actively implement or employ something to obtain an objective. Subsequently, in *Bailey* v. *United States*, 516 U.S. 137, 143 (1995), the Court reaffirmed that definition, holding that "use" of a firearm, as contained in 18 U.S.C. § 924(c), meant the "active employment" of the firearm to obtain an objective; possession, alone, did not constitute "use." And in *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) the Court found the "active employment" definition determinative in construing the term "use . . . of physical force" in 18 U.S.C. § 16(a). *Leocal* added that "use . . . of physical force" "suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* Since *Leocal*, almost all federal courts of appeals have held that crimes involving reckless conduct do not meet the definition of "use . . . of physical force," as reckless conduct is accidental conduct.

The First Circuit is the only court of appeals to hold to the contrary, and it did so largely on the basis of an incomplete account of the policy concerns at issue. To be sure, domestic violence is a real and serious problem in our society, and it deserves to be treated as such. The First Circuit wrongly assumed, however, that a misdemeanor domestic violence conviction results from the most egregious cases because officers and prosecutors exercise discretion. This rationale fails to account for "mandatory"- or "preferred arrest" laws and departmental policies requiring a police officer to make an arrest in some or all domestic disputes, as well as "no-drop" prosecution policies. Such removal of law enforcement and prosecutorial discretion inevitably

leads to higher conviction rates in the misdemeanor court system, which in most states provides misdemeanants few meaningful due process rights.

Section 921(a)(33)(A) unambiguously excludes reckless conduct from its coverage, but to the extent that there are any doubts at all they should be resolved in favor of petitioners' preferred reading in light of the doctrines of lenity and constitutional avoidance.

ARGUMENT

I. THE PHRASE "USE . . . OF PHYSICAL FORCE" EXCLUDES MERELY RECKLESS CONDUCT.

Petitioners' convictions under § 922(g)(9) were based on their guilty pleas to the misdemeanor offense of "intentionally, knowingly, or recklessly caus[ing] bodily injury or offensive physical contact to another person" under Maine state law. Me. Stat. tit. 17-A, §§ 207(1)(A) & 207-A(1)(A). Combining the three possible mental states and the two possible criminal acts under the Maine assault statute yields six possible ways by which one can commit an assault in Maine—one can intentionally, knowingly, or recklessly cause either bodily injury or offensive physical contact.

In light of petitioners' generic charging documents, it was (and is) impossible to determine which of the six possible types of Maine assault was the basis for petitioners' state convictions. As a result, the First Circuit correctly recognized that it needed to analyze whether a Maine domestic violence assault qualified as a § 922(g)(9) predicate offense using the "categorical approach." J.A. 10–14. Under that approach, a court analyzing such a question must "look[] only to the statutory definitions of the prior

offenses, and not to the particular facts underlying those convictions."[3] *Taylor*, 495 U.S. at 600, see also *Shepard* v. *United States*, 544 U.S. 13 (2005). Thus, unless the Court determines that a conviction under the Maine domestic violence assault statute categorically constitutes a "misdemeanor crime of domestic violence,"—that is, unless all possible mental states and all possible acts of assault delineated by Maine law qualify—petitioners' convictions must be overturned. See *Castleman*, 134 S. Ct. at 1413–14.

It is clear under *Castleman* that four of the six possible variants of assault under the Maine statute at issue qualify as "misdemeanor crimes of domestic violence." But *Castleman* expressly left open the question of whether *reckless* batteries, which are within the scope of the Maine statute, qualify as "misdemeanor crimes of domestic violence" for purposes of § 922(g)(9). *Id.* at 1414 n.8.

***18 U.S.C. § 922(g)(9) Predicate Offenses After* Castleman**

	Intentionally	Knowingly	Recklessly
Cause bodily injury	Qualifies	Qualifies	?
Cause offensive physical contact	Qualifies	Qualifies	?

[3] The categorical approach rests on a constitutional foundation. Going beyond the elements of the statute at issue and "allowing a sentencing court to make a disputed determination about what a defendant and a state judge must have understood as the factual basis of a prior plea" would "at the least[] raise serious Sixth Amendment concerns." *Descamps* v. *United States*, 133 S. Ct. 2276, 2288 (2013) (citation omitted).

The issue in this case is reflected in the boxes at the right hand side of the table: Whether the phrase "use . . . of physical force," as contained in 18 U.S.C. § 921(a)(33)(A) extends to all misdemeanor Maine assaults that are committed with the *mens rea* of recklessness. In Maine, a person acts recklessly if he or she "consciously disregards a risk" that his or her conduct will cause a certain result, and the disregard constitutes a "gross deviation" from the standard of conduct of a reasonable person. Me. Stat. tit. 17-A § 35(3).[4] By contrast, a person acts "knowingly" under Maine law only when he or she is "aware that it is practically certain" that his or her conduct will cause a result. *Id.* § 35(2).

A. *Castleman* Dictates That The Common-Law Definition Of Battery Must Be Used To Interpret The Phrase "use . . . of physical force" In 18 U.S.C. § 921(a)(33)(A).

In *Castleman*, this Court relied on the common-law definition of battery to determine the meaning of the phrase "use . . . of physical force" in the same statutory provision at issue in this case, holding that "Congress incorporated the common-law meaning of 'force'—namely, offensive touching—in § 921(a)(33)(A)'s definition of a 'misdemeanor crime of domestic violence.'" 134 S. Ct. at 1410. In doing so, the Court drew a connection between "use . . . of physical force" and the crime of battery at common-

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[4] This is similar to the Model Penal Code definition of the term. *See* Model Penal Code § 2.02(2)(c) ("A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk . . . . The risk must be of such a nature and degree that . . . its disregard involves a gross deviation" from a reasonable standard of care.)

law, noting that "it makes sense for Congress to have classified as a 'misdemeanor crime of domestic violence' the type of conduct that supports a common-law battery conviction" because domestic violence crimes are usually prosecuted under general assault or battery statutes, the origins of which are rooted in common-law assault and battery crimes. *Id.* at 1411.

The Court distinguished a prior case that reached the opposite conclusion when interpreting the phrase "use . . . of physical force" in a different statute. In *Johnson* v. *United States*, 559 U.S. 133 (2010), the issue was the *actus reus* required for "use . . . of physical force" in the context of defining "violent felon[ies]" under 18 U.S.C. § 924(e)(2)(B)(i), part of the Armed Career Criminal Act. The Court in *Johnson* declined to rely on the common-law definition of battery, explaining that it made little sense to believe that Congress intended the common-law definition of "force"—that is, the "slightest offensive touching"—to govern in the context of "violent felon[ies]." *Johnson*, 559 U.S. at 139–40. By contrast, in *Castleman*, the Court concluded that "the common-law meaning of 'force' fit[] perfectly," given that the Court was interpreting that term in the context of "misdemeanor crime[s] of domestic violence" rather than "violent felon[ies]," especially considering that battery was a misdemeanor, not a felony, at common-law. 134 S. Ct. at 1410.

Contrary to the First Circuit's tortured efforts to distinguish *Castleman*,[5] Congress's use of the phrase

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[5] Although both petitioners and the government "agree[d] that, under *Castleman*, the term 'use of physical force' . . . incorporates the common law *mens rea* for battery", the First Circuit majority "decline[d] the parties' invitation to define the *mens rea* of a common law battery independent of the

"use . . . of physical force" must be interpreted to incorporate not only common-law battery's *actus reus* (as the Court held in *Castleman*), but also its *mens rea*. This result is mandated by the "settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'" *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (citation omitted); see also *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

B. The Common-Law Definition Of Battery Makes Clear That The Crime Could Be Committed Only With The Mental State Of Intentional Or Knowing Conduct.

In *Johnson,* the Court recognized that a common-law battery was "the *intentional* application of unlawful force against the person of another." *Johnson*, 599 U.S. at 139 (emphasis added) (citing 2 Wayne LaFave & Austin Scott, Substantive Criminal Law § 7.15(a), 301 (1986 and Supp. 2003)). This description of common-law battery rests on firm ground. Blackstone described battery as "[t]he least

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interpretation Maine gives its own statute." J.A. 19. The First Circuit's reasoning, as discussed herein, was fatally flawed because it failed to follow *Castleman*'s reasoning and because it was based on invalid policy determinations.

touching of another's person willfully, or in anger."[6] 3 William Blackstone, *Commentaries on the Laws of England*, 120 (1768). A criminal battery, according to Black's Law Dictionary, is "[t]he nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact." *Battery*, Black's Law Dictionary (10th ed. 2014); see also *Battery*, Ballentine's Law Dictionary (3d ed. 1969) (defining battery as the "unlawful touching or striking of the person of another . . . with the intention of bringing about a harmful or offensive contact . . .").

The *Johnson* formulation also accords with judicial opinions from an array of states applying the common-law of battery. See, *e.g.*, *Lynch* v. *Virginia*, 109 S.E. 427, 428 (Va. 1921) ("To constitute battery, there must be some touching of the person of another, but not every such touching will amount to the offense. Whether it does or not will depend, not upon the amount of force applied, but *upon the intent of the actor*." (emphasis added)); *Cluff* v. *Mut. Benefit Life Ins. Co.*, 95 Mass. 308, 317 (Mass. 1866) ("An assault is an intentional attempt by force to injure the person of another. A battery is committed whenever the menaced violence of an assault is done in the least degree to the person." (citation omitted)); *Razor* v. *Kinsey*, 55 Ill. App. 605, 613–14 (Ill. App. Ct. 1894) ("By the common law as well as by our statutory definition, an assault and battery is a successful

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[6] Blackstone's use of the disjunctive "or" between "willfully" and "in anger" does not indicate that a criminal act done in anger was not intentional. Instead, it indicates only a lack of *malice*, which was signified by the adverb "willfully." *See Willful*, Black's Law Dictionary (10th ed. 2014) ("The term *willful* is stronger than *voluntary* or *intentional*; it is traditionally the equivalent of *malicious*, *evil*, or *corrupt*.").

attempt to commit violence to the person, and necessarily intentional.").

Thus, the common-law misdemeanor of battery required a *mens rea* greater than recklessness. The only occasional exception to that requirement at common-law occurred in cases where wanton or reckless conduct had caused actual, physical harm. See, *e.g.*, *Massachusetts* v. *Hawkins*, 32 N.E. 862, 863 (Mass. 1893) (noting that the mental state necessary to constitute assault and battery was the "intentional doing of an act which, by reason of its wanton or grossly negligent character, exposes another to personal injury, *and causes such an injury*." (emphasis added)). That exception is inapplicable here because the categorical approach requires treatment of petitioners' convictions as if they were for recklessly causing offensive physical contact. Moreover, *Castleman* affirmatively adopted the level of force associated only with intentional conduct.

C. A Plain Language Reading Of The Statute Confirms That "use . . . of physical force" Excludes Reckless Conduct.

The Court's prior cases interpreting the plain meaning of the verb "use" and the phrase "use . . . of physical force" further confirm that they require intentional and purposeful conduct—and thus do not extend to merely reckless conduct.

The foundation of the Court's decisions interpreting the phrase "use . . . of physical force" are its cases defining the term "use" in the criminal code. In *Smith*, 508 U.S. at 225, the statute at issue prohibited the "use" of a firearm in relation to other enumerated crimes, which included a drug trafficking offense. See 18 U.S.C. § 924(c). The defendant, who

was charged with a violation of this statute based on his attempt to trade a firearm for drugs, argued that this act did not constitute "use" of a firearm, because he had not used the firearm as a weapon, but rather as an item of barter. Because the statute did not define the meaning of the word "use," the Court began its statutory interpretation with the plain language of the statute, explaining:

> Webster's [Dictionary] defines "to use" as "to convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950). Black's Law Dictionary contains a similar definition: "to make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 1541 (6th ed. 1990).

Smith, 508 U.S. at 228–29 (holding that defendant's conduct in bartering a firearm for drugs constituted "use" of the firearm). The Court adopted this same approach when it later determined that "use" cannot be equated with mere possession of a firearm, without some other factor that indicates that the firearm was *actively* employed to carry out the defendant's purpose of furthering a predicate crime. See *Bailey*, 516 U.S. at 143.

The Court relied on these cases in interpreting the *mens rea* required to constitute "use . . . of physical force" under another provision of the federal criminal code. *Leocal* involved a provision of the Immigration and Nationality Act that makes an alien who has committed a "crime of violence," as defined in 18 U.S.C. § 16, deportable from the United States. Section 16 in turn defines a "crime of violence" to mean:

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

Leocal, 543 U.S. at 4–5.

The question presented in *Leocal* was whether the crime of driving under the influence and causing serious bodily injury under Florida state law—which did not contain any *mens rea* element and could be committed negligently—constituted a "crime of violence" pursuant to 18 U.S.C. § 16.

The Court considered the term "use" to be "critical," stating:

> As we said in a similar context in *Bailey*, "use" requires active employment. 516 U.S.[] at 145. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use . . . physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him. . . . The key phrase in § 16(a)—the "use . . . of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

Leocal, 543 U.S. at 9 (citation omitted).

The Court thus held that "use . . . of physical force," in § 16(a) cannot encompass conduct committed with

the *mens rea* of negligence. The Court then went a step further, holding that § 16(b), the broader provision of the statute that extends to an offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," similarly does not encompass conduct committed with the *mens rea* of negligence. As the Court explained, "while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person or property of another." *Id.* at 11.

Notably, the language of § 16(a) at issue in *Leocal* is nearly identical to the language of § 921(a)(33)(A) at issue in this case, as both require the "use . . . of physical force." Absent compelling evidence to the contrary, the same statutory language should be given the same meaning. See, *e.g.*, *Leocal*, 543 U.S. at 11 ("[W]hile § 16(b) is broader than § 16(a) . . . , it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person . . . of another. Accordingly, we must give the language in § 16(b) an identical construction"); *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

The Court in *Leocal* did not expressly reach the issue in this case—whether a crime committed with the *mens rea* of recklessness constitutes a "use . . . of physical force" for purposes of the criminal code. See *Castleman*, 134 S. Ct. at 1414 n.8 (noting that "*Leocal*

reserved the question whether a reckless application of force could constitute a 'use' of force."). Nevertheless, the Court in *Leocal* repeatedly emphasized that "use . . . of physical force" cannot be "accidental." *Leocal*, 543 U.S. at 9, 11.

Unsurprisingly—given that the result of reckless conduct is, as a matter of ordinary meaning, accidental—"the Courts of Appeals have almost uniformly held that recklessness is not sufficient" to constitute a "use . . . of physical force" for purposes of federal criminal law. See *Castleman*, 134 S. Ct. at 1414 n.8.[7] For example, the Ninth Circuit, in *Fernandez-Ruiz* v. *Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc), held that a recklessly committed domestic violence assault did not qualify as a § 16 crime of violence, given *Leocal*'s instruction that "accidental" conduct was not sufficient.[8] See *Fernandez-Ruiz*, U.S. 466 F.3d at 1129–30. Even the First Circuit has held, in interpreting another federal criminal statute that "use . . . of physical force" cannot extend to reckless conduct. See *United States*

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[7] This phrase appears in several other provisions of the federal criminal code, including 18 U.S.C. §§ 373 (Solicitation to Commit a Crime of Violence), 16 (Crime of Violence Defined), 521 (Criminal Street Gangs), 921(a)(33)(A) (defining "misdemeanor crime of domestic violence"), 924(e) (defining "Violent Felony" for sentencing enhancement purpose), 1512 (Witness Tampering), 3156 (Bail Reform Act definitions), and 5032 (Transfer of a Juvenile for Criminal Prosecution). The phrase also occurs at various points in the Federal Sentencing Guidelines. *See, e.g.*, 2L1.2 (Immigration Application Note B(iii)), 4B1.2 (Career Offender Definitions).

[8] The definition of recklessness in that case was similar to the Maine definition at issue in this case. *See Fernandez-Ruiz*, 466 F.3d at 1130.

v. *Fish*, 758 F.3d 1, 9–10 (1st Cir. 2014) (interpreting 18 U.S.C. § 16(b)). Thus, both the plain meaning of "use . . . of physical force" and the common-law definition of battery dictate that a predicate crime must be committed with a *mens rea* of more than recklessness to qualify as a "misdemeanor crime of domestic violence."

II. NEITHER LEGISLATIVE HISTORY NOR POLICY CONSIDERATIONS WARRANT DEPARTING FROM BINDING PRECEDENT AND THE TEXT OF THE STATUTE.

A. A Sparse Legislative History Cannot Override Clear Statutory Language.

Where, as here, the meaning of the statutory text is clear, "there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). Assuming *arguendo* that legislative history were relevant to this case—as the First Circuit believed—it too indicates that a reckless act does not constitute a "use . . . of physical force." Nothing in the threadbare legislative history of § 922(g)(9), referred to as the "Lautenberg Amendment" after the Senator who sponsored it, can override the *mens rea* requirement reflected in a fair reading of the statute's text. The Lautenberg Amendment was not the subject of extensive congressional discussions, hearings, and reports that would give any insight into whether the "use . . . of physical force" may be satisfied by the mere reckless causing of an offensive contact. Cf. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 483 (1951) ("[T]he legislative history of [the] Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will."). To the

contrary, the Lautenberg Amendment was a last-minute addition to a 750-page omnibus spending bill.

Although Senator Lautenberg and a few others spoke on the Senate floor in favor of the bill, such stray remarks in support of a last-minute rider to an act whose primary purpose was to make "omnibus consolidated appropriations for the fiscal year ending September 30, 1997"[9] are not entitled to substantial weight. This is particularly true where, as here, the statute does not criminalize petitioners' conduct on a fair reading of its text, and where principles of lenity would favor petitioners in any event. See *Crandon* v. *United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."); *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (emphasizing "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant," in declining to rely on legislative history).

As originally introduced, the Lautenberg Amendment defined a "crime involving domestic violence" as a "*crime of violence* . . . committed by a current or former spouse, parent, or guardian of the victim . . . ." Statement of Sen. Lautenberg, 142 Cong. Rec. S10377 (daily ed. Sept. 12, 1996) (introducing amendment) (emphasis added). "Crime of violence" is in turn defined under 18 U.S.C. § 16 to include not only an offense involving the "use . . . of physical force," *id.* § 16(a), but also an offense that involves the "threatened use of physical force" against

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[9] Pub. L. No. 104-208, 110 Stat. 3009, 3009 (Sept. 30, 1996).

a person or property, *id.*, or one that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *id.* at § 16(b).

"[C]rime of violence" with its broader definition, did not make it into the final version, however. The specific concern reported by Senator Lautenberg leading to the change involved the application of the gun ban to perpetrators of property crimes. Statement of Sen. Lautenberg, 142 Cong. Rec. S11876, S11877 (daily ed. Sept. 30, 1996). Thus, as the sponsor himself explained, the final version included "a new definition of the crimes for which the gun ban will be imposed" precisely because some had "argued that the term crime of violence was too broad" in the language as originally proposed. *Id.*

Finally, it is worth noting that the specific goal of the Lautenberg Amendment was to close a "loophole" where crimes that would be treated as a felony if the victim were a stranger could end up resulting in misdemeanor convictions because "[o]utdated or ineffective laws often treat domestic violence as a lesser offense." Statement of Sen. Feinstein, 142 Cong. Rec. S10380 (daily ed. Sept. 12, 1996). In other words, Congress sought to put crimes of domestic violence on equal footing by "look[ing] to the type of crime, rather than the classification of the conviction." *Id.*; see also Statement of Sen. Wellstone, 142 Cong. Rec. S10379 (daily ed. Sept. 12, 1996) ("If the offense is a misdemeanor, then under the current law there is a huge loophole."). But if the purpose was to close a loophole where serious crimes—such as those involving intentional harm—are charged as misdemeanors, it does not make sense to extend the statute's reach to conduct that is inherently *less* serious, *i.e.*, merely recklessly causing

offensive contact. The best reading of the statute, which does not reach reckless conduct, is also the one that best fits the "loophole" that Congress appears to have had in mind.

To be sure, the legislative history includes a string of general, impassioned statements of policy regarding the very serious problem of domestic violence. But those general statements of policy do not speak to the precise and technical question of *mens rea* at issue here. Nor do they trump either the specific evidence of express congressional purpose supporting petitioners' proposed reading or the principles of lenity that would compel reversal if the statute were ambiguous. See *Hughey*, 495 U.S. at 422 (emphasizing lenity and refusing to resolve "ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history"). Nothing in the legislative history casts doubt on the proposition that the mere reckless causing of an offensive contact does not constitute the "use of physical force" under 18 U.S.C. § 921(a)(33)(A).

B. Recent Data Undermines The First Circuit's Policy Rationale.

The First Circuit majority relied in large part on this Court's recognition in *Castleman* that domestic violence often escalates in severity over time and that as a result, minor acts may be part of a pattern of domestic violence over time. J.A. 7–8. To be sure, domestic violence is a serious problem, and it often involves an ongoing cycle of behavior between intimate partners or family members that may escalate. Legislative and law enforcement responses have recognized and should recognize it as such. But the Court of Appeals went too far in its reliance on

policy to justify a broad application of § 922(g)(9) to cover reckless conduct across the board despite canons of construction requiring a more narrow reading.

In its policy rationale, the First Circuit majority incorrectly assumed that Maine likely would not prosecute minor reckless acts, and that there was little reason to think that § 922(g)(9) would be applied to such minor acts. J.A. 24 (noting that "it is hard to identify a case of reckless assault in the domestic context that Maine would prosecute but that Congress did not intend to serve as a § 922(g)(9) predicate."). As an initial matter, no appeal to the discretion of police and prosecutors can justify an overbroad reading of a criminal statute. Cf. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."); *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory . . . . Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

More critically, however, the empirical assumption on which the First Circuit's appeal to police and prosecutorial discretion is based turns out to be false. The reality is that law enforcement officers frequently lack discretion and must make an arrest when called about a domestic dispute, even when the dispute involves minor incidents or the facts are unclear. Many states, including Maine, now have

either mandatory or preferred arrest laws requiring or encouraging responding officers to arrest under some or all circumstances in a domestic dispute. See, *e.g.,* David Hirschel, U.S. Dep't. of Justice, Nat'l Inst. of Justice*, Domestic Violence Cases: What Research Shows About Arrest and Dual Arrest Rates*, (July 25, 2008) (discussing mandatory arrest as a response to domestic violence and identifying states in which the practice is law). And even in states where arrest is preferred or left to the discretion of the officer, police departments often have internal policies of mandatory arrest in domestic disputes. *Id.* at 10.

States have also directly limited prosecutorial discretion by adopting "no-drop" policies in cases stemming from domestic disputes. See Erica L. Smith, et al., *State Court Processing of Domestic Violence Cases*, U.S. Dept. of Justice, Bureau of Justice Statistics, (March 12, 2008) (discussing case processing, including prosecution practices in domestic dispute assault cases compared to those in cases involving non-domestic dispute assault). As a result, more people involved in intimate partner domestic disputes are arrested, prosecuted, and convicted, because police and prosecutors do not have the discretion to forego arrest and prosecution in cases where the conduct is minor or unclear. See David Hirschel et al., *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. Crim. L. & Criminology 255, 258–59 (Fall 2007) (discussing the impact of mandatory arrest, including an increase in the number of women arrested); Smith, et al., *supra,* at 2–3 (concluding that domestic assaults now have a higher overall conviction rate, felony conviction rate, and misdemeanor conviction rate compared to non-domestic assaults, and that as a result of "no-drop"

prosecution policies, prosecutorial diversion, whereby a defendant is given an opportunity to avoid prosecution and conviction for a first time offense or minor conduct, has been reduced). It stands to reason that the practices of mandatory arrest, dual arrest, and aggressive prosecution result in higher rates of minor conduct being swept into the criminal justice system, precisely the opposite effect the Court of Appeals relied on in determining that, as a matter of public policy, there is relatively little harm in the broadest possible reading of § 922(g)(9).[10]

The First Circuit majority's policy rationale is unjustified (and unjust) for the additional reason that, once swept into the misdemeanor court system, a defendant is vulnerable to pleading guilty to reckless conduct regardless of that person's guilt or innocence. See, *e.g.,* Robert C. Boruchowitz, et al., Nat'l Ass'n of Criminal Def. Lawyers *Minor Crimes,*

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[10] Some studies show that mandatory arrest laws may have a serious adverse impact on women, especially as a result of law enforcement practices of "dual arrests," in which both parties to a domestic dispute are arrested. "Anecdotal evidence from some battered women advocates suggests that 'dual arrests' are the most serious problem with mandatory arrest." *See, e.g.,* Radha Iyengar, *Does the certainty of arrest reduce domestic violence? Evidence from mandatory and recommended arrest laws*, 93 Journal of Public Economics, 85, 88 (2009) (analyzing the impact of mandatory arrest on domestic violence, and in particular, on intimate partner homicides). This is especially concerning because the available data suggest that the notion that domestic disputes are repeated and necessarily evolve into ongoing violence, and that arrest as an intervention is a meaningful deterrent, is inconclusive. *See, e.g.,* Christopher D. Maxwell, et al., U.S. Dep't. of Justice, Nat'l Inst. of Justice, *The Effects of Arrest on Intimate Partner Violence: New Evidence From the Spouse Assault Replication Program*, (July 2001) (analyzing recidivism in domestic violence cases).

Massive Waste, The Terrible Roll of America's Misdemeanor Courts, (April 2009) (detailing the due process concerns and abuses in the misdemeanor court system, including the overwhelming case loads, the pressure on defendants from judges and prosecutors to take pleas to resolve cases quickly, and the frequency with which defendants plead guilty without counsel).[11] Wrongful convictions happen as a result of the dire consequences that face defendants, including incarceration from conviction and the fear of not being able to make bail while awaiting trial (and being absent from a job as a result). See, *e.g.,* Alexandra Natapoff*, Misdemeanors*, 85 S. Cal. L. Rev. 101, 134–35 (2012) ("The confluence of police authority to trigger incarceration simply by asserting that a minor offense has been committed, combined with the pressures of bail and general acquiescence of the poor [and minorities], can create the perfect storm of wrongful pleas."). See also, *Amici* Br. ACLU et. al., at 6–7, *Kingsley* v. *Hendrickson et. al.*, No. 14-

[11] This study documented widespread constitutional abuses in the state misdemeanor court systems. It found that of the more than 10 million misdemeanor cases arising annually, most were resolved at the first court appearance in a matter of minutes with the defendant agreeing to plead guilty, more often than not without having had any meaningful representation from a defense attorney. *Id.* at 11–12. Following the publication of this study, the American Civil Liberties Union prevailed in a class action on behalf of misdemeanants in two cities in Washington state, in which the court found there was a lack of meaningful representation because public defenders had excessively high case loads. *Wilbur* v. *City of Mount Vernon*, 989 F. Supp. 2d, 1122 (W.D. Wash. 2013). See also *Pattershall* v. *Jenness*, 485 A.2d 980, 983 (Me. 1984) (citation omitted) (misdemeanor conviction for misdemeanor assault in which fine or punishment is minimal does not present "the incentive and opportunity to fully and fairly litigate the issues in the criminal proceedings" to act as preclusive in subsequent civil action for same assault).

6368 (S. Ct. Mar. 9, 2015) (describing a study of non-felony defendants in New York City in 2008 showing that those who could not make bail (the vast majority) spent an average of 15.7 days in jail). Some data suggest the risk of wrongful convictions is high for the most vulnerable groups, non-whites, and the poor. Boruchowitz, et al., *supra,* at 47–48 (discussing the disproportionate impact the injustices of the misdemeanor system have on the poor and minorities).

Accordingly, the First Circuit's premature resort to policy concerns cannot stand even on its own terms. Well-established procedural and constitutional shortcomings in the state misdemeanor court systems counsel against reading § 922(g)(9) to cast the broadest possible net and raise serious concerns that there is no safety mechanism in the criminal justice system's handling of domestic violence cases to ensure a defendant is not wrongfully or unfairly deprived of a constitutional right. Indeed, such a reading of the statute may do more harm than good from a policy perspective.[12]

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[12] Policy considerations may even dictate the opposite conclusion—that categorically sweeping reckless conduct into the definition of "use . . . of physical force" in the face of mandatory arrest practices may so negatively impact the most disenfranchised groups that it *increase*s rather than decreases the likelihood of future domestic violence. *See, e.g.,* Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 Duke J. Gender L. & Pol'y, 221 (2012–13); Iyengar, *supra* at 93; G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 24 Hous. L. Rev., 237 (2005–06); Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, Signs: 25 Journal of Women in Culture and Society, 1133 (2000).

III. THE RULE OF LENITY REQUIRES THAT THE "USE . . . OF PHYSICAL FORCE" BE READ TO EXCLUDE RECKLESS CONDUCT.

In light of the foregoing, § 922(g)(9) should be read to require a *mens rea* of intent or knowledge, consistent with common-law and plain-language meanings of the phrase "use . . . of physical force." Reliance upon a lesser mental state on the basis of sparse legislative history or subjective contextual analyses only serves to introduce ambiguity into an otherwise clear statutory mandate. Yet, if ambiguity is generated in this fashion, the doctrine of lenity requires a court to choose the meaning that excludes reckless conduct from the phrase "use . . . of physical force" as it occurs in § 921(a)(33)(A).

Lenity should be invoked when a criminal statute is so ambiguous "that the Court must simply guess as to what Congress intended," *Castleman*, 134 S. Ct. at 1416 (quoting *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010)). The First Circuit's effort to create a foggy relationship between Maine's "recklessness" *mens rea* and the mental state of "misdemeanor crime[s] of domestic violence" under § 922(g)(9) necessitates such a guessing game, with significant sentences for petitioners and future defendants hanging in the balance.

The rule of lenity is especially applicable where, as here, a court's guess at Congress's intent means the difference between a potentially heavy sentence—up to ten years in prison, 18 U.S.C. § 924(a)(2)—and *no* criminal liability whatsoever. "[I]t is appropriate, before [the Court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Cleveland* v.

United States, 531 U.S. 12, 25 (2000) (quoting *United States* v. *Universal C.I.T. Credit Co.*, 344 U.S. 218, 222 (1952); see also *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (invoking the rule of lenity when a statutory term's definition meant the difference between up to 20 years in prison and no liability). No such clear and definite language exists in § 922(g)(9) or § 921(a)(33)(A) to suggest that recklessness is sufficient to render a past crime a "misdemeanor crime of domestic violence" and indeed, the only clear and definite textual evidence (*viz.* the word "use") points in exactly the opposite direction. It is wholly inappropriate, therefore, for petitioners to "languish[] in prison" without "the lawmaker ha[ving] clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)).

IV. THE DOCTRINE OF CONSTITUTIONAL DOUBT ALSO REQUIRES THAT THE "USE . . . OF PHYSICAL FORCE" EXCLUDES RECKLESS CONDUCT.

Before the Court accepts an argument that "use . . . of physical force" within the meaning of § 921 (a)(33)(A), can include reckless conduct crimes, it must consider whether petitioners can lose their constitutional rights by accident and on the basis of having caused only minor harms or no harm at all. Although many states have felony level reckless conduct offenses, the Court is not construing a felony provision. Indeed, the very reason that *Castleman* adopted the common-law definition of "force" was that simple assaults and batteries involve lesser harms than felonies and are inherently associated with misdemeanor level conduct. See *Castleman* at 1410-11. See also *Boyde* v. *California*, 494 U.S. 370,

399 n.5 (1990) (Marshall, J., dissenting) ("in describing the evolution of offense classification in our criminal system, [a criminal treatise] reports that 'serious offenses' such as murder, manslaughter, rape and arson came to be called felonies, whereas other, presumably 'less serious' offenses, came to be called misdemeanors." (citing 1 Charles E. Torcia, Wharton's Criminal Law § 17, 81 (14th ed. 1978))).

To the extent that Congress intended to prohibit those who "use" such minor acts to control a domestic partner, see *Castleman*, 134 S. Ct. at 1411–12, "use" inherently connotes intentionality. But the First Circuit disassociated Congress's purpose from its goal and would disqualify individuals from any gun possession for life even where their prior convictions are deemed crimes of recklessness. Such crimes fall outside the scope of Congress's apparent purpose, and the subsequent felony conduct of possession comes entirely within the scope of constitutionally protected conduct.

Under the doctrine of constitutional doubt, if there are two reasonable ways to construe a statute, and one would raise constitutional questions while the other would not, the Court must opt for the construction that avoids the constitutional question. See *Zadvydas* v. *Davis,* 533 U.S. 678, 688–90 (2001) (setting forth a two-step approach to the constitutional doubt doctrine: (1) determine whether the statute is ambiguous; and (2) if so, adopt the interpretation free from grave constitutional concerns.); see also *Almendarez-Torres* v. *United States*, 523 U.S. 224, 250 (1998) (citing *United States ex rel. Att'y Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)) (emphasis added) (in order to invoke the doctrine of constitutional doubt, no finding of unconstitutionality is required; instead, the standard

is that a "grave and doubtful constitutional question[] *arises*.") (emphasis added).

Here, reading § 922(g)(9) to prohibit any individual convicted of *recklessly* causing offensive physical contact to be precluded from exercising his or her right to possess a firearm would raise grave constitutional issues. In passing § 922(g)(9), Congress sought to protect domestic partners from violent crime by disarming those who have been convicted of prior domestic violence assaults. But a lifetime ban on firearm possession based on reckless conduct presents an insufficient connection between the target concern, protecting victims of domestic violence, and the remedy, disarming perpetrators of "domestic violence." See *Castleman*, 134 S. Ct. at 1411–12.

Put another way, extending § 922(g)(9) to unintentional but reckless conduct weakens the nexus between the prohibited conduct and the law's objectives. Although the Court has not established which level of scrutiny should apply to Second Amendment issues, it has ruled out rational basis. See *District of Columbia* v. *Heller*, 554 U.S. 570, 628 n.27 (2008). The other tests that may be applied to a Second Amendment analysis range from strict scrutiny, to intermediate scrutiny, to an "undue burden" analysis. Strict scrutiny requires that a statute or regulation "be narrowly tailored to serve a compelling governmental interest in order to survive" a constitutional challenge. See *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997). "Intermediate scrutiny" requires that the challenged statute or regulation be "substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). A statute or regulation survives an "undue burden" analysis where it does not have the "purpose or effect

[of] plac[ing] a substantial obstacle in the path" of the individual seeking to engage in constitutionally protected conduct. *Gonzales* v. *Carhart*, 550 U.S. 124, 146 (2007).

Post-*Heller*, the circuit courts have disagreed on the level of constitutional scrutiny to apply to Second Amendment cases. Even in those cases in which the courts have applied intermediate scrutiny to analyses of § 922(g)(9), however, the cases partially turn on the presumed intentionally violent nature of the convicted. See *United States* v. *Chester*, 628 F.3d 673, 690 (4th Cir. 2010) (Davis, J., concurring in the judgment) ("Undisputedly, those convicted for having committed *violent* assaults against cohabitants and family members in general, and [the defendant] in particular, are not law-abiding, responsible citizens. [The defendant] had been convicted of a serious crime . . . in which the facts indicate that he acted *particularly violently*.") (emphasis added); *United States* v. *Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) (defining § 922(g)(9) violations to exclude "risky act[s]").

This Court has deliberately avoided deciding whether constitutionally-protected conduct can be criminalized based on recklessness. See, *e.g.*, *Elonis* v. *United States*, 135 S. Ct. 2001, 2011 (2015) (finding negligent conduct insufficient to establish the offense of communicating a threat by means of interstate commerce, but declining to reach the question as to whether reckless conduct would suffice); *United States* v. *Bailey*, 444 U.S. 394, 407 (1980) (declining to decide whether mental state of recklessness or negligence could suffice for criminal liability under 18 U.S.C. § 751, even though a "court may someday confront a case" presenting issue); *Ginsberg* v. *New York*, 390 U.S. 629, 644–45 (1968) (finding that

rejecting defendant's challenge to obscenity law "makes it unnecessary for us to define further today 'what sort of mental element is requisite to a constitutionally permissible prosecution'"); *Smith* v. *California*, 361 U.S. 147, 154 (1959) (overturning conviction because the lower court did not require any mental element under the statute, but noting that "[w]e need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution"); cf. *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 103–04 (1981) (finding a lower court's order impermissible under the First Amendment but not deciding "what standards are mandated by the First Amendment in this kind of case . . .") Given the clear language used by Congress here, the Court should not tread haphazardly into the thicket it has so far declined to enter.

The First Circuit majority's reading of § 922(g)(9) makes the law over-inclusive by including unintentional crimes. The uncertainty of both the post-*Heller* constitutional gun-control landscape, as well as potential problems of predicating a federal gun prohibition felony based upon misdemeanor convictions for reckless conduct, creates grave constitutional questions that the Court would have to answer if it were to extend the statute to defendants such as the petitioners.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First Circuit, vacate petitioners' convictions, and remand these cases for proceedings consistent with the exclusion of reckless conduct misdemeanors from the definition of a "misdemeanor crime of domestic violence."

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL STATUTES

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

18 U.S.C. § 922(g)(9)

(g) 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.

18 U.S.C. § 921(a)(33)(A)

(a)(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, 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. § 924(c)

(c) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such

crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years . . . .

18 U.S.C. § 16

The term "crime of violence" means—

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

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

18 U.S.C. § 924(e)(2)(B)(i)

(e)(2)(B) [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that

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

18 U.S.C. § 373

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corrobora-

tive of that intent, solicits . . . such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both . . . .

18 U.S.C. § 521

(c) OFFENSES.—The offenses described in this section are— . . .

(2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another . . . .

18 U.S.C. § 924(e)

(e)(2)(B) [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that

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

18 U.S.C. § 1512

(3) The punishment for an offense under this subsection is— . . .

(B) in the case of— . . .

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years . . . .

18 U.S.C. § 3156

(a)(4) [T]he term "crime of violence" means—

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

18 U.S.C. § 5032

(A) juvenile who is alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony offense that has as an element thereof the use, attempted use, or threatened use of physical force against the person of another . . . and who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this paragraph or an offense in violation of a State felony statute that would have been such an offense if a circumstance giving rise to Federal jurisdiction had existed, shall be transferred to the appropriate district court of the United States for criminal prosecution.

18 U.S.C. § 924(a)(2)

Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

MAINE STATUTES

Me. Stat. tit. 17-A, § 207(1)(A)

(1) A person is guilty of assault if:

(A) The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person . . . .

Me. Stat. tit. 17-A, § 207-A(1)(A)

(1) A person is guilty of domestic violence assault if:

(A) The person violates section 207 and the victim is a family or household member . . . .

Me. Stat. tit. 17-A, § 35(3)(A)

A person acts recklessly with respect to a result of the person's conduct when the person consciously disregards a risk that the person's conduct will cause such a result.

Me. Stat. tit. 17-A, § 35(2)

(A) A person acts knowingly with respect to a result of the person's conduct when the person is aware that it is practically certain that the person's conduct will cause such a result.

(B) A person acts knowingly with respect to attendant circumstances when the person is aware that such circumstances exist.

OTHER RELATED SOURCES

Model Penal Code § 2.02(2)(c)

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

U.S. Sentencing Guidelines § 2L1.2

Application Note (B)(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: [listing several specific offenses], or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

U.S. Sentencing Guidelines § 4B1.2

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

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