No. 12-1371

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,
v.
JAMES ALVIN CASTLEMAN, *Respondent*.

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

Brief *Amicus Curiae* of
Gun Owners Foundation,
Gun Owners of America, Inc.,
U.S. Justice Foundation, and
Conservative Legal Defense and Education
Fund in Support of Respondent

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*

December 23, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE TERM "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" AS USED IN 18 U.S.C. SECTION 921(A)(33)(A)(II) HAS NO COMMON-LAW ANALOG 4

A. The Text Does Not Support a Common-Law Meaning 4

B. The Legislative Record Does Not Support a Common-Law Meaning 8

C. The ATF Regulations Do Not Establish a Common-Law Meaning 11

II. IT IS IRRELEVANT WHETHER, AT THE TIME THAT THE LAUTENBERG AMENDMENT WAS ENACTED, THERE WERE STATE MISDEMEANOR STATUTES THAT HAD AS AN ELEMENT THE USE OR ATTEMPTED USE OF PHYSICAL FORCE 14

A. Congress's Intent is Determined by the Statutory Text, Not by Statements of Its Individual Members 15

B. Adhering to the Statutory Language Defining an MCDV Does Not "Render Section 922(g)(9) a Practical Nullity" As the Government Argues 18

III. IF SECTION 921(A)(33)(A)(II) WERE TO BE INTERPRETED AS THE GOVERNMENT HAS ARGUED, IT WOULD PLACE THE CONSTITUTIONALITY OF SECTION 922(G)(9) IN SERIOUS DOUBT 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CONSTITUTION
Amendment II 3, 4, 23

STATUTES
Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 19
NICS Improvement Amendment Act of 2007, Pub. L. 110-180, 121 Stat. 2560 . . . . 13, 14
18 U.S.C. § 921(a)(33)(A)(i) 18, 19
18 U.S.C. § 921(a)(33)(A)(ii) . . . . 2, *passim*
18 U.S.C. § 922(g)(9) . . . . 15, *passim*
18 U.S.C. § 924(a)(2) 21
18 U.S.C. § 924(e)(2)(B)(i) 5, 6

CASES
Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427 (1932) 6
District of Columbia v. Heller, 554 U.S. 570 (2008) 3, 21, 22
Mitchell v. Great Works Milling & Mfg. Co., 17 F.Cas. 496 (C.C.D. Me. 1843) 11
New York v. United States, 505 U.S. 144 (1992) . 19
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 17
United States v. Hayes, 555 U.S. 415 (2009) . . . 8, 9
United States v. Morrison, 529 U.S. 598 (2000) . 19
United States v. Smith, 964 F. Supp. 286 (N.D. Iowa 1997) 7

MISCELLANEOUS

142 Cong. Rec. S. 11,872, 11,878 (Sept. 30, 1996) 10, 15, 16
142 Cong. Rec. 26,675 (1996) 10
Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (5th ed., Little, Brown: 1883) . 5
K. Fredheim, "Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. §922(g)(9), *19 Pace L. Rev. 445* (1999) 6
Georgetown University Law Center, The Writing Center, "Parentheticals" (2011) 12
T. J. Halstead, "Firearms Prohibitions and Domestic Violence Convictions: The Lautenberg Amendment" (CRS: October 1, 2001) 17
O.W. Holmes, *Collected Legal Papers* (1920) 17
A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (West: 2012) 8, 11, 17, 22

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc. is a nonprofit social welfare organization, exempt from federal income tax under IRC section 501(c)(4).

The *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the Second Amendment and the individual right to acquire, own, and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and in other federal courts.

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

At issue in this case is the meaning of "use or threatened use of physical force" as that phrase defines "misdemeanor crime of domestic violence" in 18 U.S.C. Section 921(a)(33)(A)(ii). The court of appeals below found "physical force" to require proof of violent force. The Government contends that the phrase is nothing more than the adoption of a common-law meaning of assault and battery. This would include any uninvited offensive touching or a slight shove or push. To reach this conclusion, the Government has excised "physical" from the statute, leaving only "force," upon which it then has put its common law gloss. By erasing "physical" from the statute the Government has violated the settled canon of statutory interpretation that every word must be rendered "operative," that none be "idle and nugatory."

In an effort to override this rule of construction, the Government cherry picks floor statements from an admittedly "limited drafting history." That effort should be rejected. First, it violates the canon that the statutory words rather than statements of individual legislators determine the legislative purpose. Second, there is nothing even in the quoted statements that supports the adoption of a common law meaning.

In a further effort to evade the plain meaning of "physical force," the Government maintains that Congress has acquiesced to this common-law meaning, because ATF issued a rule in which it parenthetically defined misdemeanor crime of domestic violence as equivalent to an assault and battery. But the

Government has failed to produced any evidence or reason for this interpretation. Moreover, Congress expressly relied on the statutory definition, not the administrative interpretation as recently as 2008, when it enacted the NICS Improvement Act of 2007.

The Government also claims that an MCDV must include the common-law meaning of an assault and battery must be injected because otherwise, at the time of enactment, there were very few states whose statutes would qualify as MCDVs. The Government insists that its common-law theory is necessary lest the MCDV ban become a "practical nullity." This claim is baseless.

By its own terms, the MCDV ban does not operate automatically upon passage, but is contingent upon a conviction under a state misdemeanor statute that each state is free to enact — or not to enact — into law. There is nothing in Section 921(a)(33)(A)(ii) that mandates there be such a law. To the contrary, the MCDV ban was enacted by Congress to aid the states, not to coerce them, as domestic relations is a subject that quintessentially belongs to the States under the Tenth Amendment.

If "physical force" is given the common-law meaning urged by the Government, it would put in jeopardy the constitutional right of "all Americans" to keep and bear arms for the defense of self, family and home, as secured by the Second Amendment to the Constitution. District of Columbia v. Heller, 554 U.S. 570, 581 (2008). According to this Court's opinion in Heller, the right of defense of hearth and home by

force of arms lies at the very core of this right. Yet, the Government has argued in favor of an interpretation that would deprive a citizen of his Second Amendment rights when he has been convicted only of a minor offense, such as an assault or battery by an offensive touching or a slight push or shove. Applying the constitutional-doubt canon of interpretation, the words "physical force" ought not be loosely handled in this way. Adopting the Government's position would raise serious constitutional concerns, and should this Court be inclined in that direction, it should order further briefing on the Second Amendment issues that would be raised.

ARGUMENT

I. THE TERM "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" AS USED IN 18 U.S.C. SECTION 921(a)(33)(A)(ii) HAS NO COMMON-LAW ANALOG.

A. The Text Does Not Support a Common-Law Meaning.

A "misdemeanor crime of domestic violence" ("MCDV") "has, as an element, the use or attempted use of physical force." Throughout its opening brief, the Government labors mightily to convince this Court that this element is satisfied by any misdemeanor statute or ordinance that comports with the common law definition of assault and battery. *See* Brief for the United States ("U.S. Br."), at 13-47. In order to reach this conclusion, the Government reads 18 U.S.C.

Section 921(a)(33)(A)(ii) as if it requires the predicate misdemeanor statute to require any kind of "force" — not "physical force." *See id.* at 11, 15.

The Government rejects the ordinary meaning of "physical force" in favor of the "'more specialized legal usage' ... from common-law battery" where "unlawful force" is understood as embracing "'even the slightest offensive touching.'" *Id.* at 14. Because the common law does not "'draw the line between different degrees of violence,'" the Government insists that the MCDV "force" requirement must "'totally prohibit[] the first and lowest stage of it.'" *Id.* To reach this conclusion, the Government simply disregards the fact that the predicate misdemeanor, as defined by the plain text of 18 U.S.C. Section 921(a)(33)(A)(ii), explicitly does what the common law of assault and battery does not — it distinguishes the degree or quantum of force, by requiring that the element of the predicate misdemeanor must include "physical force," not just "force." In effect, the Government would strip the word "physical" from the statute, leaving only the word "force," in violation of the interpretative canon that "favor[s] a construction which will render every word operative, rather than one which may make some idle and nugatory." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union, 71 (5th ed., Little, Brown: 1883).

The Government repeats this error in its effort to persuade this Court that the meaning of "physical force," as that phrase appears in 18 U.S.C. Section 924(e)(2)(B)(i), is different from the "physical force"

language in 18 U.S.C. Section 921(a)(33)(A)(ii). *See* U.S. Br. at 15-18. Referring to both statutes as if they required only "force," not "physical force," the Government conveniently disregards the parallel language on the ground that Section 924(e)(2)(B)(i) applies to a "violent felony," whereas "[t]he 'specialized legal usage' of 'force' from common-law misdemeanor battery comfortably 'fit[s]' when defining the term 'misdemeanor crime of domestic violence.'" *Id.* at 18. In an effort to overcome the presumption that "identical words used in different parts of the same act are intended to have the same meaning,"[2] the Government attempts to denigrate the "noun 'violence'" as it appears in 18 U.S.C. Section 921(a)(33)(A). *Id.* at 19. Noting that Section 921(a)(33)(A) describes a "domestic ... misdemeanor," in contrast with 18 U.S.C. Section 924(e)(2)(B) which describes a "violent felony," the Government argues that "Congress could have just as easily chosen to prohibit the possession of firearms by those convicted of 'misdemeanor crime[s] of domestic abuse,'" rather than domestic violence. *See* U.S. Br. at 19. But Congress never chose that route. The MCDV ban was specifically devised to close an alleged "loophole in the law that essentially allowed a felon who 'got lucky' and had his [violent domestic] offense reduced to a misdemeanor...." K. Fredheim, "Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. §922(g)(9), *19 Pace L. Rev. 445, 501* (1999). As the United States District Court for the Northern

---

[2] *See* Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).

District of Iowa observed before the enactment of the Lautenberg Amendment:

> [u]nder current Federal law, it is illegal for persons convicted of felonies to possess firearms, yet, many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies. [A]fter a plea bargain, they are, at most, convicted of a misdemeanor. In fact, most of those who commit family violence are never even prosecuted. But when they are, one-third of the cases that would be considered felonies, if committed by strangers, are instead filed as misdemeanors. [United States v. Smith, 964 F. Supp. 286, 292 (N.D. Iowa 1997).]

Inexplicably, after claiming that the MCDV was designed to "'close this dangerous loophole,'" the Government argues that the MCDV definition was crafted not only to include persons whose actions warranted a felony conviction, but also to persons convicted of an "intentional offensive touching." U.S. Br. at 35-36, 38. To reach this conclusion, the Government previously repudiated what it considered to be "[a] narrow definition of 'physical force' [because it] enhance[d] the punishment of only the most violent criminals," which is purportedly "out of place in a statute designed to prevent harms by restricting a wider group of untrustworthy persons from possessing firearms." *Id.* at 21. Unashamedly, the Government would have this Court misuse its judicial power to endorse the Government's extension of the MCDV ban, instead of faithfully applying the limiting words

employed by Congress in the governing statute. This Court should decline the Government's invitation to search for a Congressional purpose that is not "derived from the [statutory] text." *See* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, p. 56 (West: 2012).

B. The Legislative Record Does Not Support a Common-Law Meaning.

The Government has contended that even though "Section 922(g)(9)'s 'drafting history' is admittedly limited, ... it reveals a general understanding that domestic abusers were often prosecuted under generic assault and battery laws — and that Congress intended such laws to qualify as 'misdemeanor crime[s] of domestic violence' under the newly enacted statutory provision." U.S. Br. at 44. Then, quoting from this Court's "explanation" in United States v. Hayes,[3] the Government has recounted that "Senator Frank Lautenberg, the sponsor of the provision, observed in a floor statement that '[c]onvictions for domestic violence-related crimes often are for crimes, *such as assault*, that are not explicitly identified as related to domestic violence'" *Id.* at 44-45 (italics original). Relying, in part, on this excerpt from the legislative history, the Government has claimed confirmation that "only the common-law meaning of 'force' can effectuate Congress's intent." *Id.* at 44. The Government's contention is misleading and erroneous.

---

[3] 555 U.S. 415 (2009).

The Government's argument is misleading because the Hayes Court relied upon the Lautenberg quotation solely for the purpose of reinforcing its conclusion that "a domestic relationship between aggressor and victim often would not be a designated element of the predicate offense." Hayes, 555 U.S. at 428. Indeed, of the four distinct references in Hayes to the legislative record, three (including the one referred to in the Government brief) related to the issue as to whether "the domestic relationship" was required to be an "element of the offense." *Id.* at 428-29. That is decidedly not an issue in this case. Instead, there is no question that the "use or threatened use of physical force" is a required element of a MCDV. And the question here concerns the meaning of that requirement. On that point, the "drafting history" is somewhat more illuminating, as the Hayes opinion indicates:

> Congress did revise the language of §921(a)(33)(A) to spell out the use-of-force requirement. The proposed legislation initially described the predicate domestic-violence offense as a "crime of violence".... The final version replaced the unelaborated phrase "crime of violence" with the phrase "has, as an element, the use or threatened use of physical force, or the threatened use of a deadly weapon." [Hayes, 555 U.S. at 429.]

As Castleman explains in his response brief, this change was calculated "to narrow the scope of the statute," not broaden it. Brief for Respondent ("Resp. Br."), pp. 22-23. And there is no evidence in the

legislative record that Senator Lautenberg or any other Senate supporter believed that the change incorporated the common-law meaning into the statute. *See id.* While Senator Lautenberg did suggest generally that the "new definition of covered crimes [was] probably broader," he did not explain this assertion. 142 Cong. Rec. 26,675 (1996). Rather, his commentary on the scope of the new ban was dominated by political rhetoric calculated to mask rather than illumine the practical impact that a "more precise" term would have on the actual enforcement of the amendment:

> I would strongly urge law enforcement authorities to thoroughly investigate misdemeanor convictions on an applicant's criminal record to ensure that none involves domestic violence.... After all, for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life or death. [142 Cong. Rec. S. 11,872, 11,878 (Sept. 30, 1996).]

For the Government to suggest that Senator Lautenberg gave voice to a lower threshold of "domestic abuse," such as is contemplated by a simple common-law assault or battery, is simply mistaken.

Moreover, it is altogether problematic to give any weight to floor speeches even by the legislation's sponsor, especially with respect to the meaning of language exacted by others in exchange for their support, as was the case here. *See* U.S. Br. at 19. In any event, there really is no good reason to search for

the intent of Congress in any source but the statute itself:

> [I]t could scarcely be affirmed, that the opinions of a few members ... are to be considered as the judgment of the whole house, or even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute.... [I]n truth, courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true, that the legislature intend precisely what they say, and to the extent which the provisions of the act require, for the purpose of securing their just operation and effect. [Mitchell v. Great Works Milling & Mfg. Co., 17 F.Cas. 496, 498-99 (C.C.D. Me. 1843).]

"What a legislature says in the text of the statute is considered the best evidence of the legislative intent or will." *See* Reading Law at 397. "Even [this Court] gave voice to this view when it said that a statute's language is 'the most reliable evidence of [congressional] intent.'" *Id.*

C. The ATF Regulations Do Not Establish a Common-Law Meaning.

The Government proffers three reasons why the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") regulations establish that the statutory phrase

"use or attempted use of physical force" should be given a common-law meaning. The first reason is just plain wrong; the second is unpersuasive; and the third is insupportable.

First, the Government contends that the ATF "has read Section 921(a)(33)(A) in a manner consistent with Senator Lautenberg's interpretation." U.S. Br. at 45. As demonstrated *supra*, there is nothing in the legislative record confirming that Senator Lautenberg gave the "physical force" phrase a common law meaning. Indeed, nothing that Senator Lautenberg said on the floor of the U.S. Senate even purported to give meaning to the phrase. Rather, the Senator's remarks were limited to factual examples of domestic violence that comport with violent force, not merely offensive contact, the latter of which is the hallmark of a common-law assault and battery.

Second, the Government argues that the ATF established by rulemaking that the MCDV is the equivalent of an "assault and battery." U.S. Br. at 45. Both in the rule promulgated and in the explanation for the rule, the ATF placed "e.g., assault and battery" in parentheses. As a parenthetical expression, the ATF committed what the Georgetown University Law Center has labeled "Parenthetical Pitfall # 1: Parentheticals are a poor substitute for legal analysis." The Writing Center, "Parentheticals," p. 4 (2011). The Law Center states:

> Parentheticals can provide an efficient means of communicating basic information about a source. However parentheticals do not explain

> the relationship of the law to your set of facts as express legal analysis.... [*Id.*]

The ATF rule not only failed to provide any legal analysis demonstrating how "assault and battery" implemented the required physical force element of a MCDV, but also the explanation offered by ATF completely begs the question, making no effort to explain why and how the two were linked.

Third, the Government asserts that "Congress has never ... repudiated the ATF's clear understanding that 'assault and battery' offenses are the quintessential example of the sort of misdemeanor offense that would have, as an element, the use of physical force." U.S. Br. at 46. As Castleman has pointed out in his response, the Government has failed to offer any evidence of acquiescence. Resp. Br. at 24-25.

Indeed, in 2008 Congress passed the NICS Improvement Amendment Act of 2007 ("NICS Act"), in which Congress found that one of the primary delays in NICS background checks was the lack of "automated access to information concerning persons prohibited from possessing or receiving a firearm because of ... misdemeanor convictions for domestic violence." Pub. L. 110-180, 121 Stat. 2560, Sec. 2(5)(B). To remedy this shortfall, Section 102(c)(2) of the NICS Act provided that "[t]he State shall make available to the Attorney General, for use by [NICS], records relevant to a determination of whether a person has been convicted in any court of a [MCDV]." *Id.* at 2566. The states were further mandated to

"provide information specifically describing the offense and the specific section or subsection of the offense for which the defendant has been convicted and the relationship of the defendant to the victim in each case." *Id.* In order to facilitate this transfer of records, the NICS Act affirmed that "[t]he term, 'misdemeanor crime of domestic violence' has the meaning given to the term in section 921(a)(33) of title 18, United States Code." 121 Stat., Section (3) at 2561. *See also id.* at Section 102(b)(C)(vi). Conspicuously missing is any reference to the ATF regulations. Had Congress acquiesced to the ATF common-law gloss on the statutory definition, it would have said so, especially in an Act the purpose of which was to encourage state and local officials to provide more complete and accurate reports of MCDV convictions. The Government's suggestion to the contrary is without any evidentiary support. *See* U.S. Br. at 46.

II. IT IS IRRELEVANT WHETHER, AT THE TIME THAT THE LAUTENBERG AMENDMENT WAS ENACTED, THERE WERE STATE MISDEMEANOR STATUTES THAT HAD AS AN ELEMENT THE USE OR ATTEMPTED USE OF PHYSICAL FORCE.

The Government urges this Court to disregard the statutory language that an MCDV must have as an element the use or attempted use of physical force, and to substitute therefor the requirement that the predicate misdemeanor need be only a generic common law assault and battery. The Government promotes such a reading lest adherence to the statutory text "thwart [the] undisputed purpose" of Congress to take

firearms away from men who beat their wives. *See* U.S. Br. at 46-47. Indeed, the Government has devoted ten pages of its 47-page brief to an effort to convince this Court that the statutory language must be set aside because "it undermines the effective application of Section 922(g)(9) in a manner that Congress could not have intended." *Id.* at 35. The statutory language, the Government asserts, "cannot be the law," because it "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.'" *Id.* at 40. The Government's argument is baseless.

A. Congress's Intent is Determined by the Statutory Text, Not by Statements of Its Individual Members.

The Government's argument that, by passage of the Lautenberg Amendment, Congress intended to "keep firearms out of the hands of domestic abusers ... who engage in serious spousal or child abuse [but] ultimately are not charged with or convicted of felonies,"[4] is based not on law, but rests entirely upon statements made on the Senate floor by individual Senators. *See* U.S. Br. at 35-36, 44-47. None of those statements purports to be a carefully crafted explanation of the meaning of the statutory text. Rather, made without regard for the statutory language, they are highly emotional remarks — triumphal proclamations of victory over "intense opposition from one of the most powerful special

---

[4] U.S. Br. at 36.

interests in American politics."[5] As Senator Lautenberg celebrated in his closing argument on the Senate floor:

> We have overcome one road block after the next, and there were times when I did not think we would make it. But throughout it all, the supporters of this bill have always kept in mind that we were fighting for literally a matter of life and death. That knowledge has helped sustain us and make us that much more determined as we have worked our way through the legislative minefield.
>
> So, in the end, we have a glorious victory, a victory for America's frightened, battered women, a victory for our abused children, a victory of life over death.
>
> I am honored and humbled to have been able to play a part in this legislation. We hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun. That is the way it ought to be. Lord willing, it will be. I yield the floor. [142 Cong. Rec. S. 11,878 (Sept. 30, 1996).]

---

[5] 142 Cong. Rec. S 11,872 (Sept. 30, 1996).

Taking these and other similar remarks out of context, the Government insists that Senator Lautenberg's comments are the expressions of the "concerns" and "wants" of the entire Congress, and that "applying Section 922(g)(9) to cover the classic assault and battery statutes that were and are commonly used to prosecute spousal abuse and domestic violence would fill the gap that Congress intended to address." U.S. Br. at 46-47.

But the intent of Congress is not found in the hearts and minds of individual legislators, even of the legislator after whom the MCDV statute is popularly named.[6] Rather, that intent is to be found in "the meaning of the statutory text": "To be 'a government of laws, not of men,' is to be governed by what the laws *say*, and not by what the people who drafted the laws intended." *See* Reading Law at 375. As Justice Oliver Wendell Holmes wrote, "[w]e do not inquire what the legislature meant; we ask only what the statute means." O.W. Holmes, "The Theory of Interpretation," in *Collected Legal Papers* 203, 207 (1920). This canon is especially applicable to "[f]loor statements," even if made while "the [legislative] chamber was full, [for] there is no assurance that everyone present listened, much less agreed." Reading Law at 376. Further, and directly in point here, as Justice Jackson once observed, "political controversies which are quite proper in the enactment of a bill ... should have no place in its interpretation." Schwegmann Bros. v.

---

[6] *See, e.g.,* T. J. Halstead, "Firearms Prohibitions and Domestic Violence Convictions: The Lautenberg Amendment" (CRS: October 1, 2001).

Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

B. Adhering to the Statutory Language Defining an MCDV Does Not "Render Section 922(g)(9) a Practical Nullity" As the Government Argues.

The Government contends that to construe Section 921(a)(33)(A)(ii) to require a predicate misdemeanor to have, as an element, "'violent' physical force," as the court of appeals required,[7] "would render Section 922(g)(9) a virtual 'dead letter' ... leav[ing] the provision with little application...." *See* U.S. Br. at 40. This is nonsense.

First, even if, at the time of passage of the Lautenberg Amendment, no state had a misdemeanor statute that qualified under Section 921(a)(33)(A)(ii), Section 922(g)(9) would not have been a "practical nullity" or "dead letter." There is nothing in the United States Code that prevented then, or prevents now, a state from enacting into a law a misdemeanor offense that meets Section 921(a)(33)(A)(ii), and thus to "close the loophole." Section 921(a)(33)(A)(i) contemplates that state legislatures are free to choose whether to enact such a law. Indeed, it would be outside the scope of its constitutional authority for Congress to require a state legislature to enact into law a misdemeanor offense that meets the federal

---

[7] U.S. Br. at 38.

definition. *See* New York v. United States, 505 U.S. 144, 188 (1992).

To be sure, Section 921(a)(33)(A)(i) contemplates[8] that a Congressionally enacted misdemeanor statute could serve as a predicate misdemeanor (such as a statute applying to the District of Columbia, a federal enclave, etc.), but it certainly does not contemplate that such a law would prohibit acts of domestic violence nationwide. Indeed, if Congress did pass such a statute federalizing prohibitions against domestic violence, it would undoubtedly be found to be engaged in an unconstitutional exercise of the State's police power over domestic matters, reserved to the States by the Tenth Amendment. *See* United States v. Morrison, 529 U.S. 598, 612-19 (2000).

Second, by enacting Section 922(g)(9) as an amendment to the Gun Control Act of 1968, Congress was adding to the list of persons ineligible to possess a firearm in accordance with the statutorily stated purpose of the 1968 Act, namely, "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence," not "to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter." *See* Pub. L. 90-618, 82 Stat. 1213, 1126 (Sec. 101 and 102 (§927)).

---

[8] 18 U.S.C. Section 921(a)(33)(A)(i) defines "the term 'misdemeanor crime of domestic violence' [as] an offense that— is a misdemeanor under **Federal**, State, or Tribal law..." (emphasis added).

Third, while Senator Lautenberg and his fellow senators hailed the passage of the Lautenberg Amendment as having closed a "'dangerous loophole' by keeping firearms out of the hands of domestic abusers,"[9] it would be foolhardy to assume that the passage would have any such immediate effect. It would also be presumptuous to assume that the senators expected the new law to apply to past convictions under misdemeanor statutes, the elements of which did not meet the qualifications of Section 921(a)(33)(A)(ii). Yet, that appears to be the assumption of the Government in its brief. *See* U.S. Br. at 36-37. Even if the Lautenberg Amendment had a limited retroactive effect, it would not render it a "practical nullity," as the government has claimed. *See* U.S. Br. at 36.

Finally, had Congress meant the ban to have immediate retroactive impact on persons convicted of a misdemeanor of domestic violence in the past it could have adopted a **fact-based** definition of the predicate misdemeanor, requiring proof that the defendant had, in the past, actually used physical force, instead of a **categorical** definition, based on requisite elements of the misdemeanor statute of conviction. Such could have been the case had Congress enacted the original Lautenberg Amendment, describing the predicate misdemeanor as a "crime of violence." But Congress did not enact such a statute. Instead, Congress chose a categorical definition that required the misdemeanor statute of conviction to have "as an element, the use or

---

[9] *See* U.S. Br. at 36.

attempted use of physical force, or the threat of a deadly weapon." In so doing, Congress limited the immediate impact of the scope of the new law. Enforcing that limitation does not nullify the law, as the Government has contended. Rather, it fulfills the purpose of the law as it is written.

III. IF SECTION 921(a)(33)(A)(ii) WERE TO BE INTERPRETED AS THE GOVERNMENT HAS ARGUED, IT WOULD PLACE THE CONSTITUTIONALITY OF SECTION 922(g)(9) IN SERIOUS DOUBT.

According to the Government, every person convicted of a common law battery by a single offensive touching (*e.g.*, a push, a shove, or even spitting) has been convicted of an MCDV, if the victim is in one of the domestic relationships set forth in Section 921(a)(33)(A)(ii). As a consequence of that conviction, the person would be subject to criminal prosecution punishable by fine and imprisonment up to 10 years if he or she retained possession of a firearm, or thereafter came into possession of a firearm. *See* 18 U.S.C. Sections 922(g)(9) and 924(a)(2). As a further consequence, such person would be denied access to a firearm for self-defense for life.

This Court recently confirmed that every American has the constitutional right to keep and bear arms for the purpose of self-defense. District of Columbia v. Heller, 554 U.S. 570 (2008). Conviction, or threatened prosecution, of a person for violation of Section 922(g)(9) denies that person access to a firearm to defend himself or herself, his or her family, and his or

her home, "where the need for defense of self, family, and property is most acute." *Id.* at 628. If the Government's interpretation of the required MCDV element of "physical force" is given a common-law meaning, requiring no more than an offensive touching, without any proof of any act of violence and without actual use or threatened use of "physical force," the ban would be imposed whenever the victim was a person in a domestic relationship of the person convicted.

There is no doubt that a serious question of constitutionality would be raised by denial of access to a firearm for defense of hearth and home to a person whose misdemeanor conviction — even one arising out of a domestic conflict — was based solely on evidence of a nonviolent act, such as an offensive touch, spitting, or a slight push or shove with no injury. According to the "constitutional-doubt canon," "statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly...." Reading Law at 249. While the Supreme Court may believe that denying a convicted felon access to a firearm is a presumptively constitutional "regulatory measure,"[10] denying such access to a person convicted of a misdemeanor assault and battery as defined by the common law is quite another matter.

Section 921(a)(33)(A)(ii) should be understood according to its terms to avoid an expansive disarming of misdemeanants who have not committed acts of

---

[10] *See* Heller 554 U.S. at 626-27 n.26.

violence. If it is not understood in such a way, the Court should request further briefing on the Second Amendment implications.

CONCLUSION

Under the Government's theory of the case, a misdemeanor crime of domestic violence does not require violence. The opinion of the Sixth Circuit should be affirmed.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Attorney for Amicus Curiae U.S. Justice Foundation

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste.4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

Attorneys for Amici Curiae

**Counsel of Record*
December 23, 2013