

**VOISINE v. UNITED STATES: DANGEROUS LOOPHOLE OR  
CONSTITUTIONAL VIOLATION?**

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**I. INTRODUCTION**

A twenty-year-old federal ban on firearms possession includes a provision that applies a lifetime ban on firearms possession to any person with a prior conviction of misdemeanor “use . . . of physical force” against a domestic relation.<sup>1</sup> Congress enacted that provision in 1994 to “close a dangerous loophole” in the statutes and to prevent persons convicted of domestic violence from having access to firearms.<sup>2</sup> The Court had previously ruled that the statute applied to a misdemeanor conviction for intentional use of force against a close family member.<sup>3</sup> The issue presented in this case was whether reckless conduct met the criteria for application of the lifetime ban on possession of firearms.<sup>4</sup>

After reviewing the facts surrounding the case, and the procedural history, this Note will then examine the reasoning the Court used in reaching its findings, including the language of the statute and the congressional intent.<sup>5</sup> This Note will then examine Justice Thomas’s dissent, which takes issue with the majority’s reasoning and raises significant constitutional issues the majority ignores.<sup>6</sup> Finally, this Note will compare and contrast the majority opinion with the dissent and discuss the important constitutional implications arising from the decision.<sup>7</sup>

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<sup>1</sup> 18 U.S.C. § 921(a)(33)(A) (2006); 18 U.S.C. § 922(g)(9) (2015).

<sup>2</sup> *Voisine v. United States*, 136 S. Ct. 2272, 2276 (2016).

<sup>3</sup> *United States v. Castleman*, 134 S. Ct. 1405, 1416 (2014).

<sup>4</sup> *Voisine*, 136 S. Ct. at 2276.

<sup>5</sup> See *infra* Parts II, III.

<sup>6</sup> See *infra* Part III.F.

<sup>7</sup> See *infra* Part IV.

## II. BACKGROUND

Petitioners Stephen L. Voisine and William E. Armstrong pled guilty to domestic abuse misdemeanors under section 207 of the Maine Criminal Code.<sup>8</sup> Voisine assaulted his girlfriend in 2004.<sup>9</sup> Subsequently, Voisine was arrested for shooting a bald eagle with a rifle he owned.<sup>10</sup> During the investigation of that crime, officials discovered his conviction for domestic abuse and charged him with violation of the firearms possession ban.<sup>11</sup> Similarly, Armstrong assaulted his wife in 2008.<sup>12</sup> In a later narcotics investigation, investigators found him to be unlawfully in possession of several firearms and charged him under the domestic violence offender ban.<sup>13</sup>

In the district court, both argued that under the Maine statute, their convictions could have been considered reckless rather than intentional or knowing conduct.<sup>14</sup> Therefore, they should not be subject to the ban on firearms possession.<sup>15</sup> The district court found their arguments without merit and allowed the two to enter guilty pleas with a right to appeal.<sup>16</sup> The Court of Appeals for the First Circuit affirmed the district court's ruling and held that a mens rea of recklessness qualifies as a "misdemeanor crime of violence" under the firearms ban.<sup>17</sup>

Upon a joint petition for certiorari, the Court originally vacated the appellate decision and remanded the cases for reconsideration under the Court's recent decision in *U.S. v. Castleman*, which "left open whether a reckless assault . . . [is] a 'use' of force."<sup>18</sup> The court of appeals upheld the conviction, and the Supreme Court subsequently

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<sup>8</sup> *Voisine*, 136 S. Ct. at 2277.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

granted a second petition for certiorari to determine “whether a misdemeanor conviction for reckless[] . . .” domestic assault subjects the person to the lifetime ban on firearms possession.<sup>19</sup>

### III. ANALYSIS

#### A. *Required Mens Rea*

The Court first considered the issue of whether the firearms ban applied to those convicted of reckless assaults in the same way as it applies to knowing and intentional assaults.<sup>20</sup> The Court granted certiorari in order to settle a split among circuit decisions.<sup>21</sup> The beginning point of the Court’s consideration focused on an examination of the mens rea required for a conviction of reckless assault.<sup>22</sup> The Maine statute adopted the Model Penal Code definition of recklessness as “to ‘consciously disregard[]’ a substantial risk that the conduct will cause harm to another.”<sup>23</sup> Citing *Farmer v. Brennan*, the Court added that a person is reckless only if he disregards a risk of harm “of which he is aware.”<sup>24</sup> The Court then contrasted the *Farmer* decision with the Model Penal Code definitions of “knowingly” as “aware that [harm] is practically certain” and “intentionally” as having “that result as a ‘conscious object.’”<sup>25</sup> Thus, the Court concluded from the Maine statutory text “that a reckless domestic assault” is a “misdemeanor crime of domestic violence” as defined in the federal statute.<sup>26</sup>

The federal statute includes “use . . . of physical force” as a required element of “a misdemeanor crime of domestic violence.”<sup>27</sup> In enacting the firearms ban, Congress intended to prevent those convicted of domestic abuse under “run-of-the-mill assault and battery laws” from

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<sup>19</sup> *Id.* at 2277-78.

<sup>20</sup> *Id.* at 2278.

<sup>21</sup> *Id.* at 2277-78.

<sup>22</sup> *Id.* at 2278.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

possessing firearms.<sup>28</sup> Because two-thirds of state assault and battery laws incorporate reckless acts, the exclusion of such state laws would be counter to Congress's purpose in enacting the firearms ban statute.<sup>29</sup>

### B. Statutory Language

In the Court's opinion, the "use of force," as an element of domestic violence, does not apply only to "knowing or intentional" assault.<sup>30</sup> In examining several dictionary definitions of "use," the Court found it to mean an "act of employing something."<sup>31</sup> When a person does something involuntarily, that act is not usually considered to be an "active employment."<sup>32</sup> Thus, in common usage, to use something implies a volitional act.<sup>33</sup> So, in the statute's language, a person uses physical force as the "instrument" to do something.<sup>34</sup> That, however, does not necessarily mean that the person using physical force has "the mental state of intention, knowledge, or recklessness" concerning the consequences of his voluntary act.<sup>35</sup> "That language, naturally read, encompasses acts of force undertaken recklessly—*i.e.*, with conscious disregard of a substantial risk of harm."<sup>36</sup> The "state-law backdrop to that provision, which include[s] misdemeanor assault statutes covering reckless conduct in a significant majority of jurisdictions, indicates that Congress meant just what it said."<sup>37</sup> Possession of a gun, following a conviction under Maine law for assaulting a domestic partner, even if recklessly and unintentionally, "therefore violates section 922(g)(9)."<sup>38</sup>

The Court used two examples to illustrate the difference.<sup>39</sup> The

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2279.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2282.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2279.

first contrasted someone dropping a soapy, wet plate, which shatters and injures his wife; with a man who angrily throws a plate, which unintentionally hits and injures his wife.<sup>40</sup> In dropping the plate, the first man did not use force against his wife.<sup>41</sup> Throwing the plate was a volitional use of force, regardless of whether or not he knew or recognized a risk that a piece of the plate would hit his wife.<sup>42</sup> In the second example, the Court conjectured a door slipping from a man's grasp and striking his girlfriend as opposed to a man slamming the door in anger, striking and injuring her.<sup>43</sup> As with the plate thrower, the second used a force against the partner regardless of whether the man knew or recklessly disregarded the risk of injury.<sup>44</sup>

### C. Defining "Use of Force"

Petitioners cited the Court's decision in *Leocal v. Ashcroft* to support their position that "use" requires a distinction between knowledge and recklessness.<sup>45</sup> In that case, the Court found that the statutory definition of a crime of violence as "the use . . . of physical force against the property or person of another," excluded conduct that was "merely accidental."<sup>46</sup> If someone tripped and fell into someone else, one would not say they used physical force against the other.<sup>47</sup> However, the person tripping is like the soapy-handed person dropping the plate.<sup>48</sup> Not only is the injury unintended, but the action itself was unintended: a "true accident."<sup>49</sup> No one would call that an "'active employment' of force."<sup>50</sup> That contrasts with recklessness, where the action is intentional and in disregard of the "substantial risk of causing injury."<sup>51</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

The decision in *Leocal* distinguished between accident and recklessness but specifically did not decide whether the statutory definition at issue, in that case, included recklessness.<sup>52</sup> The Court then held that the definition of “use . . . of physical force” in the firearms prohibition does include recklessness.<sup>53</sup> Therefore, the statutory definition of a “misdemeanor crime of violence” does not exclude reckless behavior.<sup>54</sup> A reckless assault is a “use of force” just as is a knowing or intentional use, and the statute prohibits anyone so convicted from owning or possessing firearms.<sup>55</sup>

#### D. Statutory History

When enacting the firearms ban, Congress was well aware that the majority of states, using the Model Penal Code as their source, included recklessness in their assault and battery statutes.<sup>56</sup> The congressional intent was “to apply firearms restrictions to [all] those abusers” included under the states’ misdemeanor assault statutes.<sup>57</sup> Typical of those state laws, Maine’s misdemeanor assault law includes “intentionally, knowingly or recklessly” injuring another person.<sup>58</sup>

Petitioners maintained that the Maine statute lists alternative mens rea for the single crime of misdemeanor assault while their definition of the firearms ban requires knowing or intentional.<sup>59</sup> Citing *Descamps v. United States*, petitioners argued the Maine law “sweeps more broadly” than the federal law and a conviction under that law, therefore, “‘cannot count’ as a predicate” for the firearms ban, regardless of the mens rea.<sup>60</sup> In response, the Court referred to *Castleman*, wherein the Court held that “the knowing or intentional application of [such] force” as used in the firearm ban “is a ‘use’ of force” using the common law understanding of the word force as “broad

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<sup>52</sup> *Id.* at 2279-80.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2280.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2280-81.

enough to include offensive touching.”<sup>61</sup> Likewise, here the firearms ban’s definition of “use” did not preclude the inclusion of a reckless mens rea.<sup>62</sup>

Petitioners further argued that the Court should look beyond the state laws that were current when Congress passed the ban and instead examine the common law definition of assault and battery.<sup>63</sup> Under the common law, their convictions would be overturned because the common law definition “required a *mens rea* greater than recklessness.”<sup>64</sup> The Court, however, noted that Congress clearly intended the statute to prevent convicted abusers from possessing weapons, and in doing so meant to encompass the state assault statutes current at the time.<sup>65</sup> The common law approach to mental state was confusing and unclear.<sup>66</sup> Congress could not have intended to use such an outdated, murky element to author a statute with such clear intent.<sup>67</sup>

### *E. Justice Thomas’s Dissent*

Justice Thomas, in sharp contrast with the majority, stated that “because mere recklessness is sufficient to sustain a conviction under” the Maine statute, it “does not necessarily involve the ‘use’ of force, and thus, does not trigger . . . [the federal] prohibition on firearm possession.”<sup>68</sup> He found that three aspects of the federal statute demonstrate that “use of physical force” requires intent.<sup>69</sup>

Referring to many of the same dictionary definitions of the word “use” as the majority, Justice Thomas reached the opposite conclusion—that “use . . . is an inherently intentional act . . .”<sup>70</sup> As the

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<sup>61</sup> *Id.* at 2277 (internal citations omitted).

<sup>62</sup> *Id.* at 2282.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2282.

<sup>68</sup> *Id.* at 2282-83 (Thomas, J., dissenting).

<sup>69</sup> *Id.* at 2283.

<sup>70</sup> *Id.*

majority concluded, using something means to employ it.<sup>71</sup> Justice Thomas carried that definition further to conclude that it also means “to employ the thing for its instrumental value . . . to accomplish a further goal.”<sup>72</sup> He found support for his interpretation in case history, citing *Castleman*, *Bailey v. United States*, and *Leocal* to conclude that “use” requires “active employment” of something (i.e., more than accidental or reckless conduct).<sup>73</sup>

The second aspect of the federal statute that Justice Thomas cited was the meaning of “force.”<sup>74</sup> Based on *Black’s Law Dictionary’s* definition, force, when used in law, means “violence . . . directed against a person or thing.”<sup>75</sup> “[V]iolence’ . . . implies an intentional act.”<sup>76</sup> He distinguished between “using force” to punch, kick, shove, or use a weapon and an automobile accident, which no one would consider a “use of force” even though injuries occur as a result of the “force of the accident.”<sup>77</sup> Quoting Justice Oliver Wendell Holmes, he stated, “[E]ven a dog distinguishes between being stumbled over and being kicked.”<sup>78</sup>

Finally, Justice Thomas concluded that the context of the statute confirms his position.<sup>79</sup> Alongside “use of physical force,” the statute adds “the threatened use of a deadly weapon.”<sup>80</sup> Citing *Sorenson v. Secretary of Treasury*, “the same words in a statute presumptively have the same meaning,” he concluded that both phrases necessarily require an intentional act.<sup>81</sup>

In Justice Thomas’s analysis, the Maine statute does not require “use or attempted use of physical force” as an element.<sup>82</sup> It, therefore,

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (emphasis added); *Force*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>76</sup> *Voisine*, 136 S. Ct. at 2283.

<sup>77</sup> *Id.* at 2284.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

necessarily includes “recklessly caus[ing] bodily injury or offensive physical contact to another person.”<sup>83</sup> The statute would thereby cover someone who injures another by recklessly texting while driving, resulting in a car crash.<sup>84</sup> Therefore, the statute “likely does not qualify as a ‘misdemeanor crime of domestic violence’” triggering the firearms prohibition.<sup>85</sup> The charging documents for petitioners cited the statute’s language and charged them with an “indivisible offense that is satisfied by recklessness.”<sup>86</sup> Because their convictions do not necessarily include the required element of “use of physical force against a family member,” their convictions cannot be “a misdemeanor crime involving domestic violence under federal law” and should either be reversed or, at least, vacated and remanded to determine the correct interpretation of the statutory language.<sup>87</sup>

#### ***F. Thomas’s Dictum: Three Categories of Conduct***

Justice Thomas wrote an extended dictum to demonstrate how he differed from the majority’s interpretation of various mental states.<sup>88</sup> He described three “categories of conduct.”<sup>89</sup> First, a person can intentionally create a force and intentionally apply it against something, such as when one punches a punching bag.<sup>90</sup> This is a “paradigmatic case of battery.”<sup>91</sup> Both Justice Thomas and the majority agree this is a “use of physical force.”<sup>92</sup>

Second, a person can intentionally create a force and recklessly apply it, such as when a person practices a kick and recklessly strikes furniture.<sup>93</sup> This category encompasses the majority’s examples of “the

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See generally *id.* at 2272, 2282-92 (discussing Justice Thomas’s dissent from the majority’s interpretation of the various mental states).

<sup>89</sup> *Id.* at 2285.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Angry Plate Thrower” and “the Door Slammer.”<sup>94</sup> Both intentionally applied a force (throwing or slamming) in a reckless manner but did not intentionally strike their victims.<sup>95</sup> These would certainly be “use[s] of physical force.”<sup>96</sup>

Finally, a person can recklessly create and apply a force, such as in a car accident.<sup>97</sup> Justice Thomas found the rub in this category.<sup>98</sup> He gave two examples.<sup>99</sup> First, a father texting while driving rear-ends another car, injuring his son.<sup>100</sup> Second, a police officer speeding to a crime scene does not activate his siren and lights and has an accident which injures another officer standing nearby.<sup>101</sup> In the majority’s opinion, these could both be “use[s] of physical force” under the Maine statute because they include reckless actions.<sup>102</sup> In Justice Thomas’s opinion, they are not “an active employment of something *for a particular purpose*” and, therefore, not a “use of physical force.”<sup>103</sup>

Justice Thomas concluded that the majority’s interpretation is too broad because it confuses several concepts.<sup>104</sup> First, the majority does not distinguish between the mens rea for force and for causing harm.<sup>105</sup> By equating “purposeful, knowing, and reckless,” the majority would make “the Reckless Policeman” and “the Text-Messaging Dad” equally guilty as “the Angry Plate Thrower.”<sup>106</sup> The majority used examples where the actor intentionally but recklessly used force and failed to distinguish those from an unintentional reckless use of force.<sup>107</sup> In distinguishing between “practical certainty” (i.e., knowledge or

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<sup>94</sup> *Id.* at 2286.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 2287.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> *Id.* at 2287-88.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 2288.

<sup>107</sup> *Id.*

intent) and “a substantial risk” (i.e., recklessness) as the probability of the result decreases, the actor’s intent decreases, and the action becomes increasingly like reckless.<sup>108</sup> Any resulting injury becomes a mere accidental by-product of the reckless behavior, not a result of “actively employed force.”<sup>109</sup>

In Justice Thomas’s opinion, the majority erroneously added two more requirements to the definition of “use.”<sup>110</sup> The act must be volitional and cannot be accidental.<sup>111</sup> According to accepted legal definitions, a “volitional” action is nothing more than a voluntary muscular movement, as opposed to an unwilled movement (e.g., a seizure).<sup>112</sup> Thus, while “all involuntary actions are blameless, not all blameless conduct is involuntary.”<sup>113</sup> However, in the majority’s construction, “Recklessly unleashing a force that recklessly causes physical injury . . . is an assault . . . .”<sup>114</sup> Under that construction “the Text-Messaging Dad” would be as guilty of assault as “the Angry Plate Thrower”—a result Thomas found implausible.<sup>115</sup> If Congress wanted to include all forms of reckless action in the firearms ban statute, it could have used language that reflected the Model Penal Code usage and included “the intentional, knowing, or *reckless* causation of physical injury” as a required element.<sup>116</sup> Instead, the statute specifies “the use of physical force,” which by plain meaning applies only to intentional actions that are meant to cause harm.<sup>117</sup>

### G. *The Constitutional Question*

Justice Thomas ended his dissent by pointing out that the majority’s opinion “creates serious constitutional problems.”<sup>118</sup> The

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<sup>108</sup> *Id.* at 2288-89.

<sup>109</sup> *Id.* at 2289.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2289-90.

<sup>116</sup> *Id.* (emphasis added).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

constitutional avoidance doctrine requires that when a court must choose between “two plausible constructions of a statute—one constitutional and the other unconstitutional—[it must] choose the constitutional reading.”<sup>119</sup> The firearms ban statute is on its face very broad.<sup>120</sup> Any unconsented touching of a family member can result in “a lifetime ban on gun ownership.”<sup>121</sup> Thus, a mother who strikes her child as a discipline could be charged under a local ordinance and lose the constitutional right to own a firearm.<sup>122</sup> The majority’s ruling would further expand the statute to include any reckless act.<sup>123</sup> That is “constitutionally problematic territory.”<sup>124</sup>

In *District of Columbia v. Heller*, the Court reiterated the right of all citizens to have a firearm for any legitimate purpose and in *McDonald v. Chicago*, held the right to bear arms is a fundamental right.<sup>125</sup> While the Second Amendment is not an absolute prohibition and states may impose “narrow limitations” on firearms ownership, including preventing “dangerous persons” from acquiring weapons, states may not broadly inhibit the right.<sup>126</sup> In Justice Thomas’s opinion, the firearms ban statute “does far more than ‘close a dangerous loophole.’”<sup>127</sup> The statute “imposes a lifetime ban on” gun ownership and possession “for *all* nonfelony domestic offenses,”<sup>128</sup> including those that, “like traffic tickets,” would be punished by no more than a fine.<sup>129</sup> This, in Justice Thomas’s closing, is a case in which “the Court continues to ‘relegat[e] the Second Amendment to a second-class right.’”<sup>130</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 2291 (internal citations omitted).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (emphasis added).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2292.

## IV. COMMENTARY

Two interesting aspects of this case are that Justice Thomas's dissent is nearly twice as long as the majority opinion and that his dissent concludes with a discussion of an important constitutional question that the majority dismisses in a footnote.<sup>131</sup> In order to reach the constitutional question, Justice Thomas presented a detailed discussion of mens rea, intent, and volition to demonstrate where he believed the majority erred in interpreting the Maine assault statute.<sup>132</sup>

Federal law<sup>133</sup> imposes an absolute lifetime ban on the possession of firearms to keep weapons out of the hands of several categories of persons considered possibly dangerous.<sup>134</sup> The petitioners in this case fall into the category of those "convicted . . . of a misdemeanor crime of domestic violence."<sup>135</sup> A statute must have as a required element "use or attempted use of physical force" in order to be a misdemeanor crime of domestic violence.<sup>136</sup> The Maine assault statute defines assault as "intentionally, knowingly or recklessly caus[ing] bodily injury or offensive physical contact."<sup>137</sup> If the person assaulted is "a family or household member (which includes domestic partners), the crime is categorized as a "domestic violent assault."<sup>138</sup>

The crux of Justice Thomas's dissent is his disagreement with the majority's conclusion that the Maine domestic assault statute includes the required element to fall under the firearms ban.<sup>139</sup> His position is based on firmer ground. The Maine statute was written broadly, and a charge under the statute does not require a mens rea distinction.<sup>140</sup> The statute, thus, sweeps in violations that range from intentionally shooting a spouse to, as Justice Thomas points out, a

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<sup>131</sup> *Id.* at 2282-92; *Id.* at 2282, n.6.

<sup>132</sup> *Id.*

<sup>133</sup> 18 U.S.C. § 922(g)(9) (2015); 18 U.S.C. § 921(a)(33)(A) (2006).

<sup>134</sup> 18 U.S.C. § 922 (2015).

<sup>135</sup> 18 U.S.C. § 922(g)(9) (2015).

<sup>136</sup> 18 U.S.C. § 921(a)(33)(A) (2006).

<sup>137</sup> ME. REV. STAT. 17-a, § 207(1)(A) (2017).

<sup>138</sup> ME. REV. STAT. 17-a, § 207-A(1)(A) (2017).

<sup>139</sup> *Voisine v. United States*, 136 S. Ct. 2272, 2282 (2016).

<sup>140</sup> *Id.* at 2288.

mother's slap to a recalcitrant child.<sup>141</sup> The federal ban was clearly intended to identify persons who pose a danger and to prevent them from having ready access to weapons.<sup>142</sup> However, the broad reading of the Maine statute would lump into the same category a habitual wife-beater with a girlfriend who, in a single instance of anger, throws her purse and accidentally strikes her ex-boyfriend.<sup>143</sup> While, as Justice Thomas admitted, such an unintended, accidental striking would not likely be prosecuted, a real possibility exists that a bitter ex-partner could bring charges on such a petty event, and the result could be a lifetime loss of the right to bear arms.<sup>144</sup>

Therein lies the significance of Justice Thomas raising the constitutional question buried by the majority. A real doubt exists concerning the extent to which Maine's overly broad statute could reach in taking a person's constitutional rights under the Second Amendment. As Justice Thomas pointed out, *Heller* and *McDonald* together established that the right of a person to own a firearm for any purpose is a fundamental right under the Second Amendment, and a fundamental right is not to be lost lightly.<sup>145</sup> The limits of the application of the Maine statute are doubtful and, when constitutional issues are involved, "doubts must be 'resolved in favor of protecting the constitutional claim.'"<sup>146</sup>

Justice Thomas is correct in his dissent. The majority erred on the side of an overly broad interpretation of Maine's domestic assault statute and in doing so, wrongly deprived petitioners of their right to bear arms.

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<sup>141</sup> *Id.* at 2290.

<sup>142</sup> *Id.* at 2276.

<sup>143</sup> *Id.* at 2287.

<sup>144</sup> *Id.* at 2291.

<sup>145</sup> *Id.* at 2290-91.

<sup>146</sup> *Montejo v. Louisiana*, 556 U.S. 778, 778 (2009) (quoting *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (concerning doubt whether a request for counsel at an arraignment activated Sixth Amendment implications)).