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

REPLY BRIEF FOR THE UNITED STATES

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Respondent contends that a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A)[1] must have, as an element, a domestic relationship between the defendant and the victim. That interpretation runs contrary to the text of the statute, its purposes, and its history. The statutory text mentions only one required "element" (the use or attempted use of physical force or threatened use of a deadly weapon) and separates that requirement from the domestic-relationship requirement with a comma. Moreover, respondent's interpretation would require this Court to ignore the ordinary meaning of the word "committed" and adopt the strained construction that a person "commits" a "use of physical force" or "use of a deadly weapon." That interpretation also would render the statute inapplicable in almost half the States, despite the fact that the statute

[1] As in the government's opening brief, citations in this brief to 18 U.S.C. 921(a)(33)(A) refer to the statute in its current form.

was enacted to address the nationwide problem of domestic violence involving firearms, and contradict the statute's drafting history.

Respondent hypothesizes a number of reasons why Congress might have wished to limit the firearm possession ban to predicate offenses with a domestic-relationship element. None is persuasive. He also speculates that the modification in the statutory language during the drafting process reflected a congressional compromise to exempt offenses without a domestic-relationship element from the statute's reach. But that modification concerned only the violence requirement of the predicate offense, not the domestic-relationship requirement. Likewise, there is no reason to invoke the canon of constitutional avoidance, because neither respondent nor his amici has identified any constitutional defect with the statute. Nor is there any basis for invoking the rule of lenity because, after all tools of statutory construction have been exhausted, there is no grievous ambiguity that would trigger that rule.

This Court therefore should reject respondent's interpretation and hold, in line with the overwhelming majority of courts of appeals, that an offense need not have a domestic-relationship element to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. 921(a)(33)(A).

A. The Statutory Text Does Not Require That A Crime Have A Domestic-Relationship Element To Be A "Misdemeanor Crime Of Domestic Violence"

1. Respondent contends (Br. 15-16, 24-27) that an ordinary reader confronted with the words "has, as an element," followed by two clauses relating to the distinct concepts of mode of aggression and domestic rela-

tionship, would expect that both of those concepts are subsumed into one compound "element." That is incorrect. The statute identifies only one "element," which is defined by the clause immediately following that word: "the use or attempted use of physical force, or the attempted use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(ii). A comma then directs the reader to pause, *The Chicago Manual of Style* ¶ 6.18, at 244 (15th ed. 2003), and the next clause switches the reader's focus from the mode of aggression to the relationship between the aggressor and the victim.

Because "[t]he amount of force used and the relationship between the aggressor and the victim are two very different" concepts, an ordinary reader would understand them to constitute two different things, as opposed to a single element. *United States* v. *Belless*, 338 F.3d 1063, 1066 (9th Cir. 2003). Not surprisingly, in the States that have laws specifically addressing domestic violence, the mode of aggression and aggressor-victim relationship have routinely been treated as distinct offense elements.[2]

The structure of the domestic-relationship clause confirms that the singular "element" refers only to the mode of aggression. The clause is set off by a comma, which signifies that Congress finished defining the use of force "element" and turned to a new concept. See *The Chicago Manual of Style* ¶ 6.38, at 250; see also *United States* v. *Barnes*, 295 F.3d 1354, 1363 (D.C. Cir. 2002) (the comma "reinforces the separateness of the 'use of

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[2] See, *e.g.*, *State* v. *Robinson*, No. 8-08-05, 2008 WL 4377860, at *4 (Ohio Ct. App. Sept. 29, 2008); *State* v. *Roman*, No. 26359, 2008 WL 4173821, at *10 (Haw. Sept. 11, 2008); *State* v. *Coffin*, 191 P.3d 244, 248 (Idaho Ct. App. 2008); *People* v. *Pickens*, 822 N.E.2d 58, 65 (Ill. App. Ct. 2004); *State* v. *Rodriquez*, 636 N.W. 2d 234, 247 (Iowa 2001).

force' element from the 'committed by' language"). The domestic-relationship clause begins with the word "committed," which introduces that new concept and confirms a break from the previous clause. Had Congress intended to make the domestic relationship part of the required "element," one would have expected it to link the two clauses together, rather than insert a comma and a new verb to de-link them.

Respondent asserts that Congress "frequent[ly] inclu[des] * * * multiple concepts" in a single offense element, citing several statutes that define a "crime of violence" as a crime that "has as an element the use, attempted use, or threatened use of physical force against" the person or property of another. Resp. Br. 24-25 (citing 18 U.S.C. 16(a), 373(a), 521(c)(2), 924(c)(3)(A) and (e)(2)(B)(i), 3559(c)(2)(F)(ii)). The "crime of violence" definition stands in sharp contrast to the statutory language here, for two reasons. First, although Congress included the direct object of the force in defining a "crime of violence," it did not take the additional and unusual step of defining the identity of the aggressor in a single "element." Second, in defining a "crime of violence," Congress used the word "against" to connect the force used with its object and did not separate the two with any punctuation. When Congress intends to require that two distinct requirements be met, it uses the plural "elements," U.S. Br. 14 n.4 (citing statutes), and it did not use that formulation here.[3]

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[3] Respondent observes (Br. 25-27) that courts considering the same statutory offense definition may divide the offense into different elements in describing the offense to a jury. That is true, but irrelevant. The question here is not the number of elements of the federal offense, but whether one of them—the domestic-relationship requirement—also must have been established beyond a reasonable doubt to

Respondent invokes (Br. 25) the Dictionary Act, but the Act's statement that singular nouns may be treated as plural applies only where doing so would make sense in context, see 1 U.S.C. 1, and would be "necessary to carry out the evident intent of the statute," *First Nat'l Bank* v. *Missouri*, 263 U.S. 640, 657 (1924). Neither is true here: Congress placed the distinct mode of aggression and domestic relationship concepts in two clauses, separated by a comma, and reading the statute to require that both be treated as elements would severely constrict the statute's application. See pp. 2-4, *infra*. The Dictionary Act cannot be used to create an ambiguity where none exists.

2. Respondent argues (Br. 19-24) that the domestic-relationship clause, which begins with the word "committed," modifies the mode of aggression clause, rather than the noun "offense." The words Congress chose and the manner in which it arranged them compel the contrary conclusion.

In ordinary usage, a person "commits" an "offense"; he does not "commit" a "use of physical force" or a "use of a deadly weapon." That conclusion is confirmed by numerous dictionary definitions, which define "commit" as "do," "perform," or "perpetrate," and illustrate the concept by providing the specific example of committing a crime. U.S. Br. 15 (citing definitions). Respondent ignores those numerous probative indicators of common meaning, instead citing (Br. 23) four examples in sup-

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the court that adjudicated the predicate offense. Respondent also asserts (Br. 27) that because "[a] conviction under § 922(g)(9) cannot be secured without proving a domestic relationship in the underlying assault," "such a relationship is an 'element' of the predicate offense," but that analysis mistakenly conflates the elements of the federal offense with the elements of the state offense.

port of his position, only two of which speak of "committing" a "use of force." The linguistics professors amici (Professors Br. 7-8, 3a-9a) add a few more. But none of those examples require the reader to choose between using "committed" to modify (a) an "offense" or (b) a "use of physical force" or "use of a deadly weapon." Although a reader confronted with a sentence in which "use of force" is the *only* object may well read "committed" to modify that object, the presence here of the additional object "offense" makes it extremely unlikely that a reader would choose the awkward construction "committed a use of force."

Moreover, the fact that respondent and the amici have only uncovered a smattering of examples of "committing" a "use of force" belies respondent's assertion that his reading of the statutory language is common. In common usage, "[t]he *use* of force is not 'committed,' 'done' or 'perpetrated.'" *Barnes*, 295 F.3d at 1360. Even the linguistics professors amici, who strain to justify respondent's reading of the statute, agree that it sounds "weird." Professors Br. 4; *id.* at 10 (construction "sounds a little strange"); *id.* at 35 (construction is "relative[ly] rar[e]"). "Committing" an "*offense*," on the other hand, is an extremely common construction, used over a dozen times in this Court's opinions from the past

Term alone[4] and throughout the federal criminal code.[5] Because respondent's reading of the statute "violates the ordinary meaning of [a] key word," *Dunn* v. *CFTC*, 519 U.S. 465, 470 (1997) (internal quotation marks omitted), this Court should reject it.

The structure of the statute confirms that the clause beginning with "committed" modifies the word "offense," rather than modifying the "use or attempted use of physical force, or threatened use of a deadly weapon." The comma preceding the domestic-relationship clause separates it from the mode of aggression clause, and the word "committed" signals that what follows does not continue defining the mode of aggression.[6]

Contrary to respondent's assertion (Br. 19-22), the principle that a qualifying phrase generally should be read to modify the phrase immediately preceding it does

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[4] See, *e.g.*, *Kennedy* v. *Louisiana*, No. 07-343, 2008 WL 4414670, at *1 (Oct. 1, 2008); *Rothgery* v. *Gillespie County*, 128 S. Ct. 2578, 2582 (2008); *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2318 (2008); *Munaf* v. *Geren*, 128 S. Ct. 2207, 2216, 2220-2223, 2225 (2008); *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2259 (2008); *United States* v. *Ressam*, 128 S. Ct. 1858, 1861 (2008); *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1787-1790, 1793 (2008); *Begay* v. *United States*, 128 S. Ct. 1581, 1584 (2008).

[5] For example, the provisions describing principal and accomplice liability use that formulation, see 18 U.S.C. 2(a), 3, as does the penalty provision applicable to firearm offenses like the offense at issue here, see 18 U.S.C. 924(b), (c)(3)(B), (e)(1) and (*o*), and the "crime of violence" provisions upon which respondent relies (Br. 24-25; see p. 4, *supra*), see 18 U.S.C. 16(b), 521(b), (c)(3) and (d), 3156(a)(4)(B), 3559(c)(1)(B), (c)(2)(F)(i)-(ii) and (d)(2).

[6] A simple example illustrates the point. If a statute said: "[L]arceny means an offense that has, as an element, monetary gain, committed by a person," it would be "obvious that 'committed' modifies 'offense' and that monetary gain is the only 'element,'" because "[j]ust as 'monetary gain' is not 'committed,' the 'use of force' is not 'committed.'" *Barnes*, 295 F.3d at 1360.

not compel a contrary conclusion. The comma before "committed" is strong evidence that the qualifying phrase does not apply to the language immediately preceding it. See 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 490-491 (7th ed. 2007); 73 Am. Jur. 2d *Statutes* § 139, at 347 (2001). Moreover, application of the rule of the last antecedent would be inconsistent with the ordinary meaning of the word "commit." See pp. 5-7, *supra*. Notably, in each of the cases respondent cites (Br. 19-20) in which this Court has utilized the rule of the last antecedent, the qualifying phrase was not preceded by any punctuation, and the qualifying phrase began with a relative pronoun ("which" or "whose") that clearly connected the qualifying phrase with the language preceding it. See *Jama* v. *ICE*, 543 U.S. 335, 340-344 (2005); *Barnhart* v. *Thomas*, 540 U.S. 20, 26-27 (2003).[7] Finally, everyone agrees that the rule of the last antecedent cannot be applied strictly in this case, because under a strict application of the rule the "committed" clause would modify only the "threatened use of a deadly weapon," and not the "use or attempted use of physical force." Pet. App. 12a-13a; see Professors Br. 37 (cautioning that the rule cannot "be applied too woodenly").

Respondent's fallback argument (Br. 23 n.5) is that "committed by" is "a harmless verbal excess" that should be ignored. That suggestion runs directly con-

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[7] Respondent is mistaken in contending (Br. 20-22) that the mere number of words between the qualifying phrase and the word "offense" means that the former cannot modify the latter. It is perfectly acceptable, as a matter of grammar, to separate a noun and a qualifying phrase with a relative clause, and the number of words between the qualifying phrase and its object does not change the relationship between the two. See U.S. Br. 21-22.

trary to this Court's presumption against superfluous language. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). And it is especially inapt here, because the word "committed" serves important functions: it signifies the introduction of a new thought, along with the comma that precedes it, and it directs the reader back to the word "offense," because, in ordinary usage, a person "commits" an "offense."

3. Respondent's remaining arguments regarding punctuation and spacing provide no basis for requiring that the predicate offense contain a domestic-relationship element. Respondent notes (Br. 16) that, in 18 U.S.C. 921(a)(33)(A), Congress placed a semicolon at the end of clause (i), but placed only a comma, rather than a semicolon or hard return, at the end of the mode of aggression requirement in clause (ii). That is true, but hardly dispositive. A comma, like a semicolon, signifies a break. Compare *The Chicago Manual of Style* ¶ 6.18, at 244 (comma), with *id.* ¶ 6.57, at 256 (semicolon). The fact that Congress could have used a different punctuation mark to make its point (Resp. Br. 16) does not mean this Court should ignore the punctuation mark it chose. And, in any event, imperfect punctuation does not warrant overriding the ordinary meaning of the statutory text. See U.S. Br. 17-18 (collecting cases).[8] Here, re-

[8] Respondent cites (Br. 17) Military Rule of Evidence 611(d) and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulations, but neither support his argument. Rule 611(d) does not interpret the statute at issue here. The ATF regulations highlight the fact that the statutory language has long been understood to apply to offenses that do not have a domestic-relationship requirement. See U.S. Br. 33-34 (citing 27 C.F.R. 478.11, 478.32(a)(9)). The ATF regulations perhaps show ways Congress could have made its manifest intent even more clear, but they do not make the current statutory text ambiguous.

gardless of the particular punctuation mark or spacing used, the words Congress chose ("commit[]" an "offense") make clear that the domestic-relationship clause modifies the word "offense," not the "use of physical force" or "use of a deadly weapon." See pp. 5-7, *supra.* Respondent's alternative reading of the statute is not consistent with the ordinary meaning of the text or its structure.

B. Requiring That A Predicate Crime Have A Domestic-Relationship Element Frustrates The Statute's Purpose

1. Respondent agrees (Br. 50) that the statute's "original purpose" was to close the loophole that permitted persons convicted of violent misdemeanor offenses against family members and loved ones to possess firearms. But he contends (Br. 49-50) that, during the drafting process, Congress narrowed the statute's focus to encompass only persons who committed violent offenses with a domestic-relationship element, intentionally rendering the statute a dead letter in more than half the States and with respect to the federal government. There is no support for that proposition in the legislative record. Contrary to respondent's suggestion (*ibid.*), the fact that Congress refined the language identifying the type of violent offense necessary provides no indication that Congress also intended to change whether the offense must have a domestic-relationship element. If Congress had suddenly decided to abandon its goal of uniformly prohibiting domestic abusers from possessing firearms, one would have expected it to say so.

All of the evidence of legislative purpose in the record makes clear that Congress's goal was "to keep firearms out of the hands of people whose past violence in domestic relationships makes them untrustworthy cus-

todians of deadly force," regardless of whether their past offense had a domestic-relationship element. *Belless*, 338 F.3d at 1067; see, *e.g.*, 142 Cong. Rec. 22,986 (1996) (statement of Sen. Lautenberg) (statute designed to "keep guns away from violent individuals who threaten their own families"); *id.* at 22,988 (statement of Sen. Feinstein) ("Anyone convicted of a domestic violence offense would be prohibited from possessing a firearm."); *id.* at 27,264 (statement of Sen. Dodd) (statute "prevent[s] anyone convicted of any kind of domestic violence from owning a gun"). The statutory language itself reflects that broad purpose, prohibiting "any" person who has been convicted in "any" court from possessing "any" firearm. 18 U.S.C. 922(g)(9); see also *Barrett* v. *United States*, 423 U.S. 212, 218 (1976) (the "very structure" of Section 922(g) "demonstrates that Congress * * * sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous").

In light of that broad purpose, it would make no sense for Congress to limit the statute's application to persons who were previously *convicted* of offenses with a domestic-relationship element. A person who batters a spouse is not less dangerous if he was convicted under a general battery statute as opposed to a specific domestic battery statute. See National Network to End Domestic Violence et al. Br. 3-8 (detailing how possession of firearms by persons who have committed violent domestic offenses substantially increases risks to potential victims and imposes enormous societal costs); Brady Center et al. Br. 8-23 (describing risks to potential victims and to law enforcement officials). To the contrary: Congress determined that "*anyone* who attempts or threatens violence against a loved one has demonstrated

that he or she poses an unacceptable risk, and should be prohibited from possessing firearms." 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) (emphasis added); see Senators Lautenberg et al. Br. 9 (Congress's intent was "to prohibit gun possession by *anyone* convicted of a misdemeanor that involved domestic violence"). Yet, under respondent's reading of the statute, only some violent domestic offenders would be prohibited from possessing firearms, creating a patchwork application of federal law. See U.S. Br. 24-27. Indeed, the statute would not even apply to predicate offenses in the home state of the statute's sponsor, Senator Lautenberg. See National Network to End Domestic Violence et al. Br. 17; see also U.S. Br. 23-24 nn.8-9.

Respondent does not dispute that his reading of the statute would render it inapplicable to almost half the States. See U.S. Br. 22-24. Nor does he dispute that there are no uniquely federal offenses to which it would apply. See *id.* at 25. Instead, he merely argues (Br. 46-47) that his interpretation "negates no part of the statute" because the phrase "misdemeanor under Federal . . . law" refers to domestic assaults and batteries that occur in federal enclaves. That is mistaken. The Assimilative Crimes Act permits the assimilation of state law only where no federal criminal statute bars the conduct at issue. See 18 U.S.C. 13(a); see also *Lewis* v. *United States*, 523 U.S. 155, 159-165 (1998). Because federal law criminalizes assault and battery in federal enclaves, see 18 U.S.C. 113(a)(4)-(5), it is extremely unlikely that a domestic assault or battery committed in a federal enclave would be charged as an assimilated state offense. See, *e.g.*, *United States* v. *Chavez*, 204 F.3d 1305, 1308-1309 (11th Cir. 2000) (husband who beat his wife on military base charged under 18 U.S.C. 113(a)(4)).

Thus, not only does respondent's reading severely constrict the statute's scope, but it likely renders the phrase "misdemeanor under Federal * * * law" superfluous.

2. Respondent (Br. 45-46) and his amici (Eagle Forum 23-24; Second Amend. Found. Br. 3, 16) assert that Congress intentionally confined the statute's reach to offenses with a domestic-relationship element "to give States an incentive to enact" such laws. That is incorrect. Section 922(g)(9) is not a remedial grant program—it is a criminal prohibition enacted to punish persons who possess firearms after being convicted of violent offenses against intimate partners.

When Congress wishes to encourage a State "to adopt a legislative program consistent with federal interests," it typically does so using its spending power. *New York* v. *United States*, 505 U.S. 144, 166-167 (1992); see *South Dakota* v. *Dole*, 483 U.S. 203, 208-209 (1987). For example, in the Violence Against Women Act of 1994, Congress authorized a wide variety of grant programs designed "to encourage States, Indian tribal governments and units of local government to treat domestic violence as a serious violation of criminal law." Pub. L. No. 103-322, Tit. IV, § 40231, 108 Stat. 1932. As a result, numerous federal grant programs now provide States with direct financial incentives to enact and enforce domestic violence laws. See 42 U.S.C. 3796gg *et seq.* (grants to combat violent crimes against women); 42 U.S.C. 3796hh *et seq.* (grants to ensure enforcement of protection orders against domestic abusers).

The fact that those measures were in place when Congress enacted Section 922(g)(9) makes it extremely unlikely that Congress intended to prompt additional state action simply by criminalizing the later act of gun possession in Section 922(g)(9). Moreover, it would

make no sense for Congress to *exempt* persons who concededly committed violent acts against family members from the possession ban in order to *further* its goal of combating domestic violence. The more likely scenario, which is borne out by the legislative record in this case, is that Congress intended to, and did, prohibit *all* domestic offenders from owning firearms.

3. Respondent (Br. 47-48) and his amicus (Gun Owners Found. Br. 19-25) suggest that Congress intentionally limited the statute to predicate offenses with a domestic-relationship element to speed the background check process under the Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536 (1993) (primarily codified at 18 U.S.C. 922(s)-(t)). The Brady Act requires federally licensed firearms importers, manufacturers, and dealers to verify that individuals who wish to purchase firearms are not prohibited from doing so under state or federal law. 18 U.S.C. 922(t)(2); 28 C.F.R. 25.1. That verification is performed using the National Instant Criminal Background Check System (NICS), a computer system maintained by the Federal Bureau of Investigation. 28 C.F.R. 25.3, 25.4.

There is no evidence in the legislative record that Congress intentionally limited the reach of Section 922(g)(9) because it was concerned that law enforcement officials would not be able to identify which crimes are "misdemeanor crime[s] of domestic violence." When Congress desires to improve the efficiency of the NICS, it does so directly; it does not sacrifice other legislative goals in the hopes of obtaining minor system improvements. See NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (to be codified at 18 U.S.C. 922 note (Supp. II 2008)). Moreover, Congress knew at the time it enacted the statute that "it will

not always be possible * * * to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence." 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg). In those instances, Congress expected that law enforcement officials would undertake "further exploration" to determine whether the offense qualifies. *Id.* at 26,676. Congress did not, as respondent contends, give up and exempt dangerous domestic offenders in two-thirds of the States simply because additional efforts might be required to identify them.

Further, there is no evidence that respondent's interpretation of the statute would "streamline[]" (Resp. Br. 47) background checks under the Brady Act. When an individual wishes to purchase a firearm from a licensed dealer, he completes a form that asks a number of questions relating to the prohibitions contained in 18 U.S.C. 922(g), including, "Have you ever been convicted in any court of a misdemeanor crime of domestic violence?" ATF, Form 4473, at 1 (rev. Aug. 2008) <http://www.atf.gov/press/2008press/100308atf-important-ffl-notice.htm>; see ATF, *Federal Firearms Regulations Reference Guide* 192 (2005) (*Firearms Guide*) <http://www.atf.gov/pub/fire-explo_pub/2005/p53004/index.htm>.[9] If the buyer answers "yes" to any of those questions, the sale cannot proceed. Form 4473, at 2; see 18 U.S.C. 922(d). If not, then the dealer contacts the FBI or a state criminal justice agency operating as an NICS point of contact to initiate an NICS background check. If, for example, the FBI is contacted, the dealer

[9] The individual is not left to guess about the meaning of "misdemeanor crime of domestic violence," because the form specifically explains that offenses such as "*assault and battery*" may qualify. See Form 4473, at 4; see also Gun Owners Found. Br. 22-24.

provides the buyer's biographical information from the form, an NICS check is initiated, and the dealer receives one of two responses: "proceed" (in which case the sale may proceed) or "delayed" (in which case further investigation is necessary). *Firearms Guide* 192; see 27 C.F.R. 478.102. If the transaction is "delayed," law enforcement officials have three business days to investigate whether the prospective buyer is prohibited from possessing the firearm. *Firearms Guide* 192-193; see 18 U.S.C. 922(t)(1)(B)(ii). That investigation typically involves contacting officials in the prosecuting jurisdiction, who provide the needed information using court documents or police reports. FBI, *National Instant Criminal Background Check System, Operations 2005*, at 3 <http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf>. That is just how Congress intended the system to work, and it has worked: from 1998 to 2005, more than 60,000 domestic violence misdemeanants have been precluded from purchasing firearms through NICS background checks. *Id.* at 9, 11.

That background check process will be the same regardless of whether an offense must have a domestic-relationship element to qualify as a "misdemeanor crime of domestic violence." If a dealer contacts the NICS and the prospective buyer has a criminal history, the purchase likely will be delayed—but that delay may last no more than three business days.[10] There is therefore no warrant for assuming that respondent's view of the stat-

[10] Even if respondent's view of the statute prevailed, it would not eliminate the need for that investigation, because state domestic violence statutes often do not use the same list of covered domestic relationships as Section 921(a)(33)(A). See, *e.g.*, Okla. Stat. Ann. tit. 21, § 644(C) (West Supp. 2008) (extends to a parent or foster parent of the offender and a person "in a dating relationship" with the offender).

ute would significantly speed the process for purchasing firearms. And there is no reason to believe that Congress intended to exempt a majority of misdemeanor domestic offenders from Section 922(g)(9)'s prohibition on gun possession simply to obtain a modest improvement in the efficiency of the background check system.

C. The Statute's History Confirms That Congress Did Not Intend To Limit "Misdemeanor Crimes Of Domestic Violence" To Crimes With A Domestic-Relationship Element

1. Respondent contends (Br. 28-32) that, as a result of a legislative compromise, the definition of "misdemeanor crime of domestic violence" was narrowed to limit it to predicate offenses with a domestic-relationship requirement. The drafting history of that provision belies that contention. As the government has explained (Br. 28-31), Congress considered two different versions of the definition of "misdemeanor crime of domestic violence"—the one introduced by Senator Lautenberg and the one that was eventually enacted. The key difference between those provisions was the substitution of 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" for the phrase "crime of violence." Compare S. 1632, 104th Cong., 2d Sess. 1 (1996), with 18 U.S.C. 921(a)(33)(A); see U.S. Br. 28-30; Senators Lautenberg et al. Br. 12-18. The domestic-relationship component of the definition did not change in any significant respect from the initial version of the legislation to the final version. See U.S. Br. 29-31 & n.13. The fact that Congress modified the language about the types of violent offenses subject to the possession ban, while leaving unchanged the domestic-relation-

ship language, makes clear that the only legislative compromise concerned the type of violent offenses that would be covered by the statute.

The legislative history confirms the point. Senator Lautenberg specifically explained that the change in the statutory language was intended to clarify which violent offenses qualify as predicate offenses under the statute. See 142 Cong. Rec. at 26,675 (change in definition was regarding "the term crime of violence"); see also U.S. Br. 27-31. Neither Senator Lautenberg nor any other Member of Congress ever suggested that the change was designed to limit the statute to predicate offenses with a domestic-relationship element. See Senators Lautenberg et al. Br. 12. Respondent cites (Br. 30) some Members' concerns about the statute's "breadth," but those concerns were that the statute might be applied to acts that were not sufficiently violent to justify prohibiting firearm possession, not that the statute might be applied to offenses that lacked a domestic-relationship element. See 142 Cong. Rec. at 26,675 (statement of Sen. Lautenberg) ("Some argued that the term crime of violence was too broad, and could be interpreted to include * * * cutting up a credit card with a pair of scissors."). The "final agreement" reached in Congress addressed those concerns by "explicitly" identifying "crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *Ibid.* It had nothing to do with whether a domestic relationship was an element of the predicate offense.

Respondent suggests (Br. 31) that Congress's deletion of the catch-all clause at the end of the original definition of "misdemeanor crime of domestic violence" supports his view. He hypothesizes (*id.* at 31-32) that there

was uncertainty regarding whether the catch-all clause limited the possession ban to persons convicted of a crime of violence "under the domestic or family violence law of" the convicting jurisdiction, or whether it simply concluded the list of victims covered in the domestic-relationship clause. There is nothing in the legislative record that supports that claim. Moreover, the original language can only reasonably be read one way, because the phrase "under the domestic or family violence law" clearly modified the language immediately preceding it (*i.e.*, "a person similarly situated to a spouse, parent, or guardian of the victim"); no comma or other language suggested that the language related back to "crime of violence."

2. Contrary to respondent's contention (Br. 33-37), the specific, contemporaneous statements of Senator Lautenberg, who sponsored the legislation at issue, shed light on the statute and, in any event, rebut respondent's extra-statutory arguments. Even though those statements are "not controlling," *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), they may be instructive, especially where (as here) they address the precise issue before the Court. U.S. Br. 32; cf. *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1, 13 n.9 (1972). At a minimum, they are pertinent in addressing respondent's theory of the statute's history. Senator Lautenberg explained that a predicate offense need not have a domestic-relationship element to be a "misdemeanor crime of domestic violence." 142 Cong. Rec. at 26,675 (noting that the statute extends to "convictions for domestic violence-related crimes, such as assault" that "are not explicitly identified as related to domestic violence"); see U.S. Br. 31-32.

Respondent cites nothing in the legislative record that refutes that view. Instead, he claims (Br. 34) that Senator Lautenberg's comments are "irrelevant" because the legislation was modified from its original form. But the modification related only to the requirement that the predicate offenses be violent, and Senator Lautenberg specifically explained the concerns that prompted that modification and how those concerns were resolved. See pp. 17-18, *supra*. That explanation is probative because it is specific and entirely consistent with the statute's text and purposes. *United States* v. *Meade*, 175 F.3d 215, 219 (1st Cir. 1999).

Respondent also attacks (Br. 35-36) Senator Lautenberg's statements about the reach of the "use of physical force" language as unreliable or "mistaken." But regardless of whether Senator Lautenberg was correct to say that the modified language was "broader" than the original "crime of violence" formulation, 142 Cong. Rec. at 26,675, the fact remains that the modification concerned only the violence component of the predicate offense, not the domestic-relationship component. There is, therefore, no basis for casting aside the numerous statements that confirm that a predicate offense need not have a domestic-relationship element to be a "misdemeanor crime of domestic violence."[11]

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[11] Nor is there any basis for ignoring the fact that Section 921(a)(33)(A) consistently has been interpreted to apply to predicate offenses without a domestic-relationship element. See U.S. Br. 32-34. Not only has Congress failed to correct that interpretation, but it has continued to enact new laws that rely on the definition in Section 921(a)(33)(A). See *id.* at 18-19, 33-34 (citing 25 U.S.C. 2803(3)(c) (Supp. V 2005) and NICS Improvement Amendments Act of 2007, § 3, 121 Stat. 2561); see also Brady Center et al. Br. 35-37; Senators Lautenberg et al. Br. 24-27.

D. No Constitutional Concerns Warrant Limiting Section 921(a)(33)(A) To Crimes With A Domestic-Relationship Element Or Remanding The Case

1. Respondent's amicus (Eagle Forum Br. 10-22) contends that this Court should rely on the principle of constitutional avoidance to adopt respondent's reading of the statute. Amicus, however, has not identified any "grave and doubtful" constitutional questions raised by the government's construction. *Jones* v. *United States*, 526 U.S. 227, 239 (1999).

First, amicus's Second Amendment argument lacks merit. Although the Second Amendment guarantees individuals a right to possess a firearm in the home for the lawful purpose of self-defense, *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2817-2818, 2822 (2008), this Court has also recognized that that right "is not unlimited," *id.* at 2816. Thus, in *Heller*, the Court noted that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," *id.* at 2816-2817, reflecting the historical understanding that a person may forfeit his right to keep and bear arms through the commission of serious criminal conduct or where the possession may pose serious safety risks because of an individual's demonstrated lack of self-control. The Court added that it identified such "presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2817 n.26.

In enacting Section 922(g)(9), Congress permissibly concluded that, in addition to felonies, a narrow range of violent misdemeanor offenses should result in the forfeiture of the right to possess a firearm. That restriction is valid because Section 922(g)(9) targets violent conduct

that, by its nature, casts doubt on the defendant's suitability to possess firearms safely and responsibly. See, *e.g.*, 18 U.S.C. 921(a)(33)(A)(ii) (predicate offenses must have "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon"). Indeed, even respondent's amicus recognizes that, "[l]ike other valuable civil rights, the right to keep and bear arms may be forfeited by engaging in violent criminal activity." Second Amend. Found. Br. 2; see *id.* at 19 & n.10 ("The right to keep and bear arms would be self-defeating were it retained by violent criminals."). And at the time of the Framing, even the most ardent supporters of a specific amendment guaranteeing an individual right to keep and bear arms recognized that those who engaged in violent criminal activity would not enjoy the benefit of such a right. See 2 Bernard Schwartz, *The Bill of Rights: A Documentary History* 665, 681 (1971). Not surprisingly, therefore, all of the courts that have considered Second Amendment challenges to Section 922(g)(9) since *Heller* have rejected them.[12]

Even if there were serious Second Amendment concerns about Section 922(g)(9), amicus does not explain how limiting its reach to predicate offenses with a domestic-relationship element would alleviate those concerns. Amicus's primary objection (Eagle Forum Br. 13-14) is that Second Amendment rights cannot be forfeited by commission of misdemeanors, and that objection is

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[12] See *United States* v. *Chester*, Crim. No. 2:08-00105, 2008 WL 4534210, at *1-*2 (S.D. W. Va. Oct. 7, 2008); *United States* v. *Skoien*, No. 08-CR-12-BBC, 2008 U.S. Dist. LEXIS 66105, at *1-*4 (W.D. Wis. Aug. 27, 2008); *United States* v. *Booker*, 570 F. Supp. 2d 161, 163-164 (D. Me. 2008); *United States* v. *White*, Crim. No. 07-00361-WS, 2008 WL 3211298, at *1 (S.D. Ala. Aug. 6, 2008).

not lessened if prohibition is limited to misdemeanors with a domestic-relationship element.

Amicus's other constitutional objections (Eagle Forum Br. 14-22) likewise lack merit. Section 922(g)(9) does not violate the Ex Post Facto Clause, because it punishes the act of firearm possession, not the predicate offense that makes that possession illegal. See, *e.g.*, *United States* v. *Mitchell*, 209 F.3d 319, 322-324 (4th Cir.), cert. denied, 531 U.S. 849 (2000). The statute does not violate the Due Process Clause, because domestic violence offenders have sufficient notice that it is illegal for them to possess firearms; "ignorance of the law is no excuse," and, in any event, "an individual's domestic violence conviction should itself put that person on notice that subsequent possession of a gun might well be subject to regulation." *United States* v. *Hutzell*, 217 F.3d 966, 968-969 (8th Cir. 2000), cert. denied. 532 U.S. 944 (2001); see also, *e.g.*, *United States* v. *Smith*, 171 F.3d 617, 622-626 (8th Cir. 1999) (rejecting vagueness challenge).[13] Section 922(g)(9) is a permissible exercise of Congress's Commerce Clause power because Congress "has the power to regulate the interstate trade in firearms" by "act[ing] to stem the flow of guns to those whom it rationally believes may use them irresponsibly," and Section 922(g) contains a jurisdictional element that limits its application to firearm possession "in or affecting commerce." *Gillespie* v. *City of Indianapolis*, 185

[13] Amicus is mistaken in describing (Gun Owners Found. Br. 13-15) the mens rea requirement under Section 922(g). The statute's "knowledge" requirement refers to the fact of possession, not knowledge of the fact that the possession was illegal. See *Bryan* v. *United States*, 524 U.S. 184, 192-193 (1998); see also *United States* v. *Shelton*, 325 F.3d 553, 563 (5th Cir. 2003) (citing cases), cert. denied, 540 U.S. 916 (2003) and 543 U.S. 1057 (2005).

F.3d 693, 700-707 (7th Cir. 1999), cert. denied, 528 U.S. 1116 (2000). Finally, even if any of amicus's constitutional concerns had merit, amici provide no explanation of how respondent's reading of the statute would mollify those concerns.

2. Respondent suggests (Br. 50-52) that if this Court rejects his reading of the statute, it should remand his case to permit him to mount a constitutional challenge to 18 U.S.C. 922(g)(9). But respondent never raised a Second Amendment challenge to his conviction in the district court or court of appeals, despite numerous opportunities to do so. Nor did he raise the issue in his brief in opposition to the petition for certiorari. And he readily acknowledges (Br. 50-51) that a Second Amendment challenge is not fairly included within the question presented. Respondent's constitutional claim therefore has been waived, and he cannot resurrect it at this late date. See, *e.g.*, *United States* v. *Bean*, 537 U.S. 71, 74 n.2 (2002) (finding claim "waived" when "respondent raised it for the first time in his brief on the merits to this Court"); see also Sup. Ct. R. 14.1(a), 15.2. In any event, respondent's constitutional argument lacks merit. See pp. 21-22, *supra.*

E. The Categorical Approach To Classifying Predicate Offenses Does Not Resolve The Question Presented

Respondent has abandoned the argument (Br. in Opp. 15-17) that the categorical approach to interpreting prior convictions for sentence enhancement purposes justifies dismissal of the indictment in this case. See U.S. Br. 34-37. His amicus, however, presses another version of that argument, contending that the categorical approach should be used to resolve the statutory interpretation issue in respondent's favor. See Second

Amend. Found. Br. 13-16. That argument is unavailing. The question here is not how to determine whether a certain predicate offense had all of the required elements (the question addressed through the categorical approach), but which elements are required in the first place. Attempting to answer that question through the categorical approach improperly "puts the cart before the horse." *Meade*, 175 F.3d at 221; see also U.S. Br. 34-37.

F. There Is No Reason To Resort To The Rule Of Lenity

1. Respondent misunderstands the trigger for the rule of lenity. Although he correctly notes that the rule should only be invoked "[a]fter all interpretative means are exhausted" (Br. 41), he contends that legislative purpose may not be considered as part of the interpretative process (*id.* at 43 n.11). That is incorrect. This Court routinely and appropriately considers legislative purpose before turning to the rule of lenity. See, *e.g.*, *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (rejecting application of the rule of lenity where the defendant's reading "is an implausible reading of the congressional purpose"); *Moskal* v. *United States*, 498 U.S. 103, 108, 118 (1990) (rule of lenity applies only after Court has reviewed "the language and structure, legislative history, and motivating policies of the statute" (internal quotation marks omitted)).

Contrary to respondent's suggestion (Br. 43), the rule of lenity is applicable only when 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." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and cita-

tions omitted). A statute does not have a "grievous ambiguity" simply because courts have disagreed as to its meaning, *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995), or because it is "*possible* to articulate a construction more narrow than that urged by the Government," *Moskal*, 498 U.S. at 108.

2. There is no grievous ambiguity in this case. The statutory text makes plain that an offense need not have a domestic-relationship element to be a "misdemeanor crime of domestic violence"; such a requirement would unnaturally constrict the scope of the statute, rendering it inoperable in almost half the States; and the statutory history confirms that Congress did not intend such a limitation. Respondent and his amici strain to provide a merely plausible reading of the statutory text while essentially ignoring the statute's purposes and history. But a mere "grammatical possibility" is not sufficient to trigger the rule of lenity, *Caron*, 524 U.S. at 316, and the rule does not permit "engraft[ing] an illogical requirement to [the statutory] text," *Salinas* v. *United States*, 522 U.S. 52, 66 (1997). The rule of lenity thus has no application in this case.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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