No. 11-662

IN THE
Supreme Court of the United States

DELROY FISCHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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I. THE GOVERNMENT ADMITS THAT THE COURT BELOW RELIED SOLELY ON THE FACTUAL RECORD TO DETERMINE THAT THE STATE STATUTE HAS THE USE OF PHYSICAL FORCE AS AN ELEMENT.

The Government explains the basis for the Court of Appeals' decision below very differently in its Statement of the Case than in its Argument. In its Statement, the Government candidly admits that the courts below relied **solely** on United States v. Amerson, 599 F.3d 854 (8th Cir. 2010), to determine that Neb. Rev. Stat. § 28-310(1)(a) "qualified as a misdemeanor crime of domestic violence" ("MCDV"). Brief for the United States in Opposition ("Opp. Br."), p. 6. Then it admits that Amerson had determined that the similar Nebraska statute, Neb. Rev. Stat. § 28-323(1)(a), "satisf[ied] the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)" **solely** because the defendant had "'assented to factual findings'" that demonstrated his use of physical force. *Id.* According to the Government, because Fischer made a similar assent to factual findings of the use of physical force, Amerson governed, and the case below was rightly decided. *See* Opp. Br., pp. 4, 6. Thus, the Government effectively concedes that both Amerson and the case below used the factual record to determine the legal elements of the statute of conviction.

Then, in its Argument, the Government reverses field and incorrectly asserts that the court in Amerson had relied on the factual record **only** to determine the portion of Neb. Rev. Stat. § 28-323 under which the defendant had been convicted (*see* Opp. Br., p. 11 and

n.2), ignoring Amerson's clear statement to the contrary — that the defendant "assented to factual findings [to] satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *Id.* at 855. The Government then misconstrues Fischer, asserting that, since "circuit precedent" had already established that assault by causing bodily injury was categorically an MCDV (Opp. Br., p. 12), there was no need for the Fischer Court to have bothered with the "factual record," except to have determined the subsection of Neb. Rev. Stat. § 28-310 under which Fischer had been convicted. *Id.* However, the Fischer Court did "consult" the factual record, not to "confirm what was already clear," as the Government has contended (Opp. Br., p. 12), but to support its conclusion that the "facts" assented to by Fischer, like the facts "assented to [by Amerson] ... satisfy the force requirement of 18 U.S.C. § 921(a)(33)(A)(ii)." *See* United States v. Fischer, 641 F.3d 1006, 1009 (8th Cir. 2011).

II. THE FISCHER DECISION IS NOT CONSISTENT WITH THE "MODIFIED CATEGORICAL APPROACH."

The Government asserts that "the [Fischer] decision ... is consistent with [the] well-established principles [of] the modified categorical approach" (Opp. Br., p. 9), having:

> examined the factual basis for petitioner's plea to determine that petitioner's third-degree assault conviction rested on having "caus[ed] bodily injury to another person" ... rather than having "threaten[ed] another in a menacing

> manner" ... **and thus concluded** that petitioner was convicted of an offense that "has, as an element, the use ... of physical force." [*Id.*, p. 9 (emphasis added).]

Having misstated the modified categorical approach, the Government misapplies that approach to this case.

In Johnson v. United States, 559 U.S. ___, 130 S.Ct. 1265 (2010), this Court stated the modified categorical approach, as follows:

> When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the "modified categorical approach" that we have approved ... permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record.... [*Id.*, 130 S.Ct. at 1273.]

However, once the "statutory phrase" is identified, a court may not then use that same factual basis a second time to determine whether the identified phrase "has, as an element, the use of physical force," as the Government contends (*see* Opp. Br., p. 9), and as the Government acknowledges that the Fischer Court did (*see* Opp. Br., p. 6). Rather, under the modified categorical approach, once the statutory phrase is identified, the factual record is set aside, and the court examines only the language of the identified statutory subsection to determine its elements. *See* Johnson, 130 S.Ct. at 1269-1270. The Fischer Court erroneously

bypassed this necessary step, thus departing from the well-established principles of the modified categorical approach. *See* Pet., pp. 24-25.

The government suggests that if Fischer "intentionally" caused bodily injury, rather than "knowingly" or "recklessly," the statute somehow should be read as having an element of physical force.[1] *See* Opp. Br., pp. 12-13. The modified categorical approach was devised to take into account numerous state prosecutions in which the charging document refers only generally to a section of the criminal code that includes more than one provision, each of which defines a distinctly different crime with different elements. To accommodate this practice, the categorical approach is modified, permitting use of the factual record for the narrow purpose of identifying which of two or more "divisible" offenses fit the offense of conviction. *See*, *e.g.*, United States v. Woods, 576 F.3d 400, 405-06 (7th Cir. 2009). To permit the factual record to be used a second time, as the Government

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[1] Even if Fischer had been convicted only of "**intentionally"** causing bodily injury, that still does not mean that the language of the statute he was convicted under **categorically requires** "use of physical force." The words "intentional,""knowing," and "reckless" are words that relate to the *mens rea* of the crime, whereas the words "caus[ing] bodily injury" relate to the *actus reus*. Thus, the government's proposed excision of one or more *mens rea* elements would not add "use of physical force" to the *actus reus* element. As Judge Colloton pointed out in his concurrence, one could cause bodily injury without using "physical force," for example, by "intentionally signaling to the driver of a vehicle that a roadway is clear while knowing that the driver is likely to cause an accident and suffer injury by proceeding." *See* Fischer, 641 F.3d at 1010 (Colloton, J., concurring).

proposes, to parse the elements of an indivisible offense already specifically defined by a legislature, violates the Congressional directive to discover the elements of a state statute by the language of the statute.

III. THE GOVERNMENT WOULD CREATE A FEDERAL STANDARD TO DETERMINE THE ELEMENTS OF THE STATE STATUTE.

The Government claims that the Eighth Circuit has by its "cases establish[ed] that the offense of assault by causing bodily injury categorically has, as an element, the use of physical force," and the Government argues that the Fischer Court was bound by "circuit precedent" to find that Neb. Rev. Stat. § 28-310(1)(a) was an "offense that has, as an element, the use of physical force." *See* Opp. Br., pp. 10, 12.

A. The Cases Cited by the Government Do Not Support Its Claim.

In support of its claim, the Government cites three cases, United States v. Smith, 171 F.3d 617 (8th Cir. 1990), United States v. Salean, 583 F.3d 1059 (8th Cir. 2009), and Amerson. Only Amerson involved an assault statute similar to the statute in Fischer: "causing bodily injury." *See* Amerson, 599 F.3d at 855. In Smith, the court ruled that an Iowa statute, defining assault as an "**act** intended to cause pain, injury, or offensive or insulting physical contact [is categorically] an offense with an element of physical force." *Id.,* 171 F.3d at 621 (emphasis added). Likewise, in Salean, the court ruled that a Minnesota statute, defining assault

as "[a]n **act** done with intent to cause fear in another of immediate bodily harm ... or the intentional infliction or attempt to inflict bodily harm on another," categorically requires physical force. *Id.*, 583 F.3d at 1060 (emphasis added). Both statutes require proof of an "act" that directly causes the specified injury.

The Nebraska statute in Amerson and the statute here, however, require proof of no direct act, but only of "causing bodily injury." *See* Neb. Rev. Stat. § 28-323(1)(a). Amerson, then, stands by itself and remains the sole "circuit precedent" upon which Fischer rests. Because Amerson was wrongfully decided in reliance on the factual record, so, too, was Fischer wrongfully decided. *See* Pet., pp. 6-8.

B. There Can Be No "Eighth Circuit Law" Establishing an MCDV Assault Offense.

The Government asserts that there is an "Eighth Circuit law" which generally "establish[es] that the offense of assault by causing bodily injury categorically has, as an element, the use of physical force." Opp. Br., p. 10. This assertion appears to be based upon the Government's contention that "Congress has employed the common-law definition of misdemeanor battery to define the term 'misdemeanor crime of domestic violence,'" and thus, "Congress intended to describe generic, common law battery crimes, including crimes involving the causation of bodily injury, whether by means of direct physical contact or employment of subtle and indirect uses of force." Opp. Br., p. 18. The language of 18 U.S.C. § 921(a)(33)(A)(ii) dictates otherwise.

The statute specifically states that to be a misdemeanor crime of domestic violence an "offense" must be "a misdemeanor under Federal, State, or Tribal law," not a misdemeanor at common law. While a statute may contain common law terms, it is the statute, not the common law, that dictates whether the offense categorically requires proof of "physical force." *See* Johnson, 130 S.Ct. at 1270. While the issue of what constitutes "physical" and "force" is a matter of federal law, the "determination of the elements" of the specific state statute under which a person has been convicted is a matter of state law. *See* Johnson v. United States, 130 S.Ct. 1269.

Thus federal courts, including the Supreme Court, are bound by state law as interpreted by state courts, and are not free to define a federal common law definition of assault and battery to be applied irrespective of the words of the applicable state statute. Rather, the federal courts are confined to determine whether an element of a state statute, as determined by state law, meets the federal definition of "use or threatened use of physical force." *See* Johnson, 130 S.Ct. at 1269-72. Therefore, there can be so such thing as "Eighth Circuit law" that categorically "establish[es] the offense of assault causing bodily injury," as the Government has claimed. *See* Opp. Br., p. 10.

The Government's statement on page 19 of its brief — that, based upon United States v. Nason, 269 F.3d 10 (1st Cir. 2001), "[t]he First Circuit ... has held that misdemeanor assault or battery by causing bodily injury qualifies as a [MCDV] for purposes of Section 922(g)(9)" (Opp. Br., p. 19) — is flatly wrong. Rather,

in Nason, the First Circuit held that "the **Maine assault statute** that prohibits 'intentionally, knowingly, or recklessly caus[ing] bodily injury to another,' 'unambiguously involves the use of physical force,'" making it a MCDV. Opp. Br., pp. 19-20 (emphasis added).[2]

IV. THE GOVERNMENT HAS ERRONEOUSLY ASSUMED THAT "PHYSICAL FORCE" AS STATED IN THE FEDERAL STATUTE INCLUDES "SUBTLE AND INDIRECT FORCE."

The Government attempts to convince this Court that the phrase "physical force," as that term appears in 18 U.S.C. § 921(a)(33)(A)(ii), means any "force," no matter how "subtle and indirect." *See* Opp. Br., pp. 17-18. In support of this position, the Government relies heavily upon Johnson v. United States, 130 S.Ct. at 1270. *See* Opp. Br., pp. 17-18, and n.3. The Government's reliance is seriously misplaced.

In Johnson, this Court addressed the meaning of "physical force" as it appears in 18 U.S.C. § 924(e)(2)(B)(i) in a phrase substantially identical to that in 18 U.S.C. § 921(a)(33)(A)(ii). Johnson, 130 S.Ct. at 1268. Noting that the term "physical force" is

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[2] The First Circuit's classification of a Maine statute does not govern a similar statute in another state. For example, after examining state law, the Second Circuit construed substantially similar language in a Connecticut statute **not** to include the element of use of physical force. *See* Chrzanoski v. Ashcroft, 327 F.3d 188, 195-96 (2nd Cir. 2003).

not defined by Section 924(e)(2)(B)(i), this Court concluded that it must be given its "ordinary meaning." *Id.*, 130 S.Ct. at 1270. "The adjective 'physical,'" the Court observed, "plainly refers to force exerted by and through concrete bodies — distinguishing **physical** force from, for example, **intellectual** force or **emotional** force." *Id.* (emphasis added).

Instead of supporting the Government's position that "any kind" of "force" will do, physical or otherwise, Johnson supports Fischer's position that a statute like Nebraska's that prohibits "causing bodily injury" encompasses causes ranging from direct "physical force" to more "indirect and subtle forces" such as "guile" or "omission." *See* n.1, *supra*. *See* Pet., pp. 13-15. In light of the Johnson Court's recognition that not all force is physical force, it is wholly unwarranted for the Government to have accused Fischer of applying his "'legal imagination' to the language of Neb. Rev. Stat. § 28-310(1)(a)." Opp. Br., p. 19. To the contrary, Fischer has simply applied the ordinary meaning of the word "physical," as an adjectival limit on "force," in the same way that Justice Scalia did in Johnson.

V. THE GOVERNMENT ERRONEOUSLY SHIFTS TO FISCHER THE BURDEN TO PROVE THAT USE OF PHYSICAL FORCE IS NOT AN ELEMENT OF THE STATE STATUTE.

The Government faults Fischer for failing to "identif[y] [any] evidence that Neb. Stat. Rev. § 28-310(1)(a) has been or would be applied in the manner he hypothesizes." Opp. Br., p. 19. But it is not the

petitioner's burden to show that the predicate misdemeanor of which he was convicted does **not** have as an element of the offense the use or the threatened use of physical force. According to the plain language of 18 U.S.C. § 921(a)(33)(A)(ii), that burden falls on the Government, and the Government has failed to carry that burden, both below and in this Court. Not once in the entire proceedings of this case has the Government cited any Nebraska case or uncovered any Nebraska practice materials, such as approved jury instructions, to support the Government's contention that Neb. Stat. Rev. § 28-310(1)(a) categorically has, as an element, the use or attempted use of physical force. Instead, the Government has relied entirely upon the factual record in two Nebraska misdemeanor trials, as if the legal elements of two misdemeanor statutes are determined by the facts in two individual cases wherein two individual defendants confessed to the use of physical force.[3]

The Government tries to fill this gap by citing Nason and Smith. *See* Opp. Br., pp. 19-20. But those cases dealt with the statutes of states other than Nebraska. Moreover, the courts in each of those cases faithfully did what the Eighth Circuit failed to do in Fischer or Amerson: they actually examined state law

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[3] Moreover, Fischer has identified evidence to counter the Government's baseless assertion that physical force is categorically required by Neb. Stat. Rev. § 28-310(a)(1). For example, the Nebraska Supreme Court has stated that the offense "may be committed in a variety of ways." Nebraska v. Pribil, 224 Neb. 28, 395 N.W. 2d 543, 546 (1986). *See* Pet., p. 15.

to ascertain the elements of the statutes at issue. *See* Nason, 269 F.3d at 18-19; Smith, 171 F.3d at 620-21.

VI. THE GOVERNMENT HAS PROVIDED ADDITIONAL REASONS TO GRANT FISCHER'S PETITION.

The Government's response offers new support for the petition to be granted on the second question presented. As the Government points out, there is a circuit split on a recurring question whether "result-oriented" assault statutes, such as the two Nebraska statutes in this case, contain, as an element of the offense, the use or threatened use of physical force. *See* Opp. Br., p. 20. This Court denied the Government's petition for a writ of certiorari in 2010 on this very question. *See* United States v. Hagen, 349 Fed. Appx. 896 (5th Cir. 2009), *cert. denied*, 131 S. Ct. 457 (2010). Although the Government now changes course and opposes the granting of this writ, it has done so only on the ground that "[t]he conflict has not widened." *Id.* As evidenced by this case, the conflict is still festering, dividing the Eighth Circuit by a vote of seven to four not to rehear this case. *See* Pet., p. 6.

On June 11, 2010, when the Solicitor General filed the Government's petition in Hagen, he must have entertained a good faith belief (i) that there was a meaningful "conflict among the courts of appeals" and (ii) that such a conflict justified this Court's review. The Government argued expressly that allowing the conflict in the circuits to continue (i) "threatens to impede effective and uniform enforcement of Section 922(g)(9)"; (ii) leaves undecided a "division of authority

[that] is unlikely to be resolved without this Court's intervention"; (iii) leaves unanswered a "question ... of recurring importance in federal prosecutions and to the administration of a significant federal law"; and (iv) "likely ... prove[s] a source of confusion for defendants," as well as having "an adverse impact on officials reviewing the lawfulness of certain firearms purchases by out-of-state buyers."[4] *See* Petition for a Writ of Certiorari, United States v. Hagen, pp. 7, 15, 16, 18, and 19.[5]

CONCLUSION

For the reasons set out in his Petition and above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[4] Of course, Hagen did not involve the first question presented in this case, whether facts can be used to determine legal elements. The lower courts in Hagen did not make that mistake.

[5] http://www.justice.gov/osg/briefs/2010/2pet/7pet/2009-1520.pet.rep.pdf.