No. 12-1371

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES ALVIN CASTLEMAN,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, works to advance the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing.[1] A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest courts of numerous states. NACDL has a particular interest in the proper interpretation of 18 U.S.C. § 922(g), as an overly broad reading of the statute would extend federal jurisdiction over a wide range of state felonies and misdemeanors. In this case, NACDL believes the Solicitor General's reading of § 922(g)(9) is unduly broad

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Petitioner United States and Respondent James Alvin Castleman filed blanket consents to the filing of *amicus curiae* briefs, which were docketed on November 20, 2013, and November 19, 2013, respectively.

and that it cannot be reconciled with the statutory text or the manifest intent of Congress.

SUMMARY OF THE ARGUMENT

1. The Solicitor General's argument proves too much, in that it would expand predicate crimes under § 922(g)(9) beyond sensible boundary. Any offensive touching or indirect use of force in a domestic context would count as "domestic violence." Prosecution of such petty misdemeanors under statutes that the Solicitor General would read as predicates is a reality, not a fanciful hypothetical. Extending § 922(g)(9) to such conduct is contrary to the manifest intent of Congress which was to keep guns out of the hands of "violent domestic abusers."

2. Mr. Castleman's understanding of "physical force," by contrast, would leave the statutory scheme intact. It is not so narrow as to render § 922(g)(9) a dead letter. The Solicitor General is only able to make this argument by cherry-picking statutes for his appendices and omitting aggravated versions of statutes that would still be predicate crimes under § 922(g)(9). A significant number of generic versions of misdemeanor statutes in several states will still qualify. Additionally, use of the modified categorical approach may make more state statutes qualify as predicate offenses.

3. The push and pull of the parties' competing statutory constructions demonstrate, at the very least, a grievous ambiguity in the statute. This is especially so when this Court has interpreted the same statutory language in a recent case, albeit for Armed Career Criminal Act purposes, to exclude the very types of petty offenses that the Solicitor General would treat as qualifying predicates here. The Court should avoid creating even further ambiguity by adopting the So-

licitor General's suggested interpretation. The rule of lenity must be applied and Mr. Castleman's reading adopted. The severity of the prohibition here, a life-long ban on gun possession, strengthens the case for applying the rule in favor of Mr. Castleman, as do the historical justifications for a rule of lenity.

ARGUMENT

I. THE SOLICITOR GENERAL'S EXPANSIVE READING CANNOT BE SQUARED WITH THE MANIFEST INTENT OF CONGRESS

The Solicitor General's reading of 18 U.S.C. § 922(g)(9) is so broad that it would extend a life-long ban on gun possession to anyone convicted of a domestic count of offensive touching, no matter how slight, U.S. Br. 33, or of any intentional act that causes bodily injury (including minor scrapes, bruises, or even a stubbed toe). U.S. Br. 29. This reading cannot be squared with the words Congress used: defining a "misdemeanor crime of domestic *violence*" as requiring as an element the "use or attempted use of *physical force*." 18 U.S.C. § 921(a)(33)(A) (emphasis added). Such an expansive reading is contrary to the manifest intent of Congress to strip away gun rights only from those who have committed "violent domestic abuse." Mr. Castleman's reading of the statute, as requiring violent force, adheres to the intent of Congress and gives a consistent meaning to the term "physical force" as it is used in § 922(g). See *Johnson* v. *United States*, 559 U.S. 133, 140 (2010) (defining "physical force" as it relates to the application of § 922(g)(1) as meaning "violent force").

The Solicitor General concedes that his interpretation could be read very expansively, but attempts to dismiss the possibility of the prosecution of minor conduct as "fanciful hypotheticals." U.S. Br. 25. Mere-

ly stating that individuals are not "prosecuted . . . for causing a paper cut or stubbed toe," U.S. Br. 27, is both conclusory and cavalier.

Minor conduct is routinely punished under the Tennessee statute at issue. In *State* v. *Wachtel*, for example, the court upheld a count of assault when the defendant had "tried to slap his hands at [his mother's] arms to keep them away from him [and t]he slaps caused some scratches and bruises." No. M2003-00505-CCA-R3-CD, 2004 WL 784865, at *12 (Tenn. Crim. App. Apr. 13, 2004) (internal quotation marks omitted). Mr. Castleman points to other minor violations of the Tennessee domestic violence statute cited in criminal complaints. Br. Resp't 32. The reality is that courts applying a broad definition of physical force do regularly find convictions for such minor conduct to be predicate offenses under § 922(g)(9). In *United States* v. *Wells*, for example, the defendant had "physically restrained his wife, allegedly to prevent her from assaulting him or leaving the family residence in an intoxicated state." 826 F. Supp. 2d 441, 442-43 (N.D.N.Y. 2011). Wells pled guilty to the misdemeanor of unlawful imprisonment, which the court found to be a predicate offense under § 922(g)(9). *Id.* at 442. Likewise, in *Koll* v. *Dep't of Justice*, the court held that the defendant's disorderly conduct conviction was a sufficient predicate offense under § 922(g)(9). 769 N.W.2d 69 (Wis. Ct. App. 2009). The conduct in *Koll* involved the defendant "slapp[ing] the hand and twist[ing] the arm of his live-in girlfriend." *Id.* at 70.

Wells and *Koll* demonstrate that it is not just statutes that have a domestic relationship as a definitional element that are affected by a broad reading of § 922(g)(9). Any misdemeanor can qualify as a predicate crime under § 922(g)(9) as long as the misde-

meanor "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon" and the existence of a domestic relationship is proved to the jury beyond a reasonable doubt. *United States* v. *Hayes*, 555 U.S. 415, 425 (2009) (quoting 18 U.S.C. § 921(a)(33)(A)). The misdemeanors of disorderly conduct, unlawful imprisonment, menacing, disturbing the peace, and harassment have all been found to be sufficient predicate offenses under § 922(g)(9). See, *e.g.*, *Koll*, 769 N.W.2d at 70 (disorderly conduct conviction); *United States* v. *Medicine Eagle,* 266 F. Supp. 2d 1039 (D.S.D. 2003) (same); *Wells*, 826 F. Supp. 2d at 442 (a guilty plea of unlawful imprisonment); *United States* v. *Kavoukian*, 315 F.3d 139 (2d Cir. 2002) (conviction for menacing in the second degree); *King* v. *Wyo. Div. of Criminal Investigation*, 89 P.3d 341 (Wyo. 2004) (a guilty plea for disturbing the peace); *United States* v. *Marshall*, No. 2:08-CR-49-MEF, 2009 WL 691928 (M.D. Ala. Mar. 11, 2009) (conviction for harassment). This combination of *Hayes* and the Solicitor General's expansive interpretation of § 922(g)(9) would extend federal jurisdiction to all manner of minor misdemeanors.[2]

The Solicitor General would also have this Court give "physical force" such a broad meaning as to include even offensive touching. U.S. Br. 33. Offensive touching covers some truly trivial conduct. In *United States* v. *Lewellyn*, for example, the Ninth Circuit held that "spitting on another person is an offensive

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[2] The continuing validity of *Hayes* after *Descamps* v. *United States*, is unclear, as is the ability of these various misdemeanors to qualify as predicate offenses under the categorical approach as clarified by *Descamps*. 133 S. Ct. 2276 (2013). The broader the definition given to the element of "physical force," however, the more likely it is that these kinds of minor misdemeanors would continue to qualify as predicate offenses.

touching that rises to the level of simple assault under the theory of assault as an attempted or completed battery." 481 F.3d 695, 699 (9th Cir. 2007); see also *United States* v. *Masel*, 563 F.2d 322, 324 (7th Cir. 1977) (stating that "[i]t is ancient doctrine that intentional spitting upon another person is battery" in upholding the conviction of the defendant for spitting on a U.S. Senator as a gesture of disapproval); *Commonwealth* v. *Cohen*, 771 N.E.2d 176 (Mass. App. Ct. 2002) (upholding a conviction for assault and battery when the defendant intentionally spat on a young woman with whom he had a disagreement); *State* v. *Helou*, 822 So.2d 647, 653 (La. Ct. App. 2002) ("spitting on another constitutes a battery"), *vacated*, 857 So.2d 1024 (La. 2003). Professor LaFave confirms the low threshold for offensive touching: "But, in addition to . . . more obvious bodily injuries, offensive touchings (as where a man puts his hands upon a girl's body or kisses a woman against her will, or where one person spits into another's face) will also suffice for battery under the traditional view." 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2, at 553 (2d ed. 2003).

Mr. Castleman's proper reading of the statute to require "violent force" rather than any form of physical force, is required to prevent the application of a stiff penalty—up to ten years in prison—and a stiff prohibition—a life-long ban on gun possession—to physical, but not serious conduct, such as grabbing a person's wrist or arm, *United States* v. *Smith*, 812 F.2d 161, 164 (4th Cir. 1987), or pushing someone to break free of their grip, *United States* v. *Patch*, 114 F.3d 131, 133 (9th Cir. 1997). Such a reading is in accord with the intent of Congress in passing the Lautenberg Amendment. The sponsor emphasized that the amendment was needed because "many peo-

ple who engage in *serious* spousal or child abuse ultimately are not charged with or convicted with felonies." 142 Cong. Rec. 19,415 (1996) (statement of Sen. Lautenberg) (emphasis added). Congress was concerned not about minor conduct, but about violent individuals possessing firearms. *Id.* ("This amendment closes this dangerous loophole and keeps guns away from *violent* individuals . . . ") (emphasis added); 142 Cong. Rec. 26,674 (1996) (statement of Sen. Lautenberg) ("Once he *beat his wife brutally* and was prosecuted, but like most wife beaters, he pleaded down to a misdemeanor . . . .") (emphasis added); 142 Cong. Rec. 19,415 (1996) (statement of Sen. Lautenberg) ("In simple words, the amendment says that *wife beaters and child abusers* should not have guns.") (emphasis added); see also Br. Resp't 22-23.

II. MR. CASTLEMAN'S READING DOES NOT TURN § 922(G)(9) INTO A DEAD LETTER

The dire picture that the Solicitor General paints about the applicability of § 922(g)(9) is inaccurate. The Solicitor General selectively provides statutes to support his claim and omits aggravated misdemeanors that would trigger liability under § 922(g)(9). U.S. Br. 21a-29a. For example, the Solicitor General cites New Mexico Statute Annotated § 30-3-15(A) which provides: "Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner." (West 2013). What the Solicitor General failed to point out, however, is a more serious domestic violence provision in N.M. Stat. Ann. § 30-3-16:

> A. Aggravated battery against a household member consists of the unlawful touching or application of force to the person of a household

> member with intent to injure that person or another.
>
> B. Whoever commits aggravated battery against a household member by inflicting an injury to that person that is not likely to cause death or great bodily harm, but that does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

(West 2013). Given that violent force is likely necessary to effect the harms prohibited by § 30-3-16, it would likely qualify as a predicate offense.

In other jurisdictions, convictions under statutes proscribing specific conduct of the sort that prompted Congress to enact the Lautenberg Amendment would likely qualify as predicate offenses. In New York, for example, N.Y. Penal Law § 121.11 provides: "A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she: [] applies pressure on the throat or neck of such person; or [] blocks the nose or mouth of such person. Criminal obstruction of breathing or blood circulation is a class A misdemeanor." (McKinney 2013). Finally, Oregon Revised Statute Annotated § 163.187(1) provides: "A person commits the crime of strangulation if the person knowingly impedes the normal breathing or circulation of the blood of another person by: (a) Applying pressure on the throat or neck of the other person; or (b) Blocking the nose or mouth of the other person." (West 2013). "Strangulation is a Class A misdemeanor." *Id.* § 163.187(3). Such statutes barring specific conduct would clearly qualify as predicate acts under § 922(g)(9) if a domestic relationship were proved.

In other states, assault and battery statutes could qualify as predicate offenses under § 922(g)(9). For example, in Utah, "[a]ssault is . . . an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." Utah Code Ann. § 76-5-102(1)(c) (West 2013). Domestic violence is defined as an assault under § 76-5-102 "by one cohabitant against another." Utah Code Ann. § 77-36-1(4)(b) (West 2013). In California, "[a] battery is any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242 (West 2013). "When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year . . . ." *Id.* § 243(d). Finally, as Mr. Castleman notes, even under the modified categorical approach, as recently clarified in *Descamps*, there are likely statutes from other states that will continue to qualify as predicate offenses. There is no need to expand federal jurisdiction by making every conviction for "rude touching" or the like a predicate offense in order to honor Congress's intent with respect to § 922(g)(9).

III. THE RULE OF LENITY SUPPORTS ADOPTING MR. CASTLEMAN'S READING OF § 922(G)(9)

1. This case presents two readings of the statute: one that potentially sweeps in many different kinds of misdemeanors and all manor of minor conduct, and another that follows the intent of Congress by only covering violent domestic abusers. The text, context, structure, and purpose of § 922(g)(9), not to mention this Court's authoritative construction of near-identical language in § 924(e)(2)(B)(i), all conclusively point in the same direction: a misdemeanor crime of

domestic violence requires *violent* force. Mere unwelcome touching or indirect applications of force do not trigger the severe penalties under § 922(g)(9).

After applying all of the tools of construction, it is clear that Mr. Castleman's reading of the statute is correct. The plain meaning of "physical force" is contrary to the Solicitor General's broad definition as Mr. Castleman persuasively shows. Br. Resp't 13-18. The structure of § 922(g) also supports Mr. Castleman's reading. This Court has interpreted "physical force" as used in § 924(e)(2)(B)(i) to mean "violent force" in *Johnson*. 559 U.S. at 140. *Johnson* dealt with application of § 922(g) to an underlying state conviction just as this case does. The same definition of "physical force" should therefore apply to the application of § 922(g)(9) as it did to § 922(g)(1). The legislative history also confirms Mr. Castleman's reading. Congress was concerned with violent domestic abusers possessing firearms. See *supra* pg. 7. The Solicitor General's arguments cannot surmount this evidence of the meaning of "physical force."

The Solicitor General posits that "physical force" means "*violent* force" when prosecuted as a violent felony but not when prosecuted as misdemeanor domestic violence because unwelcome touching would be a "comical misfit" with a felony infraction as opposed to a misdemeanor. U.S. Br. 16 (quoting *Johnson,* 559 U.S. at 145). But the *Johnson* Court noted that this misfit was occasioned by the word "violent," which connotes "strong physical force," 559 U.S. at 140-41, and that very word appears in the operative provision in this case. The difference between a felony and a misdemeanor *might* obviate the otherwise striking similarities between the two provisions—but that gets the Solicitor General only to grievous ambiguity, not to certainty.

The very most that the Solicitor General's argument can establish is grievous ambiguity in the statute. There is no way to tell if Congress used the same language to mean entirely different things in the same statute—and Mr. Castleman must still prevail. *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) (holding that when a criminal statute is ambiguous, the rule of lenity breaks the tie in favor of the defendant); see also *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013) ("'the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.'" (quoting *Barber* v. *Thomas*, 130 S. Ct. 2499, 2508 (2010))). To hold for the Solicitor General here would require this Court to guess as to Congressional intent. It would require this Court to guess that Congress meant "physical force" to mean two different things in the same statute, and to guess that Congress meant unwelcome touching when it said "domestic violence."

2. The rule of lenity applies with particular urgency in cases like this one that impinge on the constitutional right outlined in *District of Columbia* v. *Heller*, 554 U.S. 570, 595 (2008). As this Court has explained, the rule "resolve[s] doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Section 922(g)(9) imposes a very harsh condition on those convicted of a predicate offense: a life-long ban on gun possession. Determining which offenses will qualify for such a strong prohibition calls for application of the rule of lenity. The rule, which Chief Justice Marshall described as "perhaps not much less old than construction itself," *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820),

safeguards three pillars of the criminal justice system: fair notice for the accused, consistent enforcement of the law, and the separation of powers. See *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). This case implicates all three principles.

It is a fundamental tenet of Anglo-American jurisprudence that the law must provide "'fair warning . . . of what [it] intends to do if a certain line is passed.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). Courts have thus long recognized that "[i]t is not consistent with the just and benign spirit of our law to give to a criminal statute an interpretation which can be maintained only by a keen and scholastic ingenuity. The meaning of the law which consigns a man to prison, or deprives him of his property should be plain and obvious, and easily understood by an ordinary capacity." *James* v. *State*, 63 Md. 242, 253 (1885). The rule's insistence on fair notice "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subject to punishment that is not clearly prescribed." *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). But a person of ordinary capacity would strain to understand why "physical force" means "*violent* force" when it defines a violent felony, but expands to include all unwelcome touching when it defines a "misdemeanor crime of domestic violence." When this Court has defined a statutory term, the public should be able to rely on that definition for fair notice of its meaning in the same statutory context, rather than trawling through the legislative history and pondering the *most* punitive construction that the alleged statutory purpose might sustain, as the Solicitor General would instead require.

So too with uniform application of the criminal laws. The rule serves "to minimize the risk of selective or arbitrary enforcement," *Kozminski*, 487 U.S. at 952, by "fostering uniformity in the interpretation of criminal statutes . . . ." *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). The application of that principle to this case is obvious: uniform interpretation of statutes starts with giving words consistent meaning. In the absence of compelling reasons to the contrary, the same phrase should mean the same thing throughout the statute. See *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993).

Similarly, separation of powers concerns counsel in favor of Mr. Castleman's reading of the statute. The rule of lenity properly allocates the responsibility for creating and delimiting crimes and criminal penalties to Congress, and keeps courts out of the business of expanding criminal liability beyond the plain text of criminal statutes. The rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514. The Solicitor General's extensive policy arguments in favor of a broad construction of the statute here, see U.S. Br. 35-47, are thus misdirected: Congress might deem it wise to adopt a new definition of "physical force" to cover misdemeanors that do not involve violent force, but that is no reason for this Court to cast aside its settled statutory construction.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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