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No. 07-608

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RANDY EDWARD HAYES

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution, statutes, regulation and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 482 F.3d 749. The order of the district court denying respondent's motion to dismiss the indictment (Pet. App. 33a-39a) is reported at 377 F. Supp. 2d 540.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2007. A petition for rehearing was denied on July 20, 2007 (Pet. App. 40a). On October 9, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 7, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on March 24, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Following a conditional guilty plea, respondent was convicted in the United States District Court for the Northern District of West Virginia of possession of a firearm after having previously been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). He was sentenced to five years of probation, including six months of home detention with electronic monitoring. The court of appeals reversed, holding that the indictment must be dismissed because it failed to allege that respondent's state misdemeanor battery conviction was based on an offense that has, as an element, a domestic relationship between the offender and the victim. Pet. App. 1a-32a.

1. Under federal firearms laws, it is unlawful for certain persons, including any person who has been convicted of a felony in any court, "[to] possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. 922(g)(1). In 1996, Congress expanded that prohibition to include persons who have been convicted in any court of a "misdemeanor crime of domestic violence." 18 U.S.C. 922(g)(9); see Treasury Department, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, § 658(b), 110 Stat. 3009-372. The term "misdemeanor crime of domestic violence" is defined as:

> 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[.]

18 U.S.C. 921(a)(33)(A) (2000 & Supp. V 2005).[1] A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 1994, respondent pleaded guilty in the magistrate court of Marion County, West Virginia, to battery in violation of W. Va. Code Ann. § 61-2-9(c) (LexisNexis 1994). That statute provides: "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." *Ibid.* The victim named in the criminal complaint was,

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[1] After respondent committed the offense at issue in this case, Section 921(a)(33)(A) was amended to include misdemeanors under tribal, as well as federal and state law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a), 119 Stat. 3083. That amendment is not directly relevant to respondent's case. Subsequent citations in this brief to 18 U.S.C. 921(a)(33) refer to the statute as amended, 18 U.S.C. 921(a)(33) (2000 & Supp. V 2005).

at the time of the offense, respondent's wife, with whom respondent lived and with whom he had a child in common. Pet. App. 2a; J.A. 7-8. Respondent was sentenced to one year of probation. Pet. App. 2a.

3. In 2004, law enforcement officials in Marion County, West Virginia, were summoned to respondent's home in response to a domestic violence 911 call. Respondent consented to a search. The search revealed a Winchester rifle belonging to respondent. A subsequent investigation showed that respondent had possessed at least four other rifles following his 1994 state battery conviction. Pet. App. 2a & n.2; 7/5/05 Plea Hr'g Tr. 28-29.

Respondent was indicted on three counts of possessing firearms after being convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) and 924(a)(2). After respondent filed a motion to dismiss the indictment, the grand jury returned a superseding indictment that alleged that respondent's 1994 state battery conviction qualified as a misdemeanor crime of domestic violence because it was a misdemeanor offense; the offense had, as an element, the use and attempted use of physical force; and the victim was respondent's wife, who cohabited with respondent and with whom he had a child in common. Pet. App. 2a-3a; J.A. 1-4.

Respondent's motion to dismiss the superseding indictment argued that his 1994 battery conviction was not a misdemeanor crime of domestic violence within the meaning of 18 U.S.C. 921(a)(33)(A), because the West Virginia battery statute, W. Va. Code Ann. § 61-2-9(c) (LexisNexis 1994), does not have, as an element, a domestic relationship between the offender and the victim. The district court denied the motion, relying on the

Fourth Circuit's unpublished decision in *United States* v. *Ball*, 7 Fed. Appx. 210, cert. denied, 534 U.S. 900 (2001). Pet. App. 33a-39a. In *Ball*, the court held that Section 921(a)(33)(A) requires only that the predicate offense have as an element the use or attempted use of force; a domestic relationship need not appear in the formal definition of the offense if the evidence shows that there was in fact a domestic relationship between the offender and victim. 7 Fed. Appx. at 213.

Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, respondent entered a conditional plea of guilty to one count of possessing a firearm after having been convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9). Respondent reserved the right to appeal the denial of his motion to dismiss the indictment on the ground that his 1994 state battery conviction was not a misdemeanor crime of domestic violence under federal law. Pet. App. 3a-4a.

3. On direct appeal, a divided panel of the court of appeals reversed. Pet. App. 1a-32a. The court acknowledged that "several of our sister circuits have ruled that the predicate offense need not, in order to be a [misdemeanor crime of domestic violence], contain a domestic relationship element." *Id.* at 22a n.12. The court also acknowledged that the Fourth Circuit had previously reached the same conclusion in its unpublished decision in *Ball*. *Id.* at 5a n.7. But the court ruled, in conflict with these decisions, that 18 U.S.C. 921(a)(33)(A) requires that a predicate offense have, as an element, "commi[ssion] 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, par-

ent, 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). The court reasoned that, because the "committed by" phrase appears in the second clause of the definition, and immediately follows the phrase, "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," the "committed by" phrase does not modify the noun "offense," but rather the phrase beginning "has, as an element." Pet. App. 5a-10a. Therefore, the court concluded, a domestic relationship constitutes a required element of the predicate misdemeanor offense. *Id.* at 5a. The court rejected arguments based on the grammar and legislative history of Section 921(a)(33)(A), and it resolved any doubts about the meaning of the statute by reliance on the rule of lenity. *Id.* at 10a-23a.

Judge Williams dissented. Pet. App. 23a-32a. In her view, the language of the statute, "read in its natural and obvious sense, * * * unambiguously requires that only that the mode of aggression, and not the relationship status between the perpetrator and the victim, be included in the formal definition of the predicate misdemeanor offense." *Id.* at 26a. Judge Williams found it "significant" that Congress had used the word "element" in the singular, reasoning that, had Congress intended to make both the use of force and a domestic relationship required elements of the predicate offense, it would have used the word "elements," in the plural. *Ibid.*

The dissent also concluded that the majority's interpretation is inconsistent with the statute's purpose and history. The dissent noted that, when 18 U.S.C. 922(g)(9) was enacted in 1996, most States prosecuted domestic violence offenders under their general assault statutes, and fewer than half of the States had enacted misdemeanor assault statutes containing a domestic-relationship element. Pet. App. 27a-28a. The dissent considered it "unlikely" that Congress would "enact[] legislation that would immediately become a dead letter in a majority of the states." *Id.* at 28a. The dissent also observed that the drafting history of the legislation and contemporaneous statements of its sponsor supported the conclusion that the prohibition on gun possession applies to persons "convict[ed] for domestic violence-related crimes * * * that are not explicitly identified as related to domestic violence." *Id.* at 29a (quoting 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg)).

SUMMARY OF ARGUMENT

Respondent's misdemeanor conviction for battery of his wife qualifies as a "misdemeanor crime of domestic violence" and therefore triggers the federal prohibition on firearms possession in 18 U.S.C. 922(g)(9). Section 922(g)(9) requires the government to show that the defendant was convicted of a violent misdemeanor and that the defendant and victim had a qualifying domestic relationship, but the misdemeanor offense need not specify the domestic relationship as an element. The court of appeals therefore erred in concluding that the prosecution in this case was deficient.

A. The term "misdemeanor crime of domestic violence" is defined in 18 U.S.C. 921(a)(33)(A) as "an offense that * * * is a misdemeanor under Federal, State, or Tribal law; 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," or a person with another specified domestic relationship with the victim. In that definition, the reference to a defendant's "offense" is twice qualified: first, by a restrictive relative clause (*i.e.*, "that is a misdemeanor under Federal, State, or Tribal law; and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"); and next, by the phrase beginning "committed by a current or former spouse, parent, or guardian of the victim." A "misdemeanor crime of domestic violence" is, thus, an offense, committed by a person with a domestic relationship with the victim, that both is a misdemeanor and has, as an element, the use or attempted use of force, or the threatened use of a deadly weapon.

That reading is consistent with the ordinary meaning and usage of the words of the statute. Congress would not ordinarily use the word "element," in the singular, to describe two unrelated "elements" of an offense. And it is not ordinary usage to say that a person "commits" a "use or attempted use of physical force" or a "threatened use of a deadly weapon." It is, however, perfectly ordinary to say that a person "commits" an "offense."

Congress could have broken up Section 921(a)(33)(A) by placing the "committed by" clause into a separate paragraph, and thereby made its intent even clearer. But the language that Congress selected, by itself, makes Congress's intent clear. Congress's omission of a "hard return," or paragraph break, does not justify ignoring the text's clear meaning and adopting the awkward and unnatural construction reached by the court of appeals.

B. Although it is not necessary to go beyond the text of the statute in answering the question presented, the objective of Section 921(a)(33) also favors coverage of violent domestic misdemeanors, even when a domestic relationship is not an element of the offense. Indeed, a contrary construction would frustrate Congress's purpose of achieving a national standard. Congress enacted Section 922(g)(9) and its accompanying definitional provision to address what it regarded as a nationwide problem: the possession of firearms by those convicted of violent crimes against their families and household members—crimes often prosecuted as misdemeanors rather than felonies, and therefore outside the reach of existing federal firearms laws. At the time Sections 922(g)(9) and 921(a)(33) were enacted, however, only about one-third of the States had enacted criminal misdemeanor laws that contained domestic-relationship elements; although that number has since increased, it still hovers at only about one-half. No distinctly federal misdemeanor has, as an element, a domestic relationship between the offender and the victim. And even in jurisdictions that have enacted misdemeanor laws specifically targeting domestic violence, offenses involving domestic violence will naturally continue to be prosecuted as general assault, battery, and other offenses. Congress could not have intended to enact a law that would, upon its passage, have virtually no effect in much of the country. Nor could it have intended to address what it regarded as a nationwide problem by enacting a law that would inevitably operate in a patchwork and haphazard manner.

C. The history of Sections 922(g)(9) and 921(a)(33) likewise confirms the plain meaning of the text. Early drafts of the legislation defined a predicate offense for purposes of Section 922(g)(9) as a "felony or misdemeanor crime of violence * * * committed by a current or former spouse, parent, or guardian of the victim," or by a person with another specified domestic relationship with the victim. S. 1632, 104th Cong., 2d Sess. 1 (1996). The reference to an "element" of the offense was added only shortly before the provision was enacted, when the phrase "crime of violence" was replaced with the phrase "an offense that * * * has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." The substitution was designed to explicate the type of covered violent offenses. It was not, however, intended to alter the relationship between the "committed by" phrase and the general reference to the defendant's crime. As the sponsor and author of the legislation explained, the statute, as enacted, applies to convictions for domestic-violence-related crimes such as assault and battery, even if the offenses were not specifically identified as related to domestic violence. In that situation, the statute contemplates a factual inquiry into the existence of a domestic relationship between the batterer and his or her victim.

Significantly, until the court of appeals issued its decision in this case, the statute had widely been read to apply to convictions under general assault and battery statutes, including by the agency charged with the regulation of commerce in firearms and ammunition. Although Congress has amended Sections 921 and 922 in other respects, it has never overridden that interpretation.

D. Permitting the government to prove the existence of a domestic relationship between offender and victim in a Section 922(g)(9) prosecution is fully consistent with this Court's cases, and raises no concerns that would justify overriding the clear import of the text, purpose, and history of the statute. Section 922(g)(9) is not a sentencing provision, but a substantive provision of criminal law. As such, it contemplates the presentation and weighing of proof, and a finding of guilt beyond a reasonable doubt. It is well within a jury's competence to determine, based on documentary and testimonial evidence, whether the defendant shared a domestic relationship with the victim of a prior crime.

E. Finally, the rule of lenity is inapplicable here because there is no grievous ambiguity that would justify resort to the rule. Section 921(a)(33) unambiguously includes violent misdemeanors involving domestic violence, regardless of whether the formal definition of the offense included, as an element, a domestic relationship between the offender and the victim.

ARGUMENT

RESPONDENT'S MISDEMEANOR CONVICTION FOR BATTERY OF HIS WIFE QUALIFIES AS A "MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" AND THEREFORE TRIGGERS APPLICATION OF 18 U.S.C. 922(g)(9)

The divided court of appeals in this case concluded that the federal prohibition on firearm possession by persons who have committed violent crimes against family or household members applies only where the statute of conviction included, as an element, a domestic relationship between the offender and the victim. If the offender was convicted in a jurisdiction that had no such statute, or if the relevant authorities chose for other reasons to prosecute the crime as, or accept a guilty plea for, simple battery, assault, or a similar offense, then, under the decision below, the firearm prohibition has no application.

The court of appeals' decision is incorrect. The text, purpose, and history of the statute all confirm what nine other courts of appeals have already held: Section 922(g)(9) prohibits firearms possession by any person who has been convicted of a violent misdemeanor that was committed against a person having a covered domestic relationship, regardless of whether the statute of conviction included a domestic-relationship element.

A. The Text Of Section 921(a)(33)(A) Makes Clear That A "Misdemeanor Crime Of Domestic Violence" Need Not Have A Domestic-Relationship Element

Section 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence" to mean "an offense that" "is a misdemeanor under Federal, State, or Tribal law; and" "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," "committed by" a person with a specified domestic relationship with the victim. 18 U.S.C. 921(a)(33)(A). That definition expressly requires that a predicate offense have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. In that respect, it resembles other provisions defining the term "crime of violence" and other similar terms.[2] The definition also expressly requires that a predicate offense have been committed by a person with a domestic relationship with the victim. But Section 921(a)(33)(A) im-

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[2] See, *e.g.*, 18 U.S.C. 16(a) (defining "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); 18 U.S.C. 924(c)(3)(A) (defining "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); 18 U.S.C. 924(e)(2)(B)(i) (defining "violent felony" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another"); 28 U.S.C. 540A(c)(1) (defining "felony crime of violence" as "an offense punishable by more than one year in prison that has as an element the use, attempted use, or threatened use of physical force against the person of another").

poses no requirement that the domestic relationship be an *element* of the violent misdemeanor.

1. Section 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence" as an "offense," and qualifies the term in two ways. First, a relative clause, introduced by the word "that," restricts the meaning of the word "offense" by setting out two defining characteristics: the "offense" must be one 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." The word "offense" is next modified by the past participle of the verb "commit." A "misdemeanor crime of domestic violence" is, thus, an offense, committed by a person with a domestic relationship with the victim, that is a misdemeanor and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.

Section 921(a)(33) does not mean, as the court of appeals held in this case, that a "misdemeanor crime of domestic violence" encompasses only misdemeanor offenses that have, as elements, *both* the "use of physical force" *and* "commi[ssion] by" a person with a domestic relationship with the victim. As an initial matter, that Section 921(a)(33)(A)(ii) uses the word "element," in the singular, makes clear that Congress intended to describe only one required element. That single required element is set out in the clause immediately following the word "element": that is, "the use or attempted use of physical force, or the threatened use of a deadly weapon." Had Congress intended to require *additional* elements, separate and apart from the use of force, it presumably would have used the word "elements," in the plural.[3] And given the conceptual distinction between the mode of aggression (*e.g.*, the use of physical force) and the relationship between aggressor and victim (*e.g.*, current or former spouse), it would be at the very least surprising to discover that Congress had subsumed both attributes in a single "element" requirement.[4]

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[3] The Dictionary Act, 1 U.S.C. 1, provides that "words importing the singular include and apply to several persons, parties, or things." This Court has recognized, however, that "this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute," *First Nat'l Bank* v. *Missouri*, 263 U.S. 640, 657 (1924), and the Dictionary Act itself makes clear that the rule applies only "unless the context indicates otherwise," 1 U.S.C. 1; cf. *Rowland* v. *California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). Thus, while an unvarnished statutory reference to a "buying rate," in the singular, might be read to allow for the possibility of multiple buying rates, for example, see *Barr* v. *United States*, 324 U.S. 83, 91 (1945), the context of Congress's use of the word "element" in Section 921(a)(33)(A)(ii) precludes a similar interpretation. Congress would not have used a singular noun to refer to multiple items in a list of purportedly conjunctive requirements.

[4] As a general matter, when Congress has sought to identify prior offenses by reference to multiple distinct and unreleated features, it has not grouped the features together into a single "element," but rather has used the word "elements," in the plural. See, *e.g.*, 18 U.S.C. 3559(c)(2)(A) ("[T]he term 'assault with intent to commit rape' means an offense that *has as its elements* engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse.") (emphasis added); 18 U.S.C. 3559(c)(2)(B) ("[T]he term 'arson' means an offense that *has as its elements* maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive.") (emphasis added); 42 U.S.C. 14071(a)(3)(B) ("The term 'sexually violent offense' means * * * an offense that *has as its elements* engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse.") (emphasis added).

More fundamentally, the "committed by" phrase is not naturally read to modify the phrase "has, as an element, the use of force," such that a domestic relationship might be considered a kind of required subelement of the use-of-force element. That reading not only renders the word "committed" superfluous, see, *e.g.*, *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004), but is inconsistent with "the language as we normally speak it," *Watson* v. *United States*, 128 S. Ct. 579, 583 (2007). We do not normally say that a person has "committed" a "use of force," an "attempted use of force," or a "threatened use of a deadly weapon," much less an "element." We do say, however, that a person has "committed" a crime. See *Oxford English Dictionary* 559 (2d ed. 1989) (defining "commit" as "[to] do (something wrong or reprehensible), to perpetrate, be guilty of (a crime or offence, etc.)"); *Webster's Third New International Dictionary* 457 (1993) (defining "commit" as "do, perform," and giving as an example, "convicted of *committing* crimes against the state"); *Random House Dictionary of the English Language* 412 (2d ed. 1987) (defining "commit" as "to do; perform; perpetrate," and giving as examples, "*to commit murder; to commit an error*"); *American Heritage Dictionary* 381 (3d ed. 1992) ("To do, perform, or perpetrate," and giving as an example, "*commit a murder*"). The "committed by" phrase thus is most naturally read to refer to the defendant's criminal "offense," rather than to modify the use-of-force element.

Given the clear import of the language of Section 921(a)(33), it is unsurprising that every other court of appeals to consider the question—as well as a different panel of the Fourth Circuit, see Pet. App. 5a n.7 (citing *United States* v. *Ball*, 7 Fed. Appx. 210, cert. denied, 534 U.S. 900 (2001))—has read the statute to apply to all misdemeanor crimes of violence committed by a person with a domestic relationship with the victim, regardless of whether the offense included a domestic-relationship element. *United States* v. *Heckenliable*, 446 F.3d 1048, 1049 (10th Cir.), cert. denied, 127 S. Ct. 287 (2006); *United States* v. *Belless*, 338 F.3d 1063, 1067 (9th Cir. 2003); *White* v. *Department of Justice*, 328 F.3d 1361, 1364-1367 (Fed. Cir. 2003); *United States* v. *Shelton*, 325 F.3d 553, 561-562 (5th Cir.), cert. denied, 540 U.S. 916 (2003); *United States* v. *Kavoukian*, 315 F.3d 139, 142-144 (2d Cir. 2002); *United States* v. *Barnes*, 295 F.3d 1354, 1358-1361 (D.C. Cir. 2002); *United States* v. *Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000); *United States* v. *Meade*, 175 F.3d 215, 218-221 (1st Cir. 1999); *United States* v. *Smith*, 171 F.3d 617, 619-621 (8th Cir. 1999).

2. In reaching its contrary conclusion, the court of appeals relied on the punctuation of Section 921(a)(33)(A), as well as on the grammatical rule of the last antecedent. Neither argument provides sufficient reason to disregard the ordinary meaning of the words Congress used to define the scope of the federal prohibition on firearm possession for persons convicted of misdemeanor crimes of domestic violence.

a. First, in the court of appeals' view, that Congress placed a semicolon at the end of clause (i) of Section 921(a)(33)(A), but placed only a comma between the "has, as an element" phrase and the "committed by" phrase in clause (ii), is dispositive evidence that Congress meant to link the two phrases. Pet. App. 7a-9a. The court noted that it "might very well" have reached a different conclusion "[i]f Congress * * * had seen fit to place the second half of clause (ii)—that is, the words 'committed by a current or former spouse, parent, or guardian of the victim'—in a separate clause." *Id.* at 9a. The court's interpretation of the punctuation that Congress used is mistaken.

It is true that Congress could have, for example, inserted a paragraph break before the "committed by" language, such that the statute read:

> [T]he term "misdemeanor crime of domestic violence" means 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.

But the possibility that Congress could have made its manifest intent even more clear had it punctuated the provision differently does not mean that courts should refuse to read the words Congress wrote in a manner consistent with their ordinary, everyday meaning. Although "matters like punctuation" are useful as interpretive guides "where they reaffirm conclusions drawn from the words themselves," *United States* v. *Naftalin*, 441 U.S. 768, 774 n.5 (1979) (internal quotation marks and citation omitted), punctuation cannot override the meaning of those words. See, *e.g.*, *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) ("[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning."); *Costanzo* v. *Tillinghast*, 287 U.S. 341, 344 (1932)

("[P]unctuation is not decisive of the construction of a statute."); *Barrett* v. *Van Pelt*, 268 U.S. 85, 91 (1925) ("Punctuation is a minor, and not a controlling, element in interpretation.") (citation omitted); cf. *Ewing* v. *Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) ("Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning: if that is not apparent on judicially inspecting the whole, the punctuation will not be suffered to change it."). This Court has accordingly concluded that courts "should 'disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.'" *United States Nat'l Bank*, 508 U.S. at 462 (quoting *Hammock* v. *Loan & Trust Co.*, 105 U.S. 77, 84-85 (1882)).[5]

Notably, Congress has used language essentially identical to that of Section 921(a)(33)(A) without using *any* semicolons or "hard returns." Section 2803 of Title 25 authorizes federal agents to make warrantless arrests for offenses committed in Indian country where:

> the offense is a misdemeanor crime of domestic violence, dating violence, stalking, or violation of a protective 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 com-

[5] It is also noteworthy that clause (ii) of Section 921(a)(33)(A) lacks any punctuation mark at the end. See, *e.g.*, Pet. App. 25a (Williams, J., dissenting); *Barnes*, 295 F.3d at 1360 n.5. That omission renders it all the more difficult to ascribe dispositive weight to the punctuation of that provision.

> mon, by a person who is cohabiting 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, and the employee has reasonable grounds to believe that the person to be arrested has committed, or is committing the crime.

25 U.S.C. 2803(3)(C) (Supp. V 2005).

The resemblance that Section 2803(3)(C) bears to Section 921(a)(33)(A) is not accidental. Section 2803(3)(C) was enacted as a companion to the provision amending Section 921(a)(33)(A)'s definition of "misdemeanor crime of domestic violence" to include misdemeanors under tribal law. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 908(a) and (b)(3), 119 Stat. 3083. That Congress considered the two provisions in conjunction—and at a time when federal appellate courts had given uniform interpretation to Section 921(a)(33)(A)(ii), see page 16, *supra*—suggests that Congress deliberately borrowed the language of Section 921(a)(33)(A), and intended Section 2803(3)(C) to carry the same meaning. See, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). And that, in turn, supports the conclusion that the meaning of neither provision turns on the presence or absence of semicolons or "hard returns."[6]

b. The court of appeals also found support for its conclusion in the "rule of the last antecedent," according

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[6] Although Congress did not add tribal-law misdemeanors to Section 921(a)(33)(A) and enact Section 2803(3)(C) until after petitioner's conduct in this case, Congress's later actions can be understood to confirm the legislature's earlier intent not to treat the covered domestic relationship as an element of the offense.

to which a limiting clause or phrase is "ordinarily * * * read as modifying only the noun or phrase that it immediately follows." Pet. App. 9a (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003), and citing 73 Am. Jur. 2d *Statutes* § 138 (2001)). Applying that rule, the court of appeals concluded that, because the "committed by" phrase immediately follows the "use of physical force" phrase, both phrases must define elements of the offense. *Id.* at 9a-13a. The court of appeals' reliance on the last-antecedent rule was misplaced.

As a preliminary matter, the rule of the last antecedent is "not an absolute and can assuredly be overcome by other indicia of meaning." *Thomas*, 540 U.S. at 26; accord 2A Norman A. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 490 (7th ed. 2007) (the rule of the last antecedent "is another aid to discovery of intent or meaning and is not inflexible and uniformly binding").[7] The rule is also usually accompanied by an important caveat: where, as here, the qualifying phrase is set off from the immediately preceding language by a comma, the comma is generally considered evidence that the qualifying phrase was in-

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[7] The court of appeals itself recognized the flexibility of the rule in rejecting the argument that a literal application of the rule of the last antecedent would mean that the "committed by" phrase modified only its immediate antecedent: "the threatened use of a deadly weapon." Pet. App. 12a-13a; see *Barnes*, 295 F.3d at 1361 n.7. The court concluded that such a reading "would not be compelled" because reading the "committed by" phrase to modify "use or attempted use of physical force" would be "quite plausible as a matter of common sense." Pet. App. 13a. The court's appeal to common sense should have led it to a different conclusion altogether: that the "committed by" phrase does not modify *either* "the threatened use of a deadly weapon" *or* "the use or attempted use of physical force," but rather the word "offense" (or, alternatively, the entire phrase that begins with the word "offense").

tended to reach beyond its immediate antecedent. See *id.* at 491-492 & n.5; 73 Am. Jur. 2d *Statutes* § 139.

It is particularly significant that the comma here in question separates the qualifying phrase (*i.e.*, "committed by") from the end of a relative clause (*i.e.*, the language introduced by the words "an offense *that*"). Inserting a relative clause between a noun and a qualifying phrase need not alter the intended connection between the two. Cf. William Strunk & E.B. White, *The Elements of Style* 29 (4th ed. 2000) (identifying relative clauses as an exception to the general rule that related words must be kept together). The District of Columbia Circuit has offered the following example: In the sentence "'Act 284 is a law that deals with robbery, enacted by the legislature in 1975,'" the phrase " 'enacted by the legislature in 1975' can modify both 'a law' as well as 'a law that deals with robbery.' " It does not, however, modify the word "robbery" alone. *Barnes*, 295 F.3d at 1361 n.6.

In a provision that defines the term "misdemeanor crime of domestic violence" as "an offense committed by a current or former spouse, parent, or guardian of the victim," the "committed by" phrase unquestionably modifies the word "offense." Inserting a relative clause—*i.e.*,"that is a misdemeanor under Federal, State, or Tribal law; and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"—does not alter that relationship. Notwithstanding the distance that necessarily results from the insertion of a lengthy relative clause, cf. Pet. App. 13a, the "committed by" phrase still modifies the reference to the defendant's "offense" (or, alternatively, the complete reference to an offense that is a misdemeanor and has a use-of-force element), rather than modifying only "the use or attempted use of physical force, or the threatened use of a deadly weapon."

B. Limiting The Reach Of Section 922(g)(9) To Convictions Entered Under Domestic-Violence-Specific Laws Would Unnaturally Constrict The Scope Of The Statute

The court of appeals' interpretation of Section 921(a)(33) not only conflicts with the terms of that provision and ordinary rules of usage, but undermines the effective application of Section 922(g)(9) in a manner that Congress could not have intended.

1. Congress enacted Section 922(g)(9) as a supplement to the federal felon-in-possession law, 18 U.S.C. 922(g)(1), based on the recognition that "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies," but "are, at most, convicted of a misdemeanor." 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg). Section 922(g)(9) was designed to "close this dangerous loophole and keep guns away from violent individuals who threaten their own families." *Id.* at 22,986. Properly interpreted, the statute advances that purpose by prohibiting gun possession by any person who has been convicted of a crime involving the use of force against a current or former spouse, child, or other intimate.

By contrast, the court of appeals' reading of the statute would limit application of Section 922(g)(9) to persons convicted under criminal misdemeanor laws specifically addressing domestic violence. When Section 922(g)(9) was enacted in 1996, only about one-third of the States had enacted laws that might have satisfied the court's standard. See *Barnes*, 295 F.3d at 1364 n.12.[8] As the court of appeals has interpreted Section 921(a)(33)(A), Section 922(g)(9) would have been, on its passage, a virtual nullity in most of the country.

Although more States have enacted such laws in the years since Section 922(g)(9) was enacted, the number of States with domestic-violence misdemeanor laws is still

[8] As of the date Section 922(g)(9) was enacted, state misdemeanor statutes specifically addressing domestic violence included: Ark. Code Ann. § 5-26-305 (LexisNexis 1995) and *id.* §§ 5-26-307 to 5-26-309; Cal. Penal Code § 243(e)(1) (West 1997); Ga. Code Ann. § 16-5-23.1(f) (LexisNexis 1996); Haw. Rev. Stat. § 709-906 (LexisNexis 1996); Idaho Code § 18-918 (LexisNexis 1996); 720 Ill. Comp. Stat. Ann. 5/12-3.2 (West 1996); Iowa Code Ann. § 708.2A (West 1996); Mich. Comp. Laws Ann. § 750.81(2)-(3) (West 1996); Minn. Stat. Ann. § 609.2242 (West 1997); Mont. Code Ann. § 45-5-206 (West 1996); N.M. Stat. Ann. § 30-3-12 (West 1996) and *id.* § 30-3-15; Ohio Rev. Code Ann. § 2919.25 (West 1997); Okla. Stat. Ann. tit. 21, § 644(C) (West 1997); S.C. Code Ann. § 16-25-20 (LexisNexis 1996); Vt. Stat. Ann. tit. 13, § 1042 (LexisNexis 1996); Va. Code Ann. § 18.2-57.2 (West 1996); and W. Va. Code Ann. § 61-2-28 (LexisNexis 1996). Other States had enacted statutes setting out guidance for the procedural handling of criminal cases involving domestic violence, prescribing treatment for offenders, or, in some cases, providing for heightened penalties for second or subsequent offenses involving violence in a domestic context, but do not appear to have treated domestic-relationship status as an element of an offense distinct from, for example, simple assault or battery. *E.g.*, Ariz. Rev. Stat. Ann. § 13-3601 (LexisNexis 1996); Colo. Rev. Stat. Ann. § 18-6-801 (West 1997); N.J. Stat. Ann. §§ 2C:15-19 *et seq.* (West 1997); see Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 Geo. Wash. L. Rev. 558-560 (2007) (explaining that "most jurisdictions do not define domestic violence as a separate criminal offense proven with statutory elements unique to domestic violence," and that "any differences in treatment between domestic violence and other forms of violence within the criminal justice system have been limited primarily to the procedural aspects of enforcing general criminal laws") (footnote omitted). See generally *id.* at 557-565.

only around one-half.[9] And even in those jurisdictions that have enacted domestic-violence-specific misdemeanor laws, domestic abusers can and will be charged with, and convicted of, other offenses, including simple assault and battery, that do not contain a domestic-relationship element. In many cases, the only material difference between simple assault or battery and domestic assault or battery is that the prosecution must prove an additional element to convict a defendant of the latter offense. Compare, *e.g.*, W. Va. Code Ann. § 61-2-9(c) (LexisNexis 2008) (simple battery a misdemeanor punishable by a maximum of 12 months of imprisonment and a fine of up to $500) with, *e.g.*, *id.* § 61-2-28(a) (domestic battery a misdemeanor punishable by a maximum of 12 months of imprisonment and a fine of up to $500, absent prior conviction for domestic assault, domestic battery, or simple assault or battery involving domestic violence).

If the court of appeals' interpretation were correct, that would mean that "Congress remedied one disparity—between felony and misdemeanor domestic violence convictions—while at the same time creating a new disparity among (and sometimes, within) states." *Barnes*,

[9] Statutes passed after 1996 include: Ala. Code § 13A-6-132 (West 2005); Ind. Code § 35-42-2-1.3 (LexisNexis 2004); Kan. Stat. Ann. § 21-3412a (LexisNexis 2001); La. Rev. Stat. Ann. § 14:35.3 (West 2007); Me. Rev. Stat. Ann. tit. 17-A, § 207-A (West 2008); Miss. Code Ann. § 97-3-7 (LexisNexis 1998); Mo. Rev. Stat. § 565.074 (West 2008); Neb. Rev. Stat. § 28-323 (West 2007); Tenn. Code Ann. § 39-13-111 (LexisNexis 2000); see also N.C. Gen. Stat. § 14-33(d) (West 2007) (addressing offenses involving infliction of serious injury or use of deadly weapon on a person with whom the defendant shares a "personal relationship," and "in the presence of a minor"). Respondent has calculated that "nearly half" of the States now have "domestic-battery statutes containing a domestic-relationship element." Br. in Opp. 3 & n.1.

295 F.3d at 1364. A person who battered a spouse in a state with a misdemeanor domestic assault statute, and was prosecuted under that statute, would be prohibited by Section 922(g)(9) from owning a firearm; a person who engaged in the same conduct, but was convicted of misdemeanor simple battery or assault, would not.

Moreover, because no federal misdemeanor has as its elements the use of force against a spouse, child, or other person similarly situated, the court of appeals' decision would largely render meaningless the statute's inclusion of offenses that are "misdemeanor[s] under Federal * * * law."[10] 18 U.S.C. 921(a)(33)(A)(i); see *Barnes*, 295 F.3d at 1364-1365; cf. *Chavez*, 204 F.3d at 1313-1314 (concluding that 18 U.S.C. 922(g)(9) applies to a person convicted of misdemeanor violation of 18 U.S.C. 113(a)(4), assault by striking, beating or wounding within the maritime and territorial jurisdiction of the United States, for assaulting his wife on a military base).

As the dissenting judge observed in this case, it is unlikely that Congress, in its effort to provide a solution to a serious nationwide problem of gun-related violence in the domestic context, would have deliberately enacted legislation "that would immediately become a dead letter in a majority of the states," not to mention the federal system, Pet. App. 28a (Williams, J., dissenting).

2. Respondent has argued (Br. in Opp. 7-9) that Congress assumed the risk of inconsistent application when it chose to "tether[] its definition of 'misdemeanor crime of domestic violence' to State law"; according to respondent, that decision "virtually guarantee[d] that

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[10] State domestic-violence offenses occurring within the special maritime and territorial jurisdiction of the United States could be prosecuted under 18 U.S.C. 13. But there is no distinctly federal misdemeanor offense that would qualify.

different standards [would] apply in different States." *Id.* at 7. Respondent is incorrect.

The definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A) is "tethered" to state law only in the sense that Congress chose to include convictions entered in state courts, as well as federal and tribal courts, as predicates for application of Section 922(g)(9). Rather than rely on the labels that the States have attached to qualifying offenses, Congress defined predicate offenses by setting out a list of required attributes. When Congress defines a range of predicate offenses by reference to certain common characteristics, as it has in Section 921(a)(33)(A), it generally does so to ensure, to the extent practicable in a federalist system, the consistent application of federal law. Cf. *Taylor* v. *United States*, 495 U.S. 575, 582, 588-589 (1990) (explaining that, in enacting the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. V 2005), Congress defined predicate offenses by reference to common characteristics, rather than by reference to how States choose to label a particular offense, to "ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases" (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 20 (1983)).[11]

[11] *Logan* v. *United States*, 128 S. Ct. 475 (2007), is not to the contrary. *Logan* concerned 18 U.S.C. 921(a)(20), which excludes convictions for which the offender had his civil rights restored from the category of convictions that, *inter alia*, qualify as predicates for sentencing under the ACCA. In response to the petitioner's argument that literal application of the civil-rights-restored exemption would anomalously treat persons whose civil rights were never lost more harshly than those who lost, then regained, their civil rights, the Court echoed the Second

The court of appeals' misreading of Section 921(a)(33)(A) fundamentally undermines the consistent application of federal law, resulting in a patchwork and haphazard application of a law designed to provide a solution to what Congress regarded as a serious nationwide problem: the possession of firearms by persons convicted of violent misdemeanors in a domestic context.

C. The Statute's History Confirms That Section 922(g)(9) Applies To All Persons Convicted Of Misdemeanors Involving Domestic Violence, Without Regard To Whether Domestic Relationship Status Was An Element Of The Offense

The statute's history further confirms that application of Section 922(g)(9) does not turn on whether the defendant was convicted of a crime of violence that also had, as an element, a domestic relationship between the offender and the victim.

1. Section 922(g)(9) was enacted as part of the Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, 110 Stat. 3009-314, which was in turn enacted as part of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009. Sponsored by Senator

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Circuit's observation that such anomalies "are the inevitable consequence of making access to the exemption depend on the differing laws and policies of the several states." *Logan*, 128 S. Ct. at 483 (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995), cert. denied, 516 U.S. 1121 (1996)). But Congress's decision "to have restoration triggered by events governed by state law" under Section 921(a)(20), *ibid.* (quoting *McGrath*, 60 F.3d at 1009), is fundamentally different from Congress's decision to make certain legal consequences turn on convictions for offenses that share specified characteristics, whether those convictions were entered in federal, state, or tribal courts. See 18 U.S.C. 921(a)(33)(A).

Lautenberg, the initial version of the bill would have extended Section 922(g)'s prohibitions to any person "who is under indictment for, or has been convicted in any court, of any crime involving domestic violence," and would have added to Section 921(a) the following definition:

> 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.

S. 1632, 104th Cong., 2d Sess. 1 (1996); 142 Cong. Rec. at 5840.

Before the bill was reported out of the Senate Judiciary Committee, however, Senator Lautenberg offered it as an amendment to an anti-stalking bill. See 142 Cong. Rec. at 19,394. When the anti-stalking legislation stalled in the House of Representatives, Senator Lautenberg offered his bill as an amendment to a Treasury and Postal Service appropriations bill. *Id.* at 22,985-22,986; see *id.* at 23,119. The Senate approved the amendment by a 97-2 vote. *Id.* at 22,988. That bill was subsequently subsumed within the Omnibus Consolidated Appropriations Act, which was passed on September 30, 1996. *Id.* at 26,675.

In a floor statement made on the date of the legislation's passage, Senator Lautenberg explained that the final version of the legislation differed in several respects from the previous version the Senate had passed, and that those differences in language were products of negotiations that had taken place shortly beforehand. 142 Cong. Rec. at 26,675. Among those differences was the substitution of the phrase "an offense that * * * * has, as an element, the use or attempted use of force, or the threatened use of a deadly weapon" for the phrase "crime of violence." 18 U.S.C. 921(a)(33)(A)(ii). Senator Lautenberg described the substitution as one of a number of "minor changes to the Senate-passed version that actually strengthen the ban slightly":

> [T]he revised language includes a new definition of the crimes for which the gun ban will be imposed. Under the original version, these were defined as crimes of violence against certain individuals, essentially family members. Some argued that the term crime of violence was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition of covered crimes that is more precise, and probably broader.
>
> Under the final agreement, the ban applies to crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon. This is an improvement over the earlier version, which did not explicitly include within the ban crimes involving an attempt to use force, or the threatened use of a weapon, if such an

> attempt or threat did not also involve actual physical violence.

142 Cong. Rec. at 26,675.[12]

Senator Lautenberg's remarks made clear that the substitution of the "has, as an element" language for the "crime of violence" formulation was designed to lend

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[12] As part of the Omnibus Consolidated Appropriations Act, 1997, Congress also enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 119 Stat. 3009-575, which included a provision making commission of a "crime of domestic violence" a basis for deportation, Div. C, § 350(a), 110 Stat. 3009-639 (8 U.S.C. 1227(a)(2)(E)). That provision, like the original draft of Senate Bill 1632, defines the term "crime of domestic violence" as a "crime of violence" that is "committed by" a person with a specified domestic relationship with the victim. The statute reads:

> [T]he term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

8 U.S.C. 1227(a)(2)(E)(i). By incorporating the definition of "crime of violence" in 18 U.S.C. 16, Section 1227(a)(2)(E)(i) covers a broader array of crimes than Section 921(a)(33)(A): Most notably, it includes crimes that have, as an element, the "threatened use of physical force," regardless of whether the threat involves the "use of a deadly weapon." Compare 18 U.S.C. 16(a) with 18 U.S.C. 921(a)(33)(A)(ii). Section 1227(a)(2)(E)(i) also includes crimes that do not have a use-of-force element, but nevertheless "involve[] a substantial risk that physical force * * * may be used in the course of committing the offense." 18 U.S.C. 16(b).

greater precision to the scope of violent criminal acts that would be covered by the statute. His remarks also made clear that the addition of the use-of-force phrase was not designed to alter the effect of the statute's domestic relationship language, which had remained largely unchanged in the final version of the legislation.[13] In discussing the implementation of the new law, Senator Lautenberg noted that the Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)-(t), requires law enforcement officials to make a "reasonable effort" to ensure that persons seeking to purchase handguns are not prohibited from doing so under federal law. See 18 U.S.C. 922(s)(2). Senator Lautenberg explained how the reasonable-effort requirement should apply in the case of persons convicted of misdemeanor crimes of domestic violence:

> [C]onvictions for domestic violence-related crimes often are for crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.
>
> * * * * *
>
> In my view, the reasonable effort requirement should not be interpreted * * * so narrowly that it

[13] The final version of the legislation omitted the final clause of the earlier proposed definition, which had included among its list of specified domestic relationships a catch-all provision for other domestic relationships recognized "under the domestic or family violence laws of the jurisdiction in which such felony or misdemeanor was committed." S. 1632, 104th Cong., 2d Sess. 2 (1996); 142 Cong. Rec. at 5840.

> would allow law enforcement agencies to routinely ignore misdemeanor convictions for violent crimes, without further exploration into whether these crimes involved domestic violence.

142 Cong. Rec. at 26,675-26,676.

Senator Lautenberg's remarks indicate that Congress was aware that domestic-violence offenses were generally prosecuted under state laws that do not contain a domestic-relationship element. The remarks also make clear Senator Lautenberg's intent that the firearm prohibition apply without regard to whether an offender's domestic-violence misdemeanor was prosecuted under a statute specifically targeting domestic violence. While one Senator's remarks are of course "not controlling," Pet. App. 19a (citing *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980)), the explanation provided by the sponsor of the legislation and the author of its operative language is certainly pertinent legislative history. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982). That is particularly true where, as here, the sponsor's explanation serves to confirm the reading of the statute compelled by its text and consistent with its purposes.

2. Following its enactment, Section 921(a)(33)(A) was read in a manner consistent with Senator Lautenberg's interpretation. Members of Congress so read it, see H.R. Rep. No. 845, 105th Cong., 2d Sess. 88 (1999) (describing a "misdemeanor crime of domestic violence" under the statute as "an offense that is (1) either a federal or state charge, and (2) has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon, and (3) is committed by a current or former spouse," or person with another specified domes-

tic relationship with the victim), as did every court of appeals to consider the question, see page 16, *supra*.

In 1998, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), amended its regulations concerning commerce in firearms and ammunition to implement Section 922(g)(9). See *Implementation of Public Law 104208, Omnibus Consolidated Appropriations Act of 1997*, 63 Fed. Reg. 35,520 (1998); cf. 18 U.S.C. 926 (2000 & Supp. V 2005). The regulations define the term "misdemeanor crime of domestic violence" as an offense that: (1) "Is a misdemeanor"; (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 person with a specified domestic relationship with the victim. 27 C.F.R. 478.11 (2007); see 27 C.F.R. 478.32(a)(9). In promulgating the regulation, ATF explained:

> The definition of misdemeanor crime of domestic violence includes all offenses that have as an element the use or attempted use of physical force (*e.g.*, assault and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault and battery against his or her spouse would be prohibited from receiving or possessing firearms or ammunition.

63 Fed. Reg. at 35,521.

Since the ATF promulgated its regulation, Congress has several times amended Sections 921 and 922. Congress has never, however, repudiated the ATF's interpretation of the statutory definition of "misdemeanor crime of domestic violence." Indeed, in the recent NICS

Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (2008) (to be codified at 18 U.S.C. 922 note), Congress incorporated the existing definition of the term without altering it in any respect. *Id.* § 3, 122 Stat. 2561. That Congress has not altered the ATF's interpretation suggests that ATF has correctly interpreted the statutory language, see, *e.g.*, *North Haven Bd. of Educ.*, 456 U.S. at 535, and provides further evidence in support of the conclusion compelled by the text, purposes, and history of the statute.

D. Permitting The Government To Prove The Identity Of The Victim In A Section 922(g)(9) Prosecution Is Consistent With This Court's Cases

Respondent contends (Br. in Opp. 15-17) that, even if the statute itself contains no requirement that a predicate offense have, as an element, a domestic relationship between the offender and the victim, this Court's decisions in *Taylor*, 495 U.S. at 575, and *Shepard* v. *United States*, 544 U.S. 13 (2005), generally restrict courts to examining the fact of a prior conviction and the statutory definition of the prior offense, and thus forbid the government from relying on "extrinsic evidence" to establish the parties' domestic-relationship status. Br. in Opp. 17. Respondent's contention is without merit.

In *Taylor*, the Court considered the meaning and application of the ACCA, 18 U.S.C. 924(e) (2000 & Supp. V 2005), which provides a sentence enhancement for any person who violates Section 922(g) after three prior convictions for serious drug offenses or violent felonies, including "burglary." 18 U.S.C. 924(e)(2)(B)(ii). Reviewing the history and background of the statute, the Court determined that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States," namely, an offense that has "at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598.

The Court then turned to the problem of how to determine whether a prior conviction qualified as "burglary" within the scope of that definition. Agreeing with the uniform judgment of the courts of appeals, the Court concluded, based on the language, history, and purpose of the statute, that the ACCA "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600. The Court thus concluded that "an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602.

In *Shepard*, the Court concluded that *Taylor*'s categorical approach governs the identification of generic offenses following guilty pleas, as well as convictions following verdicts, for purposes of ACCA sentencing. The Court concluded that, where a prior conviction was the result of a guilty plea, the sentencing court may look only to "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16.

Together, *Taylor* and *Shepard* govern the range of documents that a court may consult to determine whether a defendant's criminal record merits imposition of an enhanced sentence under the ACCA. The holdings of those cases have no application, however, with respect to Section 922(g)(9): a different statute with different language, different purposes, and a different history.

Moreover, respondent's reliance on a general principle of "avoidance of collateral trials," Br. in Opp. 17 (quoting *Shepard*, 544 U.S. at 23), makes little sense in this distinct context. Unlike the ACCA, Section 922(g)(9) is a substantive provision of criminal law. As such, its application naturally requires judges and juries "to engage in an elaborate factfinding process" for the simple purpose of determining whether the defendant is guilty of the offense. *Taylor*, 495 U.S. at 601. There is nothing impractical or unfair, see *ibid.*, about including the defendant's relationship to the victim of a prior violent offense in the list of matters to be established in a Section 922(g)(9) prosecution. As the First Circuit has explained, "[f]ederal criminal trials typically involve proof and differential factfinding, and the issue of a relationship status is by no means outside a jury's competence." *Meade*, 175 F.3d at 222 n.1. Furthermore, in many cases, including this one, the defendant will not dispute that he or she had a domestic relationship with the victim, and indeed may decide to admit the existence of the relationship. See Pet. App. 20 n.11; see also, *e.g.*, *Shelton*, 325 F.3d at 556; *Barnes*, 295 F.3d at 1359. Congress clearly contemplated an inquiry into domestic-relationship status in Section 922(g)(9)'s parallel restriction on firearm ownership by persons subject to domestic restraining orders. See 18 U.S.C. 922(g)(8). There is no reason to think that Congress intended Section 922(g)(9) to operate differently, based on a purported concern for avoidance of evidentiary disputes about the nature of a defendant's prior conviction.

Nor does permitting the government in a Section 922(g)(9) prosecution to prove domestic-relationship status implicate the kinds of constitutional concerns members of this Court have identified in the ACCA context. See *Shepard*, 544 U.S. at 24-26 (plurality opinion). Allowing a jury to decide, based on documentary and testimonial evidence, whether the victim of the defendant's prior crime was a person with whom the defendant had a domestic relationship (*e.g.*, a spouse), and thus whether the defendant's past crime involved domestic violence, preserves the jury trial right and is fully consistent with the Sixth Amendment.

E. The Rule Of Lenity Does Not Apply

Because the text, purpose, and history of Section 921(a)(33)(A) all confirm that the statute reaches misdemeanor offenses that have, as an element, the use of force, when the government can prove the existence of a domestic relationship between the offender and the victim, the rule of lenity has no role to play in this case. Contrary to the court of appeals' suggestion (Pet. App. 20a-22a), "[t]he simple existence of some statutory ambiguity * * * is not sufficient to warrant application of that rule." *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998). And contrary to respondent's suggestion (Br. in Opp. 14-15), it is not sufficient that different courts have reached different conclusions on the meaning of the same statutory provision. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Rather, the rule of lenity applies only if there is a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscar-*

ello, 524 U.S. at 138-139 (internal quotation marks and citation omitted).

There is no such "grievous ambiguity" here. Section 922(g)(9) unambiguously applies to a person who has been convicted of battering his or her spouse, regardless of whether the offense of conviction had, as an element, a domestic relationship between the parties. Resort to the rule of lenity is therefore unwarranted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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), the term "misdemeanor crime of domestic violence" means 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

(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.