THE IMPRECISE DRAFTSMANSHIP OF THE LAUTENBERG AMENDMENT AND THE RESULTING PROBLEMS FOR THE JUDICIARY

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In 1996, Congress passed the Domestic Violence Offender Gun Ban ("Lautenberg Amendment"), a controversial amendment to the Gun Control Act[1] that makes it unlawful for individuals previously convicted of a misdemeanor domestic violence offense to possess a firearm.[2] Legislative history shows that Congress intended to address state criminal laws that prosecute domestic violence as only a misdemeanor, which allows offenders to continue to possess firearms.[3]

Statutory interpretation is the only remaining avenue to challenge the Lautenberg Amendment and the courts' improper interpretation of its meaning. In the rush of the legislative process, Congress hastily enacted Senator Lautenberg's amendment,[4] and this sheds light on the resulting problems for the judiciary, which is forced to interpret unclear statutory language. Congress has not corrected the Lautenberg Amendment, enacted

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[1] 18 U.S.C. § 922(g) (2000) (banning individuals. such as convicted felons, illegal aliens, and those adjudicated to be mentally incompetent, from possessing a firearm).

[2] *Id.* § 922(g)(9); *see also* 18 U.S.C. § 921(a)(33)(A) (2000).

[3] 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg) (asserting that the amendment would "keep guns away from violent individuals who threaten their own families").

[4] Senator Lautenberg attached his amendment to the 1997 Omnibus Consolidated Appropriations Act, a "massive federal budget bill" that was immediately necessary to avoid "government 'shut-down'." *See* Nancy Rhodes, *Are Cops Who Batter Above the Law? The Lautenberg Gun Ban*, PEACE NEWSLETTER (Syracuse Peace Council, Syracuse, N.Y.), Mar. 1997, *available at* http://www.dartguy.com/cop/gunlaw.html; 142 CONG. REC. S11872-901 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

over a decade ago. Further, numerous constitutional challenges to the Lautenberg Amendment have already failed.[5]

This Article considers the circuit courts' use of statutory interpretation to broaden one phrase, the "use of physical force,"[6] and to narrow another phrase, "as an element."[7] The circuit courts have selectively pulled certain arrows from the quiver, while ignoring others, in order to "bolster"[8] a conclusion that leads to short-term results—a retroactive, broad firearm prohibition. Yet there are other tools of statutory construction that direct the judiciary to read the word "violence" into the "use of physical

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[5] Opponents have sought the Amendment's repeal and have challenged its constitutionality under the Commerce Clause, the Tenth Amendment, the Second Amendment, and the Ex Post Facto Clause. Thus far, the courts have rejected these claims. *See* Chris Nolan, *2006 Repeal of § 658 of Public Law 104-208, Commonly Referred to as the Lautenberg Amendment*, PETITION SPOT, Sept. 24, 2005, http://www.petitionspot.com/petitions/Lautenbergrepeal; United States v. Barnes, 295 F.3d 1354, 1366-68 (D.C. Cir. 2002) (denying vagueness, due process, and equal protection challenges); United States v. Smith, 171 F.3d 617, 623-24 (8th Cir. 1999) (denying constitutional vagueness and equal protection challenges and rejecting Second Amendment challenge) (citing Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (holding there is no violation of the Second Amendment "unless possession of a weapon has a reasonable relationship to the militia")); Fraternal Order of Police v. United States, 173 F.3d 898, 901-03 (D.C. Cir. 1999) (denying equal protection challenge that the Lautenberg Amendment "imposes a harsher sanction on domestic violence misdemeanants than on felons[,] . . . [who have an] exemption for government-issued firearms"); United States v. Brady, 26 F.3d 282, 285, 290-91 (2d Cir. 1994), *cert. denied*, 513 U.S. 894 (1994) (denying ex post facto challenge to a § 922(g)(1) conviction); United States v. Waters, 23 F.3d 29, 36 (2d Cir. 1994) (denying ex post facto challenge to a § 922(g)(4) conviction because the Amendment punishes the possession and not merely the acquisition of a firearm and the defendant's "disqualifying status occurred before passage of the statute, but the prohibited possession occurred after the statute was enacted").

[6] *See* 18 U.S.C. § 921(a)(33)(A) (2000); United States v. Griffith, 455 F.3d 1339, 1330-41 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007); United States v. Nason, 269 F.3d 10, 20-21 (1st Cir. 2001); *Smith*, 171 F.3d at 621 n.2.

[7] *See* 18 U.S.C. § 921(a)(33)(A); *Griffith*, 455 F.3d at 1346 (holding that "a domestic relationship must exist as part of the facts giving rise to the prior offense, but it need not be an element of that offense"); United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1374 (Fed. Cir. 2003); United States v. Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002); *Barnes*, 295 F.3d at 1365-66; United States v. Ball, 7 F. App'x 210, 213 (4th Cir. 2001), *overruled by* United States v. Hayes, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); *Smith*, 171 F.3d at 620; United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999).

[8] *See Griffith*, 455 F.3d at 1342.

force" and to require the predicate state statute to contain both physical force and a domestic relationship as elements.[9] This alternate construction would limit the amendment's scope to offenders charged with committing violent physical force against a domestic partner, in violation of a statute that contains both as elements.

Although this interpretation has the consequence of narrowing the scope of the firearm prohibition, it is one that the courts can be expected to follow. The judiciary must determine the meaning of a statute,[10] and its decision-making is a systematic process that cannot be circumvented solely due to policy concerns.[11] Further, the constitutional principle of separation of powers designates the legislature as the appropriate branch to modify statutory language on the basis of policy implications. If advocates against domestic violence want to avoid such a result, then they should mobilize for legislative reform. For the courts, it is better to err on the side of a narrow interpretation. Although this will not resolve every issue that arises under the Lautenberg Amendment, which will remain irreparably unfair and inconsistent in application, it will narrow the scope until Congress clarifies the text or repeals the statute.

Part I examines the enactment of the Lautenberg Amendment and the textual problems that arise from the imprecise draftsmanship. It also sets the scene for questioning the circuit courts' reliance on legislative history and on one senator's misconstrued statements as representative of "Congress's intent." The Eleventh Circuit Court's decision in *United States v. Griffith* establishes a backdrop to examine the two textual provisions, the use of physical force and the domestic relationship requirement, and the resulting problems for the judiciary.

Part II discusses the circuit court split regarding what constitutes "physical force," in order to bring a state predicate offense within the scope of the federal firearm prohibition. This Article examines the mechanisms that the Eleventh, First, and Eighth Circuit Courts used to justify holding that any physical contact constitutes "physical force."[12] It then considers the

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[9] *See* 18 U.S.C. § 921(a)(33)(A).

[10] *See* LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION xix (2006).

[11] *Id.* at 6 (noting that there are "policy-based sources [that] are derived from the Constitution or from existing common law concepts," which are represented by canons of construction, such as the rule of lenity).

[12] *Griffith*, 455 F.3d at 1340-41; United States v. Nason, 269 F.3d 10, 20-21 (1st Cir. 2001); *Smith*, 171 F.3d at 621 n.2.

interpretation by the Fifth, Seventh, and Ninth Circuit Courts,[13] which reads "violent" into the "use of physical force," and argues that this narrow interpretation is a common-sense approach. It is necessary to distinguish physical contact from physical force,[14] and it is supported by a neighboring statute[15] and pertinent legislative history,[16] which the circuit courts have ignored.[17]

Part III challenges the circuit courts' nearly-unanimous interpretation of the domestic relationship provision in the Lautenberg Amendment.[18] It argues that the statutory language requires the predicate state offense to have a domestic relationship as an element, in order to bring the defendant's assault or battery conviction within the scope of the federal firearm ban. This is supported by the plain language of the amendment and

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[13] United States v. Villegas-Hernandez, 468 F.3d 874, 882 (5th Cir. 2006); Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003) (holding that a distinction must be made "between violent and non-violent offense[s]" and that force should have "a meaning in the legal community that differs from its meaning in the physics community"); United States v. Belless, 338 F.3d 1063, 1068-69 (9th Cir. 2003).

[14] *See Flores*, 350 F.3d at 672.

[15] *See* 18 U.S.C. § 924(e) (2000).

[16] *See* 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg); 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

[17] *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

[18] *See* 18 U.S.C. § 921(a)(33)(A) (2000); United States v. Griffith, 455 F.3d 1339, 1346 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007) (holding "a domestic relationship must exist as part of the facts giving rise to the prior offense, but it need not be an element of that offense"); United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); *Belless*, 338 F.3d at 1067; United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1367 (Fed. Cir. 2003); United States v. Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002); United States v. Barnes, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); United States v. Ball, 7 Fed. App'x 210, 213 (4th Cir. 2001), *overruled by* United States v. Hayes, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999); United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999). *Contra* United States v. Hayes, 482 F.3d 749, 752 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608) (holding that a domestic relationship is required as an element of the predicate offense). *Hayes*, the single circuit court case to hold that a domestic relationship is required as a statutory element, *id.*, is discussed at Part III *infra*.

the courts' misplaced justification based on the need for uniformity.[19] Further, the circuit courts' reliance on legislative history[20] is undermined by the rule of lenity, which construes ambiguous language in favor of the defendant.[21] Additionally, Supreme Court precedent requires a categorical approach, considering only the elements of the state offense, which results in a more uniform application of this federal statute.

I. LEGAL BACKGROUND

In 1968, pursuant to its Commerce Clause powers, Congress passed the Gun Control Act, sweeping legislation that prohibits certain individuals from possessing weapons.[22] In 1996, the 104th Congress passed a controversial amendment,[23] the Domestic Violence Offender Gun Ban, which is codified in 18 U.S.C. § 922(g)(9). The purpose of the subsection, also known as the Lautenberg Amendment, is to prohibit anyone convicted of a misdemeanor crime of domestic violence from possessing a firearm.[24]

According to statements on the Senate floor, Congress's primary concern was that, under state criminal laws, domestic violence is a misdemeanor instead of a felony.[25] Senator Lautenberg noted several

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[19] *See Barnes*, 295 F.3d at 1364 (relying on the need for uniformity to justify its holding).

[20] *See Heckenliable*, 446 F.3d at 1052; *Shelton*, 325 F.3d at 562; *White*, 328 F.3d at 1365; *Barnes*, 295 F.3d at 1365; *Kavoukian*, 315 F.3d at 143-44; *Smith*, 171 F.3d at 620; *Meade*, 175 F.3d at 219.

[21] *See* JELLUM & HRICIK, *supra* note 10, at 147.

[22] 18 U.S.C. § 922(g) (2000) (banning individuals such as convicted felons, illegal aliens, and those adjudicated to be mentally incompetent from possessing a firearm).

[23] *See supra* notes 4-5 and accompanying text. *See also* Comment, *Closing the Loopholes in Domestic Violence Laws: The Constitutionality of 18 U.S.C. §922(g)(9)*, 19 PACE L. REV. 445, 446-47 ("The Lautenberg Amendment was overwhelmingly approved by the Senate on September 12, 1996, by a vote of 97-2. Nevertheless, the bill was characterized as controversial because of its content, because it was never debated on the House floor, and because it was just a very small portion of a huge spending bill that was finalized in the early morning hours of September 28, 1996.").

[24] 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

[25] *Id.* ("The fact is that in many places domestic violence is not taken as seriously as other forms of brutal behavior. . . . In over 30 States, even today, beating your wife or your child is a misdemeanor.") Additionally, Senator Wellstone stated: "In all too many cases, unfortunately, if you beat up or batter your neighbor's wife, it is a felony. If you beat

situations where judges handed down light sentences to men who had murdered their wives.[26] He stated: "Two-thirds of domestic violence murders involve firearms. In 150,000 cases of abuse, . . . a gun is present."[27] By passing the amendment, Congress sought to prevent those domestic violence offenders, who are charged with lesser offenses or who plead down to a misdemeanor, from circumventing firearm possession prohibitions that were limited to violent felons.[28]

A. Enacting the Lautenberg Amendment: Try, Try Again

Senator Lautenberg authored the Domestic Violence Offender Gun Ban and attempted to pass the legislation several times.[29] He originally introduced it in March 1996, and after extensive compromise, the Senate adopted the provision as an amendment to an anti-stalking bill.[30] Yet when the bill reached the House of Representatives, the House refused to support it.[31] Senator Lautenberg then sought an alternative route:[32] he reoffered the amendment to be incorporated into the 1997 Treasury, Postal Service and

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up or batter, brutalize your own wife or your own child, it is a misdemeanor." *Id.* (statement of Sen. Wellstone).

[26] *Id.* Senator Lautenberg stated:

> [T]ake the case of a man who tracked down his wife, shot her five times in the face and killed her. The judge in that case gave the man a minimal sentence to be served on weekends. In explaining why he was being so lenient, the judge said the victim provoked her husband by not telling him that she was leaving their abusive marriage.

Id.

[27] *Id.*

[28] *Id.*

[29] 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

[30] 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

[31] *Id.* According to Senator Lautenberg, when the anti-stalking bill reached the House of Representatives, "they . . . let it be known that they will not let this 'no guns for domestic abuser' amendment survive. They will not act on the antistalking bill, and there is no indication that they intended to do so at any time soon." *Id.*

[32] *Id.*

General Government appropriations bill.[33] Addressing the Senate on September 12, 1996, he stated: "Since the stalking bill may not become law, we, therefore, need to pursue another vehicle that has a realistic chance of being enacted, and this is one of the few such vehicles remaining."[34] However, Republican Senator Lott, who was involved with the initial negotiations regarding the language of the bill, removed it from the floor.[35]

During the early morning hours on Saturday, September 28, 1996, Senator Lautenberg initiated his third attempt and ensured that the bill would pass by attaching it to the 1997 Omnibus Consolidated Appropriations Act.[36] The "massive federal budget bill" was considered must-pass legislation to "prevent [a] government 'shut-down.'"[37] Thus, during the "feverish last days of the 104th Congress," Senator Lautenberg's amendment passed both houses, and when President Clinton signed the omnibus appropriations bill, the Domestic Violence Offender Gun Ban finally became law.[38]

B. Resulting Problems for the Judiciary

1. Imprecise Draftsmanship Created Textual Issues

The imprecise draftsmanship of the Lautenberg Amendment has created confusion for the judiciary in two aspects.[39] The first issue is what constitutes "physical force" in the predicate state assault and battery

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[33] 142 CONG. REC. S11872-01.

[34] 142 CONG. REC. S10377-01.

[35] 142 CONG. REC. S11872-01.

[36] *Id.*

[37] Rhodes, *supra* note 4.

[38] *Id.* For a more extensive discussion of the enactment of the Lautenberg Amendment, see Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 574-75 (2003) (noting the "'use of force' requirement was added after midnight on the eve of the bill's passage in the House of Representatives," that "there was little scrutiny of this eleventh-hour revision," and it may have been inserted by opponents of the amendment "to limit the scope of the Lautenberg Amendment to a narrower class of prospective defendants").

[39] *See* United States v. Barnes, 295 F.3d 1354, 1361 (D.C. Cir. 2002) ("Needless to say, if the Congress had more precisely articulated its intention, our task would have been easier.").

statutes. The second issue is whether the Lautenberg Amendment requires the underlying state statute to contain a domestic relationship as an element.

Section 922(g) of the Domestic Violence Offender Gun Ban provides:

> It shall be unlawful for any person—
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> . . . .
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> (9) 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.[40]

The definition provision, § 921(a)(33)(A), states:

> Except as provided in subparagraph (C),[41] the term "misdemeanor crime of domestic violence" means an offense that—
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> (i) is a misdemeanor under Federal, State, or Tribal law; and
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> (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 cohabitating 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.[42]

Three words, "as an element," have created a contradiction in the judiciary's interpretation: it has required physical force, but not an enumerated domestic relationship. Two issues arise from the amendment, one which turns on the words "physical force," and the other which turns on the words "has, as an element."[43]

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[40] 18 U.S.C. § 922(g)(9) (2000).

[41] Subparagraph (C) does not exist.

[42] § 921(a)(33)(A) (emphasis added).

[43] *See id.*

a. What Constitutes "Physical Force"?

The Domestic Violence Offender Gun Ban requires the state misdemeanor conviction to contain "as an element, the use or attempted use of physical force."[44] A defendant's usual contention on appeal is that the state misdemeanor conviction does not qualify as a misdemeanor crime of domestic violence and therefore, does not fall within the federal firearm statute's definition.[45] The defendant argues that the element in the state statute does not qualify as "the use or attempted use of physical force."[46] The predicate state assault and battery statutes contain elements such as: "offensive physical contact,"[47] "physical contact of an insulting or provoking nature,"[48] an act intended to cause pain, injury, or offensive or insulting physical contact,[49] and "unlawfully touch[ing] . . . in a rude, insolent or angry manner."[50] The circuit courts are split as to whether these state statutory elements constitute "physical force."[51] Is any amount of physical force sufficient, or does "physical force" require physical violence?

b. What Does "as an Element" Modify?

The statutory definition of a "misdemeanor crime of domestic violence" states that the state misdemeanor conviction must contain, "as an element, the use or attempted use of physical force . . . committed by" one

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[44] § 921(a)(33)(A)(ii).

[45] *See, e.g.*, United States v. Griffith, 455 F.3d 1339, 1340 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007).

[46] *See, e.g.*, *id.* at 1341.

[47] ME. REV. STAT. ANN. tit. 17-A, § 207 (2006); United States v. Nason, 269 F.3d 10, 11 (1st Cir. 2001).

[48] GA. CODE ANN. § 16-5-23(a)(1) (2006); *Griffith*, 455 F.3d at 1341.

[49] IOWA CODE § 708.1(1) (2005); United States v. Smith, 171 F.3d 617, 621 (8th Cir. 1999).

[50] WYO. STAT. ANN. § 6-2-501 (2006); United States v. Belless, 338 F.3d 1063, 1065 (9th Cir. 2003).

[51] *See Griffith*, 455 F.3d at 1340-41; United States v. Villegas-Hernandez, 468 F.3d 874, 882 (5th Cir. 2006); Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003); *Belless*, 338 F.3d at 1068-69; *Nason*, 269 F.3d at 20-21; *Smith*, 171 F.3d at 621 n.2.

who is in an enumerated domestic relationship.[52] Due to the imprecise drafting of the amendment, it is unclear whether the language "has, as an element" also modifies the domestic relationship requirement.[53] A defendant usually contends that, although he committed assault or battery against a spouse or domestic partner, the relationship status was not an element of the state offense; thus, the state conviction does not qualify as a predicate for the federal firearm statute.[54]

Courts have predominately held that a domestic relationship is not required as an element of the predicate misdemeanor offense.[55] Yet the plain language, the text of similar statutes, Congress's intent, the rule of lenity, and Supreme Court precedent all support rejecting the courts' current application of the domestic relationship requirement and finding that a domestic relationship is a required element of the predicate misdemeanor offense under the Lautenberg Amendment.

2. Unreliable Legislative History

The Lautenberg Amendment's controversial enactment[56] should undermine the reliability of its legislative history, especially Senator Lautenberg's speeches. When interpreting the meaning of a statute, a court always begins with "intrinsic sources," which include the text itself, punctuation, syntax, and cannons of construction.[57] Textualist judges generally will not examine "extrinsic sources," including legislative history, unless they hold that the language itself is absurd or that it is ambiguous—

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[52] 18 U.S.C. § 921(a)(33)(A)(ii) (2000).

[53] *Id.*

[54] *See, e.g.*, *Griffith*, 455 F.3d at 1340, 1345.

[55] *See Griffith*, 455 F.3d at 1346 (holding that "a domestic relationship must exist as part of the facts giving rise to the prior offense, but it need not be an element of that offense"); United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); *Belless*, 338 F.3d at 1067; United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1367 (Fed. Cir. 2003); United States v. Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002); United States v. Barnes, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); *Smith*, 171 F.3d at 620; United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999). *Contra* United States v. Hayes, 482 F.3d 749, 752 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608) (holding that a domestic relationship is required as an element of the predicate offense).

[56] *See supra* notes 4-5 and accompanying text.

[57] JELLUM & HRICIK, *supra* note 10, at 5.

"capable of more than one equally plausible meaning."[58] With respect to the Lautenberg Amendment, the circuit courts purport to be textualists.[59] They have refused to hold that the text of the Lautenberg Amendment is absurd or ambiguous,[60] stating only that the statute "is not a paradigm of precise draftsmanship."[61] Yet the circuit courts have extensively relied on legislative history, especially the statements of Senator Lautenberg.[62]

This extensive reliance on Senator Lautenberg's statements is misplaced. It is undermined by the controversy surrounding the amendment itself and by the enactment process.[63] The Domestic Violence Offender Gun Ban is the product of an aggressive senator, who attached an obscure rider to a desperately-needed appropriations bill.[64] Thus, the courts' decisions, which purport to be based on the "intent of Congress" as a whole, are

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[58] *Id.* at 6-7 (noting that legislative history is the most controversial extrinsic source); *see also* Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 811-12 (1998) (summarizing the arguments in favor of and against the use of legislative history). Judge Kozinski notes that once legislatures realized that courts examine the legislative history for interpretive guidance, "they became somewhat promiscuous in using it as a tool for influencing the interpretive process." *Id.* Justice Scalia led a backlash against the "widespread misuse of legislative history to achieve substantive ends." *Id.* For further information on the textualist methodology, see Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347 (2005).

[59] *See Griffith*, 455 F.3d at 1342 ("The result we reach by applying the plain meaning rule is bolstered" by examining another statutory provision, Congressional intent, and other courts' interpretations.); *Heckenliable*, 446 F.3d at 1052 ("While we recognize the syntax of the statute is imprecise, we do not find its language ambiguous. Thus, we do not resort to legislative history to resolve an ambiguity, but cite to it only to confirm what we have said."); *Barnes*, 295 F.3d at 1362 ("[W]e refer to imprecision (not 'ambiguity') only in connection with the *syntax* of the statute, not with the meaning used"); United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001) ("If statutory language points to a plain and unambiguous meaning, courts are bound to follow . . . . We nonetheless mention two additional facts that confirm the absence of congressional intent [to limit the] . . . construction of the words 'physical force' as used in that statute."); *Smith*, 171 F.3d at 620 ("We find the language of the statute to be unambiguous, and look to the legislative history only to bolster our conclusion.").

[60] *See supra* note 59 and accompanying text.

[61] *Barnes*, 295 F.3d at 1356.

[62] *See supra* note 59 and accompanying text.

[63] *See supra* notes 4-5 and accompanying text.

[64] Rhodes, *supra* note 4.

actually based on the words of a single person, Senator Lautenberg, considered out of context.[65]

Accepting that the circuit courts have used legislative history without holding that the language is ambiguous, there is other pertinent legislative history that undermines the courts' interpretation of the statute. The circuit courts have taken Senator Lautenberg's statements out of context, misconstruing his remarks regarding the effect of the compromise with the Republican Senators.[66] Further, they have examined only Senator Lautenberg's statements, ignoring the pertinent statements of Senator Wellstone, a co-sponsor of the bill.[67] This alternative legislative history undermines the circuit courts' reliance on statements by Senator Lautenberg to "bolster" their holdings.[68]

C. The Eleventh Circuit Court's Decision in *United States v. Griffith*

The most recent case to address both issues related to the Domestic Violence Offender Gun Ban is *United States v. Griffith* from the Eleventh Circuit.[69] In 2000, Jerry Griffith pled guilty to two counts of simple battery for hitting his wife and dragging her across the floor.[70] Two years later, police officers, investigating a fight near a restaurant, noticed the driver of a parked car drinking alcohol.[71] When the officers approached, the driver began to roll forward.[72] The officers stopped the vehicle and restrained the

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[65] *See supra* note 59 and accompanying text.

[66] *See* 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (noting that there were "extensive negotiations with the Republican leadership, including Senator LOTT, Senator CRAIG, and Senator HUTCHISON"); United States v. Nason, 269 F.3d 10, 17 (1st Cir. 2001).

[67] *See* 142 CONG. REC. S10,377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone). *See, e.g.*, United States v. Barnes, 295 F.3d 1354, 1365 (D.C. Cir. 2002) (examining Senator Lautenberg's speeches on the Senate floor and noting that statements by "the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction") (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982)).

[68] *See supra* note 59 and accompanying text.

[69] 455 F.3d 1339, 1339 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007).

[70] *Id.* at 1340.

[71] Brief for Appellee, United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006) (No. 05-12448-HH), 2005 WL 4720729, at *3.

[72] *Id.*

driver and three other occupants, including Griffith.[73] A subsequent search revealed bullet-proof vests, ski masks, binoculars, security-guard badges, and three firearms—one of which was found near Griffith.[74]

Griffith was indicted under 18 U.S.C. § 922(g)(9) for possessing a firearm after having been convicted of a "misdemeanor crime of domestic violence."[75] He entered a conditional guilty plea, preserving the right to appeal the district court's ruling.[76] On appeal, Griffith claimed that his Georgia conviction for simple battery in 2000 did not qualify as a predicate offense for his conviction under the Domestic Violence Offender Gun Ban because it did not meet the definition of a "misdemeanor crime of domestic violence" under § 921(a)(33)(A).[77] He based this contention on two grounds: (1) the Georgia statute required "physical contact of an insulting or provoking nature," which did not rise to the level of "physical force";[78] and (2) the Georgia statute did not require a domestic relationship as an element of the offense.[79]

The Eleventh Circuit upheld his conviction, interpreting that the element "physical contact" in the Georgia statute constituted "physical force," as required by the federal statute.[80] Furthermore, the court held that a domestic relationship is not required as an element of the predicate offense.[81] Instead, the court examined the underlying facts of the misdemeanor conviction, which involved battery against a spouse. Thus, Griffith used "physical force" in a domestic relationship, which meets the

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[73] *Id.*

[74] *Id.* at *4; Brief of Appellant Jerry Griffith, United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006) (No. 05-12448-HH), 2005 WL 4720680, at *3.

[75] Brief for Appellee, United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006) (No. 05-12448-HH), 2005 WL 4720729, at *1.

[76] United States v. Griffith, 455 F.3d 1339, 1340 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007); 18 U.S.C. § 922(g)(9) (2000).

[77] *Griffith*, 455 F.3d at 1340 (referring to the statute at the "Armed Career Criminal Act").

[78] *Id.* at 1341.

[79] *Id.* at 1345.

[80] *Id.* at 1342, 1346.

[81] *Id.* at 1345.

definition in § 921(a)(33)(A).[82] Therefore, the court found that the offense qualified as "a misdemeanor crime of domestic violence" under § 922(g)(9).[83]

Griffith furthered a circuit court split, in which the Eleventh, First, and Eighth Circuits have opposed the Fifth, Seventh, and Ninth Circuits.[84] Although the courts agree that the defendant must have been convicted of violating a state statute that includes "use or attempted use of physical force" as an element,[85] they disagree as to which state statutory elements constitute "physical force."[86]

With respect to the domestic relationship requirement, all circuit courts, save one, have held that a domestic relationship is not required as an element of the underlying state offense.[87] The courts that employ this interpretation have used a fact-specific approach, examining the defendant's conduct in the record below, to determine if the physical force was used in a domestic relationship.[88] This Article examines both the physical force and the domestic relationship requirements.

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[82] *Id.* at 1340, 1345.

[83] *Id.*

[84] *See id.* at 1343-45; United States v. Villegas-Hernandez, 468 F.3d 874, 882 (5th Cir. 2006); Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003); United States v. Belless, 338 F.3d 1063, 1068-69 (9th Cir. 2003); United States v. Nason, 269 F.3d 10, 20-21 (1st Cir. 2001); United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999).

[85] *See Griffith*, 455 F.3d at 1341; *Villegas-Hernandez*, 468 F.3d at 882; *Flores*, 350 F.3d at 669; *Belless*, 338 F.3d at 1068-69; *Nason*, 269 F.3d at 20-21; *Smith*, 171 F.3d at 620.

[86] *See Griffith*, 455 F.3d at 1341-42; *Villegas-Hernandez*, 468 F.3d at 882; *Flores*, 350 F.3d at 672; *Belless*, 338 F.3d at 1068-69; *Nason*, 269 F.3d at 20-21; *Smith*, 171 F.3d at 621 n.2.

[87] *See Griffith*, 455 F.3d at 1346 ("a domestic relationship must exist as part of the facts giving rise to the prior offense, but it need not be an element of that offense"); United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); *Belless*, 338 F.3d at 1067; United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1367 (Fed. Cir. 2003); United States v. Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002); United States v. Barnes, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); *Smith*, 171 F.3d at 620; United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999). *Contra* United States v. Hayes, 482 F.3d 749, 752 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608) (holding that a domestic relationship is required as an element of the predicate offense).

[88] *See Griffith*, 455 F.3d at 1340 (examining state court records to determine that the defendant hit his wife); *Kavoukian*, 315 F.3d 139, 141 (2d Cir. 2002) (examining the plea hearing transcript and the statement of conviction from the defendant's state offense); *see also Barnes*, 295 F.3d at 1357, 1359 (failing to find a relationship in the charging documents,

II. PHYSICAL FORCE REQUIREMENT

Courts have unanimously held that the phrase "has, as an element" applies to the "use of physical force" requirement; however, the courts are split as to which state elements qualify as "use of physical force."[89] The Eleventh Circuit's holding in *United States v. Griffith* demonstrates a broad interpretation of the term "physical force."[90] The predicate offense, a Georgia simple battery statute in section 16-5-23(a),[91] states: "A person commits the offense of simple battery when he or she either: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or (2) Intentionally causes physical harm to another."[92] Griffith was convicted under subparagraph (1).[93]

Griffith's conviction under the Lautenberg Amendment did not turn on his actual conduct (e.g., whether his conduct that led to his simple battery conviction involved physical force),[94] rather, it turned on the elements of the Georgia simple battery statute. The issue was whether the Georgia statutory element, "physical contact of an insulting or provoking nature," qualified as "physical force" to support a conviction under the Domestic Violence Offender Gun Ban.[95]

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but allowing defendant's statement that he shared a child with the victim to qualify as one of the enumerated domestic relationships).

[89] *See Griffith*, 455 F.3d at 1340-41; *Villegas-Hernandez*, 468 F.3d at 882; *Flores*, 350 F.3d at 672; *Belless*, 338 F.3d at 1068-69; *Nason*, 269 F.3d at 20-21; *Smith*, 171 F.3d at 621 n.2.

[90] *Griffith*, 455 F.3d at 1343.

[91] *Id.* at 1340.

[92] GA. CODE ANN. § 16-5-23(a)(1), (2) (2006).

[93] *Griffith*, 455 F.3d at 1341.

[94] *Id.*

[95] *Id.*

A. The Eleventh, First, and Eighth Circuit Courts: "Physical Contact" Necessarily Requires "Physical Force"

In their analyses, the Eleventh, First, and Eight Circuits examined the plain language of the statute.[96] The Eleventh Circuit stated in *Griffith* that "because the straightforward definition of physical force produces 'an entirely plausible result,' the plain language controls."[97] Yet, without holding that the text is ambiguous or absurd, the courts "bolstered"[98] their conclusions by relying on the text of a neighboring statutory provision[99] and legislative history.[100]

1. Plain Language

The Eleventh Circuit sided with the First and Eighth Circuits and held that a predicate state statute, which criminalizes "offensive physical contact," qualifies as "physical force."[101] The Eleventh and First Circuits relied on the plain language of the statute and cited Black's Law Dictionary,[102] which defines "physical force" as "[p]ower, violence, or pressure directed against a person . . . consisting in a physical act."[103] The *Griffith* court held that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—without exerting some level of physical force."[104] Therefore, the Georgia statutory element, "physical contact of an insulting or provoking nature," qualified as "physical force."[105]

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[96] *Id.* at 1342; United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001); United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999).

[97] *Griffith*, 455 F.3d at 1342 (quoting *Nason*, 296 F.3d at 16).

[98] *Griffith*, 455 F.3d at 1342; *Smith*, 171 F.3d at 620.

[99] *Griffith*, 455 F. 3d at 1342; *Nason*, 269 F.3d at 16.

[100] *Nason*, 269 F.3d at 16-17.

[101] *Griffith*, 455 F.3d at 1341 (citing *Nason*, 269 F.3d at 20-21 and *Smith*, 171 F.3d at 621 n.2).

[102] *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 16.

[103] BLACK'S LAW DICTIONARY 873 (8th ed. 1999).

[104] *Griffith*, 455 F.3d at 1342.

[105] *Id.*

Similarly, in *United States v. Nason*, the First Circuit examined a Maine assault statute, which provides that one is guilty of a misdemeanor if "he intentionally, knowingly or recklessly causes bodily injury . . . [or] offensive physical contact to another."[106] The court noted that common sense requires accepting that, in order to "cause physical injury" or "offensive physical contact," the "force necessarily must be physical in nature."[107] Thus, physical contact "invariably emanate[s] from the application of some quantum of physical force, that is, physical pressure exerted against the victim."[108]

The Eighth Circuit first examined this issue in 1999 in *United States v. Smith*.[109] During an argument, Smith shot and wounded the mother of his child.[110] He pled guilty to simple misdemeanor assault.[111] The Iowa code, section 708.1, provides two variants of assault:

> (1) Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another . . . .
>
> (2) Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive . . . .[112]

The state convicted Smith under subparagraph (1),[113] which served as the predicate offense for § 922(g)(9).[114] The court stated that if Smith had pled guilty to subparagraph (2), then he would not have been guilty of violating § 922(g)(9) because "placing another in fear of imminent physical contact" did not require "physical force."[115] Although subparagraph (1) also

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[106] *Nason*, 269 F.3d at 18.

[107] *Id.* at 20.

[108] *Id.*

[109] United States v. Smith, 171 F.3d 617 (8th Cir. 1999).

[110] *Id.* at 619.

[111] *Id.*

[112] IOWA CODE ANN. § 708.1 (West 2005).

[113] *Smith*, 171 F.3d at 621.

[114] 18 U.S.C. § 922(g)(9) (2000).

[115] *Smith*, 171 F.3d at 620; 18 U.S.C. § 921(a)(33)(A) (2000).

contains contact that is merely insulting or offensive, the court stated that "such physical contact, by necessity, requires physical force to complete."[116] Thus, the simple misdemeanor assault constituted a "misdemeanor crime of domestic violence."[117]

2. Neighboring Statutory Provision

In *Griffith*, the Eleventh Circuit supported its broad interpretation of "physical force" by examining § 922(g)(8), a provision in the Gun Control Act which "immediately precedes" § 922(g)(9).[118] Section 922(g)(8)(C)(ii) criminalizes possession of a firearm, if a person "is subject to a court order that . . . explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury."[119] The Eleventh Circuit reasoned that the inclusion of the limiting language, "reasonably expected to cause bodily injury," in subparagraph (8), but not in subparagraph (9), "speaks loudly and clearly" that Congress did not want to limit the physical force requirement.[120] Thus, the court held that a predicate "misdemeanor crime of domestic violence" includes a misdemeanor that involves *any* type of physical force, regardless of whether it "would reasonably be expected to cause bodily injury."[121] Therefore, an element in an assault or battery statute that includes language amounting to physical touching or physical contact will constitute "physical force" and potentially bring the statute within the reach of the Lautenberg Amendment. [122]

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[116] *Smith*, 171 F.3d at 621 n.2.

[117] *Id.*

[118] United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007). The First Circuit in *Nason* also relied on § 922(g). United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001); *see* 18 U.S.C. § 922(g)(8), (9).

[119] *Griffith*, 455 F.3d at 1343; 18 U.S.C. § 922(g)(8)(C)(ii).

[120] *Griffith*, 455 F.3d at 1342.

[121] *Id.* at 1342-43; *see also Nason*, 269 F.3d at 16-17. The First Circuit applied the Rule of Surplusage ("a statute must, if possible, be construed in such fashion that every word has some operative effect") to hold that the additional clause in § 922(g)(8) cannot be dismissed as "mere surplusage." *Nason*, 269 F.3d at 16. Thus, the absence of qualifying language in § 922(g)(9) is a "clear signal" that Congress deliberately acted to exclude it and intended to include all types of physical force. *Nason*, 269 F.3d at 16.

[122] To fall within the reach of the amendment, the physical contact still has to have been committed against a person with whom the actor has a domestic relationship.

3. Legislative History

Although the Eleventh Circuit did not expressly consider legislative history to support its decision, it extensively relied on the First Circuit's decision in *United States v. Nason*.[123] In *Nason*, the First Circuit cited legislative history to support finding that Congress did not intend to limit the statute's applicability to instances where the defendant used force that could result in physical injury.[124] On the Senate floor, Senator Lautenberg commented:

> The revised language includes a new definition of the crimes for which the gun ban will be imposed. Under the original version, these were defined as crimes of violence against certain individuals, essentially family members. Some 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 of covered crimes that is more precise, and probably broader.
>
> [T]he final agreement . . . is an improvement over the earlier version, which did not explicitly include within the ban crimes involving an attempt to use force, or the threatened use of a weapon, if such an attempt or threat did not also involve actual physical violence.[125]

The First Circuit concluded that Senator Lautenberg's statements plainly showed that Congress's principal reason for substituting "crimes involving the use or attempted use of physical force" for "crimes of violence" in § 921(a)(33)(A)[126] was to "broaden the spectrum of predicate offenses covered by the statute."[127] Therefore, the court believed that the substitution expanded the statute to predicate offenses that include the use

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[123] *Griffith*, 455 F.3d at 1341-42; *Nason*, 269 F.3d 10.

[124] *Nason*, 269 F.3d at 17.

[125] *Id.* (quoting 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg)).

[126] *See* 18 U.S.C. § 921(a)(33)(A)(ii) (2000) ("[An offense that] has, as an element, the use or attempted use of physical force.").

[127] *Nason*, 269 F.3d at 17.

of any physical force, regardless of whether it resulted in bodily injury or risk of harm.[128]

B. The "Use of [Violent] Physical Force"

1. Distinction Between Physical Force and Physical Contact

The Eleventh, First, and Eighth Circuits ignored common sense when they held that a predicate state statute that contains as an element "offensive physical contact" qualifies as "physical force."[129] Physical contact may involve some level of force, but it does not rise to the level of physical violence, and therefore, it should not fall within the scope of the Lautenberg Amendment. Instead, a better interpretation is that "physical force" means the "use or attempted use of [violent] physical force."[130] This interpretation avoids collapsing the distinction between physical force and physical contact.

The Fifth,[131] Seventh,[132] and Ninth Circuits[133] have held that "physical force" is more than "mere impolite behavior"[134] or "physical contact";[135] rather, the force must be violent in nature.[136] For example, in *United States v. Belless*, the Ninth Circuit considered the requisite level of force in a predicate state statute.[137] Robert Belless was convicted of assault

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[128] *Id.* at 17-18.

[129] *See* United States v. Griffith, 455 F.3d 1339, 1340-41 (11th Cir. 2006) *cert. denied*, 127 S. Ct. 2028 (2007); *Nason*, 269 F.3d at 20-21; United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999).

[130] 18 U.S.C. § 921(a)(33)(A)(ii) (2000); *see also* Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003).

[131] United States v. Villegas-Hernandez, 468 F.3d 874, 882 (5th Cir. 2006) (holding that the Texas statute, which requires that the defendant "intentionally, knowingly, or recklessly cause bodily injury to another," can be violated through means other than the actual, attempted, or threatened "use of physical force."). Thus, the Texas statute did not qualify as a "crime of violence" under 18 U.S.C. § 16(a). *Id.*

[132] *Flores*, 350 F.3d at 672.

[133] United States v. Belless, 338 F.3d 1063, 1068-69 (9th Cir. 2003).

[134] *Id.* at 1068.

[135] *Flores*, 350 F.3d. at 673.

[136] *Id.*

and battery for "grabbing [his wife's] chest/neck area and pushing her against her car in an angry manner."[138] Six years later, he entered a conditional plea of guilty for possession of a firearm, in violation of 18 U.S.C. § 922(g)(9).[139] The Wyoming statute, section 6-2-501(b), states: "A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another."[140]

The Ninth Circuit distinguished "physical force" from "touching" and reversed the conviction for firearm possession.[141] The court noted that, although the laws of physics require that "[a]ny touching constitutes 'physical force,'" it stated that "our purpose . . . is to assign criminal responsibility, not to do physics."[142] It reasoned that the federal statute refers to physical force that "is not *de minimis*."[143] Relying on the doctrine of *noscitur a sociis*—"the meaning of doubtful words may be determined by reference to associated words and phrases"—the Ninth Circuit examined "physical force" in context.[144] The federal statute defines a "misdemeanor crime of domestic violence" as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon."[145] Possession of a deadly weapon is a "gravely serious threat to apply physical force."[146]

Wyoming's battery statute, which criminalizes the unlawful touching of "another in a rude, insolent or angry manner,"[147] is broadly inclusive. It addresses behavior that is "minimally forcible, though

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[137] *Belless*, 338 F.3d at 1068-69.

[138] *Id.* at 1065.

[139] *Id.*

[140] WYO. STAT. ANN. § 6-2-501 (2006).

[141] *Belless*, 338 F.3d at 1068, 1070.

[142] *Id.* at 1067-68.

[143] *Id.* at 1068.

[144] *Id.*

[145] 18 U.S.C. § 921(a)(33)(A)(ii) (2000).

[146] *Belless*, 338 F.3d at 1068.

[147] WYO. STAT. ANN. § 6-2-501 (2006).

ungentlemanly."[148] The Ninth Circuit explained that Wyoming criminalizes "the ungentlemanly act of hollering in anyone's face, . . . [which] may be characterized as 'insolent,'" as well as jabbing a finger in someone's chest, which, according to the court, "may be fairly characterized as 'rude.'"[149] The court noted that the likely purpose of the battery statute is to grant police the authority to arrest individuals in such confrontations, in order to insure against the risk that such rudeness will "escalate into violence."[150] However, "physical force" under the federal statute "means the *violent* use of force against the body of another individual."[151] The Wyoming statute includes behavior that is less than violent; thus, it is too broad to qualify as the predicate misdemeanor crime of domestic violence.[152]

The Seventh Circuit, in *Flores v. Ashcroft,* reached a similar conclusion.[153] Flores attacked and beat his wife, and he pled guilty to a misdemeanor battery.[154] The Indiana battery statute states that a person is guilty of a misdemeanor if the individual "knowingly or intentionally touches another person in a rude, insolent, or angry manner . . . [and] it results in bodily injury to any other person."[155] Thus, there are three elements in the state statute: intentional touching, a rude or angry manner, and bodily injury.[156] The court observed that the statute does not require a high degree of either touching or injury; rather, any contact, including a "snowball, spitball, or paper airplane," and any injury, including a bruise or physical pain, will suffice.[157]

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[148] *Belless*, 338 F.3d at 1068.

[149] *Id.* (quoting WYO. STAT. ANN. § 6-2-501 (2006)).

[150] *Id.*

[151] *Id.* at 1068 (emphasis added).

[152] *Id.* at 1068-69.

[153] Flores v. Ashcroft, 350 F.3d 666, 668-69, 672 (7th Cir. 2003) (finding in an immigration law case that an Indiana battery conviction did not serve as a predicate offense justifying deportation for "the use, attempted use, or threatened use of physical force against the person or property of another"). The Eleventh Circuit criticized *Flores* in *United States v. Griffith*: "If Congress had meant to say 'violent physical force' it easily could have done so." 455 F.3d 1339, 1345 (11th Cir 2006), *cert. denied*, 127 S. Ct. 2028 (2007).

[154] *Flores*, 350 F.3d at 669.

[155] IND. CODE ANN. § 35-42-2-1 (West 2006).

[156] *Flores*, 350 F.3d at 669.

[157] *Id.* at 669-70.

The Seventh Circuit reasoned: "Every battery entails a touch, and it is impossible to touch someone without applying *some* force, if only a smidgeon."[158] The court explained: "To avoid collapsing the distinction between violent and non-violent offenses, we must treat the word 'force' as having a meaning in the legal community that differs from . . . the physics community."[159] Force must be "violent in nature," either intended or likely to cause bodily injury.[160] Thus, it is necessary to distinguish between physical force and physical contact.[161] The court clarified: "An offensive touching is on the 'contact' side of this line, a punch on the 'force' side; and even though we know that Flores's *acts* were on the 'force' side of this legal line, the elements of his *offense* are on the 'contact' side."[162]

Although the discussion of a "snowball, spitball, or paper airplane"[163] seems improper in the context of domestic violence, it demonstrates the point that not every assault or battery merits forever prohibiting the offender from carrying a firearm. Whether a defendant's assault or battery conviction falls within the scope of the Lautenberg Amendment is not determined by the severity of his actual conduct, but by the language of the element in the predicate state statute.[164]

Other courts should follow the Fifth, Seventh, and Ninth Circuit Courts[165] and limit the scope of the Lautenberg Amendment by strictly interpreting the definition of a "misdemeanor crime of domestic violence."[166] Only state statutes that have "as an element the use or attempted use of [violent] physical force" should qualify.[167] This narrow

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[158] *Id.* at 672.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* (emphasis added).

[163] *See id.* at 669.

[164] *See* 18 U.S.C. § 921(a)(33)(A)(i), (ii) (2000) ("[An offense that] has, as an element, the use or attempted use of physical force . . . .").

[165] United States v. Villegas-Hernandez, 468 F.3d 874, 882 (5th Cir. 2006); *Flores*, 350 F.3d at 672; United States v. Belless, 338 F.3d 1063, 1068-69 (9th Cir. 2003).

[166] 18 U.S.C. § 922(g)(8)(C) (2000).

[167] *See supra* note 164.

interpretation avoids collapsing the distinction between physical force and physical contact.[168]

2. Support from a Different Neighboring Provision

A neighboring statute, 18 U.S.C. § 924(e), supports the interpretation that "use or attempted use of physical force"[169] requires violent physical force.[170] Further, the Eleventh Circuit's reliance on the neighboring provision, § 922(g)(8), is misplaced.[171] Two canons of construction support this argument. First, the "identical words presumption" mandates that "identical words used in different parts of the same act are intended to have the same meaning."[172] Second, "*in pari material*" requires courts to give the same meaning to words chosen by the legislature to regulate similar subjects.[173]

The Lautenberg Amendment is codified in § 922(g), which prohibits a person convicted of a misdemeanor crime of domestic violence from possessing a firearm.[174] Section 921(a)(33)(A) defines "the term 'misdemeanor crime of domestic violence.'"[175] A closely related provision, 18 U.S.C. § 924(e), provides for a comparison of statutory language.[176] Section 924(e) provides sentencing guidelines for anyone who violates § 922(g) and has "three previous convictions . . . for a violent felony or serious drug offense."[177] Section 924(e)(2)(B) defines "violent felony" as any crime punishable by imprisonment for more than a year that:

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[168] *See Flores*, 350 F.3d at 672.

[169] 18 U.S.C. § 921(a)(33)(A).

[170] 18 U.S.C § 924(e)(2)(B)(ii) (2000).

[171] *See* United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007); 18 U.S.C. § 922(g)(8)(C).

[172] JELLUM & HRICIK, *supra* note 10, at 6, 169 (quoting U.S. v. Cleveland Indians Baseball, 532 U.S. 200, 213 (2001)).

[173] *Id.* at 172.

[174] 18 U.S.C. § 922(g)(9).

[175] 18 U.S.C. § 921(a)(33)(A) (2000).

[176] 18 U.S.C. § 924(e) (2000).

[177] *Id.*

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .[178]

Section 924(e)(2)(B) is a disjunctive provision; "serious risk of physical injury to another" is not required.[179] Thus, "use, attempted use, or threatened use of physical force" alone will constitute a "violent felony."[180] The analysis is as follows: "felony" means a crime punishable by more than a year;[181] "violence" means "the use, attempted use, or threatened use of force," *or* a named offense, such as burglary, *or* conduct that poses a serious "risk of physical injury" to others.[182] Furthermore, the use or attempted use of physical force will singularly constitute a "violent felony" if it is punishable by more than a year in prison;[183] thus, the use of physical force involves violence. If punishable by more than a year, then it is a "violent felony," but if punishable by less than a year, then it is a "violent misdemeanor." Therefore, if violent force is used to commit a misdemeanor in a domestic relationship, then it is a "misdemeanor crime of domestic violence."[184]

Clearly, §§ 924 and 921 use the same language to *define* terms.[185] Section 924 is persuasive because the statutory language so closely mirrors § 921 with the text "has as an element the use, attempted use, or threatened use of physical force."[186] This provision and the two canons of construction, mentioned above, support the conclusion that a misdemeanor crime of

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[178] *Id.* § 924(e)(2)(B)(i), (ii).

[179] *Id.*

[180] *Id.*

[181] *Id.* § 924(e)(2)(B).

[182] *Id.* § 924(e)(2)(B)(i), (ii).

[183] *Id.* § 924(e)(2)(B).

[184] 18 U.S.C. § 921(a)(33)(A) (2000).

[185] 18 U.S.C. § 924(e)(2)(B)(i), (ii); 18 U.S.C. § 921(a)(33)(A).

[186] 18 U.S.C. § 924(e)(2)(B)(i); 18 U.S.C. § 921(a)(33)(A).

domestic violence should be interpreted to require "as an element, the use or attempted use of [violent] physical force."[187]

The Eleventh Circuit relied on § 922(g)(8) to "bolster" its holding.[188] Section 922(g)(8)(C)(ii) criminalizes possession of a firearm if a person "is subject to a court order that . . . explicitly prohibits the use, attempted use, or *threatened use* of physical force against such intimate partner or child that would reasonably be expected to *cause bodily injury*."[189] The Eleventh Circuit reasoned that, since Congress excluded the limiting language, "reasonably expected to cause bodily injury," from subparagraph (9), then it did not intend to narrow the requirement of "physical force" to violent physical force when it defined "misdemeanor crime of domestic violence."[190]

The Eleventh Circuit neglected to consider that subparagraph (8) applies to prohibit possession of a firearm when a person has a court restraining order against them.[191] Congress limited the application of this section to instances where the court finds that the person is a "credible threat to the physical safety of such intimate partner or child," or when the court order explicitly prohibits "the use, attempted use, or threatened use of physical force" against an intimate partner or child.[192] Section 921(a)(33)(A) does not include "threatened use" in the physical force provision; rather, it is limited to "use or attempted use of physical force."[193] As such, it is logical for Congress to include limiting language in subparagraph (8) because a finding that the person is a "credible threat" to another's physical safety cannot be based merely on any threat (e.g., threatening to require a spouse or child to move out of the house, to cut off financial support, to destroy a beloved item, or to take custody of the children); rather, it must be a threat that "would reasonably be expected to

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[187] 18 U.S.C. § 921(a)(33)(A).

[188] United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007) ("The result we reach by applying the plain meaning rule is bolstered by a look at a close neighbor of the statutory provision we are interpreting.").

[189] *Id.* at 1342; 18 U.S.C. § 922(g)(8)(C)(ii) (2000) (emphasis added).

[190] *Griffith*, 455 F.3d at 1342.

[191] *See* 18 U.S.C. § 922(g)(8)(A), (B).

[192] *Id.* § 922(g)(8)(C)(i), (ii).

[193] 18 U.S.C. § 921(a)(33)(A) (2000).

cause bodily injury."[194] Section 921(a)(33)(A), in contrast, limits a conviction for threatening behavior to the "threatened use of a deadly weapon."[195] Thus, they are not as closely related as the Eleventh Circuit Court indicated.[196]

Although § 922(g)(8) may "immediately precede" § 922(g)(9),[197] a "misdemeanor crime of domestic violence" is actually defined in § 921(a)(33)(A), which is the statutory provision containing the language "the use or attempted use of physical force."[198] Further, § 924, similar to § 921, is a definitional provision; by contrast, § 922(g)(8) is not a statutory definition.[199] Consequently, the statutory provision in § 924(e) is more determinative of this issue than § 922(g)(8). The Eleventh Circuit gave weight to statutory language that was *not* used: the modifying clause in § 922(g)(8), "reasonably expected to cause bodily injury."[200] Instead, the circuit courts should give substantial weight to what is being defined by the same language—"violence."[201] Thus, the circuit courts should hold that a misdemeanor crime of domestic violence requires the "use or attempted use of [violent] physical force."

3. Misconstrued and Ignored Legislative History

The circuit courts, in considering Senator Lautenberg's statements on the Senate floor, have misconstrued Congress's purpose for using the term "physical force." Further, the courts have entirely ignored statements by Senator Wellstone, a co-sponsor of the bill. The legislative history of the Lautenberg Amendment illustrates that Congress changed the bill's

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[194] 18 U.S.C. § 922(g)(8).

[195] 18 U.S.C. § 921(a)(33)(A).

[196] United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007).

[197] 18 U.S.C. § 922(g)(8), (9); *Griffith*, 455 F.3d at 1342; *see also* United States v. Nason, 269 F.3d 10, 16 (1st Cir. 2001).

[198] 18 U.S.C. § 921(a)(33)(A).

[199] 18 U.S.C. § 924(e) (2000); 18 U.S.C. § 921(a)(33)(A); *cf.* 18 U.S.C. § 922(g)(8) (2000).

[200] 18 U.S.C. § 922(g)(8).

[201] 18 U.S.C. § 921(a)(33)(A) (defining "misdemeanor crime of domestic violence"); 18 U.S.C. § 924(e)(2)(B) (defining "violent felony").

language to ensure that it encompassed both actual violence and attempted violence.[202] The First Circuit Court in *Nason*,[203] which the Eleventh Circuit relied on in *Griffith*,[204] reasoned that Congress's removal of the term "crime of violence," and substitution with the language "crimes involving the use or attempted use of physical force," supported finding that Congress intended a broad application to predicate offenses.[205]

Notably, the First Circuit omitted the last sentence of Senator Lautenberg's comments on the change in statutory language.[206] The Senator went on to state:

> This is an improvement over the earlier versions, which did not explicitly include within the ban[,] crimes involving an attempt to use force . . . if such an attempt or threat did not also *involve actual physical violence*. In my view, anyone who *attempts or threatens violence* against a loved one has demonstrated that he or she poses an unacceptable risk, and should be prohibited from possessing firearms.[207]

As a result of legislative compromise, Congress replaced the term "violence" because of the "far-fetched" concern[208] that it would only include predicate crimes that involved "actual physical violence."[209] It substituted the term "use or attempted use of physical force," in order to include predicate offenses that involved "attempt[ed] violence."[210] "[U]se of physical force" still means "violence," and "attempted use of physical force" means "attempted violence." The First Circuit Court misinterpreted

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[202] 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

[203] United States v. Nason, 269 F.3d 10, 16-17 (1st Cir. 2001).

[204] United States v. Griffith, 455 F.3d 1339, 1342-43 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007).

[205] *Nason*, 269 F.3d at 17-18.

[206] *Id.* at 17.

[207] 142 CONG. REC. S11872-01, (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (emphasis added).

[208] *Id.*

[209] *Id.*

[210] *Id.*; *see also* 18 U.S.C. § 921(a)(33)(A)(i), (ii) (2000).

the legislative history by focusing on the expansion of crimes, yet missing the mark.[211] Congress did not intend the Lautenberg Amendment to apply to all assaults and batteries committed in a domestic relationship. The expansion of crimes was intended to reach domestic violence offenders, who attempted violence, but were unsuccessful.

Further, legislative history demonstrates that Congress chose the term "physical force" because it believed this term was narrower than "violence."[212] The fact that Congress substituted the text because "the term crime of violence was too broad" should direct the circuit courts to interpret the language narrowly.[213] The First Circuit Court misconstrued Senator Lautenberg's statements[214] by focusing on one comment: "I did agree to a new definition of covered crimes that is more precise, and probably broader."[215] A reasonable reading of the legislative history shows that Senator Lautenberg was referring to the addition of "attempted use of physical force," which broadens the scope to include attempted violence. Congress chose the term "physical force" because it wanted to preclude certain instances, such as "cutting up a credit card with a pair of scissors,"[216] and to limit the scope of the statute to acts of *physical* violence, not just any violence.

Considering that statutes are usually the result of legislative compromise, courts should examine what the legislature intended to accomplish.[217] In this instance, the operative word is "violence." Senator

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[211] *See* United States v. Nason, 269 F.3d 10, 17-18 (1st Cir. 2001).

[212] *See* 142 CONG. REC. S11872-01, (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) ("Some argued that the term crime of violence was too broad . . . . Although this concern seemed far-fetched to me, I did agree to a new definition of covered crimes that is more precise, and probably broader.").

[213] *See id.*

[214] *Nason*, 269 F.3d at 17.

[215] 142 CONG. REC. S11872-01, (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

[216] *Id.*

[217] ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 30 (2002) ("The need to compromise in a legislative body is the heart of the legislative process. Bills, for the most part, cannot become laws without compromise."). Senator Lautenberg stated: "The compromise that we reached was acceptable to all involved, even if none of us was entirely happy." 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

Lautenberg used it four times in his discussion of the statutory change.[218] Further, the term that the statute seeks to define is "domestic *violence*."[219] The term has been coined and predominately used to promote awareness of battered women in society, but the word "violence" still has legal meaning.

It is also relevant that the circuit courts have entirely ignored the statements of Senator Wellstone, who also spoke on the Senate floor regarding the Domestic Violence Offender Gun Ban.[220] He stated:

> [T]his very important piece of legislation . . . would prohibit the possession of a firearm by someone who has been convicted of an act of domestic *violence*. . . . In all too many cases, unfortunately, if you beat up or batter your neighbor's wife, it is a felony. If you beat up or batter, brutalize your own wife or your own child, it is a misdemeanor. . . . What [we are] trying to do is plug this loophole and prohibit someone convicted of domestic abuse, whether felony or misdemeanor, of purchasing a firearm. For example, in my State of Minnesota, an act of domestic violence is not characterized as a felony unless there is permanent physical impairment, the use of a weapon, or broken bones. . . . We are talking about *significant violence*. For any Senator who says that we do not want to prohibit any law-abiding citizen from purchasing a gun, I respond that we are not talking about law-abiding citizens. We are talking about citizens who have been convicted of an *act of violence* against a spouse or child . . . . [B]y adopting this amendment, [we] will be saying three things. We will be saying we will not tolerate this *violence*; we will not ignore this *violence*; and we will no longer say that it is someone else's responsibility.[221]

Senator Wellstone's statements make it clear that the Lautenberg Amendment applies to individuals convicted of an act of violence in a domestic relationship.[222]

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[218] 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

[219] 18 U.S.C. § 921(a)(33)(A) (2000) (emphasis added).

[220] 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Wellstone).

[221] *Id.* (emphasis added).

[222] *See id.*

The Eleventh, First, and Eighth Circuits' interpretation of "physical force" to mean "physical contact"[223] ignores common sense. Physical contact, even if it is insulting or offensive, may necessarily involve "some force," but it is not the level of force rising to violence. The Eleventh Circuit, in *Griffith*, accorded undue weight to a neighboring statute, which is not as closely related to the definition of "misdemeanor crime of domestic violence" as another statute that defines "violent felony."[224] Further, the Eleventh Circuit Court relied on the First Circuit Court, which misconstrued the legislative history, inappropriately focusing on one senator's interpretation of the change in statutory language.[225] The circuit courts have failed to consider another legislator's statements on the Senate floor. The plain meaning of the statute, neighboring provisions, and the legislative history support a narrow interpretation of physical force. To carry out congressional intent in a common sense approach, the courts should hold that the "use of physical force" means "the violent use of physical force," which would narrow the scope of the Lautenberg Amendment to predicate offenses that involved domestic *violence*.[226]

III. DOMESTIC RELATIONSHIP REQUIREMENT

The second issue created by the imprecise drafting of the Lautenberg Amendment turns on the domestic relationship requirement. Until recently, the circuit courts considering this issue have unanimously held that the triggering state crime does not need to have a domestic relationship as an element.[227] The Fourth Circuit, in *United States v. Hayes*,

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[223] *See* United States v. Griffith, 455 F.3d 1339, 1340-41 (11th Cir. 2006) *cert. denied*, 127 S. Ct. 2028 (2007); United States v. Nason, 269 F.3d 10, 20-21 (1st Cir. 2001); United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999).

[224] *See Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 16.

[225] *Id.*

[226] *See* 18 U.S.C. § 921(a)(33)(A) (ii) (2000).

[227] *Griffith*, 455 F.3d at 1346 ("[A] domestic relationship must exist as part of the facts giving rise to the prior offense, but it need not be an element of that offense."); United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1367 (Fed. Cir. 2003); United States v. Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002); United States v. Barnes, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); United States v. Ball, 7 Fed. App'x 210, 213 (4th Cir. 2001), *overruled by* United States v. Hayes, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); *Smith*, 171 F.3d at 620; United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999).

created a definitive circuit split, standing as the sole court to hold that a domestic relationship is required as an element.[228] The Supreme Court will resolve this split in the upcoming term when it reviews *Hayes*.

In *Hayes*, what is most notable is not simply the conclusion that the Fourth Circuit reached, but the court's systematic approach. [229] The Fourth Circuit is one of few courts to independently analyze the issue, reevaluating its 2001 decision in United States v. Ball.[230] It began with the text, applied canons of construction, and concluded that the legislative history was "unreliable."[231]

By comparison, the other circuit courts confronted the imprecise drafting by examining the text, refusing to apply canons of construction,[232] and holding that statements by the bill's sponsor definitively resolved any possible ambiguity.[233] The courts often perfunctorily dismissed other considerations, pausing only to point out that sister circuits had already decided the appropriate interpretation of the federal statute.[234] For example,

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[228] 482 F.3d 749, 752 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[229] *Id* at 751 (stating that the issue is "a pure question of statutory interpretation.").

[230] United States v. Ball, 7 Fed. App'x 210, 213 (4th Cir. 2001) (holding that the federal statute does not require a domestic relationship as an element). The Fourth Circuit in *Hayes* noted that *Ball* was not controlling precedent because its circuit court rules "disfavor[]" unreported decisions, yet the court explicitly stated that "*Ball* was not correctly decided." *Hayes*, 482 F.3d at 752 n.7.

[231] *Hayes*, 482 F.3d at 752, 758 (stating that "there are clear indicia that the available legislative history is an unreliable guide to Congress's intent.").

[232] *See Barnes*, 295 F3d at 1360, 1366 (refusing to apply the rule of lenity or the rule of the last antecedent); *Heckenliable*, 446 F.3d at 1052 n.9; *Kavoukian* 315 F.3d at 144; *Meade*, 175 F.3d at 222.

[233] See United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003) (quoting *Kavoukian*, 315 F.3d at 143).

[234] *See e.g.*, United States v. White, 328 F.3d 1361,1367 (Fed. Cir. 2003) (stating that "petitioner offers us no reason why the consistent interpretation of these five other circuits is incorrect."); United States v. Griffith, 455 F.3d 1339,1346 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007); *Heckenliable*, 446 F.3d at 1049; *Barnes*, 295 F.3d at 1362 (pointing out that "the district court as well as every other court that has considered the issue" had held that only one element is required); *Kavoukian*, 315 F.3d at 142 (stating: "Although we previously have not had occasion to address this question, several other circuits have considered it, and all have agreed . . . ."); *see also Hayes*, 482 F.3d at 760 (Williams, J. dissenting) (stating that "[i]n ruling as we do today, we are not *in* the minority on this issue, we *are* the minority. The nine circuits that have considered the question in a published opinion have uniformly rejected the interpretation advanced by the majority.").

the Ninth Circuit stated that the defendants' argument for a different interpretation was "not so compelling as to persuade us to depart from the views of all the other circuits to rule on the issue."[235]

This results-oriented reasoning is a common denominator in the circuit courts' decisions.[236] Although initial resolution of the issue hinged on pure statutory analysis,[237] this eroded as circuits began to fall in line behind one another. For example, the Eleventh Circuit, in *United States v. Chavez*, devoted only one paragraph to consideration of whether the defendant's predicate offense fell within the federal firearm prohibition, simply citing the Eighth Circuit Court's 1999 decision in *United States v. Smith*.[238] Five other circuits then followed along, citing *Chavez* to support their holdings.[239] When the Eleventh Circuit reviewed the issue again in *United States v. Griffith*, it dismissed the defendant's claim that a domestic relationship is required as an element by citing, without analysis, the courts that relied on *Chavez* and the courts that reached the same conclusion as that of *Chavez*.[240] Thus, in many of the more recent decisions, the circuit courts appeared to have started with the premise that, since other circuits have unanimously agreed, their interpretation must be correct. Although precedent from other circuits is persuasive, if the courts had independently analyzed the plain language, then they may have reached a different conclusion, as the Fourth Circuit did in *Hayes*.[241]

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[235] United States v. Belless, 338 F.3d 1063,1067 (9th Cir. 2002).

[236] *See Griffith*, 455 F.3d at 1345-46 (noting that four other circuits had followed its initial decision in United States v. Chavez, 204 F.3d 1305 (11th Cir. 2000) and that "[n]o circuits have gone the other way.").

[237] *See, e.g.*, United States v. Meade, 175 F.3d 215, 218-21 (1st Cir. 1999); United States v. Smith, 171 F.3d 617, 620-21 (8th Cir. 1999).

[238] *Chavez*, 204 F.3d at 1313-14 (citing *Smith*, 171 F.3d at 620).

[239] *Heckenliable*, 446 F.3d at 1049 n.2; United States v. Shelton, 325 F.3d 553, 562 n.12 (5th Cir. 2003); *Belless*, 338 F.3d at 1066 n.6; *Kavoukian*, 315 F.3d at 142. The Fourth Circuit's original decision in *United States v. Ball* also cited the Eleventh Circuit, but this was later overruled in *United States v. Hayes*. United States v. Ball, 7 Fed. Appx. 210, 213 (4th Cir. 2001), *overruled by* United States v. Hayes, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); *Hayes*, 482 F.3d at 752 n7.

[240] *Griffith*, 455 F.3d at 1345-46.

[241] *Hayes*, 482 F.3d 749.

Section 921(a)(33)(A), which defines "misdemeanor crime of domestic violence," states:

> [T]he term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal or State 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 cohabitating 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.[242]

In *Griffith*, one of the defendant's main contentions was that his Georgia simple battery conviction did not qualify as a predicate offense under the Lautenberg Amendment because the misdemeanor lacked a domestic relationship as an element.[243] The Eleventh Circuit held that, "while the domestic nature of the relationship must be a fact, it need not be an element of the prior offense."[244] Since Griffith had committed battery against his spouse, which qualified as one of the enumerated domestic relationships, he fell within the scope of the firearm prohibition.[245]

This section analyzes the circuit courts' tools of statutory construction, policy reasons, and legislative history to justify their interpretation. Further, it argues that the circuit courts should interpret the statute as requiring a domestic relationship as an element of the predicate state offense. This is supported by the statute's plain language, the circuit courts' misplaced reliance on need for uniformity, the rule of lenity, and Supreme Court precedent. Although this interpretation would narrow the scope of the firearm prohibition, it is one that the courts can be expected to reach. Accordingly, when the Supreme Court reviews *Hayes*, it should uphold the Fourth Circuit's interpretation and, as a result, reject the Eleventh Circuit's decision in *Griffith*.

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[242] 18 U.S.C. § 921(a)(33)(A) (emphasis added).

[243] *Griffith*, 455 F.3d at 1345 (limiting the court's review to plain error, due to Griffith's failure to previously raise the issue).

[244] *Id.* at 1345.

[245] *Id.* at 1340; 18 U.S.C. § 921(a)(33)(A).

A. Plain Language Supports Requiring a Domestic Relationship as an Element

1. Circuit Courts' Justifications for Narrowing the Statute

The First, Eighth, Ninth, and Tenth Circuits relied on the singular use of the word "element" as conclusive evidence that the federal statute only requires "physical force" as an element in the predicate offense; it does not require relationship status as an element.[246] For example, the Ninth Circuit Court stated: "The definition says 'has as an element,' not, for instance, 'has as elements,' indicating that it speaks only of a single element rather than plural."[247]

The Tenth Circuit, in *United States v. Heckenliable*, focused on punctuation.[248] The court noted that the definition of a "misdemeanor crime of domestic violence" has two "distinct sentence fragments, each describing a distinct attribute[,]. . . and each is separated by a comma."[249] Thus, the "use of force" element is separate from the "committed by one in a domestic relationship" component.[250]

The D.C. Circuit refused to apply the rule of the last antecedent, to justify effectively reading words into the statute.[251] The rule of the last antecedent is a canon of construction, in which "ordinary, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote."[252] If the canon is applied literally, then "committed by" would modify the "threatened use of a deadly weapon."[253] The D.C. Circuit rejected this possibility, stating:

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[246] United States v. Heckenliable, 446 F.3d 1048, 1050 (10th Cir. 2006); United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); United States v. Meade, 175 F.3d 215, 218-19 (1st Cir. 1999); United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999).

[247] *Belless*, 338 F.3d at 1066.

[248] *Heckenliable*, 446 F.3d at 1051.

[249] *Id.*

[250] *Id.*

[251] United States v. Barnes, 295 F.3d 1354, 1360 (D.C. Cir. 2002) (reasoning that the rule of the last antecedent is "not an inflexible rule") (citing United States v. Pritchett, 470 F.2d 455, 459 n.9) (D.C. Cir. 1972)).

[252] *Id.* (quoting *Pritchett*, 470 F.2d at 459 n.9); *See also* JELLUM & HRICIK, *supra* note 10, at 60-64.

[253] *Barnes*, 295 F.3d at 1361 n.7.

"[T]he verb 'commit' means 'to do (something wrong or reprehensible), to perpetrate, be guilty of (a crime or *offence*, etc.).' The *use* of force is not 'committed,' 'done' or 'perpetrated.' An '*offense*' is 'committed' or 'perpetrated.'"[254] Therefore, the words "committed by" reach back, modifying the word "offense" at the beginning of the section.[255] The court noted that "Congress somewhat awkwardly included the 'committed by' phrase," and as a solution, the court effectively read words into the statute—"a misdemeanor crime of domestic violence" is an offense that is a misdemeanor, has, as an element, the use of physical force, *and was* committed by one in a domestic relationship."[256]

2. Alternative Readings

It is entirely plausible that Congress intended to limit the federal firearm statute to predicate offenses that contain both elements, physical force and a domestic relationship. There are several ways to read the statute that support this interpretation. Instead of effectively reading the statute to apply to an offense that has, as an element, the use of physical force, "*and was* committed by one in a domestic relationship,"[257] the circuit courts could read the statute as "[have], as an element"[258] or "has, as an element" with two subparts.[259]

Chief Justice Mayer of the Federal Circuit dissented in *White v. Department of Justice*, noting that the "plain language here clearly and unambiguously requires that the misdemeanor '[have], as an element,' a domestic component."[260] Even the Ninth Circuit recognized the plausibility

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[254] *Id.* at 1360.

[255] *Id.* at 1360 n.6.

[256] *Id.* at 1360 (emphasis added). *Contra* United States v. Hayes, 482 F.3d 749, 755 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608) (criticizing the D.C. Circuit's holding because "it defies common sense to accept the proposition that the 'committed by' phrase does not modify the phrase immediately preceding it, but does, on the other hand, modify the term 'offense'"; thus, the D.C. Circuit's interpretation resulted in "a grammatically labored and erroneous reading.").

[257] *Barnes*, 295 F.3d at 1360.

[258] White v. Dep't of Justice, 328 F.3d 1361, 1374 (Fed. Cir. 2003) (Mayer, C.J., dissenting).

[259] *Barnes*, 295 F.3d at 1369 (Sentelle, C.J., dissenting).

[260] *White*, 328 F.3d at 1374 (Mayer, C.J., dissenting).

of the alternative interpretation,[261] stating: "True, in making 'element' singular, Congress could have made a syntactical error."[262] Thus, it is plausible that Congress overlooked the language "has, as an element" and actually meant "have, as an element."[263]

An error in the statute supports this reading. Section 921(a)(33)(A) states: "Except as provided in subparagraph (C), the term 'misdemeanor crime of domestic violence' means an offense that—(i) is a misdemeanor . . . and (ii) has, as an element . . . ."[264] Yet the subparagraph (C) does not exist.[265] What predicate state offenses did Congress intend to exclude from the statute's reach? The rushed enactment[266] of the Lautenberg Amendment created drafting errors. This undermines the circuit courts' unrelenting adherence to the singular use of the word "element."

Alternatively, the courts should read the statute as requiring a single element with two subparts. In a dissenting opinion, Judge Sentelle of the D.C. Circuit stated that the issue is "not how many elements are involved, but what the singular element is."[267] The Fourth Circuit, the only court to hold that a domestic relationship is required as an element, adopted this approach in *United States v. Hayes*.[268] Hayes was convicted of simple battery under a West Virginia statute that did not require a domestic relationship as an element.[269] Analyzing the text of the federal statute, the court found it "significant" that clause (i), which requires the predicate offense to qualify as a state or federal misdemeanor, contains a

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[261] United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003) ("The alternative reading has some force.").

[262] *Id.* at 1067.

[263] The Supreme Court also found drafting errors in the Gun Control Act and refused to apply traditional rules of statutory interpretation. *See* Taylor v. United States, 495 U.S. 575, 590-91 (1990).

[264] 18 U.S.C. § 921(a)(33)(A) (2000).

[265] *Id*; *see also Belless*, 338 F.3d at 1067 n.11; United States v. Heckenliable, 446 F.3d 1048, 1051 n.6 (10th Cir. 2006) (noting that Congress "neglected to enact a subparagraph (C)").

[266] *See* Rhodes, *supra* note 4.

[267] United States v. Barnes, 295 F.3d 1354, 1369 (D.C. Cir. 2002).

[268] United States v. Hayes, 482 F.3d 749, 752-54 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[269] *Id.* at 751.

semicolon.[270] This punctuation mark sets apart clause (i) from clause (ii) as a "separate and distinct" requirement.[271] Thus, the absence of a semicolon in the text of clause (ii), which requires the use of force and a domestic relationship, supports inferring that Congress did not intend the language "has, as an element" to be restricted to the use of force requirement.[272] Rather, "has, as an element" applies to the use of force and to the domestic relationship; otherwise, Congress simply could have placed the domestic relationship provision in a separate clause (iii), separating it from the "has, as an element" language.[273]

Notably, there are several statutes, such as solicitation and sentence-enhancement statutes, which use the language "has as an element" to require both the mode of aggression and the object of aggression as elements of the predicate state statute.[274] For example, as discussed above, 18 U.S.C. § 924(e)(2)(B) defines "violent felony" as any crime punishable by imprisonment for more than a year, which: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another."[275] Further, 18 U.S.C. § 16 (a) states: "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."[276]

These statutes use the language "has as an element" to require both physical force and the object of the force, another person or another's property, as elements of the predicate offense.[277] Similarly, the definition of

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[270] *Id.* at 753.

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *See* 18 U.S.C. § 924(e)(2)(B) (2000); 18 U.S.C. § 16 (2000); 18 U.S.C. § 924(c)(3) (2000); 18 U.S.C. § 373 (2000); 18 U.S.C. § 521(c)(2) (2000).

[275] 18 U.S.C. § 924(e)(2)(B)(i).

[276] 18 U.S.C. § 16.

[277] *See also* 18 U.S.C. § 924(c)(3) ("For purposes of this subsection the term 'crime of violence' means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ."); 18 U.S.C. § 373(a) ("Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States . . . ."); 18 U.S.C. § 521(c)(2) (including "a Federal felony crime of violence

"misdemeanor crime of domestic violence" can be construed to include both the mode of aggression (use of physical force) and the object of aggression (a person in a domestic relationship) as elements of the predicate offense.[278] This literal reading is consistent with Congress's purpose to prevent individuals convicted of a crime of domestic violence from possessing firearms.[279]

B. Beyond a Cursory Glance, the Courts' Policy Considerations Falter

1. The Statute Would Become Dead Letter and Uniformity Is Needed

Some of the circuit courts justified holding that the domestic relationship is not an element of the predicate offense by focusing on the goal of uniform application and the lack of state domestic violence statutes.[280] For instance, the D.C. Circuit was reluctant to create a disparity between states for the same conduct.[281] The court stated that if it limited the statute's applicability to instances where the underlying conviction included a domestic relationship as an element, then:

> Congress remedied one disparity-between felony and misdemeanor domestic violence convictions—while at the same time creating a new disparity among (and sometimes, within) states. A person who abused his spouse in a state with a domestic assault statute would lose the right to possess a firearm while a person who engaged in the same conduct but was convicted of simple assault would not.[282]

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that has as an element the use or attempted use of physical force against the person of another").

[278] *See* 18 U.S.C. § 921(a)(33)(A) (2000). *But see* United States v. Heckenliable, 446 F.3d 1048, 1051 n.7 (10th Cir. 2006) (rejecting this argument, reasoning that "[w]hen defining a crime having more than one element, Congress generally uses the phrase 'has as its elements.' See, for example, 18 U.S.C. § 3559(c)(2)").

[279] 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

[280] *See* United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); United States v. Barnes, 295 F.3d 1354, 1364-65 (D.C. Cir. 2002); United States v. Meade, 175 F.3d 215, 220 (1st Cir. 1999).

[281] *Barnes* at 1364.

[282] *Id.*

The D.C. Circuit, following the First and Ninth Circuits, justified its holding because of the risk that "requiring a domestic relationship element 'would render the statute a dead letter in most jurisdictions.'"[283] The Ninth Circuit focused on Congress's purpose to prohibit individuals from possessing firearms when they have a history of domestic violence, which makes those individuals "untrustworthy custodians of deadly force."[284] In most states, domestic violence offenders are charged under general assault or battery statutes.[285] In fact, less than half of the states have a domestic violence statute that expressly includes both physical force and a domestic relationship between the victim and the perpetrator as elements.[286] The First, Ninth, and D.C. Circuits refused to support a reading that would limit the statute's reach to individuals who were convicted of misdemeanors where domestic violence is an element of the predicate offense.[287]

2. State Domestic Violence Statutes Exist, But Uniform Application Is Impossible

The circuit courts have improperly relied on the lack of express domestic violence statutes to justify the fear that requiring a domestic relationship as an element would "render the statute a dead letter."[288] This ignores the fact that, although not all states have domestic violence statutes, there are at least twenty-three states that have express domestic violence statutes or assault and battery statutes that contain a domestic violence

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[283] *Belless*, 338 F.3d at 1067 n.13 (quoting *Meade*, 175 F.3d at 220); *see also Barnes*, 295 F.3d at 1364 (stating that it would render "the law a nullity in a majority of the states").

[284] *Belless*, 338 F.3d at 1067.

[285] *Id.* at 1067 n.13 (quoting *Barnes*, 295 F.3d at 1364-65 (noting that only nineteen states have domestic violence statutes)).

[286] *Belless*, 338 F.3d at 1067 n.13 (quoting *Barnes*, 295 F.3d at 1364). *See also* NATIONAL CENTER ON FULL FAITH AND CREDIT, STATE STATUTES: MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE *(2008) available at* http://www.abanet.org/domviol/docs/State-MCDV-Matrix.pdf [hereinafter, STATE STATUTES: MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE] (reporting that twenty-three states have domestic violence statutes).

[287] *Belless*, 338 F.3d at 1067; *Barnes*, 295 F.3d at 1364-65; *Meade*, 175 F.3d at 220.

[288] *Belless*, 338 F.3d at 1067 n.13 (quoting *Meade*, 175 F.3d at 220); *see also Barnes*, 295 F.3d at 1364 (stating that it would render "the law a nullity in a majority of the states").

provision.[289] Further, it was improper for the D.C. Circuit to rely on the need for uniformity.[290] The state statutes have to conform to the requirements in the Lautenberg Amendment;[291] thus, it is impossible to create a uniform application of the statute.

In *White v. Department of Justice*, Chief Judge Mayer of the Federal Circuit Court rejected the majority's reliance on the possibility that a literal reading would "render the law a nullity in a majority of states" because the state of Virginia, in which the predicate offense occurred, has a domestic violence statute.[292] Hence, Chief Judge Mayer found the "dead letter" argument irrelevant.[293]

Further, while some states may not have a specific domestic violence statute, many state assault and battery statutes have a provision expressly governing a domestic relationship.[294] For example, in *United States v. Griffith*, the defendant was convicted of simple battery for hitting his wife and dragging her across the floor.[295] The same Georgia simple battery statute has a domestic violence provision.[296] It states: "If the offense of simple battery is committed between past or present spouses, . . . parents and children, [or other parent-child relationship], . . . the defendant shall be punished for a misdemeanor of a high and aggravated nature."[297] If Griffith

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[289] STATE STATUTES: MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE, *supra* note 286. *See, e.g.*, WYO. STAT. ANN. § 6-2-501(e) (2006); GA. CODE ANN. § 16-5-23(f) (West 2006). The ABA considered Wyoming's statute to be a "domestic violence" statute, but found that Georgia lacked one. *Id.* Thus, the number of states could be more than twenty-three.

[290] *See Barnes*, 295 F.3d at 1364.

[291] *See* 18 U.S.C. § 922(g)(9) (2000); 18 U.S.C. § 921(a)(33)(A)(i), (ii) (2000).

[292] *See* White v. Dep't of Justice, 328 F.3d 1361, 1374 (Fed. Cir. 2003) (Mayer, C.J., dissenting).

[293] *See id.*

[294] *See, e.g.*, WYO. STAT. ANN. § 6-2-501(e) (2006); GA. CODE ANN. § 16-5-23(f) (West 2006); *see also* STATE STATUTES: MISDEMEANOR CRIMES OF DOMESTIC VIOLENCE, *supra* note 285 (reporting that twenty-three states have domestic violence statutes, but not including the Georgia statute in this number).

[295] *See* United States v. Griffith, 455 F.3d 1339, 1340 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007).

[296] GA. CODE ANN. § 16-5-23(f) (West 2006).

[297] *Id.*

had been convicted under this subparagraph, it would clearly serve as a predicate offense for the Domestic Violence Offender Gun Ban.[298]

All but one of the circuit courts have refused to require a domestic relationship as an element, in order to support a broad application of the federal statute.[299] Although requiring the domestic relationship provision to be an element does not lead to short-term results, Congress may have intended to provide an incentive for states to pass domestic violence statutes and to charge offenders under existing domestic violence statutes, instead of under simple battery statutes.[300] The Ninth Circuit recognized that Congress "may have intended to limit predicate offenses to those with a domestic element . . . to spur states to pass statutes that expressly focus on domestic violence."[301] Senator Lautenberg stated that he anticipated that the amendment would "send a message about our Nation's commitment to ending domestic violence and about our determination to protect the millions of women and children who suffer from this abuse."[302] Thus, the "dead letter" argument[303] is inconsistent with congressional intent, and it is not for the courts to force a broad interpretation in order to justify casting a broad, retroactive net.

The D.C. Circuit relied on the need for uniform application of the Lautenberg Amendment,[304] but this is impossible, and the circuit courts

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[298] *See id.*; *Griffith*, 455 F.3d at 1340. Not all state assault and battery statutes will qualify because the state elements still have to constitute "use of physical force." *See, e.g.*, United States v. Webb, No. CR07-4069-MWB, 2007 U.S. Dist. LEXIS 90541 (N.D. Iowa, Nov. 9, 2007) (holding defendant's conviction of domestic abuse assault does not qualify as a predicate offense because threatening the victim is not an act of physical force).

[299] *See* United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); United States v. Barnes, 295 F.3d 1354, 1364-65 (D.C. Cir. 2002); United States v. Meade, 175 F.3d 215, 220 (1st Cir. 1999). *Contra* Unites States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[300] *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

[301] *Belless*, 338 F.3d at 1067 (finding this argument was not compelling enough to "depart from the views of all the other circuits" who have ruled on the issue).

[302] 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

[303] *See Belless*, 338 F.3d at 1067 n.13 (quoting *Meade*, 175 F.3d at 220); *see also Barnes*, 295 F.3d at 1364 (stating that it would render "the law a nullity in a majority of the states").

[304] *Barnes*, 295 F.3d at 1364.

should not rely on this incorrect assumption to justify their holdings. The judiciary should hold that the Lautenberg Gun Ban "requires violation of a domestic violence statute as a predicate element."[305] Even the Ninth Circuit Court acknowledged the benefits of requiring a domestic relationship as an element of the predicate offense. It noted that "[t]he alternative reading has some force" because it would "avoid questions years later about what the relationship might have been between the perpetrator and the victim."[306] Currently, in order to prohibit a person from carrying a firearm because of a twenty-year-old assault or battery conviction, the court must look to the record below or the charging document to determine if the defendant was in an enumerated domestic relationship.[307] If the defendant entered a plea agreement, the firearm prohibition will turn on whether the record was sufficiently documented to show that he committed assault against his spouse and not against his neighbor.[308] Unless the courts require a domestic relationship as an element, the Lautenberg Amendment will remain manifestly unworkable; this is a far cry from any uniform application of the statute.[309]

Bernard H. Teodorski, the National Vice President of the Fraternal Order of Police, testified before the House Subcommittee on Crime and stated: "The statute has created a large new category of prohibited persons lacking adequate definition—enforcement turns on the highly fact-specific

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[305] White v. Dep't of Justice, 328 F.3d 1361, 1373-74 (Fed. Cir. 2003) (Mayer, C.J. dissenting).

[306] *Belless*, 338 F.3d at 1067.

[307] *See, e.g.*, United States v. Griffith, 455 F.3d 1339, 1340 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007) (examining state court records to determine that the defendant hit his wife); United States v. Kavoukian, 315 F.3d 139, 141 (2d Cir. 2002) (examining the plea hearing transcript and the statement of conviction from the defendant's state offense); *see also Barnes*, 295 F.3d at 1357, 1359 (failing to find a relationship in the charging documents, but allowing defendant's statement that he shared a child with the victim to qualify as one of the enumerated domestic relationships).

[308] *See Kavoukian*, 315 F.3d at 140-41, 145. The court noted that the defendant pleaded guilty to menacing, but there was "no information in the indictment, the plea hearing transcript, or the statement of conviction describing the nature of the relationship between the Defendant and his victim." *Id.* The court remanded to determine if the grand jury indictment for the federal firearm offense was sufficient when it did not allege a domestic relationship. *Id.*

[309] *See Barnes*, 295 F.3d at 1364.

findings in each individual case. From any standpoint, the statute is an enforcement nightmare."[310]

Furthermore, defendants who do not fall within one of the enumerated domestic relationships are not within the reach of the federal statute.[311] For example, who qualifies as "a person similarly situated to a spouse, parent, or guardian of the victim"?[312] Will a domestic partner in a homosexual relationship qualify as a "person similarly situated to a spouse"?[313] Further, at least one court has held that an adult child who commits assault or battery against an elderly parent is not "similarly situated," and the firearm prohibition does not apply.[314] Convictions under existing domestic violence statutes and provisions in assault and battery statutes may or may not qualify as predicate offense.

Perhaps Congress intended the firearm prohibition to motivate states to enact domestic violence statutes.[315] Regardless, the requirements for the predicate offense must mirror that of the Lautenberg Gun Ban—the predicate offense must constitute the "use of physical force," and the

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[310] *Domestic Violence Offender Gun Ban: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Bernard H. Teodorski), *available at* http://judiciary.house.gov/legacy/313.htm.

[311] 18 U.S.C. § 921(a)(33)(A)(i), (ii) (2000). The statute contains a list of enumerated domestic relationships, and the physical force had to be committed by a person in one of these relationships.

[312] 18 U.S.C. § 921(a)(33)(A)(i), (ii) (stating "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by . . . a person who is cohabitating with or has cohabited with the victim as a spouse, parent, or guardian").

[313] Michelle Aulivola, Note, *Gay and Lesbian Families in the 21st Century: Outing Domestic Violence: Affording Appropriate Protections to Gay and Lesbian Victims*, 42 FAM. CT. REV. 162, 168 (2004) (noting that in most states, homosexual partners are not protected by domestic violence laws); *see also* United States v. Costigan, No. 00-9-B-H, 2000 U.S. Dist. LEXIS 8625, at *17 n.10 (D. Me. June 16, 2000) ("Through the passage of the Defense of Marriage Act ("DOMA"), Congress has defined the term spouse to refer only to persons of the opposite sex. Thus, a gay partner is not a 'spouse or former spouse.'"). However, Congress's definition does not foreclose finding that a same sex partner may be cohabiting "as a spouse." *Id.*

[314] United States v. Skuban, 175 F. Supp. 2d 1253, 1254-55 (D. Nev. 2001) (reversing conviction under the Lautenberg Amendment because the defendant assaulted his mother, which is not an enumerated relationship).

[315] *See* 142 CONG. REC. S10377-01 (daily ed. Sept. 12, 1996) (statement of Sen. Lautenberg).

defendant must have been in one of the enumerated domestic relationships; otherwise, it is inapplicable.[316] Thus, the circuit courts justified their holdings by focusing on the lack of existing express domestic violence statutes or the need for "uniformity,"[317] but these policy considerations are logical only if they are limited to a cursory glance.

C. Rule of Lenity Undermines Reliance on Legislative History

1. Legislative History

Although the circuit courts purport to look beyond the plain meaning only in situations of ambiguity or absurdity,[318] in this instance, they have gone beyond the "unambiguous" text to support their holdings[319] and have extensively relied on Senator Lautenberg's statements on the Senate floor.[320] He addressed whether § 922(g)(9) would apply to crimes that lack a domestic relationship element, stating:

> Mr. President, the final agreement does not merely make it against the law for someone convicted of a misdemeanor crime of domestic violence from possessing firearms. It also incorporates this new category of offenders into the Brady law, which provides for a waiting period for handgun purchases. Under the Brady law, local law enforcement authorities are required to make reasonable efforts to ensure that those who are seeking to purchase a handgun are not prohibited under Federal law from doing so. Mr. President, convictions for domestic violence-related crimes often are for crimes, *such as assault, that are not explicitly identified as related to domestic violence.* Therefore, it will not always be possible for law enforcement authorities to

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[316] *See* 18 U.S.C. § 921(a)(33)(A)(ii).

[317] *See* United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); United States v. Barnes, 295 F.3d 1354, 1364-65 (D.C. Cir. 2002); United States v. Meade, 175 F.3d 215, 220 (1st Cir. 1999).

[318] *See supra* note 59 and accompanying text.

[319] *See id.*

[320] *See* United States v. Heckenliable, 446 F.3d 1048, 1052 (10th Cir. 2006); United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1365 (Fed. Cir. 2003); *Barnes*, 295 F.3d at 1365; United States v. Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002); United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999); *Meade*, 175 F.3d at 219.

> determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.[321]

Thus, circuit courts have held that "any possible ambiguity was 'cleared up' by the statute's legislative history."[322] Statements by the sponsor of the bill are "an authoritative guide to the statute's construction."[323] Therefore, courts have held that the federal firearm ban applies, even if the predicate offense does not contain a domestic relationship as an element.[324]

2. The Rule of Lenity Should Apply

Although the legislative history supports the circuit courts' interpretation,[325] even statements by a bill's sponsor[326] become less compelling when they are inconsistent with an alternate interpretation, which is supported by the statutory language and the rule of lenity. The rule of lenity is a canon of construction that requires ambiguities in a criminal

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[321] 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg) (emphasis added).

[322] *Shelton*, 325 F.3d at 562 (quoting *Kavoukian*, 315 F.3d at 143).

[323] *Barnes*, 295 F.3d at 1365 (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982)). *Contra* United States v. Hayes, 482 F.3d 749 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608) (criticizing *Barnes*, *Meade*, and *Smith* for only examining Senator Lautenberg's statements and ignoring Supreme Court precedent, which directs courts to "go beyond the remarks of the legislation's sponsor and consider the enactment's entire legislative history.") (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc. 447 U.S. 102, 118 (1980)).

[324] *See* United States v. Griffith, 455 F.3d 1339, 1346 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007) (holding that "a domestic relationship must exist as part of the facts giving rise to the prior offense, but it need not be an element of that offense"); *Heckenliable*, 446 F.3d at 1049; United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003); *Shelton*, 325 F.3d at 562; *White*, 328 F.3d at 1367; *Kavoukian*, 315 F.3d at 144; *Barnes*, 295 F.3d at 1365-66; United States v. Ball, 7 Fed. App'x 210, 213 (4th Cir. 2001), *overruled by* United States v. Hayes, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); *Smith*, 171 F.3d at 620; *Meade*, 175 F.3d at 219.

[325] *See supra* note 323 and accompanying text; 142 CONG. REC. S11872-01 (daily ed. Sept. 30, 1996) (statement of Sen. Lautenberg).

[326] *See* JELLUM & HRICIK, *supra* note 10, at 21-22 (noting there are "conflicting views on how much weight to give to statements made by the sponsor of a bill").

statute to be interpreted in favor of the defendant.[327] The Fourth Circuit, in *United States v. Hayes*, pointed out that, even if it had found that the plain language did not clearly require a domestic relationship as an element, the rule of lenity would have instructed the court to resolve the issue based on that interpretation.[328]

The statutory language in the Lautenberg Amendment is ambiguous.[329] Ambiguous statutory language means that reasonable people can differ as to the meaning of the language or that there is "more than one equally plausible meaning."[330] Here, reasonable persons (the circuit court judges) have disagreed as to whether the "use of physical force" means any physical contact or means violent physical force.[331] Further, reasonable persons (the Fourth Circuit in *United States v. Hayes* and circuit court dissenting judges in other cases) have found that the language "has, as an element" means "[have], as an element"[332] or a singular element with two subparts—physical force and a domestic relationship.[333]

D.C. Circuit Judge Sentelle, in *United States v. Barnes*, stated: "Fundamental to our fairness-centered criminal justice system is the rule of lenity for the interpretation of ambiguous penal statutes."[334] Determining that the language of the Lautenberg Amendment is ambiguous, he also found that "[t]he majority opinion itself is rife with allusions to its ambiguity."[335] For example, the majority stated that the "awkward[]" statute

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[327] *See id.*

[328] *Hayes*, 482 F.3d at 759.

[329] *See* 18 U.S.C. § 921(a)(33)(A)(ii) (2000).

[330] *See* JELLUM & HRICIK, *supra* note 10, at 80.

[331] *See* United States v. Griffith, 455 F.3d 1339, 1340-41 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007); United States v. Villegas-Hernandez, 468 F.3d 874, 882 (5th Cir. 2006); Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003); United States v. Belless, 338 F.3d 1063, 1068-69 (9th Cir. 2003); United States v. Nason, 269 F.3d 10, 20-21 (1st Cir. 2001); United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999).

[332] White v. Dep't of Justice, 328 F.3d 1361, 1374 (Fed. Cir. 2003) (Mayer, C.J., dissenting).

[333] United States v. Barnes, 295 F.3d 1354, 1369 (D.C. Cir. 2002) (Sentelle, J., dissenting); United States v. Hayes, 482 F.3d 749, 752 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[334] *Barnes*, 295 F.3d 1354, 1369.

[335] *Id.*

"is not a paradigm of precise draftsmanship" and that Congress failed to "precisely articulate[]" its intentions.[336] Thus, the circuit courts should not resort to a "snippet of legislative history" to resolve any ambiguity; rather, they should apply the rule of lenity.[337]

Alternatively, the rule of lenity should apply to undermine the use of legislative history and return the focus to the plausible interpretations of the plain language of the statute. Justice Scalia criticized the Supreme Court for resorting to the use of legislative history to support its opinion.[338] In *Taylor v. United States*, he referred to the rule of lenity, stating:

> [I]f the meaning is so clear that it cannot be constricted by that venerable canon of construction, surely it is not so ambiguous that it can be constricted by the sundry floor statements . . . that the Court discusses. Is it conceivable that we look to the legislative history only to determine whether it displays, not a less extensive punitive intent than the plain meaning (the domain of the rule of lenity), but a more extensive one? If we found a more extensive one, I assume we would then have to apply the rule of lenity, bringing us back once again to the ordinary meaning of the statute.[339]

Here, the imprecise drafting of the Lautenberg Amendment resulted in ambiguous language. The circuit courts have relied on legislative history to expand the scope of the Lautenberg Amendment to include crimes that lack a domestic relationship element.[340] The courts have refused to hold that

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[336] *Id.* at 1356, 1361, 1369.

[337] *See id.* at 1370. *But see id.* at 1366 (stating that "[t]he rule of lenity is reserved for a case in which 'reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute'"); United States v. Heckenliable, 446 F.3d 1048, 1052 n.9 (10th Cir. 2006) (holding that the language is unambiguous); United States v. Kavoukian 315 F.3d 139, 144 (2d Cir. 2002) (holding that the rule of lenity is not applicable because the statutory language is clear and "affirm[ed]" by the legislative history); United States v. Meade, 175 F.3d 215, 222 (1st Cir. 1999) (refusing to apply the rule of lenity because Congress's intent is clear).

[338] Taylor v. United States, 495 U.S. 575, 603 (1990) (Scalia, J., concurring).

[339] *Id.*

[340] *See Heckenliable*, 446 F.3d at 1052; United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1365 (Fed. Cir. 2003); *Barnes*, 295 F.3d at 1365; *Kavoukian*, 315 F.3d at 143-44; United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999); *Meade*, 175 F.3d at 219.

the statutory language is ambiguous[341] and have refused to apply the rule of lenity.[342] Yet it is improper for the circuit courts to go wading through statements on the floor of the Senate.[343] Thus, the rule of lenity undermines the use of legislative history to expand the statutory language. It should be used to construe the ambiguous text in the defendant's favor; alternatively, it returns the argument to two plausible interpretations of the plain language in the statute.

D. Supreme Court Precedent Requires a Categorical Approach

Even if Congress intended the Lautenberg Amendment to apply to assault and battery convictions that do not explicitly require a domestic relationship, the judiciary must presume that Congress is aware of the Supreme Court's jurisprudence,[344] which favors a categorical approach for predicate state offenses.[345] If Congress intended to part with Supreme Court precedent and to require courts to "probe the facts of an underlying misdemeanor to determine the domestic relationship of the victim, it could

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[341] *See* United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007) (reasoning that "[t]he result we reach by applying the plain meaning rule is bolstered" by examining another statutory provision, Congressional intent, and other courts' interpretation); *Heckenliable*, 446 F.3d at 1052 ("While we recognize the syntax of the statute is imprecise, we do not find its language ambiguous. Thus, we do not resort to legislative history to resolve an ambiguity, but cite to it only to confirm what we have said . . . ."); *Smith*, 171 F.3d at 620 ("We find the language of the statute to be unambiguous, and look to the legislative history only to bolster our conclusion.").

[342] *Heckenliable*, 446 F.3d at 1052 n.9 (holding that the language is unambiguous); *Barnes*, 295 F.3d at 1366 ("The rule of lenity is reserved for a case in which 'reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.'"); *Kavoukian*, 315 F.3d at 144 (holding that the rule of lenity is not applicable because the statutory language is clear and "affirm[ed]" by the legislative history); *Meade*, 175 F.3d at 222 (refusing to apply the rule of lenity because Congress's intent is clear).

[343] *See Taylor*, 495 U.S. at 603 (Scalia, J. concurring).

[344] Rodriguez v. United States, 480 U.S. 522, 525 (1987) (stating that Congress is "presumed to act with full awareness of the well-established judicial interpretation . . . 'unless [it is] explicitly made inapplicable'" (quoting United States v. Donovan, 242 F.2d 61, 64 (2d Cir. 1957))); *see also* Vincent P. Tassinari, *The Statutory Term Analysis (STA) Method*, 1998 DET. C.L. REV. 977, 1021-22 (1998).

[345] *Taylor*, 495 U.S. at 591.

easily have said so."[346] The judiciary should adhere to Supreme Court precedent and apply a categorical approach to both the physical force and the domestic relationship provisions by interpreting that the domestic relationship status is required as an element of the predicate state offense.[347]

In *Taylor v. United States*, the Supreme Court analyzed whether an individual, with three alleged prior violent felony convictions and a conviction under 18 U.S.C. § 922(g) for unlawful possession of a firearm, was subject to a sentence enhancement under 18 U.S.C. § 924(e).[348] Section 924(e)(2)(B) defines "violent felony" as any crime punishable by imprisonment more than a year, which:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ."[349]

In *Taylor*, the issue was whether the defendant's prior burglary conviction constituted a "violent felony," which would count towards enhancement of his sentence.[350] The resolution depended on the definition of "burglary," which Congress deleted from the statute when it amended it,[351] and which has varying meanings in common law, state codes, and the Model Penal Code.[352]

The Court noted that a statute based on a predicate offense "always has embodied a categorical approach . . . . Congress intended that the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary.'"[353] The Court explained that, if the meaning of "burglary"

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[346] White v. Dep't of Justice, 328 F.3d 1361, 1374 (Fed. Cir. 2003) (Mayer, C.J. dissenting).

[347] *See Taylor*, 495 U.S. at 580.

[348] *Id.* at 577-78; 18 U.S.C § 924(e) (2000).

[349] 18 U.S.C § 924(e)(2)(B).

[350] *Taylor*, 495 U.S. at 579.

[351] *Id.* at 582.

[352] *Id.* at 580.

[353] *Id.* at 588.

depended on the state's definition, then whether a person received a sentence enhancement would turn on whether the state happened to label the conduct "burglary."[354]

The Supreme Court clarified that Congress designated predicate offenses by "using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law."[355] The Court stated that "absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, 'because the application of federal legislation is nationwide.'"[356] Thus, the Court refused to apply traditional rules of statutory interpretation when it examined 18 U.S.C. § 924(e), adhering instead to the categorical approach.[357] It held that an offense constitutes "burglary" if the statutory definition includes the general elements of a burglary offense.[358] The Supreme Court authorized looking to the charging documents at the underlying state offense only to determine which section of a statute the defendant was charged under or pled to and the elements of the predicate offense.[359]

With respect to the Lautenberg Amendment, circuit courts have erred in applying a "modified categorical approach."[360] The Supreme Court requires a categorical approach for predicate offenses—the federal statute is "triggered by crimes having certain specified elements."[361] Yet the circuit courts have examined the elements of the predicate state offense only for the "physical force" requirement.[362] When determining whether the physical

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[354] *Id.* at 590-91.

[355] *Id.* at 590.

[356] *Id.* at 591 (quoting Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 119-120 (1983)).

[357] *Id.* at 589-90.

[358] *Id.* at 602.

[359] *Id.* at 601-02.

[360] *See* United States v. Belless, 338 F.3d 1063, 1069 (9th Cir. 2003).

[361] *Taylor*, 495 U.S. at 588.

[362] *See* United States v. Griffith, 455 F.3d 1339, 1346 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007); United States v. Heckenliable, 446 F.3d 1048, 1049 (10th Cir. 2006); *Belless*, 338 F.3d at 1067; United States v. Shelton, 325 F.3d 553, 562 (5th Cir. 2003); White v. Dep't of Justice, 328 F.3d 1361, 1367 (Fed. Cir. 2003); United States v.

force was committed in a domestic relationship, the courts have used a fact-specific approach, looking to the defendant's conduct in the record below, instead of the elements of the state statute.[363]

United States v. Griffith exemplifies a "modified categorical approach."[364] The Eleventh Circuit held that "while the domestic nature of the relationship must be a fact, it need not be an element of the prior offense."[365] Since Griffith, convicted of simple battery, had committed that battery against his spouse, and a spouse qualifies as one of the enumerated domestic relationships, he fell within the scope of the firearm prohibition.[366]

Supreme Court precedent mandates that whether an individual is prohibited from possessing a firearm should not depend on whether a state labels a crime "assault" or "battery," nor should the court's determination of a domestic relationship turn on the defendant's underlying conduct.[367] Thus, the federal firearm ban should be triggered only by a "misdemeanor crime of domestic violence," which should be defined as any offense that has as its elements both "the [violent] use of physical force" and one of the enumerated domestic relationships.[368] The courts should determine whether

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Kavoukian, 315 F.3d 139, 144 (2d Cir. 2002); United States v. Barnes, 295 F.3d 1354, 1365-66 (D.C. Cir. 2002); United States v. Ball, 7 F. App'x 210, 213 (4th Cir. 2001), *overruled by* United States v. Hayes, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *cert. granted*, 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608); United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999); United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999).

[363] *See, e.g.*, *Griffith*, 455 F.3d at 1340 (finding based on state court records that the defendant hit his wife); *Kavoukian*, 315 F.3d at 139 (examining the plea hearing transcript and the statement of conviction from the defendant's state offense); *see also Barnes*, 295 F.3d at 1357, 1359 (failing to find a relationship in the charging documents, but allowing defendant's statement that he shared a child with the victim to qualify as one of the enumerated domestic relationships).

[364] *See Belless*, 338 F.3d at 1069.

[365] *Id.* at 1067.

[366] *Id.*; 18 U.S.C. §§ 921(a)(33)(A) (2000).

[367] Taylor v. United States, 495 U.S. 575, 591 (1990).

[368] *See id.*; *cf.* United States v. Nason, 296 F.3d 10, 14 (1st Cir. 2001); United States v. Meade, 175 F.3d 215, 221 (1st Cir. 1999). In *Meade*, the First Circuit rejected application of Taylor's categorical approach to both the physical force and domestic relationship requirements. The court reasoned:

> Before engaging in a categorical approach, one first must establish the formal definition of the particular predicate offense, a process that necessarily requires determining the requisite elements of the statute of conviction. The appellant's attempt to establish the formal definition of a 'misdemeanor crime of domestic

the predicate state statute qualifies by applying "uniform categorical definitions,"[369] instead of examining the defendant's conduct. This is congruent with the Supreme Court's decision in *Taylor*.[370]

IV. CONCLUSION

The Lautenberg Amendment is an "inadvertent casualty"[371] of a hasty enactment of an obscure rider to an appropriations bill. Congress failed to enact clear statutory language to carry out its purpose. The imprecise drafting of the Lautenberg Amendment has led to a circuit court split in statutory interpretation, woven with discussions of physics, paper airplanes, spitballs, modifiers, and Senator Lautenberg's statements on the Senate floor. Congress should have enacted a statute that would include all future domestic violence convictions, regardless of form or language, within the Gun Control Act. Instead, the terms "physical force" and "has, as an element" have left the courts with no alternative but to use tools of statutory interpretation to wade through the muck.

The circuit courts purport to be textualists, looking beyond the text only in cases of absurdity or ambiguity,[372] yet they selectively pulled arrows from the quiver, reaching to neighboring statutes, congressional purpose, and legislative history to "bolster"[373] their interpretation of "unambiguous"

> violence' by direct resort to a categorical approach thus puts the cart before the horse.

Meade, 175 F.3d at 221. Here, the courts must first accept the argument that "as an element" applies to the domestic relationship requirement. After determining the elements of the federal statute, the courts must examine the state offense to determine if it qualifies. This requires applying a categorical approach to both elements. Because circuit courts hold only "use of physical force" is required as an element, the courts examine the elements of the state statute to determine if it meets the categorical definition of "use of physical force." Since the domestic relationship is not an element of the federal offense, courts examine the defendant's underlying conduct to determine if it meets the federal requirement of domestic relationship status. *See also* United States v. Flores, 350 F.3d 666, 670 (7th Cir. 2003); *Belless*, 338 F.3d at 1068-69.

[369] *See Taylor*, 495 U.S. at 590.

[370] *See id.*

[371] *See id.* at 589-90.

[372] *See supra* note 59 and accompanying text.

[373] *See* United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2028 (2007); United States v. Smith, 171 F.3d 617, 620 (8th Cir. 1999).

language.[374] Instead of shoring it up, the courts' grasping for support undermines their positions, leading one to believe that they are doubtful of their holdings; like one grasping for straws to form a bale of hay.[375] Perhaps this demonstrates the thoroughness of the consideration given to the statute, but as Justice Scalia noted: "We must find some better way of demonstrating our conscientiousness."[376]

Further, with respect to the domestic relationship requirement, the circuit courts have repeatedly pointed to other circuit precedent, dismissing relevant statutory analysis as too weak to overcome the strength of unanimity. It took the Fourth Circuit six years after *Ball* to return to the issue[377] with an independent statutory analysis. It found the alternate interpretation compelling enough to create a dichotomy within its own precedent.[378] The Supreme Court recently granted certiorari of *United States v. Hayes*[379] and should resolve the circuit split by holding that a domestic relationship is required as an element of the predicate state offense.

The circuit courts have used statutory interpretation to justify short-term results: they have broadly interpreted "use of physical force" to include any physical contact, in order to bring the "threatened use of force" within the scope of the statute, and they have narrowly interpreted "as an element," in order to bring state assault and battery statutes within the amendment's reach. One might think that this furthers the cause of domestic violence prevention, casting a wide net to include all types of domestic violence offenders; however, the federal statute remains inconsistent in application and irreparably unfair.

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[374] United States v. Heckenliable, 446 F.3d 1048, 1052 n.9 (10th Cir. 2006) (holding that the language is unambiguous); *see also* United States v. Barnes, 295 F.3d 1354, 1366 (D.C. Cir. 2002); United States v. Meade, 175 F.3d 215, 222 (1st Cir. 1999).

[375] *See Meade*, 175 F.3d at 219 (1st Cir. 1999) ("From time to time, however, courts (perhaps manifesting a certain institutional insecurity) employ such secondary sources as a means of confirmation.").

[376] *Taylor*, 495 U.S. at 603 (Scalia, J., concurring).

[377] *See* United States v. Ball, 7 Fed. App'x 210, 213 (4th Cir. 2001), *overruled by* United States v. Hayes, 482 F.3d 749, 752 n.7 (4th Cir. 2007), *cert. granted* 76 U.S.L.W. 3255 (U.S. Mar. 24, 2008) (No. 07-608).

[378] *Hayes*, 482 F.3d at 752 n.7 (noting that *Ball* was an unpublished decision and thus, is not controlling precedent, but "[i]n any event, we are convinced . . . that *Ball* was not correctly decided.").

[379] *Hayes*, 482 F.3d 749.

It is inconsistent in application because the text of the amendment continues to provide numerous loopholes. Some defendants convicted under state assault and battery statutes that contain a domestic violence provision will continue to escape the reach of the Lautenberg Amendment; the issue will always turn on whether the state statute contains an element that constitutes the "use of physical force." Whether the predicate offense qualifies depends on whether violent use of physical force is required by the particular circuit. Further, even if this requirement is met, within the Fourth Circuit, a domestic relationship is also required as an element of the offense. The Supreme Court will resolve this latter issue when it reviews *Hayes*.[380] Regardless of the outcome, defendants that do not fall within one of the enumerated domestic relationships will continue to evade the firearm prohibition. New issues will be presented, often beyond the scope of Congress's intent or foreseeability, such as who will qualify as "a person similarly situated to a spouse, parent, or guardian of the victim."[381]

Notably, uniform application is impossible. For instance, consider the plausibility of state legislature finally determining that it is time to take action to combat domestic violence. What is the probability of it enacting the magic statutory language to ensure that domestic violence offenders fall within the Lautenberg Gun Ban?

The Lautenberg Amendment is irreparably unfair because it continues to cast a wide, retroactive net, without furthering the policy against domestic violence. For example, in 1997, Bernard H. Teodorski, the National Vice President of the Fraternal Order of Police, spoke before the House Subcommittee on Crime.[382] He was forthright in condemning domestic violence as "an ugly, cowardly crime which destroys families."[383] Yet Teodorski urged the Subcommittee to recognize that Senator Lautenberg's amendment to the Gun Control Act has penalized police officers with the loss of their livelihoods.[384] Some of these veteran officers

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[380] *Id.*

[381] *See* United States v. Costigan, No. 00-9-B-H, 2000 U.S. Dist. LEXIS 8625, *17 n.10 (D. Me. June 16, 2000) (stating that it is unclear whether the Lautenberg Amendment will apply to same sex couples); United States v. Skuban, 175 F. Supp. 2d 1253, 1254 (D. Nev. 2001) (holding that elder abuse is not within the scope of the Lautenberg Amendment).

[382] *Domestic Violence Offender Gun Ban: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Bernard H. Teodorski), *available at* http://judiciary.house.gov/legacy/313.htm.

[383] *Id.*

[384] *Id.*

are heads of their departments and have over twenty years of experience.[385] Due to a prior domestic assault or battery conviction that occurred up to twenty-one years ago, police officers have been placed on desk duty, placed on indefinite administrative leave, or forced to take early retirement with reduced benefits.[386] It is pandemically unfair to police officers, "who as young men or women, may have made an error in judgement [sic] and have since gone on to serve their communities, departments and agencies with honor and distinction."[387]

Further, as applied, the Lautenberg Amendment "does not address, in any meaningful way, the real problems of domestic violence."[388] As Teodorski stated, the amendment "does not make it easier to prevent incidents of domestic abuse" because states lack the funding to track down domestic violence offenders and prohibit firearm possession. Rather, it is an "enforcement nightmare" that, contrary to Supreme Court precedent, turns on the facts of each case.[389]

Constitutional challenges to the Lautenberg Amendment have repeatedly failed. The imprecise draftsmanship has left the courts with no choice but to turn to tools of statutory interpretation to make sense of the ambiguous language. Yet nearly all have erred in reaching a conclusion that the statute should have broad application, and then selectively pointing to tools of statutory construction to support or "bolster" this conclusion. Circuit courts should interpret the statutory language of the Lautenberg Amendment, as codified in 18 U.S.C. § 922(g)(9) and defined in § 921(a)(33)(A), to limit the scope to predicate offenses that have as elements the "[violent] use of physical force" *and* an enumerated domestic relationship.

Consequently, this narrows the scope of the firearm prohibition; although this is an unsavory result, it is one that can be expected. The

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[385] *Id.*

[386] *Id.*

[387] *Domestic Violence Offender Gun Ban: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Bernard H. Teodorski), *available at* http://judiciary.house.gov/legacy/313.htm.; *see also* Fraternal Order of Police v. United States, 173 F.3d 898, 904-09 (D.C. Cir. 1999), *vacating* 152 F.3d 998 (D.C. Cir. 1998) (denying equal protection, Tenth Amendment, and Commerce Clause challenges).

[388] *Domestic Violence Offender Gun Ban: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Bernard H. Teodorski), *available at* http://judiciary.house.gov/legacy/313.htm.

[389] *Id.*

judiciary must determine what the Lautenberg Amendment means, and policy considerations do not justify circumventing the systematic decision-making process of statutory interpretation. The principle of separation of powers requires the legislature to remain the avenue for reform. Thus, it is better for the judiciary to err on the side of a narrow interpretation, until Congress corrects the ambiguous language or repeals the Lautenberg Amendment.