

No. 07-608

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RANDY EDWARD HAYES,

Respondent.

*On a Writ of Certiorari
to the United States Court of Appeals
for the Fourth 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. The question presented is whether, to qualify as a “misdemeanor crime of domestic violence” under 18 U.S.C. § 921(a)(33)(A) (2000 & Supp. V 2005), an offense must have as an element a domestic relationship between the offender and the victim.

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STATUTES AND OTHER PROVISIONS INVOLVED

Relevant statutory and regulatory provisions and other material are set forth in the appendices to this brief. App., *infra*, 1a-15a.

STATEMENT OF THE CASE

A. The firearms

Respondent Randy Edward Hayes and his longtime girlfriend, Misty Oldaker, live in Mannington, West Virginia.

In 2003, Ms. Oldaker bought three new .17-caliber Marlin rifles at Wal-Mart to give to their sons, once each became old enough to hunt. R.83 Sentencing Memorandum, p. 3. She later gave one to Mr. Hayes's father, a licensed gun dealer, and replaced it with a new .17-caliber Rossi rifle.

In early 2004 Ms. Oldaker and Mr. Hayes broke up; she moved out and asked for the two Marlin and the Rossi back. *Id.* at 2. Mr. Hayes arranged to return them at the Mannington Police Department so the exchange would be documented, and the handover took place without incident. *Id.* at 2-3. Later that year, the couple reconciled.

After his father died, Mr. Hayes arranged for the sale of the Marlin, still new in its box. J.A. 6, 9, 16; R.83 Defendant's Sentencing Memorandum, at 2. The buyer, Larry Orloff, traded it to a licensed firearms

dealer, who in turn sold it to a woman who gave it to her son as a gift. CA4 J.A. 144-145.

When Mr. Hayes was a boy of 9 or 10 in the mid-1970s, his father gave him a .30-30 Winchester hunting rifle. J.A. 9; CA4 J.A. 147. It never has been used for anything else. CA4 J.A. 186, 169. In 2004 the gun was stored, unloaded, in a case without ammunition beneath Mr. Hayes's bed; he referred to it as an "old rust bucket" and did not know if it still fired. *Id.*

Nothing in the record indicates that any of the rifles ever has been used illegally.

B. Police are sent to Mr. Hayes's house.

In 1994, Mr. Hayes pleaded guilty to a misdemeanor charge of battery under W. Va. Code Ann. § 61-2-9(c), relating to a November 1993 incident in which he struck his then-wife, Maryann Carnes, with his hand during an argument. He was given one year probation. J.A. 6; Pet. App. 2a; App. 6a. They later divorced.

On the evening of July 24, 2004, Mr. Hayes and Ms. Oldaker got into an argument over Mr. Hayes's decision that it was too late for his 11-year-old son to go outside. The boy phoned Ms. Carnes, his mother, around 10:30 p.m. CA4 J.A. 186. Ms. Carnes demanded that Mr. Hayes allow the boy to come to her home but Mr. Hayes refused, since that was contrary to the parenting-time schedule. R.83 Sentencing Memorandum, at 3. The call ended with Ms. Carnes threatening to send police to arrest Mr. Hayes. *Id.*

Ms. Carnes called 911 and reported that Mr. Hayes was threatening Ms. Oldaker with a gun. CA4 J.A. 186. That assertion, which she claimed to have been told by Ms. Oldaker, would later prove to be unfounded. *Id.* at 186-87; *also* J.A. 10. Ms. Carnes's report was the only mention of a gun being involved in the incident. CA4 J.A. 186.

Several deputies responded and found Mr. Hayes on the porch. R. 83, at 3. They asked him if there was a gun inside; he said no and consented to a search. Beneath Mr. Hayes's bed, unloaded and in its case without ammunition, deputies found the old Winchester. CA4 J.A. 186. Mr. Hayes was arrested and charged with misdemeanor domestic battery under W. Va. Code Ann. § 61-2-28(a), and obstruction under W. Va. Code Ann. § 61-5-17(a) for telling officers there was no gun. R.92, Sentencing Hearing DX 1.

Investigators found nothing to corroborate Ms. Carnes's allegation regarding use of a gun. CA4 J.A., 186. Responding deputies testified that the gun was in its case beneath the bed, no ammunition for it was found, and there was no physical evidence it had been used in any way. *Id.* at 186-87.

The domestic-battery charge ultimately was dropped. Mr. Hayes pleaded guilty to misdemeanor obstruction and was sentenced to the eight hours he spent in jail the night of his arrest. Guilty or No Contest Plea in *West Virginia v. Randy Hayes*, Marion County Magistrate's Court Case No. 04-M1171, App. 7a.

C. The United States investigates and charges Mr. Hayes with unlawful firearm possession.

One of the deputies who responded to the 911 call also was involved in Mr. Hayes's 1994 misdemeanor case, and after discovering the Winchester, police contacted the Bureau of Alcohol, Tobacco, Firearms and Explosives. An ATF agent met with deputies early on July 25 and immediately began investigating whether Mr. Hayes had violated the Gun Control Act of 1968, 18 U.S.C. 922(g)(9), which makes it a felony for anyone convicted of a "misdemeanor crime of domestic violence" to possess a firearm. J.A. 6.

ATF's investigation discovered Mr. Hayes's sale of the new rifle to Mr. Orloff and his return of the three new rifles to Ms. Oldaker at the police station. J.A. 5-11; CA4 J.A. 169-70. Mr. Hayes was indicted on three counts of possessing a firearm in violation of § 922(g)(9): Count I arose from the rifle sold to Mr. Orloff; Count II related to the guns returned at the police station, and Count III involved the Winchester given him as a boy. Superseding Indictment, J.A. 1.¹

Mr. Hayes moved to dismiss the superseding indictment, asserting that his 1994 conviction was not a "misdemeanor crime of domestic violence" because W. Va. Code Ann. § 61-2-9(c) does not have as an element, a domestic relationship between the accused and the victim. App. 6a. The district court denied the motion. Pet. App. 33a. Mr. Hayes entered a conditional guilty plea to Count I (possession of the rifle sold to

¹ Various court documents misspell Mr. Orloff's name as "Orloft."

Mr. Orloff), allowing him to appeal the denial of his motion under Fed. R. Crim. P. 11(a)(2). Order Following Plea Hearing, J.A. 12; *also* TR 7/5/05, CA4 J.A. 154. The remaining two counts were dropped.

The Government objected to the application of U.S. Sentencing Guidelines Manual § 2K2.1(b)(2) (2005), which provides for a sentence reduction when the defendant possessed the firearm(s) “solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition....” CA4 J.A. 185. After hearing testimony from Mr. Hayes, Ms. Carnes and two deputies who responded to the 911 call, the court found there was no evidence that Mr. Hayes used a firearm unlawfully, and applied the sporting-purposes reduction. CA4 Sealed J.A. 186-87.

While a violation of § 922(g)(9) is punishable by up to 10 years in prison and a \$250,000 fine, 18 U.S.C. 924(a)(2); 18 U.S.C. 3571(b)(3), the court sentenced Mr. Hayes to five years’ probation, including six months’ home detention with an electronic tether. Judgment, CA4 J.A. 174.

D. The Fourth Circuit directs that the indictment be dismissed.

The Fourth Circuit reversed the denial of Mr. Hayes’s motion, holding that his 1994 conviction was not for a “misdemeanor crime of domestic violence” as defined in 18 U.S.C. 921(a)(33)(A) because W. Va. Code Ann. § 61-2-9(c) has no domestic-relationship element. The court found that the text and structure of § 921(a)(33)(A) require that the predicate offense have

such an element. Pet. App. 5a-9a. It further held that the grammatical rule of the last antecedent supported that interpretation, and that Congress's use of the term "element" did not foreclose requiring both use-of-force and domestic-relationship elements. Pet. App. 9a-15a.

Nothing in the legislative history was inconsistent with that, the court held, noting that other courts improperly had focused only on statements by the bill's original sponsor. Pet. App. 15a-20a. Lastly, it found that even if the statute was ambiguous, the rule of lenity compelled Mr. Hayes's interpretation. Pet. App. 20a-22a. Over a dissenting opinion (Pet. App. 23a-32a), the court remanded for dismissal of the superseding indictment.

The Fourth Circuit denied the Government's petition for rehearing and rehearing *en banc*. Pet. App. 40a.

E. The gun-possession ban of 18 U.S.C. 922(g)(9)

1. Legislation is introduced to ban gun possession by anyone indicted for or convicted of domestic abuse.

In March 1996, New Jersey Sen. Frank Lautenberg introduced a measure to ban firearm possession by "anyone under indictment for, or [who] has been convicted in any court of, any crime involving domestic violence." S. 1632, 104th Cong., 2d Sess. 1 (1996), 142 Cong. Rec. at 5840, App. 5a. The bill defined that predicate offense as:

a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, 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 the spouse, parent, or guardian of the victim under the domestic or family violence law of the jurisdiction in which such a felony or misdemeanor was committed.

Ibid. App. 4a. It was referred to the Senate Judiciary Committee, where it languished for months. (A similar measure in the previous Congress never made it out of committee. S. 1570, 103rd Cong., 1st Sess., (1993); 139 Cong. Rec. at 25,490).

With no hearing scheduled, Sen. Lautenberg in late July 1996 pulled the measure from committee and sought to add it to H.R. 2980, an anti-stalking bill. The Senate sponsor of that bill, Sen. Hutchison of Texas, realized the depth of House opposition to the ban and insisted on several amendments, including removal of its provision prohibiting gun possession merely upon indictment. 142 Cong. Rec. at 19,300-19,301 (statement of Sen. Hutchison); *Id.* at 19,394. After that provision was removed, the ban was joined to the anti-stalking bill and sent to the House. 142 Cong. Rec. at 19,300. It still defined the predicate offense as a “crime involving domestic violence.”

The anti-stalking bill had been “universally supported.” 142 Cong. Rec. at 20,995 (statement of

Sen. Lott). But within a week, opposition to the gun-possession ban in the House brought the combined bill to a standstill. On August 2, Sen. Hutchison lamented that “my bill is dying in the House right now because of the amendment...” 142 Cong. Rec. at 21,435; *see also id.* at 21,438-21,439. Sen. Lautenberg complained about House “extremists” blocking the measure. *Id.* at 21,437-21,438; 22,985. Opposition spilled back into the Senate, where the controversy held up eight judicial nominations, *Id.* at 20,996 (statement of Sen. Lautenberg), and House opponents tried to strip the ban from the anti-stalking bill. *Id.* at 21,436 (statement of Sen. Ford).

With her measure “bogged down,” Sen. Hutchison demanded that the minority leader honor a prior agreement to remove the gun-possession ban. *Id.* at 21,435. Once the two were uncoupled, the anti-stalking measure easily received final legislative approval on September 10, and was signed into law as part of the National Defense Authorization Act for Fiscal Year 1997, Interstate Anti-Stalking Punishment and Prevention Act of 1996, Pub. L. No. 104-201, 110 Stat. 2422 (1996) (codified at 18 U.S.C. 2261, 2261A and 2262).

In early September, Sen. Lautenberg offered the gun-possession ban as an amendment to H.R. 3396, the Defense of Marriage Act, but it was tabled. 142 Cong. Rec. at 21,784.

As the end of September (and fiscal) 1996 neared, six of 13 appropriations bills needed to fund the Government for 1997 still had not passed. 142 Cong. Rec. at 25,814 (statement of Rep. Livingston). Running

out of legislative options, Sen. Lautenberg on September 12 offered his bill as an amendment to H.R. 3756, the \$23.5-billion Treasury and Postal Service appropriations bill. *Id.* at 22,985 (statement of Sen. Lautenberg). It was identical to the version attached to the anti-stalking bill six weeks earlier, including its definition of “crime involving domestic violence,” and the Senate approved its addition 97-2. *Ibid*; *see also id.* at 22,988. The Treasury and Postal Service bill eventually was folded into H.R. 3610, the Omnibus Consolidated Appropriations Act, along with the other remaining appropriations measures. 142 Cong. Rec. at 25,942; 26,045.

When the appropriations package entered conference committee, however, the ban again ran into staunch resistance. 142 Cong. Rec. at 25,001-25,002 (1996) (statement of Sen. Lautenberg). Sen. Lautenberg on September 25 complained that “behind closed doors, the Republican leadership has decided to entirely gut this legislation....the gun lobby is now intruding in the legislative process and emasculating this legislation. The NRA language, apparently being placed in the [conference report] would completely gut the protections in our amendment.” 142 Cong. Rec. at 24,646. Four amendments offered by House conferees attempted to “water down” the bill, he charged, and were “little more than a sham...drafted cleverly by the gun lobby.” *Id.* at 24,647. The following day, Sen. Lautenberg complained again about a continuing “determined effort to gut my proposal....” *Id.* at 25,001. He agreed to one of the proposed amendments; the others were withdrawn. *Id.* at 26,674-26,677.

2. The ban passes, but only after opponents rewrite its central definition on the final weekend of the 104th Congress.

In negotiations with House Republican leaders in the early hours of Saturday, September 28, proponents of the ban agreed to drop the definition of “crime involving domestic violence.” In place of that, which had been part of the proposed legislation since its introduction, the current language of § 921(a)(33)(A) was inserted – re-labeling the predicate offense as a “misdemeanor crime of domestic violence” and defining it in the language giving rise to this dispute:

an offense that—

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

142 Cong. Rec. at 26,045 (App. 1a-2a); *see also id.* at 26,675 (statement of Sen. Lautenberg).² Of critical importance, Saturday, September 28, 1996 marks the first time that language was part of the bill.

The omnibus spending package was filed in both chambers that evening. The conference report accompanying H.R. 3610, H.R. Rep. No. 104-863 (1996), was “about a foot and a half long” and could give one a “double hernia lifting it.” 142 Cong. Rec. at 25,851 (statement of Rep. Obey). The bill moved completely through the House in a little over three hours: it was filed before 7:00 p.m., debate began after 8:30, and by 10:15 it had passed 370-37, one member voting “present.” 1996 House Journal at 2457, 2678; *see also* THOMAS online, “H.R. 3610 – Making appropriations for the Department of Defense for fiscal year ending September 30, 1997, and for other purposes,” <http://www.congress.gov/cgi-bin/bdquery/z?d104:HR03610:@@L&summ2=m&> (1996); 142 Cong. Rec. at 25,874.

The package’s size and the haste in which it had to be considered sparked an outcry. One Representative called it “a case study in institutional failure because of the massive amount of somebody else’s unfinished business that had to be attached to the appropriations legislation.” 142 Cong. Rec. at 25,851 (1996) (statement of Rep. Obey). Another expressed outrage because “no one knows what is in this bill nor who put

² As the Government notes (Br. 3 & n.1), the statute was amended in 2005 to add misdemeanors under tribal law.

it here,” resulting in “proposals which have never been scrutinized.” *Id.* at 25,870 (statement of Rep. LaFalce).

Not one Representative read and analyzed the entire bill before voting began, 142 Cong. Rec. at 25,873 (statement of Rep. Collins), and the gun ban was not discussed in any way during the one-hour House debate. After approving the spending package, the House adjourned for the 104th Congress, and Representatives went home. *Id.* at 25,866 (statement of Rep. Gingrich).

The Senate took up the omnibus appropriations bill on Monday, September 30, the last day to avoid a repeat of the previous October’s Government shutdown. Senators knew that the bill “absolutely must be signed tonight,” 142 Cong. Rec. at 26,614 (statement of Sen. Stevens), and it prompted similar complaints as in the House regarding their inability to review it fully – including its many non-appropriations provisions. *Ibid.* (statement of Sen. Byrd). Several Senators made floor statements, but only Sen. Lautenberg discussed the gun-possession ban. He downplayed the last-minute amendment forced into the measure as immaterial to its substance, saying that it perhaps had even “broadened” the ban. 142 Cong. Rec. at 26,674-26,677.

The Senate approved the package by voice vote and the President signed it into law that day. Treasury Department, Postal Service and General Government Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, 110 Stat. 3009-314; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110

Stat. 3009. Like the rest of the measure, the firearm-possession ban took effect immediately.

SUMMARY OF ARGUMENT

Domestic violence undeniably is a serious problem, one that in 1996 prompted some in Congress to seek to ban firearm possession by anyone convicted of misdemeanor assault against a family member or intimate. But while the original bill would have had the sweeping reach the Government advocates, the statute enacted was the product of legislative compromise, and imposes a ban of more limited scope. Section 922(g)(9) prohibits firearm possession only by those convicted of a misdemeanor containing a domestic-relationship element.

Everyday English usage, punctuation and grammatical rules support the Fourth Circuit's reading of "misdemeanor crime of domestic violence," as does the statute's drafting history. In contrast, the measure's scant legislative history is an extremely dubious indicator of its meaning, and the statement on which the Government and most courts have placed heaviest emphasis was not even made until after the House of Representatives had voted and adjourned.

The Government cannot establish its reading with sufficient clarity to avoid the rule of lenity, and thus the statute should be construed in favor of Mr. Hayes. If not, the Court should remand to allow Mr. Hayes to raise a Second-Amendment challenge in light of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) – review that the Government's own *Amicus Curiae* brief suggests would be appropriate.

ARGUMENT

The statute’s language, structure, history, and real-world effects confirm that it bans firearm possession only where the predicate offense contains a domestic-relationship element.

Section 921(a)(33)(A) as enacted reflects a congressional balancing of the Nation’s longstanding tradition of lawful firearm possession by non-felons, with the growing awareness of the serious problem of domestic violence. The Government’s contrary view takes undue liberties with the statutory language, overemphasizes the floor statement of a single lawmaker, and disregards that the final measure was the result of legislative compromise.

A. The most natural reading of the statute requires a domestic relationship as an element.

1. Common English usage aligns with the Fourth Circuit’s interpretation.

Statutory text is a medium of communication. It conveys society’s collective will, as expressed by legislative representatives, so people will know how they should behave and what consequences will attach to certain actions. 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 45.01, at 5 (7th ed. 2007). Where a statute contains an explicit definition, this Court follows it. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). The Fourth Circuit correctly read § 921(a)(33)(A)’s definition of “misdemeanor crime of domestic violence” to require a

domestic-relationship element in the predicate offense. Pet. App. 4a-15a.

As the court noted, Congress structured § 921(a)(33)(A) as a statement of what is being defined (misdemeanor crime of domestic violence) followed by a parallel list of its two essential attributes. Pet. App. 7a. Clause (i) requires that the predicate offense be a misdemeanor under Federal or State (or, now, tribal) law. Clause (ii), meanwhile, requires that it have

...as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

18 U.S.C. 921(a)(33)(A)(ii) (2000 & Supp. V 2005), App. 1a-2a.

The most natural reading of that text requires both a use-of-force and a domestic-relationship element in the predicate offense. The ordinary speaker of American English would not read clause (ii) by placing a period after “deadly weapon” and cleaving away the rest of the wording, beginning with “committed by....,” as the Government does. That arbitrarily truncates the definition to require only actual or threatened force as an element, and to exclude the remainder of the provision describing the domestic relationship.

No signal within clause (ii) (or anywhere else) alerts the reader that its statement of what is required as an element ends a quarter of the way through, after the fourth of the clause's 13 commas and 20th of its 79 words. Nor is there any indication that, from "committed by" forward, clause (ii) merely lists the types of offender-victim relationships that will elevate an offense into a "misdemeanor crime of domestic violence," regardless of whether that relationship was an element.

Everyday usage compels Mr. Hayes's reading of the statute. *See Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006) (rejecting Government's reading of "felony punishable under the Controlled Substances Act" to include State felonies, since "[r]egular usage points in the other direction").

2. Punctuation and structure confirm that Congress tempered the statute's reach.

Section 921(a)(33)(A)'s punctuation confirms the requirement of a domestic-relationship element. The Fourth Circuit properly deemed significant both Congress's placement of a semicolon at the end of clause (i), and its omission of a semicolon in clause (ii). A semicolon (or hard return) between "deadly weapon" and the "committed by" phrase in clause (ii) would have set off the latter and divided the text to read precisely as the Government suggests it now does, since semicolons "mark a more important break in sentence flow than that marked by a comma." *The Chicago Manual of Style* ¶ 5.89 (14th ed. 1993). Again, this is consistent with how everyday people read, speak, and understand English.

ATF's regulation implementing § 922(g)(9), and an evidentiary rule added to the *Manual for Courts-Martial* in 1999, illustrate this. In its regulation defining "misdemeanor crime of domestic violence," ATF restructured § 921(a)(33)(A)'s language in the exact manner the Fourth Circuit suggested: by using a hard return (and the marker "(3)") to segregate the domestic-relationship language ("committed by...") from the use-of-force component. App. 12a (27 C.F.R. 478.11 (2007); *see also* 63 Fed. Reg. 35,520 (1998). Likewise, Mil. R. Evid. 611(d), addressing remote court-martial testimony by a child, defines "domestic violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by" someone in the same four types of relationships listed in § 921(a)(33)(A)(ii). App. 14a Exec. Order No. 13,140, §2b, 64 Fed. Reg. 55,118 (Oct. 12, 1999) (amending *Manual for Courts-Martial*, pt. III, §6 (1998)).

In both instances, drafters used the copulative conjunction "and" (along with a hard return and "(3)" in the ATF regulation) to sever the domestic-relationship description from the use-of-force component. Either formulation makes plain that a domestic relationship is not an element of the offense, but rather simply an "additional fact." *See The Chicago Manual of Style* ¶ 5.183 (15th ed. 2003). But Congress used neither.³

³ ATF's regulation in fact improperly exceeds the statute's text. Indeed, the Government concedes that ATF criminal regulations generally are unworthy of deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See United States v. Orellana*, 405 F.3d 360, 396 & n.63 (5th Cir. 2005) (*citing*

The Government's dismissal of the Fourth Circuit's citation to punctuation (Br. 16-18) misses the mark, since the court did none of the things the Government's cases decry. It did not rely exclusively on punctuation in its analysis, nor cite it as controlling, nor invoke it before construing the text, nor use it to defeat plain meaning. Rather, the court simply viewed punctuation as affirming the conclusion compelled by the statutory words – a practice even the Government concedes is “useful” as an interpretive guide. Br. 17 (*citing United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979)).

And while the Government urges the Court to disregard Congress's punctuation to reach the “true meaning of the statute” (Br. 18), that malleable interpretive practice has little to recommend it. *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995) (“the proposition that [a] statute...should be liberally construed to achieve its purposes” is the “last redoubt of losing causes”). The Fourth Circuit was spot-on in noting that, had Congress chosen to set apart the phrase “committed by” in a separate clause, the Government's reading would be plausible – but Congress did not. Pet. App. 9a.

The 2005 statute permitting warrantless arrests in Indian country, part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, 25 U.S.C. 2803(3)(C) (Supp. V 2005), is not

United States v. Gayle, No. 02-26673, 2003 U.S. App. LEXIS 26673 (2d Cir. 2003), and amended, 342 F.3d 89, 93-94 & n.4 (2004).

“essentially identical” to § 921(a)(33)(A). Pet. Br. 18-19. The two differ fundamentally. In § 921(a)(33)(A), the “has, as an element” language is contained in clause (ii), one of the two component clauses that together constitute the definition of “misdemeanor crime of domestic violence.” But in § 2803(3)(C)’s description of “offense,” App. 11a, the “has, as an element” phrase is something required *in addition to* a “misdemeanor crime of domestic violence” (or three other listed non-felony violations) to trigger the statute – and “misdemeanor crime of domestic violence” is undefined. Equating § 921(a)(33)(A)’s definition of “misdemeanor crime of domestic violence” with the “has, as an element” clause of 25 U.S.C. 2803(3)(C) renders the latter a redundancy – a coffee with cream, with cream.

3. The “committed by” phrase modifies the statute’s force requirement, rather than “offense,” located 31 words distant.

The Fourth Circuit also correctly applied the rule of the last antecedent, which calls for a limiting clause or phrase ordinarily to be read as modifying the noun or phrase it immediately follows. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Under that grammatical construct, Mr. Hayes’s reading of § 921(a)(33)(A) makes sense – while the Government’s does not.

The latter part of clause (ii), from “committed by” onward, is properly read to modify its immediate antecedent, “the use or attempted use of physical force, or the threatened use of a deadly weapon.” Read in that fashion, the predicate offense must have among its elements not only one of the three types of force,

but also one of the specified types of domestic relationships between offender and victim.

The Government reads the “committed by” phrase as instead modifying “offense.” Br. 21-22. But under the rule of the last antecedent, the lengthy distance between the two prevents that. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 342-43 (2005) (rejecting as contrary to rule of last antecedent an interpretation that would have applied the “acceptance” requirement of 8 U.S.C. 1231(b)(2)(D)(vii) as a modifier to clauses (i) through (vi) of the provision, located 20 or more words before it).

The Government’s own authority recognizes this. “Modifiers should come, if possible, next to the words they modify.” William Strunk & E.B. White, *The Elements of Style* 30 (4th ed. 2000); see also Margaret Shertzer, *The Elements of Grammar* 47 (1986) (“subordinate clauses should be placed near the words they modify”). The Government’s interpretation erects a 31-word buffer between “offense” and “committed by,” forcing the reader to traverse all of clause (i) and a sizable portion of clause (ii) before alighting on the modifier for “offense”:

an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the

victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.] (App. 1a-2a) (emphasis added).

Mr. White and Prof. Strunk doubtless would be surprised to see their imprimatur placed on such a “grammatically labored” reading of the statute. Pet. App. 11a-12a.⁴

For § 921(a)(33)(A) to have the meaning the Government advocates, Congress could have placed the “committed by” phrase immediately after “offense,” to make clear that that is what it modifies, and moved the 31-word relative clause (subsections (i) and (ii)) to the end. That would define “misdemeanor crime of domestic violence” as:

⁴ The passage from which the Government distills its “relative clause exception” to the last-antecedent rule (Br. 21) states merely that interrupting a sentence’s subject and its principal verb “is not usually bothersome when the flow is checked only by a relative clause or by an expression in apposition.” Strunk & White, *supra* p. 20, at 29. Strunk & White then give an example of a relative clause separated from the noun it modifies by *five words*, a distance great enough to create ambiguity and thus require the relative clause to be moved forward, closer to the noun. *Id.* at 30.

Here, the Government’s construction creates a 31-word interruption, one that is not just “bothersome,” but which renders § 921(a)(33)(A) inscrutable.

an offense, 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, that—

- (i) is a misdemeanor under Federal, State or tribal law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.

As the Government notes (Br 21), that construct undeniably makes the “committed by” phrase modify “offense.” But that is because in that version, the two adjoin – consistent with the rule of the last antecedent.

In fact, the gun-possession ban as introduced would have had the sweeping reach its proponents sought. But that language also brought the bill, and every other piece of legislation it touched, to a standstill until it was removed in the early hours of September 28, 1996. The wording ultimately forced into the measure in the House and enacted as § 921(a)(33)(A)(ii) is significantly different, and there is no sound grammatical basis for skimming past the 30- (now 31-) word relative clause separating “committed by” from “offense.”

The Government also asserts that “committed by” cannot modify the use-of-force requirement because it

is irregular English usage to say one “commits” a use or act of force (Br. 15). But that is not so. Courts use such language. *See, e.g., Lankford v. Idaho*, 500 U.S. 110, 117 n.11 (1991) (quoting sentencing judge’s finding that defendants “committed acts of force and violence” on the victims); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 503 (1964) (framing issue as whether Ford made full payment “for the infringing use committed directly by Ford’s purchasers and contributorily by Aro”); *Williams v. County of Scotts Bluff*, No. 7:05CV5018, 2005 U.S. Dist LEXIS, 31948, at **15-17 (D. Neb. Nov. 28, 2005) (plaintiff’s allegation that county had “policy or custom of allowing deputy sheriffs to commit uses of excessive force” stated a claim under 42 U.S.C. 1983).

And even the Government, on the printed page, “commits” the “use of force.” *See* Federal Bureau of Investigation, *Terrorism in the United States 1996 3* (1996), available at <http://www.fbi.gov/publications/terror/terroris.pdf> (defining “international terrorism” in part as “...the unlawful use of force or violence committed by an individual...”). The Brief of Professors of Linguistics and Cognitive Science as *Amici Curiae* in Support of Neither Party argues persuasively that such wording is not at all uncommon, and provides many other examples. Br. 6-11 & App. 3a-12a. In everyday English usage, a person can indeed “commit” a “use of force.”⁵

⁵ As used in § 921(a)(33)(A)(ii), “committed by” appears to be merely a pleonasm, a harmless verbal excess like “more preferable” or “continue to remain.” H.W. Fowler, *A Dictionary of Modern English Usage* 455 (2d ed. 1965). “By” on its own would say the same thing, perhaps better: “has, as an element, the use

The rule of the last antecedent of course is not “inflexible and uniformly binding.” Pet. Br. 20. Few rules are. But the yawning, 31-word gap that the Government’s interpretation requires readers to leap, from “offense” to “committed by....,” simply “stretches the modifier too far.” *Jama*, 543 U.S. at 342. The Fourth Circuit’s reading is the more natural.

4. Congress’s use of “element” is consistent with requiring both domestic-relationship and use-of-force elements.

The Fourth Circuit also properly read “element” in § 921(a)(33)(A)(ii) as requiring both a force and a domestic-relationship element. Pet. App. 13a-15a. Standard English and other congressional enactments support its conclusion.

“Common usage in the English language does not scrupulously observe a difference between singular and plural word forms.” Singer, *supra* p. 14, § 47.34, at 493. As the Fourth Circuit recognized, various statutes throughout Title 18 define an offense by combining the mode of aggression and some other factor – typically, its object – into a single “element,” precisely as does § 921(a)(33)(A)(ii). Pet. App. 14a (*citing* 18 U.S.C. 16(a) and 18 U.S.C. 924(c)(3)(A)); *see also* 18 U.S.C. 373(a) (1994) (barring solicitation to commit a crime of violence, i.e. any conduct “constituting a felony that has as an element the use, attempted use, or threatened use of physical force

or attempted use of physical force...*by* a current or former spouse...”). But “committed by” is not grammatically improper.

against property or against the person of another in violation of the laws of the United States); 18 U.S.C. 521(c)(2) (2000 & Supp. II 2002) (including among offenses barred by criminal street-gang statute “a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another”); *accord* 18 U.S.C. 924(e)(2)(B)(i) (2006), 18 U.S.C. 3156(a)(4)(A) (1994 & Supp. IV 1998), and 18 U.S.C. 3559(c)(2)(F)(ii) (2006). Congress’s frequent inclusion of multiple concepts within the term “element” in other criminal statutes, undercuts the assertion that “element” cannot encompass both the concepts described in clause (ii).

The Dictionary Act, 1 U.S.C. 1 (2000 & Supp. II 2002), also supports that outcome. In a Federal statute, unless context indicates otherwise, “words importing the singular include and apply to several persons, parties, or things.” *Ibid*. The Government dismisses the Act as inapplicable, arguing that “Congress would not have used a singular noun to refer to multiple items in a list of purportedly conjunctive requirements.” Br. 14 & n.3. Not so. As noted above, Congress often does that. Where the term “has, as an element” is followed by three force descriptors phrased in the disjunctive, then by four types of domestic relationships (also phrased in the disjunctive), the Government’s insistence that “element” cannot include both groups is misplaced. The Dictionary Act’s rule of construction applies, and “element” in clause (ii) must be read to encompass both a mode of aggression/force and a domestic relationship.

But even declaring “element” singular would not resolve in the Government’s favor the relevant issue:

what, exactly, must the predicate offense outlaw? The Government’s singular/plural “element” dichotomy is “not only unconvincing, but largely meaningless,” because the relevant point “is not how many elements are involved, but what the singular element is.” *United States v. Barnes*, 295 F.3d 1354, 1369 (D.C. Cir. 2002) (Sentelle, J., dissenting). Nor does it help to repackage the issue as determining which “attributes” Congress bundled into clause (ii) – that merely “begs the question of what single element-turned-attribute the statute requires. Just as an element might be either simple or complex and remain a single element, so might an attribute.” *Id.* After all, labels alone do not control whether a thing is an “element.” Pet. App. 14a (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

A look at various pattern jury instructions describing a single criminal offense confirms this. For uttering or publishing a false document in violation of 18 U.S.C. 495’s second paragraph, the Seventh Circuit’s pattern instruction lists five elements, while the Eighth and Eleventh circuits group the same factors into only three. Pattern Criminal Federal Jury Instructions for the Seventh Circuit, 18 U.S.C. 495 (Uttering or Publishing a False Document—Elements), at 147 (1999); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 6.18.495B, Uttering a Forged Writing (18 U.S.C. 495), at 158 (2008); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), No. 81.2, at 159-163 (2003).

For a charge under 18 U.S.C. 111(b) of forcibly assaulting, resisting, or otherwise interfering with a

Federal officer engaged in official duties, with the aggravating factor of either a deadly weapon or bodily injury, the Fifth Circuit pattern instruction describes four elements, while the Ninth Circuit's uses only three. Fifth Circuit Criminal Jury Instructions, No. 2.09 (2001); Ninth Circuit Manual of Model Criminal Jury Instructions, No. 8.2 (2003). The Eighth Circuit's fluctuates between three or four, depending on the aggravating factor involved. 8th Cir. Model Criminal Jury Instructions 6.18.111, at 134-36. And another tells jurors that the crime has five "essential" elements. 2 Kevin F. O'Malley, Jay E. Greinig & Hon. William C. Lee, *Federal Jury Practice and Instructions—Criminal* § 24.06, at 63 (5th ed. 2000). Plainly, there is nothing talismanic about either the word "element" in Title 18, or the manner in which an offense's "attributes" are assigned among them.

The Government itself has defined "element" with sufficient breadth to include the domestic-relationship component. A 2007 OLC memorandum opinion interpreting the force aspect of § 921(a)(33)(A)(ii) defines "element" as "the factual predicates of an offense that are specified by law and must be proved to secure a conviction. 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." *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence,"* 31 Op. Off. Legal Counsel 3 (2007) (citations omitted). A conviction under § 922(g)(9) cannot be secured without proving a domestic relationship in the underlying assault. Under OLC's definition, such a relationship is an "element" of the predicate offense.

B. The drafting and legislative histories show that the predicate-offense definition was restricted as part of a congressional compromise.

The statute's drafting history in Congress fully supports the Fourth Circuit's view. The Government (Br. 27-34) ignores that the ban was stymied in the House of Representatives until its original broad definition of the predicate offense was replaced at the eleventh hour with the term "misdemeanor crime of domestic violence" and the "has, as an element" wording. Only then did Representatives relent and approve the bill.

Legislative history – lawmakers' pre-enactment statements about a bill – in no way undercuts that view. Sen. Lautenberg's September 30, 1996 floor statement, the only one addressing the language at issue, is of suspect reliability as an analytical tool, and even the Government elsewhere has criticized it. Of greater significance, it can shed no light on what half of Congress understood about the gun-possession ban: House members had voted on the bill two days earlier, and gone home.

1. The ban languished in the House of Representatives until its original broad wording was limited via compromise.

Mr. Hayes fully agrees with the Government that the legislation's original purpose was to prohibit firearm possession by anyone convicted of using or threatening force against a spouse, child or other intimate. Pet. Br. 22. There simply is no denying that

Sen. Lautenberg and like-minded colleagues had that goal. But the flaw in the Government's argument, as its reliance on a September 12, 1996 floor statement reveals (*Ibid.*), is that as long as the bill contained the sweeping predicate-offense definition that would have accomplished that end, it was a legislative pariah. Only when "crime involving domestic violence" was replaced with the more limited phrase "misdemeanor crime of domestic violence" did the measure finally win House approval.

For nearly its entire existence in Congress, the bill's predicate-offense definition did not suggest, much less require, a domestic-relationship element. It did not even contain the word "element." 142 Cong. Rec. at 5840; App. 4a. Plainly, Sen. Lautenberg and other Senate supporters intended to ban gun possession for anyone using, or who was charged with using, force against a person in one of the listed domestic relationships. *Ibid.*

That was not lost on opponents in the House, who bottled up the bill from the moment it arrived. When Sen. Lautenberg pulled his proposal from committee and attached it to the anti-stalking bill, it brought that measure to a halt. The Government's claim that the two were decoupled "[w]hen the anti-stalking legislation stalled in the House" (Br. 28), papers over a key detail: the controversial gun-possession ban was the very reason the anti-stalking measure bogged down, as sponsors of each acknowledged. 142 Cong. Rec. at 21,435 (statement of Sen. Hutchison); *Id.* at 21,437-21,438 (statement of Sen. Lautenberg). The statement that "the House's failure to act on the [anti-stalking] bill had nothing to do with the language in

the Lautenberg Amendment,” brief *Amicus Curiae* of Senators Lautenberg, Feinstein, and Murray 15, is inaccurate.

The bill drifted for weeks before finally being joined to the omnibus spending package. But even within that legislative haystack it remained a target, with efforts to “emasculate” and “gut” it continuing into the final days of the 104th Congress in late September.

In the early hours of September 28, opponents forced the removal of “crime involving domestic violence” – as the bill’s backers admit, due to concerns over its breadth. Brief *Amicus Curiae* of Senators Lautenberg, Feinstein and Murray 17. In its place was inserted the markedly different phrase “misdemeanor crime of domestic violence,” written to require the predicate offense to “have, as an element” both a use of force and a domestic relationship. It was drafted at least in part by House Republicans, the very “extremists” Sen. Lautenberg accused of doing the bidding of the “gun lobby” in trying to “water down” the legislation, through “clever” loophole drafting. 142 Cong. Rec. at 26,675, 24,647. Only after that substitution did the bill win House approval, hours later.

Comparison of the text before and after that midnight session confirms that the compromise intentionally limited the bill’s reach. On September 27, the bill defined the predicate offense as

a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, 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 the spouse, parent, or guardian of the victim **under the domestic or family violence law of the jurisdiction in which such a felony or misdemeanor was committed** (App. 4a) (emphasis added).

Opponents of the gun-possession ban no doubt feared that the final clause (bolded) would be read as pertaining to the domestic-relationship language immediately preceding it (“committed by a current or former spouse...”), rather than the opening words of the passage (also bolded). That reading, which would be consistent with the rule of the last antecedent, would permit prosecution of anyone convicted under a general misdemeanor assault statute – such as Mr. Hayes.

But the September 28 compromise completely rewrote that provision, establishing separate subsections (i) and (ii), inserting at the beginning of the latter the “has, as an element” introduction, and then including *both* the use-of-force and domestic-relationship descriptions after it. Subsection (ii) thus became a self-contained passage listing the elements that the predicate offense must contain: force and a domestic relationship.

an offense that—

(i) is a misdemeanor under Federal or State law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.] (App. 1a-2a).

Where a key statutory term springs from congressional compromise between groups with divergent interests, courts must respect and give effect to that compromise. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002). In *Ragsdale*, this Court noted that Congress provided up to 12 weeks' unpaid leave in the Family and Medical Leave Act as a middle ground between employers, who sought less, and employees, who wanted more. 535 U.S. at 93. So too, here: supporters wanted to outlaw firearm possession by anyone committing any misdemeanor use of force against a family member or intimate. Opponents wanted no ban at all, or at most a “guttred” one.

Congress settled on a compromise, banning gun possession only by those convicted of violating specific domestic-abuse misdemeanor statutes.

2. The scant legislative history cannot support the Government's reading.

Where legislative history has any relevance, it is not to reflect a general understanding of a bill's meaning. Rather, it is grounded on the theory that other lawmakers who heard the comments presumably voted with the same understanding.

There is no House legislative history of the language at issue. There were no hearings, and in the one-hour House debate on the omnibus appropriations package September 28 (142 Cong. Rec. at 25,814-25,874), no Representative mentioned either the bill in general or the specific term "misdemeanor crime of domestic violence" substituted hours earlier – despite having five days to revise and extend remarks. *Id.* at 25,814 (statement of Rep. Livingston). Sen. Lautenberg's September 30 floor statement, on which the Government and several courts rely heavily (Br. 29-32), came two days *after* Representatives had voted and gone home. It cannot possibly illuminate what any Representative understood. See *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 313-15 (1956) (dictum) (colloquy between two Senators as to suggested meaning disregarded in part because House already had passed the measure, and nothing in House proceedings indicated that that meaning should be given).

This is no mere technicality or quirk of timing. In contrast to the Senate, the House vehemently opposed the bill in all its earlier versions, and relented only when the current wording was substituted on September 28. The lack of legislative history germane

to half of Congress is fatal to the Government's attempt to rely on any such material.

Though there is legislative history in the Senate, it largely is irrelevant. Floor statements predating September 28 – such as that of September 12, in which the Government fixes the statute's purpose, Br. 22 – speak to a fundamentally different bill, whose predicate-offense definition did not reach the President's desk. They can show neither the enacted statute's meaning nor its purpose. *United States v. Granderson*, 511 U.S. 39, 49 (1994) (legislative declarations that do not address the meaning of the provision at issue cannot reflect Congress's purpose) (citations omitted). At most, they highlight the depth of House opposition to the original wording.

Nor can Sen. Lautenberg's September 30 floor statement, the only comment discussing "misdemeanor crime of domestic violence," support the weight placed on it by the Government and various courts. The Government exalts it by calling Sen. Lautenberg "the author of [the] operative language" (Br. 32), but the final definition resulted from bipartisan negotiations – as even he admitted. 142 Cong. Rec. at 26,675. The phrase "misdemeanor crime of domestic violence," like success, had many parents, and no one lawmaker's view of it is entitled to added weight.

More fundamentally, the statement's context seriously undermines its reliability. Legislative materials give their authors "both the power and the incentive to attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." *Exxon*

Mobil Corp. v. Allapattah Svcs., Inc., 545 U.S. 546, 568 (2005). When he rose to speak, Sen. Lautenberg had just completed a bruising, six-month legislative battle. Stymied at every turn, having seen various deals fall apart, supporters had secured a gun-possession ban only by agreeing in the waning hours of the 104th Congress to rewrite its central provision. The House voted on the substitute language hours later, without debating it, and neither chamber held any hearing, on any version of the bill. The Senator thus would have been acutely aware of both the need to bolster the new language, and the wide latitude he would have to do so: few of his colleagues were likely to engage in a serious floor colloquy, having twice voted overwhelmingly for the broad original measure. The floor statement thus is an even less-reliable source of meaning than the two-lawmaker exchange disregarded in *McKesson & Robbins, supra* – the legislative equivalent of one hand clapping.

The floor statement's content cautions further against its use. Sen. Lautenberg ascribed the new definition to critics concerned that its predecessor could outlaw firearm possession merely for "cutting up a credit card with a pair of scissors." 142 Cong. Rec. at 26,675. But the original wording (App. 4a) plainly required both a "crime of violence" and a human "victim," and no reasonable reading could stretch it to reach the slicing up of a Master Card – even when done to instill fear. Likewise suspect was the assertion that the new definition was "probably broader" than the original, 142 Cong. Rec. at 26,675. "Extremists" seeking to "gut" a bill do not broaden its central provision. In the end, the accurate view is the

admission that the new language was “more precise.”
Ibid.

Interestingly, the Government itself has viewed the September 30 floor statement dismissively. *See* OLC Opinion 12 & n.4 (final language enacted was a compromise between competing interests, and reliance on it would give lawmakers the power and incentive to strategically manipulate legislative history) (*citing Exxon Mobil*, 545 U.S. at 568)). In discussing the amended language “for the historical record” (142 Cong. Rec. at 26,674), it seems likely that the Senator was speaking not to his colleagues, so much as to the justices of this Court, 12 years later.

An alternate possibility is that the September 30 floor statement was simply mistaken – that House negotiators snookered proponents into accepting a more limited ban than they realized. Congressional logrolling is tricky business, after all, especially when the log contains \$800 billion and the rolling is done in the wee hours before a looming Government shutdown.

It is questionable whether legislative history should ever be relied on to impose criminal liability. *See United States v. R.L.C.*, 503 U.S. 291, 311-12 (1993) (Thomas, J., concurring). But leaving that aside, such material is at its most tenuous when it relates to a politically controversial statute (though it still may be helpful if sufficiently comprehensive). *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 856-74 (1992). Thus, while the Urban Mass Transportation Act’s legislative history informed judicial resolution of a preemption issue, that history contained 1) a cabinet

member's hearing testimony stating the views of his department and of key stakeholders; 2) a floor colloquy on the precise issue between Senators for and against the bill; and 3) correction of a misstatement during the floor debate so the legislative record would be accurate. *Id.* at 856-58, 872 n.71. And it dealt with a civil statute – not criminal liability.

The legislative history of the gun-possession ban consists only of the September 30 floor statement, which bears no resemblance to any of those materials. Relying on it to convey the statute's meaning or purpose, and to impose criminal liability, is the abuse of legislative history, not its use.⁶

⁶ The brief *Amicus Curiae* of Senators Lautenberg, Feinstein and Murray should be disregarded not only because legislators' post-enactment views should not be considered when interpreting the statute, 2A Singer, § 48.20, at 628 (7th ed. 2007), but because "as time passes memories fade and a person's perception of his earlier intention may change." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

Twelve years removed from events, the brief categorically states that the gun-possession ban had "nothing to do with" the anti-stalking measure stalling in the House (Br. 15), when Sen. Lautenberg at the time linked the two directly. 142 Cong. Rec. at 22,985. It relies heavily on pre-September 28 floor statements. Br. 10-12, 14, 15 n.5, 20-21. And it draws from silence in the legislative record to assert that the "as an element" language was added not to require a domestic-relationship element, but to confine the predicate misdemeanor to offenses involving use, attempted use or threat of physical force. *Id.*, pp. 12-13.

3. Courts that follow the Government's view failed to consider the drafting history and misused legislative history.

The Government trumpets the number of courts sharing its reading (Br. 15-16), but none of them acknowledged the gun-possession ban's rocky reception and complete lack of legislative history in the House. None discussed the last-minute, compromise nature of the key amendment. And none considered that the September 30 floor statement may have been deliberately crafted to repackage as victory a significant legislative setback.

Early decisions simply quote the floor statement without acknowledging its deficiencies.⁷ Later ones reference the prior rulings, essentially substituting string-cite for legislative analysis.⁸ Some misread the legislative record: *White v. Dep't of Justice*, 328 F.3d 1361, 1366 n.1 (Fed. Cir. 2003) erroneously deems Sen. Lautenberg “the author of the disputed language” en route to giving his September 30 comments dispositive weight. And the *Barnes* majority, after noting “context is everything,” divines the statute's purpose from the September 12 floor statement discussing a failed prior version. 295 F.3d at 1360, 1364 (*quoting* 142 Cong.

⁷ *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999); *United States v. Meade*, 175 F.3d 215, 219 (1st Cir. 1999).

⁸ *United States v. Chavez*, 204 F.3d 1305, 1313-14 (11th Cir. 2000); *United States v. Kavoukian*, 315 F.3d 139, 142-44 (2d Cir. 2002); *United States v. Shelton*, 325 F.3d 553, 561-62 & n.12 (5th Cir. 2003); *White v. Dep't of Justice*, 328 F.3d 1361, 1365-67 (Fed. Cir. 2003) (“[p]etitioner offers us no reason why the consistent interpretation of these other five circuits is incorrect”).

Rec. S10377-78 (Sept. 12, 1996)). One court relies heavily on the defendant's concession,⁹ while another forgoes the September 30 statement entirely – in favor of the statute's grammar and syntax, as interpreted “by all seven of our sister circuits to have spoken on the issue.”¹⁰

The Fourth Circuit's legislative analysis (Pet. App. 5a-22a) stands in clear contrast. Alone, it heeded this Court's directive to consider history from introduction to passage. *Id.* at 15a (citing *Regan v. Wald*, 468 U.S. 222, 238 (1984)). It properly disregarded pre-September 28 floor statements, and declined to let the September 30 statement supplant the text Congress enacted. *Id.* at 15a-22a; see also *Barnes*, 295 F.3d at 1368-70 (Sentelle, J., dissenting); *White*, 328 F.3d at 1373-74 (Mayer, C.J., dissenting).

Consistency in case law is unpersuasive where the decisions contain little discussion and/or simply rely on perfunctory prior opinions. *Poleto v. Consol. Rail Corp.*, 826 F.2d 1270, 1278 (3d Cir. 1987), *disapproved of on other grounds*, *Kaiser Aluminum & Chem. Co. v. Bonjorno*, 494 U.S. 827 (1990). Nearly every circuit court to adopt the Government's reading found support in the September 30 floor statement – and completely ignored both the context from which it arose, and the history of House intransigence. To render someone a

⁹ *United States v. Heckenliable*, 446 F.3d 1048, 1052 n.9 (10th Cir. 2006).

¹⁰ *United States v. Belless*, 338 F.3d 1063, 1065-67 n.6 (9th Cir. 2003).

felon based on such material is to revive the whim and caprice that inspired Magna Carta.

4. The Government's other authority is unpersuasive.

Post-enactment views of those involved with legislation are not part of legislative history. Singer, *supra* p. 14, § 48.16, at 619. The 1999 House Judiciary Committee Report on which the Government relies, H.R. Rep. No. 105-845, at 88 (1999) (Pet. Br. 32) is even further outside the pale: the product of a committee that never held hearings on the bill, in a subsequent Congress that never voted on it.

Congressional inaction over the past decade also lends the Government no support. Br. 33-34; Br. *Amicus Curiae* Brady Center to Prevent Gun Violence 35-37. As an interpretive doctrine, legislative acquiescence is at most an auxiliary tool reserved for ambiguous statutes. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947) (citation omitted). When it is employed, this Court typically credits congressional inactivity only regarding its own decisions. It does not expect Congress to fix every circuit-court mistake, *Jones*, 332 U.S. at 533-34, and certainly not those of ATF. Pet. Br. 33-34. Moreover, it generally requires a jurisprudential lineage far greater than exists in this case. *Cf.*, *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338-39 (1988) (legislative inaction persuasive where courts ruled with virtual unanimity for seven decades, and Congress amended statute many times over 80 years without addressing issue). Here, the Government invokes the doctrine based on a handful of technical amendments and a seven-year-old line of

cases, whose incomplete analysis is coming under increasing question – as the Fourth Circuit and the various dissenting circuit opinions show.

Given the uproar that ensued the first time Congress legislated at the confluence of these two areas of intense public interest (domestic abuse and gun control) its decision not to revisit the issue is unremarkable. Nothing meaningful can be gleaned from that inaction.

C. The rule of lenity requires dismissal of the superseding indictment.

After all interpretive means are exhausted, the Government's reading of § 921(a)(33)(A) cannot be adopted without guessing what Congress intended. This is a quintessential case for applying the rule of lenity.

The rule rests on society's "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *R.L.C.*, 503 U.S. at 305 (quoting *United States v. Bass*, 404 U.S. 336, 344 (1971) and H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967)). It is premised on the twin notions that fair warning should be given, in language the common world will understand, of what the law intends to do if a certain line is passed, and that legislatures, not courts, should define criminal activity. Pet. App. 21a (quoting *Babbitt v. Sweet Home Chapter of Comtys. for a Greater Or.*, 515 U.S. 687, 704 & n.18 (1995)).

This statute fails both tests. Even the Government's authority derides it as "not a model of clarity or preciseness," *Heckenliable*, 446 F.3d at 1050; *accord Barnes*, 295 F.3d at 1356. A law that requires citizens and courts to consult style manuals and linguistic experts to divine its meaning, or weigh the rule of the last antecedent against restrictive relative clauses, neither draws a line "in language that the common world will understand" nor prevents judges from becoming lawmakers.

The rule's "fair warning" rationale is particularly appropriate for statutes criminalizing conduct that is not *malum in se*. 3 Norman J. Singer, *Statutes and Statutory Construction* § 59:3, at 143-44 (6th ed. 2001). While most murderers and robbers give little forethought to statutory text, "in the case of gun acquisition and possession it is not at all unreasonable to imagine a citizen attempting to steer a careful course between violation of the statute and lawful conduct." *Bass*, 404 U.S. at 348 n.15 (citations, internal brackets and quotation marks omitted). Had § 921(a)(33)(A) so obviously outlawed firearm possession by Mr. Hayes, he likely would have chosen some means of returning Ms. Oldaker's guns other than asking a police officer to supervise the handoff at the stationhouse.

The contrast in potential outcomes facing Mr. Hayes also supports application of the rule. If lenity is "particularly appropriate" where a conviction will form a predicate offense leading to additional penalties under other statutes, *Pasquantino v. United States*, 544 U.S. 349 (2005) (Ginsburg, J. dissenting), it is even more fitting where the statute would criminalize what

otherwise appears to be constitutionally protected conduct. *Heller*, 128 S.Ct. at 2797-2798. Under Mr. Hayes's interpretation of § 921(a)(33)(A), he was delivering his late father's rifle to a friend who was buying it, something citizens have done since before the Revolution. Under the Government's interpretation, he was committing a felony.

Mr. Hayes is not arguing that Congress cannot regulate firearms. But if it wants citizens to forfeit their Second-Amendment rights upon conviction of a misdemeanor whose elements do not include a domestic relationship, it should say so more clearly than it has in § 921(a)(33)(A).

The Government asserts the strictest version of lenity (Br. 37), under which the rule applies only if "after seizing everything from which aid can be derived" the Court "can make no more than a guess as to what Congress intended." *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998). More recently, this Court noted that "[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." *Scheidler v. Nat'l Org. For Women, Inc.*, 537 U.S. 393, 409 (2003) (citation omitted). Regardless of which is used, Mr. Hayes must prevail.

The statute's text, history, and structure plainly support Mr. Hayes's reading.¹¹ Even if the same could

¹¹ The Government errs in advocating review of the statute's text, history, and "purpose" prior to invoking lenity (Br. 37). This Court looks to text, history, and structure. *Granderson*, 511 U.S. at 54.

be said for the Government's (which it cannot), the resulting equipoise, under *Scheidler*, ends the inquiry.

Muscarello yields the same result. Drafting history cannot support the Government's conclusion that the broad wording introduced in March 1996 made it through Congress. The legislative history is meager, at best – and wholly irrelevant to the House. The Government may disagree with Mr. Hayes's description of the September 28 negotiations and its result, but it can point to nothing in the legislative history that says things did not happen that way – just as it can point to nothing supporting an alternate explanation.

Lastly, this Court has read with leniency other statutes passed under remarkably similar circumstances. *See Granderson*, 511 U.S. at 51-52 n.9 (late substitution inserted as a floor amendment, without any conference report or close inspection, into a complex, phone-book size bill and subjected to middle- of-the-night debate with Congress anxious to adjourn for elections); *Bass*, 404 U.S. at 344 (last-minute Senate amendment to a long and complex bill that “was hastily passed, with little discussion, no hearings, and no report”).

If the rule of lenity is premised on the idea that fair warning should be given, in language “the common world will understand,” this case is tailor-made for its application.

D. Mr. Hayes’s reading is consistent with the statute’s aims.

The Government describes a variety of practical difficulties it fears the Fourth Circuit’s interpretation will create. Br. 22-27, 34-37. But its concerns do not stand up to close inspection, and in any event would be for Congress to rectify.

1. Congress reasonably could have intended, through its compromise, to give States an incentive to enact domestic-violence assault laws.

In the Government’s view, Mr. Hayes’s interpretation requires the belief that Congress intended to impose a “dead letter” on the two-thirds of States that in 1996 lacked a domestic-violence statute. Br. 22-25. But Congress more likely was serving the twin goals of compromising between competing interests (by narrowly targeting the reach of a novel criminal prohibition), and giving States without a domestic-abuse law an incentive to enact one. Even adherents to the Government’s reading suggest Congress may have had such a motive. *Belless*, 338 F.3d at 1067.

No one disputes that domestic violence is a serious and pervasive problem. Presumably, that is why States have begun enacting domestic-abuse laws – because they are more effective at curbing and/or punishing such behavior than are general assault statutes. By the Government’s own tally, since 1996 there has been a 60-percent increase in the number of States with such laws – from 17, to 27. Br. 22-24 & nn.

8-9. To deem it “unlikely” that Congress intended such a result, *Id.* at 25, requires the jaded viewpoint that things rarely work out as Congress intends them.

In limiting the ban’s reach via the September 28 amendment, Congress also could have been respecting limits on its own lawmaking authority. It might reasonably have determined that, if a State did not take domestic violence seriously enough to enact its own domestic-assault statute, there was no reason to let it avail itself of the Federal firearm-possession ban.

2. The Fourth Circuit’s reading negates no part of the statute.

Requiring a domestic-relationship element does not render meaningless the word “Federal” in § 921(a)(33)(A)(i), as the Government claims. Br. 25. In Federal enclaves, the Assimilative Crimes Act (ACA), 18 U.S.C. 13, applies State law to actions that are “not made punishable by any enactment of Congress.” 18 U.S.C. 13(a). It is a continuing adoption by Congress of the criminal laws of the State where each enclave is located, except those that have been preempted. *United States v. Sharpnack*, 355 U.S. 286, 294 (1958). In any State having a domestic-assault misdemeanor statute qualifying under § 921(a)(33)(A) – i.e., with a domestic-relationship element – such an offense committed on a Federal enclave is punishable under the ACA.

The Government’s point that “no federal misdemeanor” has a domestic relationship among its elements (Br. 25) subtly but significantly blurs the statutory language. Section 921(a)(33)(A)(i) requires

the predicate offense to be a “misdemeanor under Federal...law,” not a “federal misdemeanor.” Since the ACA is a continuing adoption by Congress of certain State laws, under its own legislative authority, *Sharpnack*, 355 U.S. at 294, where it applies, it renders violation of State domestic-assault law a “misdemeanor under Federal law.”

3. Requiring a domestic-relationship element also streamlines Brady Act enforcement.

The Fourth Circuit’s interpretation also solves a practical problem regarding implementation of the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t). That Act requires law-enforcement officials to make a “reasonable effort” to ensure that would-be handgun purchasers are not prohibited from ownership by Federal law; in response the Attorney General established the National Instant Criminal Background Check System (NICS) within the FBI. Licensed dealers contact NICS to determine whether a transferee is prohibited from possession under Federal law. *See* 28 C.F.R. 25.1 & 25.3 (2006).

Under the Government’s reading, where NICS’s background check reveals a prior misdemeanor simple assault or battery, officials must investigate and make a determination whether, at the time of the offense, the purchaser and victim shared one of the relationships described in § 921(a)(33)(A)(ii). As Sen. Lautenberg acknowledged, that frequently will be a difficult, if not futile, task. 142 Cong. Rec. at 26,675.

But under the Fourth Circuit’s interpretation, the issue will turn on the misdemeanor statute under

which the firearm purchaser was convicted. That bright-line test greatly simplifies Brady Act compliance, avoiding debate – years if not decades after the fact – about the purchaser’s relationship with the victim, and other such issues. Pet. App. 19a-20a & n.11; *see also Belless*, 338 F.3d at 1067 (Congress could have intended to limit predicate offenses to those with a domestic-relationship element in part to avoid questions years later about the underlying offense).

Contrary to the intemperate predictions of some *Amici*, the Fourth Circuit’s interpretation will not turn the Nation into a shooting gallery in which no spouse or peace officer is safe. In the first year of the gun-possession ban only 10 people were charged under it, a number that rose to 159 in 2000 before falling back to 125 in 2001. Tom Lininger, *A Better Way to Disarm Batterers*, 54 *Hastings L.J.* 525, 532 (2003). The number of those actually convicted is unknown, as is the subset from among that group whose predicate offense, like Mr. Hayes’s, lacked a domestic-relationship element.

Mr. Hayes in no way intends to minimize the risk that domestic-violence calls pose to peace officers. But neither the Government nor its aligned *Amici* can show that the Fourth Circuit’s reading will affect that risk in any appreciable manner.¹²

¹² *Amicus Curiae* Brady Center misreads the data in asserting that there were 473,433 NICS denials in 2005, of which 60,237 (13 percent) were attributable to misdemeanor crimes of domestic violence. Br. 34 n.85 (*citing* National Instant Criminal Background Check Systems, Operations 2005 at 11, *available at* http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2

4. The statute has a limited reach because Congress intended that.

The Government complains that the Fourth Circuit’s interpretation will result in fewer individuals being covered by the gun-possession ban, but its grievance should be directed to Congress. For all but its last few hours in Congress, the predicate offense was described in a manner entirely consistent with what the Government seeks. App. 4a. It would have fulfilled supporters’ intent to block all domestic-abuse misdemeanants from owning firearms. Pet. Br. 22. But it failed to muster enough votes.

“Adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill.” Singer, *supra* p. 14, § 48.18, at 623. The eleventh-hour amendment is strong evidence that that language was a compromise that limited the ban’s reach. Certainly, it is evidence that lawmakers intended to discard that version to which the vast majority of the legislative history relates.

005.pdf). The cited NICS report shows those are aggregate figures for the seven-year period 1998-2005, not just for 2005. *Id.* at 4.

The Brady Center further ignores that those 473,433 denials represent fewer than 1.5 percent of all firearm transactions run through NICS in that seven-year period. *Id.* at 9. Indeed, the 60,237 denials for misdemeanor crimes of domestic violence represent only 0.19 percent of the 31.9 million total NICS-screened transactions in 1998-2005. And it is unknown how many of *those* were individuals rejected due to a conviction under a specific domestic-abuse statute – who will continue to be denied firearms, regardless of this Court’s decision.

The respective consequences of an erroneous ruling also warrant consideration. If the Court affirms the Fourth Circuit but Congress indeed intended a broad gun-possession ban, Congress can rectify that easily by re-enacting the measure with clearer wording – Mr. Hayes and others like him will again be barred from possessing firearms. If, on the other hand, the Fourth Circuit gave the statute the limiting reading Congress intended, but this Court reverses, Mr. Hayes and others like him will have been rendered felons, contrary to Congress’s wishes. For them, the harm will be irreparable, absent expungement or pardon.

There really is no dispute regarding the statute’s original purpose – to ban firearm possession by those convicted of misdemeanor use of force against a family member or other intimate. But after protracted legislative struggle, Congress in the end decided the best and fairest way to serve that purpose was not by enacting the original proposed language. Rather, it settled on a more finely tuned definition of the predicate offense. Since 1996, those who want no gun-possession ban have tried to narrow it further and even repeal it, without success. Those who wish to broaden it, and restore the sweeping scope its proponents originally sought, are free to try the same.

E. If the Government’s reading is adopted, this case should be remanded for review of the ban’s constitutionality.

On June 26 this Court issued its decision in *Heller*, recognizing the right to bear arms as an individual one pre-existing the Constitution. The Court left further

clarification regarding the scope of that right for later cases. *Heller*, 128 S. Ct. at 2821.

Currently, this matter involves only the single issue of statutory interpretation on which certiorari was granted – briefing already had begun when *Heller* was decided. But *Heller* raises a serious issue as to whether 18 U.S.C. 922(g)(9) is constitutional. The opinion cites with approval various “longstanding” firearm regulations that presumably remain valid: bans on possession by felons or the mentally ill, or in schools and government buildings. 128 S. Ct. at 2816-17. But each is of a fundamentally different nature, and far more ingrained in society, than the restriction § 922(g)(9) imposed 12 years ago – without legislative comment, hearings, or debate on its key definitional provision.

The statute indeed appears to be without peer in requiring an individual to forfeit a right enumerated in the Bill of Rights, permanently, upon conviction of a misdemeanor.

The Government’s own *Heller* brief supports remand for this inquiry. Where a law “directly limits the private possession of ‘Arms’ in a way that has no grounding in Framing-era practice, the Second Amendment requires that the law be subject to heightened scrutiny....” Brf. for the United States as *Amicus Curiae* 8 (citation omitted). Section 922(g)(9) limits private possession of arms in a way that has no grounding in Framing-era practice. Keeping an unloaded hunting rifle at home, the act that launched ATF’s investigation, and possessing a new rifle in the course of delivering it to a buyer, the conduct for which

Mr. Hayes pleaded guilty, were ubiquitous practices in 1791. It would have been nearly unthinkable then for a person to forfeit permanently the right to possess firearms due to a misdemeanor assault, domestic or otherwise – domestic-abuse statutes were enacted precisely because of society’s past refusal to take even the underlying assault seriously. Under the Government’s own rationale, heightened scrutiny must be given this measure to determine its constitutionality.

Because this Court ordinarily does not decide in the first instance issues not addressed below, *NCAA v. Smith*, 525 U.S. 459, 470 (1999), it should remand for analysis of the constitutional issue, if it reverses. “Allowing lower courts to develop doctrines to address issues concerning the scope of the Second Amendment, its application to a variety of circumstances, and the relevance of particular historical materials has much to recommend it.” Brf. for the United States as *Amicus Curiae* 29-30 (citation omitted).

CONCLUSION

The broad reading of the gun-possession ban espoused by the Government and the majority of circuit courts would be accurate, had the legislation originally introduced been enacted into law. But that measure failed to win passage. Instead, Congress passed and the President signed a compromise statute, banning firearm possession only for those convicted under a statute having, as an element, a domestic relationship between offender and victim – a specific domestic-abuse statute.

Statutory text and history show that the firearm ban of 18 U.S.C. 922(g)(9) applies only to those convicted of a misdemeanor containing a domestic-relationship element. Even if the Government could establish its contrary reading as plausible, the rule of lenity requires adoption of the Fourth Circuit's ruling. Its decision should be affirmed.

Alternatively, the Court should remand with instructions that Mr. Hayes be allowed to challenge the constitutionality of 18 U.S.C. 922(g)(9) in light of *Heller*.

Respectfully submitted,

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September 19, 2008

**Counsel of Record*

APPENDIX

APPENDIX A

1. 18 U.S.C. 922(g)(9) provides:

It shall be unlawful for any person—

* * *

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. 921(a)(33) (2000 & Supp. V 2005) provides:

(A) Except as provided in subparagraph (C),² the term “misdemeanor crime of domestic violence” means an offense that—

(i) is a misdemeanor under Federal, State or Tribal³ law; and

² So in original. No subparagraph (C) was enacted in subsec. (A)(33).

³ So in original. Probably should not be capitalized.

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(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless –

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of

this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

APPENDIX B

S. 1632, 104th Cong., 2d Sess. 1 (1996); 142 Cong. Rec. 5840 (March 21, 1996) provides:

S.1632

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DEFINITIONS.

Section 921(a) of title 18, United States Code, is amended by adding at the end the following new paragraph:

“(33) The term ‘crime involving domestic violence’ means a felony or misdemeanor crime of violence, regardless of length, term, or manner of punishment, 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 cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed.”.

SEC. 2. UNLAWFUL ACTS.

Section 922 of title 18, United States Code, is amended—

- (1) in subsection (d)—
 - (A) by striking “or” at the end of paragraph (7);
 - (B) by striking the period at the end of paragraph (8) and inserting “; or”; and
 - (C) by inserting after paragraph (8) the following new paragraph:
 - “(9) is under indictment for, or has been convicted in any court of, any crime involving domestic violence.”; and
- (2) in subsection (g)—
 - (A) by striking “or” at the end of paragraph (7);
 - (B) in paragraph (8), by striking the comma and inserting “; or”; and
 - (C) by inserting after paragraph (8) the following new paragraph:
 - “(9) who is under indictment for, or has been convicted in any court, or [*sic*] any crime involving domestic violence.”.

APPENDIX C

W. Va. Code § 61-2-9 (LexisNexis 1994) provides:

(c) Battery.

If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail for not more than twelve months, or fined not more than five hundred dollars, or both such fine and imprisonment.

APPENDIX D

**IN THE MAGISTRATE COURT OF MARION
COUNTY, WEST VIRGINIA**

Criminal Case No. 04M1171

Complaint Date: 7/24/04

STATE OF WEST VIRGINIA

v.

RANDY HAYES

Defendant

GUILTY OR NO CONTEST PLEA

1. The magistrate has informed me that I am charged with the offense(s) of *Obstructing an Officer* and that the possible penalties are: *\$50.00 to \$500.00 and / or up to 1 year (state mandatory minimum penalty, if any, and maximum penalty)*. I understand the charge(s) and the penalties that the court may impose.

2. The magistrate has informed me that I have the right to be represented by an attorney at every stage of the proceeding, and that if I cannot afford to hire an attorney and I qualify, one will be appointed to represent me. I understand this right, and further understand that if I decide to represent myself I

cannot later claim that I was deprived of my right to be represented by an attorney.

DEFENDANT MUST INITIAL THE APPROPRIATE LINE:

____(a) I give up my right to have any attorney represent me.

REH(b) I have an attorney, who is present and is representing me.

____(c) I want to hire an attorney to represent me.

____(d) I want an attorney appointed to represent me.

NOTE: If I have initialed (c) or (d), I request that this plea proceeding be postponed so that I can talk with an attorney and have an attorney representing me for the rest of this proceeding.

3. The magistrate has informed me that I have the right to plead not guilty (or to maintain a plea of not guilty if it has already been made). I understand this right.

4. The magistrate has informed me that I have a right to be tried by a jury or by a magistrate without a jury, and at that trial I have the right to be represented by an attorney, the right to confront and cross-examine witnesses against me, the right not to be forced to incriminate myself, the right to call witnesses on my

own behalf, and the right to testify on my own behalf or to be silent. I understand these rights.

5. The magistrate has informed me, and I understand, that if I plead guilty or no contest I give up my right to a trial.

6. The magistrate has informed me, and I understand, that if I plead guilty or no contest, the court may ask me questions while I am under oath about the offense(s) to which I plead. I further understand that if I answer these questions under oath, my answers may later be used against me in a prosecution for false swearing.

/s/ Randy E. Hayes
Defendant's Signature
(Continued on next page)

7. The magistrate has informed me, and I understand, that the magistrate may neither entertain nor grant a request to withdraw this plea once the magistrate has accepted it.

8. I am entering this plea voluntarily, and not as a result of force or threats or of promises apart from a plea agreement. I have informed the magistrate of any prior discussions between the prosecuting attorney and me or my attorney that led to my willingness to plead guilty or no contest.

9. I plead as follows (**initial one**): REH guilty; ___ no contest.

11-17-04

/s/ Randy E. Hayes

10a

Date

Defendant's Signature

(signed by counsel)

Counsel's Signature (if applicable)

I have addressed the defendant personally in open court and have informed the defendant of the matters set out above, and find that the defendant understands. I find further that the foregoing waiver of rights and plea are made knowingly and voluntarily by the defendant, and I accept the defendant's plea.

11/17/04

Date

(signed by Magistrate)

Magistrate's Signature

*Sentenced to 8 hours. Credit for time served of 8 hours.
Witness fee \$14.50, Process Fee \$20.00, CC \$123.50 =
\$158.00.*

APPENDIX E

25 U.S.C. § 2803 (2000 & Supp. V 2005) provides:

The Secretary may charge employees of the Bureau with law enforcement responsibilities and may authorize those employees to—

* * *

(3) make an arrest without a warrant for an offense committed in Indian country if—

* * *

(C) the offense is a misdemeanor crime of domestic violence, dating violence, stalking, or violation of a protection order and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating 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, and the employee has reasonable grounds to believe that the person to be arrested has committed, or is committing the crime;

APPENDIX F

27 C.F.R. 478.11 (1998) provides:

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

* * *

Misdemeanor crime of domestic violence. (a) Is a Federal, State or local offense that:

(1) Is a misdemeanor under Federal or State law or, in States which do not classify offenses as misdemeanors, is an offense punishable by imprisonment for a term of one year or less, and includes offenses that are punishable only by a fine. (This is true whether or not the State statute specifically defines the offense as a “misdemeanor” or as a “misdemeanor crime of domestic violence.” The term includes all such misdemeanor convictions in Indian Courts established pursuant to 25 CFR part 11.);

(2) Has, as an element, the use or attempted use of physical force (e.g., assault and battery), or the threatened use of a deadly weapon; and

(3) Was 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, (e.g., the equivalent of a “common law” marriage even if such relationship is not recognized under the law), or a person similarly situated to a spouse, parent, or guardian of the victim (e.g., two persons who are residing at the same location in an intimate relationship with the intent to make that place their home would be similarly situated to a spouse).

APPENDIX G

Exec. Order No. 13,140, §2b, 64 Fed. Reg. 55,115 – 55,118 (Oct. 12, 1999) provides:

Executive Order 13,140 of October 6, 1999

1999 Amendments to the Manual for Courts-Martial, United States

* * *

Sec. 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

* * *

b. Mil. R. Evid. 611 is amended by inserting the following new subsection at the end:

(d) Remote live testimony of child.

* * *

(2) . . . The term “domestic violence” means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is 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

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as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.