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Emily J. Sack

Roger Williams University School of Law

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United States v. Castleman: **The Meaning of Domestic Violence**

Emily J. Sack*

In 2001, James Alvin Castleman pled guilty to having “intentionally or knowingly cause[d] bodily injury” to the mother of his child, in violation of a Tennessee state criminal law.¹ Seven years later, federal law enforcement authorities learned that Castleman was selling firearms on the black market.² Castleman was indicted on two counts of violating 18 U.S.C. § 922(g)(9), a federal law prohibiting possession of a firearm by anyone previously convicted of a “misdemeanor crime of domestic violence.”³ Castleman moved to dismiss the indictment on the ground that his conviction in Tennessee did not qualify as a “misdemeanor crime of domestic violence,” which required the “use or attempted use of physical force.”⁴ The federal district court granted the motion to dismiss, and the U.S. Court of Appeals for the Sixth Circuit affirmed.⁵ The U.S. Supreme Court granted

* Professor of Law, Roger Williams University School of Law.

1. *United States v. Castleman*, 134 S. Ct. 1405, 1409 (2014) (alteration in original) (quoting TENN. CODE ANN. § 39-13-111(b) (Supp. 2002)) (internal quotation marks omitted).

2. *Id.*

3. *Id.*; 18 U.S.C. § 922(g)(9) (2012). Section 922(g)(9) states:

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; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. *Castleman*, 134 S. Ct. at 1409 (quoting 18 U.S.C. § 921(a)(33)(A)(ii)) (internal quotation marks omitted).

5. *Id.*; *see also* *United States v. Castleman*, 695 F.3d 582 (6th Cir.

certiorari to resolve a split in the circuits on the degree of force necessary for an offense to qualify as a “misdemeanor crime of domestic violence”;⁶ in 2014, it reversed the Sixth Circuit’s judgment and gave a broad reading to the meaning of force in the context of domestic violence.⁷

United States v. Castleman marks the latest step in a long series of challenges to the federal domestic violence firearms prohibition and the second time in five years that this provision has reached the Supreme Court.⁸ Though the case concerned what might appear to be a somewhat technical question of statutory interpretation—the meaning of “the use of physical force” in the provision defining a “misdemeanor crime of domestic violence”—more profoundly, it involved a struggle over the meaning and dynamics of domestic violence. *Castleman*’s significance lies in the nuanced understanding of domestic violence expressed by the majority, which could have impact well beyond its reading of the firearms prohibition at issue in the case.

To provide context for the debate in *Castleman*, first, I briefly explore the motivation for the domestic violence gun prohibition and the history of legal challenges to the provision since its enactment. Next, I examine both *Castleman*’s majority opinion by Justice Sotomayor and the concurring opinion authored by Justice Scalia, focusing on their competing understandings of domestic violence. I then raise yet one more challenge to the firearms prohibition that has been percolating and may be strengthened by the *Castleman* holding—a claim that the statute is unconstitutional on Second Amendment grounds. However, whatever further attacks on the firearms ban may lie ahead, I

2012); *United States v. Castleman*, CR. No. 08-20240-MI, 2010 WL 711179 (W.D. Tenn. Feb. 22, 2010).

6. *United States v. Castleman*, 134 S. Ct. 49 (2013) (mem.) (granting certiorari). Compare *United States v. White*, 606 F.3d 144, 156 (4th Cir. 2010) (applying a more narrow definition of physical force to include only force “capable of causing physical pain or injury to the victim”), and *Castleman*, 695 F.3d at 587 (similarly), and *United States v. Hays*, 526 F.3d 674, 679 (10th Cir. 2008) (similarly), and *United States v. Belless*, 338 F.3d 1063, 1068 (9th Cir. 2003) (similarly), with *United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006) (utilizing a broader definition of physical force), and *United States v. Nason*, 269 F.3d 10, 18 (1st Cir. 2001) (similarly), and *United States v. Smith*, 171 F.3d 617, 621 (8th Cir. 1999) (similarly).

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

8. See *United States v. Hayes*, 555 U.S. 415, 418 (2009).

conclude that the Court's conception of domestic violence will have lasting influence on a range of legal issues.

I. GUNS, DOMESTIC VIOLENCE, AND 18 U.S.C. §922(g)(9)

As the Supreme Court put it in *United States v. Hayes*, “[f]irearms and domestic strife are a potentially deadly combination.”⁹ There is a strong link between access to firearms and domestic violence fatalities. As Senator Lautenberg, the chief sponsor of section 922(g)(9), stated, “[d]omestic violence, no matter how it is labeled, leads to more domestic violence, and guns in the hands of convicted wife beaters leads to death.”¹⁰ As one study noted, there is a high correlation between access to guns and intimate partner homicide; “[w]hen a gun was in the house, an abused woman was 6 times more likely than other abused women to be killed.”¹¹ Other studies have found that anywhere from over half to more than two-thirds of all victims of intimate partner homicides were killed by guns.¹² As Senator Wellstone, another supporter of section 922(g)(9), put it, “the only difference between a battered woman and a dead woman is the presence of a gun.”¹³

In 1996, Congress amended the federal Gun Control Act of 1968 to prohibit firearm possession by anyone convicted of a “misdemeanor crime of domestic violence.”¹⁴ Though the Act had long banned convicted felons from possessing firearms, the extension to domestic violence misdemeanors was necessary because domestic violence offenders were routinely undercharged or convicted of less serious offenses than their behavior warranted. As Senator Lautenberg explained, the felony ban was not keeping firearms out of the hands of domestic abusers, since “many people who engage in serious spousal or child abuse

9. *Id.* at 427.

10. 142 CONG. REC. 22986 (1996) (statement of Sen. Frank Lautenberg).

11. Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NAT'L INST. JUST. J., Nov. 2003, at 14, 16; *accord Castleman*, 134 S. Ct. at 1408–09.

12. Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CENTER FOR FAM. CHILD. & CTS. 3, 3 (2005).

13. 142 CONG. REC. 22986 (statement of Sen. Paul Wellstone); *accord Castleman*, 134 S. Ct. at 1409.

14. 18 U.S.C. § 922(g)(9) (2012). Congress previously had passed a prohibition on gun possession for anyone subject to a qualifying protection order. 18 U.S.C. § 922(g)(8).

ultimately are not charged with or convicted of felonies.”¹⁵ Therefore, extending the ban to persons convicted of misdemeanor domestic violence offenses would “close this dangerous loophole.”¹⁶

The gun prohibition applies to a person convicted of a misdemeanor crime of domestic violence at any time, even if the conviction was prior to the enactment of section 922(g)(9).¹⁷ The ban is permanent, and unlike other gun control legislation, it contains no exemption for police, military personnel, or government officials.¹⁸ For all of these reasons, as well as general hostility to gun prohibitions from some quarters, section 922(g)(9) has been subject to extensive criticism and multiple legal challenges.¹⁹

II. LEGAL CHALLENGES TO THE DOMESTIC VIOLENCE FIREARMS PROHIBITION

A. *Claims in the Lower Courts*

Challenges to section 922(g)(9) began soon after its implementation and were based on a number of different legal grounds, many of them constitutional. However, despite the multitude of legal attacks, these challenges have consistently been unsuccessful.

One common early claim centered on the Commerce Clause. Defendants attempted to rely on *United States v. Lopez*, in which the Supreme Court had invalidated a federal firearms possession statute on Commerce Clause grounds.²⁰ Particularly after the Supreme Court struck down another federal domestic violence provision on these grounds in *United States v. Morrison*,²¹

15. 142 CONG. REC. 22985 (statement of Sen. Frank Lautenberg).

16. 142 CONG. REC. 22986 (statement of Sen. Frank Lautenberg).

17. See, e.g., *United States v. Pfeifer*, 371 F.3d 430, 436–37 (8th Cir. 2004); *United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *United States v. Mitchell*, 209 F.3d 319, 322–23 (4th Cir. 2000).

18. See ELIZABETH M. SCHNEIDER, CHERYL HANNA, EMILY J. SACK & JUDITH G. GREENBERG, *DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE* 404 (3d ed. 2013). See also 18 U.S.C. § 925(a)(1) (2012).

19. See, e.g., Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 559–63 (2003); Lisa D. May, *The Backfiring of the Domestic Violence Firearms Bans*, 14 COLUM. J. GENDER & L. 1, 11 (2005).

20. 514 U.S. 549, 551 (1995). The statute at issue in *Lopez*, 18 U.S.C. § 922(q), made it a crime to possess a firearm in a school zone. *Id.*

21. 529 U.S. 598, 602 (2000). The provision struck down in *Morrison*, 42

defendants claimed that Congress did not have authority under the Commerce Clause to enact section 922(g)(9). However, unlike the provisions at issue in *Lopez* and *Morrison*, the domestic violence firearms prohibition contains an explicit jurisdictional element, requiring that the gun or one of its parts has crossed state lines.²² Ultimately, these Commerce Clause challenges uniformly failed at the appellate level.²³

Because the firearms prohibition applies to misdemeanor convictions that occurred prior to the enactment of section 922(g)(9), another common claim focused on the Ex Post Facto Clause. Defendants whose convictions (and sometimes firearms purchases) occurred prior to the law's enactment challenged the provision as violating the Ex Post Facto Clause, arguing that they were being punished for behavior that took place prior to the law's existence.²⁴ However, these challenges also consistently failed because, as one Court of Appeals stated:

It is immaterial that [defendant]'s firearm purchase and domestic violence conviction occurred prior to § 922(g)(9)'s enactment because the conduct prohibited by § 922(g)(9) is the *possession* of a firearm. As it is undisputed that [defendant] possessed the firearm after the enactment of § 922(g)(9), the law's application to [him] does not run

U.S.C. § 13981, created a federal civil rights remedy for gender-motivated violence. *Id.* at 601–02.

22. Section 922(g)(9) states:

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; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

See also Lininger, *supra* note 19, at 545, 559.

23. *See, e.g.*, *United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *United States v. Costigan*, 18 F. App'x 2, 4 (1st Cir. 2001); *Fraternal Order of Police v. United States*, 173 F.3d 898, 901 (D.C. Cir. 1999). *See also* *United States v. Santiago*, 238 F.3d 213, 214 (2d Cir. 2001).

24. *See, e.g.*, *Hemmings*, 258 F.3d at 594. *See also* *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (“To fall within the *ex post facto* prohibition, a law must be retrospective—that is, ‘it must apply to events occurring before its enactment’—and it ‘must disadvantage the offender affected by it’ by altering the definition of criminal conduct or increasing the punishment for the crime.” (citation omitted) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981))).

afoul of the ex post facto prohibition.²⁵

Defendants also attacked the statute on Due Process Clause grounds, arguing that it did not provide fair warning that continuing possession of firearms after a domestic violence misdemeanor conviction was illegal. This claim too was unsuccessful in the appellate courts, which found that the statute made clear that possession of a firearm after conviction for a domestic violence misdemeanor was unlawful and further that “ignorance of the law or a mistake of law is no defense to criminal prosecution.”²⁶ In a related claim pertaining to the knowledge requirement of the statute, the appellate courts found that the “knowing” *mens rea* did not require that the defendant have knowledge that his conduct was illegal, but simply that he have knowledge of the facts that constitute the offense.²⁷ Other claims

25. *United States v. Mitchell*, 209 F.3d 319, 322–23 (4th Cir. 2000) (citations omitted). Other courts also rejected such ex post facto challenges to section 922(g)(9) on similar grounds. *See, e.g.*, *United States v. Pfeifer*, 371 F.3d 430, 436–37 (8th Cir. 2004); *Hemmings*, 258 F.3d at 594.

26. *United States v. Denis*, 297 F.3d 25, 28 (1st Cir. 2002) (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)) (internal quotation marks omitted); *see also Mitchell*, 209 F.3d at 322–23; *United States v. Beavers*, 206 F.3d 706, 707 (6th Cir. 1999). In *Denis*, as in other similar cases, the defendant argued that conviction under section 922(g)(9) fell within an exception to this principle recognized by the Supreme Court in *Lambert v. California*, 355 U.S. 225 (1957). 297 F.3d at 28. In *Lambert*, a Los Angeles ordinance criminally punished felons who remained in the City more than five days without registering with the police. 355 U.S. at 226. The Supreme Court held that, because the defendant had no notice that failure to register would subject him to criminal prosecution, this provision violated due process. *Id.* at 229–30. However, in *Denis*, the First Circuit rejected this claim, finding that *Lambert* has had a very narrow application and did not apply to the situation addressed by the court, which involved the affirmative act of possessing the gun, as opposed to the passive conduct at issue in *Lambert*. 297 F.3d at 29. Further, unlike the *Lambert* defendant, whose simple presence in a city was presumptively innocent, the defendant’s behavior in *Denis*, possession of a firearm after a domestic violence conviction, was a “‘circumstance[] which might move one to inquire’ as to any applicable regulations or prohibitions.” *Id.* at 30 (alteration in original) (quoting *Lambert*, 355 U.S. at 229).

27. *See, e.g.*, *United States v. Hutzell*, 217 F.3d 966, 967–68 (8th Cir. 2000); *Mitchell*, 209 F.3d at 322. 18 U.S.C. § 924(a)(2) (2012) is the provision which states the penalties for those who “knowingly” violate section 922(g). In *Bryan v. United States*, the Supreme Court stated that “the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.” 524 U.S. 184, 192 (1998) (quoting *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345 (1952) (Jackson,

included arguments that the provision constituted a “bill of attainder,” violated the Eighth Amendment prohibition against cruel and unusual punishment for the underlying misdemeanor offense, violated the Equal Protection Clause by treating domestic violence misdemeanants differently from other misdemeanants, and violated the Tenth Amendment by usurping powers reserved for the states; all of these were rejected by the appellate courts.²⁸

B. *The Supreme Court and United States v. Hayes*

Though the challenges discussed above were settled at the federal appellate level, section 922(g)(9) first came to the Supreme Court in *United States v. Hayes*, focusing on the question of the definition of “misdemeanor crime of domestic violence.”²⁹ The gun ban of section 922(g)(9) applies to defendants who have been convicted of a “misdemeanor crime of domestic violence,” which is defined in 18 U.S.C. § 921(a)(33)(A) to include any 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

The issue before the Court in *Hayes* involved the relationship requirement of section 921(a)(33)(A)(ii); as the Court put it, the question was whether this definition “cover[ed] a misdemeanor battery whenever the battered victim was *in fact* the offender’s spouse (or other relation specified in § 921(a)(33)(A)) . . . [or] to trigger the possession ban, must the predicate misdemeanor

J., dissenting)) (internal quotation marks omitted). The Court concluded that “unless the text of the statute dictates a different result, the term ‘knowingly’ merely requires proof of knowledge of the facts that constitute the offense.” *Id.* at 193.

28. See Lininger, *supra* note 19, at 561, 563 (discussing various claims).

29. 555 U.S. 415, 418 (2009).

30. 18 U.S.C. § 921(a)(33)(A) (2012).

identify *as an element of the crime* a domestic relationship between aggressor and victim?”³¹

In an opinion authored by Justice Ginsburg, the Court held that the former definition was correct and that a domestic relationship between the offender and victim need not be an element of the crime; instead, it is enough for the government to charge and prove a prior conviction for an offense that was in fact committed by a defendant against a spouse or other domestic victim.³²

In reaching this decision, the Court first examined the text and grammatical structure of the definitional statute.³³ It then found that interpreting the statute to require the domestic relationship as an element of the misdemeanor offense would frustrate Congress’ purpose in enacting section 922(g)(9) because most of the states did not have criminal statutes that specifically prohibited domestic violence; thus, the gun ban would have been a “dead letter” in two-thirds of the states at the time of its enactment.³⁴ Finally, the Court found that the rule of lenity, which interprets criminal statutes narrowly in favor of a defendant, applied only when, after utilizing traditional principles of statutory interpretation, a statute is ambiguous.³⁵ Here, “[t]he text, context, purpose, and what little there is of drafting history all point in the same direction”; therefore, the statute was not ambiguous, and Congress defined “misdemeanor crime of domestic violence” to include offenses committed by a person with a

31. *Hayes*, 555 U.S. at 418 (emphasis added).

32. *Id.*

33. *Id.* at 420–26. The Court noted that section 921(a)(33)(A) used the word “element” in the singular, suggesting that it meant only the use of force, which follows immediately thereafter, to be a required element and not the offender’s relationship with the victim: “Had Congress meant to make the latter as well as the former an element of the predicate offense, it likely would have used the plural ‘elements,’ as it has done in other offense-defining provisions.” *Id.* at 421–22. The Court also noted that treating the relationship between the parties as a required element was awkward “as a matter of syntax.” *Id.* at 422.

34. *Id.* at 426–27 (quoting *United States v. Hayes*, 482 F.3d 749, 762 (4th Cir. 2007) (Williams, J., dissenting)). The Court noted that additional states had enacted such statutes since the legislation was passed, but as of 2009, about one-half of the states still prosecuted domestic violence exclusively under generally applicable criminal laws. *Id.* at 427 n.8.

35. *Id.* at 429.

domestic relationship to the victim, whether or not such a relationship was an element of the crime.³⁶

Chief Justice Roberts, joined by Justice Scalia, dissented in *Hayes*.³⁷ Chief Justice Roberts argued, based on text and structure, that the most natural reading of the statute would be for the domestic relationship to be included as a required element of the offense, and “it would be at least surprising to find . . . that ‘a misdemeanor crime of domestic violence’ need not by its terms have anything to do with domestic violence.”³⁸ The dissent also noted that the majority’s approach would be difficult to apply because often it would be necessary to go beyond the conviction itself to determine whether the offense on its facts involved domestic violence.³⁹ Further, the dissent argued that the statute was ambiguous, making it a strong case for application of the rule of lenity.⁴⁰

A key point of dispute between the majority and the dissenting Justices centered on the use of legislative history to discern congressional intent.⁴¹ Chief Justice Roberts contested the majority’s use of legislative history, focusing on the floor statement of the bill’s chief sponsor, Senator Lautenberg.⁴² He argued that this “tidbit[] [did] not amount to much,” because the statement was delivered the day the legislation was passed and after the House of Representatives had already passed the pertinent provision.⁴³ Further, whatever Senator Lautenberg’s purpose, it was not necessarily shared by Congress as a whole in passing the legislation.⁴⁴ Legislators may have had differing views on the reach of the new law, and some may have been willing to agree to the gun prohibition, but only if the predicate misdemeanor required that the domestic relationship was an

36. *Id.*

37. *Id.* at 430–37 (Roberts, C.J., dissenting).

38. *Id.* at 431.

39. *Id.* at 435–36.

40. *Id.* at 436 (“Taking a fair view, the text of § 921(a)(33)(A) is ambiguous, the structure leans in the defendant’s favor, the purpose leans in the Government’s favor, and the legislative history does not amount to much. This is a textbook case for application of the rule of lenity.”).

41. *See id.* at 434–35.

42. *Id.*

43. *Id.*

44. *Id.*

element of the offense.⁴⁵

The majority and dissent in *Hayes* thus disagreed about methods of statutory interpretation. However, on another level, the Justices' argument related to how broadly they would permit a domestic violence law to apply. Must a crime of domestic violence be limited to the relatively few number of states that specifically demarcate "domestic violence crimes" in their statutes, or can a crime of domestic violence be identified as any one of a variety of crimes that exist throughout the criminal code, as long as the defendant had a domestic relationship with the victim? The dissent's approach would have confined what is considered a "crime of domestic violence" to the narrow category of crimes that are specifically delineated as such.⁴⁶ As Chief Justice Roberts expressed his view, to him it was "surprising" and "counterintuitive" that a "crime of domestic violence" need not have domestic violence as an element.⁴⁷

However, the majority's holding encompassed a wide range of crimes within the category of "crime of domestic violence."⁴⁸ This of course had the immediate impact of permitting a broader application of section 922(g)(9); but further, the Court demonstrated a more expansive vision of what is considered a domestic violence crime. The fight over this vision of domestic violence would come back to the Court just a few years later, when it considered the firearms ban again in *United States v. Castleman*.⁴⁹

III. THE *CASTLEMAN* DECISION

As in *Hayes*, the issue in *Castleman* centered on the definition of "misdemeanor crime of domestic violence."⁵⁰ However, the question in *Castleman* focused on the first part of 18 U.S.C. § 921(a)(33)(A)(ii)—what kind of conduct could be considered "the use or attempted use of physical force," a required element of a qualifying misdemeanor crime.⁵¹ In an opinion authored by

45. *See id.* at 435.

46. *See id.* at 431–37.

47. *Id.* at 431, 436–37.

48. *See id.* at 420–26 (majority opinion).

49. 134 S. Ct. 1405 (2014).

50. *Id.* at 1408.

51. *Id.* at 1409. *See supra* note 30 and accompanying text for the

Justice Sotomayor, the Court again gave a broad reading to the domestic violence firearms prohibition, finding that “use of physical force” in the statute incorporated the common law definition of force—an expansive definition that included not only violent force, but offensive touching.⁵² As in *Hayes*, the *Castleman* Court debated principles of statutory interpretation.⁵³ However, *Castleman* also returned to the deeper issue in *Hayes*: how to conceive of domestic violence.⁵⁴ Even more explicitly than in *Hayes*, the majority and concurring opinions battled over this core issue—the meaning of domestic violence itself.

A. *Statutory Interpretation*

The Court first turned to principles of statutory interpretation to determine the meaning of the “use of physical force,” which was part of the federal law’s definition of “misdemeanor crime of domestic violence.”⁵⁵ It relied on a principle of interpretation that “absent other indication, ‘Congress intends to incorporate the well-settled meaning of the common-law terms it uses.’”⁵⁶ It found that there was no such “other indication” here, so that Congress intended to incorporate the common law meaning of force into section 921(a)(33)(A)’s definition of a “misdemeanor crime of domestic violence.”⁵⁷ Because the common law meaning of force included “offensive touching,” rather than only more violent forms of force,⁵⁸ the Court’s holding resulted in a broad reading of “misdemeanor crime of domestic violence” and, thus, broader applicability of the section 922(g)(9) firearms prohibition.

In reaching this conclusion, the Court distinguished a similar provision that it had considered in *Johnson v. United States*.⁵⁹ In

language of 18 U.S.C. § 921(a)(33)(A).

52. *Castleman*, 134 S. Ct. at 1410. Justice Sotomayor’s opinion was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Kagan.

53. *Id.* 1410–13.

54. *Id.*

55. *Id.*

56. *Id.* at 1410 (quoting *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013)).

57. *Id.*

58. *Id.* (citing *Johnson v. United States*, 559 U.S. 133, 139 (2010)) (internal quotation marks omitted).

59. *Id.*; *Johnson*, 559 U.S. 133.

Johnson, the issue was whether a battery conviction qualified as a “violent felony” under the Armed Career Criminal Act; the Act defined “violent felony” as one that “has as an element the use . . . of physical force.”⁶⁰ The Court had noted in *Johnson* that at common law, the element of force in the crime of battery included offensive touching and stated the general principle that a common law term of art should be given its usual meaning, except “where that meaning does not fit.”⁶¹ There, the Court found a “comical misfit with the defined term.”⁶² Therefore, when defining “violent felony,” the Court held that the phrase “physical force” did not take on the broad common law meaning, but instead meant “violent force.”⁶³ In *Johnson*, the Court explicitly reserved the question of whether the definition of “physical force” for purposes of interpreting “violent felony” under the Armed Career Criminal Act should extend to the meaning of “physical force” required for “misdemeanor crime of domestic violence” under section 922(g)(9).⁶⁴ In *Castleman*, the Court answered that question and determined that the same definition of “physical force” did not apply to the domestic violence firearms prohibition.⁶⁵ Unlike in *Johnson*, here the common law meaning of force “fits perfectly.”⁶⁶

In explaining the difference between the statute in *Johnson* and this case, the Court first made a distinction between felony and misdemeanor offenses.⁶⁷ Because the common law definition of force applied specifically to misdemeanors, it was not likely that Congress meant to incorporate that meaning into the definition of a “violent felony” in *Johnson*; in contrast, “it makes sense for Congress to have classified as a ‘misdemeanor crime of domestic violence’ the type of conduct that supports a common-law battery conviction,” under which perpetrators of domestic violence are routinely charged.⁶⁸

The Court argued that another reason for distinguishing

60. 559 U.S. at 135 (quoting 18 U.S.C. § 924(e)(2)(B)(i)).

61. *Id.* at 139.

62. *Id.* at 145.

63. *Id.* at 140.

64. *Id.* at 143–44; *see also* United States v. Castleman, 134 S. Ct. 1405, 1410 n.3 (2014).

65. 134 S. Ct. at 1410.

66. *Id.*

67. *Id.* at 1411.

68. *Id.*

Johnson was that a determination that a defendant's crime was a "violent felony" would classify him as an "armed career criminal"; in contrast, the statute at issue in *Castleman* grouped those convicted of "misdemeanor crimes of domestic violence" with others banned from gun possession who are not necessarily violent, such as substance abuse addicts, those who have entered the United States under a nonimmigrant visa, and those who have renounced United States citizenship.⁶⁹ Therefore, according to the Court, there was "no anomaly in grouping domestic abusers convicted of generic assault or battery offenses together with the others whom § 922(g) disqualifies from gun ownership."⁷⁰

Similar to an argument made in *Hayes*, the Court further noted that a narrow reading of the statute would have rendered it inoperative in many states at the time it was enacted.⁷¹ Assault or battery laws under which domestic violence abusers were routinely prosecuted can be grouped into two categories: those that prohibit both offensive touching and the causation of bodily injury, and those that prohibit only the causation of bodily injury.⁷² Therefore, if offensive touching does not qualify as "force," then the federal domestic violence gun ban would have been inoperative in at least ten states, making up nearly thirty percent of the nation's population at time of its enactment.⁷³

Relying on statutory interpretation, the Court therefore found good reason to give an expansive reading to "force" and, thus, to "misdemeanor crime of domestic violence" under the statute.⁷⁴ Applying this standard, the Court held that *Castleman's* prior

69. *Id.* at 1412 (internal quotation marks omitted).

70. *Id.*

71. *Id.* at 1413.

72. *Id.*

73. *Id.*

74. *Id.* at 1410–13. The majority also rejected what it called other "nontextual" arguments made by *Castleman*. *Id.* at 1415. For example, the defendant argued that the legislative history of the statute suggested that Congress did not intend for it to apply to acts involving minimal force. *Id.* The Court found this argument unpersuasive, stating there was nothing in the "isolated references" of legislators to severe domestic violence that suggested they would not have wanted the statute to apply to a misdemeanor assault conviction like the defendant's. *Id.* The Court similarly rejected *Castleman's* rule of lenity argument, finding that the rule applies only when a statute is ambiguous after considering text, structure, history, and purpose. *Id.* at 1416. The Court stated simply "that [this] is not the case here." *Id.*

conviction qualified as a “misdemeanor crime of domestic violence.”⁷⁵

B. *The Meaning of Domestic Violence*

But the Court went further in justifying its broad reading of “misdemeanor crime of domestic violence,” and, in doing so, it expressed a refined and accurate understanding of the concept of domestic violence. Instead of viewing “domestic” simply as a descriptive term modifying the noun violence, the majority opinion understood “domestic violence” as an independent concept:

[W]hereas the word “violent” or “violence” standing alone “connotes a substantial degree of force,” that is not true of “domestic violence.” “Domestic violence” is not merely a type of “violence”; *it is a term of art encompassing acts that one might not characterize as “violent” in a nondomestic context.* . . . Minor uses of force may not

75. *Id.* at 1413. The Court first employed the “categorical approach,” in which it looked to the statute to determine whether the defendant’s conviction necessarily had the element of the “use or attempted use of physical force, or the threatened use of a deadly weapon.” *Id.* at 1413 (quoting 18 U.S.C. § 921(a)(33)(A)) (citing *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990)). The Tennessee statute made it a crime to “commit an assault” against a family member and incorporated by reference another statute that defined three types of assault: “1) intentionally, knowingly or recklessly causing bodily injury to another; 2) intentionally or knowingly causing another to reasonably fear imminent bodily injury; or 3) intentionally or knowingly causing physical contact with another in a manner that a reasonable person would regard as extremely offensive or provocative.” *Id.* (quoting TENN. CODE ANN. § 39-13-111(b) (2010); *id.* § 39-13-101(a) (internal quotation marks omitted)). The Court acknowledged that it did not appear that every type of assault under these definitions would necessarily involve the use or attempted use of physical force or the threatened use of a deadly weapon, even under the Court’s broad reading. *Id.* For example, the reckless causation of bodily injury may not be a “use” of force. *Id.* at 1414. However, the parties did not contest that the Tennessee law was a “divisible statute,” meaning that the Court may apply a “modified categorical approach” and look at the indictment to which the defendant pled guilty to determine whether his actual conviction did include the elements necessary to qualify for the federal offense. *Id.* Here, he pled guilty to “intentionally or knowingly” causing bodily injury, and the knowing or intentional causation of bodily injury does necessarily involve the use of physical force, as the Court has defined it. *Id.* at 1414–15. Since the indictment made clear that use of physical force was an element of his conviction, it was a qualifying “misdemeanor crime of domestic violence.” *Id.* at 1415.

constitute “violence” in the generic sense. For example, in an opinion that we cited in *Johnson*, the Seventh Circuit noted that it was “hard to describe . . . as ‘violence’” “a squeeze of the arm [that] causes a bruise.” But an act of this nature is easy to describe as “domestic violence,” when *the accumulation of such acts over time can subject one intimate partner to the other’s control*.⁷⁶

The Court thus recognized that domestic violence is in essence a course of conduct through which the abuser exercises power and control over his victim; it is a series and pattern of behaviors and not simply a sum of discrete acts of violence. Domestic violence is not merely generic violence exhibited in a particular locale or by a perpetrator with a particular relationship to his victim. It is this pattern of domination, and not a particular level of violent force, that is central to the concept of domestic violence.

This recognition permits wider application of the domestic violence gun ban because a greater range of prior convictions will qualify as “misdemeanor crime[s] of domestic violence.” But further, the Court’s recognition of domestic violence as a pattern of behavior with particular dynamics, rather than as discrete incidents of generic violence, has the potential to affect the treatment of a range of legal issues both at the Supreme Court level and in the lower courts. Just a few examples demonstrate this potential. This conception of domestic violence as a course of

76. *Id.* at 1411–12 (emphasis added) (citations omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010); *Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003)). For this reason, the Court also distinguished its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). *Id.* at 1415. In *Leocal*, the Court considered the meaning of a “crime of violence” under 18 U.S.C. § 16, which the statute defined in part as one “that has as an element the use . . . of physical force.” 543 U.S. at 8–12; 18 U.S.C. § 16(a) (2012). The Court stated that the ordinary meaning of “crime of violence” “suggests a category of violent, active crimes.” *Id.* at 11. In *Castleman*, the Court noted that the lower courts have generally held that mere offensive touching cannot constitute the physical force necessary for a “crime of violence,” similar to the holding in *Johnson*, which held that it could not constitute the physical force necessary for a “violent felony.” 134 S. Ct. at 1411 n.4; *see also generally Johnson*, 559 U.S. 133. However, the Court noted that these interpretations of “crime of violence” did not apply to “misdemeanor crimes of domestic violence” because “‘domestic violence’ encompasses a range of force broader than that which constitutes ‘violence’ *simpliciter*.” *Castleman*, 134 S. Ct. at 1411 n.4.

conduct and an “accumulation of . . . acts over time”⁷⁷ could influence the determination of what constitutes an “ongoing emergency” and, therefore, what statements are non-testimonial for Confrontation Clause purposes.⁷⁸ This understanding also could affect the legal treatment of “imminence” and “reasonableness” in self-defense claims by defendants who are victims of domestic violence. And, it could influence the courts’ determination of how the presence of domestic violence should be weighed in a custody or child protection decision. In short, a more accurate legal understanding of domestic violence could help give effect to the actual experiences of domestic violence victims and ensure that they are treated more fairly by the legal system in a variety of contexts.⁷⁹

C. *Justice Scalia’s Concurrence*

Justice Scalia agreed that under the facts of this case, the charge to which Castleman pled, “intentionally or knowing causing bodily injury” to a family member, had the use of physical force as an element and so constituted a “misdemeanor crime of domestic violence” under the statute.⁸⁰ However, he “reach[ed] that conclusion on narrower grounds” and so wrote separately to concur only in part and in the judgment.⁸¹

Justice Scalia would have found that the same meaning of physical force used in *Johnson* applied to the statute here and encompassed the conduct to which Castleman pled.⁸² In *Johnson*, the Court concluded that physical force meant violent force—that is, “force capable of causing physical pain or injury to another

77. *Castleman*, 134 S. Ct. at 1412.

78. See generally *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

79. See SCHNEIDER, HANNA, SACK & GREENBERG, *supra* note 18, at 202 (“A central challenge facing lawyers in this field is to translate the complexity of battering experiences into law. . . . [T]he legal system has historically denied or minimized abuse in intimate relationships, and focused on single incidents of violence rather than grappling with the broader context in which these incidents occur. To put it simply, domestic violence has been invisible or distorted in many legal cases in which it is relevant.”).

80. *Castleman*, 134 S. Ct. at 1416 (Scalia, J., concurring in part and in the judgment).

81. *Id.*

82. *Id.* at 1416–17.

person.”⁸³ Justice Scalia argued that if physical force was given the same meaning here, this was an “easy case” because “it is impossible to cause bodily injury without using force ‘capable of producing that result.’”⁸⁴ Therefore, Justice Scalia concluded that Castleman’s conviction qualified as a “misdemeanor crime of domestic violence” under that definition.⁸⁵

Justice Scalia, however, objected to the majority’s broader interpretation of physical force in the domestic violence firearms statute and to its incorporation of the common law definition of force, which includes offensive touching.⁸⁶ He argued that there was no reason to interpret the phrase “use of physical force” differently in this case than it was interpreted in *Johnson*.⁸⁷ Justice Scalia made several arguments to contest the majority’s reasoning on this issue.⁸⁸

He argued that the principle of statutory interpretation relied upon by the majority, in which it is presumed that “absent other indication, ‘Congress intend[ed] to incorporate the well-settled meaning of the common-law terms it uses,’” was of “limited relevance” in this case, because there was such “other indication” here—the contesting presumption of consistent usage, that when Congress uses the same language, it means the same thing.⁸⁹ Since the Court had already found that the common law meaning of force was not incorporated into the phrase “use of physical force” in the statute at issue in *Johnson*, this presumption meant that Congress also did not intend to incorporate it into the domestic violence statute, which used very similar language.

Justice Scalia also rejected the Court’s argument that any interpretation excluding offensive touching would have rendered the gun ban inoperative in many states at the time of its

83. *Id.* at 1416 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)) (internal quotation marks omitted).

84. *Id.* at 1416–17.

85. *Id.* at 1417.

86. *Id.* at 1416–22.

87. *Id.* at 1418. Justice Scalia also objected to interpreting the phrase differently than it was interpreted in *Leocal*, which considered use of physical force to define “crime of violence.” *Id.* See discussion of *Leocal* *supra* note 76.

88. *Castleman*, 134 S. Ct. at 1418–20 (Scalia, J., concurring in part and in the judgment).

89. *Id.* at 1418 (quoting *id.* at 1410 (majority opinion)).

enactment.⁹⁰ He argued that “there is no interpretive principle to the effect that statutes must be given their broadest possible interpretation,” and in any event under the narrower interpretation, the statute “would have had effect in four-fifths of the States.”⁹¹ Justice Scalia found it more plausible that Congress enacted a statute that had effect in this large majority of states and “left it to the handful of nonconforming States to change their laws (as some have),” than that “Congress adopted a meaning of ‘domestic violence’ that included the slightest unwanted touching.”⁹²

Justice Scalia also countered the distinction the majority made between the misdemeanor crime at issue here and the felony crime interpreted in *Johnson*.⁹³ He argued that the term being considered here was not simply a “misdemeanor crime,” but a “*misdemeanor crime of domestic violence*.”⁹⁴ According to Justice Scalia, consideration of this full term leads to the “unremarkable conclusion that ‘physical force’ in [the domestic violence statute] refers to the type of force involved in violent misdemeanors (such as bodily-injury offenses) rather than nonviolent ones (such as offensive touching).”⁹⁵ As indicated by this argument, in contrast to the majority’s approach, Justice Scalia viewed domestic violence merely as a type of violence. He made this position explicit in his final argument, in which he took on the Court’s statement that domestic violence encompasses a range of force and a pattern of conduct.⁹⁶

D. *Justice Scalia’s “Absurdity”*

It is apparent that Justice Scalia’s core disagreement with the majority focused on the Court’s discussion of the meaning of domestic violence, as he wrote extensively and vociferously on this point. He called the majority’s definition of domestic violence in which, as he put it, “an act need not be violent to qualify as

90. *Id.* at 1418–19 (Scalia, J., concurring in part and in the judgment).

91. *Id.* at 1418.

92. *Id.* at 1419.

93. *Id.* at 1419–20.

94. *Id.* at 1420.

95. *Id.*

96. *Id.*

‘domestic violence,’ an “absurdity.”⁹⁷ Further, he found it inconsistent with definitions of “domestic violence” from the period of the statute’s enactment, relying on dictionary definitions such as “violence between members of a household, usu. spouses; an assault or other violent act committed by one member of a household against another.”⁹⁸ Justice Scalia stated that contemporary dictionaries gave domestic violence the same meaning, which he phrased as “ordinary violence that occurs in a domestic context.”⁹⁹

He argued that the Court relied for its definition of domestic violence on an amicus brief filed by the National Network to End Domestic Violence and other anti-domestic violence organizations, as well as publications from the U.S. Department of Justice’s Office on Violence Against Women.¹⁰⁰ He dismissed the amicus brief as providing a series of definitions drawn from “law review articles, foreign-government bureaus and similar sources,” which included a range of both nonviolent and nonphysical conduct that he said “cannot possibly be relevant to the meaning of a statute requiring ‘physical force,’ or to the legal meaning of ‘domestic violence’ (as opposed to the meaning desired by private and governmental advocacy groups).”¹⁰¹ He referred to the Department of Justice’s definition as “equally capacious and (to put it mildly) unconventional,” including “a pattern of abusive behavior . . . used by one partner to gain or maintain power and control over another.”¹⁰²

Justice Scalia attacked the amici organizations as having a “vested interest in expanding the definition of ‘domestic violence’ in order to broaden the base of individuals eligible for support services;” as an example, he explained that the amicus National Network to End to Domestic Violence had advocated for expansion of a program assisting victims of domestic violence to include victims of “dating violence” in order to “ensure that all victims in danger can access services.”¹⁰³ By using the term “vested

97. *Id.*

98. *Id.* (quoting BLACK’S LAW DICTIONARY 1564 (7th ed. 1999)) (internal quotation marks omitted).

99. *Id.*

100. *Id.* at 1420–21.

101. *Id.* at 1421.

102. *Id.*

103. *Id.* at 1422 & n.10.

interest,” Justice Scalia seemed to imply that these organizations would be improperly motivated to provide an inaccurately broad definition of domestic violence; however, as his own example demonstrates, the “vested interest” of these organizations is to define domestic violence accurately so that it encompasses all victims who require services.¹⁰⁴

Justice Scalia also spoke dismissively of what he called the “Department of Justice’s (nonprosecuting) Office [on Violence Against Women].”¹⁰⁵ He noted that the Department of Justice, which of course is charged with enforcing the statute at issue here, “thankfully receives no deference in our interpretation of the criminal laws whose claimed violation the Department of Justice prosecutes.”¹⁰⁶ And, though he could not call the Department of Justice an advocacy organization with a “vested interest,” he did lump it with the amici to find that they all had what seemed to him to be a questionable purpose.¹⁰⁷ According to him, these groups were,

entitled to define “domestic violence” any way they want for their own purposes –purposes that can include (quite literally) giving all domestic behavior harmful to women a bad name. (What is more abhorrent than *violence* against women?) But 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. When everything is domestic violence, nothing is. Congress will have to come up with a new word (I cannot imagine what it would be) to denote actual domestic *violence*.¹⁰⁸

It is hard to know exactly how to interpret this statement from Justice Scalia. It could be read as disdain or sarcasm—“what is more abhorrent than *violence* against women?” But whatever his intent, this invective betrays Justice Scalia’s lack of understanding of domestic violence. It is not that “everything is

104. As the majority opinion stated, these are the organizations “most directly engaged with the problem and thus most aware of its dimensions.” *Id.* at 1412 (majority opinion).

105. *Id.* at 1421 (Scalia, J., concurring in part and in the judgment).

106. *Id.* at 1422.

107. *Id.* at 1421.

108. *Id.*

domestic violence;” rather, in failing to comprehend the widely-accepted meaning of the term as a pattern of abusive behavior designed to gain power and control, he is uninformed.¹⁰⁹

Justice Scalia’s failure to understand the meaning of domestic violence is highly troubling. In *Castleman*, he stood alone in attacking the Court’s conception of domestic violence.¹¹⁰ However, it is unlikely that this struggle over the legal meaning of domestic violence is over at the Court. Justice Scalia has authored many important opinions involving domestic violence,¹¹¹

109. He revealed this lack of education in another portion of his opinion when he referred to a principle of statutory interpretation as a “rule of thumb.” *Id.* at 1417. For those familiar with the history of the legal treatment of domestic violence, this phrase is jarring because it is understood to represent the old common law principle that a man had the right of moderate chastisement—that is, the legal right to beat his wife as long as he used a switch no thicker than his thumb. See U.S. COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982), available at <https://www.law.umaryland.edu/marshall/usccr/documents/cr12w8410.pdf>. There is some dispute over whether the term “rule of thumb” had its origins in the context of wife-beating. See, e.g., Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 256 n.205 (1996); Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582, 598 n.83 (1996); Henry Ansgar Kelley, *Rule of Thumb and the Folklore of the Husband’s Stick*, 44 J. LEGAL EDUC. 341, 342–44 (1994). However, it is clear that the concept was utilized in several legal cases involving domestic violence in the nineteenth century. See, e.g., *Bradley v. State*, 1 Miss. 156, 157 (1824) (discussing the doctrine of “moderate correction” and the use of a whip or rattan; “no bigger than my thumb, in order to enforce the salutary restraints of domestic discipline”); *State v. Oliver*, 70 N.C. 44, 45 (1874) (“The doctrine of years ago, that a husband had the right to whip his wife, provided he used a switch no longer than his thumb, no longer governs decisions of our courts.”); *State v. Rhodes*, 61 N.C. 453, 454 (1868) (“The Defendant had a right to whip his wife with a switch no bigger than his thumb.”).

110. Justice Alito, joined by Justice Thomas, wrote separately to concur in the judgment on different grounds. *Castleman*, 134 S. Ct. at 1422 (Alito, J., concurring in the judgment). Justice Alito had dissented in *Johnson*, arguing that physical force under the statute in that case should have included the common law meaning of force. 559 U.S. 133, 146–53 (2010) (Alito, J., dissenting). In *Castleman*, he argued that the meaning of the language in the domestic violence statute was the same as his interpretation of the statute at issue in *Johnson*. *Castleman*, 134 S. Ct. at 1422 (Alito, J., concurring in the judgment). Therefore, he would not have extended the reasoning of *Johnson* to the question here. *Id.*

111. See, e.g., *Giles v. California*, 554 U.S. 353 (2008); *Davis v. Washington*, 547 U.S. 813 (2006).

and no doubt, he will continue to be a powerful voice in this area. Yet the *Castleman* majority's expression of the meaning domestic violence marks an important development and provides a competing conception to the view articulated by Justice Scalia.

IV. THE FUTURE OF SECTION 922(G)(9) AND THE FUTURE OF DOMESTIC VIOLENCE IN THE SUPREME COURT

In *Castleman*, the domestic violence firearms ban withstood yet another legal challenge. However, though this is the most recent in a long line of attacks, it may not be the last. The Supreme Court's recent Second Amendment rulings may have created yet another route to challenge section 922(g)(9).

In 2008, in *District of Columbia v. Heller*, the Court held that the Second Amendment afforded an individual the right to keep and bear arms and that statutes that ban handgun possession in the home, or those that ban operable firearms in the home for the immediate purpose of self-defense, are unconstitutional.¹¹² In *McDonald v. City of Chicago*, the Court found that this right was fully applicable to the states through the Due Process Clause.¹¹³ In both decisions, however, the Court made clear that this Second Amendment right was "not unlimited."¹¹⁴ As the Court stated in *Heller*:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹¹⁵

The Court made clear that this list was meant only to provide examples and was not exhaustive.¹¹⁶ However, since *Heller*, there

112. 554 U.S. 570 (2008).

113. 130 S. Ct. 3020 (2010).

114. *Heller*, 554 U.S. at 626.

115. *Id.* at 626–27; accord *McDonald*, 130 S. Ct. at 3047 (quoting *Heller* language and noting that "[d]espite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms").

116. *Heller*, 554 U.S. at 627 n.26. ("We identify these presumptively lawful regulatory measures only as examples: our list does not purport to be exhaustive.")

has been a new set of challenges to section 922(g)(9), seeking to test its constitutionality on Second Amendment grounds. Though there have been disagreements on such issues as the standard of review, thus far, all of the Courts of Appeal that have considered the constitutionality of section 922(g)(9) post-*Heller* have upheld the domestic violence gun ban against Second Amendment challenges.¹¹⁷ Courts have reasoned that “both logic and data” established a substantial relation between the state’s interest in preventing armed domestic violence and the statute banning firearms for those convicted of misdemeanor domestic violence.¹¹⁸

However, not all circuits have weighed in on this issue. Further, the circuits, and ultimately, the Supreme Court’s determination of the Second Amendment issue may be impacted by the *Castleman* holding. Whether the statute serves an important enough state interest and is strongly enough related to that interest, may be affected by the Court’s broad reading of “use of physical force.” For example, in the pre-*Castleman* case of *United States v. Engstrum*, a federal district court in Utah, using strict scrutiny review in a Second Amendment challenge to section 922(g)(9), found the statute narrowly tailored to the government’s compelling interest in protecting household members from those who pose a risk of violence.¹¹⁹ The court’s ruling was based in part on the fact that the Tenth Circuit had, at that time, required physical force under the statute to have “some degree of power or violence.”¹²⁰ Now, with the broader definition given to physical force by the Supreme Court in *Castleman*, the argument that the statute does not serve as important an interest or is not narrowly enough tailored to meet that interest may be strengthened.¹²¹ A

117. See, 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. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010).

118. See, e.g., *Skoien*, 614 F.3d at 641.

119. 609 F. Supp. 2d 1227, 1234–35 (D. Utah 2009).

120. *Id.*; *accord Staten*, 666 F.3d at 162–63 (making a similar point as to the Fourth Circuit’s interpretation of “use of physical force” and its relevance to the Second Amendment analysis). See also Elizabeth Coppolecchia et al., Note, *United States v. White: Disarming Domestic Violence Misdemeanants Post-Heller*, 64 U. MIAMI L. REV. 1505, 1524–25 (2010) (pointing out a connection between the definition of the physical force requirement and a Second Amendment challenge).

121. In *Castleman*, the Court summarily rejected a brief argument made

direct challenge to section 922(g)(9) on Second Amendment grounds post-*Castleman* may be the next chapter in the long history of challenges to this statute.

In the meantime, however, the Court now has articulated a concept of the legal meaning of domestic violence that is more consistent with our actual understanding of domestic violence dynamics, and which can impact the outcomes of a number of legal issues in criminal, evidence, and family law, both at the Supreme Court level and in the lower courts. This is a significant development and is likely the most lasting and hopeful legacy of *Castleman*.

by *Castleman* that the statute should be read narrowly because “it implicates his constitutional right to keep and bear arms.” 134 S. Ct. 1405, 1416 (2014). However, *Castleman* did not challenge the constitutionality of the statute on these grounds, and the Court said that “the meaning of the statute is sufficiently clear that we need not indulge *Castleman*’s cursory nod to constitutional avoidance concerns.” *Id.*