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No. 07-608

IN THE
Supreme Court of the United States

UNITED STATES,
Petitioner,
v.
RANDY EDWARD HAYES,
Respondent.

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

BRIEF AMICUS CURIAE OF GUN OWNERS FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Gun Owners Foundation ("GOF") (www.gunowners.com) was established as a nonprofit corporation in the Commonwealth of Virginia in 1983. GOF engages in nonpartisan research, study, analysis and education regarding, *inter alia*, the ownership and use of firearms, and engages in public interest litigation in defense of the Second Amendment to the U.S. Constitution, as well as human and civil rights secured by law, the rights of victims of crime, the right to own and use firearms, and related issues. GOF is exempt from federal income tax as an organization described in Section 501(c)(3) of the Internal Revenue Code, and is classified as a public charity.

GOF fulfills its educational/public interest litigation mission through a variety of projects, including the submission of briefs in federal and state legal actions presenting significant questions of law. GOF has filed *amicus curiae* briefs in other federal litigation involving constitutional or statutory issues, including briefs in this Court — District of Columbia v. Heller, 554 U.S. __, 171 L.Ed.2d 637 (2008), among others — as well as in United States district courts and United States courts of appeal. This brief is intended to assist the Court with respect to its analysis of whether the court below — the United States Court of Appeals for the Fourth Circuit — correctly interpreted 18 U.S.C. Section 921(a)(33)(A), requiring a remand for dismissal of the superseding indictment in the district court.

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

This brief, *inter alia*, analyzes the meaning of the term "misdemeanor crime of domestic violence" textually, as well as in its broad statutory context, arguments different from, although supportive of, those advanced by the respondent. GOF is particularly concerned that the misdemeanor crime of domestic violence prohibition on firearms possession, use, and ownership be properly construed so as to (1) protect lawful firearm ownership, (2) improve the accuracy and uniformity of the purchase disqualifying data on the National Instant Criminal Background Check System, and (3) reduce the risk of inadvertent self-incrimination in complying with the certification requirements imposed by ATF Form 4473 on purchases of firearms from federally-licensed firearms dealers.

SUMMARY OF ARGUMENT

This appeal concerns the application of the term, "misdemeanor crime of domestic violence" ("MCDV"), as defined in 18 U.S.C. Section 921(a)(33)(A), to the prosecution of a person for violation of 18 U.S.C. Sections 922(g)(9) and 924(a)(2). Section 921(a)(33)(A)'s definition of MCDV, however, has ramifications well beyond the instant case. Settling the requisite elements of MCDV in this case will determine whether a prior misdemeanor conviction will prevent a person from purchasing a firearm from a federal firearms license holder ("FFL"), because an MCDV conviction appears on the National Instant Background Check System ("NICS") as a disqualifying conviction under 18 U.S.C. Section 922(t). Further, the MCDV definition determined in this case could serve

as the predicate for the possible prosecution of a person for filing a false statement on ATF Form 4473, which requires every person who seeks to purchase a firearm from an FFL to certify that he has not been convicted in any court of a MCDV.

In its brief, petitioner ("the Government") has assumed that the MCDV definition affects only criminal prosecutions under 18 U.S.C. Sections 922(g)(9) and 924(a)(2). Indeed, the opinions of the courts of appeals upon which the Government has relied to support its MCDV definition have made the same assumption, having examined the language of Section 921(a)(33)(A) only in relation to Section 922(g)(9). Having made this mistaken assumption, both the Government and the courts of appeals have failed to apply this Court's standard rule that "[t]he plainness or ambiguity of statutory language is [i] determined by reference to the language itself, [ii] the specific context in which that language is used, and [iii] the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

Apparently, the Government believes that the Robinson rule of construction does not even apply to this case, because the language of 18 U.S.C. Section 921(a)(33)(A) is so "clear," and the Fourth Circuit's interpretation is so "awkward and unnatural," that it is "not necessary to go beyond the text of [Section 921(a)(33)(A)] in answering the question presented." *See* Brief for the United States (hereinafter "U.S. Br."), pp. 8, 12-22. Upon closer look, however, it is the Government's interpretation that is "awkward and unnatural," not the Fourth Circuit's, as revealed by a

careful examination of both the specific and the broader context of the statute as a whole.

Specifically, the Government has put forth interpretations of Section 921(a)(33)(A) that deconstruct the statutory language and structure, substituting a revised version of the text, omitting some words and adding others to support an incomplete predicate offense.

More broadly, the Government has failed to set forth an MCDV definition that best serves the purpose of the enforcement of federal firearms law as a whole. Its proposed definition introduces uncertainty into the mens rea element governing the enforcement of the criminal prohibition set forth in Sections 922(g)(9) and 924(a)(2). It also undermines the uniformity and accuracy of the MCDV information on NICS. And it unnecessarily creates a trap for the unwary purchaser of a firearm who must certify on ATF Form 4473 that he has not been convicted of a MCDV.

While the Government has purported to have examined the language in light of the "scope" of the statute and its legislative history (U.S. Br., pp. 22-34), it has failed to address the text in light of its statutory context, having substituted its own, and a single senator's, policy views for the rule expressly adopted by the Congress.

ARGUMENT

I. The Government's Interpretation of the Language of 18 U.S.C. Section 921(a)(33)(A) Is Tendentious and Deconstructive.

A. The Government Has Erroneously Rewritten Section 921(a)(33)(A).

No matter how "awkward" or "even ungrammatical" the language of a statute may be, the "starting point in discerning congressional intent ... is the existing statutory text." *See* Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). In pertinent part, 18 U.S.C. Section 921(a)(33)(A) states:

> [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, 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.

In violation of the Lamie rule, the Government puts this text aside, rewriting the statute so as to define a

misdemeanor crime of domestic violence as "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." *See* U.S. Br., pp. 8 and 13. The Government's revised version of the actual statutory text should be rejected by this Court.

Purporting to quote the text, the Government begins its analysis of the statutory language first by dropping the subsection designations. U.S. Br., pp. 7, 12. Second, the Government couples the "misdemeanor clause" that appears in the statutory subsection (i) and the "use of force" clause that appears in the statutory subsection (ii), and collapses the two clauses into one "restrictive relative clause" modifying the word "offense" as it appears in the preface of Section 921(a)(33)(A). U.S. Br., pp. 8, 13. By melding the two clauses, as if they are in one subsection, instead of the statutorily designated separate subsections, the Government has divorced the "domestic relation" clause from the "use of force" clause, even though the two clauses appear in the same statutory subsection (ii) in the actual text. By separating these two clauses, the Government simultaneously separates the "domestic relation" clause from the word "element" so that "element" appears to apply only to the "use of force" clause. Thus, by the Government's **textual manipulation** the statute would appear to provide that the "use of force" clause is a requisite element of a MCDV, and that the "domestic relation" provision is not. *See* U.S. Br., pp. 8, 13.

Just as dramatically, the Government has moved the word "that," which appears in the prefatory section of the statute — dropping the immediately following dash (—) — and merged it into subsection (i). Thus, it rewrites the statute, making "that" relate only to the misdemeanor and use of force clauses, and not to the requisite domestic relationship clause. *See* U.S. Br., pp. 7-8, 12-13. By this sleight of hand, the Government has freed itself to read "committed by a current or former spouse" as if it directly followed the prefatory word "offense." *See* U.S. Br., p. 21. Had the Government not excised "that —" from its paraphrase of the prefatory clause, it would have had to face the embarrassment of urging upon this Court an interpretation that would have caused the statute to read as follows: "the term misdemeanor crime of domestic violence means an offense that — committed by a current or former spouse."

As the Amicus Brief for the Professors of Linguistic Science points out, the Government's "reconfigured text would be an ungrammatical mess [that] could be fixed only by adding a word to the statute." Brief of Professors of Linguistics and Cognitive Science as Amici Curiae in Support of Neither Party ("Linguistics Br."), pp. 30, 32. Moreover, by reconfiguring the text by dropping "that —," the Government seeks to lead this Court to ignore the canon against "rewriting rules that Congress has affirmatively and specifically enacted." *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

B. The ATF Has Erroneously Rewritten Section 921(a)(33)(A).

Although the Government has not expressly relied on the revised regulatory version of Section 921(a)(33)'s MCDV definition set forth in regulations of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), it has found solace in the fact that Congress has "never ... repudiated the ATF's interpretation of the statutory definition." U.S. Br., p. 33. Yet, ATF's interpretation is not the same as the one that the Government urges this Court to adopt. *Compare* 27 C.F.R. § 478.11 *with* U.S. Br., pp. 8, 13. Instead, in pertinent part, the ATF has its own revised version:

> Misdemeanor crime of domestic violence. (a) Is a Federal, State ... offense that:
>
> (1) Is a misdemeanor under Federal or State law ...
>
> (2) Has, as an element, the use or attempted use of physical force ... or the threatened use of a deadly weapon; and
>
> (3) Was committed by a current or former spouse, parent, or guardian of the victim.... [27 C.F.R. § 478.11.]

Unlike the Government's interpretative approach, the ATF honors the statutory structure of Section 921(a)(33)(A), placing the "misdemeanor clause" in regulatory subsection (1) and the "use of force" clause

in subsection (2). Furthermore, the ATF version conforms to the language of Section 921(a)(33)(A), utilizing the present-tense verbs "is" and "has" to link each subsection to the prefatory term so as to faithfully render the statutory definition that a MCDV "**is** a misdemeanor under federal or state law and **has,** as an element, the use ... of physical force." (Emphasis added.)

With respect to the "domestic relation" clause, however, the ATF's definition, like the one proposed by the Government, deviates from both the statutory language and structure. Instead of having placed the "domestic relation" language in the regulatory subsection (2), so as to correlate that subsection with subsection (ii) in the statute, ATF has placed the "domestic relation" clause in a separate subsection (3). To make this structural alteration work, ATF has **added** a semicolon and the word "and" at the end of the "use of force" clause subsection (2), neither of which appears in the statute. More significantly, ATF has chosen to begin subsection (3) with the word "was" so as to link that subsection to the prefatory language in such a way that it summarily reads, as follows: "Misdemeanor crime of domestic violence ... is a Federal, State or local offense that ... **was** committed by a current or former spouse, etc." (Emphasis added.)

Not only does the addition of these words to the statutory definition violate the canon of construction against "read[ing] an absent word into the statute" *(see* Lamie v. United States Trustee, 540 U.S. at 538), as well as the rule of the last antecedent (*see* Resp. Br., pp. 19-24); ATF has chosen a past tense form of the

verb for its subsection (3), rather than a present tense form as appears in subsections (1) and (2). The past tense reinforces ATF's policy preference that, in order to establish the existence of a predicate misdemeanor crime undergirding Section 922(g)(9), it is enough to do so **after** a conviction of a misdemeanor wherein the "use of force" element has been proved. Thus, under ATF's revision, law enforcement authorities could determine — long after a conviction — whether a misdemeanor offense had been committed against a victim who was in one of the specified domestic relationships with the misdemeanant by reference to information or finding outside of the court proceeding. By choosing the past tense, rather than the statutorily prescribed present tense, ATF has superimposed its view that the domestic relationship need not be proved as part of the predicate misdemeanor crime of domestic violence, but can be discovered and proved later. *See* 63 Fed. Reg. 35,520 (ATF Temporary Rule, June 30, 1998). *See also* Brief *Amicus Curiae* of Brady Center to Prevent Gun Violence, *et al*., p. 29 n.76.

Of course, whether the ATF revisions are in the present or past tense, the ATF regulation contains language that Congress did not put in the statute. Clearly, there is no grammatical need to add to the statutory language in order to make sense out of text as it is written. *See* Linguistics Br., pp. 6-11. Moreover, by its additions, the ATF would urge upon this Court "an enlargement of [MCDV] by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *See* Iselin v. United States, 270 U.S. 245, 251 (1926). This Court, however, has refused to "read an absent word into the statute

[in] 'deference to the supremacy of the Legislature, as well as [in] recognition that Congressmen typically vote on the language of a bill'" (*see* Lamie, 540 U.S. at 538), not language added later.

C. The Government Has Erroneously Created an Incomplete Predicate Offense.

In support of its argument that the "use of force" clause is an element of the offense, whereas the "domestic relation" clause is not, the Government contends that "Congress would not ordinarily use the word 'element' in the singular to describe two **unrelated** 'elements' of an offense." U.S. Br., p. 8 (emphasis added). *See also id.*, pp. 13-14. But the Government offers no support for its argument that the two are "unrelated." Contrary to that argument, it is clear that both concepts — force/deadly weapon and a domestic relationship — are critical to the definition of a MCDV. Nevertheless, the Government emphasizes that "[h]ad 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." *Id.*, pp. 13-14 (italics original). To the contrary, as respondent has demonstrated, Congress often uses the singular element to embrace both the mode of aggression and its object — here the use of force or deadly weapon, and a person in one of the described domestic relationships. *See* Resp. Br., pp. 24-27.

But, the Government has subliminally substituted "any person" for the more restrictive class of persons set forth in Section 921(a)(33)(A) in order to complete

the predicate misdemeanor offense. It has perpetrated this legerdemain by a distraction, claiming that "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)" would not have been "subsumed [by Congress] in a single 'element' requirement." *See* U.S. Br., p. 14. But why not? After all, Congress set out to define a misdemeanor crime of **domestic** violence, not just a misdemeanor crime of violence that could have been committed against another person generally, or even against another person's pet dog or cat, rather than another human being. Whatever the "conceptual distinction" the Government has in mind, it surely does not dictate that the crime defined is limited to a single element without regard to the identification of the "target" class of victims to be protected by the statute. *See* Linguistics Br., pp. 12- 25.

II. The Government's Interpretation of Section 921(a)(33)(A) Disregards the Statutory Context as a Whole.

The purpose of 18 U.S.C. Section 921(a)(33)(A) is twofold. First, it provides the definition of the predicate misdemeanor offense upon which a prosecution for violation of 18 U.S.C. Section 922(g)(9) may be based. Second, by providing the definition of the predicate offense defined by Section 922(g)(9), it controls the decision whether "receipt of a firearm by [a particular buyer] would violate" 18 U.S.C. Section 922(g)(9) and, therefore, preclude an FFL holder from transferring a firearm to such buyer, as provided in 18

U.S.C. Section 922(t)(4). This Court's standard rule is that "[t]he plainness or ambiguity of statutory language is [i] determined by reference to the language itself, [ii] the specific context in which that language is used, and [iii] the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337 (1997). On close examination, the Government's statutory interpretation does not serve both purposes of the statute, but the interpretation of the court of appeals below does.

A. The Government Has Failed to Address How Its Interpretation Serves the Mens Rea Requirement of 18 U.S.C. Section 924(a)(2) in a Prosecution for Violation of Section 922(g)(9).

The Government brief is premised entirely upon the assumption that one need only examine the language of Section 921(a)(33), as it relates to the actus reus element of 18 U.S.C. Section 922(g)(9), without regard to the mens rea element of Section 924(a)(2). *See* U.S. Br., pp. 7, 10-11, 34-37. Thus, the Government contends that omitting the "domestic relationship" as an element of the predicate offense is neither "impractical nor unfair," because in a prosecution for a violation of 18 U.S.C. Section 922(g)(9), the Government must prove beyond a reasonable doubt that the misdemeanor of which a person had previously been convicted must have been committed against a person who is in one of the domestic relationships specified in 18 U.S.C. Section 921(a)(33). U.S. Br., pp. 36-37.

The Government's position is not new. The several courts of appeals which have ruled that the domestic relationship is not an element of the predicate misdemeanor offense have come to the same conclusion. *See, e.g.,* United States v. Barnes, 295 F.3d 1354, 1359 (D.C. Cir. 2002); United States v. Hartsook, 347 F.3d 1, 4 (1st Cir. 2003); United States v. Kavoukian, 315 F.3d 139, 142, 145 (2d Cir. 2002); United States v. Shelton, 325 F.3d 553, 557, 562 (5th Cir. 2003). Indeed, three of the courts have expressly concurred with the Government's contention that there is no denial of fundamental fairness because the requisite domestic relationship of the predicate misdemeanor would have to be proved beyond a reasonable doubt in a Section 922(g)(9) prosecution. *See* Barnes, 295 F.3d at 1366-67; United States v. Meade, 175 F.3d 215, 221, n.1 and 222 (1st Cir. 1999); Kavoukian, 315 F.3d at 145.

Overlooked by these courts and by the Government, however, is the increased risk of the criminalization of the possession of a firearm under circumstances that most people would think would be perfectly legal. As this Court stated in Staples v. United States, 511 U.S. 600 (1994), "guns can be owned [in America] in perfect innocence." *Id.*, 511 U.S. at 611. In recognition of this fact, 18 U.S.C. Section 924(a)(2) imposes a "knowing" requirement upon any prosecution for violation of 18 U.S.C. Section 922(g)(9). Applying that mens rea standard to such a prosecution, the Government must prove beyond a reasonable doubt not only the existence of a domestic relationship described in 18 U.S.C. Section 921(a)(33)(A), but that the defendant **knew** that the relationship fell within the parameters of the

domestic relationships therein described. As the Staples Court has put it, "the usual presumption that a defendant must know the **facts** that make his conduct illegal should apply." Staples, 511 U.S. at 619 (emphasis added). This presumption is especially applicable to a prosecution for violation of Section 922(g)(9) which is punishable as a felony, subject to a prison term of up to 10 years.[2] *Id.,* 511 U.S. at 618.

Applying the Staples rule, it would not be enough for the prosecution in a Section 922(g)(9) case to prove that a requisite domestic relationship existed — as the Government and the courts of appeals have assumed. Rather, the prosecution would also be required to prove that the defendant knew that he was in a domestic relationship with his victim. If that fact had been established previous to the Section 922(g)(9) prosecution — in the predicate misdemeanor proceeding — then a defendant would have had ample opportunity to be apprised of the facts that would make his possession of a firearm illegal. But, if the domestic relationship were not an element of the underlying predicate misdemeanor, the misdemeanant could assume — and rightly so in light of the "long tradition of widespread lawful gun ownership by private individuals in this country" — that it was perfectly legal for him to continue to receive, possess and own a firearm. *See* Staples, 511 U.S. at 610, 611.

In light of America's established culture of lawful gun ownership and possession, requiring proof of the

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[2] 18 U.S.C. Section 924(a)(2).

requisite domestic relationship to establish the underlying predicate misdemeanor would better serve the mens rea requirement of Section 924(a)(2), as applied to a Section 922(g)(9) prosecution.

B. The Government Has Mistakenly Relied Upon Senator Frank Lautenberg's Description of How the NICS Actually Works.

Section 921(a)(33)'s definition of misdemeanor crime of domestic violence is not confined to its application to a federal prosecution for violation of 18 U.S.C. Section 922(g)(9), but extends to the administration of the National Instant Criminal Background System governing the transfers of firearms by FFL's. Neither the Government nor the courts have paused to examine how the exclusion of the domestic relation provision as an element of the MCDV would impact that system. Had they done so, they would have found that inclusion of the domestic relationship as an element of a MCDV is necessary to ensure fairness and accuracy in the NICS criminal background check system.

Without hesitation, the Government has assumed that the current NICS operates in the way described by Senator Lautenberg in his Senate remarks in support of the misdemeanor crime of domestic law statute. *See* U.S. Br., pp. 31-32.[3] Thus, the

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[3] Those courts of appeals that have addressed this matter make the same assumption. *See* Barnes, 295 F.3d at 1365; Meade, 175 F.3d at 219; Kavoukian, 315 F.3d at 144; Shelton, 325 F.3d at 562;

Government writes approvingly: "[i]n 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)." U.S. Br., p. 31 (emphasis added).

While Senator Lautenberg accurately described the Brady Act interim background check extant in 1996, the Government is mistaken to have relied upon that description as a representation of the way that the NICS works today. At the time of the passage of the MCDV transfer prohibition, the Brady Act interim background check governed only FFL transfers of "**handguns**," not all **firearms**, as now. And, in order to implement that **temporary system**, Congress mandated state and local law enforcement officials to make a "reasonable effort" to determine "whether [a particular] receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." *See* 18 U.S.C. Section 922(s)(2). Not only was this mandate ruled to be unconstitutional in Printz v. United States, 521 U.S. 898 (1997), but Section 922(s)(2) expired when the NICS became operational on November 30, 1998.

White v. Dept. of Justice, 328 F.3d 1361, 1366 (Fed. Cir. 2003).

Under NICS there is no comparable mandate requiring States to submit information on prohibited persons to the NICS, much less to keep accurate and complete records. *See* Testimony of Rachel L. Brand, Assistant Attorney General for Legal Policy, U.S. Department of Justice, before the Committee on Oversight and Government Reform Subcommittee on Domestic Policy, U.S. House of Representatives, 110th Cong., p. 5 (May 10, 2007) (hereinafter "Brand Testimony"). Indeed, until the enactment of the NICS Improvement Amendments Act of 2007 (Pub. L. 110-180, Jan. 8, 2008), the only incentive that States had to provide up-to-date information to the NICS was "to gain the mutual benefit of having ready access to criminal history and other information relevant to law enforcement activities on an individual arising in other States." *Id.* Even with the enactment of the 2007 amendments, state and local officials are only offered a federal carrot, "a waiver of the 10 percent matching requirement for National Criminal History Improvement Grants under the Crime Identification Technology Act of 1998." *See* Pub. L. 110-180, Section 102.

In short, Senator Lautenberg's 1996 comments have nothing to do with the way the NICS works, and it is simply incorrect for the Government to urge this Court to rely upon them. *See* U.S. Br., p. 31.

C. Sections 922(t)(4) and 922(g)(9) Are Best Served by the Interpretation that the Requisite Domestic Relation Is an Element of the Predicate Misdemeanor.

According to 18 U.S.C. Section 922(t)(1), an FFL — before transferring possession of a firearm to "any other person who is not" an FFL — must "contact" the NICS. "[I]f the [NICS] notifies the [contacting] licensee that the **information available** to the system does **not** demonstrate that the receipt of a firearm by such other person would violate" Section 922(g), then the licensee may transfer the firearm. *See* 18 U.S.C. Section 922(t)(4) (emphasis added). While the NICS is designed to keep firearms out of the hands of the nine categories of dangerous people set forth in Section 922(g), the effectiveness of the system depends largely on the "voluntary" decision of State and local government officials to provide the pertinent information. Furthermore, reporting officials are protected from any liability either for any failure to report or for any mistaken report of pertinent disqualifying information. *See* 18 U.S.C. Section 922(t)(6). Although the recently-enacted NICS Improvement Amendments Act of 2007 has added a financial incentive to state and local government reporting agencies (Pub. L. 110-180, Section 102), the accuracy and completeness of the information received by NICS is still largely dependent upon the discretion of State and local officials. As a matter of constitutional law, of course, Congress cannot conscript nonfederal officials to report the information needed to make the NICS work. *See* D. Kopel, "The Brady Bill Comes Due," 9 *Civil Rights J.* 189 (1999).

Because NICS depends largely upon the cooperation and self-interest of State and local governments, "[t]he effectiveness of the NICS in preventing gun transfers to prohibited persons depends directly on the availability to the system of automated information about which individuals are prohibited from receiving a firearm." Brand Testimony, p. 4. Among the five most serious problem areas identified by Assistant Attorney General Brand — in her 2007 congressional testimony — were MCDV convictions. And the primary reason given for this deficiency was the fact that "[t]he records of most misdemeanor assault convictions do **not** identify whether the victim had a **domestic relationship** with the offender that makes the offense one that prohibits the offender from receiving or possessing a firearm." Brand Testimony, p. 8 (emphasis added).

So long as the requisite domestic relationship is not an element of a MCDV, the underreporting problem will persist. Moreover, in the absence of a clear judicial finding of the existence of a requisite domestic relationship, reporting inaccuracies will continue. Unsurprisingly, an official U.S. Department of Justice guide designed to assist government officials to identify MCDV's states that "[i]t is ... beneficial, whenever possible, to have the *relationship between the defendant and victim* documented in the charging papers and the court's record of conviction...." *See* U.S. Department of Justice, Information Needed to Enforce Firearm Prohibition, Misdemeanor Crimes of Domestic Violence ("MCDV Information Guide") (Nov. 2007) (italics original). Nevertheless, the Guide concedes

that the requisite domestic relationship is "typically made by reference to the police report...." *Id.*

Police reports, as well as other such untested information sources, are often unreliable, based upon self-serving statements made under emotionally-charged circumstances, and not subject to the rigors of cross-examination in a courtroom. Furthermore, the existence of a requisite domestic relationship is not self-evident. While Section 921(a)(33)(A) identifies the familiar and formal husband/wife relationship, it also includes the less formal and less obvious relationships of parent/child, guardian/child, "a person with whom the victim shares a child in common; a person who is cohabiting with or who has cohabited with the victim as a spouse, parent or guardian; or a person ... similarly situated to a spouse, parent, or guardian...." Significantly, the Department of Justice MCDV Information Guide contains only one specific instruction on the meaning of these terms, and that instruction is in the negative: "Simply indicating that the persons are boyfriend/girlfriend does not establish the relationship necessary for the MCDV prohibitor to apply."

Construing Section 921(a)(33)(A) to require proof of the requisite domestic relationship as an element of a MCDV offense would resolve these reporting uncertainties, thereby improving the completeness and accuracy of the MCDV information on NICS. No longer would MCDV reports to NICS be based upon police notes and administrative inserts into court records. Rather, such reports would relate judicial findings in an adversary proceeding based upon

articulated legal criteria and, where available, documentary evidence, such as marriage licenses, birth certificates, adoption papers, and guardianship papers. Furthermore, in today's laissez-faire sexual environment, proof of the requisite domestic relationship as an element of the offense would be based upon legal criteria that are necessary to assess whether two persons are "cohabiting" or living in a way that is "similarly situated" to a marriage relationship, thereby bringing a more uniform application to the MCDV prohibition in the more informal domestic relationships.

D. ATF's Administration of Sections 922(t)(4) and 922(g)(9) Is Best Served by the Interpretation that the Requisite Domestic Relation Is an Element of the Predicate Misdemeanor.

Prior to the purchase of a firearm from an FFL, the prospective buyer must complete Section A of ATF Form 4473 — Firearms Transaction Record Part I - Over-the-Counter. Among the questions asked is whether the prospective buyer has "been convicted in any court of a misdemeanor crime of domestic violence." *See* ATF Form 4473, Question 12.i (http://www.atf.gov/forms/4473/). To assist the prospective buyer in answering the question, yes or no, the form directs the buyer to "Important Notice 6, Exception 1, and Definition 4."

Important Notice 6 warns, *inter alia*, that 18 U.S.C. Section 922(g) "prohibits ... receipt, or possession ... of

a firearm by one who: has been convicted of a misdemeanor crime of domestic violence...."

Exception 1 advises, *inter alia*, that a person "who had been convicted of a misdemeanor crime of domestic violence is not prohibited from purchasing, receiving, or possessing a firearm" and should answer "no" to Question 12.i if: "(1) under the law [of the jurisdiction] where the conviction occurred, the person has been pardoned, the conviction has been expunged or set aside, or the person has had civil rights ... restored AND (2) the person is not prohibited by the law [of the jurisdiction] where the conviction occurred from receiving or possessing firearms." Exception 1 further advises that a prospective buyer, even though convicted of a MCDV, should answer Question 12.i in the negative unless: "(1) the person was represented by a lawyer or gave up the right to a lawyer; and (2) if the person was entitled to a jury, was tried by a jury or gave up the right to a jury trial."

Quoting almost *verbatim* the language of 18 U.S.C. Section 921(a)(33), Definition 4 informs the prospective buyer that a MCDV is:

> A Federal, State, or local offense that is a misdemeanor under Federal or State and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is 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.

In explanation of this statutory language, Definition 4 concludes:

> The term includes all misdemeanors that have as an element the use or attempted use of physical force or the threatened use of a deadly weapon *(e.g., assault and battery)*, if the offense is committed by one of the defined parties. [Italics original.]

According to the Government's proposed interpretation of 18 U.S.C. Section 921(a)(33), whether the misdemeanor was "committed by one of the defined parties" need not be established as part of the record of the misdemeanor conviction, but may be ascertained outside the judicial process and subsequent to it. However, if the requisite domestic relationship is not an established fact at the time that a person is convicted of an assault and as part of the judicial record, how is a prospective buyer to answer Question 12.i? According to Definition 4, whether a person has committed a MCDV depends upon whether it "is committed by one of the defined parties." Only if the "defined party" relationship is an element of the predicate misdemeanor offense, and thus established as a fact on the judicial record, would the prospective buyer, in many instances, really know whether to answer the question yes or no. For example, who would be competent to determine if an individual were "similarly situated to a spouse, parent, or guardian of the victim"? *See* ATF Form 4473, Definition 4. Indeed,

one could argue that the question could be answered in the negative so long as the person has not been convicted of violation of 18 U.S.C. Section 922(g)(9) because only then has it been established that the predicate misdemeanor was committed by "one of the defined parties."

But this question should not be left open to interpretation. After all, ATF Form 4473 requires the prosepective buyer to "certify that the answer[] to [Question 12.i is] true and correct" and warns the buyer that "making any false oral or written statement ... with respect to this transaction, is a crime punishable as a felony." *See* 18 U.S.C. Section 1001. Unless the requisite domestic relationship is an element of the MCDV as defined in 18 U.S.C. Section 921(a)(33), ATF Form 4473 could set a trap for the unwary, rather than further its purpose of keeping firearms out of the hands of ineligible persons.

III. Both the Floor Statements and Current Memories of Senator Lautenberg Are Unreliable and Irrelevant in Understanding the Meaning of 18 U.S.C. Section 921(a)(33).

The Government brief places principal reliance on the views expressed by the provision's sponsor, Senator Frank Lautenberg, on the Senate floor to document the legislative history of 18 U.S.C. Section 921(a)(33). U.S. Br. pp. 27-32 (citing the Senator 10 times in its five-page analysis of legislative history, and using quotations from his Senate floor statement). Unsurprisingly, the Lautenberg brief also views

Senator Lautenberg's views to be of preeminent importance. Lautenberg Br., pp. 3-27. However, there are many reasons to give Senator Lautenberg's personal views no more weight than the views of any one senator out of 100, or even any one federal legislator out of 535. Respondent's brief details the omissions and weaknesses in the Lautenberg brief (Respondent's Brief, pp. 28-40), leaving only a few remaining observations to be made.

The Lautenberg brief does not seek to hide the visceral anti-gun views of the Senator. Its introduction cites favorably an article that "'[p]eople who keep guns in their homes appear to be at greater risk of homicide...'" (Lautenberg Br., p. 2) and then asserts that offenders who were permitted to plead down felonies to misdemeanors had been "free to possess firearms and to terrorize and murder their loved ones" as if that is what persons who own firearms normally do (*id.*, p. 4). Senator Lautenberg's oft-quoted floor statement distinguishes between "major civil rights, such as the right to vote, to hold public office, and to serve on a jury" from presumably what he viewed as a minor right or no right at all, such as owning a firearm.[4] 142 Cong. Rec. S11877 (Sept. 30, 1996). The

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[4] Justice Scalia evidenced a much more respectful view of the United States Constitution when he stated that it "surely elevates above all other interests the right of law-abiding responsible citizens to use arms in defense of hearth and home." District of Columbia v. Heller, 554 U.S. __,171 L.Ed.2d 637, 683 (2008). Indeed, the "right to keep and bear arms" is preserved because the framers viewed it as "being necessary to the security of a free State." *Id.* It is a right shared by members of the American polity, and is certainly no less important than voting, holding

right to own a firearm may be disparaged by Senator Lautenberg, but it is a right enshrined in this nation's Constitution and dozens of state constitutions. In sum, Senator Lautenberg comes to this Court as a political actor, whose views are entitled to no special weight. Indeed there are specific signs that his political agenda may have clouded his memory of the events of September 29-30, 1996.

The Lautenberg brief asserts that "Senator Lautenberg introduced the legislation at issue in this case." Lautenberg Br., p. 3. His brief is offered "on behalf of the sponsor of the legislation" and "attempts to provide this Court with a complete account of the legislative history of the Lautenberg Amendment." *Id.*, p. 6. It fails to fulfil this mission.

The Lautenberg brief reveals that "the 'as an element' language at the crux of this interpretive dispute had never been part of Lautenberg's legislation ... until the eve of the Amendment's enactment." *Id.*, p. 13. Therefore, while Senator Lautenberg may have fathered the movement underlying 18 U.S.C. Section 921(a)(33), the language at issue here was not his own. Rather, that language was inserted "hours before [the amendment's] enactment..." *Id.*, p. 13. The

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public office, and serving on a jury. Indeed, it can be argued that none of the rights considered "major" by Senator Lautenberg have as much constitutional protection as the "right to keep and bear arms." *See* discussion of the Second Amendment as resting upon the principle that the People embody the nation's sovereignty in Amicus Brief of Gun Owners of America, Inc., Gun Owners Foundation, *et al.* filed in Heller, pp. 10-18.

Lautenberg brief never states that Senator Lautenberg wrote this language, but that he "agreed, on the night before the bill's final passage, to a number of changes in order to address its opponents concerns." *Id.*, p. 17. As the entire amendment was quite short, and the "crux of this interpretive dispute" was not his, it is difficult to understand why Senator Lautenberg's views would be given exalted status.

From his own words, one might conclude that Senator Lautenberg delivered his floor statement more for reading by judges, than listening by Senators: "I do want to make very clear, however, that this language should not be **interpreted** ..." in a certain way. "I wanted to state this definitively **for the record**." He described statutory language "as it should be **interpreted** in the future." 142 Cong. Rec. S11877 (emphasis added). His representation to this Court, that the language of the Lautenberg amendment "is unambiguous" (Lautenberg Br., p. 7), appears to be at odds with his earlier efforts to clarify how it should be interpreted.

More likely, Senator Lautenberg had political reasons to deliver his floor statement. He heaps praise on the gun control posse that helped him, including "Sarah Brady and Handgun Control for raising this issue at the Democratic convention," and a broad mix of anti-gun and other groups, which he describes as "[o]ver 30 national organizations." 142 Cong. Rec. S11877. Those persons who helped him get his bill through were probably not present the previous night, when Senator Lautenberg said he accepted the language required by opponents of his provision to see

it passed. It can be assumed that at least some of the ideologues he identifies as his supporters would have been very upset with him for his compromise, accepting weakening language to his provision. It may be that his claims that "we agreed to include in the final agreement a provision that has no real substantive effect, but that may help to assure some people" was no more than cover for his compromise. *See* 142 Cong. Rec. S11877. Beyond characterizing his compromise as having "no real substantive effect," he even asserted that he "did agree to a new definition of covered crimes that is more precise, and probably broader." 142 Cong. Rec. S11877. In implicitly asserting his consummate skill as a negotiator, and the ineptitude of his Senate opposition, Senator Lautenberg may have protested too much to retain credibility to now explain the real effect of the compromise language.

Lastly, the Lautenberg brief illustrates the problems associated with asking any person, even a veteran political warhorse, to recall the details of events that occurred over a 24-hour span, a dozen years ago. On the last page of his brief, Senator Lautenberg's view of his amendment is summarized for this Court as follows:

> Senator Lautenberg was clear that the Amendment applied to all offenders convicted of violent crimes, whether misdemeanor or **felony**, committed against **loved ones**. [Lautenberg Br., p. 27 (emphasis added).]

Senator Lautenberg's representation to this Court that he thought his "Amendment applied to all offenders convicted of ... felon[ies]" throws into question the accuracy of the rest of his memories about the events of September 1996. Further, to summarize the class of relationships set out in the statute, Senator Lautenberg's employs the phrase — "loved ones" — a term that has more the ring of a political slogan than a statement of technical legal precision. These are not the type of clear and accurate memories that this Court can even consider relying on to understand the meaning of 18 U.S.C. Section 921(a)(33).[5]

For the reasons set out above, Senator Lautenberg's floor statement, and the derivative arguments contained in Government brief and Lautenberg brief based heavily thereon should be given no weight.

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[5] "Everyone who has written knows that his opinion of his own work changes, and that his responses to his own text vary from reading to reading." E.D. Hirsch, Jr., Validity in Interpretation, p. 7 (Yale Univ. Press 1967).

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully Submitted,

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