No. 12-1371

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ALVIN CASTLEMAN,

Respondent.

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

BRIEF FOR RESPONDENT

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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 in or affecting commerce. The phrase "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. § 921(a)(33)(A). The question presented is:

Whether a "misdemeanor crime of domestic violence" within the meaning of Section 922(g)(9) is an offense that has, as an element, the use of violent force.

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BRIEF FOR RESPONDENT

STATEMENT

The government contends that a person commits a crime of "domestic violence" within the meaning of 18 U.S.C. § 922(g)(9) if he or she engages in "even the slightest offensive touching" (U.S. Br. 14), and that a person "uses physical force" within the meaning of 18 U.S.C. § 921(a)(33)(A) by (for example) tricking a victim into swallowing poison because "the forceful physical properties of the poison" operate in the victim's system at the molecular level. *Id.* at 31. These contentions are insupportable: they take no account of the plain meaning of the words "violence," "use," and "force" that Congress actually used in the statutory provisions.

The government's position also departs from the manifest congressional purpose. There is no doubt about what Congress meant to accomplish in Section 922(g)(9): its goal was to keep firearms from people who "engage in serious spousal or child abuse." 142 Cong. Rec. 22,985 (1996) (Sen. Lautenberg). Congress did *not* intend to impose a lifetime firearms ban on people who engage in "offensive touching," or who cause "a paper cut or a stubbed toe." U.S. Br. 27. But that is what the government reads the statute to accomplish.

Against this background, Tennessee's misdemeanor assault statute simply does not contain the elements necessary to make it a predicate offense for application of Section 922(g)(9). At bottom, it cannot be the case that someone who has done nothing either forceful or violent can be thought guilty of a crime of "violence" that requires the "use of physical force." If the government now believes that Congress

defined the offense of "misdemeanor domestic violence" in excessively narrow terms, it is for Congress, and not the government or this Court, to change that definition.

A. Statutory Background.

The statute at issue here, 18 U.S.C. § 922(g)(9), imposes a lifetime ban on the possession of a firearm on any person "who has been convicted in any court of a misdemeanor crime of domestic violence." A "misdemeanor crime of domestic violence" is defined in relevant part to include a state-law misdemeanor committed against a person who has a specified relationship to the defendant and 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). Violators of Section 922(g)(9) are subject to a term of up to ten years' imprisonment. 18 U.S.C. § 924(a)(2).

Section 922(g)(9) is part of a broad federal scheme of firearm prohibitions, first established by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, that principally prohibits felons from possessing firearms. See, *e.g.*, 18 U.S.C. § 922(g)(1). As this Court has acknowledged, the impetus for Section 922(g)(9)—commonly known as the "Lautenberg Amendment"—was Congress's sense that "[e]xisting felon-in-possession laws * * * were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States* v. *Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. 22,985 (1996) (Sen. Lautenberg)). By extending the firearms ban to certain violent misdemeanors, "proponents of § 922(g)(9)

sought to 'close this dangerous loophole.'" *Ibid.* (quoting 142 Cong. Rec. 22,986 (1996) (Sen. Lautenberg)).

As the measure's chief sponsor, Senator Lautenberg, noted at length:

> There is no reason for someone who beats their wives or abuses their children to own a gun. When you combine wife beaters and guns, the end result is more death.
>
> This amendment would close this dangerous loophole and keep guns away from violent individuals who threaten their own families, people who have shown that they cannot control themselves and are prone to fits of violent rage directed, unbelievably enough, against their own loved ones.

142 Cong. Rec. 22,986 (1996). Every other senator who spoke on the legislation expressed a similar intent to keep guns away from violent individuals. See, *e.g.*, 142 Cong. Rec. 19,301 (1996) (Sen. Hutchison) ("keep[ing] people who batter their wives or people with whom they live from having handguns"); *id.* at 22,987 (Sen. Wellstone) ("We are talking about citizens who have been convicted of an act of violence against a spouse or child[.]"); *id.* at 22,987-22,988 (Sens. Murray and Feinstein).

Congress drafted the statute accordingly. As originally proposed, the language referred to any "crime of domestic violence," defined in part as any "felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment." 142 Cong. Rec. 5,840 (1996). But, 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. 26,675 (1996) (Sen. Lautenberg)),[1] Congress "revise[d] the language of 921(a)(33)(A) to spell out the use-of-force requirement," replacing the "unelaborated phrase 'crime of violence,' with the phrase 'has, as an element, the use or attempted use of physical force.'" *Hayes*, 555 U.S. at 428. See 142 Cong. Rec. 26,675 (1996) (Sen. Lautenberg).

By linking its definition of a crime of domestic violence to the "use of physical force," Congress borrowed the language of existing laws that had defined the meaning of "violent" crimes across a range of statutory contexts. For example, Congress had defined a "crime of violence" generically to include, in part, "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a).[2] Similarly, in a statute enacted in 1986, Congress defined the term "violent felony" for purposes of the Armed Career Criminal Act ("ACCA") to include, among other things, a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). In *Johnson* v. *United States*, 559 U.S. 133, 140, 142 (2010), this Court held that the term "physical force" as used in Section

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[1] Senator Lautenberg added that the revised definition "is more precise, and probably broader," insofar as "the earlier version * * * did not explicitly include within the ban crimes involving an attempt to use force, or the threatened use of a weapon, if such an attempt or threat did not also involve actual physical violence." 142 Cong. Rec. 26,675 (1996).

[2] Congress enacted this provision in 1984, and its definition of a "crime of violence" is "incorporated into a variety of statutory provisions, both criminal and noncriminal." *Leocal* v. *Ashcroft*, 543 U.S. 1, 6-7 (2004).

924(e)(2)(B)(i) means "*violent* force"—that is, "force strong enough to constitute 'power.'" 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."

B. Respondent's Predicate Conviction.

In 2001, respondent pleaded guilty to one count of misdemeanor domestic assault, in violation of Tenn. Code Ann. § 39-13-111(b). Pet. App. 1a-2a. As it read in 2001, that statute made it unlawful to "commit[] an assault as defined in § 39-13-101 against a domestic abuse victim." Under Tenn. Code Ann. § 39-13-101(a)(1), one committed assault by, among other things, "[i]ntentionally, knowingly, or recklessly caus[ing] bodily injury to another." In turn, bodily injury was defined to include "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." *Id.* § 39-11-106(a)(2).

The indictment against respondent alleged that he "did intentionally or knowingly cause bodily injury" in violation of Section 39-13-111(b). JA 27.[3] The indictment did not allege that respondent caused a serious injury to the victim, that he used or attempted to use force or violence to cause injury, or, indeed, that he engaged in any physical contact with the vic-

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[3] The indictment establishes that respondent was charged with causing bodily injury under Tenn. Code Ann. § 39-13-101(a)(1), rather than under the other prongs of the Tennessee assault statute, which address causing another to fear bodily injury or engaging in offensive contact. See *id.* §§ 39-13-101(a)(2) and (a)(3).

tim at all. Rather than go to trial, respondent pleaded guilty and was sentenced to probation. JA 17. Tennessee law required that respondent be informed before his plea that it is a criminal offense for a person convicted of a crime of domestic violence to possess or purchase a firearm (see Tenn. Code Ann. § 40-14-109(b)), but respondent was not given the required warning. JA 18.

Although the indictment and plea do not reveal additional facts about respondent's specific conduct, police in Tennessee often arrest individuals for violations of the Tennessee misdemeanor assault statute that are alleged to rest on conduct involving a minimal degree of force, such as poking or shoving the victim. See, *e.g.*, Affidavit of Complaint, *State* v. *Burnett*, No. 13CR1433 (Tenn. Cnty. Ct. June 13, 2013); Affidavit of Complaint, *State* v. *Stanfill*, No. 13CR1222 (Tenn. Cnty. Ct. May 21, 2013). Occasionally, an arrest involves merely aggressive conduct, such as spitting on the victim or shaking one's fist. See, *e.g.*, Affidavit of Complaint, *State* v. *Cummings*, No. 13CR2165 (Tenn. Cnty. Ct. Sept. 9, 2013).[4] Tennessee courts have held conduct of this sort to be within the bounds of the misdemeanor assault statute. See, *e.g.*, *State* v. *Wachtel*, No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Crim. App. Apr. 13, 2004) (scratches and bruises from swatting at victim's arms sufficient to qualify as "bodily injury").

While the present case against respondent was pending, he sought to have his Tennessee conviction for domestic assault set aside in a collateral state

[4] Respondent has sought leave to lodge these documents with the Clerk.

proceeding. See JA 17-20. He explained that he was never informed, and in fact did not know, that his guilty plea for misdemeanor domestic assault would render him ineligible to own a firearm, and that this failure to inform him of the consequences of his plea violated state law. JA 18. The state circuit court agreed and ordered respondent's conviction set aside. JA 20, 26. That decision was reversed by a divided state appellate court on the ground that respondent's collateral attack was untimely. *State* v. *Castleman*, No. W2009-01661-CCA-R3-CD, 2010 WL 2219543 (Tenn. Crim. App. May 27, 2010), cert. denied, 131 S. Ct. 2964 (2011).[5]

C. Procedural History.

1. In 2008, more than seven years after his misdemeanor plea, respondent was charged in an indictment with two counts of possession of a firearm by a person previously convicted of a misdemeanor crime of domestic violence. JA 13-16. There was no allegation that respondent had used, attempted to use, or threatened to use any of these firearms against family members.

Respondent moved to dismiss the charges on the ground that his Tennessee conviction was not a

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[5] The dissenting judge observed:

> [T]he facts of this case clearly establish that an illegal judgment of conviction was entered against the defendant and, as such, should not now stand to allow him to be convicted of the very crime that the Tennessee trial court failed to warn him of. In this case, the blatant fundamental unfairness is obvious and, in my opinion, clearly rises to the level of a due process violation.

Castleman, 2010 WL 2219543, at *5 (Williams, J.).

"misdemeanor crime of domestic violence" under Section 922(g)(9) because the Tennessee offense did not include, as an element, the use of physical force. The district court agreed and ordered the charges dismissed. Pet. App. 34a-50a. It explained that "[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. 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.*

2. The Sixth Circuit affirmed. Pet. App. 1a-33a. The court began by noting 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 offenses 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, citing the similar views of several other courts of appeals, the court below "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 5a-6a.

The court then turned to the question 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 found that "an individual can cause an unspecified bodily injury with nonviolent physical force." *Id.* at 18a. 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.

SUMMARY OF ARGUMENT

A. The government is wrong in contending that the misdemeanor crime of domestic violence described by 18 U.S.C. § 922(g)(9) is equivalent to common-law assault and battery, which may be established by the slightest offensive touching. Congress defined the crime as an offense that requires the exercise of "physical force," a term that connotes a significant degree of power. And it classified the crime as one of "violence," a word that suggests extreme and severe force. These words define a crime that is much narrower, and more violent and damaging, than common-law battery. That point is confirmed by decisions of this Court, which repeatedly have interpreted virtually identical statutory definitions to require the exercise of violent force. And it is emphasized by the statutory background, which shows that Congress aimed Section 922(g)(9) at persons who engaged in serious acts of violence.

It is no answer to say, as does the government, that Section 922(g)(9) refers to a misdemeanor rather than a felony. Historically, misdemeanors are differentiated from felonies not by the nature of the conduct involved, but by the length of the sentence im-

posed for engaging in that conduct. Indeed, Congress enacted Section 922(g)(9) precisely because many people who engaged in conduct that could have supported a felony charge were, in the domestic context, charged instead with a misdemeanor.

B. The government also is incorrect in contending that *any* force producing *any* degree of pain or physical injury necessarily is violent physical force that supports conviction under Section 922(g)(9). An act causing a paper cut or a stubbed toe, although doubtless painful and producing bodily injury—and although sufficient to support a conviction under the Tennessee misdemeanor assault statute—cannot, in ordinary usage, be regarded as an act of "violence." The government's contrary reading would produce "a comical misfit" between the defendant's conduct and the crime of conviction. *Johnson*, 559 U.S. at 145. Any doubt on this score should be resolved by application of the rule of lenity, which applies with particular force in circumstances where the statutory language did not give respondent fair warning that he was committing an offense.

C. In addition, 18 U.S.C. § 921(a)(33)(A) requires more than conduct that results in an injury; it requires "use" of physical force. This Court has held that the word "use," in a criminal statute, mandates that the defendant actively have employed the thing used, which in this context means that the defendant's conduct must *itself* have employed violent force. No such showing was, or had to have been, made in this case. The government's contrary argument—that every injury, no matter how it is produced, necessarily involves the use of force—would read the "use" requirement out of the statute entirely.

D. The government's practical enforcement concerns cannot save its reading of Section 922(g)(9). Although the government argues that reading the statute according to its plain terms would have rendered Section 922(g)(9) a virtual nullity from the date of enactment because most state assault statutes at that time included neither violent force nor the use of force as an element, Congress in 1996 may well have believed that the particular facts of a defendant's offense could be considered in determining whether Section 922(g)(9) applied. Moreover, the government's current enforcement concerns are overstated because a substantial majority of the States themselves prohibit firearms possession by people who have committed misdemeanor crimes of domestic violence, because some States have enacted domestic assault statutes that require use of violent force, and because others may do so. And however that may be, practical considerations cannot justify disregard for the plain terms of a criminal statute.

ARGUMENT

When Congress addressed the serious national problem of domestic violence, it did so by acting to keep firearms from people who had committed a specified "crime of domestic violence" that has a particular defined element: the "use of physical force." But the government's reading of the statute in this case disregards the plain and ordinary meaning of each of these terms. That reading would apply the firearms ban—and its associated 10-year prison term—to people who were not violent, whose acts were not forceful, and who did not "use" force at all. The Court should reject this approach, which "would make hash out of the effort to distinguish ordinary

crimes from violent ones." *Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003).

A. A Crime Of Domestic Violence Must Include, As An Element, The Use Of Violent Force.

The government's principal contention is that "'[v]iolent' physical force is not required for a conviction to qualify as a 'misdemeanor crime of domestic violence'"; instead, in the government's view, a crime involves the requisite physical force so long as it "include[s] 'even the slightest offensive touching.'" U.S. Br. 12, 14. That is so, the government continues, because Congress meant Section 922(g)(9) to have the same definition as common-law assault and battery. U.S. Br. 13-16. The government thus postulates that a defendant may be guilty of a crime of violence without ever committing a violent act. That approach cannot be reconciled with the plain statutory language and Congress's manifest purpose.

1. The ordinary meaning of "physical force" indicates that a crime must involve violence to qualify as a misdemeanor crime of domestic violence.

a. The crime created by Section 922(g)(9) is that of "domestic violence," defined in relevant part as an offense that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). The government's contention that this offense is committed by the slightest "offensive touch" disregards the plain meaning of each of the controlling statutory terms. U.S. Br. 14.

First, the government takes no account of the ordinary meaning of the word "force." In *Johnson*, the Court addressed 18 U.S.C. § 924(e), which in rele-

vant part defines the term "violent felony"—in terms virtually identical to those used in 18 U.S.C. § 921(a)(33)(A)—as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). The Court explained that, in "general usage," the word "force" suggests "a degree of power that would not be satisfied by the merest touching." *Johnson*, 559 U.S. at 138-139. See also *id.* at 142 ("the term 'physical force' itself normally connotes force strong enough to constitute 'power'"). The Court thus noted at some length that force means "[s]trength or energy; active power; vigor; often an unusual degree of strength or energy"; "[p]ower to affect strongly in physical relations"; or "[p]ower, violence, compulsion, or constraint exerted upon a person." *Id.* at 138-139 (quoting Webster's New International Dictionary 985 (2d ed. 1934)).

Black's Law Dictionary similarly defines "force" as "[p]ower, violence, or pressure directed against a person or thing" and "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim." *Johnson*, 559 U.S. at 139 (quoting Black's Law Dictionary 717 (9th ed. 2009)). Prior editions of Black's, including the edition that "was current at the time the Lautenberg Amendment was passed," likewise emphasized that "force" requires a violent act. John M. Skakun III, *Violence and Contact: Interpreting "Physical Force" in the Lautenberg Amendment*, 75 U. Chi. L. Rev. 1833,

1846 (2008).[6] All of these definitions recognize that "force" implies strong or violent action.

Second, it is significant that the word "force" is used in the statute to define the term "crime of violence"; "an unclear definitional phrase may take meaning from the term to be defined." *United States* v. *Stevens*, 559 U.S. 460, 474 (2010). 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). Dictionaries contemporary with the passage of Section 922(g)(9) emphasized that violent acts entail "extreme and sudden * * * force" (Black's Law Dictionary 1570 (6th ed. 1990)) that is "intense, vehement, very strong or severe" and "done or performed with intense or unusual force" "in order to injure, control, or intimidate others." XIX The Oxford English Dictionary 655-656 (2d ed. 1989). See also III Webster's New International Dictionary 2846 (2d ed. 1946) (violence characterized as "[s]trength or energy actively displayed" through "vehement or forcible action"). These definitions comport with the kind of offenses typically treated as "violent" crimes: "[c]rimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon." Black's Law Dictionary 1570 (6th ed. 1990).

Third, the remainder of Section 921(a)(33)(A) supports the conclusion that "physical force" as used in this context means violent force. Thus, the provision criminalizes not only "the use or attempted use

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[6] Thus, the sixth edition defined physical force as "force applied to the body; actual violence." *Black's Law Dictionary* 1147 (6th ed. 1990).

of physical force," but also "the threatened use of a deadly weapon." A deadly weapon is one "capable of producing death or serious bodily injury" (Black's Law Dictionary 398 (6th ed. 1990)), and threatening the use of a deadly weapon is "a gravely serious threat to apply physical force." *United States* v. *Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003). The phrase's proximity to the "use or attempted use of physical force" indicates that both were intended to capture similarly serious and violent offenses: "a word is given more precise content by the neighboring words with which it is associated." *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (quoting *United States* v. *Williams,* 553 U.S. 285, 294 (2008)).

b. The government nevertheless insists that Section 922(g)(9) adopts the "specialized legal usage" of the term "force" that "comes from common-law battery," and that, viewed from this perspective, "nothing is incongruous" about a reading that categorizes rude touching as a "crime of domestic violence." U.S. Br. 14, 18. But in defining the statutory crime 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.

As the government correctly notes, at common law battery was defined as the "application of unlawful force against the person of another," and "force" in this specialized context covered "even the slightest offensive touching." U.S. Br. 14 (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 552 (2d ed. 2003), and *Johnson*, 559 U.S. at 139). "[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).

In *Johnson*, however, the Court warned against "forc[ing] term-of-art definitions into contexts where they plainly do not fit and produce nonsense." 559 U.S. at 139-140 (quoting *Gonzales* v. *Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting)). Section 921(a)(33)(A) presents just such a context. Although the government would read the crime defined in that provision as identical to the nonviolent common-law crime of battery, 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 violence] by reference to a *nonviolent* misdemeanor." 559 U.S. at 142 (emphasis added). 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 the other violent offenses addressed in 18 U.S.C. § 924(e)(2)(B)(i) and 18 U.S.C. § 16(a). It thus narrowed the field of eligible battery offenses, singling out a particularly malign class of crimes: those that have, "as an element, the use or attempt-

ed use of physical force."[7]

2. The "physical force" requirement of Section 921(a)(33)(A) should have the same meaning that Congress intended when using the same term in prior statutes.

a. As the preceding discussion suggests, the Court already has rejected the government's contention in reading statutes that use terminology almost identical to that of Section 921(a)(33)(A). As we have noted, in *Johnson* the Court addressed the meaning of 18 U.S.C. § 924(e)(2)(B), which in relevant part de-

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[7] The government minimizes the significance of the term "violence," asserting: "Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of 'misdemeanor crime[s] of domestic abuse.' Placing undue emphasis on the word 'violence' in isolation ignores that larger statutory context." U.S. Br. 19. But "abuse" and "violence" are not synonyms. Indeed, some state statutes define "domestic abuse" and "domestic violence" as separate offenses, with the former covering a much broader range of conduct than the latter. See, *e.g.*, Colo. Rev. Stat. Ann. § 13-14-101(2) (West 2013) (defining "domestic abuse" as "any act, attempted act, or threatened act of violence, stalking, harassment, or coercion"); Colo. Rev. Stat. Ann. § 18-6-800.3(1) (West 2013) (defining "domestic violence" as "an act or threatened act of violence upon a person with whom the actor is or has been involved in an intimate relationship"). Other federal statutes, like Section 922(g)(9), focus specifically on definitions of "domestic violence." See, *e.g.*, 8 U.S.C. § 1227(a)(2)(E)(i) (defining domestic violence as "any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse" or with other specified domestic relationships); 42 U.S.C. § 13925(a)(8) (defining domestic violence as "includ[ing] felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim" or with other specified domestic relationships).

fines 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)(i). 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].'" 559 U.S. at 139, 140. 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. Similarly, in *Leocal*, the Court understood 18 U.S.C. § 16(a)'s definition of "crime of violence"—"an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"—as "suggest[ing] a category of violent, active crimes." 543 U.S. at 11.

As the court below noted, "§ 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 sec-

tions 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). Instead, "when 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." *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228, 233 (2005) (plurality opinion). 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 for that conclusion." *Gustafson*, 513 U.S. at 573. The government has not carried that burden here.

Indeed, Section 921(a)(33)(A) is more *narrowly* drawn than both Section 924(e)(2)(B) and Section 16(a). Unlike the latter two statutes, Section 921(a)(33)(A) does not extend in general to any threatened use of physical force; it applies only to the more serious situation of threatened use of a deadly weapon. And, unlike the latter two statutes, Section 921(a)(33)(A) does *not* include an alternative and broader definition of violence beyond a use-of-physical-force requirement.[8] These differences are consistent with Congress's intent to carefully delimit

[8] See 18 U.S.C. § 924(e)(2)(B)(ii) (alternative definition of "violent felony" to include felony that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"); 18 U.S.C. § 16(b) (alternative definition of "crime of violence" to include "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").

the class of misdemeanor violators subject to a lifetime ban on possessing firearms.

b. To be sure, as the government notes (U.S. Br. 16), 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) as identical to the *nonviolent* common-law crime of battery because the statute addresses predicate misdemeanors rather than felonies (see U.S. Br. 17-19), that contention does not answer the obvious point that "there is no reason to define [misdemeanor crime of domestic *violence*] by reference to a *nonviolent* misdemeanor." *Johnson*, 559 U.S. at 142 (emphasis added).

Moreover, the government's distinction between misdemeanors and felonies (U.S. Br. 17-19) fails on its own terms. The misdemeanor-felony distinction depends on the *punishment* applied to a given crime—not the *nature* of the crime itself. Thus, "most criminal statutes defining specific crimes do not themselves label as felonies or misdemeanors the

crimes which they describe, leaving the matter to be determined by reference to the punishment provided (according to the place or to the length of confinement)." Wayne R. LaFave, *Criminal Law* § 1.6, at 37 (5th ed. 2010) (citing *State* v. *Wolford Corp.*, 689 N.W.2d 471 (Iowa 2004)). Congress emphasized this point by using nearly identical language to define "misdemeanor crime of domestic violence" and "violent felony"—indicating that both phrases cover the same type of conduct, even if different penalties are applied to that conduct. This should come as no surprise to the government, which acknowledged at oral argument in *Johnson* that "the misdemeanor versus felony distinction is somewhat unimportant to the interpretation of the 'use of physical force' language" because "the same language was deployed first in the 'crime of violence' definition of 18 U.S.C. 16, which by its terms, applies to both misdemeanors and felonies." Tr. of Oral Arg. at 39, *Johnson*, 559 U.S. 133.

3. The statutory background of Section 922(g)(9) confirms that Congress intended the statute to reach only violent offenders.

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. At the time of Section 922(g)(9)'s enactment, federal law barred felons from possessing firearms. But Senator Lautenberg explained that the amendment was needed because "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor." 142 Cong. Rec.

22,985 (1996).[9] By expanding the ban on firearms possession to specified misdemeanants, Congress sought to "close this dangerous loophole and keep guns away from violent individuals" (142 Cong. Rec. 22,985 (1996) (Sen. Lautenberg))—and not to reach a broader range of conduct.

Other senators uniformly echoed this purpose, emphasizing that Congress was concerned specifically with serious and violent conduct. See 142 Cong. Rec. 19,301 (1996) (Sen. Hutchison) ("Because of Senator Lautenberg's amendment, we are also going to be able to keep people who batter their wives or people with whom they live from having handguns."); *id.* at 22,986 (1996) (Sen. Wellstone) ("[I]f you beat up or batter your neighbor's wife, it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor."); *id.* at 22,988 (Sen. Feinstein) ("plea bargains often result in misdemeanor convictions for what are really felony crimes," permitting "perpetrators of severe and recurring domestic violence" to possess a gun).

That the ultimate language of Section 922(g)(9) was the product of a legislative compromise strengthens this view. The House passed the Lautenberg Amendment the very day that the language of the provision was amended to incorporate the use-of-force requirement. 142 Cong. Rec. 26,675 (1996). According to Senator Lautenberg, the language was a direct response to opponents who worried that "the term crime of violence was too broad." *Ibid.* The "use

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[9] 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 Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982).

of force" element therefore was intended to narrow the scope of the statute to convictions based on especially severe conduct.[10] This Court has frequently reiterated that "[c]ourts and agencies must respect and give effect to these sorts of compromises." *Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 94 (2002). That principle requires adopting a narrow interpretation of physical force.

The government's only response to this history is its reliance on several stray references by Senator Lautenberg to "assault," which it takes to mean that the drafters of Section 922(g)(9) had in mind common-law assault and battery. U.S. Br. 44-45. But, in context, it is plain that none of these brief and colloquial references were meant to minimize the nature of the qualifying conduct. See, *e.g.*, U.S. Br. 45 ("Assault your ex-wife, lose your gun"). The government also invokes the parenthetical observation of the Bureau of Alcohol, Tobacco, and Firearms (ATF) that Section 922(g)(9) reaches "assault and battery." U.S. Br. 45 (citing *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,520, 35,521 (June 30, 1998)). But the ATF did not indicate how it arrived at this conclu-

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[10] The government previously has acknowledged that this compromise was intended to limit qualifying predicate offenses to those involving violence:

> Respondent cites some Members' concerns about the statute's "breadth," but those concerns were that the statute might be applied to acts that were not sufficiently violent to justify prohibiting firearm possession, not that the statute might be applied to offenses that lacked a domestic-relationship element.

Reply Brief for the United States at 18, *Hayes*, 555 U.S. 415 (2009) (No. 07-608) (citations omitted).

sion or explain how its interpretation is consistent with Congress's intent. And although the government suggests that Congress acquiesced in the ATF statement, there is no evidence that Congress was aware of, let alone that it meant to endorse, that statement. The Court has "sometimes relied on congressional acquiescence [to an agency interpretation] when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court," but, "absent such overwhelming evidence of acquiescence," it is "loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (internal quotations, brackets, and citations omitted).

4. Not all bodily injury is the product of violent force.

a. As a fallback, the government maintains that, if violent force is required for conviction under Section 922(g)(9), *any* force that produces *any* pain or bodily injury necessarily satisfies that standard. U.S. Br. 23-24. Although the nature of the government's proposed standard is in some respects opaque, it does not deny that its construction would find the requisite violent force present even when the defendant caused "a paper cut or a stubbed toe." U.S. Br. 23 (quoting Pet. App. 16a-17a). If that is the government's position, it is incorrect: violent force "connotes a substantial degree of force" (*Johnson*, 559 U.S. at 140) of the sort that could produce "serious physical injury." Pet. App. 17a.

Section 922(g)(9) creates a crime of "violence," and, as we have explained, a "violent" action ordinarily is understood to be one that involves "great force."

The American Heritage Dictionary 1994 (3d ed. 1992). An act that inflicts a stubbed toe or a paper cut doubtless causes pain and bodily injury—and thus satisfies the government's test—but describing such an act as a "crime of violence" would, in ordinary usage, be "a comical misfit." *Johnson*, 559 U.S. at 145. Moreover, as we also have explained, Congress meant exactly what it said in the statutory text when it used the word "violence": it directed Section 922(g)(9) at the "wife beaters and child abusers" (142 Cong. Rec. 19,415 (1996) (Sen. Lautenberg)) who were "perpetrators of severe and recurring domestic violence." *Id.* at 22,988 (Sen. Feinstein). Beating a domestic partner is a crime of violence; causing a paper cut is not.

Thus, as Judge Easterbrook emphasized for the Seventh Circuit, when "[a] paper airplane inflicts a paper cut, the snowball causes a yelp of pain, or a squeeze of the arm causes a bruise, the aggressor has" engaged in an act that results in bodily injury, but it "is hard to describe any of this conduct as 'violence.'" *Flores* v. *Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003). The line between violence and an action that is less severe "is not a quantitative line * * * but a qualitative one" (*id.* at 672), and understanding a paper cut to be a "violent crime" "would make hash out of the effort to distinguish ordinary crimes from violent ones." *Ibid.*

b. This understanding is confirmed by the meaning of the phrase "use of physical force" as it appeared in the ACCA, the immediate antecedent to Section 922(g)(9). That statute initially applied only to persons who had been convicted of burglary or robbery. See Armed Career Criminal Act of 1984, Pub. L. No. 98-473, §§ 1801-1803, 98 Stat. 2185,

2185. It subsequently was expanded to reach persons who committed a "violent felony," defined as any crime punishable by imprisonment for more than a year that (i) "has as an element the use, attempted use, or threatened use of physical force against the person of another" or (ii) "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. §§ 924(e)(2)-(B)(i), (ii). These provisions target "armed, habitual drug traffickers and violent criminals" (H.R. Rep. No. 99-849, at 1 (1986)), who tend to commit serious offenses like "homicides," "rapes," "robberies," and "aggravated assaults." *Id.* at 2.[11] These are "offenses of a certain level of seriousness that involve violence or an inherent risk thereof." *Taylor* v. *United States*, 495 U.S. 575, 590 (1990). They manifestly are not offenses that are characterized by *de minimis* injury.

Accordingly, the use of virtually identical language in Section 921(a)(33)(A) to require the "use of physical force" in connection with a crime of domestic violence is best read as addressing offenses of similar severity. Congress could have changed this formulation to address a broader and less serious range of offenses, but it did not.

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[11] Congress viewed robbery and burglary, the focus of the earliest iteration of the ACCA, as among "the most common violent street crimes." *Taylor* v. *United States*, 495 U.S. 575, 581 (1990) (quoting S. Rep. No. 98-190, at 5 (1983)). The 1986 Amendments, which included Section 924(e)(2)(B), maintain this focus on street crime while expanding the scope of the original act to all violent felonies.

5. The government's argument is inconsistent with the rule of lenity.

Finally, we of course submit that our reading of Section 922(g)(9) is compelled by the plain statutory text. But if there is any doubt on that score, the government's contrary approach—under which people who engage in conduct that would be thought nonviolent in every ordinary sense are deemed guilty of a "crime of domestic violence," subjecting them to a lengthy prison term if they engage in the otherwise lawful act of acquiring a firearm—must be thought to rest on language that is (from the government's perspective) no better than ambiguous. In these circumstances, "[t]his is a textbook case for application of the rule of lenity." *Hayes*, 555 U.S. at 436 (Roberts, C.J., dissenting). See *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.").

Although it may be commonly understood that *violent* offenders are not permitted to purchase or own firearms, individuals are very unlikely to be aware that *nonviolent* action causing minor (or no) injury bars them from exercising their right to own a gun. The "construction of a criminal statute must be guided by the need for fair warning" (*Hayes*, 555 U.S. at 436 (Roberts, C.J., dissenting) (quoting *Crandon* v. *United States*, 494 U.S. 152, 160 (1990))), and the government's construction of Section 922(g)(9) would not provide such a warning in circumstances like those here.

And lack of fair warning is, in fact, just what occurred in the present case. Respondent was never in-

formed, and did not know, that his guilty plea for misdemeanor domestic assault would render him ineligible to own a firearm. See JA 20. There is no reason he would have been aware that he was subject to the ban; "[i]t cannot fairly be said here that the text [of Section 922(g)(9)] 'clearly warrants' the counter-intuitive conclusion that a 'crime of domestic violence' need not have * * * *violence* as an element." *Hayes*, 555 U.S. at 436-437 (Roberts, C.J., dissenting) (emphasis added). In these circumstances, it should not be lightly presumed that Congress intended to expose unsuspecting gun purchasers to a ten-year prison term, "especially given that there is nothing wrong with the conduct punished—possessing a firearm—if the prior misdemeanor is not covered by the statute." *Id.* at 437. "If the rule of lenity means anything" (*ibid.*), it compels the conclusion that Section 921(a)(33)(A) requires the use of violent force, a reading that may give defendants the necessary notice that they could be subject to application of the statute.

That consideration applies with particular force here. The Tennessee legislature evidently recognized that persons who plead to a misdemeanor are unlikely to be aware that they become subject to the reach of Section 922(g)(9). It therefore specifically required that, before a court "accepts the guilty plea of a defendant charged with a domestic violence offense, it shall inform the defendant" that "the defendant will never again be able to lawfully possess or buy a firearm of any kind." Tenn. Code Ann. § 40-14-109(b). But respondent received no such warning. Exposing him to federal prosecution now, many years later, raises substantial concerns that the prosecution does not comport with the notice requirements of due process. Cf. *Padilla* v. *Kentucky*, 559 U.S. 356 (2010)

(failure to notify pleading defendant of significant consequences of the plea is inconsistent with Sixth Amendment requirements).

Moreover, the conduct that triggers the penalty here (possession of a firearm) itself involves a constitutionally protected interest. Although "an individual right to keep and bear arms" is conferred by the Second Amendment (*District of Columbia* v. *Heller*, 554 U.S. 570, 595 (2008)), Section 922(g)(9) "amounts to a 'total prohibition' on firearm possession for a class of individuals—in fact, a 'lifetime ban.'" *United States* v. *Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). Reading Section 921(a)(33)(A) to require violent force "keeps § 922(g)(9)'s prohibitory sweep narrow" and assures a "reasonable fit" between the provision and the government's substantial interest in preventing domestic violence. *United States* v. *Staten*, 666 F.3d 154, 163 (4th Cir. 2011), cert. denied, 132 S. Ct. 1937 (2012). See *Chovan*, 735 F.3d at 1140; *United States* v. *Skoien*, 614 F.3d 638, 642 (7th Cir. 2010).

6. The use of physical force is not an element of Tennessee's misdemeanor assault statute.

a. The conclusion that a state offense is a crime of domestic violence within the meaning of Section 922(g)(9) only if it has, as an element, the use of violent force, is fatal to the government's position. Here, Tennessee's code defines "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty." Tenn. Code Ann. § 39-11-106(a)(2). There is no serious dispute that an act causing the slightest pain or physical injury violates this statute: 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.

In this setting, use of violent force is not an element of Tennessee's misdemeanor assault statute. "Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt." *United States* v. *O'Brien*, 560 U.S. 218, 224 (2010). An "element" thus is a "factual predicate[] of an offense that [is] specified by law and *must* be proved to secure a conviction." Office of Legal Counsel, U.S. Dep't of Justice, *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence,"* at *2 (May 17, 2007), 2007 WL 3125588 ("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. That "element" principle disposes of this case: if it is *possible* to commit the state-law misdemeanor of causing bodily injury to another without "using physical force," that offense necessarily cannot have, "*as an element*, the use or attempted use of physical force."

b. In response, the government does not dispute that causing a paper cut would constitute assault under the Tennessee statute. Instead, pointing to *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013), the government declares it beside the point that a defendant *could* be convicted under the Tennessee statute even if he or she did not use force (or violent force). U.S. Br. 25-26. In its view, "fanciful hypotheticals" are not enough to establish that the state law could be used to prosecute a nonviolent act; the government submits that there must be a "'realistic probability,' and not just a 'theoretical possibility,' that the state statute would be applied" in such a manner. U.S. Br. 25. This argument, however, is unavailing for two reasons.

First, although the record in this case reveals nothing about the acts actually leading to respondent's misdemeanor conviction, prosecutions for conduct including nonviolent domestic assault are *not* hypothetical in Tennessee. See *State* v. *Wachtel*, No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Crim. App. 2004) (defendant "tried to slap his hands at [the victim's] arms to keep them away from him," causing "some scratches and bruises"). And individuals are not infrequently arrested in assault cases for less severe conduct. See Affidavit of Complaint, *State* v. *Stanfill*, No. 13CR1222 (Tenn. Cnty. Ct. May 21, 2013) (defendant arrested for domestic assault for "poking his finger on [the victim's] face several times," causing "red marks and a scratch on her face."); Affidavit of Complaint, *State* v. *Cummings*, No. 13CR2165 (Tenn. Cnty. Ct. Sept. 9, 2013) (man "raised his fist at" his girlfriend and "[spat] on her"); Affidavit of Complaint, *State* v. *Burnett*, No. 13CR1433 (Tenn. Cnty. Ct. June 13, 2013) (woman

"pushed" a man). Because prosecutions for nonviolent domestic assault have taken place, convictions under Tennessee's bodily-injury statute cannot categorically qualify as misdemeanor crimes of domestic violence even on the government's view of the law.[12] And, of course, most cases involving less serious conduct are disposed of by plea, and therefore do not produce reported decisions.

Second, and in any event, 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*, the Court addressed whether a California conviction for "aiding and abetting" a theft offense qualified as a "theft offense" under a federal statute. 549 U.S. at 185. Because the federal law did not list the specific elements of the crime, the Court inquired into "the generic sense in which the term ['theft offense'] is now used in the criminal codes of most States." *Id.* at 186 (quoting *Taylor*, 495 U.S. at 598). The defendant argued that California's definition of "theft offense" deviated from this generic definition, because California law held aiders and abettors liable "for any crime that 'naturally and probably' result[ed] from [their] intended crime." *Id.* at 190

[12] Such prosecutions also occur in other jurisdictions. See, *e.g.*, *United States* v. *Smith*, 812 F.2d 161, 164 (4th Cir. 1987) (grabbing a person's wrist and arm); *United States* v. *Patch*, 114 F.3d 131, 133 (9th Cir. 1997) (pushing someone in an attempt to break free from the person's hold); *United States* v. *Lewellyn*, 481 F.3d 695, 696 (9th Cir. 2007) (spitting in a person's face).

(quoting *People* v. *Durham*, 449 P.2d 198, 204 (Cal. 1969)).

Because "many States and the Federal Government apply some form or variation of" the "natural and probable consequences" doctrine, the Court required the defendant to "show something *special* about California's version of the doctrine—for example, that California in applying it criminalizes conduct that most other States would not consider 'theft.'" *Id.* at 191. In this context, the question was whether the "natural and probable consequences" doctrine *had been applied* in California so as to cover nongeneric crimes. See Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 Geo. Mason L. Rev. 625, 648-649 (2011). Hypothetical convictions do not aid in this inquiry because a hypothetical act covered by California's "natural and probable consequences" doctrine is presumably covered by the doctrine in other States as well—unless California applies the doctrine in a distinctive way. But nothing in *Duenas-Alvarez* requires proof of actual prosecutions in the full range of circumstances to which a state statute may apply when that statute's plain terms reach conduct falling outside the generic criminal conduct defined by federal law: "*Duenas-Alvarez* does not require this showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition." *Ramos* v. *U.S. Attorney Gen.*, 709 F.3d 1066, 1071-1072 (11th Cir. 2013).

Here, the Court must decide whether bodily-injury domestic assault includes as an element the

"use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A). If any act—even a hypothetical one—qualifies under a state assault statute but does not involve use of physical force, use of physical force is not an element of the offense created by that statute: "If 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. In *Duenas-Alvarez*, hypotheticals were irrelevant because the Court was asking how a specific doctrine had been applied *in practice*; in this case, hypotheticals are essential because the Court must determine whether an act of bodily-injury domestic assault *could* fall outside the scope of the federal statute.

The government's reliance on *Moncrieffe* is even further afield. There, the Court noted that the "state offense of conviction [satisfied] the 'elements' of the generic federal offense"; the real question in the case was whether the state conviction could be punished as a felony under federal law. 133 S. Ct. at 1687. Nothing in this holding—which reiterated that "[a]mbiguity" on the point mandates the conclusion that a defendant was prosecuted for conduct falling *outside* the generic federal definition (*ibid.*)—supports the view that conduct within the express terms of a state statute should be disregarded in conducting the "categorical" inquiry. And here, the government's assertion is particularly dubious when measured against its vigorous argument that, from time immemorial, state assault laws have been understood to reach even the slightest offensive touch.

B. Section 921(a)(33)(A) Requires The *Active Employment* Of Physical Force.

The government's approach—which postulates that *any* act leading to physical injury necessarily

involves the "use of physical force"—has an additional flaw: it would read the term "use" out of the statute altogether.

1. At the outset, we note that the government has abandoned the theory regarding "use" of force that it advanced in the petition for certiorari. At that point, the government asserted that, "[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 (emphasis added). But there is nothing at all ordinary in that usage: to consider the familiar examples recited by the government (see U.S. Br. 29), in everyday speech no one would say that a defendant who tricked another into drinking poison or jumping from a window "used force" to injure the victim, even though that defendant most certainly *did* cause the victim bodily injury in a but-for sense. The defendant in such a case would much more naturally be described as having "used trickery" rather than "force" to cause injury.

The government therefore no longer argues that it is advancing an "ordinary" reading of the word "use." Instead, it insists that, in the specialized, "common-law understanding of the word 'force'" (U.S. Br. 31), causing "injury through poisoning, deceit, or other subtle or indirect means" "entail[s] the use of 'force.'" U.S. Br. 29. This is so, the government continues, because, when (for example) a person poisons his victim, "he has intentionally used the forceful physical properties of the poison to achieve his objective." *Id.* at 31. But this understanding cannot be squared with the plain meaning of the text that Congress actually used.

To begin with, the offense defined by Section 922(g)(9) requires as an element the defendant's *use* of physical force. "The word 'use' in the statute must be given its 'ordinary or natural' meaning, a meaning variously defined as '[t]o convert to one's service,' 'to employ,' 'to avail oneself of,' and 'to carry out a purpose or action by means of.'" *Bailey* v. *United States*, 516 U.S. 137, 145 (1995). "These various definitions of 'use' imply action and implementation." *Ibid.*

Thus, as the Court has explained, "use" is a term that conveys the idea that the thing used (here, "physical force") has been made the user's instrument: the statutory phrase "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*, 516 U.S. at 144 ("use" in the definition of "crime of violence" means "active employment")). Accordingly, statutory "emphasis on the use of physical force against another person * * * suggests a category of violent, active crimes." *Id.* at 11. As Judge Moore explained in her concurrence below, "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. Poison may have "forceful physical properties" as a matter of organic chemistry, but no one would say that a poisoner "employs" force or "carries out a purpose by means of force" when he or she sprinkles poison in a victim's drink. It therefore is unsurprising that, as the government recognizes (U.S. Br. 29 n.10), its understanding of the "use" requirement has been rejected by numerous courts of appeals. See *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006); *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003).

This understanding of the phrase "use of physical force" was well established prior to 1996. By that year, the Court had held in *Bailey* that "use" of a firearm requires active employment of the weapon. In addition, a number of contemporary circuit court decisions had expressed a similar understanding of the phrase "use of physical force" in the context of 18 U.S.C. § 16 (see, *e.g.*, *United States* v. *Doe*, 49 F.3d 859, 866 (2d Cir. 1995)); 18 U.S.C. § 3 (see, *e.g.*, *United States* v. *Innie*, 7 F.3d 840, 850 (9th Cir. 1993)); and 18 U.S.C. § 924(e)(2)(B) (see, *e.g.*, *United States* v. *Mathis*, 963 F.2d 399, 407 (D.C. Cir. 1992)).

Given that courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts" (*Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988)), it must be assumed that Congress was aware of this judicial interpretation of "use." And "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well." *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85 (2006)). As a result, Congress "must be considered to have adopted" the understanding of "use" established in decisions like *Bailey* and "made it a part of the enactment" of Section 922(g)(9). *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948) (quoting *Hecht* v. *Malley*, 265 U.S. 144, 152 (1924)).

2. Of course, as the government observes (U.S. Br. 14-15), at some level, *everything* that happens in the physical world is the product of the application of force; the victim of poison is injured by the operation

of force at the molecular level by the strychnine that has entered his system, while the victim who falls from a window 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, even apart from the inconsistency of the government's argument with ordinary usage, 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, Section 921(a)(33)(A)'s definition would be satisfied in literally *every* case and would add nothing at all to the statute.[13] That is not a permissible reading of the statutory text: the Court must read a statute "with the assumption that Congress intended each of its terms to have meaning. 'Judges should hesitate to treat as surplusage statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.'" *Bailey*, 516 U.S. at 145 (alterations omitted).

By the same token, the government's reading of Section 922(g)(9) treats as a misdemeanor crime of domestic violence literally every intentional act that causes bodily injury. Had Congress really wanted to write such a law, "it easily could have so provided" (*Bailey*, 516 U.S. at 143); if that were the congressional intent, Congress surely would have borrowed the generic language of the dozens of state assault-and-battery laws like Tennessee's—laws that (the government notes, at U.S. Br. 11) were then on the

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[13] 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)(i) "plainly refers to force exerted by and through concrete bodies." *Ibid.*

books—that made use of just that "causes bodily injury to another" formulation. But it did not, instead defining the crime as requiring the "use of physical force." That language must be given independent meaning.

In arguing to the contrary, the government observes that the common-law definition of battery reached "'indirect[]' applications of force" (U.S. Br. 29) such as "administering a poison" or "causing another to jump from a window." *Id.* at 30. But the government is here assuming its conclusion; its examples simply highlight the way in which the common-law understanding of battery *departs* from the express statutory definition of "domestic violence." The government's observation thus reinforces the conclusion that it does not make sense to read the latter in light of the former.

3. There is nothing anomalous in this outcome. As we have explained, prior to the enactment of Section 921(a)(33)(A), the most recent congressional application of the "use of physical force" formulation was in statutes aimed at forcible street crimes; in such a context, one would expect Congress to apply a formula that referred to the "use" of physical force in a direct and ordinary sense. And in the particular context of this case, Congress understandably borrowed that formulation to prevent individuals who had "demonstrated propensity for the *use* of physical violence against others" from obtaining a handgun. *United States* v. *Rogers*, 371 F.3d 1225, 1229 (10th Cir. 2004) (emphasis added). "The belief underpinning § 922(g)(9) is that people who have been convicted of violence once—toward a spouse, child, or domestic partner, no less—are likely to use violence

again. That's the justification for keeping firearms out of their hands." *Skoien*, 614 F.3d at 642.

The government nevertheless suggests that reading "use of physical force" in the ordinary sense of those words will produce "statutory anomalies." U.S. Br. 11.[14] Because "[m]any States[] define a range of crimes against a person, from simple assault to murder, by specifying a particular result * * * without explicitly specifying the means by which an offender must have achieved that result" (U.S. Br. 33), the government suggests that the Sixth Circuit's reading will exclude from the reach of Section 922(g)(9) "quintessential violent crimes such as murder." *Id.* at 34. But murderers are subject to the firearm ban under Section 922(g)(1), which prohibits gun ownership by anyone "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Congress thus has targeted serious results-oriented offenses such as murder using other provisions of the federal firearms ban.[15]

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[14] One such anomaly suggested by the government is that, if offensive touching is understood to be "violent force" but poisoning or trickery is not understood to involve the "use" of force, less serious offenses will be covered by Section 922(g)(9) but more serious ones will not. U.S. Br. 33. But the obvious answer to that oddity is to read the statute correctly, as not reaching offensive touching at all.

[15] The government also suggests that crimes such as "solicitation to commit a crime of violence" might not reach solicitation to commit murder. U.S. Br. 34. But Section 16(b)'s generic definition of "crime of violence" includes any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). That surely includes murder, as well as many other serious

4. If we are correct in what we have argued to this point, 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 (footnote and citation omitted). 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." And that, too, is fatal to the government's case.[16]

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violent crimes. In contrast, Section 921(a)(33)(A) includes no such catch-all provision.

[16] The government reiterates its contention that "[p]urely hypothetical applications of the bodily-injury prong of Tennessee's domestic assault statute are insufficient to demonstrate that respondent's conviction does not qualify as a 'misdemeanor crime of domestic violence.'" U.S. Br. 32-33. But the government's only support for this proposition comes from *Duenas-Alvarez* and *Moncrieffe*—both of which are inapposite. See pages 31-35, *supra*.

C. Considerations Of Policy Do Not Support The Government's Reading Of Section 922(g)(9).

In the end, the government defends its position on the ground that the court of appeals' "interpretation would render Section 922(g)(9) a virtual 'dead letter' in all but (at most) a handful of States 'from the very moment of its enactment.'" U.S. Br. 40 (quoting *Hayes*, 555 U.S. at 426-427). Most state assault and battery statutes cover (a) offensive touching, (b) bodily injury, or (c) both; according to the government, the Sixth Circuit's interpretation of the statute would prevent convictions under these statutes from qualifying as misdemeanor crimes of domestic violence, an outcome that Congress "could not have intended." *Id.* at 36-38. But the current limitations on the practical scope of Section 922(g)(9) described by the government are, in substantial part, the product of decisions of this Court that post-date enactment of the statute; these limitations tell us nothing about the intent of the Congress that enacted Section 922(g)(9). Moreover, the government overlooks the state assault statutes that *do* incorporate a "use of force" element and ignores the continued availability of the modified categorical approach in those States. And whatever the validity of the government's practical concerns, they cannot justify applying a criminal statute to people who fall outside its express terms.

1. When Congress enacted Section 922(g)(9) in 1996, it could not have anticipated that future judicial decisions would limit the applicability of the modified categorical approach.

a. At the outset, Congress in 1996 would have had no reason to suspect that all offenses under the state statutes the government invokes would fall beyond the reach of Section 922(g)(9). In particular, Congress may well have believed that the modified categorical approach would permit courts to look at the facts of predicate convictions and to apply the firearms ban to persons who in fact engaged in domestic violence.

Although the Court first expounded the categorical and modified categorical approaches in *Taylor* v. *United States*, 495 U.S. 575 (1990), the scope of these approaches was not clarified until much later. *Taylor* suggested that courts could look beyond the statute in a "narrow range of cases" (*id.* at 602), although it did not explain comprehensively which cases fall within that range or what record materials could be considered in those cases. Given this state of the law, the Congress that enacted Section 922(g)(9) may have believed that courts could assess the facts underlying a prior conviction to determine whether it qualified as a predicate offense, rendering moot the government's current concerns about enforcement.

In 1992, the First Circuit held that courts could assess the facts of a crime—as revealed, for example, in presentence reports—to determine whether an act qualified as a predicate offense. *United States* v. *Harris*, 964 F.2d 1234, 1236-1237 (1st Cir. 1992) (Breyer, C.J.). The Tenth Circuit followed suit in 1993, the Sixth Circuit in 1994, the Second Circuit in

1995, and the Eleventh Circuit in 1996.[17] Shortly after the enactment of Section 922(g)(9), a Third Circuit decision even permitted a court to consult letters from defense counsel to the probation officer and sentencing judge in assessing the facts underlying a predicate conviction. *United States* v. *Bennett*, 100 F.3d 1105, 1110 (3d Cir. 1996).

Other courts of appeals specifically held that the modified categorical approach applied to any statute, whether divisible or indivisible.[18] In 1994, the Sixth Circuit wrote, "*Taylor* provides that a prior conviction meets the generic definition of a[n] [offense] where (1) the language of the statute, under which the defendant was convicted, substantially corresponds with the generic * * * definition; or (2) *regardless of the exact language of the underlying statute*, the charges brought against the defendant contained all of the elements of a generic [offense]." *United States* v. *Maness*, 23 F.3d 1006, 1008 (6th Cir. 1994)

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[17] *United States* v. *Adams*, 91 F.3d 114, 116 (11th Cir. 1996); *United States* v. *Palmer*, 68 F.3d 52, 55-56, 59 (2d Cir. 1995); *United States* v. *Kaplansky*, 42 F.3d 320, 325 (6th Cir. 1994); *United States* v. *Smith*, 10 F.3d 724, 733-734 (10th Cir. 1993); see *United States* v. *O'Neal*, 937 F.2d 1369, 1373-1374 (9th Cir. 1990), *abrogated on other grounds as recognized by United States* v. *Garcia-Cruz*, 40 F.3d 986, 988-989 (9th Cir. 1994).

[18] The "divisible"/"indivisible" terminology—at least in the context of the modified categorical approach—is of relatively recent vintage, and circuit courts that interpreted *Taylor* in the 1990s did not use this language. Courts' failure to employ these terms confirms that they were unaware that a statute's divisibility might influence the availability of the modified categorical approach. The Court did not clarify the importance of a statute's divisibility until *Descamps* v. *United States*, 133 S. Ct. 2276 (2013).

(emphasis added). The court thus concluded that *Taylor* offered judges two alternative methodologies—the categorical approach (which required analysis of the statutory language) and the modified categorical approach (which permitted courts to look beyond the statute). According to the Sixth Circuit, the modified categorical approach did not involve any assessment of the underlying statute (see *id.* at 1009-1010); the court's logic implies that this approach applied to any statute, whether divisible or indivisible. The Fourth, Fifth, Ninth, and Tenth Circuits reached the same conclusion.[19] These lower court cases were all decided before the enactment of Section 922(g)(9).[20]

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[19] *United States* v. *Blankenship*, No. 92-5354, at *1 (4th Cir. Feb. 18, 1993) (noting that it was unnecessary to assess the language of West Virginia's burglary statutes before applying the modified categorical approach); *United States* v. *Strahl*, 958 F.2d 980, 984 (10th Cir. 1992) (referring to charging documents to determine whether defendant had engaged in "unlawful entry" in violating California's burglary statute, even though the statute was not divisible with respect to the element of "unlawful entry"); *United States* v. *Garza*, 921 F.2d 59, 60-61 (5th Cir. 1991) (noting that it was unnecessary to assess the statutory definition of burglary before applying "the *Taylor* alternative," *i.e.*, the modified categorical approach); *O'Neal*, 937 F.2d at 1373-1374 (applying the modified categorical approach to determine whether defendant had engaged in "unlawful entry" in violating California's burglary statute, even though the statute was not divisible with respect to the element of "unlawful entry"), *abrogated on other grounds as recognized by United States* v. *Garcia-Cruz*, 40 F.3d 986, 988-989 (9th Cir. 1994).

[20] There were some conflicting precedents. The Seventh Circuit's jurisprudence on the modified categorical approach provides an example. In 1994, the *en banc* court implied that judges could look to factual allegations in applying the modi-

In particular, the lower courts' pre-1996 understanding of the modified categorical approach evidently reflected a distinctive understanding of the term "element" as used in this context. Thus, several circuit courts held that judges could assess the elements of a crime by looking at the facts underlying a conviction or particular conduct charged. See, *e.g.*, *Adams*, 91 F.3d at 116; *Palmer*, 68 F.3d at 55-56; *Maness*, 23 F.3d at 1008; *Blankenship*, No. 92-5354, at *1; *Harris*, 964 F.2d at 1236-1237; *O'Neal*, 937 F.2d at 1373-1374; *Garza*, 921 F.2d at 60-61.

The Sixth Circuit demonstrated this understanding of "element" in *United States* v. *Kaplansky*, 42 F.3d 320, 325 (6th Cir. 1994) (en banc). In that case, the court held that the defendant's kidnapping conviction qualified as a violent felony involving as an element the use of force because the allegations of the indictment and the defendant's guilty plea revealed that he had "failed to release the victim in a safe place unharmed." *Ibid.* Although this factual al-

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fied categorical approach. *United States* v. *Hudspeth*, 42 F.3d 1015, 1018 n.3 (7th Cir. 1994). Later that same year, a panel contradicted the *en banc* decision by holding that the modified categorical approach allowed courts to analyze only "the conduct expressly charged in the count of which a defendant was convicted." *United States* v. *Lee*, 22 F.3d 736, 738-739 (7th Cir. 1994). In 1996, a divided panel affirmed that conclusion, even as the dissenter described *Lee* as a "misguided decision" that "mistakenly and without adequate explanation departed from prior precedent." *United States* v. *Shannon*, 94 F.3d 1065, 1091 (7th Cir. 1996) (Coffey, J., concurring in part and dissenting in part). This confusion within the circuit only highlights the complicated state of the law in 1996. Given the array of conflicting decisions, Congress could not have anticipated that subsequent rulings would entirely eliminate courts' ability to make factual inquiries in applying the modified categorical approach.

legation was not formally an "element" of the kidnapping offense, the court held that it did not constitute "mere surplusage." *Ibid.* Accordingly, the court concluded that, "[b]y pleading guilty to this indictment, defendant has also necessarily admitted that he attempted to use some degree of actual physical force in restraining [the victim]." *Ibid.* Under an "elements-based" approach—as that term is understood today—the Sixth Circuit's ruling is incorrect; the factual allegation in the defendant's guilty plea was, in fact, "mere surplusage." *Ibid.* But, when *Kaplansky* was decided in 1994, the Sixth Circuit evidently did not believe that *Taylor*'s explicit endorsement of an elements-based approach precluded courts from analyzing material facts as revealed in pleading documents.

b. Since that time, the law has changed in significant ways. In the sentencing context, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)—decided four years after Congress passed Section 922(g)(9)—indicated that only juries (rather than judges) could make certain factual findings that resulted in sentence enhancements beyond the statutory maximum. Notably, both *Apprendi* dissenters warned that, in passing earlier laws, Congress might have assumed that judges would be able to assess factual allegations in imposing sentence enhancements. See *id.* at 564 (Breyer, J., dissenting); *id.* at 524 (O'Connor, J., dissenting) (noting that *Apprendi* "will surely be remembered as a watershed change in constitutional law"); *id.* at 552 ("The most unfortunate aspect of to-

day's decision is that our precedents did not foreordain this disruption in the world of sentencing.").[21]

Following *Apprendi*, the Court continued to restrict the scope of the modified categorical approach in the sentencing context. In *Shepard* v. *United States*, 544 U.S. 13, 16 (2005), the Court limited the types of documents that sentencing judges could consult in applying that approach—overturning circuit court decisions that permitted judges to assess the facts of prior convictions as revealed in presentencing reports or police reports. In *Descamps* v. *United States*, 133 S. Ct. 2276, 2281-2282, 2288 (2013), the Court relied on *Apprendi* in holding that the modified categorical approach applied only to divisible statutes.

In this context, the 1996 Congress might well have expected that courts could use the modified categorical approach when analyzing a conviction under any state domestic assault statute—divisible or indivisible—that criminalized a broader range of conduct than Section 922(g)(9). Congress might also have reasonably believed that courts could refer to a wide range of materials to determine the factual underpinnings of predicate convictions. Subsequent judicial decisions have clarified the application of the categorical and modified categorical approaches, but the Court cannot impute clairvoyant knowledge of

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[21] Justice O'Connor made the same point in her dissent in *Shepard* v. *United States*: "I strongly suspect that the driving force behind [*Shepard*] is not *Taylor* itself, but rather '[d]evelopments in the law since *Taylor*.' A majority of the Court defends its rule as necessary to avoid a result that might otherwise be unconstitutional under *Apprendi* v. *New Jersey,* and related cases." 544 U.S. at 37 (O'Connor, J., dissenting) (citation omitted).

those decisions to the Congress that enacted the firearm prohibition in 1996. The government's argument about the impact of the decision below on enforcement of Section 922(g)(9) under current law therefore says nothing to support the notion that Congress would have regarded the law as a nullity when enacted.

In saying this, we do not suggest that the Court should either depart from the now-settled understanding of what constitutes the "elements" of a crime or countenance broad factual inquiries into a defendant's actual conduct in making determinations such as the one required in this case. Our point, simply, is that Congress in 1996 might not have anticipated evolution of the law governing the categorical and modified categorical approaches—a reality that undermines the government's contention that "the 'paucity of state' statutes that conform to the lower courts' approach" (U.S. Br. 40) must be understood to mean that Congress in 1996 meant to criminalize a far broader range of substantive conduct than appears on the face of Sections 921(a)(33)(A) and 922(g)(9).

2. Many state laws bar domestic abusers from acquiring firearms.

The government raises other enforcement concerns in its discussion of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (primarily codified at 18 U.S.C. § 922(s)-(t)). U.S. Br. 43-44. That Act prohibits firearm dealers from selling guns to people who are not permitted to purchase them under federal or state law. 18 U.S.C. § 922(s)(1). The government asserts that the Sixth Circuit's interpretation would undermine this Act's purpose by permitting the sale of firearms to

people who have committed misdemeanor crimes of domestic violence. In particular, the government suggests that, "[b]etween NICS's [National Instant Criminal Background Check System] creation in November 1998 and December 2012, misdemeanor crime of domestic violence convictions have accounted for more than 100,000 federal denials—the second most common reason for denying firearms to a prospective purchaser." U.S. Br. 43 (citing FBI, *National Instant Background Check System (NICS) Operations 2012*, http://www.fbi.gov/aboutus/cjis/nics/reports/2012-operations-report ("2012 Report")).

The government's dramatic numbers, however, hide the ameliorative effect of *state* prohibitions on firearm possession. The NICS system first "determines if a federal prohibitor exists"; if none does, "the NICS Section employee processing the background check must further review the record match(es) to determine if any applicable state law renders the prospective firearms transferee prohibited." 2012 Report. This means that state prohibitions on firearm purchases, many of which prevent domestic abusers from purchasing firearms, may be underrepresented in the FBI's statistics. Currently, at least thirty-three States have laws that limit firearm possession by people who have committed misdemeanor domestic assault or battery or are subject to domestic violence protective orders. See, *infra*, Appendices A and B. Even if Section 922(g)(9) is read narrowly, there will not be 100,000 more potential abusers in possession of firearms.

3. Several States have enacted statutes that require "use of violent force" as an element.

The government's concern about enforcement is overstated for another reason: several state misdemeanor domestic assault or battery statutes include use of violent force as an element, and other States may follow suit by enacting similar laws. For example, Colorado defines "domestic violence" as "an act or threatened act of *violence* upon a person with whom the actor is or has been involved in an intimate relationship." Colo. Rev. Stat. Ann. § 18-6-800.3 (West 2013) (emphasis added). Similarly, Louisiana defines "[d]omestic abuse battery" as "the intentional use of force or *violence* committed by one household member upon the person of another household member." La. Rev. Stat. Ann. § 14:35.3 (2012) (emphasis added). See Cal. Fam. Code § 6211 (West 2013) (defining "domestic violence" as "abuse," where "abuse" —described in Cal. Fam. Code § 6203 (West 2013) and Cal. Fam. Code § 6320 (West 2013)—includes violent acts like "attacking" and "striking"); Colo. Rev. Stat. Ann. § 13-14-101 (West 2013) ("'Domestic abuse' means any act, attempted act, or threatened act of violence, stalking, harassment, or coercion * * *."); Idaho Code Ann. § 18-918(3)(b) (West 2013) (defining "domestic battery" by reference to the State's generic battery statute, Idaho Code Ann. § 18-903 (West 2013), which characterizes one form of battery as "willful and unlawful use of force or violence upon the person of another"); Utah Code Ann. § 77-36-1 (West 2013) ("'Domestic violence' means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a crimi-

nal offense involving violence or physical harm, when committed by one cohabitant against another.").

Other States have created "aggravated misdemeanor" offenses, which may capture people who commit violent assaults but plead down to misdemeanors. For example, Iowa's Code states that a person commits "[a]n aggravated misdemeanor[] if the domestic abuse assault is committed by knowingly impeding the normal breathing or circulation of the blood of another by applying pressure to the throat or neck of the other person or by obstructing the nose or mouth of the other person." Iowa Code Ann. § 708.2A(2)(d) (West 2013). This type of statute provides a way for state legislatures to create "aggravated" assault or battery misdemeanors that encompass the federal law's "use of physical force" requirement; at the same time, States can still maintain lower-grade assault charges for persons whose actions do not rise to the level of physical violence.

Furthermore, even under the restrictive version of the modified categorical approach that the Court endorsed in *Descamps*, courts can still apply this approach to divisible statutes. Idaho's current domestic violence statute provides an example that other States might follow, defining domestic violence by reference to its generic battery statute, which reaches (a) "[w]illful and unlawful use of force or violence upon the person of another"; (b) "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other"; and (c) "[u]nlawfully and intentionally causing bodily harm to an individual." Idaho Code Ann. § 18-903 (West 2013). Under the Sixth Circuit's reading of Section 922(g)(9), a conviction under the first prong of Idaho's statute may categorically qualify as a misdemeanor crime of

domestic violence, while a conviction under either of the latter two prongs likely does not. Because the statute is divisible—identifying three different ways to commit the crime of battery—under *Descamps* a court could apply the modified categorical approach to determine the specific prong under which a defendant was convicted. Such statutes allow for enforcement of Section 922(g)(9).

4. Policy concerns do not justify departure from the unambiguous statutory language.

Finally, even if these possibilities do not allay all enforcement concerns, the Court should not permit the government's pragmatic arguments to supersede the plain meaning of Section 922(g)(9). In *Johnson*, the Court held that enforcement challenges do not justify a departure from the ordinary meaning of plain statutory text:

> 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. 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."[22]

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[22] This observation also directly refutes the government's objection that "the modified categorical approach may often be

559 U.S. at 145 (citation omitted).

The same fundamental point answers the arguments of the government's *amici* that our reading will obstruct Congress's attempts to deal with "a well-documented problem—indeed, a problem of crisis proportions." National Network to End Domestic Violence Br. 12; see also, *e.g.*, Children's Defense Fund Br. 3 (referring to domestic violence as a "pervasive national problem"). We certainly agree that domestic violence presents a profoundly serious and difficult problem—but it is one that Congress addressed by focusing on individuals who previously committed acts of physical violence, and who therefore present a heightened risk of future violence. If the government is correct that reading Section 922(g)(9) as Congress wrote it produces an unwarranted result, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks." *Bifulco* v. *United States*, 447 U.S. 381, 401 (1980).

CONCLUSION

The judgment for the court of appeals should be affirmed.

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unavailable in practice because state and local records generally track the statutory language and do not specify which one (of several) disjunctive elements the defendant violated." U.S. Br. 41 n.20. These concerns should not convince the Court to adopt an interpretation that otherwise does not fit with the statute's text.

Respectfully submitted.

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APPENDICES

APPENDIX A

STATE LAWS THAT PROHIBIT PEOPLE WHO HAVE COMMITTED MISDEMEANOR DOMESTIC ASSAULT OR BATTERY FROM POSSESSING FIREARMS

Arizona: Ariz. Rev. Stat. Ann. § 13-3101(A)(7)(d) (2013) ("'Prohibited possessor' [of a firearm] means any person * * * [w]ho is at the time of possession serving a term of probation pursuant to a conviction for a domestic violence offense as defined in § 13-3601 * * *."); Ariz. Rev. Stat. Ann. § 13-3601(A) (2013) ("'Domestic violence' means any act that is * * * an offense prescribed in § * * * 13-1203); Ariz. Rev. Stat. Ann. § 13-1203(A) (2013) (defining assault).

Delaware: Del. Code Ann. tit. 11, § 1448(a)(7) (West 2013) ("[T]he following persons are prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm within the State: * * * Any person who has been convicted in any court of any misdemeanor crime of domestic violence. For purposes of this paragraph, the term 'misdemeanor crime of domestic violence' means any misdemeanor offense that: * * * Is an offense as defined under § 601 * * *."); Del. Code Ann. tit. 11, § 601 (West 2013) (defining "offensive touching"); Del. Code Ann. tit. 11, § 1448(d) (West 2013) ("Any person who is a prohibited person solely as the result of a conviction for an offense which is not a felony shall not be prohibited from purchasing, owning, possessing or controlling a deadly weapon or ammunition for a firearm if 5 years have elapsed from the date of conviction.").

Illinois: 430 Ill. Comp. Stat. Ann. 65/8(l) (West 2013) ("The Department of State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Department finds that the applicant or the person to whom such card was issued is or was at the time of issuance: * * * A person who has been convicted of domestic battery, aggravated domestic battery, or a substantially similar offense in another jurisdiction committed before, on or after January 1, 2012 (the effective date of Public Act 97-158).").

Iowa: Iowa Code Ann. § 724.26(2)(a), (c) (West 2013) ("Except as provided in paragraph "b", a person * * * who has been convicted of a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9) and who knowingly possesses, ships, transports, or receives a firearm, offensive weapon, or ammunition is guilty of a class "D" felony. * * * For purposes of this section, "misdemeanor crime of domestic violence" means an assault under section 708.1, subsection 2, paragraph "a" or "c", 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.").

Minnesota: Minn. Stat. Ann. § 609.2242(3)(b), (c) (West 2013) ("If the court determines that the assault was of a family or household member, and that the offender owns or possesses a firearm and used it in any way during the commission of the assault, it shall order that the firearm be summarily forfeited under section 609.5316, subdivision 3. * * * When a

person is convicted of assaulting a family or household member and is determined by the court to have used a firearm in any way during commission of the assault, the court may order that the person is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of the person's life."); Minn. Stat. Ann. § 624.713(1)(9) (West 2013) ("The following persons shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or, except for clause (1), any other firearm: * * * a person who has been convicted in this state or elsewhere of assaulting a family or household member and who was found by the court to have used a firearm in any way during commission of the assault is prohibited from possessing any type of firearm for the period determined by the sentencing court * * *").

Montana: Mont. Code Ann. § 45-5-206(7) (West 2013) ("The court may prohibit an offender convicted under this section [which criminalizes partner or family member assault] from possession or use of the firearm used in the assault.").

New Hampshire: N.H. Rev. Stat. Ann. § 173-B:5(I) (2013) ("Upon a showing of abuse of the plaintiff by a preponderance of the evidence, the court shall grant such relief as is necessary to bring about a cessation of abuse. Such relief shall direct the defendant to relinquish to the peace officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order.").

New Jersey: N.J. Stat. Ann. § 2C:39-7(b)(1), (2) (West 2013) ("A person having been convicted in this State or elsewhere of the crime of aggravated assault

* * * or a crime involving domestic violence as defined in section 3 of P.L.1991, c. 261 (C.2C:25-19), whether or not armed with or having in his possession a weapon enumerated in subsection r. of N.J.S.2C: 39-1 * * * who purchases, owns, possesses or controls a firearm is guilty of a crime of the second degree and upon conviction thereof, the person shall be sentenced to a term of imprisonment by the court."); N.J. Stat. Ann. § 2C:25-19(a) (West 2013) (defining "domestic violence" to include, among other things, "assault").

Tennessee: Tenn. Code Ann. § 39-13-111(c)(6) (West 2013) ("A person convicted of a violation of this section [which criminalizes domestic assault] shall be required to terminate, upon conviction, possession of all firearms that the person possesses as required by § 36-3-625.").

Texas: Tex. Penal Code Ann. § 46.04(b) (West 2013) ("A person who has been convicted of an offense under Section 22.01, punishable as a Class A misdemeanor and involving a member of the person's family or household, commits an offense if the person possesses a firearm before the fifth anniversary of the later of: (1) the date of the person's release from confinement following conviction of the misdemeanor; or (2) the date of the person's release from community supervision following conviction of the misdemeanor."); Tex. Penal Code Ann. § 22.01 (West 2013) (defining assault).

Washington: Wash. Rev. Code Ann. § 9.41.040(2)(a)(i) (West 2013) ("A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if * * * the person owns, has in his or her possession, or has in his or her control any firearm: * * * After having

previously been convicted or found not guilty by reason of insanity in this state or elsewhere of * * * any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree * * *.").

West Virginia: W. Va. Code Ann. § 61-7-7(a)(8) (West 2013) ("Except as provided in this section, no person shall possess a firearm * * * who: * * * Has been convicted of a misdemeanor offense of assault or battery either under the provisions of section twenty-eight, article two of this chapter or the provisions of subsection (b) or (c), section nine of said article or a federal or state statute with the same essential elements in which the victim was a current or former spouse, current or former sexual or intimate partner, person with whom the defendant has a child in common, person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant's child or ward or a member of the defendant's household at the time of the offense or has been convicted in any court of any jurisdiction of a comparable misdemeanor crime of domestic violence.").

APPENDIX B

STATE LAWS THAT PROHIBIT PEOPLE WHO ARE SUBJECT TO DOMESTIC VIOLENCE PROTECTIVE ORDERS FROM POSSESSING FIREARMS

Alaska: Alaska Stat. Ann. § 18.66.100(c)(6)-(7) (West 2013) ("A protective order under this section may * * * prohibit the respondent from using or possessing a deadly weapon if the court finds the respondent was in the actual possession of or used a weapon during the commission of domestic violence; * * * direct the respondent to surrender any firearm owned or possessed by the respondent if the court finds that the respondent was in the actual possession of or used a firearm during the commission of the domestic violence.").

Arizona: Ariz. Rev. Stat. Ann. § 13-3602(G)(4) (2013) ("If a court issues an order of protection, the court may do any of the following: * * * If the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designed persons, prohibit the defendant from possessing or purchasing a firearm for the duration of the order."); Ariz. Rev. Stat. Ann. § 13-3624(D)(4) (2013) ("An emergency order of protection may include any of the following: * * * If the court finds that the defendant may inflict bodily injury or death on the plaintiff, the defendant may be prohibited from possessing or purchasing a firearm for the duration of the order.").

Arkansas: Ark. Code Ann. § 9-15-207(b)(3) (West 2013) ("An order of protection shall include a notice to the respondent or party restrained that: * * * It is unlawful for an individual who is subject to

an order of protection or convicted of a misdemeanor of domestic violence to ship, transport, or possess a firearm or ammunition pursuant to 18 U.S.C. § 922(g)(8) and (9) as it existed on January 1, 2007 * * *.").

California: Cal. Penal Code § 136.2(a)(7)(B)(i)-(ii) (West 2013) ("If a court does not issue an order pursuant to subparagraph (A) in a case in which the defendant is charged with a crime of domestic violence as defined in Section 13700, the court on its own motion shall consider issuing a protective order upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, that provides as follows: (I) The defendant shall not own, possess, purchase, receive, or attempt to purchase or receive, a firearm while the protective order is in effect. (II) The defendant shall relinquish any firearms that he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure."); Cal. Penal Code § 136.2(d)(1)-(3) (West 2013) ("A person subject to a protective order issued under this section shall not own, possess, purchase, receive, or attempt to purchase or receive a firearm while the protective order is in effect. * * * The court shall order a person subject to a protective order issued under this section to relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the Code of Civil Procedure. * * * A person who owns, possesses, purchases or receives, or attempts to purchase or receive a firearm while the protective order is in effect is punishable pursuant to Section 29825."); Cal. Fam. Code § 6389(a) (West 2013) ("A person subject to a protective order, as defined in Section 6218, shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect."); Cal.

Civ. Proc. Code § 527.6(t) (West 2013) ("A person subject to a protective order issued under this section shall not own, possess, purchase, receive, or attempt to purchase or receive a firearm or ammunition while the protective order is in effect."); Cal. Civ. Proc. Code § 527.9(a) (West 2013) ("A person subject to a temporary restraining order or injunction issued pursuant to Section 527.6, 527.8, or 527.85 or subject to a restraining order issued pursuant to Section 136.2 of the Penal Code, or Section 15657.03 of the Welfare and Institutions Code, shall relinquish the firearm pursuant to this section.").

Colorado: Colo. Rev. Stat. Ann. § 18-1-1001(3)(c) (West 2013) ("Upon motion of the district attorney or on the court's own motion for the protection of the alleged victim or witness, the court may, in cases involving domestic violence as defined in section 18-6-800.3(1), * * * enter any of the following further orders against the defendant: * * * An order prohibiting possession or control of firearms or other weapons * * *"); Colo. Rev. Stat. Ann. § 18-1-1001(9)(a)(I) (West 2013) ("When the court subjects a defendant to a mandatory protection order that qualifies as an order described in 18 U.S.C. sec. 922(g)(8), the court, as part of such order: * * * Shall order the defendant to: * * * Refrain from possessing or purchasing any firearm or ammunition for the duration of the order; and * * * Relinquish, for the duration of the order, any firearm or ammunition in the defendant's immediate possession or control or subject to the defendant's immediate possession or control * * *.).

Delaware: Del. Code Ann. tit. 10, § 1045(a)(8), (11) (West 2013) ("After consideration of a petition for a protective order, the Court may grant relief as

follows: * * * Order the respondent to temporarily relinquish to the sheriff, constable or to a police officer the respondent's firearms and to refrain from purchasing or receiving additional firearms for the duration of the order; * * * Issue an order directing any law-enforcement agency to forthwith search for and seize firearms of the respondent upon a showing by the petitioner that the respondent has possession of a firearm * * *.").

District of Columbia: D.C. Code § 16-1005(c)(10) (2013) ("If, after hearing, the judicial officer finds that there is good cause to believe the respondent has committed or threatened to commit a criminal offense against the petitioner or against petitioner's animal or an animal in petitioner's household, the judicial officer may issue a protection order that: * * * Directs the respondent to relinquish possession of any firearms * * *.").

Florida: Fla. Stat. Ann. § 741.30(6)(g) (West 2013) ("A final judgment on injunction for protection against domestic violence entered pursuant to this section must, on its face, indicate that it is a violation of s. 790.233, and a first degree misdemeanor, for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition."); Fla. Stat. Ann. § 741.31(4)(b)(1) (West 2013) ("It is a violation of s. 790.233, and a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, for a person to violate a final injunction for protection against domestic violence by having in his or her care, custody, possession, or control any firearm or ammunition."); Fla. Stat. Ann. § 790.233(1) (West 2013) ("A person may not have in his or her care, custody, possession, or control any firearm or ammunition if the person has been issued

a final injunction that is currently in force and effect, restraining that person from committing acts of domestic violence, as issued under s. 741.30 or from committing acts of stalking or cyberstalking, as issued under s. 784.0485.").

Hawaii: Haw. Rev. Stat. § 134-7(f) (West 2013) ("No person who has been restrained pursuant to an order of any court, including an ex parte order as provided in this subsection, from contacting, threatening, or physically abusing any person, shall possess, control, or transfer ownership of any firearm or ammunition therefor, so long as the protective order, restraining order, or any extension is in effect, unless the order, for good cause shown, specifically permits the possession of a firearm and ammunition.").

Illinois: 725 Ill. Comp. Stat. Ann. 5/112A-14(b)(14.5)(A) (West 2013) ("A person who is subject to an existing order of protection, interim order of protection, emergency order of protection, or plenary order of protection, issued under this Code may not lawfully possess weapons under Section 8.2 of the Firearm Owners Identification Card Act."); 750 Ill. Comp. Stat. Ann. 60/214(b)(14.5)(a) (West 2013) ("The remedies to be included in an order of protection shall be determined in accordance with this Section * * *. * * * Prohibit a respondent against whom an order of protection was issued from possessing any firearms during the duration of the order if the order: (1) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; (2) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reason-

able fear of bodily injury to the partner or child; and (3)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury.").

Indiana: Ind. Code Ann. § 34-26-5-9(c)(4) (West 2013) ("A court may grant the following relief after notice and a hearing, whether or not a respondent appears, in an order for protection or in a modification of an order for protection: * * * Prohibit a respondent from using or possessing a firearm, ammunition, or a deadly weapon specified by the court, and direct the respondent to surrender to a specified law enforcement agency the firearm, ammunition, or deadly weapon for the duration of the order for protection unless another date is ordered by the court."); Ind. Code Ann. § 34-26-5-9(f) (West 2013) ("Upon a showing of domestic or family violence by a preponderance of the evidence, the court shall grant relief necessary to bring about a cessation of the violence or the threat of violence. The relief may include an order directing a respondent to surrender to a law enforcement officer or agency all firearms, ammunition, and deadly weapons: (1) in the control, ownership, or possession of a respondent; or (2) in the control or possession of another person on behalf of a respondent; for the duration of the order for protection unless another date is ordered by the court.").

Iowa: Iowa Code Ann. § 236.4(2) (West 2013) ("The court may enter any temporary order it deems necessary to protect the plaintiff from domestic abuse prior to the hearing, including temporary cus-

tody or visitation orders pursuant to subsection 3, upon good cause shown in an ex parte proceeding. * * * A temporary order issued pursuant to this subsection shall specifically include notice that the person may be required to relinquish all firearms, offensive weapons, and ammunition upon the issuance of a permanent order pursuant to section 236.5."); Iowa Code Ann. § 236.5(1)(b)(2) (West 2013) ("Upon a finding that the defendant has engaged in domestic abuse: * * * The court may grant a protective order or approve a consent agreement which may contain but is not limited to any of the following provisions: * * * That the defendant not knowingly possess, ship, transport, or receive firearms, offensive weapons, and ammunition in violation of section 724.26, subsection 2."); Iowa Code Ann. § 664A.3(6) (West 2013) ("A no-contact order issued pursuant to this section shall specifically include notice that the person may be required to relinquish all firearms, offensive weapons, and ammunition upon the issuance of a permanent no-contact order pursuant to section 664A.5."); Iowa Code Ann. § 724.26(3) (West 2013) ("Upon the issuance of a protective order or entry of a judgment of conviction described in subsection 2, the court shall inform the person who is the subject of such order or conviction that the person shall not possess, ship, transport, or receive a firearm, offensive weapon, or ammunition while such order is in effect or until such conviction is vacated or until the person's rights have been restored in accordance with section 724.27.").

Maine: Me. Rev. Stat. tit. 19-A, § 4007(1)(A-1) (2013) ("The court, after a hearing and upon finding that the defendant has committed the alleged abuse or engaged in the alleged conduct described in section 4005, subsection 1, may grant a protective order

or, upon making that finding, approve a consent agreement to bring about a cessation of abuse or the alleged conduct. * * * Relief granted under this section may include: * * * Directing the defendant not to possess a firearm or other dangerous weapon for the duration of the order.").

Maryland: Md. Code Ann., Fam. Law § 4-505(a)(2)(viii) (West 2013) ("The temporary protective order may order any or all of the following relief: * * * order the respondent to surrender to law enforcement authorities any firearm in the respondent's possession, and to refrain from possession of any firearm, for the duration of the temporary protective order if the abuse consisted of: 1. the use of a firearm by the respondent against a person eligible for relief; 2. a threat by the respondent to use a firearm against a person eligible for relief; 3. serious bodily harm to a person eligible for relief caused by the respondent; or 4. a threat by the respondent to cause serious bodily harm to a person eligible for relief * * *."); Md. Code Ann., Fam. Law § 4-506(f) (West 2013) ("The final protective order shall order the respondent to surrender to law enforcement authorities any firearm in the respondent's possession, and to refrain from possession of any firearm, for the duration of the protective order.").

Massachusetts: Mass. Gen. Laws Ann. ch. 140, § 129B(1)(viii) (West 2013) ("Any person residing or having a place of business within the jurisdiction of the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority an application for a firearm identification card, or renewal of the same, which the licensing authority shall issue, unless the applicant: * * * is currently

subject to: * * * a permanent or temporary protection order issued pursuant to chapter 209A or a similar order issued by another jurisdiction."); Mass. Gen. Laws Ann. ch. 140, § 131(d)(vi) (West 2013) (similar); Mass. Gen. Laws Ann. ch. 209A, § 3B (West 2013) ("Upon issuance of a temporary or emergency order under section four or five of this chapter, the court shall, if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, order the immediate suspension and surrender of any license to carry firearms and or firearms identification card which the defendant may hold and order the defendant to surrender all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses in accordance with the provisions of this chapter * * *."); Mass. Gen. Laws Ann. ch. 209A, § 3C (West 2013) ("Upon the continuation or modification of an order issued pursuant to section 4 or upon petition for review as described in section 3B, the court shall also order or continue to order the immediate suspension and surrender of a defendant's license to carry firearms, including a Class A or Class B license, and firearms identification card and the surrender of all firearms, rifles, shotguns, machine guns or ammunition which such defendant then controls, owns or possesses if the court makes a determination that the return of such license to carry firearms, including a Class A or Class B license, and firearm identification card or firearms, rifles, shotguns, machine guns or ammunition presents a likelihood of abuse to the plaintiff.").

Michigan: Mich. Comp. Laws Ann. § 600.2950(1)(e) (West 2013) ("[A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a spouse, a former spouse, an individual with whom he

or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner from doing 1 or more of the following: * * * (e) Purchasing or possessing a firearm.").

Minnesota: Minn. Stat. Ann. § 518B.01(14)(j) (West 2013) ("When a person is convicted under paragraph (b) or (c) of violating an order for protection and the court determines that the person used a firearm in any way during commission of the violation, the court may order that the person is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of the person's life."); Minn. Stat. Ann. § 518B.01(14)(m) (West 2013) ("If the court determines that a person convicted under paragraph (b) or (c) of violating an order for protection owns or possesses a firearm and used it in any way during the commission of the violation, it shall order that the firearm be summarily forfeited under section 609.5316, subdivision 3.").

Montana: Mont. Code Ann. § 40-15-201(2)(f) (West 2013) ("Upon a review of the petition and a finding that the petitioner is in danger of harm if the court does not act immediately, the court shall issue a temporary order of protection that grants the petitioner appropriate relief. The temporary order of protection may include any or all of the following orders: * * * (f) prohibiting the respondent from possessing or using the firearm used in the assault * * *.").

Nebraska: Neb. Rev. Stat. Ann. § 42-924(1)(g) (West 2013) ("Any victim of domestic abuse may file a petition and affidavit for a protection order as provided in subsection (2) of this section. Upon the filing of such a petition and affidavit in support thereof,

the court may issue a protection order without bond granting the following relief: * * * (g) Enjoining the respondent from possessing or purchasing a firearm as defined in section 28-1201 * * *.").

Nevada: Nev. Rev. Stat. Ann. § 33.031 (West 2013) ("A court may include in an extended order issued pursuant to NRS 33.030: (a) A requirement that the adverse party surrender, sell or transfer any firearm in the adverse party's possession or under the adverse party's custody or control in the manner set forth in NRS 33.033; and (b) A prohibition on the adverse party against possessing or having under the adverse party's custody or control any firearm while the order is in effect."); Nev. Rev. Stat. Ann. § 33.033 (West 2013) ("If a court orders an adverse party to surrender any firearm pursuant to NRS 33.031, the adverse party shall, not later than 24 hours after service of the order: (a) Surrender any firearm in the adverse party's possession or under the adverse party's custody or control to the appropriate local law enforcement agency designated by the court in the order; (b) Surrender any firearm in the adverse party's possession or under the adverse party's custody or control to a person designated by the court in the order; or (c) Sell or transfer any firearm in the adverse party's possession or under the adverse party's custody or control to a licensed firearm dealer.").

New Hampshire: N.H. Rev. Stat. Ann. § 173-B:4(I) (2013) ("Upon a showing of an immediate and present danger of abuse, the court may enter temporary orders to protect the plaintiff with or without actual notice to defendant. * * * Such temporary relief may direct the defendant to relinquish to a peace officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or

any other person on behalf of the defendant for the duration of the protective order."); N.H. Rev. Stat. Ann. § 173-B:5(II) (2013) ("The defendant shall be prohibited from purchasing, receiving, or possessing any deadly weapons and any and all firearms and ammunition for the duration of the order. The court may subsequently issue a search warrant authorizing a peace officer to seize any deadly weapons specified in the protective order and any and all firearms and ammunition, if there is probable cause to believe such firearms and ammunition and specified deadly weapons are kept on the premises or curtilage of the defendant."); N.H. Rev. Stat. Ann. § 173-B:9(I)(b) (2013) ("Subsequent to an arrest [for violating either a temporary or permanent protective order], the peace officer shall seize any firearms and ammunition in the control, ownership, or possession of the defendant and any deadly weapons which may have been used, or were threatened to be used, during the violation of the protective order.").

New Jersey: N.J. Stat. Ann. § 2C:25-26(a) (West 2013) ("When a defendant charged with a crime or offense involving domestic violence is released from custody before trial on bail or personal recognizance, * * * [t]he court may enter an order prohibiting the defendant from possessing any firearm or other weapon enumerated in subsection r. of N.J.S.2C:39-1 and ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located."); N.J. Stat. Ann. § 2C:25-21(d)(3) (West 2013) (noting that courts may determine, after conducting an appropriate hearing, that firearms seized following a domestic violence incident "are not to be returned to the owner"); N.J. Stat. Ann. § 2C:25-28(j) (West 2013) ("Emergency relief may include * * * forbidding the

defendant from possessing any firearm or other weapon enumerated in subsection r. of N.J.S.2C:39-1, ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located and the seizure of any firearms purchaser identification card or permit to purchase a handgun issued to the defendant * * *."); N.J. Stat. Ann. § 2C:25-29(b) (West 2013) ("[A]ny restraining order issued by the court shall bar the defendant from purchasing, owning, possessing or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun pursuant to N.J.S.2C:58-3 during the period in which the restraining order is in effect or two years whichever is greater * * *."); N.J. Stat. Ann. § 2C:58-3(c)(6), (8) (West 2013) ("No handgun purchase permit or firearms purchaser identification card shall be issued: * * * To any person who is subject to a restraining order issued pursuant to the 'Prevention of Domestic Violence Act of 1991,' P.L.1991, c. 261 (C.2C:25-17 et seq.) prohibiting the person from possessing any firearm; * * * To any person whose firearm is seized pursuant to the 'Prevention of Domestic Violence Act of 1991,' P.L.1991, c. 261 (C.2C:25-17 et seq.) and whose firearm has not been returned.").

New York: N.Y. Crim. Proc. Law § 530.14(1) (McKinney 2013) ("Whenever a temporary order of protection is issued pursuant to section eight hundred twenty-eight of this article, or pursuant to subdivision one of section 530.12 or subdivision one of section 530.13 of this article: * * * the court shall suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender of any or all firearms owned or possessed where the court re-

ceives information that gives the court good cause to believe that (i) the defendant has a prior conviction of any violent felony offense as defined in section 70.02 of the penal law; (ii) the defendant has previously been found to have willfully failed to obey a prior order of protection and such willful failure involved (A) the infliction of physical injury, as defined in subdivision nine of section 10.00 of the penal law, (B) the use or threatened use of a deadly weapon or dangerous instrument as those terms are defined in subdivisions twelve and thirteen of section 10.00 of the penal law, or (C) behavior constituting any violent felony offense as defined in section 70.02 of the penal law; or (iii) the defendant has a prior conviction for stalking in the first degree as defined in section 120.60 of the penal law, stalking in the second degree as defined in section 120.55 of the penal law, stalking in the third degree as defined in section 120.50 of the penal law or stalking in the fourth degree as defined in section 120.45 of such law; and * * * the court shall where the court finds a substantial risk that the defendant may use or threaten to use a firearm unlawfully against the person or persons for whose protection the temporary order of protection is issued, suspend any such existing license possessed by the defendant, order the defendant ineligible for such a license and order the immediate surrender pursuant to subparagraph (f) of paragraph one of subdivision a of section 265.20 and subdivision six of section 400.05 of the penal law, of any or all firearms owned or possessed."); N.Y. Fam. Ct. Act § 842-a (McKinney 2013) (similar).

North Carolina: N.C. Gen. Stat. Ann. § 50B-3(a) (West 2013) ("If the court, including magistrates as authorized under G.S. 50B-2(c1), finds that an act of domestic violence has occurred, the court shall

grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief: * * * (11) Prohibit a party from purchasing a firearm for a time fixed in the order."); N.C. Gen. Stat. Ann. 50B-3.1(a) (West 2013) ("Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors: (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons. (2) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons. (3) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons. (4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.").

North Dakota: N.D. Cent. Code Ann. § 12.1-31.2-02(2) (West 2013) ("If the court has probable cause to believe that the individual charged or arrested [for a domestic violence offense] is likely to use, display, or threaten to use a firearm or dangerous weapon as defined in section 12.1-01-04 in any further act of violence, the court shall require that the individual surrender for safekeeping any firearm or specified dangerous weapon in or subject to the individual's immediate possession or control, to the sheriff of the county or chief of police of the city in

which the individual resides."); N.D. Cent. Code Ann. § 14-07.1-02(4) (West 2013) ("Upon a showing of actual or imminent domestic violence, the court may enter a protection order after due notice and full hearing. The relief provided by the court may include any or all of the following: * * * (g) Requiring the respondent to surrender for safekeeping any firearm or other specified dangerous weapon, as defined in section 12.1-01-04, in the respondent's immediate possession or control or subject to the respondent's immediate control, if the court has probable cause to believe that the respondent is likely to use, display, or threaten to use the firearm or other dangerous weapon in any further acts of violence."); N.D. Cent. Code Ann. § 14-07.1-03(2) (West 2013) ("An ex parte temporary protection order may include: * * * (d) Requiring the respondent to surrender for safekeeping any firearm or other specified dangerous weapon, as defined in section 12.1-01-04, in the respondent's immediate possession or control or subject to the respondent's immediate control, if the court has probable cause to believe that the respondent is likely to use, display, or threaten to use the firearm or other dangerous weapon in any further acts of violence.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 6105(a.1)(2), (c)(6) (West 2013) (prohibiting those who are "the subject of an active protection from an abuse order" from possessing firearms); 23 Pa. Cons. Stat. Ann. § 6107(b)(3) (West 2013) (permitting the court to require relinquishing of firearms, weapons, or ammunition based on signs of domestic abuse); 23 Pa. Cons. Stat. Ann. § 6108(a) (West 2013) ("The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include: * * * (7) Ordering the de-

fendant to temporarily relinquish to the sheriff the defendant's other weapons and ammunition which have been used or been threatened to be used in an incident of abuse against the plaintiff or the minor children and the defendant's firearms and prohibiting the defendant from acquiring or possessing any firearm for the duration of the order * * *.").

Rhode Island: R.I. Gen. Laws Ann. § 15-15-3(a), (West 2013) ("A person suffering from domestic abuse may file a complaint in the family court requesting any order which will protect and support her or him from abuse including, but not limited, to the following: * * * (5) After notice to the respondent and a hearing, the court in addition to any other restrictions, may order the defendant to surrender physical possession of all firearms in his or her possession, care, custody or control."); R.I. Gen. Laws Ann. § 15-15-3(d), (West 2013) ("If the defendant is present in court at a duly noticed hearing, the court may order the defendant to physically surrender any firearm in that person's immediate possession or control, or subject to that person's immediate physical possession or control, within twenty-four (24) hours of the order * * *.").

South Dakota: S.D. Codified Laws § 25-10-24 (2013) ("The court may require the defendant to surrender any dangerous weapon in his possession to local law enforcement.").

Tennessee: Tenn. Code Ann. § 39-13-113(h)(1) (West 2013) ("It is an offense and a violation of an order of protection for a person to knowingly possess a firearm while an order of protection that fully complies with 18 U.S.C. § 922(g)(8) is entered against that person and in effect, or any successive order of protection containing the language of § 36-3-606(g)

and that fully complies with 18 U.S.C. § 922(g)(8) is entered against that person and in effect.").

Texas: Tex. Fam. Code Ann. § 85.022(b), (West 2013) ("In a protective order, the court may prohibit the person found to have committed family violence from: * * * (6) possessing a firearm * * *."); Tex. Fam. Code Ann. § 85.022(b), (West 2013) ("In a protective order, the court shall suspend a license to carry a concealed handgun issued under Subchapter H, Chapter 411, Government Code, that is held by a person found to have committed family violence."); Tex. Code Crim. Proc. Ann. art. 17.292(c) (West 2013) ("The magistrate in the order for emergency protection may prohibit the arrested party from: * * * (4) possessing a firearm, unless the person is a peace officer, as defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision.").

Utah: Utah Code Ann. § 78B-7-106(2)(d) (West 2013) ("A court may grant the following relief without notice in an order for protection or a modification issued ex parte: * * * upon finding that the respondent's use or possession of a weapon may pose a serious threat of harm to the petitioner, prohibit the respondent from purchasing, using, or possessing a firearm or other weapon specified by the court.").

Virginia: Va. Code Ann. § 18.2-308.1:4 (West 2013) ("It is unlawful for any person who is subject to (i) a protective order entered pursuant to § 16.1-253.1, 16.1-253.4, 16.1-278.2, 16.1-279.1, 19.2-152.8, 19.2-152.9, or 19.2-152.10; (ii) an order issued pursuant to subsection B of § 20-103; (iii) an order entered pursuant to subsection E of § 18.2-60.3; (iv) a preliminary protective order entered pursuant to subsection

F of § 16.1-253 where a petition alleging abuse or neglect has been filed; or (v) an order issued by a tribunal of another state, the United States or any of its territories, possessions or commonwealths, or the District of Columbia pursuant to a statute that is substantially similar to those cited in clauses (i), (ii), (iii), or (iv) to purchase or transport any firearm while the order is in effect.").

Washington: Wash. Rev. Code Ann. § 9.41.800(1) (West 2013) ("Any court * * * shall, upon a showing by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040 (a) Require the party to surrender any firearm or other dangerous weapon; (b) Require the party to surrender any concealed pistol license issued under RCW 9.41.070; (c) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon; (d) Prohibit the party from obtaining or possessing a concealed pistol license.").

West Virginia: W. Va. Code Ann. § 48-27-403(a) (West 2013) ("If the magistrate court determines to enter an emergency protective order, the order shall prohibit the respondent from possessing firearms."); W. Va. Code Ann. § 48-27-502(b) (West 2013) ('The protective order must prohibit the respondent from possessing any firearm or ammunition."); W. Va. Code Ann. § 61-7-7(a) (West 2013) ("[N]o person shall possess a firearm * * * who: * * * (7) [i]s subject to a domestic violence protective order * * *.").

Wisconsin: Wis. Stat. Ann. § 813.12(4m)(2) (West 2013) ("An injunction issued under sub. (4) shall * * * require the respondent to surrender any

firearms that he or she owns or has in his or her possession to the sheriff of the county in which the action under this section was commenced, to the sheriff of the county in which the respondent resides or to another person designated by the respondent and approved by the judge or circuit court commissioner."); Wis. Stat. Ann. § 941.29(2)(d) (West 2013) ("A person specified in sub. (1) is guilty of a Class G felony if he or she * * * possesses a firearm while subject to the court order * * *."); Wis. Stat. Ann. § 941.29(2)(e) (West 2013) ("A person specified in sub. (1) is guilty of a Class G felony if he or she * * * possesses a firearm while the injunction, as specified in sub. (1)(f), is in effect.").

APPENDIX C

STATE LAWS THAT PERMIT POLICE OFFICERS TO TEMPORARILY CONFISCATE FIREARMS RECOVERED AT THE SCENE OF A DOMESTIC VIOLENCE INCIDENT

Alaska: Alaska Stat. Ann. § 18.65.515(b) (West 2013) ("If a peace officer investigating a crime involving domestic violence determines that it is necessary to protect the victim or the victim's family from domestic violence or to protect the officer or the public during the investigation, the officer may (1) seize a deadly weapon in plain view of the officer, and (2) if a deadly weapon was actually possessed during or used in the domestic violence, seize all deadly weapons owned, used, possessed, or within the control of the alleged perpetrator. If the weapon is not needed as evidence in a criminal case, the law enforcement agency having custody of the weapon, within 24 hours of making the determination that the weapon is not needed as evidence in a criminal case, shall make the weapon available for pickup by the owner of the weapon during regular business hours.")

Arizona: Ariz. Rev. Stat. Ann. § 13-3601(C) (2013) ("A peace officer may question the persons who are present to determine if a firearm is present on the premises. On learning or observing that a firearm is present on the premises, the peace officer may temporarily seize the firearm if the firearm is in plain view or was found pursuant to a consent to search and if the officer reasonably believes that the firearm would expose the victim or another person in the household to a risk of serious bodily injury or death.").

Connecticut: Conn. Gen. Stat. Ann. § 46b-38b(a) (West 2013) ("Whenever a peace officer determines that a family violence crime has been committed, such officer may seize any firearm or electronic defense weapon, as defined in section 53a-3, or ammunition at the location where the crime is alleged to have been committed that is in the possession of any person arrested for the commission of such crime or suspected of its commission or that is in plain view. Not later than seven days after any such seizure, the law enforcement agency shall return such firearm, electronic defense weapon or ammunition in its original condition to the rightful owner thereof unless such person is ineligible to possess such firearm, electronic defense weapon or ammunition or unless otherwise ordered by the court.").

Hawaii: Haw. Rev. Stat. § 134-7.5(a) (West 2013) ("Any police officer who has reasonable grounds to believe that a person has recently assaulted or threatened to assault a family or household member may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of the offense. The police officer may seize any firearms or ammunition that are in plain view of the officer or were discovered pursuant to a consensual search, as necessary for the protection of the officer or any family or household member. Firearms seized under this section shall be taken to the appropriate county police department for safekeeping or as evidence."); Haw. Rev. Stat. § 709-906(4)(f) (West 2013) ("Any police officer, with or without a warrant, may take the following course of action where the officer has reasonable grounds to believe that there was physical abuse or harm inflicted by one person upon a family or household member, regardless of

whether the physical abuse or harm occurred in the officer's presence: * * * The police officer shall seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.")

Illinois: 725 Ill. Comp. Stat. Ann. 5/112A-30(a)(2) (West 2013) ("Whenever a law enforcement officer has reason to believe that a person has been abused by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, including: * * * If there is probable cause to believe that particular weapons were used to commit the incident of abuse, subject to constitutional limitations, seizing and taking inventory of the weapons * * *."); 750 Ill. Comp. Stat. Ann. 60/304(a)(2) (West 2013) ("Whenever a law enforcement officer has reason to believe that a person has been abused, neglected, or exploited by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, neglect, or exploitation, including: * * * If there is probable cause to believe that particular weapons were used to commit the incident of abuse, subject to constitutional limitations, seizing and taking inventory of the weapons * * *.").

Indiana: Ind. Code Ann. § 35-33-1-1.5(b) (West 2013) ("A law enforcement officer may confiscate and remove a firearm, ammunition, or a deadly weapon from the scene if the law enforcement officer has: (1) probable cause to believe that a crime involving domestic or family violence has occurred; (2) a reasonable belief that the firearm, ammunition, or deadly weapon: (A) exposes the victim to an immediate risk of serious bodily injury; or (B) was an instrumentali-

ty of the crime involving domestic or family violence; and (3) observed the firearm, ammunition, or deadly weapon at the scene during the response.").

Maryland: Md. Code Ann., Fam. Law § 4-511(a) (West 2013) ("When responding to the scene of an alleged act of domestic violence, as described in this subtitle, a law enforcement officer may remove a firearm from the scene if: (1) the law enforcement officer has probable cause to believe that an act of domestic violence has occurred; and (2) the law enforcement officer has observed the firearm on the scene during the response.").

Montana: Mont. Code Ann. § 46-6-603(1) (West 2013) ("A peace officer who responds to a call relating to partner or family member assault shall seize the weapon used or threatened to be used in the alleged assault.").

Nebraska: Neb. Rev. Stat. Ann. § 29-440(1) (West 2013) ("Incident to an arrest under section 28-323 [relating to domestic assault], a peace officer: (a) Shall seize all weapons that are alleged to have been involved or threatened to be used; and (b) May seize any firearm and ammunition in the plain view of the officer or that is discovered pursuant to a search authorized or consented to by the person being searched or in charge of the premises being searched, as necessary for the protection of the officer or any other person.").

New Hampshire: N.H. Rev. Stat. § 173-B:10(I) (2013) ("Whenever any peace officer has probable cause to believe that a person has been abused, as defined in RSA 173-B:1, that officer shall use all means within reason to prevent further abuse including, but not limited to: (a) Confiscating any dead-

ly weapons involved in the alleged domestic abuse and any firearms and ammunition in the defendant's control, ownership, or possession.").

New Jersey: N.J. Stat. Ann. § 2C:25-21(d)(1)(b) (West 2013) ("In addition to a law enforcement officer's authority to seize any weapon that is contraband, evidence or an instrumentality of crime, a law enforcement officer who has probable cause to believe that an act of domestic violence has been committed shall: * * * upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury. If a law enforcement officer seizes any firearm pursuant to this paragraph, the officer shall also seize any firearm purchaser identification card or permit to purchase a handgun issued to the person accused of the act of domestic violence.").

Ohio: Ohio Rev. Code Ann. § 2935.03(B)(3)(h) (West 2013) ("If a peace officer described in division (A) of this section responds to a report of an alleged incident of the offense of domestic violence or an alleged incident of the offense of violating a protection order and if the circumstances of the incident involved the use or threatened use of a deadly weapon or any person involved in the incident brandished a deadly weapon during or in relation to the incident, the deadly weapon that was used, threatened to be used, or brandished constitutes contraband, and, to the extent possible, the officer shall seize the deadly weapon as contraband pursuant to Chapter 2981. [*sic*] of the Revised Code.").

Oklahoma: Okla. Stat. Ann. tit. 22, § 60.8(A) (West 2013) ("Each peace officer of this state shall seize any weapon or instrument when such officer

has probable cause to believe such weapon or instrument has been used to commit an act of domestic abuse as defined by Section 60.1 of this title, provided an arrest is made, if possible, at the same time.").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 2711(a) (West 2013) ("General rule.--A police officer shall have the same right of arrest without a warrant as in a felony whenever he has probable cause to believe the defendant has violated section 2504 (relating to involuntary manslaughter), 2701 (relating to simple assault), 2702(a)(3), (4) and (5) (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2706 (relating to terroristic threats) or 2709.1 (relating to stalking) against a family or household member although the offense did not take place in the presence of the police officer."); 18 Pa. Cons. Stat. Ann. § 2711(b) (West 2013) ("Seizure of weapons.--The arresting police officer shall seize all weapons used by the defendant in the commission of the alleged offense.")

Tennessee: Tenn. Code Ann. § 36-3-620(a)(1) (West 2013) ("If a law enforcement officer has probable cause to believe that a criminal offense involving domestic abuse against a victim, as defined in § 36-3-601, has occurred, the officer shall seize all weapons that are alleged to have been used by the abuser or threatened to be used by the abuser in the commission of a crime.").

Utah: Utah Code Ann. § 77-36-2.1(1)(b) (West 2013) ("A law enforcement officer who responds to an allegation of domestic violence shall use all reasonable means to protect the victim and prevent further violence, including: * * * confiscating the weapon or weapons involved in the alleged domestic violence * * *.").

West Virginia: W. Va. Code Ann. § 48-27-1002(e) (West 2013) ("Whenever any person is arrested pursuant to the provisions of this article or for a violation of an order issued pursuant to section five hundred nine or subsections (b) and (c), of section six hundred eight, article five of this chapter the arresting officer, subject to the requirements of the Constitutions of this state and of the United States: (1) Shall seize all weapons that are alleged to have been involved or threatened to be used in the commission of domestic violence; (2) May seize a weapon that is in plain view of the officer or was discovered pursuant to a consensual search, as necessary for the protection of the officer or other persons; and (3) May seize all weapons that are possessed in violation of a valid protective order.").