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CRIMINAL LAW—Giving Gun Rights Back to the Wrong People: The United States Court of Appeals for the Tenth Circuit Takes a Bite Out of The Federal Firearm Prohibition in Wyoming; *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008)

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CASE NOTE

CRIMINAL LAW—Giving Gun Rights Back to the Wrong People: The United States Court of Appeals for the Tenth Circuit Takes a Bite Out of The Federal Firearm Prohibition in Wyoming; *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008).

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INTRODUCTION

Due to the use of outdated thinking, individuals who commit crimes of domestic violence rarely face felony prosecution.¹ Seldom do domestic offenders incur prosecution at all; those who do will, at most, face misdemeanor charges.² This unfortunate result often stems from a plea agreement.³ Ironically, one-third of these crimes would qualify as felonies if committed by a stranger.⁴ In comparison to similar forms of criminal behavior, domestic violence rarely receives equivalent prosecutionary treatment.⁵

On March 27, 2003, the Fremont County Sheriffs' Department issued Steven Hays a misdemeanor citation for violating Wyoming's simple assault and battery statute.⁶ Neither the citation issued to Hays, nor the subsequent judgment entered in the case, described the factual circumstances leading to his conviction.⁷ On September 22, 2006, a federal grand jury indicted Hays for possessing a firearm in violation of a federal statute prohibiting individuals convicted of a misdemeanor

* Candidate for J.D., University of Wyoming, 2010. I would like to thank my family and friends for their support during this project. Special thanks to Professor Lisa Rich for her assistance with this note. Additionally, I would like to express my immeasurable gratitude to John Barksdale. Without you, this project would not have been possible; your assistance and words of encouragement will be missed.

¹ *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008); see Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 207846, Family Violence Statistics Including Statistics on Strangers and Acquaintances 51 (2005), available at <http://www.ojp.usdoj.gov/bjs/abstract/fvs.htm> (last visited Mar. 19, 2009).

² *Hays*, 526 F.3d at 680.

³ *Id.*; Adam W. Kersey, *Misdemeanants, Firearms, and Discretion: The Practical Impact of The Debate over "Physical Force" and 18 U.S.C. § 922(G)(9)*, 49 WM. MARY L. REV. 1901, 1902 (2008).

⁴ *Hays*, 526 F.3d at 680.

⁵ *Id.*

⁶ *Id.* at 675; WYO. STAT. ANN. § 6-2-501(b) (2008) ("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.").

⁷ *Hays*, 526 F.3d at 675.

crime of domestic violence from possessing or transporting firearms.⁸ The grand jury also indicted Hays under 18 U.S.C. § 924(a)(2), which provides a sentencing court with statutory guidance for potential fines and imprisonment of individuals found in violation of 18 U.S.C. § 922(g)(9).⁹

Hays' prior conviction under Wyoming Statute § 6-2-501(b) served as the predicate offense in the federal matter.¹⁰ Hays subsequently filed a Motion to Dismiss the indictment on January 22, 2007, contending his misdemeanor conviction did not meet the requirements of a crime of domestic violence under federal law.¹¹ Hays argued his prior Wyoming conviction did not contain an element of "the use or attempted use of physical force, or the threatened use of a deadly weapon."¹²

In considering Hays' motion, Judge Clarence Brimmer of the United States District Court for the District of Wyoming concluded a person could not make contact in a "rude, insolent or angry manner" without some level of physical force; thus, the language of the Wyoming battery statute satisfied the requirement for an element of physical force under 18 U.S.C. § 921(a)(33)(A)(ii).¹³ Accordingly, Judge Brimmer denied the motion and Hays pled guilty, reserving his right to appeal.¹⁴ Judge Brimmer sentenced Hays to eighteen months in prison and three years of supervised release.¹⁵

On appeal, Hays again argued that his prior conviction under Wyoming Statute § 6-2-501(b) did not satisfy the use of physical force element required by 18 U.S.C. § 921(a)(33)(A)(ii)'s definition of a misdemeanor crime of domestic

⁸ *Id.*; 18 U.S.C. § 922(g)(9) (West 2005).

It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9).

⁹ *Hays*, 526 F.3d at 675; 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection (a) (6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than ten years, or both.").

¹⁰ *Hays*, 526 F.3d at 675.

¹¹ *Id.*; 18 U.S.C. § 921(a)(33)(A)(ii) (West 2006) (defining 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").

¹² *Hays*, 526 F.3d at 675.

¹³ *Id.* at 676.

¹⁴ *Id.* at 675–76.

¹⁵ *Id.* at 675 (Hays appealed this decision on May 2, 2008).

violence.¹⁶ In essence, Hays claimed the federal statute required more than the *de minimis* contact criminalized by Wyoming's simple assault and battery statute.¹⁷

The United States Attorney's office, argued to the contrary, following the reasoning of the First, Eighth, and Eleventh Circuits.¹⁸ It contended Hays' domestic violence conviction under Wyoming Statute § 6-2-501(b) satisfied 18 U.S.C. § 921(a)(33)(A)(ii)'s requirement for the use of "physical force" against the victim.¹⁹ The United States Attorney asserted the improbability of physically touching someone in a "rude, insolent, or angry manner" without also exerting some degree of physical force against that person.²⁰ The United States Attorney concluded Wyoming's statute met the definitional requirements of 18 U.S.C. § 921(a)(33)(A)(ii) and therefore, a conviction under this statute constituted a misdemeanor crime of domestic violence.²¹ Such a conviction forbids offenders from possessing firearms.²²

The United States Court of Appeals for the Tenth Circuit agreed with Hays and held that Wyoming Statute § 6-2-501(b) does not satisfy the "use or attempted use of physical force" element of 18 U.S.C. § 921(a)(33)(A)(ii).²³ In reaching this conclusion, the court rejected the reasoning of the First, Eighth and Eleventh Circuits.²⁴ The Tenth Circuit reasoned those courts may be correct from a scientific perspective, but such a holding merges violent and non-violent offenses into one category.²⁵ The Tenth Circuit held Wyoming's simple assault and battery statute does not satisfy the requirement for an element of physical force.²⁶

This case note addresses the varying approaches federal courts utilize in determining whether statutes similar to Wyoming Statute § 6-2-501 satisfy the federal definition of a misdemeanor crime of domestic violence.²⁷ This note also

¹⁶ Brief of Petitioner-Appellant at 6, *United States v. Hays*, 526 F.3d 674, No. 07-8039 (10th Cir. Jul. 20, 2007).

¹⁷ *Id.*

¹⁸ See *infra* notes 44–55 and accompanying text (discussing if the statutory language is clear and unambiguous courts are bound to follow it as long as the results are neither unreasonable, nor absurd).

¹⁹ Brief of Petitioner-Appellee at 28, *United States v. Hays*, 526 F.3d 674, No. 07-8039 (10th Cir. Aug. 20, 2007).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Hays*, 526 F.3d at 680–81.

²⁴ *Id.* at 681.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *infra* notes 39–87 and accompanying text.

examines the United States Court of Appeals for the Tenth Circuit's opinion in *United States v. Hays*.²⁸ Finally, this case note illustrates the need for the United States Supreme Court to resolve the split of authority and provide a uniform interpretation of the behavior criminalized under 18 U.S.C. § 922(g)(9).²⁹

BACKGROUND

Given the *Hays* court's focus regarding whether Wyoming's battery statute satisfied the federal definition of a crime of domestic violence, this section first discusses why Congress amended the Gun Control Act of 1968 by enacting 18 U.S.C. § 922(g)(9).³⁰ This section also explains the federal circuits' varying interpretations of whether the federal definition of a crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(ii) criminalizes *de minimis* touches.³¹

The Lautenberg Amendment

In 1996, Congress codified a firearm restriction for qualified domestic offenders, which prohibits criminals convicted of a misdemeanor crime of domestic violence from possessing a firearm.³² By enacting 18 U.S.C. § 922(g)(9), Congress aimed to close a “dangerous loophole” allowing violent offenders to possess firearms.³³ The amendment, known as the “Lautenberg Amendment,” relies on the prosecution of criminals under state substantive law.³⁴ This state conviction dependence gives states a significant role in the facilitation of federal criminal “policy and goals.”³⁵ Some commentators claim the use of state criminal proceedings as predicate offenses to federal firearm convictions not only has the potential to lead to an arbitrary application of the law, but also relinquishes federal lawmaking authority to the states.³⁶ These commentators contend federal

²⁸ See *infra* notes 88–124 and accompanying text.

²⁹ See *infra* notes 125–200 and accompanying text.

³⁰ See *infra* notes 32–38 and accompanying text.

³¹ See *infra* notes 39–87 and accompanying text.

³² Matthew A. Radefeld, *Commentary: Ever Heard of the Lautenberg Amendment? Don't Worry You're Not Alone*, MISSOURI LAWYERS WEEKLY, Oct. 31, 2005.

³³ *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009); *Hays*, 526 F.3d at 679.

During the debate of the bill, that later became 18 U.S.C. § 922(g)(9), one of the sponsoring senators referred repeatedly to “wife beaters” and “child abusers” and also to “people who engage in serious spousal or child abuse” and “people who show they cannot control themselves and are prone to fits of violent rage,” suggesting that the concern was with the violent individuals rather than those who have merely touched their spouse or child in a rude manner.

Hays, 526 F.3d at 679.

³⁴ See Kersey, *supra* note 3, at 1902; Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 67 (2006).

³⁵ Logan, *supra* note 34, at 70, 90–96.

³⁶ *Id.* at 90–96.

courts interpreting federal statutes having a foundation in state substantive law must be cognizant of these two concerns because of the far-reaching effects of the Amendment.³⁷ Since no exemptions to the Lautenberg Amendment exist, convicted individuals who use firearms in their line of work must procure different forms of employment because they may no longer possess a firearm.³⁸

Interpretation of the Lautenberg Amendment within the Federal Courts

Currently, a split of authority exists among the circuit courts of appeals regarding the issue presented in *United States v. Hays*.³⁹ The United States Courts of Appeals for the First, Eighth, and Eleventh Circuits held the plain language of the statute should control.⁴⁰ Under this view, the federal definition of domestic violence makes it clear that a person cannot make physical contact with another without rising to some level of physical force.⁴¹ Meanwhile, the Seventh and Ninth Circuits have adopted a standard requiring the violent use of physical force.⁴²

³⁷ *Id.*

³⁸ Radefeld, *supra* note 32.

Under the Lautenberg Amendment, if a law enforcement officer or a member of the military is convicted of a misdemeanor crime of domestic violence, they cannot possess a firearm ever again. Such a conviction may result in loss of employment or permanent reassignment to a position that does not involve carrying or possessing a firearm.

Id.

³⁹ *Hays*, 526 F.3d at 684 n.4 (Ebel, J., dissenting), *see generally* John M. Skakun III, *Violence and Contact: Interpreting "Physical Force" in the Lautenberg Amendment*, 75 U. CHI. L. REV. 1833 (2008) (discussing the split amongst the federal circuits which recognize *de minimis* touching and courts which require a violent act to satisfy § 921(a)(33)(A)(ii)).

⁴⁰ *See United States v. Griffith*, 455 F.3d 1339, 1342 (11th Cir. 2006) (holding under the plain meaning rule, the "physical contact of an insulting or provoking nature" made illegal by Georgia Statute satisfied the "physical force" requirement of § 921(a)(33)(A)(ii)); *United States v. Nason*, 269 F.3d 10, 22 (1st Cir. 2001) (holding all convictions under the Maine statute necessarily involve, as an element, the use of "physical force"); *United States v. Smith*, 171 F.3d 617, 621 n.2 (8th Cir. 1999) (finding insulting or offensive contact, by necessity, requires physical force to complete).

⁴¹ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

⁴² *See United States v. Belless*, 338 F.3d 1063 (9th Cir. 2003). Belless pled guilty to battery in violation of Wyoming Statute § 6-2-501(b) and years later faced prosecution for violating 18 U.S.C. § 922(g). *Id.* at 1065. The United States Court of Appeals for the Ninth Circuit found that Wyoming's battery statute encompassed less violent behavior than definitional requirements of 18 U.S.C. § 921(a)(33)(A)(ii) and was too broad to qualify as a misdemeanor crime of domestic violence. *Id.* at 1069. The court therefore reversed the judgment and remanded the case. *Id.* at 1070. *See also Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003). Flores pled guilty in Indiana to battery, a misdemeanor under Indiana Code § 35-42-2-1, which criminalizes "rude, insolent, or angry" touching, as does Wyoming Statute § 6-2-501(b). *Id.* at 669. The Board of Immigration Appeals determined this offense qualified as a crime of domestic violence under 18 U.S.C.S. § 16 and ordered Flores' removal from the country. *Id.* at 671. Upon review, the United States Court of Appeals for the Seventh Circuit found the issue was whether the offense created under the Indiana Code

Despite the varying interpretations of § 921(a)(33)(A)(ii), the United States Supreme Court declined to grant certiorari when presented with this issue.⁴³

The Plain Language of the Statute Should Control: The First, Eighth, and Eleventh Circuits

The First, Eighth, and Eleventh Circuit Courts of Appeals applied the principles of statutory construction in their interpretation.⁴⁴ When faced with determining whether statutes similar to Wyoming Statute § 6-2-501(b) satisfied the “use of physical force” element, as required in § 921(a)(33)(A)(ii)’s definition of a crime of domestic violence, the First, Eighth and Eleventh Circuits concluded the language of § 921(a)(33)(A)(ii) is clear and unambiguous.⁴⁵ Courts must follow the language of the statute as long as the plain meaning is neither unreasonable nor absurd.⁴⁶ The First, Eighth and Eleventh Circuit Courts of Appeals have concluded the application of the plain meaning of the term “physical force” in § 921(a)(33)(A)(ii) produced neither unreasonable nor absurd results.⁴⁷ All three circuits acknowledge the impossibility for an offender to touch an individual in an offensive manner without exerting some level of physical force, thus holding that *de minimis* touches satisfy the physical force requirement.⁴⁸

The First, Eighth and Eleventh Circuits referenced 18 U.S.C. § 922(g)(8) to further support the position.⁴⁹ Subsection 922(g)(8) contains a qualifying clause, which limits its reach to a specific subset of physical force: the type reasonably expected to cause physical injury.⁵⁰ In *United States v. Nason* and *United States v.*

qualified as a removable offense. *Id.* at 669. Despite a police report showing that Flores attacked and beat his wife, the court found the elements of Flores’ battery conviction could not properly be viewed as a crime of violence under 18 U.S.C.S. § 16. *Id.* at 672. Therefore, the court vacated the order for Flores’ removal from the country. *Id.*

⁴³ See *Gillespie v. City of Indianapolis*, 528 U.S. 1116 (2000); *Brady v. United States*, 513 U.S. 894 (1994).

⁴⁴ *Nason*, 269 F.3d at 16 (“Where statutory interpretation is in prospect, the jumping off point always is the text of the statute itself.”); *Griffith*, 455 F.3d at 1342 (“In interpreting a statute we look first to the plain meaning of its words.”) (quoting *United States v. Maung*, 267 F.3d 113, 1121 (11th Cir. 2001)).

⁴⁵ *Nason*, 269 F.3d at 16 (“This venerable reference work defines physical force as force consisting in a physical act. The word force means power, violence, or pressure directed against a person or thing.” (internal quotations omitted)); BLACK’S LAW DICTIONARY 537 (7th ed. 1999).

⁴⁶ *Nason*, 269 F.3d at 16.

⁴⁷ *Id.*; *Griffith*, 455 F.3d at 1342; *Smith*, 171 F.3d at 621.

⁴⁸ *Nason*, 269 F.3d at 16; *Griffith*, 455 F.3d at 1344–45; *Smith*, 171 F.3d at 621.

⁴⁹ *Nason*, 269 F.3d at 16; *Belless*, 338 F.3d at 1063–64.

⁵⁰ 18 U.S.C. § 922(g)(8) (2008) provides:

It shall be unlawful for any person, who is subject to a court order that was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; restrains such person from harassing,

Griffith, the United States Courts of Appeals for the First and Eleventh Circuits respectively, found Congress revealed its intent by restricting the scope of § 922(g)(8) with a modifying clause, but declined to do so in § 922(g)(9).⁵¹

Additionally, in *United States v. Nason*, the United States Court of Appeals for the First Circuit found the legislative history suggested Congress did not intend to include an injury requirement.⁵² While on the Senate floor, Senator Frank Lautenberg observed under the final amendment that the ban applies to crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.⁵³ The United States Court of Appeals for the First Circuit found Senator Lautenberg's comments helpful when construing the federal statute.⁵⁴ The court concluded Senator Lautenberg's comments demonstrated the principal purpose of substituting "crimes involving the use or attempted use of physical force" for "crimes of violence" in § 922(g)(9) was to enlarge the scope of predicate offenses covered by the statute.⁵⁵

The Element of Physical Force Must Be Violent: The Seventh and Ninth Circuits

The United States Courts of Appeals for the Seventh and Ninth Circuits have interpreted "the use or attempted use of physical force" element in § 921(a)(33)(A)(ii) differently.⁵⁶ When examining broad state assault and battery statutes, the Seventh and Ninth Circuits have asserted *de minimis* touches cannot be categorized as violent based on the definition of a misdemeanor crime of domestic

stalking or threatening an intimate partner . . . in reasonable fear of bodily injury to the partner or child; and includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or by its terms 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*.

Id. (emphasis added).

⁵¹ *Nason*, 269 F.3d at 16–17 ("After all, when Congress inserts limiting language in one section of a statute but abjures that language in another, closely related section, the usual presumption is that Congress acted deliberately and purposefully in the disparate omission."); *see* *Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Griffith*, 455 F.3d at 1342 ("If Congress had wanted to limit the physical force requirement in § 922(g)(9), it could have done so, as it did in the last clause of the preceding paragraph of the same subsection . . . but that is not what Congress did. That it did not speaks loudly and clearly.").

⁵² *Nason*, 269 F.3d at 17–18.

⁵³ 142 CONG. REC. S11,877 (1996).

⁵⁴ *Nason*, 269 F.3d at 17.

⁵⁵ *Id.*

⁵⁶ *See generally Flores*, 350 F.3d at 668–69; *United States v. Norbinga*, 474 F.3d 561, 563–64 (9th Cir. 2006).

violence.⁵⁷ These courts reasoned that a strict interpretation in cases involving *de minimis* touching leads to harsh results.⁵⁸ The Seventh and Ninth Circuit Courts of Appeals assert that in order to avoid collapsing the distinction between violent and non-violent offenses, the word “force” requires a different legal meaning in contrast to its general scientific meaning.⁵⁹

In order to preserve the distinction between violent and non-violent offenses, the Seventh Circuit Court of Appeals, in *United States v. Flores*, established a standard requiring force of a violent nature.⁶⁰ This standard criminalizes force meant to cause, or likely to cause, bodily injury.⁶¹ The court conceded establishing such a benchmark for the use of “physical force” set a qualitative, rather than quantitative, line.⁶² However, the court elaborated that without creating a minimum boundary for the use of force, the distinction between the use of “physical force against” and “physical contact” would be indistinguishable, despite having different legal meanings.⁶³

Establishing a standard requiring the use, or attempted use, of violent physical force is significant when examining a broad battery statute like Wyoming Statute

⁵⁷ See *infra* notes 58–74 and accompanying text (discussing the exclusion of *de minimis* touches when considering the “physical force” requirement in § 921(a)(33)(A)(ii)).

⁵⁸ *Flores*, 350 F.3d at 671–72.

Every battery entails a touch, and it is impossible to touch someone without applying some force, if only a smidgeon. . . . Every battery involves “force” in the sense of physics or engineering, where “force” means the acceleration of mass. A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second per second. . . . Perhaps one could read the word “force” in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones.

Id.

⁵⁹ *Id.* at 672 (“[W]e must treat the word force as having a meaning in the legal community that differs from its meaning in the physics community.”); *Belless*, 338 F.3d at 1068 (stating the use of deadly weapon as discussed in the federal definition is a gravely serious threat in comparison with the ungentlemanly conduct criminalized by the Wyoming statute).

⁶⁰ *Flores*, 350 F.3d at 672; see *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 n.10 (7th Cir. 2000); *Xiong v. INS*, 173 F.3d 601, 604–05 (7th Cir. 1999).

⁶¹ *Flores*, 350 F.3d at 672.

Otherwise, “physical force against” and “physical contact with” would end up meaning the same thing, even though these senses are distinct in law. This is not a quantitative line (“how many newtons makes a touching violent?”) but a qualitative one. 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.

Id.

⁶² *Id.*

⁶³ *Id.*

§ 6-2-501(b) because of the criminalization of *de minimis* touching.⁶⁴ In *Flores*, the United States Court of Appeals for the Seventh Circuit analyzed a broad Indiana battery statute incorporating “rude, insolent, or angry” language similar to the Wyoming statute.⁶⁵ The court found the elements of petitioner’s battery conviction could not properly be viewed as a “crime of violence” given the broad range of conduct criminalized by the Indiana statute.⁶⁶

United States v. Belless

The Ninth Circuit Court of Appeals decision in *United States v. Belless* is significant because the court interprets the same Wyoming statute at issue in *Hays*.⁶⁷ In *Belless*, the United States Court of Appeals for the Ninth Circuit addressed whether Wyoming’s battery statute satisfies the “use of physical force” element required by the § 921(a)(33)(A)(ii) definition of a misdemeanor crime of domestic violence.⁶⁸ The *Belless* court, using the doctrine of *noscitur a sociis*, concluded Wyoming’s battery statute does not embrace conduct rising to the level of the federal definition’s requirement for “physical force.”⁶⁹ Specifically, the court held the prong of the statute criminalizing rude, insolent, or angry touches failed to meet the element of “physical force” required by § 921(a)(33)(A)(ii).⁷⁰ The court found § 921(a)(33)(A)(ii) required the violent use of force against the body.⁷¹ The court reasoned that Wyoming’s legislature drafted the more inclusive battery statute to criminalize behavior that often leads to serious violence.⁷² The court presumed it may be the state’s objective to allow police to arrest individuals for *de minimis* touches and therefore ensure such acts would not escalate into violence.⁷³ In light of this standard, the *Belless* court held Wyoming Statute § 6-2-501(b) does not satisfy the § 921(a)(33)(A)(ii) definition of a crime of domestic violence.⁷⁴

⁶⁴ *See id.* at 666.

⁶⁵ *Id.* at 668; IND. CODE § 35-42-2-1(a) (2008) (“A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor.”).

⁶⁶ *Flores*, 350 F.3d at 672 (pleading guilty in the United States District Court for the District of Montana to illegally possessing a firearm in violation of § 922(g)(9)).

⁶⁷ *Belless*, 338 F.3d at 1065. While *Belless*’ prosecution took place in the Ninth Circuit, the predicate offense in this matter was a violation of Wyoming Statute § 6-2-501(b). *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1067–68. The doctrine of *noscitur a sociis* provides that “the meaning of doubtful words may be determined by reference to associated words and phrases.” *Id.* at 1068.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Belless*, 338 F.3d at 1068 (enabling police to arrest and intervene in such confrontations in order and avoid the risk that rude touchings will escalate into further violence).

⁷³ *Id.*

⁷⁴ *Id.* at 1069.

Split of Authority within the United States District Courts of Wyoming

Prior to *Hays*, a split of authority existed within the United States District Courts for the District of Wyoming as to whether 18 U.S.C. § 921(a)(33)(A)(ii) includes *de minimis* touching.⁷⁵ The Chief Judge for the District of Wyoming, William F. Downes, examined the issue in *United States v. Gonzales*.⁷⁶ As in *Hays*, Gonzales allegedly violated Wyoming Statute § 6-2-501(b) and was subsequently indicted under 18 U.S.C. § 922(g)(9).⁷⁷ Judge Downes agreed with the United States Court of Appeals for the Ninth Circuit's analysis of Wyoming Statute § 6-2-501(b) in *Belless*.⁷⁸ Accordingly, the court held Wyoming's battery statute, which criminalizes nonviolent conduct, does not satisfy the element of physical force in § 921(a)(33)(A)(ii) and dismissed the charge against Mr. Gonzales.⁷⁹

However, Judge Clarence Brimmer and Judge Alan Johnson, Wyoming's other two United States District Court Judges, sided with the reasoning of the First, Eighth and Eleventh Circuit Courts of Appeals on the issue presented in *Hays*.⁸⁰ In *United States v. McCue*, Judge Brimmer held the language of Wyoming Statute § 6-2-501(b) was not overinclusive and criminalized conduct sufficient to meet the element of "physical force" in § 921(a)(33)(A)(ii).⁸¹ Similarly, in *United States v. Rael*, Judge Johnson found the position of the First, Eighth, and Eleventh Circuit Courts of Appeals better aligned with the principles of statutory interpretation and legislative intent.⁸² By favorably citing *Griffith* and *Nason*, Judge Johnson held Wyoming Statute § 6-2-501(b) met the physical force requirement of § 922(a)(33)(A)(ii).⁸³ In essence, the court effectively rejected *Belless*' interpretation

⁷⁵ See *infra* notes 76–87 and accompanying text.

⁷⁶ *United States v. Gonzales*, 05-CR0276-D, Order Granting Mot. Dismiss Count Three (Mar. 29, 2006).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *infra* notes 81–87 and accompanying text.

⁸¹ *United States v. McCue*, No. 05-CR-222, Order Denying Def.'s Mot. Dismiss Count Two of the Indictment (Nov. 17, 2006) ("Therefore, under the plain meaning rule, 'the unlawful touching of another in a rude, insolent or angry manner' made illegal by the Wyoming battery statute satisfies the 'physical force' requirement of § 921(a)(33)(A)(ii).").

⁸² *United States v. Rael*, No. 06-CR-183 Order Denying Def.'s Mot. to Dismiss Count One and Two of the Indictment (Nov. 27, 2006).

⁸³ *Id.* at 6.

This Court's decision that Wyoming's battery statute is sufficient to qualify as a misdemeanor crime of domestic violence under § 922(a)(33)(A) is supported by the plain meaning of the statute. This court takes particular note of the fact that § 921(a)(33)(A) does not specify any particular degree of physical force required before an act may be considered a "misdemeanor crime of domestic violence." Instead, the statute plainly refers only to the use or attempted use of physical force.

Id.

of Wyoming Statute § 6-2-501(b).⁸⁴ The court, just as in *Nason* and *Griffith*, declined to read § 921(a)(33)(A)(ii) as requiring physical force be violent, when Congress itself declined to include modifying language.⁸⁵

The district courts for the District of Wyoming, like the Federal Circuit Courts of Appeals, were split as to whether the definitional requirements of § 921(a)(33)(A)(ii) for the use or attempted use of physical force are met by *de minimis* touches.⁸⁶ However, in *Hays*, the Tenth Circuit interpreted § 921(a)(33)(A)(ii)'s physical force requirement differently than any other court to previously rule on the issue.⁸⁷

PRINCIPAL CASE

A panel of the United States Court of Appeals for the Tenth Circuit narrowly decided *Hays* by a two-to-one vote with Circuit Judge Seymour authoring the opinion for the majority.⁸⁸ The court adhered to precedent in cases where a defendant contests whether a prior conviction is a crime of violence and applied the categorical approach.⁸⁹ The categorical approach does not involve a factual inquiry, but rather an examination of the statute under which a defendant was charged, and an examination of that prong on its face.⁹⁰ The categorical approach permits a court to look beyond the statute to the facts of the prior conviction only in certain circumstances.⁹¹

Majority Opinion

The court began its analysis by examining the text of 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A)(ii).⁹² Because *Hays*' appeal turned on the

⁸⁴ *Id.* at 7.

⁸⁵ *Id.*

⁸⁶ See *supra* notes 44–87 and accompanying text.

⁸⁷ See *infra* notes 93–107 and accompanying text.

⁸⁸ See generally *Hays*, 526 F.3d at 674.

⁸⁹ *Id.* at 676; see also *Taylor v. United States*, 495 U.S. 575, 600 (1990) (finding persuasive authority in the holdings of the Courts of Appeals which mandate a formal categorical approach looking only to the statutory definitions of the prior offenses, not to the particular facts of those underlying convictions).

⁹⁰ *Hays*, 526 F.3d at 676 (“Such review does not involve a subjective inquiry into the facts of the case, but rather its purpose is to determine ‘which part of the statute was charged against the defendant and, thus, which portion of the statute to examine on its face.’”).

⁹¹ *Id.* (“When the underlying statute reaches a broad range of conduct, some of which merits an enhancement and some of which does not, courts resolve the resulting ambiguity by consulting reliable judicial records, such as the charging document, plea agreement, or plea colloquy.”).

⁹² *Id.* at 676; see also *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004); *United States v. Sanchez-Garcia*, 501 F.3d 1208, 1212 (10th Cir. 2007); *McGraw v. Barnhart*, 450 F.3d 493, 498 (10th Cir. 2006).

interpretation of the term “physical force,” and the fact that neither 18 U.S.C. § 922(g)(9) nor § 921(a)(33)(A)(ii) provided a definition for the term, the court turned to Black’s Law Dictionary for guidance.⁹³ The court found the definitions implied the term “physical force” requires something more than mere contact.⁹⁴ The court contended its interpretation—that physical force entailed something more than *de minimis* touches—conformed to what the United States Supreme Court and the Seventh and Ninth Circuits had suggested.⁹⁵ With this notion of “physical force” in mind, the court noted the United States Supreme Court’s interpretation of “crime of violence” in *Leocal v. Ashcroft*, as well as the Seventh Circuit’s interpretation in *Flores v. Ashcroft*, to support its holding that “physical force” requires violence.⁹⁶ Additionally, the court examined the Ninth Circuit Court of Appeals’ interpretation of “physical force” in *United States v. Belless*, as well as its own interpretation in *United States v. Sanchez-Garcia*.⁹⁷

The court observed the record did not indicate whether Hays had violated the “unlawfully touching” prong or the “recklessly causes bodily injury prong” of Wyoming Statute § 6-2-501(b).⁹⁸ According to the court, without any information regarding Hays’ underlying conviction, both prongs of the Wyoming battery statute must satisfy the federal definition of a crime of domestic violence.⁹⁹ Under the modified categorical approach, the court concluded each prong must satisfy 18 U.S.C. § 922(a)(33)(A)(ii)’s definition, or Hays’ prior conviction under the Wyoming Statute could not support the charge in his federal indictment.¹⁰⁰

⁹³ BLACK’S LAW DICTIONARY 537 (8th Abridged ed. 2005) (defining “force” as “power, violence, or pressure directed against a person or thing,” and the term “physical force” as “force consisting in a physical act, esp. a violent act directed against a robbery victim”).

⁹⁴ *Hays*, 526 F.3d at 677.

⁹⁵ *Id.* (“Consistent with these definitions, the Supreme Court and both this circuit and others have suggested that physical force means more than mere physical contact; that some degree of power or violence must be present in that contact to constitute physical force.” (internal quotations omitted)).

⁹⁶ *Id.*; *Leocal*, 543 U.S. at 11 (“The ordinary meaning of this term, combined with § 16’s emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent active crimes that cannot be said naturally to include DUI offenses.”); *Flores*, 350 F.3d at 672 (“Perhaps one could read the word ‘force’ in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones.”).

⁹⁷ *Hays*, 526 F.3d at 678 (“‘[F]orce’ refers to ‘destructive or violent force.’” (quoting *United States v. Venegas-Ornelas*, 348 F.3d 1273, 1275 (10th Cir. 2003))).

⁹⁸ *Id.* Due to the restrictions of the modified categorical approach, the only document in the record containing any information about the circumstances of Hays’ underlying conviction was the pre-sentence report; a document the court could not examine to resolve ambiguity. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

In analyzing the first prong of Wyoming Statute § 6-2-501(b) forbidding “rude, insolent, or angry” touching, the court discerned the Wyoming statute incorporates the common law rule and any touching, however slight, constitutes battery.¹⁰¹ However, the court reasoned the common law rule has become antiquated, as many states have moved away from the broad definition due to the Model Penal Code’s influence on state substantive law.¹⁰² Accordingly, the court found the first prong of Wyoming’s assault and battery statute criminalized conduct which did not satisfy the definition of a misdemeanor crime of domestic violence set forth in 18 U.S.C. § 921(a)(33)(A)(ii).¹⁰³

The court next examined the Congressional Record and the legislative history of 18 U.S.C. § 922(g)(9).¹⁰⁴ The court found that during the debate of what later became 18 U.S.C. § 922(g)(9), Senator Lautenberg repeatedly referred to individuals such as “wife beaters” and “child abusers,” suggesting Congress’ concern was violent offenders, rather than those who have merely touched another in a rude manner.¹⁰⁵ The court determined Congress broadened the scope of the firearm prohibition to include individuals employing violent force in non-felony crimes.¹⁰⁶

Dissenting Opinion

Judge Ebel wrote a dissenting opinion arguing the court’s holding was not supported by the principles of statutory construction or wise public policy.¹⁰⁷ Judge Ebel, unlike the majority, agreed with the reasoning of the United States

¹⁰¹ WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* §16.2 (2d ed. 2007).

¹⁰² *Hays*, 526 F.3d at 679 n.2; *see, e.g.*, UTAH CODE ANN. § 76-5-102(1)(c) (West 1953) (criminalizing behavior which intends or actually causes bodily injury); COLO. REV. STAT. ANN. §§ 18-3-202 to -204 (West, 2004) (criminalizing behavior in which the offender must intend to injure or actually cause bodily harm to the body of another, or act with an extreme indifference to the value of human life).

¹⁰³ *Hays*, 526 F.3d at 679 (“Indeed, one can think of any number of ‘touchings’ that might be considered ‘rude’ or ‘insolent’ in a domestic setting but would not rise to the level of physical force discussed [in § 921(a)(33)(A)(ii)].”).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 680.

These comments make clear that Congress broadened the scope of § 922(g) to encompass misdemeanor crimes of domestic violence not out of a hope to keep guns out of the hands of individuals who may have inflicted *de minimis* touches on their spouses or children, but to keep guns out of the hands of domestic abusers who previously fell outside the bounds of the statute because they were convicted of misdemeanors rather than felonies due to “outdated thinking” or plea-bargains.

Id.

¹⁰⁷ *Id.* at 682 (Ebel, J., dissenting).

Courts of Appeals for the First, Eighth and Eleventh Circuits, and found the language of the statute clear and unambiguous, therefore, the plain meaning should control.¹⁰⁸ Judge Ebel concluded Wyoming Statute § 6-2-501(b) does not criminalize incidental contact, but rather deliberate touches.¹⁰⁹ From his perspective, these types of intentional touches constitute the kind of aggression Congress meant to include in the enactment of § 921(a)(33)(A)(ii).¹¹⁰

Judge Ebel criticized the majority's heavy reliance on *United States v. Leocal*.¹¹¹ In his opinion, *Leocal* was not on point because the Florida statute did not include a *mens rea* requirement, while Wyoming Statute § 6-2-501(b) clearly incorporates a *mens rea* requirement.¹¹²

In addition, Judge Ebel argued the court's reasoning was misguided based on the language of the statutory scheme.¹¹³ In Judge Ebel's opinion, the statutory language of § 921(a)(33)(A)(ii) is clear and unambiguous, therefore, the court did not need to judicially graft qualifying language onto § 922(g)(9).¹¹⁴ Judge Ebel asserted an examination of § 922(g)(8)(C) demonstrated Congress had the capacity to add modifying language to § 922(g)(9).¹¹⁵ Such a finding made it clear that Congress purposely left the qualifying language broad enough to incorporate all types of force, including *de minimis* touches.¹¹⁶

¹⁰⁸ *Hays*, 526 F.3d at 682 (Ebel, J., dissenting).

¹⁰⁹ *Id.* (Ebel, J., dissenting).

¹¹⁰ *Id.* (Ebel, J., dissenting).

¹¹¹ *Id.* (Ebel, J., dissenting); see *Leocal*, 543 U.S. at 7. From a scientific perspective, every touch does include some level of physical force, but something more is required from a legal standpoint. *Id.*

¹¹² *Hays*, 526 F.3d at 682–83 (Ebel, J., dissenting); see *Streitmatter v. State*, 981 P.2d 921, 924 (Wyo. 1994).

[I]t is clear that Wyo. Stat. Ann. §§ 6-2-501 and 6-5-502, . . . simple assault and battery and aggravated assault and battery, are the statutory equivalents of a crime at common law. As such, the court had no hesitancy in concluding that Wyo. Stat. Ann. § 6-2-502(a)(ii) is a general intent crime and would no doubt reach the same conclusion in relation to § 6-2-501. Importantly, general intent crimes require the intentional doing of the prohibited act. Thus, an individual may not violate Wyo. Stat. Ann. § 6-2-501 by engaging in the type of negligent or merely accidental conduct.

Id. (internal citation omitted).

¹¹³ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

¹¹⁴ *Id.* (Ebel, J., dissenting); see *Duncan*, 533 U.S. at 173 (2001).

¹¹⁵ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

¹¹⁶ *Id.* (Ebel, J., dissenting).

Furthermore, the actual language of the standard troubled Judge Ebel.¹¹⁷ Judge Ebel argued the majority's reliance on *United States v. Leocal* and *United States v. Flores* led it to require that "physical force result in some sort of harm or injury."¹¹⁸ According to Judge Ebel, imposing a standard requiring the use of physical force result in either harm or injury provides little clarity as to what qualifies under the federal definition of a crime of domestic violence.¹¹⁹ Judge Ebel asserted, "[o]nce we start down the slippery slope left open by the majority opinion of qualifying what constitutes 'physical force,' our work will never be done."¹²⁰

In Judge Ebel's opinion, the court's adoption of the physical force standard was neither necessary nor helpful.¹²¹ Judge Ebel proffered the court's opinion was not supported by the plain language of the statute, the overall statutory scheme in which § 922(g)(9) is included, or by wise public policy.¹²² Judge Ebel concluded Congress adopted the more applicable standard based on its' own appreciation for the difficulties of defining qualifying conduct.¹²³ Like the First, Eighth, and Eleventh Circuit Courts of Appeals, Judge Ebel would have held the plain language of the statute should control.¹²⁴

ANALYSIS

The reasoning of the United States Circuit Court of Appeals for the Tenth Circuit in *Hays* is problematic for several reasons.¹²⁵ First, the court erred by concluding the 18 U.S.C. § 921(a)(33)(A)(ii) physical force requirement entails something more than *de minimis* touching.¹²⁶ Second, the court ignored its own previous interpretation of the term "physical force."¹²⁷ Third, the court incorrectly imposed a legal standard requiring the use of physical force result in physical harm or injury.¹²⁸ Fourth, rather than seizing the opportunity to clarify whether

¹¹⁷ *Id.* (Ebel, J., dissenting) ("It imposes an amorphous legal standard to determine whether conduct involving 'physical force' rises to the level of a predicate offense for purposes of section 922(g)(9).").

¹¹⁸ *Id.* (Ebel, J., dissenting).

¹¹⁹ *Id.* (Ebel, J., dissenting).

¹²⁰ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting) (acknowledging the problematic effect of a standard requiring the use or attempted use of physical force result in either harm or injury because there is no bright line rule for quantifying "physical force").

¹²¹ *Id.* at 685 (Ebel, J., dissenting).

¹²² *Id.* at 682 (Ebel, J., dissenting).

¹²³ *Id.* at 685 (Ebel, J., dissenting).

¹²⁴ *Id.* (Ebel, J., dissenting).

¹²⁵ See *infra* notes 131–97 and accompanying text.

¹²⁶ See *infra* notes 131–62 and accompanying text.

¹²⁷ See *infra* notes 163–74 and accompanying text.

¹²⁸ See *infra* notes 175–86 and accompanying text.

Wyoming's battery statute satisfies the use of physical force requirement of § 921(a)(33)(A)(ii), the court further complicated the law.¹²⁹ Additionally, this section discusses the *Hays* decision's practical implications on the firearm rights of individuals convicted under broad state assault and battery statutes within the Tenth Circuit.¹³⁰

The Plain Language of § 921(a)(33)(A)(ii) is Clear and Unambiguous

The holdings of the First, Eighth and Eleventh Circuits are more consistent with the principles of statutory interpretation and legislative intent compared to the other circuits.¹³¹ The first step in any statutory exercise is to examine the language of the statute itself.¹³² If the statutory language has a plain meaning, the courts are bound to follow that language.¹³³ The term "physical force" is an elementary concept, readily understood within the legal community.¹³⁴ Given the clarity of "physical force," the plain meaning of the language must control.¹³⁵ Furthermore, Congress is entitled to define the terms governing crimes freely.¹³⁶ For a court to find ambiguity from a straightforward phrase such as "physical force" on the basis that it disagrees with Congress' effort is improper.¹³⁷ Supposing Congress' definition of a qualifying misdemeanor does not encompass all types of force when the language clearly supports the proposition is unfounded.¹³⁸

The faulty reasoning of the Seventh and Ninth Circuit Courts of Appeals, on which the Tenth Circuit relied, frustrates the congressional intent behind § 922(g)(9).¹³⁹ The *Hays* court's reliance on *Leocal*, *Flores*, and *Belless* leads to a misguided interpretation of "physical force."¹⁴⁰ As Judge Ebel points out in the dissent, the

¹²⁹ See *infra* notes 187–91 and accompanying text.

¹³⁰ See *infra* notes 192–97 and accompanying text.

¹³¹ *United States v. Rael*, No. 06-CR0183, Order Denying Def. Mot. to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) (finding the statutory language of Wyoming Statute § 6-2-501(b) has a plain meaning and without ambiguity, a court must follow that language).

¹³² *Hays*, 526 F.3d at 677; *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 15–16.

¹³³ See *Salinas v. United States*, 522 U.S. 52, 57–58, (1997); *United States v. Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir. 1987); *McGraw*, 450 F.3d at 498.

¹³⁴ *Nason*, 269 F.3d at 16; *Griffith*, 455 F.3d at 1345 ("Unlike the Seventh Circuit, we do not feel compelled to reach a result at war with common sense, particularly when doing so would require us to alter the plain language of what Congress has written.").

¹³⁵ *Nason*, 269 F.3d at 16.

¹³⁶ *Id.* at 17.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Hays*, 526 F.3d at 685 (Ebel, J., dissenting); see *Hayes*, 129 S. Ct. at 1081 (construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute would frustrate Congress' purpose).

¹⁴⁰ *Hays*, at 682–84 (Ebel, J., dissenting).

court's reliance on *Leocal* is misplaced.¹⁴¹ The court shows a broad deference to the United States Supreme Court's statement in *Leocal* that it could not "forget that it was ultimately . . . determining the meaning of the phrase 'crime of violence.'"¹⁴² However, rather than determining the meaning of the phrase "crime of violence," the *Hays* court was asked to decipher the meaning of the term "misdemeanor crime of domestic violence."¹⁴³ As Judge Ebel noted, the court gave no weight to the misdemeanor qualifier.¹⁴⁴ By its very nature, a misdemeanor crime will involve less violence than a felony.¹⁴⁵

Likewise, the court's dependence on *Flores* is mistaken.¹⁴⁶ In *Flores*, the Seventh Circuit considered 18 U.S.C. § 16, a statute similar to § 921(a)(33)(A)(ii).¹⁴⁷ The court seems to adopt *Flores*' scientific discussion of "force" as a clear indication that Congress did not intend to include *de minimis* touches in the definition of § 921(a)(33)(A)(ii).¹⁴⁸ The *Hays* court's approval of this discussion is problematic because it deviates from the plain language of § 921(a)(33)(A)(ii).¹⁴⁹ The physics discussion in *Flores* addresses matters wholly unrelated to the practical application of the law.¹⁵⁰ *Flores*' examination considers hypothetical situations such as snowballs, spitballs and paper airplanes.¹⁵¹ These situations are the type where minimal amounts of "dynes" or "newtons" of force are used against others.¹⁵² Rarely would an individual be prosecuted for offenses involving spitballs

¹⁴¹ *Id.* at 682–83 (Ebel, J., dissenting); *Leocal*, 547 U.S. at 7. In *Leocal*, the United States Supreme Court was asked to consider the meaning of the term "crime of violence." *Id.* However, the *Hays* court was being asked to weigh the meaning of the term "misdemeanor crime of domestic violence." *Hays*, 526 F.3d at 683.

¹⁴² *Hays*, 526 F.3d at 683 (Ebel, J., dissenting) ("In this regard, the majority asserts that it is significant for our purposes that the *Leocal* Court went on to assert, 'the ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent active crimes that cannot be said naturally to include DUI offenses.'").

¹⁴³ *Id.* (Ebel, J., dissenting).

¹⁴⁴ *Id.* (Ebel, J., dissenting).

¹⁴⁵ *Id.* (Ebel, J., dissenting).

¹⁴⁶ *Id.* (Ebel, J., dissenting); see *infra* notes 148–56 and accompanying text.

¹⁴⁷ See *Flores*, 350 F.3d at 668. The Immigration and Nationality Act defined a "crime of domestic violence" in terms of 18 U.S.C. § 16 as a crime that has, an element, the use, attempted use, or threatened use of physical force against the person or property of another. *Flores*, 350 F.3d at 668; Petitioner Brief-Appellee, *supra* note 19, at 9.

¹⁴⁸ *Hays*, 526 F.3d at 678; see *supra* notes 60–66 and accompanying text for discussion of "force" in *Flores*.

¹⁴⁹ *Griffith*, 455 F.3d at 1345.

¹⁵⁰ Petitioner Brief-Appellee, *supra* note 19, at 20; *Flores*, 350 F.3d at 673 (Evans, J., concurring) ("We recently observed that critics of our system of law often see it as 'not tethered very closely to common sense.'").

¹⁵¹ See *supra* note 58 and accompanying text.

¹⁵² Petitioner Brief-Appellee, *supra* note 19, at 20; *Griffith*, 455 F.3d at 1345.

and paper airplanes.¹⁵³ In the real world, a person is prosecuted for actual battery against the body of another.¹⁵⁴ A consideration of time and resources in relation to the circumstances surrounding battery prosecutions within the American legal system leads to the rational conclusion that individuals rarely face prosecution for little more than a minimal exertion of “dynes” or “newtons.”¹⁵⁵

The *Belless* court’s reasoning presents the same analytical problems as *Flores*.¹⁵⁶ Following *Belless*’s misguided discussion of Newtonian mechanics, the court stated its goal in this exercise is to allocate criminal responsibility, not take part in a discussion of physics.¹⁵⁷ This statement is clearly erroneous as the function of assigning criminal responsibility belongs to Congress.¹⁵⁸ A reading of a statute contradicting the plain meaning ultimately frustrates Congress’ intent for the broad application of these sections.¹⁵⁹ The *Hays* court found the reasoning of the Ninth Circuit in *Belless* persuasive and consequently added its own qualifying language to 18 U.S.C. § 921(a)(33)(A)(ii).¹⁶⁰ As in *Hays*, imposing a standard requiring violent physical force when Congress itself did not include such a requirement is inappropriate.¹⁶¹ If Congress had intended the term “physical

¹⁵³ Petitioner Brief-Appellee, *supra* note 19, at 20; *Flores*, 350 at 672 (Evans, J., concurring) (“For one thing, people don’t get charged criminally for expending a newton of force against victims.”).

¹⁵⁴ Petitioner Brief-Appellee, *supra* note 19, at 20; *Griffith*, 455 F.3d at 1345 (inferring that prosecutions based on a minimal exertion of force are divorced from common sense and have little or no basis in the real world).

¹⁵⁵ Petitioner Brief-Appellee, *supra* note 19 at 20; *Flores*, 350 at 672 (Evans, J., concurring); Skakun, *supra* note 39, at 1852 (“And as a practical matter, it is likely that actual violence, not mere touching, is the basis of almost all assault and battery convictions for making physical contact with a domestic intimate.”).

¹⁵⁶ *United States v. Rael*, No. 06-CR-183, Order Denying Def’s Mot. to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) (rejecting the Ninth Circuit’s analysis of “physical force” based on Newtonian mechanics and the associated language requiring “threatened use of a deadly weapon”).

¹⁵⁷ *Id.*; *Griffith*, 455 F.3d at 1344; *see* U.S. CONST. art. I, §8, cl.2 (granting Congress the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution).

¹⁵⁸ *United States v. Gonzales*, No. 05-CR-276-D Order Granting Mot. Dismiss Count Three (Mar. 29, 2006); *see also* *Pioneer Inv. Serv. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993) (“Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry ‘their ordinary, contemporary, common meaning.’”).

¹⁵⁹ *United States v. McCue*, No. 05-CR-222-B, Order Denying Defendant’s Motions to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) at 7.

¹⁶⁰ *See Hays*, 526 F.3d at 681 (holding Wyoming Statute § 6-2-501(b) does not satisfy the “use of physical force” element in § 921(a)(33)(A)(ii) because from a legal standpoint, “physical force” entails more than mere touching).

¹⁶¹ *United States v. McCue*, No. 05-CR-222-B, Order Denying Defendant’s Motions to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) at 7; *see supra* note 51 and accompanying text (discussing the impropriety of adding language which Congress itself did not include).

force” to actually mean violent physical force, it could have expressly included the distinction in the statute’s text.¹⁶²

Hays’ Interpretation Strays From Precedent

Another problematic aspect of the *Hays* decision is the court’s disregard for its own previous interpretation of the term “physical force.”¹⁶³ It is important to note that until *Hays*, the Tenth Circuit had not ruled on the precise issue presented in *Hays*.¹⁶⁴ However, it previously interpreted analogous statutory language in *United States v. Treto-Martinez*.¹⁶⁵ In *Treto-Martinez*, the Tenth Circuit Court of Appeals considered whether a prior felony conviction under Kansas’ aggravated battery statute constituted a “crime of violence” for the purposes of U.S.S.G. § 2L1.2(b)(1)(A).¹⁶⁶ The U.S.S.G. § 2L1.2(b)(1)(A) definitional requirements are similar to those of 18 U.S.C. § 921(a)(33)(A)(ii) as both include as an element the “use or attempted use of physical force.”¹⁶⁷ The Kansas aggravated battery statute, like the Wyoming statute, prohibits “intentionally causing physical contact with another person when done in a rude, insulting, or angry manner with a deadly weapon.”¹⁶⁸ In *Treto-Martinez*, the Tenth Circuit Court of Appeals held the intentional touching of another with a deadly weapon in a “rude, insolent, or angry manner” did involve the use of physical force.¹⁶⁹

¹⁶² See *Hays*, 526 F.3d at 684 (Ebel, J., dissenting); *Nason*, 269 F.3d at 16–18; *Griffith*, 455 F.3d at 1342.

¹⁶³ See *supra* notes 163–69 and accompanying text.

¹⁶⁴ Petitioner Brief-Appellee, *supra* note 19, at 9.

¹⁶⁵ *Id.*; see *United States v. Treto-Martinez*, 421 F.3d 1156, 1157–58 (10th Cir. 2005); *United States v. Miller*, 98 Fed. Appx. 801, 802–03 (10th Cir. 2004); *United States v. Quijada*, 146 Fed. Appx. 958, 960–62 (10th Cir. 2005).

¹⁶⁶ *Treto-Martinez*, 421 F.3d at 1157. *Treto-Martinez* pled guilty in the United States District Court for the District of Colorado to unlawful reentry by a deported alien who had been removed from the country subsequent to commission of an aggravated felony. *Id.* The Sentencing Guidelines advised a court to increase punishment by sixteen levels if a defendant remains in the country after a felony conviction that is a crime of violence. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (1991). *Treto-Martinez* appealed the sentence imposed. *Treto-Martinez*, 421 F.3d at 1157. The court concluded the defendant’s prior conviction for aggravated battery constituted a crime of violence. *Id.* Causing physical contact with a deadly weapon in a rude, insulting or angry manner was sufficient to constitute actual use of force under the sentencing guidelines and would always include as an element the threatened use of physical force. *Id.*

¹⁶⁷ *Treto-Martinez*, 421 F.3d at 1159; U.S.S.G. § 2L1.2(b)(1)(A) provides that:

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels

Id.

¹⁶⁸ *Treto-Martinez*, 421 F.3d at 1159.

¹⁶⁹ *Id.* at 1162.

Despite interpreting “physical force” in other contexts, *Hays* was not a case of first impression for the United States Court of Appeals for the Tenth Circuit, as it has spoken on domestic abuse issues dealing with the interpretation of “physical force.”¹⁷⁰ Therefore, *Hays*’ interpretation of “physical force” undermines the principles of stare decisis.¹⁷¹ The court’s interpretation of “physical force” in the instant case offends the integrity of the judicial system because it did not treat analogous situations alike in accordance with the doctrine of stare decisis.¹⁷²

Hays Imposes an Amorphous Legal Standard

As indicated by Judge Ebel in the dissent, the court imposes an amorphous standard to determine whether conduct involving physical force rises to the level of a predicate offense.¹⁷³ The *Hays* court’s addition of modifying language to § 921(a)(33)(A)(ii) is improper given the overall statutory scheme.¹⁷⁴ Additionally, implementing a standard requiring physical force result in either harm or injury stifles the promotion of judicial efficiency.¹⁷⁵ In the dissent, Judge Ebel pointedly asked what constitutes harm or injury in relation to an element of physical force.¹⁷⁶ Judge Ebel asserted that imposing a standard requiring the use of physical force result in either harm or injury has the potential to flood the courts with litigation.¹⁷⁷

¹⁷⁰ Petitioner Brief-Appellee, *supra* note 19, at 10; see *Treto-Martinez*, 421 F.3d at 1158–59; *Miller*, 98 Fed. Appx. at 804; *Quijada*, 146 Fed. Appx. at 964–70.

¹⁷¹ Jordan W. Connors, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 681, (2008).

The Supreme Court considers stare decisis—the obligation to adhere to past opinions—to be “indispensable” to the “rule of law.” In describing the doctrine, the Court has explained that “when an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.” This constraint helps legitimize the judicial system by requiring the Court to treat like cases alike.

Id.

¹⁷² Connors, *supra* note 171, at 681; 20 AM. JUR. 2D *Courts* § 129 (2008).

Under the doctrine of stare decisis, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. The doctrine is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion.

Id.

¹⁷³ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

¹⁷⁴ *Griffith*, 455 F.3d at 1343.

¹⁷⁵ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting); Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court From Casey to Lawrence*, 81 N.Y.U. L. REV. 1137, 1141 (2006) (“Stare decisis serves many important interests, including: (1) promoting judicial economy by avoiding relitigation of issues.”).

¹⁷⁶ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

¹⁷⁷ *Id.*

The *Hays* court's imposition of its standard shows no regard for the rule laid out by the United States Supreme Court in *Duncan v. Walker*.¹⁷⁸ When construing the meaning of a statute a court should, if possible, prevent any clause, sentence, or word from being superfluous, void, or insignificant.¹⁷⁹ As stated by the Courts of Appeals in the First, Eighth and Eleventh Circuits, Congress clearly intended to leave the language of § 922(g)(9) broad because it chose to place qualifying language in the previous section.¹⁸⁰ Furthermore, the legal standard adopted in *Hays* frustrates the concept of judicial economy.¹⁸¹ Such a standard will inundate the Tenth Circuit with questions relating to the quantitative aspects of both harm and injury.¹⁸² This standard, like the standard adopted by the Seventh and Ninth Circuits, serves as a qualitative measure.¹⁸³ Therefore, by adopting this standard, the panel of the Tenth Circuit provides no guidance to lower courts facing the issue in the future.¹⁸⁴

Hays Provides No Clarity in Relation to § 921(a)(33)(A)(ii)

Given the split of authority within the federal courts, the *Hays* court had the opportunity to provide clarity as to whether Wyoming's battery statute satisfies the federal definition of a misdemeanor crime of domestic violence.¹⁸⁵ However, unlike the United States Courts of Appeals for the Seventh and Ninth Circuits, the Tenth Circuit imposed a standard requiring physical force result in either harm or injury to the victim.¹⁸⁶ Prior to *Hays*, the only court to consider whether the language of Wyoming's assault and battery statute satisfies the physical force requirement was the Ninth Circuit in *Belless*.¹⁸⁷ Rather than finding the *Belless* court's reasoning persuasive, the panel of the Tenth Circuit Court of Appeals adopted a different legal standard, rendering the Tenth Circuit a "lone ranger" in

¹⁷⁸ *Duncan*, 533 U.S. at 175; see *supra* note 51 and accompanying text (discussing the impropriety of finding Congress' omission of a word in one section, but not in another, intentional and purposeful).

¹⁷⁹ *Duncan*, 533 U.S. at 175.

¹⁸⁰ *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

¹⁸¹ *Id.* at 684–85 (Ebel, J., dissenting).

¹⁸² *Id.* at 685 (Ebel, J., dissenting) (asserting the standard will necessitate the courts to hear a substantial number of cases to define what types of injuries will merit an interpretation of the application of physical force).

¹⁸³ *Id.* (Ebel, J., dissenting).

¹⁸⁴ *Id.* (Ebel, J., dissenting).

¹⁸⁵ See *Hays*, 526 F.3d at 684–85 (Ebel, J., dissenting) (discussing the various interpretations of the federal courts on the issue).

¹⁸⁶ *Id.* at 677–78 (insisting force be violent in nature, the sort that is intended to cause bodily injury, or a minimum likely to do so).

¹⁸⁷ *Id.* at 680; see generally *Belless*, 338 F.3d 1063.

relation to this question.¹⁸⁸ At the time of the *Hays* decision, none of the federal circuits to rule on the issue supported the imposition of language requiring the use, or attempted use, of physical force to result in either harm or injury.¹⁸⁹

Implications of Hays

The United States Court of Appeals for the Tenth Circuit's holding in *Hays* serves as a considerable victory for individuals convicted under state assault and battery statutes criminalizing *de minimis* touches.¹⁹⁰ Given the circumstances of how state court systems process misdemeanor cases, potential now exists for widespread restoration of firearm rights, especially in states with all encompassing assault and battery statutes.¹⁹¹ As in *Hays*, misdemeanor cases often pass through the courts without the inclusion of facts in the charging document, plea agreement, or plea colloquy.¹⁹² When combining these circumstances with the restraints of the categorical approach, state assault and battery statutes like Wyoming's are rendered useless when serving as the predicate offense for federal prosecutions under the Lautenberg Amendment.¹⁹³ The *Hays* court's holding provides individuals convicted in the Tenth Circuit under broadly authored state assault and battery statutes an avenue for restoring their right to possess firearms.¹⁹⁴ Despite Congress' intention to prohibit "wife beaters" and "child abusers" from possessing firearms, *Hays* in effect restores firearm rights under the categorical approach.¹⁹⁵

¹⁸⁸ See *Hays*, 526 F.3d at 684 (Ebel, J., dissenting) (asserting the standard adopted leaves the Tenth Circuit standing alone in requiring "physical force" to result in either harm or injury).

¹⁸⁹ *Id.* at 674; see *supra* notes 39–86 and accompanying text (asserting that a person cannot make contact with the body of another without exerting some level of physical force, particularly of an insulting or rude nature); see *supra* notes 60–74 and accompanying text (asserting the term "physical force" in relation to the definitional requirements of 18 U.S.C. § 921(a)(33)(A)(ii) require the violent use of force against the body of another).

¹⁹⁰ *Fun With Crimes of Violence*, Kansas Federal Defender, <http://kansasfederaldefender.blogspot.com/2008/05/fun-with-crimes-of-violence.html>, May 21, 2008 (last visited Jan. 8, 2009).

¹⁹¹ *Id.*

¹⁹² Stanley Z. Fisher, *Just the Facts, Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 17 (1993) (discussing the omission of factual information which is important in criminal proceedings); *Hays*, 526 F.3d at 676.

Even the categorical approach, however, permits courts to look beyond the statute of conviction under certain circumstances. When the underlying statute reaches a broad range of conduct, some of which merits an enhancement and some of which does not, courts resolve the resulting ambiguity by consulting reliable judicial records, such as the charging document, plea agreement, or plea colloquy.

Hays, 526 F.3d at 676.

¹⁹³ See *Hays*, 526 F.3d at 681. The categorical approach limits a sentencing court to examining the statutory elements of the predicate offense. *Id.* at 676.

¹⁹⁴ *Id.* at 681.

¹⁹⁵ *Id.*

CONCLUSION

The United States Court of Appeals for the Tenth Circuit's decision in *Hays* blurs the law regarding whether the federal definition of a crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(ii) criminalizes *de minimis* touches.¹⁹⁶ The Tenth Circuit must reconsider the legal standard requiring "physical force" to either result in harm or injury in order to satisfy 18 U.S.C. § 921(a)(33)(A)(ii).¹⁹⁷ The disarray surrounding 18 U.S.C. § 921(a)(33)(A)(ii)'s definitional requirement for an element of "physical force" must compel the United States Supreme Court to hear a case on this precise issue and therefore provide clarity and uniformity to the lower courts in the near future.¹⁹⁸

¹⁹⁶ See *supra* notes 39–86 and accompanying text.

¹⁹⁷ See *supra* notes 39–197 and accompanying text.

¹⁹⁸ See *supra* notes 126–97 and accompanying text.