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

REPLY BRIEF FOR PETITIONERS

SARAH M. KONSKY
BRENNA WOODLEY
STEVEN J. HOROWITZ
JASON G. MARSICO
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

VIRGINIA G. VILLA*
2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioners

* Counsel of Record

February 18, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

COURT DOCUMENTS

STATUTES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

ARGUMENT

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

A. The Common-Law Of Battery And This Court's Decision In *Castleman* Preclude Reckless Misdemeanors From Qualifying As § 922(g)(9) Predicate Offenses.

The government agrees with petitioners that *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), "'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).'" U.S. Br. 16 (quoting Pet'rs Br. at 13). And it agrees that this Court said in *Johnson* v. *United States* that the "common-law crime of battery . . . consisted of the *intentional* application of unlawful force against the person of another," 559 U.S. 133, 139 (2010) (emphasis added). But the government dismisses the Court's description of common-law battery as dicta that is inconsistent with "[m]ultiple sources" that supposedly establish "that common-law battery proscribed reckless conduct." U.S. Br. 17–18 & n.3. The government's contention is wrong.

1. The government acknowledges "Blackstone's oft-cited description of battery as '[t]he least touching of another's person willfully, or in anger,'" but responds that "willfully" does not necessarily mean intentionally. U.S. Br. 20–22. "Willful" acts, the government notes, may in some circumstances include "'at least inexcusable carelessness'" as well as those that are "malicious, evil, or corrupt." *Id.* (quoting *Black's Law Dictionary* 1834 and Pet'rs Br. 16 n.6). That argument is a diversion with no merit.

To be sure, the "word 'willfully' is variously defined in legal parlance," but in the context of common-law battery it means "'designedly,' 'intentionally' or 'perversely.'" *Lynch* v. *Commonwealth*, 109 S.E. 427, 428 (Va. 1921); see also, *e.g.*, *State* v. *Rand*, 161 A.2d 852, 853 (Me. 1960) (to be guilty of assault and battery, one must "unlawfully strike, hit, touch or do any violence to another, however small, in a wanton, willful, angry or insulting manner, having an intention and existing ability to do some violence" (citation omitted)); *People* v. *Hale*, 1 N.Y.Cr. 533, 534 (3d Dep't 1883) (crime of assault and battery "necessarily involves a criminal intent, an intent to commit an act of violence upon another, by way of injury and insult, one or both").

2. None of the other "[m]ultiple sources" cited in the government's brief support the government's contrary view that all forms of "common-law battery proscribed reckless conduct." U.S. Br. 17–18. Most of the government's sources do not even purport to be describing the elements of battery at *common-law*. *Id.* (quoting Model Penal Code § 211.1 comment (n. 62) (1980) discussing differences in "whether reckless injuring could be prosecuted under then-prevailing battery *statutes*" (emphasis added)); 6A C.J.S. *Assault* § 85 (2004) (discussing contemporary standards for criminal battery without distinguishing between common-law and statutes); *Black's Law Dictionary* (10th ed. 2014) (citing Wayne R. LaFave & Austin W. Scott Jr., *Criminal Law* § 7.15 at 685 (2d ed. 1986), which likewise presents current law without distinguishing between common-law and state statutes based on the Model Penal Code); Rollin M. Perkins, *Non-Homicide Offense Against the Person*, 26 B.U. L. Rev. 119, 126 (1946) (same, for law of criminal battery as it existed in 1946). Rather, these

sources confirm that criminal liability based on "recklessness" is often a product of legislative enactments.

Indeed, there "do not seem to have been any American common-law prosecutions for reckless battery, or cases even discussing the question, until 1855." Livingston Hall, *Assault and Battery by the Reckless Motorist*, 31 J. Crim. L. & Criminology 133, 138-39 (1940). Thereafter, the common-law developed a conception of "reckless" battery for situations in which a defendant intentionally engaged in conduct, usually involving guns or automobiles, that was so likely to cause serious injury that the jury was permitted to presume that was his intent based on the "principle that every one is presumed to intend the natural and probable consequence of his own act." *Id.* at 142 (quoting *State* v. *Sloanaker*, 1 Houst. (Del.) 62 (1858) (approving instruction that the jury could presume the defendant intended to shoot someone if it found that he intentionally fired a gun into the crowd or at the carriage of the prosecuting witness)); see also 2 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 60, at 32-33 (rev. 6th ed. 1877) (reckless shooting of victim)); *Commonwealth* v. *Hawkins*, 32 N.E. 862 (Mass. 1893) (same).

3. In any event, the concept of criminal battery based on recklessness never extended at common-law to offensive touching that did not result in physical injury. See, e.g., *Commonwealth* v. *Bruno*, 487 N.E.2d 1366, 1369 (Mass. 1986) (there must by "proof of a physical injury" to sustain conviction for assault and battery under "the theory of reckless conduct causing physical injury"); Hall, *supra*, at 137 (same). Tellingly, the authorities cited by the government regarding reckless conduct batteries *solely* involve physical injury cases. See U.S. Br. at 17–20. And the

cited cases involving offensive contact were based on deliberately offensive and intentional conduct—not reckless conduct. See *United States* v. *Delis*, 558 F.3d 177, 184 (2d Cir. 2009) (finding "the intent to commit an offensive touching" sufficient to support a § 113(a)(5) assault); *United States* v. *Bayes*, 210 F.3d 64, 69 (1st Cir. 2000) (finding the intent to injure not required but sufficient to show "deliberately offensive" contact where the defendant had no "valid reason" for doing so). A common-law battery involving offensive physical contact required an intent to offend as well as to touch. See, *e.g.*, *Hale*, 1 N.Y. Cr. at 535 (the "jury found the defendant not guilty of a criminal assault; that is, they found that the defendant took hold of [the victim's] arm, but with no criminal intent.").

4. This Court held in *Castleman* 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, *Castleman rejected* physical injury as the standard of force for § 921(a)(33)(A). *Castleman* thus underscores that *intentional* application of unlawful force—the *mens rea* required for common-law battery based on offensive touching—is the touchstone for "use . . . of physical force" in § 921(a)(33)(A). See *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (when Congress incorporates common-law concepts, it "adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken" (quoting *Morissette* v. *United States*, 342 U.S. 246, 236 (1952))).

In *Castleman*, the government itself stated that the "way the common-law described [battery] is it included direct force. It included indirect force. It

included any time that the aggressor *intentionally* set something in motion that caused force to be used; in other words, directed something to act according to the . . . individual's will." Oral Argument Tr. at 13, *United States* v. *Castleman*, No. 12-1371 (S. Ct. Jan. 15, 2014) (emphasis added). Similarly, in *Castleman,* the government represented that twenty-eight states and the District of Columbia have adopted the common-law definition of offensive contact battery. *Id.* at 20. Twenty-three of those states have codified offensive physical contact crimes.[1] Of those twenty-three states, twenty limit offensive physical contact battery to intentional conduct.[2] The only jurisdiction with a statute specifically proscribing reckless offensive physical contact is Maine.[3]

5. The government is wrong to say that the Maine statutes under which petitioners were convicted, as interpreted by the Maine Supreme Court in *State* v. *Gantnier*, require intentional contact with the victim and permit criminal liability only when the person is "reckless as to the resulting harm *i.e.,* the

---

[1] Five states and the District of Columbia simply incorporate the common-law definition. *See* D.C. Code § 22-404 (a)(1); Md. Code Ann. § 3-203 (a); Mass. Gen. Laws ch. 265, § 13A; N.C. Gen. Stat. § 14-33; 11 R.I. Gen. Laws § 11-5-3; and Va. Code Ann. § 18-2-57A.

[2] *See* Alaska Stat. § 11.61.120 (a)(5); Ariz. Rev. Stat. § 13-1203 (A)(3); Cal. Penal Code § 242; Del. Code Ann. tit. 11, § 601; Fla. Stat. § 784.03; Haw. Rev. Stat. § 707-712 (1)(a); Idaho Code § 18-903 (B); Ill. Comp. Stat. 720-5/12-3 / 12-3; Ind. Code § 35-42-2-1; Iowa Code § 708.1; Mo. Rev. Stat.§ 565.070; Nev. Rev. Stat. § 200.481; N.H. Rev. Stat. Ann. § 631:2-a; N.M. Stat. Ann. § 30-3-4; Okla. Stat. tit. 21 § 21-642; Or. Rev. Stat. § 166.065; Pa. Cons. Stat. § 2709; Tenn. Code Ann. § 39-13-101; Tex. Penal Code § 22.01; and Wyo. Stat. Ann. § 6-2-501.

[3] *See* Me. Rev. Stat. tit. 17-A, § 207(1)(A).

offensiveness of the contact." U.S. Br. 25. Rather, that court vacated the defendant's conviction because its review of the record led it to conclude that the jury could find that he "did *recklessly touch* the victim and the touching was offensive" even though "it was not [his] purpose to engage in offensive or sexual contact." *State* v. *Gantnier*, 55 A.3d 404, 410 (Me. 2012) (emphasis added). Contrary to the government's assertion, *Gantnier* did not separate the mental element associated with the result from the mental element associated with the act.

6. Finally, using the *mens rea* associated with offensive contact batteries comports with the idea that "domestic violence" can include non-violent conduct, as long as that conduct is intended to subject one partner to the other's control. See *Castleman*, 134 S. Ct. at 1412. Nowhere does the government address the definition of "domestic violence" as including the concept of control, by intention or design, in its brief. Only petitioners' submission offers a limiting principle of intentionality that is consistent with the holding and reasoning of *Castleman*, the full body of the common-law of battery, and the plain language of the Lautenberg Amendment.

B. The Text Of The Statute Forecloses The Government's Interpretation.

Even if there were doubt as to the requisite *mens rea* for battery at common-law as identified in *Castleman*, the language of the statutory definition of "misdemeanor crime of domestic violence" would foreclose the government's reading. The word "use" in "use . . . of physical force" connotes an *active employment* of force. As this Court explained in *Castleman* itself, "the word 'use' conveys the idea that the thing used (here, 'physical force') has been made

the user's instrument." 134 S. Ct. at 1415 (internal quotation marks omitted). To "*use*" something—whether "force," a household appliance, or an illegal drug—is to "convert" that thing "to one's service," *i.e.*, to "carry out a purpose or action" by employing it. *Smith* v. *United States*, 508 U.S. 223, 228–29 (1993) (quoting *Webster's New International Dictionary* 2806 (2d ed. 1950) and *Black's Law Dictionary* 1541 (6th ed. 1990)). A person makes force his "instrument" by intentionally deploying it, *not* by disregarding a risk that an undesired result might come to pass.

Without disputing petitioners' textual argument on the merits, the government provides a series of justifications for ignoring what a plain reading of the text requires. None of these justifications has merit

1. The government argues that the plain meaning of "use" should be ignored because the term "must be interpreted as [a] 'common-law term[] of art' and defined by the background rule of common-law battery". U.S. Br. 27 (quoting *Castleman*, 134 S. Ct. at 1410 (first alteration in original)). But that argument simply reverts to the government's new-found understanding of the common-law definition of battery. Even if that argument has some merit, the most it achieves is to cast confusion on exactly what the common-law meaning was. The principle that Congress "intends to incorporate the well-settled meaning of the common-law terms it uses" does not apply where the term in question did not have a settled meaning at common-law. *Castleman*, 134 S. Ct. at 1410 (quoting *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013)).

2. The government relies on the relationships among the levels of culpability in criminal law to argue that "reckless" and "knowing" conduct bear a

"close kinship" that justifies treating the two interchangeably. U.S. Br. 28. The government is correct, of course, to say that reckless conduct is often treated as "culpable," and also that the default culpability under the Model Penal Code is recklessness. See, *e.g.*, U.S. Br. 31 & n.10. But that is entirely beside the point. The question is not whether recklessness is a culpable mental state under the common-law, in the Model Penal Code, or otherwise. Instead, the question is what the word "use" means. One does not "use" force by disregarding a risk that an unintended result will occur. That unsuccessful proposition ends the inquiry, regardless of whether recklessness is a culpable mental state.

3. The government also attempts to distinguish *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). U.S. Br. 34–37. According to the government, the word "use" in § 921(a)(33)'s definition of "crime of domestic violence" must be interpreted more broadly than the word "use" in 18 U.S.C. § 16's definition of "crime of violence." According to the government, "Congress could have easily" used § 16's definition—as earlier drafts of the Lautenberg Amendment actually did—but instead chose the broader language of § 921(a)(33). *Id.* at 34.

The government's position is both unfair to the Congress that enacted the Lautenberg Amendment and patently wrong. The government's view is that the word "use" is broader in § 921(a)(33) because § 16's definition includes the phrase "against the person or property of another," while § 921(a)(33)'s does not. But as Senator Lautenberg himself explained, this part of the definition was dropped from the Lautenberg Amendment because it made the definition "too broad." See Statement of Sen. Lautenberg, 142 Cong. Rec. S11876, S11877 (daily ed.

Sept. 30, 1996) (explaining that the enacted version included "a new definition of the crimes for which the gun ban will be imposed" because some had "argued that the term crime of violence was *too broad*" (emphasis added)). It makes little sense to suggest that eliminating crimes against "property"—and thus limiting § 921(a)(33) to those against a person—somehow broadened the statute rather than narrowed it. The government thus paradoxically relies on a narrowing amendment to justify its unduly broad reading of the text.

4. The Court in *Castleman* did not hesitate to rely on *Leocal* to understand the term "use" in § 921(a)(33). Interpreting the Lautenberg Amendment, *Castleman* explained that "use" conveys the idea that the thing used "has been made the user's instrument." 134 S. Ct. at 1415 (citation omitted). It also looked to *Leocal* for the proposition that "'use' of force must entail 'a higher degree of intent than negligent or merely accidental conduct.'" *Id.* (quoting *Leocal*, 543 U.S. at 9); see also *id.* at 1414 n.8 (noting that *Leocal* reserved the question presented in this case, and grouping together citations to cases under both § 16 and § 921(a)(33)). That reliance was well-founded. Section 16 uses almost identical language as, and provided the model for, § 921(a)(33). *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."). It thus makes sense that both statutes would use "use" in the same way, which happens also to be the plain and ordinary meaning of the word. And because the ordinary meaning of "use" requires active employment, it makes no difference in

the final analysis whether the Court chooses to rely on *Leocal* or not.

II. POLICY CONSIDERATIONS DO NOT WARRANT DEPARTING FROM THE COMMON-LAW AND PLAIN LANGUAGE OF THE STATUTE.

1. The government contends that interpreting the Lautenberg Amendment to apply only to misdemeanants who are convicted of crimes more culpable than reckless conduct would render § 922(g)(9) a "practical nullity" because some jurisdictions include reckless causation of bodily injury within their statutory definitions of assault. U.S. Br. 38. A ruling in petitioners' favor would do no such thing.

The government argues that many state prosecutors charge misdemeanors in the generic, and that, as a result, the federal government may not be able to produce adequate documents to charge a § 922(g)(9) predicate even where the conduct clearly warrants it. However, this argument ignores prosecutorial practices—such as occurred in *Castleman*—where a state statute proscribes intentional, knowing, or reckless conduct, but the charging document limits the offense to intentional and knowing conduct. "[T]he 'modified categorical approach' that [this Court] ha[s] approved . . . permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record—including charging documents" prepared by the prosecutor. *Johnson*, 559 U.S. at 144 (citation omitted).

The Maine assault statute at issue in this case is illustrative. As the First Circuit recognized, Maine's assault statute is divisible—it sets out six possible

variations of assault, ranging from intentional causation of bodily injury to reckless causation of offensive physical contact. Me. Stat. Ann. tit. 17-A §§ 207(1)(A), 207-A(1)(A); *United States* v. *Voisine*, 778 F.3d 176, 179–80 (1st Cir. 2015) ("Where, as here, the predicate statute is 'divisible' into crimes with alternative sets of elements, [a court] may consider whether the elements under which the defendant was convicted are still within the subsequent provision, an inquiry known as the 'modified categorical approach.'" (citing *Castleman*, 134 S. Ct. at 1414)). Of the other jurisdictions criminalizing reckless assault, the strong majority follow a similar approach, such that their assault statutes likely are divisible as to the *mens rea* element.

If this Court were to declare that prosecutors must plead and prove intentional and knowing conduct for a misdemeanor conviction to qualify as a § 922(g)(9) predicate, then prosecutors could follow that direction. The Court has previously acknowledged this charging discretion in an analogous context, noting in *Johnson* that "the Government has in the past obtained convictions under the Armed Career Criminal Act" by relying on documents that established particular variants of predicate state law crimes rather than general violations of the statutes. 559 U.S. at 144–45 (citing *United States* v. *Simms*, 441 F.3d 313, 316–17 (4th Cir. 2006) (Maryland battery), *United States* v. *Robledo-Leyva*, 307 F. App'x 859, 862 (5th Cir. 2009) (Florida battery), *United States* v. *Luque-Barahona*, 272 F. App'x 521, 524–25 (7th Cir. 2008) (same)). And on the one hand, putting the responsibility on prosecutors to plead the requisite offense with enough specificity to bring a defendant within the reach of § 922(g)(9) also would

reign in the over-breadth created by two common, but blunt, tools used to combat domestic violence—mandatory arrest and mandatory prosecution laws.[4] On the other hand, to construe § 921(a)(33)(A) to include reckless conduct (against clear statutory language to the contrary) because a prosecutor in the first instance could not prove a required element (namely, intentional or knowing conduct) would institutionalize the very violations of due process that petitioners noted in their opening brief. Pet'rs Br. at 28–29.

2. As established in petitioners' Opening Brief, the First Circuit's reliance on the discretion of law enforcement and prosecutors as a safeguard in limiting reckless conduct offenses only to those intended to be covered by § 922(g)(9), *Voisine*, 778 F.3d at 185, was misplaced both as a policy matter and legally. The government offers no response to this criticism of the decision below. Instead, it attempts a misdirection, noting that this Court "considered and rejected the view 'that Congress * * * meant to narrow the scope of the statute to convictions based on especially severe conduct'". U.S. Br. at 46 (quoting *Castleman*, 134 S. Ct. at 1416). That argument misses the mark, because an interpretation of § 922(g)(9) that includes *all* reckless misdemeanors will include many such misdemeanors that do not "subject one intimate

---

[4] For a discussion of the unintended adverse effects of the criminal justice response to domestic violence, including an increase in female arrest rate and an increase in intimate-partner homicides in jurisdictions with mandatory arrest laws, *see* Pet'rs Br. 27–28 and n. 10. The government's brief is notably silent on this subject.

partner to the other's control" in any meaningful way. *Castleman*, 134 S. Ct. at 1412.[5]

3. The government and *amici*'s other policy arguments similarly are overstated. As this Court recognized in *Castleman,* "domestic violence" is a term of art encompassing acts that might not be considered violence in other contexts—including, as the examples given by the Court, "pushing, grabbing, shoving, slapping, and hitting." *Castleman*, 134 S. Ct. at 1411-12. Significantly, these examples all involve active, intentional "uses" of force and are a far cry from reckless misdemeanors. [6]

---

[5] One example is the conduct of a battered woman in protecting or defending herself or her children—conduct which, due to mandatory arrest and no-drop prosecution policies, may lead to a conviction even where the defendant might have a valid defense. *See* Susan Miller, *The Paradox of Women Arrested for Domestic Violence: Criminal Justice and Service Providers Respond*, *in* 7 Violence Against Women 1339, 1339–40 (2001).

[6] *Amicus*'s argument pertaining to evidence of voluntary intoxication in negating intent is emblematic of the overstatement in the briefs of *amici*. *See Amici* Br. Brady Center et al. at 18–21, *Voisine* v. *United States*, No. 14-10154 (S. Ct. Jan. 26, 2016). *Amicus* contends that, because a defendant may sometimes use evidence of voluntary intoxication to attempt to negate the *mens rea* of intent or knowingness (but not recklessness), petitioners' position would "fail to restrict the access to guns of a broad category of intoxicated domestic abusers." *Id.* at 21. But neither Maine law nor any other State's law provides that voluntary intoxication is an automatic, complete defense to intentional or knowing crimes; indeed, some states do not permit voluntary intoxication to negate any mental state at all. *See, e.g.*, Del. Code Ann. tit. 11, § 421; Fla. Stat. § 775.051; Mo. Rev. Stat. § 562.076; Mont. Code Ann. § 45-2-203; Ohio Rev. Code § 2901.21; Tex. Penal Code § 8.04. A prosecutor remains free to charge intent or knowingness, and can still establish those mental states even when the defendant was intoxicated.

Published examples of reckless offensive physical contact cases are few and far between because few jurisdictions make such conduct a crime—in fact, Maine is alone in proscribing it by statute. And despite the First Circuit's assertion to the contrary, such conduct is prosecuted. See *Bailey* v. *State*, No. CR-01-036, 2003 WL 21958211 (Me. Super. Ct. July 28, 2003) (plea colloquy to an assault against an intimate partner reflected only recklessly-caused offensive physical contact); see also *State* v. *Patterson,* 851 A.2d 521 (Me. 2004) (involving conduct not intended as insulting, but resulting in offensive physical contact). Courts and prosecutors routinely distinguish between reckless and intentional acts in the context of offensive physical contact and elsewhere, including in determining whether a prior offense qualifies as a predicate for purposes of the Armed Career Criminal Act.

The government's reference to difficulties of enforcement through the National Instant Criminal Background Check System ("NICS") also is unavailing. See U.S. Br. at 42–43. As a threshold matter, ease of administration of the criminal justice system cannot be a ground for interpreting § 921(a)(33)(A) more expansively than the language that Congress enacted. Cf., *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 253 (1952) (refusing to read an intent element out of a criminal statute to ease the government's path to conviction).

In any event, many federal jurisdictions do not define "use . . . of physical force" as including reckless conduct. See *Castleman*, 134 S. Ct. at 1414 n.8. In addition, the Federal Bureau of Investigation ("FBI") already flags prior federal and state convictions that may qualify as prohibitions and must review appeals

by persons incorrectly denied or delayed.[7] Thus adoption of petitioners suggested construction of § 921(a)(33)(A) would not significantly burden the procedures that the FBI currently follows.

III. THE RULE OF LENITY AND THE DOCTRINE OF CONSTITUTIONAL DOUBT ALSO COUNSEL IN FAVOR OF PETITIONERS' READING OF "USE . . . OF PHYSICAL FORCE."

1. As petitioners have established, both the common-law of battery and the plain language of the Lautenberg Amendment support the conclusion that the phrase "use . . . of physical force" for purposes of § 922(g)(9) does not extend to reckless conduct. The principal tools of interpretation suggested by petitioners and the government both point in the same direction, indicating that a reckless misdemeanor cannot qualify as a § 922(g)(9) predicate crime.

The government argues that the common-law of battery criminalized reckless conduct. *But* cf. U.S. Br. at 40, *Johnson* v. *United States*, No. 08-6925, (Aug. 2009), ("About half of the States today (as when Section 922(g)(9) was enacted) define the crimes of assault or battery according to the common-law rule: as including both the causation of bodily harm and *intentional causation* of offensive physical contact." (emphasis added)). But even an interpretation of the common-law of battery as sometimes proscribing reckless conduct in a certain subset of cases—those

---

[7] *See* Federal Bureau of Investigation, *Reasons NICS Background Checks are Denied or Delayed*, https://www.fbi.gov/about-us/cjis/nics/appeals/nics-appeals-process/reasons-nics-background-checks-are-denied-or-delayed (last visited Feb. 17, 2016).

causing significant bodily injury—cannot outweigh the fact that the words "use . . . of physical force" do not include recklessness in any plain-language reading (an assertion with which the government never seriously disagrees). At best, the government's arguments give rise to ambiguity in the statute. The rule of lenity demands that such ambiguity be resolved in petitioners' favor.

The policies undergirding the rule of lenity apply with particular force in cases like this one, where the difference in interpretations means the difference between a harsh penalty—up to ten years in prison, 18 U.S.C. § 924(a)(2), and a complete, lifetime loss of the constitutional right to possess a firearm—and no penalty whatsoever. See, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion) (invoking lenity where the difference between interpretations was the difference between no criminal liability and up to 20 years imprisonment).

2. A weighty problem arises under the doctrine of constitutional doubt. The government fails to address the fact that the cases it cites as rejecting a Second Amendment challenge to § 922(g)(9) arose in cases involving prior convictions for both intentional and violent acts proven to be part of the underlying misdemeanor. U.S. Br. at 49–50. It thus ignores the potential due process problem of whether a person may be deprived of a constitutionally-guaranteed right based on reckless conduct that does not amount to a felony, a question that (as petitioners noted in their Opening Brief) this Court has avoided answering in other contexts. See Pet'rs Br. at 35–36.

The examples of domestic violence provided in the government's brief and those of *amici* either are not pertinent to § 922(g)(9) because either there is no

indication of the statutory basis of a prior conviction, or they are dependent on facts that would constitute a felony if prosecuted in many jurisdictions. See U.S. Br. at 26 (stating that "'[i]f the husband's knife grazes his wife or harms her grievously, it is an assault all the same'" (quoting the First Circuit Opinion in *Voisine*, see J.A. at 24); such conduct would be a felony, see Me. Stat. Ann. tit. 17-A § 208(B)); *Amici* Br. Domestic Violence Legal Empowerment and Appeals Project et al. at 20–21, *Voisine* v. *United States*, No. 14-10154 (S. Ct. Jan. 26, 2016) (citing examples involving "Russian Roulette," "fir[ing] a gun in the house," and holding a gun "up to [the victim] while arguing," all of which would be felonious conduct) (citations omitted)). In providing such examples, the government and its *amici* advocate a definition of "misdemeanor crime of domestic violence" that has no limiting principle and thus runs the risk inherent in statutes defining prior convictions based on conduct rather than elements: that it is overboard and thus potentially void for vagueness. See *Johnson* v. *United States*, 135 S. Ct. 2551 (2015) (finding the residual clause of the Armed Career Criminal statute unconstitutionally vague). This is especially the case because "domestic violence" encompasses non-violent conduct based on the notion of "control." If recklessness means anything, it means a result that was not intended, which in turn *negates* control. For "domestic violence" to serve as a definitional term, it must have some meaning other than conduct of which the government and *amici* disapprove.

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,

SARAH M. KONSKY
BRENNA WOODLEY
STEVEN J. HOROWITZ
JASON G. MARSICO
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

VIRGINIA G. VILLA*
2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN
UNIVERSITY SUPREME
COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

Counsel for Petitioners

February 18, 2016

* Counsel of Record