November 2017

The Misapplication of the Lautenberg Amendment in Voisine v. United States and the Resulting Loss of Second Amendment Protection

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I. INTRODUCTION

Since the 1990s, federal and state governments have enacted various forms of legislation aimed at protecting women and children from domestic abuse.[1] Though incidents of domestic violence have declined

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1. *See, e.g.*, Family Violence Prevention and Services Act, 42 U.S.C. § 13925 (2017);

over the past two decades, there are still millions of new cases arising each year.[2] Accordingly, despite these legislative efforts, domestic violence remains a serious problem in the United States. Some have argued that laws targeting domestic abuse lack efficiency because victims often do not report domestic assaults,[3] and when they do, there is inconsistent application of the laws from state to state.

One such law is the Lautenberg Amendment, which was enacted in 1996 with the intention of imposing a lifetime ban on firearms possession for those convicted of misdemeanor crimes of domestic violence.[4] Since the Amendment was ratified, the courts have struggled to make sense of its various ambiguous terms.[5] Further, courts have continued to broaden the scope of the Amendment, as evidenced by the Supreme Court's recent decision in *Voisine v. United States*, and have now extended its reach into potentially unconstitutional territory.[6]

This Comment focuses primarily on the Court's broad extension of the Lautenberg Amendment, and further argues that the decision in *Voisine* fails to promote a compelling government interest. In cases of knowing or intentional domestic violence, it makes sense to keep convicted abusers from possessing guns; not only is the abuser's behavior inherently violent, but sometimes, the only thing that prevents abuse from

Violence Against Women Act (codified in part at 42 U.S.C. §§ 13701 through 14040); OHIO REV. CODE ANN. § 2919.25 (LEXIS through HB 59 (excluding HB 49)).

2. *See* Melissa Jeltsen, *This is How a Domestic Violence Victim Falls Through the Cracks*, HUFFINGTON POST (Jan. 9, 2017), http://www.huffingtonpost.com/2014/06/16/domestic-violence_n_5474177.html [http://perma.cc/LG8H-3MBT] ("Domestic violence has been on a steady decline in the U.S. for the past 20 years. Since the landmark Violence Against Women Act was passed in 1994, annual rates of domestic violence have plummeted by 64 percent. But the U.S. still has the highest rate of domestic violence homicide of any industrialized country."); Shannan M. Catalano, Ph.D., *Intimate Partner Violence, 1993-2010*, U.S. BUREAU OF JUST. STAT. (Nov. 16, 2012), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4536 [http://perma.cc/F4R3-W3JV]; s*ee also National Statistics Domestic Violence Fact Sheet*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/assets/2497/domestic_violence.pdf [http://perma.cc/2N3D-Y5A4] (last visited June 13, 2017) ("In the United States, an average of 20 people are physically abused by intimate partners every minute. This equates to more than 10 million abuse victims annually.").

3. *See Domestic Violence Facts*, FEMINIST MAJORITY FOUND., http://www.feminist.org/other/dv/dvfact.html [http://perma.cc/NUK2-QF3R] (last visited Jan. 15, 2017) ("Only about half of domestic violence incidents are reported to police.").

4. 18 U.S.C. § 922(g)(9) (2017) ("It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

5. *See, e.g.*, Johnson v. United States, 559 U.S. 133 (2010); United States v. Booker, 644 F.3d 12 (1st Cir. 2011); United States v. Castleman, 134 S. Ct. 1405 (2014); Voisine v. United States, 136 S. Ct. 2272 (2016).

6. *See Voisine*, 136 S. Ct. at 2291 (Thomas, J., dissenting).

turning into murder is the presence of a gun.[7] However, extending the reach of the Lautenberg Amendment to reckless misdemeanants would not have the same effect, as many acts committed recklessly may be accidental, or at the very least, are not inherently violent.[8]

Yet, the Court found in *Voisine* that the language of the Lautenberg Amendment should extend to reckless misdemeanants and impose upon them a lifetime ban on firearms possession.[9] The Court reasoned that the inclusion of reckless misdemeanants would help close a "dangerous loophole" in gun control laws.[10] The overall impact on gun-related domestic violence will be minimal, though, because current laws do not prohibit many other groups, such as those convicted of domestic violence against a current or former dating partner, those convicted of stalking, or those under a temporary restraining order, from possessing firearms.[11] Because those groups of individuals are more likely to be dangerous and pose a significantly greater threat of harm than reckless misdemeanants, the decision in *Voisine* creates an uneven policy which will do little, if anything, to help the actual victims of dangerous domestic abuse. More importantly, the *Voisine* decision strips these individuals of protections afforded to them by the United States Constitution.

To fully appreciate the implications of the Court's decision regarding Second Amendment rights and its misapplication of the term "recklessness," it is important to first understand the significant legislative decisions leading up to *Voisine*. Therefore, Section II of this Comment looks at the history and political atmosphere at the time the Lautenberg Amendment was enacted to better explain the aim of the legislation.

Section III takes an in-depth look at *Voisine* itself, discussing the history of the case, the procedural posture, and the majority's analysis. A detailed evaluation of the dissenting opinion follows, explaining the pitfalls and constitutional implications of the majority's decision, with

7. *See, e.g.*, *Castleman*, 134 S. Ct. at 1408-09 ("[T]he presence of a firearm increases the likelihood that it will escalate to homicide." (internal citations omitted)); *National Statistics Domestic Violence Fact Sheet*, *supra* note 2 ("The presence of a gun in a domestic violence situation increases the risk of homicide by 500%." (internal citations omitted)).

8. *See Voisine*, 136 S. Ct. at 2287-90 (Thomas, J., dissenting) (explaining that the term "use of physical force" should "not include nonviolent, reckless acts that cause physical injury or an offensive touching," because not all reckless acts have the requisite *mens rea* to make them volitional, and in some instances, reckless actions may be merely accidental).

9. *Id.* at 2282.

10. *Id*. at 2274 (internal citations omitted).

11. *See Guns and Domestic Violence*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://ncadv.org/assets/2497/guns_and_dv.pdf [http://perma.cc/3LAU-8FFY] (last visited Oct. 1, 2016).

particular attention given to Justice Thomas' Second Amendment concerns.

Section IV discusses various courts' interpretations of the Lautenberg Amendment, up to and including the decision in *Voisine*, and further highlights the inconsistencies between the courts' application of the law and the legislative intent of Congress. This Section includes a detailed analysis of the recklessness standard, showing how it has been applied by other courts in similar situations, and how the application in *Voisine* is inconsistent with the jurisprudence from virtually all courts outside of the First Circuit. This Section examines various policy implications as well.

Section V looks specifically at the Second Amendment, and how the ruling in *Voisine* thrusts the Lautenberg Amendment into unconstitutional territory. In short, the majority's decision strips individuals of a fundamental constitutional right based upon an arbitrary application of the phrase "use of physical force." This meritless denial of a constitutional protection is unparalleled, unwarranted, and sets a dangerously low threshold for denying further constitutional protections in the future.

Because the courts, including the Supreme Court, continue to move further and further from applying the Lautenberg Amendment to the intended class of individuals, this constitutional injustice is unlikely to be corrected jurisprudentially. To alleviate this unfairness and truly help domestic abuse victims, Congress should revise the terminology of the Lautenberg Amendment to specifically target dangerous individuals that are likely to commit subsequent acts of firearms violence. By doing so, Congress can spell out the precise standards of inclusion, and thus provide a more consistent, constitutional application of the law.

II. FIREARMS LEGISLATION LIMITING SECOND AMENDMENT PROTECTIONS

From the time the Second Amendment was adopted, there has been considerable debate regarding the intended meaning of the phrase "the right of the people to keep and bear Arms."[12] The Supreme Court has grappled with this language for more than two centuries, offering many

12. *See Second Amendment*, CORNELL UNIV. LAW SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/second_amendment [http://perma.cc/NZ7N-A223] ("Such language has created considerable debate regarding the Amendment's intended scope. On the one hand, some believe that the Amendment's phrase 'the right of the people to keep and bear Arms' creates an individual constitutional right for citizens of the United States . . . . On the other hand, some scholars point to the prefatory language 'a well-regulated Militia' to argue that the Framers intended only to restrict Congress from legislating away a state's right to self-defense.").

theories on how best to interpret the breadth of the Second Amendment.[13] In 2008, the Court held in *District of Columbia v. Heller* that the Second Amendment protects an individual right, and not merely a collective right, to possess and use firearms for traditionally lawful purposes such as self-defense.[14] Shortly thereafter, in *McDonald v. City of Chicago*, the Court declared the Second Amendment a fundamental right that extended to the states through the Fourteenth Amendment.[15]

However, because the Second Amendment is not considered to be an "absolute right,"[16] Congress has also enacted numerous statutes placing restrictions on firearms possession in an attempt to better ensure the safety of the American people.[17] One of the earliest statutes enacted by Congress was the 1968 Gun Control Act, which regulated interstate commerce of firearms by establishing numerous licensing regulations and determining who would be prohibited from owning firearms.[18]

The 1968 Gun Control Act delegated enforcement responsibilities to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).[19] In 1982, after allegations of abuse by the ATF were raised, a Senate subcommittee released a report calling for reform of federal firearm laws, suggesting that the ATF's application of the Act may have been encroaching on Second Amendment protections.[20] The report indicated

13. *See, e.g.*, United States v. Sprague, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning . . . ." (internal citations omitted)); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("'[T]he people' seems to have been a term of art employed in select parts of the Constitution . . . [the way it is used] suggest[s] that 'the people' protected by the . . . Second Amendment . . . refers to a class of persons who are part of a national community.").

14. District of Columbia v. Heller, 554 U.S. 570, 592 (2008) ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons . . . . This meaning is strongly confirmed by the historical background of the Second Amendment.").

15. McDonald v. City of Chicago, 561 U.S. 742, 778 (2010) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

16. *Heller*, 561 U.S. at 681 (Stevens, J., dissenting) ("[T]he protection the Amendment provides is not absolute. The Amendment permits government to regulate the interests that it serves.").

17. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (prohibiting the transfer of firearms to certain classes of persons); Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (limiting restrictions on firearms ownership); Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993) (requiring background checks on certain firearm purchasers).

18. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 § 922.

19. *Id.* at § 178.11.

20. *See* REPORT OF THE S. COMM. ON THE CONST. OF THE COMM. ON THE JUDICIARY, 97TH CONG., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982) ("The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of

that up to 75% of prosecutions under the 1968 Gun Control Act "were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations," and that reform "would enhance vital protection of constitutional and civil liberties of those Americans who choose to exercise their Second Amendment right to keep and bear arms."[21] Responding to these concerns, Congress enacted The Firearm Owners' Protection Act of 1986 to better ensure that the ATF properly enforced the firearms restrictions.[22]

As the debate over Second Amendment limitations continued through the 1980s, domestic abuse crimes also started to gain attention.[23] Until the late 1970s, incidents of domestic violence were widely considered to be private matters.[24] However, as domestic violence awareness became more prevalent over the next two decades, Congress responded by enacting federal legislation aimed at protecting battered and abused women.[25]

The Violence Against Women Act, enacted in 1994, was a significant piece of legislation that focused on the shortfalls of the justice system in prosecuting violent crimes against women.[26] In the wake of the Violence Against Women Act, Congress expressed concern that existing federal gun laws were only aimed at felons convicted of domestic violence crimes, though many domestic violence acts were, in reality, prosecuted as misdemeanors.[27] Thus, Congress enacted the Lautenberg Amendment

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the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.").

21. *Id*.

22. *See* Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449.

23. *See Domestic Violence: History of Police Responses*, FINDLAW (Oct. 7, 2016), http://family.findlaw.com/domestic-violence/domestic-violence-history-of-police-responses.html [http://perma.cc/WFM6-SJQE] ("Domestic violence became an increasingly popular issue in the 1970s and 1980s. As awareness for violence between intimate partners grew, so did criticism on the manner in which police were responding to the issue.").

24. *See* R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE & SOCIAL CHANGE 160 (New York, Routledge 1992) ("The CJS [Criminal Justice System] was not considered the appropriate institution for dealing with violence against women within the home; it was . . . defined as a family and personal problem best dealt with through social and psychological solutions.").

25. *See*, *e.g.*, Family Violence Prevention and Services Act, 42 U.S.C. § 13925 (2017); Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in part at 42 U.S.C. §§ 13701 through 14040).

26. Violence Against Women Act (codified in part at 42 U.S.C. §§ 13701 through 14040).

27. *See* United States v. Hayes, 555 U.S. 415, 426 (2009) ("Existing felon-in-possession laws, Congress recognized, were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.' By extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,' proponents of § 922(g)(9) sought to 'close this dangerous loophole.'" (internal

in 1996, later codified as 18 U.S.C. § 922(g)(9), which extended the federal prohibition on firearms possession enumerated in the Gun Control Act to include individuals convicted of misdemeanor crimes of domestic violence under state law.[28] Section 921(a)(33)(A) of the Amendment defines the phrase "domestic violence misdemeanor crime" to include "any misdemeanor under federal, state or tribal law that was committed against a domestic relation that involves the 'use . . . of physical force.'"[29]

Unfortunately, since the Lautenberg Amendment's enactment, the Supreme Court has struggled to interpret its various terms, including "use," "physical force," and "domestic violence," to ensure correct and consistent application.[30] The Court initially eliminated much of this confusion in *United States v. Castleman*, holding that "a knowing or intentional assault qualifies as such a crime,"[31] though most minor applications of force would not be considered "violent."[32] This conclusion did not, however, determine if the same was true for reckless assaults.[33]

The Supreme Court was tasked with that decision in 2016, when two petitioners alleged that convictions of domestic assault, which may have been considered reckless, should not result in a lifetime firearm ban. Up until that point, the Supreme Court had not addressed the question of

citations omitted)).

28. 18 U.S.C. § 922(g)(9) (2017).

29. 18 U.S.C. § 921(a)(33)(A) (2017) ("(a) As used in this chapter—(1) The term 'person' and the term 'whoever' include any individual, corporation, company, association, firm, partnership, society, or joint stock company. (33)(A) Except as provided in subparagraph (C), the term 'misdemeanor crime of domestic violence' means an offense that—(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.").

30. *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (finding that the phrase "crime of violence" included "use, attempted use, or threatened use of physical force," and that the phrase "use of force" excluded accidents); Johnson v. United States, 559 U.S. 133, 140 (2010) (finding that the phrase "physical force" meant violent force); United States v. Castleman, 134 S. Ct. 1409 (2014) (holding that knowing or intentional assault qualifies as a misdemeanor crime of domestic violence, but did not determine whether "reckless" acts would fall under that category).

31. Voisine v. United States, 136 S. Ct. 2272, 2274 (2016) (holding that the defendant's conviction for having "intentionally or knowingly cause[d] bodily injury to" the mother of his child qualified as a "misdemeanor crime of domestic violence" (internal citations omitted)).

32. *Castleman*, 134 S. Ct. at 1412 ("Minor uses of force may not constitute 'violence' in the generic sense. For example, in an opinion that we cited with approval in *Johnson*, the Seventh Circuit noted that it was 'hard to describe . . . as "violence" 'a squeeze of the arm [that] causes a bruise.'" (internal citations omitted)).

33. *Voisine*, 136 S. Ct. at 2274 (stating that in *Castleman*, the Court held that a knowing or intentional assault qualifies as a misdemeanor crime of domestic violence, but did not determine whether the same was true of a reckless assault).

whether a reckless application of force would constitute a "use of force," though the circuit courts, with the exception of the First Circuit, had uniformly held that mere reckless conduct was not sufficient to be considered a crime of violence.[34]

III. VOISINE V. UNITED STATES

A. Background and Procedural Posture

In 2004, Stephen Voisine was convicted of violating § 207 of the Maine Criminal Code for "intentionally, knowingly or recklessly causing bodily injury or offensive physical touching" to his girlfriend when he slapped her on the cheek.[35] While being investigated during a later incident involving the death of a bald eagle, law enforcement discovered that Voisine owned a hunting rifle and charged him under 18 U.S.C. § 922(g)(9) for possessing a firearm after previously being convicted of a misdemeanor domestic assault.[36] Voisine claimed, among other things, that his actions could have been considered reckless, and that prohibiting him from possessing a gun infringed on his Second Amendment right to keep and bear arms. The district court convicted Voisine and the First Circuit affirmed the decision, finding that in passing the Lautenberg Amendment, Congress "recognized that guns and domestic violence are a lethal combination and singled out firearm possession by those convicted of domestic violence offenses from firearm possession in other contexts."[37]

34. *E.g.*, *Castleman*, 134 S. Ct. at 1414 n.8; United States v. Garcia, 606 F.3d 1317, 1335-36 (11th Cir. 2010); Jimenez-Gonzalez v. Mukasey, 548 F.3d 557, 560 (7th Cir. 2008); United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008); United States v. Torres-Villalobos, 487 F.3d 607, 615-16 (8th Cir. 2007); United States v. Portela, 469 F.3d 496, 499 (6th Cir. 2006); Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1127-32 (9th Cir. 2006) (en banc); Garcia v. Gonzales, 455 F.3d 465, 468-69 (4th Cir. 2006); Oyebanji v. Gonzales, 418 F.3d 260, 263-65 (3d Cir. 2005); Jobson v. Ashcroft, 326 F.3d 367, 373 (2d Cir. 2003); United States v. Chapa-Garza, 243 F.3d 921, 926 (5th Cir. 2001). *But see* United States v. Booker, 644 F.3d 12, 19-20 (1st Cir. 2011).

35. *Supreme Court Upholds Reach of Gun Ban for Domestic Violence*, CBS NEWS, http://www.cbsnews.com/news/supreme-court-upholds-reach-of-gun-ban-for-domestic-violence/ [http://perma.cc/LM84-S5WC] (last visited June 13, 2017).

36. United States v. Voisine, 778 F.3d 176, 178 (1st Cir. 2015).

37. United States v. Voisine, No. 1:11-cr-00017-JAW, 2011 U.S. Dist. LEXIS 40931, at *2 (D. Me. Apr. 14, 2011); *Voisine*, 778 F.3d at 187. The Court considered the exact issues raised by *Voisine* in denying a motion to dismiss in a separate matter. United States v. Bryant, 1:11-cr-00021-JAW, 2011 U.S. Dist. LEXIS 39809 (N.D. Cal Jan. 7, 2011). In *Bryant*, the First Circuit upheld an earlier decision that "all convictions under [17-A M.R.S. § 207] qualify as misdemeanor crimes of domestic violence within the purview of 18 U.S.C. § 922(g)(9)," and held that it remained "the law in this Circuit and binding on this Court." *Bryant*, 2011 U.S. Dist. LEXIS 39809.

In 2008, William Armstrong was convicted of a misdemeanor assault, in violation of § 207, after he and his wife got into a shoving match while baking cookies.[38] In May 2010, during a search of his residence in suspicion of alleged drug possession, law enforcement discovered that Armstrong owned six guns.[39] Because the guns were not within the scope of the warrant, the police contacted the ATF and alerted them that Armstrong had firearms at his residence.[40] Officers also notified Armstrong that he could not have firearms in his home, and in response, Armstrong's wife called a family friend, who removed the firearms from the premises.[41]

On May 19, 2010, the ATF executed a federal warrant to search Armstrong's home, and though the officers did not find any firearms, they recovered over 1,300 rounds of ammunition.[42] Based on this finding, Armstrong was arrested, charged with violating 18 U.S.C. § 922(g)(9), and was convicted.[43] Like Voisine, he too argued that his actions may have been reckless and that the Lautenberg Amendment's application infringed on his Second Amendment rights.[44] The First Circuit, relying on its previous reasoning in *United States v. Booker*, found that in enacting the Lautenberg Amendment, Congress was concerned with the link between "the presence of a gun in the home of a convicted domestic abuser with increased risk of homicide," and that those concerns constituted an important government interest that justified the restraint on Armstrong's constitutional rights.[45]

Voisine and Armstrong filed a joint petition for certiorari, and in the wake of *Castleman*, which held that knowing and intentional conduct constituted a misdemeanor crime of domestic violence under § 922(g)(9), the Supreme Court remanded the cases to the First Circuit for further consideration.[46] On remand, the First Circuit found differently than the other circuit courts and held that reckless assault *could* constitute an act of domestic violence.[47] The court also refused to consider Voisine and Armstrong's Second Amendment arguments, maintaining that the issue

38. United States v. Armstrong, 706 F.3d 1, 2 (1st Cir. 2013) (internal citations omitted).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 8.
46. Armstrong v. United States, 134 S. Ct. 1759 (2014).
47. United States v. Voisine, 778 F.3d 176, 183 (1st Cir. 2015) ("We see no reasoned argument that offensive physical contact does not similarly entail the use of force simply because it is inflicted recklessly as opposed to intentionally.").

was foreclosed upon by *Booker*, in which the court "denied an identical argument framed as a facial challenge."[48] This was despite the fact that the Supreme Court's decision in *Castleman* had cast doubt on the First Circuit's holding in *Booker*, suggesting that the court should have revisited these standards.[49]

After the First Circuit upheld both convictions,[50] the Supreme Court once again granted the petitioners' joint motion for certiorari.[51] The question remained, even after *Castleman*, whether a misdemeanor assault conviction for reckless conduct should result in a lifetime firearm ban.

B. The Supreme Court's Decision to Uphold the Firearms Ban on Individuals Convicted of Reckless Crimes of Domestic Violence

Justice Kagan, writing for the majority, began by explaining that when an individual commits an assault recklessly, he or she takes an action with a certain *mens rea* to "'consciously disregard' a substantial risk that the conduct will cause harm to another."[52] After evaluating the statutory text and background of § 922(g)(9), the majority concluded that a reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under the Lautenberg Amendment.[53] The Court reasoned that Congress defined the phrase "misdemeanor crime" to include acts that involve the use of physical force, and there was no distinction between reckless, knowing, or intentional acts in that regard.[54] The majority also

48. *Id.* at 179 (internal citations omitted).

49. *See id.* at 199 (Torruella, J., dissenting) ("[A]lthough [the recklessness] argument was previously foreclosed by our holding in *Booker*, 'the Supreme Court's recent decision in *Castleman* casts doubt upon this holding.' In support of that assertion, we cited the Supreme Court's statements that 'the merely reckless causation of bodily injury under [the Tennessee assault statute] may not be a "use" of force,' and that 'the Courts of Appeals have almost uniformly held that recklessness is not sufficient' to 'constitute a "use" of force.' Although *Castleman* had not directly overruled our prior decision in *Booker*, we noted that these statements from the Supreme Court provided a 'sound reason' for thinking that the *Booker* panel might well 'change its collective mind' in light of *Castleman*." (internal citations omitted)).

50. *Id.* at 177 ("As we see it, this case turns on the unique nature of § 922(g)(9). That section is meant to ensure that individuals who engage in the 'seemingly minor act[s]' that actually constitute domestic violence, like squeezing and shoving, may not possess a firearm. This range of predicate acts is broader than that found in other federal prohibitions involving the use of physical force. Applying the teachings of *Castleman*, we find that Maine's definition of reckless assault fits within § 922(g)(9). We affirm the denial of the motion to dismiss the indictment and information here. That means the conditional guilty pleas the defendants entered are valid and their sentences stand. The question is close and we rule narrowly." (internal citations omitted)).

51. Voisine v. United States, 136 S. Ct. 386 (2015), *cert. granted.*

52. Voisine v. United States, 136 S. Ct. 2272, 2278 (2016) (internal citations omitted).

53. *See id.*

54. *Id.*

relied heavily on the dictionary definition of the word "use," which is defined as the "act of employing something."[55] Justice Kagan stated that although the act must be volitional, the word "use" does not require the person applying force to have "practical certainty" that it would cause harm, only that it would be "substantially likely to do so."[56] Accordingly, the Court found that a person who recklessly uses force to cause harm in effect carries out the same action as a person who commits an action knowingly or intentionally.[57]

The Court also considered the legislative history and determined that Congress enacted § 922(g)(9) to ban "garden-variety" domestic assault misdemeanants from possessing guns.[58] Based upon this finding, the majority concluded that "Congress must have known it was sweeping in some persons who had engaged in reckless conduct."[59] The Court was also troubled by the fact that 34 states and the District of Columbia defined misdemeanor offenses to include reckless acts, and found that excluding reckless behavior would jeopardize § 922(g)(9)'s force in those jurisdictions.[60] The majority did not comment on the Second Amendment issues, as the Court had not agreed to hear that aspect of the defendants' claims. The judgments were then affirmed in favor of the government.[61]

C. The Dissenting Opinion Raising Questions of Interpretation and Constitutionality

In his dissent, Justice Thomas, who was joined by Justice Sotomayor, argued that there was sufficient evidence to suggest that § 921(a)(33)(A)(ii) required the use of physical force to be intentional, and not merely reckless.[62] As such, reckless actions would likely not qualify

55. *Id.* (citing WEBSTER'S NEW INT'L DICTIONARY 2806 (2d ed. 1954) ("[a]ct of employing anything"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2097 (2d ed. 1987) ("act of employing, using, or putting into service"); BLACK'S LAW DICTIONARY 1541 (6th ed. 1990) ("[a]ct of employing," "application")).

56. *Id.* at 2278-79.

57. *Id.* at 2280 ("In sum, Congress's definition of a 'misdemeanor crime of violence' contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly 'use[s]' force, no less than one who carries out that same action knowingly or intentionally. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms.").

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 2282.

62. *Id.* at 2283-84 (Thomas, J., dissenting) ("First, the word 'use' in that provision is best read to require intentional conduct. Second, especially in a legal context, 'force' generally connotes the use of violence against another. Black's Law Dictionary, for example, defines 'force' to mean

as misdemeanor crimes of domestic violence under the assault statute, and thus should not have resulted in firearm prohibitions for the petitioners.[63]

The dissent also looked at three different categories of conduct that could be considered forceful. First, "a person may intentionally create and use . . . force against an object." Second, "a person may intentionally create force, but recklessly apply that force against an object." And third, "a person could recklessly create force that results in damage, even if it would not be intended."[64] Though the dissenting Justices agreed that the first two categories would be enough to trigger the lifetime firearms prohibition under § 922(g)(9), they did not believe that the third category should result in such a ban.[65]

Most significantly, the dissent found that the term "use of physical force" "does not include nonviolent, reckless acts that cause physical injury or an offensive touching."[66] Rather, the majority failed to make its claim on a variety of other grounds, such as neglecting to explain the difference between recklessness in creating force and recklessness in causing harm. Instead, the majority created additional conditions, such as requiring the conduct to be volitional and not merely accidental.[67] The dissent argued that the majority's use of "'volitional' [wa]s inconsistent with its traditional legal definition,"[68] and that an accident may in fact still be an accident even if the person responsible acted in a reckless manner.[69] In short, if Congress had meant to incorporate reckless actions under § 922(g)(9), it would have written the statute with different language so as to explicitly include such acts.[70]

'[p]ower, violence, or pressure directed against a person or thing.' Third, context confirms that 'use of physical force' connotes an intentional act. Section 921(a)(33)(A)(ii)'s prohibitions also include 'the threatened use of a deadly weapon.'" (internal citations omitted)).

63. *Id*. at 2284.

64. *Id.* at 2285.

65. *Id.* ("[We] part ways with the majority's conclusion that purely reckless conduct—meaning, where a person recklessly creates force—constitutes a 'use of physical force.'").

66. *Id.* at 2287.

67. *Id.* at 2288-89 ("The majority blurs the distinction between recklessness and intentional wrongdoing by overlooking the difference between the *mens rea* for force and the *mens rea* for causing harm with that force. But the majority fails to explain why mere recklessness in creating force—as opposed to recklessness in causing harm with intentional force—is sufficient. To limit its definition of 'use,' the majority adds two additional requirements. The conduct must be 'volitional,' and it cannot be merely 'accident[al].'").

68. *Id.* at 2289.

69. *Id.* at 2290 ("An accident can mean that someone was blameless—for example, a driver who accidentally strikes a deer that darts into a roadway. But an accident can also refer to the fact that the result was unintended: A car accident is no less an 'accident' just because a driver acted negligently or recklessly. Neither labeling an act 'volitional' nor labeling it a mere 'accident' will rein in the majority's overly broad understanding of a 'use of physical force'").

70. *Id.* ("If Congress wanted to sweep in all reckless conduct, it could have written §

Although this is where Justice Sotomayor's dissent ended, Justice Thomas continued on to argue that the Lautenberg Amendment is already too broad, and that the majority's holding extended the statute into unconstitutional territory.[71] He argued that "a law that broadly frustrates an individual's right to keep and bear arms must target individuals who are beyond the scope of the 'People' protected by the Second Amendment."[72] In enacting the Lautenberg Amendment, Congress was worried about dangerous abusers and the safety of battered women and children.[73] Individuals who cause minor injury through reckless or accidental conduct are not those "People."[74]

Justice Thomas contended that the Lautenberg Amendment does more than "close a dangerous loophole" by prohibiting individuals that commit reckless acts of domestic violence from possessing firearms;[75] it also imposes a lifetime ban on firearms possession for summary offenses and minor transgressions.[76] Justice Thomas concluded by stating that, "[w]e treat no other constitutional right so cavalierly. At oral argument, the Government could not identify any other fundamental constitutional right that a person could lose forever by a single conviction of an infraction punishable by a fine."[77] Accordingly, though the Second Amendment argument was not heard by the Court, the constitutional implications were certainly present and did not escape the attention of all the Justices.

921(a)(33)(A)(ii) in different language. Congress might have prohibited the possession of firearms by anyone convicted under a state law prohibiting assault or battery. Congress could also have used language tracking the Model Penal Code by saying that a conviction must have, as an element, 'the intentional, knowing, or reckless causation of physical injury.' But Congress instead defined a 'misdemeanor crime of domestic violence' by requiring that the offense have 'the use of physical force.' And a 'use of physical force' has a well-understood meaning applying only to intentional acts designed to cause harm.").

71. *Id.* ("Section 922(g)(9) is already very broad. It imposes a lifetime ban on gun ownership for a single intentional nonconsensual touching of a family member. A mother who slaps her 18-year-old son for talking back to her—an intentional use of force—could lose her right to bear arms forever if she is cited by the police under a local ordinance. The majority seeks to expand that already broad rule to any reckless physical injury or nonconsensual touch. I would not extend the statute into that constitutionally problematic territory.").

72. *Id.* at 2291.

73. *Id.* at 2292.

74. *Id.*

75. *Id.* at 2291.

76. *Id.*

77. *Id.*

IV. THE LAUTENBERG AMENDMENT AND ITS MISAPPLICATION IN *VOISINE*

When the bill, later codified as 18 U.S.C. § 922(g)(9), was originally introduced by Senator Lautenberg, it called for any individual charged with a misdemeanor "crime involving domestic violence" to be permanently banned from possessing firearms.[78] However, Senator Lautenberg made numerous concessions to opponents of the proposed legislation to gain the support and approval of the Senate. Specifically, he yielded to the Republican Senators' insistence on removing language that created a firearms ban based solely on an indictment for a misdemeanor crime of domestic violence.[79] Additionally, when the revised bill was submitted to the House of Representatives for consideration, the proposed language that the misdemeanant be charged with a "crime of violence" against a domestic relation was amended to a "use of force" requirement.[80] Many in the House argued that the original language was too broad, and needed to be tailored toward forceful, violent abusers.[81]

Thus, the statutory ban on firearms possession was not intended to extend to individuals charged with minor misdemeanor acts of domestic violence.[82] Senator Lautenberg himself referred to the targeted group as "wife beaters and child abusers."[83] As Justice Thomas explained:

> In enacting § 922(g)(9), Congress was not worried about a husband dropping a plate on his wife's foot or a parent injuring her child by texting while driving. Congress was worried that family members were abusing other family members through acts of violence and keeping their guns by pleading down to misdemeanors. Prohibiting those convicted of intentional and knowing batteries from possessing guns—

78. *See* Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173, 177-78 (2015) (internal citations omitted).

79. *See id.* at 179 (internal citations omitted).

80. *See id.* ("'[S]ome argued that the term "crime of violence" was too broad, and could be interpreted to include an act such as cutting up a credit card with a pair of scissors. Although this concern seemed far-fetched to me, I did agree to a new definition.'" (internal citations omitted)).

81. *See id.*

82. *See* United States v. Castleman, 134 S. Ct. 1409, 1415 (2014) ("[S]everal Senators argued that the provision would help to prevent gun violence by perpetrators of severe domestic abuse. Senator Lautenberg referred to 'serious spousal or child abuse' and to 'violent individuals'; Senator Hutchison to 'people who batter their wives'; Senator Wellstone to people who 'brutalize' their wives or children; and Senator Feinstein to 'severe and recurring domestic violence.'" (internal citations omitted)).

83. *See* 142 CONG. REC. S9458 (daily ed. Aug. 2, 1996), (statement of Sen. Lautenberg) ("There is no reason why wife beaters and child abusers should have guns, and only the most progun extremists could possibly disagree with that.").

> but not those convicted of reckless batteries—amply carries out Congress' objective.[84]

Therefore, arguably, Congress approved the specific language with the narrow goal of keeping guns out of the hands of those convicted of more serious crimes of domestic violence. It simply does not follow that the Amendment was aimed toward relatively minor acts causing little or no physical harm, which in reality constitute the majority of domestic assaults.[85]

Additionally, since the Lautenberg Amendment was enacted, there have been various attacks on the constitutionality and vagueness of the statute.[86] Not only has the Amendment been challenged by both law enforcement and the military,[87] but shortly after enactment, lawsuits began to arise from individuals convicted of misdemeanor crimes of domestic violence questioning whether the Amendment violated the *Ex Post Facto* Clause of the Constitution.[88] Other groups have also expressed

84. Voisine v. United States, 136 S. Ct. 2272, 2292 (2016) (Thomas, J., dissenting).

85. *See Castleman*, 134 S. Ct. at 1411-12 ("[M]ost physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." (internal citations omitted)).

86. *See* James Lockhart, *Validity, Construction, And Application of 18 U.S.C.A. § 922(g)(9), Prohibiting Possession of Firearm by Persons Convicted Of Misdemeanor Crime of Domestic Violence*, 50 A.L.R. Fed.2d 31, 2 ("A large number of cases have dealt with the question of the constitutionality of 18 U.S.C. § 922(g)(9), and while it has been upheld against challenges under or related to the Commerce Clause, claims of unconstitutional vagueness including so-called 'Lambert exception' claims, alleged violation of principles of equal protection or equal treatment, and alleged violation of state rights under the 10th Amendment, and has also been held constitutional insofar as it applies to misdemeanors committed prior to its enactment, courts have raised some question as to its constitutionality in light of Second Amendment protections, holding in some cases that it represents a permissible limitation on possession of firearms, similar to that imposed on felons or the mentally ill, but in other cases questioning its Second Amendment validity." (internal citations omitted)).

87. *See* Ashley G. Pressler, *Guns and Intimate Violence: A Constitutional Analysis of The Lautenberg Amendment*, 13 ST. JOHN'S J.L. COMM. 705, 706-07 (1999) ("Law enforcement officials and members of the military have questioned the constitutionality of the Lautenberg Amendment on several levels. Initially, they assert that the new federal law violates the Equal Protection Clause on three grounds: (1) it unfairly applies to domestic violence misdemeanants as opposed to other misdemeanor crimes; (2) it applies only to domestic violence misdemeanors and not to felonies; and (3) it singles out law enforcement officials, specifically, as a particular class of individuals. Secondly, they suggest that the Amendment exceeds Congress' powers under the Commerce Clause. Thirdly, the Amendment is criticized as being retroactive and thus violative of the Ex Post Facto Clause. Finally, the Amendment is said to constitute a bill of attainder by virtue of its ability to inflict punishment.").

88. *E.g.*, United States v. Hicks, 992 F. Supp. 1244, 1245 (D. Kan. 1997) (arguing that the Lautenberg Amendment violates the *Ex Post Facto* Clause); United States v. Meade, 986 F. Supp. 66, 67 (D. Mass. 1997); Nat'l Ass'n of Gov't Emps. v. Barrett, 968 F. Supp. 1564, 1567 (N.D. Ga. 1997), *aff'd*, 155 F.3d 1276 (11th Cir. 1998); Gillespie v. City of Indianapolis, 13 F. Supp.2d 811, 814 (S.D. Ind. 1998) (challenging the constitutionality of the Lautenberg Amendment, including arguments that

frustration with the effectiveness of the Amendment. Though many groups supported the notion that domestic violence was a serious problem in this country and that legislation was needed to mitigate that violence, the language of the Amendment was unclear, the application varied from state to state, and as a result, the legislation was not keeping guns out of the hands of violent abusers.[89]

One reason that the Lautenberg Amendment was ineffective was because the courts struggled with the phrase "use of physical force" as it related to "domestic violence," and therefore had trouble determining the appropriate standard for triggering the lifetime firearms ban. The Court in *Castleman* took a drastic turn in interpreting the standard for "physical force" by applying it to mere "offensive touching."[90] This decision essentially contradicted the Court's earlier holding in *Johnson v. United States*, made just four years earlier.[91] In *Castleman*, the Court found that the ban would apply even to those convicted of nonviolent acts of domestic violence.[92] Yet, as Justice Scalia argued in his concurring opinion, this application resulted in an inconsistent interpretation of the phrase, which produced an "absurd result."[93] He pointed out the irony that someone could be charged with a crime of "domestic violence" when they lacked the "violence" component.[94] Textually, Justice Scalia argued, the majority's interpretation simply did not make sense, and also went against the common meaning of the term "domestic violence" at the time the Amendment was enacted.[95]

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the *Ex Post Facto* Clause had been violated).

89. *See* Lininger, *supra* note 78, at 175 ("Advocates seeking to enhance its effectiveness have focused on the Supreme Court's interpretation of the Lautenberg Amendment, and have claimed that the lack of clarity in the interpretation of the statute has hindered its application.").

90. *Castleman*, 134 S. Ct. at 1410.

91. *See* Wesley M. Oliver, *Domestic Violence, Gun Possession, And the Importance of Context*, 90 IND. L.J. SUPP. 36 (2015) ("The Supreme Court's opinion this term in *United States v. Castleman* concluded that even a misdemeanor involving only an 'offensive touching' was sufficient to trigger the prohibition. Viewed entirely through the lens of the statute, this result is particularly surprising. Just four years ago, the Supreme Court interpreted another provision of this same statute and concluded that something more than a mere unwanted touching was required to satisfy the requirement of 'physical force.'" (referencing Johnson v. United States, 559 U.S. 133, 139 (2010))).

92. *Castleman*, 134 S. Ct. at 1407.

93. *Id*. at 1420 (Scalia, J., concurring) ("[T]he Court seeks to evade *Johnson* and *Leocal* on the ground that 'domestic violence' encompasses a range of force broader than that which constitutes "violence" simpliciter.' That is to say, an act need not be violent to qualify as 'domestic violence.' That absurdity is not only at war with the English language, it is flatly inconsistent with definitions of 'domestic violence' from the period surrounding § 921(a)(33)(A)(ii)'s enactment." (internal citations omitted)).

94. *Id.*

95. *Id.*

Indeed, it has been argued that the Court failed to adhere to the basic canons of construction in *Castleman*.[96] One possible explanation is that although the Court's "conclusion strains the ordinary meaning of the language, [it] is quite consistent with a long tradition in criminal cases that favors a pro-government interpretation of a statute when the public welfare is at stake."[97] But even if such an argument is correct, the Lautenberg Amendment was only ratified in a narrow context, meant to limit the gun ban to violent offenders that would likely commit a subsequent act of domestic violence using a firearm.[98] There seems to be no strong argument derived from the text or legislative history that could support the Court's broad application of the term "use of physical force."[99]

Perhaps the most detrimental result of *Castleman* is that it extended the scope of the Lautenberg Amendment, while also leaving the door open for the term "recklessness" to trigger the federal gun ban.[100] The dicta in the *Castleman* decision did, however, offer some guidance by acknowledging that the majority of the federal appellate courts did not define the term "use . . . of physical force" as including reckless conduct.[101]

A. *The Recklessness Standard Prior to Voisine*

Prior to *Voisine*, the courts generally found that Congress had sufficiently narrowed the scope of § 922(g)(9) to only include offenders that posed a probable risk of committing future acts of domestic violence.[102] Thus, the courts found that § 922(g)(9) was narrowly tailored and presumptively lawful.[103] Yet, there is reason to believe that reckless misdemeanants were not intended to fall under this narrow scope.

First, as noted in Section II, the majority of the circuit courts and many lower courts held that acts of reckless assault do not constitute

96. *See* Oliver, *supra* note 91, at 39 ("If the work of the Court in *Castleman* is judged by its adherence to canons of statutory interpretation, the opinion may come up lacking." (internal citations omitted)).

97. *Id.* at 36.

98. *See* Lininger, *supra* note 78, at 180 ("The Republican negotiators proposed, and Senator Lautenberg accepted, a version of the use-of-force requirement that was more restrictive than the typical definition in the federal gun laws.").

99. *See* Oliver, *supra* note 91, at 39.

100. *See* Voisine v. United States, 136 S. Ct. 2272, 2274 (2016) ("In *Castleman*, this Court held that a knowing or intentional assault qualifies as such a crime, but left open whether the same was true of a reckless assault.").

101. *See* United States v. Castleman, 134 S. Ct. 1409, 1414, n.8 (2014).

102. United States v. Engstrum, 609 F. Supp. 2d 1227, 1235 (D. Utah 2009).

103. *Id.*

"crimes of violence."[104] Additionally, the term "recklessness" is not defined uniformly from state to state.[105] This lack of uniformity presents an issue because the Lautenberg Amendment is typically applied using state law, meaning that different forms of conduct can have different results depending on the jurisdiction in which they occur.

For example, in *United States v. Booker*, the First Circuit found that under Maine law, "an offense with a *mens rea* of recklessness may qualify as a 'misdemeanor crime of domestic violence' under § 922(g)(9)."[106] Yet, "*Booker* is out of step with the other circuit courts, all of which have held that recklessness is not sufficient to constitute a 'use of force'" under various other states' criminal provisions.[107] For example, the Ninth Circuit held that crimes involving the reckless use of force could not be considered "crimes of violence."[108] The Tenth Circuit agreed with this position, holding that "recklessness" should be considered accidental conduct, which would fail to satisfy the "use of physical force" requirement under various definitions of the phrase "crime of violence."[109] Additionally, the Eleventh Circuit found that "it is possible for a defendant to commit an offense 'intentionally,' 'knowingly,' or 'recklessly,' and though the first two mental states may satisfy the 'use of physical force' requirement, the third does not."[110]

Notably, with the exception of the First Circuit, the circuit courts have overwhelmingly found that reckless conduct was insufficient to be considered an act of violence. Considering the weight of the jurisprudence prior to the decision in *Voisine*, even the Maine District Court found that the law was not likely to include reckless acts of violence.[111] It is therefore

104. United States v. Voisine, 778 F.3d 176, 216 (1st Cir. 2015) (Torruella, J., dissenting).

105. *See, e.g.*, United States v. Booker, 555 F. Supp. 2d 218, 225 (D. Me. 2008) ("In addition, considering the state statute, Maine's definition of 'recklessly' is identical to some, but not all, definitions of 'recklessly.'" (internal citations omitted)).

106. United States v. Booker, 644 F.3d 12, 21 (1st Cir. 2011).

107. United States v. Sales, No. 2:13-cr-137-NT, 2014 U.S. Dist. LEXIS 94187, at *9 (D. Me. July 11, 2014).

108. *See* United States v. Nobriga, 474 F.3d 561, 564 (9th Cir. 2006) (internal citations omitted).

109. *See* United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008).

110. United States v. Garcia, 606 F.3d 1317, 1336 (11th Cir. 2010).

111. *Sales*, 2014 U.S. Dist. LEXIS 94187, at *14-15 ("The Government contends that the First Circuit has not overturned *Booker* and that this Court cannot reach a conclusion contrary to *Booker's* holding that reckless conduct is a 'use of force' for purposes of § 922(g)(9). As the Government points out, '[u]ntil a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has been cast into disrepute by supervening authority.' But as both Judges Woodcock and Singal have determined, the lower courts 'cannot ignore the guidance of the Supreme Court and the First Circuit in *Castleman*, *Armstrong* and *Carter*.' While '[r]eading Supreme Court tea leaves is chancy,' it is hard to miss the message here. Upon closer scrutiny, the First Circuit may decide that recklessness is sufficient in the § 922(g)(9) context, but given the writing

somewhat puzzling that both the First Circuit and Supreme Court found differently in *Voisine*. One reason for this may have been that most of the circuit court opinions referenced a different statute, 18 U.S.C. § 16, which defines "crimes of violence," and contains language similar to the "use of force" requirement found in § 922(g)(9).[112] The First Circuit and Supreme Court stated that in their view, "§ 922(g)(9)'s unique context suggested that it should be interpreted more broadly than other provisions, including § 16."[113] However, such an interpretation directly contradicts the legislative history of § 922(g)(9), in which House Representatives argued that the term "crime of violence" was overly broad and, consequently, wanted to narrow the scope of its meaning.[114]

To get over this hurdle, the First Circuit and Supreme Court focused on different language, implying that because "domestic violence," as used in § 922(g)(9), is a "term of art," it should be construed more broadly than § 16.[115] It is true that the most significant difference between the provisions is the inclusion of the term "domestic relation" in § 922(g)(9). Yet the courts do not explain why it would be a crime of violence to recklessly cause injury to a domestic relation, but that same reckless act directed toward a stranger under § 16 would not be considered violent. Rather, the court offers only that a "'squeeze of the arm [that] causes a bruise' is 'hard to describe as . . . "violence"' within the meaning of § 16, but 'easy to describe as "domestic violence"' within the meaning of § 922(g)(9)."[116]

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on the wall in *Carter*, it would be presumptuous for this Court to make that determination." (internal citations omitted)).

112. *See* 18 U.S.C. § 16 (2017) ("The term 'crime of violence' means—(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.").

113. United States v. Voisine, 778 F.3d 176, 181 (1st Cir. 2015) ("Considering context, section 16(a) is not analogous to the section which concerns us, § 922(g)(9). To begin, § 16(a) prohibits 'use of physical force against the person or property of another,' language crucial to the Supreme Court's holding in *Leocal* but absent from the definition at issue here. *Castleman* itself distinguished the term 'use of force' in § 16(a), a provision for undifferentiated violent crimes, from the term 'use of physical force' in § 922(g)(9)'s domestic violence provision." (internal citations omitted)).

114. *See* 142 Cong. Rec. S11872 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) ("Some argued that the term 'crime of violence' was too broad . . . .").

115. *Voisine*, 778 F.3d at 181 ("Domestic violence is a 'term of art' that 'encompasses a range of force broader than that which constitutes "violence" simpliciter,' including 'acts that might not constitute "violence" in a nondomestic context.' A 'crime of violence,' by contrast, 'suggests a category of violent, active crimes.'" (internal citations omitted)).

116. *Id.* (internal citations omitted).

As Justice Scalia stated in his concurrence in *Castleman*, "[t]hat absurdity is not only at war with the English language, it is flatly inconsistent with definitions of 'domestic violence' from the period surrounding § 921(a)(33)(A)(ii)'s enactment."[117] He then gave further strength to the argument that it was inadequate to distinguish "violence" from "domestic violence" in such a rudimentary way by providing that:

> The Court's inventive, nonviolent definition fares no better when judged against other accepted sources of meaning. Current dictionaries give "domestic violence" the same meaning as above: ordinary violence that occurs in a domestic context. The same goes for definitions of "domestic violence" found in other federal statutes. Indeed, Congress defined "crime of domestic violence" as a "crime of violence" in another section of the same bill that enacted § 921(a)(33)(A)(ii).[118]

Justice Scalia continued on to state that the Court ignored these facts, and instead based its decision on amicus briefs filed by private interest groups.[119] The problem with that, as he pointed out, is that "when they (and the Court) impose their all-embracing definition on the rest of us, they not only distort the law, they impoverish the language."[120]

Significantly, Justice Scalia was not alone in this argument. In *Voisine*, the First Circuit's Judge Torruella also argued that he "agree[d] with [the court's] sister circuits that the 'use . . . of physical force' for a 'crime of violence' requires the intentional, and not merely reckless, employment of physical force."[121] Judge Torruella's comment not only implies that he thought the First Circuit erred in its conclusion, but that the other circuit courts' holdings regarding the recklessness standard, though citing § 16, should apply to reckless acts of domestic violence as well.

In *Voisine*, Justice Thomas and Justice Sotomayor used a similar rationale, providing that "the term [use of physical force] does not include nonviolent, reckless acts that cause physical injury or an offensive touching."[122] Therefore, they argued that the majority's definition was overly broad.[123] As such, there is a strong argument that the Court needlessly deviated from the overwhelming precedent in holding that reckless conduct should be considered a "crime of violence."

117. United States v. Castleman, 134 S. Ct. 1409, 1420 (2014) (Scalia, J., concurring).
118. *Id*. (internal citations omitted).
119. *See id.* at 1420-21.
120. *Id.* at 1421.
121. *Voisine*, 778 F.3d at 216 (Torruella, J., dissenting).
122. Voisine v. United States, 136 S. Ct. 2287 (2016) (Thomas, J., dissenting).
123. *See id.* (Thomas., J., dissenting).

B. The Court's Focus on the Lautenberg Amendment's Underlying Policy

As mentioned above, despite the overwhelming weight of jurisprudence excluding reckless behavior from being considered a "crime of violence," the Supreme Court agreed with the First Circuit and found that a reckless domestic assault qualifies as a misdemeanor crime of domestic violence under § 922(g)(9).[124] The Court claimed to have arrived at this decision by dissecting the statutory text and taking into account the legislative history of the Amendment.[125] However, "[t]his [was] obviously not the correct reading of § 922(g)(9). The 'use of physical force' does not include crimes involving purely reckless conduct."[126]

The majority only provided minimal support for its position and ignored the equal, if not more substantial, interpretations cutting the other way. First, though not necessarily binding on the Court, "many federal jurisdictions [did] not define 'use . . . of physical force' as including reckless conduct."[127] Additionally, the Court's conclusion blurs the line between intentional and reckless conduct; a person who acts recklessly does not always intend to use physical force against another.[128]

The majority also failed to distinguish between conduct intended to cause harm and conduct not intend to cause harm. There is, in fact, a "fundamental difference between conduct that is intentional and reckless wrongdoing."[129] In short, an intentional wrong is meant to cause harm and a reckless wrong is not.[130] Perhaps most importantly, if Congress had wanted the Lautenberg Amendment to include those convicted of reckless acts of domestic violence, they could have easily incorporated that language into the text of § 922(g)(9). However, Congress initially elected not to do so and has never amended the language.[131]

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124. *Id.* at 2278.

125. *See id.* at 2275.

126. *Id.* at 2292 (Thomas, J., dissenting).

127. Reply Brief for Petitioner at 25, Armstrong v. United States, 134 S. Ct. 1759 (2014) (No. 14-10154), 2016 U.S. S. Ct. Briefs LEXIS 747 (2016) (No. 14-10154).

128. *See Voisine*, 136 S. Ct. at 2287 (Thomas, J., dissenting) ("The majority blurs the distinction between recklessness and intentional wrongdoing by overlooking the difference between the *mens rea* for force and the *mens rea* for causing harm with that force.").

129. *Id*. at 2288 (Thomas, J., dissenting).

130. *See id.* (Thomas, J., dissenting) ("An intentional wrong is designed to inflict harm. A reckless wrong is not: 'While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it.'").

131. *See id.* at 2290 (Thomas, J., dissenting) ("If Congress wanted to sweep in all reckless conduct, it could have written § 921(a)(33)(A)(ii) in different language.").

Another plausible reason for the Court's interpretation was that in wake of the *Castleman* decision, the Court simply gave the language a broad reach in order to meet the underlying public welfare goals of the Amendment.[132] In fact, "[c]ourts often face ambiguous language . . . and conclude that strong public policy, designed to protect the welfare of citizens, permits a broad view of a criminal statute, the rule of lenity notwithstanding. Often courts will not even acknowledge the tension between the statutory language and the strong public policy."[133] Yet in *Voisine*, even First Circuit Judge Torruella, who himself is a strong supporter of the Lautenberg Amendment, "urged his panel colleagues to lay aside their personal views on 'domestic violence' and 'gun violence,' and to do their duty as judges: to say what the law actually is, not what they might wish it to be."[134]

The First Circuit and the Supreme Court went against the urgings of Judge Torruella, and while it is true that occasionally the law "punishes relatively minor acts that themselves are not harmful but may ripen into something dangerous,"[135] this ruling goes against the overall intention of the Lautenberg Amendment. Indeed, the policy of the Amendment did not extend to those convicted of potentially minor, reckless acts, as there is nothing to suggest that they would be more likely to commit future acts of violence using firearms.[136] Additionally, the enforcement of a law relating to minor conduct should never result in the loss of a fundamental constitutional right; such losses are reserved for conduct which rises to a much higher level of culpability.

V. SECOND AMENDMENT INFRINGEMENT

It is not surprising that since the Supreme Court's decisions in *Heller* and *McDonald*, the constitutionality of § 922(g)(9)'s Second Amendment

132. *See* Oliver, *supra* note 91, at 38-39.

133. Oliver, *supra* note 91, at 39.

134. Brief Amicus Curiae of Gun Owners Foundation, Gun Owners of America, Inc., Gun Owners of California, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioners at 2, Voisine v. United States, 136 S. Ct. 2272 (2016).

135. Oliver, *supra* note 91, at 38 (internal citations omitted).

136. *See* Reply Brief for Petitioner at 22, Armstrong v. United States, 134 S. Ct. 1759 (2014) (No. 14-10154), 2016 U.S. S. Ct. Briefs LEXIS 747 (2016) (No. 14-10154) ("*Voisine* . . . was misplaced both as a policy matter and legally. The government offers no response to this criticism . . . . Instead, it attempts a misdirection, noting that this Court 'considered and rejected the view "that Congress meant to narrow the scope of the statute to convictions based on especially severe conduct."' That argument misses the mark, because an interpretation of § 922(g)(9) that includes all reckless misdemeanors will include many such misdemeanors that do not 'subject one intimate partner to the other's control' in any meaningful way." (internal citations omitted)).

restrictions has been challenged.[137] Complicating this issue is the fact that the courts have lacked uniformity regarding the level of scrutiny used for this constitutional analysis.[138] For example, while discussing the proper level of constitutional scrutiny, the Sixth Circuit initially stated that "[a]lthough it is true that strict scrutiny is not always implicated when a fundamental right is at stake, the Supreme Court has suggested that there is a presumption in favor of strict scrutiny when a fundamental right is involved."[139] However, the court subsequently stated that when it came to § 922(g)(9), the circuit courts that heard this issue had applied intermediate scrutiny, and therefore, it opted to follow suit,[140] despite the fact that a fundamental right was implicated.

In general, the courts have tried to limit the Lautenberg Amendment's constitutional implications altogether by finding that those convicted of domestic violence misdemeanors are not entitled to the Second Amendment protections discussed in *Heller*.[141] The courts have stated that domestic violence cases "fall outside the specific exceptions in

137. *E.g.*, United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013); United States v. Booker, 644 F.3d 12 (1st Cir. 2011); United States v. Staten, 666 F.3d 154 (4th Cir. 2011); United States v. Chester, 628 F.3d 673 (4th Cir. 2010); United States v. Skoien, 614 F.3d 638 (7th Cir. 2010); and United States v. White, 593 F.3d 1199 (11th Cir. 2010); *see also* Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 692 (6th Cir. 2016) ("In the wake of *Heller*, the federal courts of appeals have heard numerous constitutional challenges to the various prohibitions enumerated in § 922(g).").

138. *See* Fisher v. Kealoha, 49 F. Supp. 3d 727, 742-43 (D. Haw. 2014) ("[T]he *Chovan* court concluded that the Lautenberg Amendment 'does not implicate the core Second Amendment right, but it does place a substantial burden on the right.' As such, the Court determined that intermediate rather than strict scrutiny was the appropriate standard to apply when addressing § 922(g)(9)'s constitutionality. *Chovan* defined the intermediate scrutiny standard as requiring that '(1) the government's stated objective be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.' Applying this standard, the court reasoned that § 922(g)(9) served an important government interest in preventing domestic gun violence." (internal citations omitted)); Lockhart, *supra* note 86, at 9 (discussing Fraternal Order of Police v. U.S., 173 F.3d 898 (D.C. Cir. 1999)). Lockhart explained that though the Court decided *Fraternal Order of Police* before *Heller* and *McDonald*, the decision was important because the court claimed that "18 U.S.C.A. § 922(g)(9) did not infringe a fundamental right, so the classification of domestic violence misdemeanants versus felons had to be upheld if there was any reasonably conceivable state of facts that could provide a rational basis for the classification. This view has been rendered questionable by recent Second Amendment analysis . . . suggesting that the statute is subject to a higher level of scrutiny." *Id*.; *see also* United States v. Engstrum, 609 F. Supp. 2d 1227, 1228 (D. Utah 2009) (applying strict scrutiny analysis, requiring the government to show that § 922(g)(9) was narrowly tailored to serve a compelling government interest).

139. Tyler v. Hillsdale Cty. Sheriff's Dep't, 775 F.3d 308, 327 (6th Cir. 2014) (holding that strict scrutiny applies to "fundamental" liberty interests (internal citations omitted)), *rev'd* 837 F.3d at 691-92 (6th Cir. 2016).

140. *See Tyler*, 837 F.3d at 691-92 (6th Cir. 2016) (internal citations omitted).

141. *See Chester*, 628 F.3d at 679 ("We see no reason to exclude § 922(g)(9) from the list of long-standing prohibitions on which Heller does not cast doubt.").

Heller that warrant independent constitutional scrutiny,"[142] and though "[l]aws that restrict the right to bear arms are subject to meaningful review, unless they severely burden the core Second Amendment right of armed defense, strict scrutiny is unwarranted."[143]

Yet, because the Amendment imposes a complete restriction of a fundamental right, perhaps a more logical approach would be to first consider *Heller*'s emphasis on core Second Amendment activity, and then choose a scrutiny level that is "informed by (1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'"[144] If courts were to adopt this approach and adhere to the principles upon which they are supposedly bound, such an analysis would bring about the proper result. However, as many courts tend to focus more heavily on the underlying policy than on the law's burdening of the fundamental right, they would likely still refrain from using strict scrutiny.[145] The underlying theory used by these courts is that gun violence against domestic abuse victims is a matter of national concern and, ultimately, Congress has the authority to legislate in this area, even if doing so limits the exercise of a constitutional right.[146]

Other courts, particularly within the First Circuit's jurisdiction, seemed to brush off claims of Second Amendment infringement under the Lautenberg Amendment by relying solely on precedent. Many of the decisions that dealt with Second Amendment claims, rather than providing an in-depth analysis of the constitutional implications, simply stated that the issue had previously been decided by *Booker*.[147]

For example, in *United States v. Carter*, the defendant, Wayne Carter, was prosecuted for spitting in his girlfriend's face and shoving her on her shoulder.[148] The defendant's girlfriend told officers that she "was not hurt, did not want Carter arrested, and did not want to press charges; she only wanted him removed from the house."[149] Yet, the prosecutor

142. United States v. Chester, 367 F. App'x 392, 397 (4th Cir. 2010), *substituted opinion*, 628 F.3d 673, 2010 U.S. App. LEXIS 26508, *aff'd*, 514 F. App'x 393 (4th Cir. 2013).

143. *Id.* at 398 (internal citations omitted).

144. *Tyler*, 837 F.3d at 690 (6th Cir. 2016) (internal citations omitted).

145. *See* Oliver, *supra* note 91, at 39.

146. *See* United States v. Pettengill, 682 F. Supp. 2d 49, 57 (D. Me. 2010) (internal citations omitted).

147. *See* United States v. Armstrong, 706 F.3d 1 (1st Cir. 2013); United States v. Carter, 752 F.3d 8 (1st Cir. 2014), *rev'd*, No. 2:10-cr-00155-GZS, 2014 U.S. Dist. LEXIS 92312 (D. Me. July 8, 2014), and *rev'd*, 860 F.3d 39 (1st Cir. 2017); United States v. Voisine, 778 F.3d 176 (1st Cir. 2015) (holding that § 922(g)(9) was constitutional (internal citations omitted)).

148. *See Carter*, 752 F.3d at 10, *rev'd*, No. 2:10-cr-00155-GZS, 2014 U.S. Dist. LEXIS 92312, at *19 (D. Me. July 8, 2014), and *rev'd*, 860 F.3d 39 (1st Cir. 2017).

149. *Id.* at 10-11.

decided to file charges against Carter under the general purpose assault statute, and he was ultimately found guilty.[150] After subsequently being charged with possession of a firearm under § 922(g)(9), Carter argued that the Amendment "deprives a significant population of non-violent offenders from exercising a core constitutional right protected by the Second Amendment."[151]

Carter further maintained that a restriction depriving competent non-felons of their Second Amendment rights must be narrowly tailored to a compelling governmental interest. He asserted that "[b]ecause there is no reliable information that misdemeanants are likely to misuse firearms at a rate any greater than those not convicted of such petty crimes, the law fails constitutional muster."[152] Though Carter made several compelling arguments, the First Circuit provided little analysis on the issue, failed to address the defendant's individual arguments, and merely stated that the issue was foreclosed upon by *Booker*.[153]

Even though § 922(g)(9) was found to be constitutional by the First Circuit, other courts still saw problems with the Lautenberg Amendment's impact on the Second Amendment. For example, in *United States v. Engstrum*, after the defendant questioned the constitutionality of the Lautenberg Amendment, and even though the district court found that § 922(g)(9) protected a societal interest,[154] the court acknowledged that:

> Not every individual convicted of a domestic violence misdemeanor fits within the classification described in the legislative history, in that not all domestic violence misdemeanants have shown they cannot control themselves or are prone to fits of violent rage. However, § 922(g)(9) was intended to extend the prohibition on possession to domestic violence

150. *See id.* at 11.

151. *Id.* at 12.

152. *Id.*

153. *See id.* at 13. After the Supreme Court's decision in *Castleman*, however, the *Carter* decision was remanded for further consideration and the court granted Carter's motion to dismiss. United States v. Carter, No. 2:10-cr-00155-GZS, 2014 U.S. Dist. LEXIS 92312, at *19 (D. Me. July 8, 2014), *rev'd*, 860 F.3d 39 (1st Cir. 2017). The case was subsequently appealed, and in June 2017, the First Circuit, ironically, turned to the Supreme Court's decision in *Voisine* in reaching its holding. United States v. Carter, 860 F.3d 39, 42-43 (1st Cir. 2017). The court stated that *Castleman*'s prediction that the Lautenberg Amendment would not extend to reckless behavior proved false. *Carter*, 860 F.3d 39, 42. The court concluded that, "notwithstanding *Castleman*, the reckless form of the Maine assault statute is a misdemeanor crime of domestic violence . . . [and] [t]he Supreme Court affirmed. In so doing, it plainly and finally resolved the uncertain issue of law that has sent this case around the barn and back." *Carter*, 860 F.3d at 42-43. The First Circuit then reversed the district court's decision and reinstated Carter's indictment. *Id.* at 43.

154. *See* United States v. Engstrum, 609 F. Supp. 2d 1227, 1233 (D. Utah 2009).

> misdemeanants in order to assure that those who do pose that sort of risk to intimate partners or children would be protected.[155]

The court further stated that it found it troubling that the Lautenberg Amendment could be used to deprive otherwise law-abiding citizens, who pose no prospective risk of violence, of their Second Amendment rights as a result of a single past transgression.[156]

It should be noted that these cases were decided before either of the Supreme Court's decisions in *Castleman* and *Voisine*. The broadening of the term "use of physical force" to include misdemeanor reckless acts alone should have been enough for this argument to be revisited by the Court. Justice Thomas took advantage of this opportunity during oral argument in *Voisine* and broke his ten-year silence to ask the government whether any laws other than the Lautenberg Amendment suspend constitutional rights for misdemeanor convictions.[157] Notably, but not surprisingly, the government could not point to any such laws.[158] Justice Thomas' question implies that even though the rest of the Court was looking at the statutory interpretation issue, the underlying constitutional implications were worth consideration. Perhaps merely stating that they were foreclosed upon in *Booker* was not enough.

His question highlighted his concerns about Second Amendment protections and the fact that, other than the Lautenberg Amendment, there is no other federal statute that places such a significant limitation upon a constitutionally protected right.[159] In his dissenting opinion, Justice Thomas argued that, "[e]ven assuming any doubt remains over the reading of 'use of physical force,' the majority errs by reading the statute in a way that creates serious constitutional problems."[160] This is because, per the doctrine of constitutional avoidance, the Supreme Court is expected to choose the constitutional reading of a statute when faced with multiple interpretations.[161] Yet the majority expanded an already broad rule to also

155. *Id*. at 1233-34.

156. *See id*. at 1235.

157. *See* Adam Liptak, *Clarence Thomas Breaks 10 Years of Silence at Supreme Court*, NEW YORK TIMES (Feb. 29, 2016), https://www.nytimes.com/2016/03/01/us/politics/supreme-court-clarence-thomas.html?_r=0 [http://perma.cc/8Q2C-XT22].

158. *See id.*

159. *See id*. ("In today's case, [Justice Thomas] chose to ask a question he obviously thought his colleagues hadn't paid enough attention to: whether the constitutional protections in the Second Amendment were being taken seriously enough.").

160. Voisine v. United States, 136 S. Ct. 2290 (2016) (Thomas, J., dissenting).

161. *See id*. (internal citations omitted).

include any reckless physical injury or nonconsensual touching, which thrust the Amendment into "constitutionally problematic territory."[162]

It can also be argued that although the Second Amendment enumerates protections for individuals to keep and bear arms, states sometimes impose narrow limitations on that right.[163] These limitations, however, do not generally deny individuals convicted of minor crimes the right to bear arms.[164] To be considered constitutional, any law that denies a person the right to keep and bear arms must be aimed at those individuals who are beyond the scope of Second Amendment protection.[165] There is nothing in the Second Amendment to suggest that individuals convicted of reckless misdemeanor acts of domestic violence are beyond that scope.[166] Yet, the Lautenberg Amendment has been extended so broadly as to include "a lifetime ban on gun ownership for a single intentional nonconsensual touching of a family member."[167]

Further, as recently as 2010, the Supreme Court held that the Second Amendment right to keep and bear arms is a fundamental right.[168] Though some states have, in certain instances, imposed certain limitations on gun possession, such as by forbidding individuals from carrying concealed weapons, these restrictions "neither prohibit nor broadly frustrate any individual from generally exercising his right to bear arms."[169] Yet in *Voisine*, by "construing the statute . . . so expansively so that causing a single minor reckless injury or offensive touching can lead someone to lose his right to bear arms forever, the Court continues to 'relegat[e] the Second Amendment to a second class right.'"[170]

There is no justifiable reason to treat the right to bear arms differently than any of the other constitutional amendments.[171] For example, none of the First Amendment rights, such as freedom of religion, speech, press, assembly, and petition, are lost as a result of a person being convicted of

162. *See id.*
163. *See id.*
164. *See id*. at 2291 (Thomas, J., dissenting).
165. *See id*.
166. *See id*.
167. *Id.*
168. McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).
169. Voisine, 136 S. Ct. at 2291 (Thomas, J., dissenting).
170. *Id*. at 2292 (internal citations omitted).
171. *See* Brief Amicus Curiae of Gun Owners Foundation, Gun Owners of America, Inc., Gun Owners of California, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioners at 4, Voisine v. United States, 136 S. Ct. 2272 (2016) (No. 14-10154).

a minor crime.[172] As both are equal privileges of United States citizenship, the same should also be true for the Second Amendment.[173]

It could be argued that the Court simply needs to adequately hear and consider the Second Amendment issue, as it relates to the Lautenberg Amendment, in order to properly address this problem. However, it seems unlikely that the Court will do so, given the policy implications and its concern regarding the potential nullification of laws in jurisdictions with assault statutes extending to recklessness. Therefore, the ambiguous language will likely need to be addressed and clarified by Congress.[174] Such action is necessary, as subsequent cases have not only applied the holding in *Voisine*, but have also extended the newly defined recklessness standard to other provisions, despite the Supreme Court's interpretation being specific to the Lautenberg Amendment's language.[175]

If Congress narrows the scope of the Amendment by clarifying the pertinent terminology, the Court will then be able to apply it to the correct group of dangerous abusers—the true targets of the legislation. After all, "it is [not] the function of courts to assign criminal responsibility. That is the function of Congress. In carrying out the assignment of responsibility that Congress has decided upon, courts should be faithful to the language that it has chosen to express its will."[176] Once the language is clarified and the Court can apply the Lautenberg Amendment correctly, it will then be up to the executive branch to maintain the law's effectiveness through consistent and strict enforcement.

VI. CONCLUSION

"Given that 40% of U.S. households have guns, it is likely that hundreds of thousands of convicted domestic violence misdemeanants

172. *See id.*

173. *See id.*

174. *See* Noah Feldman, *What Being Reckless Means to Todays Courts*, BLOOMBERG VIEW (Feb. 19, 2016), https://www.bloomberg.com/view/articles/2016-02-29/what-being-reckless-means-to-today-s-courts [http://perma.cc/27JD-ZERJ] ("But the holding may eventually have broader consequences for the interpretation of other federal laws. So it's worth pausing to ask yourself: Do you think the state should be able to criminalize recklessness? If your answer is yes, then you can rest easy. If it's no, you might want to think about writing your representatives in Congress. The courts probably aren't going to do the job for you.").

175. *See, e.g.*, United States v. Carter, 860 F.3d 39 (1st Cir. 2017) (reversing the dismissal of the defendant's indictment for possession of a firearm in light of the *Voisine* decision that reckless assault qualifies as a misdemeanor crime of domestic violence); Kane v. United States, No. 1:16-cv-00146-MR, 2016 U.S. Dist. LEXIS 176684, at *11 (W.D.N.C. Dec. 21, 2016) (holding that the *Voisine* standard applies to the defendant's conviction under N.J. STAT. ANN. § 2C:12-1 (West 2015) for recklessly causing bodily injury to another with a deadly weapon).

176. United States v. Griffith, 455 F.3d 1339, 1344 (11th Cir. 2006).

possess firearms."[177] Not only is this statistic evidence that the Lautenberg Amendment has been largely ineffective, it may also be indicative of the Supreme Court's underlying motive to extend the Amendment's reach to reckless behavior. However, the reality is that many individuals convicted of domestic assault, including those who commit knowing and intentional assaults against domestic relations, will likely continue to possess guns because the convictions are not regularly reported to the gun-background-check system. In fact, "[a]s of 2013, Voisine's home state of Maine had not submitted a single domestic-violence record to the federal gun-background-check system. Neither had 12 other states."[178] Conceivably, then, part of the problem is that the legislation continues to lack uniform, effective enforcement.

Whatever the case may be, the shortcomings of the Lautenberg Amendment are apparent, and arbitrarily extending an ambiguous law to include reckless misdemeanants is not the proper way to mitigate the problem. Such an extension of the law does little, if anything, to actually help victims of domestic violence. The skewed result is that dangerous abusers often retain access to firearms, while at the same time, reckless and often nonviolent misdemeanants are prevented from possessing firearms. Such a result clearly evidences that the language of § 922(g)(9) needs amended and the law needs to be actively enforced.

In addition, the Supreme Court has established that the right to keep and bear arms is a fundamental right,[179] and has also provided that, "[w]here certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[180] It is, however, difficult to determine what compelling state interest is served by subjecting reckless misdemeanants to a lifelong firearms ban, particularly for minor incidents that may be accidental or punishable by a fine. Rather, it appears that the Court merely created an over-inclusive policy that extends beyond the clear purpose of the Lautenberg Amendment.

177. Lininger, *supra* note 78, at 176.

178. Olivia Li, *The Supreme Court Case That Could Let 'Lesser' Domestic Abusers Own Guns*, THE TRACE (Feb. 22, 2016), https://www.thetrace.org/2016/02/supreme-court-domestic-abusers-gun-ownership/ [http://perma.cc/4ZN6-4FSQ].

179. McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

180. *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (internal citations omitted); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940); Eisenstadt v. Baird, 405 U.S. 438, 460, 463-64 (1972) (White, J., concurring)).

There is certainly a compelling reason to keep violent abusers, who are not law-abiding citizens, and who knowingly and intentionally hurt their victims, from owning firearms. However, reckless misdemeanants simply do not fall into the same category as those dangerous individuals. As such, they should remain among the "people" protected by the Second Amendment,[181] and the language of § 922(g)(9) should be corrected in order to prevent this entire class of citizens from being denied their fundamental right to keep and bear arms.

181. *See* Brief Amicus Curiae of Gun Owners Foundation, Gun Owners of America, Inc., Gun Owners of California, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioners at 17, Voisine v. United States, 136 S. Ct. 2272 (2016) (No. 14-10154) ("Unless the government can affirmatively demonstrate that, because of their misdemeanor convictions, petitioners may be deprived of a right that would otherwise belong to them as citizens of this country, petitioners remain among the 'people' protected by the Second Amendment.").