No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ALVIN CASTLEMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. Such a crime is defined as one that includes, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A). In *Johnson* v. *United States*, 559 U.S. 133 (2010), this Court held that virtually identical language used to define the term "violent felony," as used in 18 U.S.C. § 924(e)(2)(B)(1), requires the use of "violent force." The question presented is:

Whether the term "use of physical force" has the same meaning in Sections 924(e)(2)(B)(i) and 921(a)(33)(A).

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

Federal law bars a person who has been convicted of a "misdemeanor crime of domestic violence," defined in relevant part as an offense that "has, as an element, the use or attempted use of physical force," from possessing a firearm. Federal law similarly bars a person who has been convicted of a "violent felony," defined in relevant part as an offense that "has, as an element the use, attempted use, or threatened use of physical force," from possessing a firearm. In *Johnson* v. *United States*, 559 U.S. 133, 136 (2010) (internal quotation marks omitted), this Court held that the definition of "physical force," as used in the "violent felony" definition, means "*violent* force." But in this case, the government argues that the term "physical force" means very different things when used to define "violent felony" and "misdemeanor crime of domestic violence:" in the first case the government, following *Johnson*, understands it to mean "violent force;" in the second, the government takes it to mean any "offensive touching."

The government's contention, and its related argument that the Court should address the issue, is incorrect. It is wrong on the merits: as the court below held, it is fundamental that identical terms used for similar purposes in closely related statutes should be given the same meaning—and that is particularly so in this case, where the government's reading would mean that a person could commit a crime of "domestic violence" without doing anything violent at all. And the government is wrong in contending that there is disagreement between the courts of appeals on the question presented that

warrants this Court's attention. The conflict asserted by the government is largely illusory, and review by this Court of the question presented, if ever appropriate, should await further consideration by the lower courts of *Johnson*'s impact. Because the decision below is correct, and because the courts of appeals are moving toward consensus on the question presented without this Court's intervention, the petition for certiorari should be denied.

1. Under 18 U.S.C. § 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence to * * * possess in or affecting commerce, any firearm or ammunition." A "misdemeanor crime of domestic violence" is defined as a misdemeanor under federal, state, or tribal law committed by a person with a specified domestic relationship with the victim that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A)(ii). Violators of Section 922(g)(9) may be fined, imprisoned for not more than ten years, or both. *Id.* § 924(a)(2).

Other statutes make use of very similar language. In particular, 18 U.S.C. § 924(e)(2)(B)(i), which also criminalizes the possession of firearms by persons who have committed a specified offense, defines a "violent felony" as one that, in relevant part, has "as an element the use, attempted use, or threatened use of physical force against the person of another." In *Johnson*, this Court held that the term "physical force" as used in Section 924(e)(2)(B)(i) means "*violent* force"—that is, "force strong enough to constitute 'power.'" 559 U.S. at 140, 142. And in *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004), the Court similarly held that the term "crime of violence," as

used in 18 U.S.C. § 16(a), "suggests a category of violent, active crimes."

2. Respondent pleaded guilty, in 2001, to one count of misdemeanor domestic assault in violation of Tennessee Code Ann. § 39-13-111(b). Pet. App. 53a-54a. As it read in 2001, that state law imposed liability when a defendant "commit[ted] an assault as defined in section 39-13-101 against a person who is that person's family or household member." Tenn. Code. Ann. § 39-13-111(b) (West 2001).[1] The corresponding definition of "assault" provided by Tenn. Code Ann. § 39-13-101(a) is "[i]ntentionally, knowingly, or recklessly caus[ing] bodily injury to another;" "bodily injury" is in turn defined as "a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2). Respondent's indictment, in line with the language of these statutes, alleged that he "did intentionally or knowingly cause bodily injury" in violation of section 39-13-111(b). Indictment, No. 01CR1672 (May 7, 2001). See Pet. 4.

3. Eight years later, in 2009, respondent was charged with possession of firearms by a person previously convicted of a misdemeanor crime of domestic violence in violation of Section 922(g)(9). Pet. App. 54a-55a. Respondent moved to dismiss the charges, arguing that his Tennessee conviction was not a "misdemeanor crime of domestic violence" under Section 922(g)(9) because the Tennessee offense did not

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[1] As in the petition, all references to the Tennessee Code Annotated in this brief are to the 2001 version—the version in force at the time respondent was charged—unless otherwise specified.

include, as an element, "the use of physical force." The district court agreed and ordered the charges dismissed. Pet. App. 34a-50a.

The court began by noting "that an assault statute does not require the 'use of physical force' solely because force in the scientific sense is involved in the offense." Pet. App. 39a. Accordingly, "[a]n assault statute that requires the mere causation of bodily injury does not necessarily require the 'use of physical force' for § 922(g)(9) purposes, at least where the statute may be violated through coercion or deception rather than through violent contact with the victim." *Id.* at 40a. And here, the court found that the text of the Tennessee assault statute "indicates that one may violate the statute without the 'use of physical force.' For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim." Pet. App. 41a. Alternatively, the court continued, "one could coerce the victim into taking the drink." *Ibid.* Accordingly, the court concluded that conviction for violating the Tennessee statute "cannot serve as a qualifying misdemeanor crime of domestic violence under § 922(g)(9)." *Ibid.*

4. The Sixth Circuit affirmed. Pet. App. 1a-33a. The court began by "determin[ing] the degree of force necessary for a misdemeanor domestic battery offense to qualify as a misdemeanor crime of domestic violence." *Id.* at 5a. In undertaking this inquiry, the court noted that Section 921(a)(33)(A), which defines misdemeanor crime of domestic violence, uses language "nearly identical" to that employed in Sections 924(e)(2)(B)(i) and 16(a), which "supports the inference that Congress intended them to capture offens-

es criminalizing identical degrees of force." *Id.* at 6a, 7a. That conclusion "gains strength in light of the order in which Congress adopted the statutes" because Section 921(a)(33)(A) was enacted last. *Id.* at 7a-8a. As a consequence, the court "conclude[d] that the degree of force *Johnson* requires for a conviction under § 924(e)(2)(B)(i) is required of a misdemeanor crime of domestic violence." *Id.* at 10a. Under this test, the court found that "[m]isdemeanor crime of 'domestic violence' is most naturally interpreted to mean any crime requiring strong and violent physical force, which happens to be a misdemeanor." *Id.* at 12a. The court therefore rejected the government's contention that Section 922(g)(9) criminalizes all conduct establishing a common-law assault and battery offense, which may "involve[] no more than slight physical touching." *Id.* at 6a.

The court then turned to the question of whether, under this standard, the Tennessee domestic assault statute "categorically qualifies as a misdemeanor crime of domestic violence"—that is, whether establishing the elements of the state offense *necessarily* would show that the defendant committed the federal crime. Pet. App. 15a. On this, the court noted that, even though it was permitted to consider respondent's indictment in determining the nature of his offense, "[t]he indictment does not specify the type of injury [respondent] caused or its severity." *Id.* at 18a. Like the Tennessee statute under which respondent was convicted, the indictment simply said that he "did intentionally or knowingly cause bodily injury." *Ibid.* And the court of appeals found that "an individual can cause an unspecified bodily injury with nonviolent physical force." *Ibid.* Respondent therefore "may have been convicted for causing a minor,

nonserious physical injury, in which he caused * * * bodily harm, but did so using less than strong physical force." *Id.* at 19a. The possibility that respondent used nonviolent force, in the majority's view, placed him outside the reach of Section 922(g)(9).

Judge Moore filed a concurring opinion. Pet. App. 21a-23a. She agreed that "the force requirement for a misdemeanor crime of domestic violence is identical to that specified under the crime-of-violence statute [Section 16] and [Section 924(e)(2)(B)(i)]." *Id.* at 21a. And under this definition, "it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." *Id.* at 22a. Under this inquiry, the Tennessee assault statute does not create a "misdemeanor crime of domestic violence." *Id.* at 23a.

Judge McKeague dissented. Pet. App. 23a-33a. In his view, the "violent felony" and "misdemeanor crime of domestic violence" standards are not identical. *Id.* at 26a. And he believed that "knowingly or intentionally causing bodily injury necessitates use of physical force." *Id.* at 30a.

5. The Sixth Circuit denied the government's petition for rehearing, with no judge requesting a vote for rehearing en banc. Pet. App. 72a-73a.

REASONS FOR DENYING THE PETITION

In *Johnson*, this Court held that the phrase "use of physical force," when used in connection with the commission of a violent crime, means the use of *violent* force. The court below reached the same conclusion in this case. That holding, which follows from the plain text of the statute, is correct. And because

most courts of appeals have not yet had the opportunity to address the significance of the decision in *Johnson* to application of Section 922(g)(9), review of the question presented in this case would be premature. The government's petition for a writ of certiorari should be denied.

A. The Decision Below Is Correct.

The government begins by contending that the decision below is wrong for two reasons. It asserts (1) that a defendant need not use violent force to commit a "crime of domestic violence;" and (2) that any crime that causes bodily injury necessarily involves the use of violent physical force. Pet. 12-19. Both of these contentions are incorrect.

1. The definition of a "misdemeanor crime of domestic violence" does not track that of common-law battery.

The government first insists that this Court's decision in *Johnson* has no bearing on the question in this case and that "[t]he statutory definition of a 'misdemeanor crime of domestic violence' tracks the common-law definition of battery." Pet. 11-12. That is not so.

a. In *Johnson*, the Court addressed the meaning of 18 U.S.C. § 924(e), which in relevant part defines the term "violent felony" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B). The Court explained that the definitions of "force" that are in "general usage" suggest "a degree of power that would not be satisfied by the merest touching." *Johnson*, 559 U.S. at 139. See also *id.* at 142 ("the term 'physical force' itself normally connotes force strong enough to constitute 'power'").

Although the Court recognized that the common-law definition of battery was "satisfied by even the slightest offensive touching," it reasoned that "[h]ere we are interpreting the phrase 'physical force' as used in defining not the crime of battery, but rather the statutory category of 'violent felon[ies].'" *Id.* at 139, 140. And the Court "th[ought] it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140. Accord *Leocal*, 543 U.S. at 11 ("emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes") (interpreting "crime of violence" under 18 U.S.C. § 16).

The definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A)(ii) is, of course, virtually identical to that in Section 924(e)(2)(B), as noted by the court of appeals below:

> For its part, § 924(e)(2)(B)(i) defines a "violent felony" in part as a crime "that has as an element the use, attempted use, or threatened use of physical force." By defining a "misdemeanor crime of domestic violence" to require "the use or attempted use of physical force," § 921(a)(33)(A)(ii) drops the reference to "threatened use" from §§ 16(a) and 924(e)(2)(B)(i) but otherwise tracks the language of §§ 16(a) and 924(e)(2)(B)(i).

Pet. App. 7a. Accordingly, "[t]he provisions' similarity supports the inference that Congress intended them to capture offenses criminalizing identical degrees of force." *Ibid.* This reading is bolstered by "the

order in which Congress adopted the statutes," which suggests that Congress intentionally modeled Section 921(a)(33)(A)(ii) after Section 924(e)(2)(B)(i) and aimed to cover the same range of conduct. *Ibid.*

This reasoning surely is correct. It is fundamental that enactments like these, which use virtually identical language in closely related statutory sections that have similar purposes, "should not be read as a series of unrelated and isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995). To the contrary, it is "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (quoting *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990)). See also *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). This presumption yields only when the context suggests that Congress used the same word to express different meanings—that is, when "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atl. Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). And "[t]he burden should be on the proponents of the view" that the same term means different things in different places "to adduce strong textual support." *Gustafson*, 513 U.S. at 573. The government has not carried that burden here.

To be sure, as the government notes (at Pet. 11-12), the Court in *Johnson* left open the question whether the words "physical force" should be interpreted identically in Sections 924(e)(2)(B)(i) and 921(a)(33)(A)(ii). See 559 U.S. at 143-144. But the

analysis used in *Johnson* has obvious relevance here: the operative language of the two provisions ("the use or attempted use of physical force") is identical; the Court in *Johnson* focused on the general definition of the word "force;" and both provisions address crimes of violence ("violent felony" and "misdemeanor crime of domestic violence"), which in each case has a "clear[]" "connotation of strong physical force." *Id*. at 140. Here, as in *Johnson*, the Court is considering "the phrase 'physical force' as used in defining not the crime of battery, but rather [a] statutory category of" offense with specific elements. *Ibid*. And although the government would read Section 921(a)(33)(A)(ii) as identical to the *nonviolent* common-law crime of battery because the statute addresses predicate misdemeanors rather than felonies (see Pet. 12-13), what the Court said of the definition of "violent felony" in *Johnson* is just as true here: "there is no reason to define [misdemeanor crime of domestic *violenc*e] by reference to a *nonviolent* misdemeanor." 559 U.S. at 142 (emphasis added). See also *United States* v. *Stevens*, 130 S. Ct. 1577, 1588 (2010) ("an unclear definitional phrase may take meaning from the term to be defined" (citing *Leocal*, 543 U.S. at 11)).

As the Sixth Circuit noted, Congress *could* have targeted Section 922(g)(9) at any "misdemeanor domestic assault or battery offense" and simply grafted the common law definition of battery into federal law. Pet. App. 12a. But it did not. Instead, Congress defined a "misdemeanor crime of domestic *violence*," echoing language and a statutory definition it had used to identify other violent offenses addressed in Sections 924(e)(2)(B)(i) and 16. It thus narrowed the field of eligible battery offenses, singling out a par-

ticularly malign class of crimes: those that have "as an element, the use or attempted use of physical force."

b. The statutory background confirms Congress's intent to use Section 921(a)(33)(A) to reach violent conduct similar to that addressed by Section 924(e)(2)(B)(i) that happened to be charged as a misdemeanor rather than a felony. Senator Lautenberg, the sponsor of the amendment that added Section 921(a)(33)(A)(ii) to the law, emphasized that the amendment was needed because "[m]any people who engage in *serious spousal or child abuse* ultimately are not charged with or convicted with felonies." 142 Cong. Rec. S8831, S8831 (1996) (statement of Sen. Lautenberg) (emphasis added).[2] The purpose of the amendment was to ensure that the prosecutor's decision to charge an offender with a misdemeanor did not take the defendant outside of the scope of the federal gun ban—and not to reach a broader range of conduct. See *id*. at S8832 ("This amendment closes this dangerous loophole and keeps guns away from violent individuals."). See also 142 Cong. Rec. S10377, S10379 (1996) (statement of Sen. Wellstone) ("If the offense is a misdemeanor, then under the current law there is a huge loophole."). Congress thus was concerned specifically with *violent* conduct. See*, e.g.*, 142 Cong. Rec. S11872, S11876 (1996) (statement of Sen. Lautenberg) ("Once he beat his wife brutally and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor."); 142

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[2] Senator Lautenberg's statements, "as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *N. Haven Bd. of Ed.* v. *Bell*, 456 U.S. 512 (1982).

Cong. Rec. S8831, S8831 (1996) (statement of Sen. Lautenberg) ("In simple words, the amendment says that wife beaters and child abusers should not have guns.").[3]

c. In defining the statutory term as it did, Congress identified a class of criminal conduct much narrower than that covered by the common law definition of battery, which requires proof neither of violence nor of physical injury. At common law, battery is defined broadly as "an unlawful touching of another," in which it "is not necessary that the touching result in injury to the person;" whether a touching is a battery "depends on the intent of the actor, not on the force applied." *Gnadt* v. *Commonwealth,* 497 S.E.2d 887, 888 (Va. Ct. App. 1998). "[S]o jealous of the sanctity of the person" was the common law that even "the slightest touching of another, or of his clothes, or cane, or anything else attached to his person, if done in a rude, insolent, or angry manner, constitutes a battery for which the law affords redress." *Crosswhite* v. *Barnes*, 124 S.E. 242, 244 (Va. 1924); see, *e.g.*, *United States* v. *Lewellyn*, 481 F.3d 695, 698 (9th Cir. 2007) (cataloguing decisions demonstrating that "noninjurious but intentional, of-

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[3] Misdemeanor crimes of domestic violence were originally defined merely as crimes of violence against family members. The definition was changed because "[s]ome argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors." 142 Cong. Rec. S11872, S11877 (1996) (statement of Sen. Lautenberg). The decision to instead focus on crimes involving the use of physical force reflected Congress's desire to focus specifically on the use of actual violence against a family member, rather than on acts that are violent in some more abstract sense.

fensive contact (even if relatively minor) satisfies the requirement for simple assault under the battery theory" at common law); *State* v. *Maier*, 99 A.2d 21, 24 (N.J. 1953) (quoting 1 William Hawkins, Pleas of the Crown 134) ("It seems that any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently justling him out of the way, are batteries in the eye of the law."). This broad scope of common-law battery—extending to impolite behavior like spitting—belies the government's contention that Congress intended to "track[]" that definition in Section 921(a)(33)(A). Pet. 12.

d. Citing the dissent in *Johnson*, the government maintains that the Sixth Circuit's approach, if applied nationwide, would effectively leave Section 922(g)(9) inapplicable in many jurisdictions because "generic assault and battery laws of about half the States do not draw distinctions between different degrees of force." Pet. 13-14. But as the government recognizes (at Pet. 14 n.6), in such jurisdictions the "modified categorical approach" may allow the use of record material to identify the type of force actually used by the defendant, and thus to establish that he or she committed a crime of "domestic violence." See *Johnson*, 559 U.S. at 144-145 (citing *Chambers v. United States,* 555 U.S. 122, 127-128 (2009); *Shepard* v. *United States,* 544 U.S. 13, 26 (2005) (plurality opinion); *Taylor v. United States,* 495 U.S. 575, 602 (1990)).

If it is clear that such material is necessary to trigger application of Section 922(g)(9), it can be anticipated that prosecutors in those jurisdictions will

take care to include a sufficient level of detail in charging, plea, or related documents. As the Court has noted, "the Government has in the past obtained convictions under the Armed Career Criminal Act in precisely this manner." *Id.* at 144. See, *e.g.*, *United States* v. *Rede-Mendez*, 680 F.3d 552, 560 (6th Cir. 2012). Moreover, States that are concerned about the issue raised by the government remain free to amend their assault statutes so as to require proof of elements that will trigger application of Section 922(g)(9).

In any event, this consideration of policy should not preclude application of Section 921(a)(33)(A)(ii) according to its plain terms. As the Court also observed in *Johnson*:

> It may well be true, as the Government contends, that in many cases state and local records from battery convictions will be incomplete. But absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well. See, *e.g., Shepard, supra,* [544 U.S.] at 22-23 * * * (burglary). It is implausible that avoiding that common-enough consequence with respect to the single crime of battery, under the single statute that is the Armed Career Criminal Act, caused Congress to import a term of art that is a comical misfit with the defined term "violent felony."

559 U.S. at 145. Precisely the same reasoning governs here.

2. An offense need not involve the use of force to cause bodily injury.

a. The government also insists that an offense that "results in bodily injury necessarily has, as an element, the use of 'physical force'"—indeed, necessarily involves use of "a heightened degree of force." Pet. 14-15. This is so, the government continues, because, "[a]s a matter of ordinary usage, the defendant's 'use' of 'physical force' is an 'element' of the offense of domestic assault by causing bodily injury because physical force is the means by which injury is necessarily produced." Pet. 15.

There is, however, nothing ordinary about the government's linguistic gymnastics. The offense defined by Section 922(g)(9) requires as an element the defendant's *use* of physical force. And as the Court has explained, "use" is a term that connotes direct, as opposed to indirect, action: "the use or attempted use of physical force" (18 U.S.C. § 921 (a)(33)(A)(ii)) is a phrase that "relates to the use of force, not to the possible effect of a person's conduct." *Leocal*, 543 U.S. at 10 n.7. See *id.* at 9 (citing *Bailey* v. *United States*, 516 U.S. 137, 144 (1995)) ("use" in the definition of "crime of violence" means "active employment"). Thus, statutory "emphasis on the use of physical force against another person * * * suggests a category of violent, active crimes." *Id.* at 11. Accordingly, as Judge Moore explained in her concurrence below, "[f]ollowing [*Johnson*'s] analysis, it is not enough to look only at the *result* of the defendant's conduct; instead, the focus must be on the nature of the force proscribed by the statute and whether the *conduct itself* necessarily involves violent force." Pet. App. 22a.

Yet to use the familiar examples recited by the government (see Pet. 16-17), in ordinary usage no one would say that a defendant who tricked another into drinking poison or walking off a cliff "used force" to injure the victim, even though that defendant most certainly *did* cause the victim bodily injury. The defendant in such a case would much more naturally be described as having "used trickery" rather than "force" to cause injury. Of course, as the government observes (Pet. 15-16), at some level *everything* that happens in the physical world is the product of the application of force; the victim of poison is tricked into employing force to lift the strychnine to his lips, while the victim who falls from a cliff is injured by the application of gravitational force—"a cause of the acceleration of mass" (*Johnson*, 559 U.S. at 139)—as she hits the ground. But the simple fact that force was involved in producing the victim's injury cannot be enough to establish that the defendant "used" force as an element of the crime. If it were, the Section 921(a)(33)(A)(ii) definition would be satisfied in literally *every* case and would add nothing at all to the statute.[4]

In arguing to the contrary, the government observes that the common-law definition of battery reached "indirect as well as direct uses of force," including such crimes as poisoning or telling "'a blind man walking toward a precipice that all is clear ahead.'" Pet. 17. But the government is here assum-

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[4] It may be that a person who persuades another to injure him- or herself has used "intellectual force or emotional force." *Johnson*, 559 U.S. at 138. But the Court explained in *Johnson* that Section 924(e)(2)(B)(1) "plainly refers to force exerted by and through concrete bodies." *Ibid*.

ing its conclusion; its examples simply highlight the way in which the common-law understanding of battery *departs* from the express statutory definition. The government's observation thus reinforces the conclusion that it does not make sense to read the latter in light of the former.

b. That conclusion is fatal to the government's argument: if it is *possible* to commit the state-law misdemeanor of causing bodily injury to another without the defendant "using force," that offense necessarily cannot have, "*as an element*, the use or attempted use of physical force." An "element" is a "factual predicate[] of an offense that [is] specified by law and *must* be proved to secure a conviction." Office of Legal Counsel, United States Department of Justice, *When a Prior Conviction Qualifies As a "Misdemeanor Crime of Domestic Violence,"* at 2 (May 17, 2007), 2007 WL 3125588 (hereinafter "OLC Memo") (citing *Patterson* v. *New York*, 432 U.S. 197, 210 (1977); *Richardson* v. *United States*, 526 U.S. 813, 817 (1999); BLACK'S LAW DICTIONARY 538 (7th ed. 1999) (emphasis added)). As the Office of Legal Counsel recognized in a memorandum on the very question at issue here, "[i]f conviction of a given offense can be secured without proof of a certain fact, then that fact is not an element of that offense." OLC Memo at 3. See *ibid.* (citing *United States* v. *Vargas-Duran*, 356 F.3d 598, 605 (5th Cir. 2004) ("If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element—implicit or explicit—of the crime."); *Singh* v. *Ashcroft*, 386 F.3d 1228, 1231 (9th Cir. 2004) ("An element of a crime is a constituent part of the offense which must be proved by the prosecution *in every case* to sustain a conviction under a

given statute.") (internal quotation marks omitted); *United States* v. *Fulford*, 267 F.3d 1241, 1250 (11th Cir. 2001) ("At common law, the word 'element' refers to a constituent part[] of a crime which must be proved by the prosecution to sustain a conviction.") (internal quotation marks omitted); *United States* v. *Jones*, 235 F.3d 342, 347 (7th Cir. 2000) (holding that assault and battery conviction is not a "crime of violence" under Sentencing Guidelines as "actual, attempted, or threatened physical force is not a necessary element")).

Here, the Tennessee misdemeanor statute does not have, as an element, the use or attempted use of force in the relevant, active sense. As the district court explained below:

> The text of [the Tennessee statute] indicates that one may violate the statute without the "use of physical force." For instance, one could cause a victim to suffer bodily injury by deceiving him into drinking a poisoned beverage, without making contact of any kind, let alone violent contact, with the victim. * * * Alternatively, one could coerce the victim into taking the drink.

Pet. App. 41a. The government does not deny that such conduct would support a conviction for misdemeanor domestic assault in Tennessee—although, for the reasons we have explained, it would not involve the "use of physical force."

There is, moreover, no doubt that it is possible to commit the Tennessee misdemeanor offense without the use of *violent* force. As the court below recognized, "the statute does not require proof of a serious physical injury." Pet. App. 17a; see *id.* at 18a-19a.

Respondent "could have caused a slight, nonserious physical injury with conduct that cannot be described as violent. [He] may have been convicted for causing a minor injury such as a paper cut or a stubbed toe." *Id.* at 17a. And "[a] * * * defendant need not necessarily use '*violent*' and 'strong physical force' to cause a cut, an abrasion, or a bruise" (*id.* at 19a (quoting *Johnson*, 559 U.S. at 140))—although the infliction of such injuries does support conviction under the Tennessee assault statute.

The government does not disagree, but suggests that the possibility of conviction absent serious injury is immaterial because *Johnson* "did not require a degree of force capable of causing 'serious' physical pain or 'serious' injury to another person." Pet. 18. That requirement, however, is the plain import of the statutory language. Section 922(g)(9) is directed at crimes of "violence," just as Section 924(e)(2)(B)(i) concerns "violent felon[ies]," and a "violent" action ordinarily is understood to be one that involves "great force" or that is "[m]arked by intensity." THE AMERICAN HERITAGE DICTIONARY 1994 (3d ed. 1992). Accord, *e.g.*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1289 (1984) ("[c]haracterized or caused by great physical force or rough action"). In ordinary usage, the choice of that language to create an offense committed by causing a stubbed toe would be "a comical misfit." *Johnson*, 559 U.S. at 145.

b. Pointing to *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013), the government finally declares it beside the point that a defendant *could* be convicted under the Tennessee statute even when he or she did not use force (or violent force) because there must be a "'realistic probability,' and not just a 'theoretical

possibility,' that the state statute would be applied in a 'nongeneric' way." Pet. 18-19. But Section 921(a)(33)(A)'s specification of the use of physical force as a required "element" of the offense means that the government's authorities are not on point.

In both *Duenas-Alvarez* and *Moncrieffe*, the Court considered whether a state crime was substantially different from a "generic" crime referenced in a federal statute. In *Duenas-Alvarez*, for example, the question was "whether the term 'theft offense' in [a] federal statute includes the crime of '*aiding and abetting*' a theft offense." 549 U.S. at 185. Unlike Sections 921(a)(33)(A) and 924(e)(2)(B)(i), the relevant federal statute in *Duenas-Alvarez* did not list specific elements—or any other specific features—that were required for a state law to fall within its reach. See 8 U.S.C. § 1101(a)(43)(G). Thus, as the Court noted, the question was simply whether a state law had "something *special*" that distinguished it from an ordinary theft offense. *Duenas-Alvarez*, 549 U.S. at 821. For purposes of that analysis, a hypothetical conviction is irrelevant: it does nothing to show that a statute describes a special or unusual "theft offense" that is different from the generic offense found in other state laws. But in the analysis of a state offense for purposes of Section 922(g)(9), a hypothetical conviction surely can show whether particular conduct is required under every application of the statute—that is, whether that conduct is in fact "an element" of the offense.

Other considerations also undermine the government's argument. Unlike the very traditional state offenses considered in *Duenas-Alvarez* and *Moncrieffe*—theft and drug trafficking, respectively—the state offense in this case is relatively new.

Tennessee traditionally used its generic assault statute to prosecute domestic violence and did not enact its special domestic violence statute until 2000. See Tenn. Public Acts, Ch. No. 824 (2000). As a consequence, comparatively few reported cases have applied the statute at issue here, and it is difficult to predict exactly how the statute will be applied in the future. There is, as always, the additional problem that it is hard to observe how the statute is applied in state trial courts, where most indictments result in plea bargains. Finally, individuals in Tennessee *have* been prosecuted under the misdemeanor domestic violence statute for injuries involving minimal force. See, *e.g.*, *State* v. *Wachtel*, 2004 WL 784865, at *12 (Tenn. Crim. App. 2004) (upholding conviction because "the appellant 'tried to slap his hands at [the victim's] arms to keep them away from him' and the slaps 'caused some scratches and bruises'").[5] In these circumstances, the possibility that the Tennessee assault statute could be applied even absent the use of force by the defendant means that it is not a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9).

B. The Government's Assertion Of A Conflict In The Circuits Does Not Warrant Review.

The government also asserts that the decision below implicates two conflicts in the circuits: on (1) whether use of "violent" force is necessary for an offense to qualify as misdemeanor crime of domestic

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[5] The government's own "sampling" of Tennessee cases indicates, with a certain lack of specificity, only that that domestic assault prosecutions "typically" involve serious injuries. Pet. 18 n.8.

violence; and (2) whether the offense of assault "by causing bodily injury" necessarily has, as an element, the use of physical force. Pet. 20-23. But these asserted conflicts are not currently well developed. Review by this Court to resolve them is not necessary at this time.

1. The government is correct that, before this Court's decision in *Johnson*, the circuits were divided on the question whether only offenses involving the use of "violent" force are covered by Section 922(g)(9). Pet. 20-21. But as the government itself recognized in recently opposing review of a decision of the First Circuit that presented a question substantially similar to the one here (*United States* v. *Booker*, 644 F.3d 12 (1st Cir. 2011)),"[a]lthough courts of appeals have disagreed about [whether Section 922(g)(9) applies to mere offensive touching], the disagreement pre-dates [*Johnson*], and few courts of appeals have had occasion to consider the issues in light of this Court's decision in that case." U.S. Br. in Opp., at 10, *Booker* v. *United States*, 132 S. Ct. 1538 (2012) (No. 11-6765). Therefore, the government continued, "the issue would benefit from further ventilation in the courts of appeals in light of *Johnson*." *Id.* at 18. The Court followed the government's guidance and denied review in *Booker*. See 132 S. Ct. 1538 (2012) (denying certiorari).

Since the Court denied certiorari in *Booker*, the courts of appeals have decided only two cases involving Section 922(g)(9). One was another decision of the First Circuit that simply followed *Booker* and pre-*Booker* First Circuit authority with minimal additional analysis. *United States* v. *Armstrong*, 706 F.3d 1, 5-6, (1st Cir. 2013), petition for cert. filed, No. 12-10209 (May 6, 2013). That decision hardly provid-

ed the "further ventilation" sought by the government.

The other is the decision below in this case, where the Sixth Circuit agreed with the Fourth Circuit's holding in *United States* v. *White*, 606 F.3d 144 (4th Cir. 2010), the only other court of appeals' decision to address the issue after *Johnson* but before *Booker*. In *White*, the Fourth Circuit held that there is "little, if any, distinction between the 'physical force' element in a 'crime of *violence*' in § 16 under *Leocal*, a '*violent* felony' under § 924(e) in *Johnson* and a 'misdemeanor crime of domestic *violence*' in § 922(g)(9)." *Id.* at 153. That court, like the Sixth Circuit here, found "no principled basis upon which to say a 'crime of domestic *violence*' would include *nonviolent* force such as offensive touching in a common law battery." *Ibid.*

In these circumstances, the Court's consideration of the question presented here is premature. If other courts of appeals follow the Fourth and Sixth Circuits in their application of *Johnson*, it is possible that the First Circuit will reconsider its pre-*Johnson* precedent. And even if the First Circuit adheres to its outlier position and this Court ultimately finds it necessary to address the issue, it would benefit from additional consideration by the courts of appeals of *Johnson*'s significance for prosecutions under Section 922(g)(2).

2. The government also maintains that "[t]he First and Eighth Circuits have held that bodily-injury assault necessarily involves the use of physical force within the meaning of Section 921(a)(33)(A)(ii)," and that those decisions conflict with the holding below in this case and with the

Fifth Circuit's decision in *United States* v. *Hagen*, 349 F. App'x 896 (5th Cir. 2009), cert. denied, 131 S. Ct. 457 (2010). Pet. 22 (citing *United States* v. *Nason*, 269 F.3d 10 (1st Cir. 2001); *United States* v. *Smith*, 171 F.3d 617 (8th Cir. 1999)). There is reason to question whether this asserted conflict in the circuits actually differs from the first conflict propounded by the government here, on the need for "violent" force; the government cites both *Nason* and *Smith* to establish the first conflict (see Pet. 20), and a determination that violent force is (or is not) necessary for conviction under Section 922(g)(9) would seem to resolve this purported second conflict as well. But the government's contention is, in any event, incorrect on its own terms.

It is true that the Maine assault statute held by the First Circuit in *Nason* to fall within Section 922(g)(9) criminalized "causing bodily injury," which was defined as "physical pain, physical illness or an impairment of physical condition." *Nason*, 269 F.3d at 12, 18. But that statute had been interpreted by the Maine courts as a matter of *state law* to require "'the *use of unlawful force against another* causing bodily injury.'" *Id.* at 20 (emphasis added). The First Circuit accordingly had no difficulty holding, in a single paragraph of conclusory analysis, that the bodily-injury prong of the Maine assault statute—which thus required the use of force to inflict physical pain or injury—"unambiguously involves the use of physical force." *Ibid.* Being bound by the state-court determination that conviction of assault under Maine's assault law requires use of force, the First Circuit had no occasion to, and did not, address the question whether statutes directed at infliction of

bodily injury that lack such a requirement nevertheless necessarily must involve the use of force.

As for the Eight Circuit's decision in *Smith*, the totality of the court's analysis consisted of its noting that the complaint alleged that the defendant "grabbed [the victim] 'by the throat, and did also push her down;'" was charged "for committing an act intended to cause pain, injury, or offensive or insulting physical contact;" and "[a]s such, [he] was charged, and pleaded guilty to, an offense with an element of physical force within the meaning of" Section 921(a)(33)(A)(ii). 171 F.3d at 621. The court gave no indication that it considered and rejected the possibility that bodily injury could be inflicted without the use of force, and offered no explanation for its conclusion. This is a very slender reed on which to base an assertion of an irreconcilable conflict in the circuits.[6]

In fact, the government recognizes that the Court denied its petition seeking review of this asserted conflict in *United States* v. *Hagen*, 131 S. Ct. 457 (2010). Pet. 23 n.9. Its petition in this case relies on the same decisions of the First and Eighth Circuits (*Nason* and *Smith*) as did its petition in *Hagen*. Since that time, the law has not changed in any material

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[6] The government indicates that decisions of the Seventh Circuit interpreting 18 U.S.C. § 16(a) hold that the crime of causing bodily injury necessarily involves the use of physical force. Pet. 22-23. The government acknowledges, however, that the Seventh Circuit also has held that "force must 'be violent in nature' in the context of defining a 'crime[] of domestic violence' under 8 U.S.C. § 1227(a)(2)(E)." Pet. 20-21. These divergent decisions, involving statutes *other* than Section 922(g)(9), suggest that the law in the Seventh Circuit regarding the statute at issue in this case cannot be regarded as settled.

way that favors the government's position. Review is no more appropriate now than it was then.

3. The government is wrong, moreover, in maintaining that the division in the courts of appeals that it asserts is causing significant problems in the administration of federal law. Pet. 23-26. We have explained that Section 922(g)(9) would not be "rendered largely inoperative" (Pet. 24) by the holding below. See pp. 13-14, *supra*. Prosecution remains possible under the modified categorical approach and, even if that were not the case, the government's complaint would not justify departure from the plain terms of the statute. And although the government maintains that divergent approaches in the courts of appeals "are likely to be a source of confusion for law enforcement and defendants alike" (Pet. 25), the government is unable to point to any actual difficulty in the administration of federal law, or any prosecutions actually triggered by misunderstanding of which rule applies in a defendant's state of residence—even though the conflict identified by the government long predates the decision in *Johnson*. The theoretical concerns raised by the government do not militate in favor of further review.

4. Finally, review of the question presented by the government necessarily would raise an issue that respondent previously presented in his own unsuccessful petition for certiorari. After respondent was indicted for the present offense under Section 922(g)(9), a divided state appellate court, reversing the decision of a state trial court, denied respondent's request to set aside his initial state-law plea of guilty to domestic assault—even though respondent had not been counseled, as required by Tennessee law, that it could be a federal crime for a person con-

victed of certain domestic violence offenses to own a firearm. See Tenn. Code Ann. § 40-13-109(b). Respondent contended that refusal to allow him to set aside his initial plea in such circumstances was fundamentally unfair and violated his federal constitutional rights. See No. 10-9795, *Castleman* v. *State of Tennessee*. And surely, respondent's plea cannot be regarded as knowing and intelligent when it was revealed, long after the fact, to potentially carry such severe consequences. For this reason as well, further review of the government's contention in this case is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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