25-5028 ORIGINAL

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2024

MICHAEL BLAKE DeFRANCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: May 16, 2025

QUESTIONS PRESENTED

Question 1: Whether the relationships listed in 18 USC §921(a)(33)(A) defining misdemeanor crime of domestic violence serve both jurisdictional and substantive purposes under controlling decisions of this Court, considering Congress's passage of the Bipartisan Safer Communities Act (BSCA); and whether the Ninth Circuit acted in violation of this Court's rule in *Steel Company v. Citizens For A Better Environment*, 523 U.S. 83 (1998), which requires federal courts to address any issue of subject matter jurisdiction before determining any issue on the merits.

Question 2: Whether this Court's decision in *United States v Hayes*, 555 U.S. 415 (2009), forbids pretrial application of the categorical approach, the circumstance-specific approach or Double Jeopardy Clause issue preclusion rules where the state domestic assault statute lists relationship elements, but that list is broader than the relationships listed in the federal law.

Question 3: Should the government be estopped from continuing with this prosecution on judicial estoppel/due process grounds since before trial the government i) cleared petitioner to possess firearms on five occasions; and ii) adopted the position that petitioner's 2013 PFMA conviction was based on a "dating" relationship in a proposed plea agreement? Positions inconsistent with its trial theory that the PFMA conviction was supported by a spousal type relationship.

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant in the district court, and defendant-appellant in the Ninth Circuit Court of Appeals, is Michael Blake DeFrance. Petitioner is represented by Deputy Federal Defender, Michael Donahoe, of the Federal Defenders of Montana for the District of Montana, Helena Branch.

Respondent, who was the plaintiff in the district court and plaintiff-appellee in the Ninth Circuit Court of Appeals, is the United States of America. Respondent is represented by Jennifer S. Clark and Timothy A. Tatarka, Assistant United States Attorneys for the District of Montana.

STATEMENT OF DIRECTLY RELATED CASES

- *Michael Blake DeFrance v. United States*, No. 22-6956, Supreme Court of the United States. Petition for Certiorari denied April 3, 2023 (App. A, p. 29).

- *United States v. DeFrance*, No. 22-30131, United States Court of Appeals for the Ninth Circuit. Interlocutory Appeal dismissed; order entered February 15, 2023 (App. A, p. 30).

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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No. _____

IN THE
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MICHAEL BLAKE DeFRANCE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Michael Blake DeFrance, petitions for a writ of certiorari, or other appropriate relief, to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1. The Opinion of the Ninth Circuit Court of Appeals styled as *United States v. DeFrance* (9th Cir. 2025) is published at 124 F. 4th 814. The Memorandum disposition, which accompanied the Ninth Circuit's published Opinion, is unpublished. Copies of those decisions are reproduced at Appendix A, pp. 1-27.

2. The district court's original decision denying pretrial relief under both the categorical approach and issue preclusion rules under the Double Jeopardy Clause is reported at 577 F.Supp.3d 1085 (2021) (App. B, pp. 174-192).

3. The district court's unpublished Findings of Fact, Conclusions of Law and Order finding petitioner guilty on all counts can also be found in the Appendix. (App. B, pp. 96-140).

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's decisions reversed, in part, and affirmed, in part, petitioner's convictions. Count I of the second superseding indictment was reversed. Counts II, III and IV were affirmed, but the sentences imposed on those counts were vacated, with a remand to the district court for resentencing. Both the Ninth Circuit's Opinion and its Memorandum disposition were filed on December 30, 2024. Petitioner then filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on January 28, 2025, which the Ninth Circuit denied on February 24, 2025 (App. A, 28).

This Court's jurisdiction arises under 28 USC §1254(1). Petitioner's petition is timely because it was both electronically filed and placed in the United States mail, first class postage pre-paid, on May 16, 2025, within the 90 days for filing under the Rules of this Court (*see* Rule 13, ¶¶ 1 and 3) *as amended* by the Court's July 19, 2021, order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Relevant state and federal statutory provisions involved are set forth in Appendix D attached to this petition.

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STATEMENT OF THE CASE

1. Introduction.

Petitioner takes this opportunity to segregate and address his contention regarding the second aspect of Question 1 set forth above; that enactment of the BSCA impacted the district court's subject matter jurisdiction on Count I. As discussed in more detail below, the district court engaged this jurisdiction argument, in part. However, when we repeated the claim in the Ninth Circuit opening brief (App. D, pp. 557-570), and the petition for rehearing, that court elected to pretermit the issue of jurisdiction over Count I. Instead, the Ninth Circuit opted to decide a legal merits issue involving application of the categorical approach to the force clause of 18 USC §921(a)(33)(A). Reversing on Count I, but allowing the convictions on Counts II, III and IV to stand (App. A, pp. 17-18, 27).

Assuming for purposes of this discussion that the district court was incorrect in its analysis regarding the jurisdictional impact of enactment of the BSCA, such error would require that Count I be dismissed by the district court under 18 USC §3231 for lack of jurisdiction. Not reversed on a categorical approach merits analysis. Thus, we contend under *Steel Company v. Citizens For A Better Environment*, 523 U.S. 83 (1998), the issue of subject matter jurisdiction should have been addressed by the Ninth Circuit first. Because, if petitioner had prevailed on that jurisdictional claim, the convictions on Counts II, III, and IV would *de facto* be

resolved on the merits. Since the conclusion that petitioner was never a prohibited person in light of enactment of the BSCA, would necessitate acquittal on Counts II, III, and IV based on insufficient evidence. *See Jackson v. Virginia*, 443 U.S. 307 (1979).

We highlight this point early so as not to bury the lead and because this situation suggests that an appropriate remedy here may be to grant this petition, vacate the judgment and remand (GVR) for consideration of the jurisdictional issue by the Ninth Circuit in the first instance:

> Regardless of its earlier history, however, the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions, see *post,* at 613 (SCALIA, J., dissenting), State Supreme Court decisions, see, *e.g., Conner v. Simler,* 367 U.S. 486, 81 S.Ct. 1679, 6 L.Ed.2d 1241 (1961), **new federal statutes**, see, *e.g., Sioux Tribe of Indians v. United States,* 329 U.S. 685, 67 S.Ct. 364, 91 L.Ed. 602 (1946) . . .
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> *Lawrence v. Chater,*
> 516 U.S. 163, 166-167 (1996)
> (emphasis added).

We respectfully submit that a GVR order in this case would be in stride with the Court's application of the GVR remedy where a new controlling statute could change the result reached by the lower court.

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2. Proceedings in the District Court.

In 2013 petitioner was convicted by his guilty plea in a Montana Justice Court for a misdemeanor assault crime entitled Partner Family Member Assault (PMFA); under the 2011 version of that Montana statute (App. D, p. 595-598). In 2021, in connection with an ongoing law enforcement investigation, petitioner was found in possession of firearms, which he admitted. In due course petitioner was indicted in federal court in a series of three indictments for being a previously convicted domestic violence misdemeanant, unlawfully in possession of firearms. The first two indictments (App. C, pp. 211-214) each charged a single count for violation of 18 USC §922(g)(9) (App. D, p. 620). However, after petitioner disclosed to the government that he had been cleared to possess firearms on five previous occasions by successfully engaging in five National Instant Criminal Background Check System (NICS) checks, the government went back to the Grand Jury a third time to charge petitioner with violations of 18 USC §922(a)(6) (App. C, p. 250-253) for lying on the ATF 4473 Forms[1] (App. C, p. 228-249). Important here is that none of the indictments ever alleged any sort of relationship element (App. C., 211-214, 250-

[1] It warrants emphasis here that petitioner disclosed the ATF 4473 Forms so he could use them as evidence that he had been successfully vetted for firearms possession on five previous occasions. *See e.g.,* petitioner's Notice of Defenses in the district court (App. C, p. 215-227). Moreover, as we will discuss later, by statute the materials or documents the government examined during those NICS background checks were destroyed. 18 USC §922(t)(2)(C). (App. C, p. 598).

253). A point we address in our discussion below under our due process/estoppel arguments.

Before and during petitioner's federal bench trial, record evidence showed that at the time of his arrest and conviction, petitioner's 2013 Montana PFMA centered on a "dating" relationship, not a spousal one. In this connection, the district court found:

> 99. Neither party contended or presented evidence that, at the time of the PFMA on April 13–14, 2013, DeFrance was Charlo's spouse or former spouse, cohabiting or had cohabited with her as a spouse, or shared a child in common with her. Accordingly, the Court concludes that it must determine whether the PFMA was "committed by . . . a person similarly situated to a spouse . . . of the victim." 18 U.S.C. § 921(a)(33)(A)(ii).
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> App. B, p. 116.

However, the record shows:

- The PFMA victim (aged 15) moved from Montana to Dulce, New Mexico, in October 2010 where she attended Dulce High School (App. C, pp. 370-374; App. D, pp. 504-505, 532, 536);
- While living in Dulce, New Mexico, for approximately 20 months, the PFMA victim dated another individual who attended Dulce High School (App. D, pp. 511, 532-539);
- The PFMA victim (aged 17) moved back to Montana from New Mexico in June 2012 attending Two Eagle River School in Pablo, Montana, the fall of 2012 through May 2014 (App. C, pp. 375-383; App. D, p. 540);

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- At the time of the PFMA in 2013, the victim was visiting petitioner for the weekend and did not live with him (App. C, pp. 261-262; App. D, pp. 436, 449, 459, 461, 469, 515, 525-528);

- At the time of the PFMA on April 13, 2013, the PFMA victim (aged 17) and petitioner (aged 19) had been dating for about nine months (*see* App. C, pp. 268; App. D, pp. 449, 468, 513-515, 525); and

- The PFMA victim did not turn 18 years until April 23, 2013, 10 days *after* the PFMA incident; and under Montana law, she had no legal capacity to marry without parental or judge approval (App. D., 396, 404-405). *Cf. Hernandez-Zavala v. Lynch*, 806 F.3d 259, 262 (2015) (showing that in immigration context "similarly situated to a spouse" must be consistent with domestic or family domestic violence laws of the jurisdiction where the offense occurs).

In addition, even apart from this proof, the government admitted in a proposed plea agreement offer that petitioner's PFMA conviction was, in fact, premised on "dating" relationship (App. D, 425). Touting the proposed agreement in its trial brief, the government stated:

> Although the defendant is proceeding to trial, the United States notes for the record that a motion for change of plea would have been more beneficial to the defendant than a conviction following trial. *See Missouri v. Frye*, 132 S. Ct. 1399 (2012). A written, proposed plea agreement was presented to the defendant for his consideration. That plea agreement represented, in the government's view, the most favorable offer extended to the defendant.

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> The Government does not seek to involve the Court in the plea agreement process in violation of Rule 11, but respectfully requests the Court make an inquiry to ensure the record is protected.
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> (App. C., pp. 329-330).

Over petitioner's objection, however, the district court elected not to inquire about the plea agreement as the government requested. Likewise, although petitioner made the government's plea agreement admission part of his appeal, the Ninth Circuit chose not to address the issue at all. The proposed plea agreement provided in part:

> The parties agree that the defendant's conviction for the misdemeanor crime of domestic violence was based on the fact he was in a current dating relationship with the victim at the time of the offense.
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> (App. D., 425).

Petitioner put on an energetic defense in the district court, which included numerous pretrial and post-trial motions described in the district court docket (App. C, pp. 195-198; ECF Nos. 14, 15, 16, 17, 31, 32, 43, 44 and 53). Relevant here are petitioner's motions to dismiss for failure to state an offense; under the categorical approach and the Double Jeopardy Clause (App. C, pp. 195-198; ECF Nos. 14, 15, 16, 17, 31, 32, 43, 44 and 53). Each of those motions being denied by the district court in a published order, 577 F.Supp.3d 1085 (D. Mont. 2021) (App. B, pp. 174-192).

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In part, petitioner argued that, unlike the situation this Court confronted in *United States v. Hayes*, 555 U.S. 415 (2009), where there were no relationship elements contained in the state predicate conviction statute, the Montana PFMA statute did contain an over-inclusive list of relationships not covered by the federal firearms ban of §922(g)(9). In particular, the "dating" relationship. *Compare by contrast* Montana Code Ann. §45-5-206 (2011) (App. D, pp. 595-598) *with* 18 USC §921(a)(33)(A) (pre-2022) (App. D, p. 616).

Six months after the district court rejected petitioner's pretrial dating relationship argument, and before trial, Congress enacted the BSCA amending §§922(g)(9) to include dating relationships within the federal firearms ban. Moreover, the Historical Notes to BCSA specifically state that:

> The amendments made by subsection (a) [of 18 USC §921(a)(33) and (37)] shall not apply to *any conviction* of a misdemeanor crime of domestic violence entered before the date of enactment of this Act [June 25, 2022].
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> App. D, p. 618 (emphasis added).

Based on this legislative development petitioner moved the district court for permission to file a motion for reconsideration of his previous motions to dismiss (App. C, p. 278-319). The district court denied that permission in a written order (App. B, p. 92-95).

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The case then proceeded to a bench trial on April 26-27, 2023. Both testimony and documentary evidence showed that the victim of the misdemeanor domestic assault was 17 years old, lived with her mother, attended school in another town, and was visiting for the weekend at the time of the assault. Trial testimony also showed by the victim's own account that petitioner and the victim had "been together since June [2012]" (App. C, p. 265) and dating for about nine months (App. C, 268). Rejecting this evidence the district court found petitioner guilty on all counts concluding that petitioner's relationship with the domestic assault victim fell within the undefined "similarly situated as a spouse" language set forth in §921(a)(33)(A) (App. B, p. 140). To do this, the district court considered evidence having nothing to do with the record supporting petitioner's domestic violence conviction.

Next, petitioner filed post-trial motions for acquittal, to arrest judgment for lack of jurisdiction, and for a new trial (App. D, pp. 395-433), which the district court denied (App. B, pp. 141-166). Contained within those post-trial arguments petitioner renewed his claim that the BSCA impacted his case in a jurisdictional sense and the government was taking inconsistent positions. Rejecting these arguments the district court ruled, in part:

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> To be sure, it could have been easier for the government to prove that Mr. DeFrance and Ms. Charlo were in a dating relationship as defined by the [BSCA] amended statute when Mr. DeFrance committed the PFMA; he has all but conceded as much during this litigation. But the evidence and arguments supporting such a conclusion are consistent, not inconsistent, with the government's position at trial that they were similarly situated to spouses. The United States nowhere conceded that it could only prove that the couple was in a dating relationship, and the Court will not construe the offered plea agreement in that manner.
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> (App. B, p. 159).

Over his objection, petitioner was sentenced on all counts to 21 months incarceration, to run concurrently, followed by three years of supervised release (App. B, pp. 168-169). Petitioner next timely appealed to the Ninth Circuit Court of Appeals. He was released on conditions pending that appeal, and remains released, currently residing in Montana.

*3. **Proceedings in the Ninth Circuit Court of Appeals.***

In the Ninth Circuit, petitioner renewed the arguments made in the district court, to include his claim that the change in law affected by the BSCA was a jurisdictional game changer as to Count I, denying the district court subject matter jurisdiction under 18 USC §3231 (App. D., pp. 558-559). And alternatively, that petitioner should have been acquitted on all counts the merits under *Jackson v. Virginia*, 443 U.S. 307 (1979). Among the several claims that petitioner presented to the Ninth Circuit, one in particular urged that under the categorical approach Montana's PMFA statute does not meet the federal definition of misdemeanor crime

of domestic violence, since it does not contain an element of force. After oral argument conducted on September 12, 2024, the Ninth Circuit organized its decision completely around that force claim, reversing petitioner's conviction on Count I, and concluding that the Montana domestic assault statute does not contain a force element (App. A, p. 2). As to the false statement counts, however, the Ninth Circuit affirmed those convictions, but vacated the sentences on those counts, tagged with the following footnote:

> 3 . . . Congress added "a person who has a current or recent former dating relationship with the victim" in 2022, after DeFrance's 2013 domestic violence conviction, *see* Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005, 136 Stat. 1313, 1332 (2022), but that change is not material to the question at issue in this opinion.

(App. A, p. 6).

In response to the Ninth Circuit's Opinion, petitioner filed a petition for both Panel Rehearing and Rehearing *En Banc*, basically echoing the jurisdictional and acquittal claims that he has argued throughout the progress of his case. The petition was denied in a written order on February 24, 2025 (App. A, p. 28).

REASONS FOR GRANTING THE WRIT

The important questions raised in this petition are generated but not resolved by this Court's decision in *United States v. Hayes*, 555 U.S. 415 (2009). There, with Chief Justice Roberts and Justice Scalia dissenting, the Court held that the categorical approach does not apply to the situation where the predicate state assault

statute does not contain a domestic relations type element. Unlike *Hayes*, however, the Montana predicate assault statute under which petitioner was convicted requires that the assault target a family or household member; or be based on some intimate relationship, including dating, with the domestic violence victim. (App. D, p. 295).

Since the proof both before and during trial showed that petitioner's Montana misdemeanor domestic violence conviction was based on a "dating" relationship, this case should have been dismissed for lack of jurisdiction or insufficient proof. Because dating did not fall within the federal firearms ban until 2022, nine years after petitioner's Montana domestic violence conviction. *Cf. Davis v. United States*, 417 U.S. 333, 346-347 (1974) (conviction and punishment for an act that the law does not make criminal is a complete miscarriage of justice). *Also see United States v. Barone*, 71 F.3d 1442, 1444 and fn. 4 (9th Cir. 1995) (recognizing that it is unclear how a jurisdictional element mingled with the merits ought to be analyzed, *de novo* as a matter of law; or deferentially in a light favorable to the government under the sufficiency the evidence test of *Jackson v. Virginia*, 443 U.S. 307 (1979).

Relatedly, the following important issues warrant this Court's review.

First, whether under this Court's decisions the relationship element in a §922(g)(9) prosecution serves both a substantive and a jurisdictional purpose.

Second, what analytic approach governs, and when is it applied, to a situation where, unlike *Hayes*, the domestic relationship supporting the state court misdemeanor domestic violence conviction was not one covered under federal law?

Third, whether petitioner's successful vetting on five occasions before trial under the NICS to possess firearms; and/or the government's admission in writing that petitioner's state domestic violence conviction centered on a "dating" relationship should have terminated this prosecution on judicial estoppel/due process notice grounds.

1. Jurisdiction.

This Court has ruled both that "a federal court always has jurisdiction to determine its own jurisdiction"; and further that in some circumstances, it may be necessary for the Court "to address the merits" in order to make that determination. *United States v. Ruiz*, 536 U.S. 622, 628 (2002), *citing United States v. Mine Workers*, 330 U.S. 258, 291 (1947). We recognize that *Ruiz* involved a statutory jurisdiction analysis arising under 18 USC §3742(a) to determine whether a federal district court sentence had been "imposed in violation of the law" 536 U.S. at 627; and in contrast here the jurisdictional question arises under 18 USC §3231 (United States District Courts shall have jurisdiction over "... offenses against the laws of the United States.") (App. D, p. 624). Despite this difference, the broader principle of *Ruiz* should remain consistent. A federal court always has jurisdiction to

determine its own jurisdiction; and sometimes it is necessary to address the merits of a dispute in order to determine whether federal jurisdiction exists. An important question here is when does that determination take place?

Applying the *Ruiz* framework shows that because petitioner's prior Montana PFMA conviction was generated under the heading of a "dating" relationship, neither the district court, nor by extension the Court of Appeals, had subject matter jurisdiction over Count I in this case under 18 USC §3231 or §1291, respectively. Petitioner never was a prohibited person within the firearms ban of 18 USC §922(g)(9). Furthermore, petitioner is not guilty under Counts II, III, and IV. Since, again, he has never been barred from possessing firearms under §922(g)(9). Or put a little differently, petitioner did not lie on the ATF 4473 Forms about his status as a domestic violence misdemeanant. In fact, that is exactly why petitioner was cleared to possess firearms via the five successful NICS checks in the first place.

In an unlawful firearms possession case under §922(g)(9), the partner/family relationships set forth in §921(a)(33)(A)(ii) are partly jurisdictional and partly substantive. Jurisdictional because Congress does not have the power to prohibit local simple assaults nationwide. And substantive because the domestic status relationships listed by Congress in §921(a)(33)(A)(ii) were intended to limit the jurisdictional reach of §922(g)(9) in order to address the problem of domestic violence, *within the specific context of the listed relationships. See e.g., United*

States v. Benton, 988 F.3d 1231, 1239 (10th Cir. 2021) (holding that to be guilty of an offense under §922(g)(9), the government must prove both material elements that defendant knowingly possessed a firearm, and at the time of possession knew his status as a person convicted of a misdemeanor crime of domestic violence as defined in federal law).

Think of it this way: Congress could have framed §922(g)(9) offenses to include any misdemeanor state domestic violence assault predicate, but chose not to. Instead, it cabined the reach of the firearms ban generated by §922(g)(9) to a slate of prior *convictions* involving specific domestic-type relationships (App. D, p. 616). Congress's 2022 enactment of the BSCA adding "dating" relationships to the reach of the §922(g)(9) firearms ban confirms this. Because the BSCA specifically provides that the addition of dating to the federal list of relationships in §921(a)(33)(A)(ii) does not apply to domestic assault *convictions* "entered" before June 25, 2022 (App. D, p. 618). This jurisdictional carve-out effected by the BSCA is unmistakable. Because, as this Court has consistently ruled, what is and what is not an "offense against the United States" under 18 USC §3231 turns on the defining "elements of the criminal offense [which definition] is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985) *citing United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812).

United States v. Feola, 420 U.S. 671 (1975) aids the discussion here, as well. There, the defendant and others were convicted of assaulting individuals during the progress of an undercover drug sting. However, the defendants did not know that the assaulted individuals were federal agents. This Court ruled that the fact that the individuals in the drug sting turned out to be federal officers was "jurisdictional only". In other words, the government was not obliged to prove that the defendants knew the status of those assaulted as federal officers. As the Court put it in an important footnote: "The question then, is not whether the requirement is jurisdictional, but whether it is jurisdictional only". 420 U.S. at 476, fn. 9.

Elements in federal criminal statutes are considered "jurisdictional only" when they serve Congress's purpose in federalizing pre-existing state law and do not transform innocent conduct into criminal conduct. *Id.* However, in holding that the victim's federal agent status was "jurisdictional only" the *Feola* Court goes on to stress that a jurisdictional element can also be "an element of the offense Congress intended to describe and to punish". 420 U.S. at 676, n.9. More specifically, *Feola* holds:

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> "a requirement is sufficient to confer jurisdiction on the federal courts for what otherwise are state crimes precisely because it implicates factors that are an appropriate subject for federal concern." . . . "*a mere general policy of deterring assaults would probably prove to be an undesirable or insufficient basis for federal jurisdiction*; but where Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement."
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> 420 U.S. at 676, n. 9 (emphasis added).

In a similar way, the purpose of §922(g)(9) and its associated definitional statues is not to deter assaults generally, which is a state function; but only firearm possession connected to state domestic violence prior convictions, involving one of the relationships listed in the federal statute, §921(a)(33)(A)(ii). Thus, under §922(g)(9) Congress intends to address the problem of domestic violence in very specific relationship situations. While at the same time honoring each state's choice as to how to define its own crimes through its own statutory text.

The courts below honored neither Montana's legislative choice to include dating relationships as context for domestic assault; nor Congress's legislative choice in deciding not to include dating as a domestic assault context, until June 25, 2022. They do this by reading this Court's *Hayes* decision so broadly as to authorize a federal retrial on *any* type of state court misdemeanor assault in order to prove the federal relationship element. In other words, regardless whether the state court assault statute/conviction at issue is of the domestic relations variety or not.

Hayes does not sanction this type of judicial de-coupling because, as is the case here, such a broad reading authorizes a federal retrial of the state domestic assault conviction, by ignoring the list of relationships contained within the state predicate domestic assault statute. Just another way of saying that petitioner's misdemeanor domestic violence conviction based on "dating", was not captured by the federal firearms ban of §922(g)(9) until long after that conviction was entered.

Importantly, Congress decided not to include a state domestic violence conviction arising from "dating" relationships in its first iteration of the §922(g)(9) banning firearms possession. Only to change course nine years after entry of petitioner's Montana PFMA, by adding "dating" to the federal list of domestic relationships falling within §922(g)(9) the current federal firearms ban. Even apart from what we contend here is a jurisdictional problem, the basic right to due process notice is totally compromised by subjecting petitioner to a federal trial on the merits based on a "spousal relationship" listed under federal law. A relationship which played no part whatsoever in the entry of petitioner's state court misdemeanor conviction. *See e.g., United States v. Lanier*, 520 U.S. 259, 266 (1997) (outlining the three related manifestations of the due process fair warning requirement); *also see United States v. Pepe*, 895 F.3d 679, 6896 (9th Cir. 2018) and *United States v. McNeil*, 362 F.3d 570, 574 (9th Cir. 2004) (each of these decisions holding, in part, that when Congress amends a statute older versions of it must be reevaluated).

Likewise, in *Torres v. Lynch*, 578 U.S. 452 (2016), this Court reinforces the point that in contrast to *Feola*, where the federal officer status element was deemed to be "jurisdictional only"; an element of a federal offense can both "make evident Congress's regulatory power", and also "play a role in defining the behavior Congress thought harmful". *Id.* at 471. According to *Torres*, these dual-purpose elements can generate "tough questions" as to whether they should be treated as both jurisdictional and substantive or "jurisdictional only". *Id.* at 470-471.

Finally, this Court's decision in *Bond v. United States*, 572 U.S. 844 (2014) is helpful here. *Bond* involved a situation where a spouse (Bond), who had been two-timed by her husband and best friend, spread toxic chemicals on the best friend's car, mailbox, and doorknob causing her minor chemical burns. Which injuries in the end were treated by rinsing with water. On a challenge mounted by Bond under the Tenth Amendment this Court held that the assaultive conduct was not covered by the federal statute at issue:

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> The question presented by this case is whether the Implementation Act also reaches a purely local crime: an amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water. Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here.
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> *Bond*, 572 U.S. at 848.

Although *Bond* is not factually similar to this case, the principles set forth in the opinion nevertheless apply. Without question the police power to charge and prosecute a domestic violence crime rests primarily with the individual states. 572 U.S. at 857-859. Thus, absent a clearly expressed Congressional intent *Bond* reasons that:

> It is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute. In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism. We conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States.
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> 572 U.S. at 859-860.

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Congress's recent 2022 amendments to §922(g)(9) under the BSCA, and its allied statutes, reflect that a "dating" relationship was not a prohibited status under §922(g)(9), when petitioner was convicted of domestic violence in 2013. As the *Bond* decision makes plain "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' " 'the usual constitutional balance of federal and state powers.'" 572 U.S. at 858, *citing Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Any Congressional intent to override traditional states' rights (*i.e.*, police power) must be unmistakably clear "in the language of the statute". *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1995). *Also see Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022), *citing cases,* including *Virigina Uranium, Inc. v. Warren*, 587 U.S. 761, 778 (2019) ("The Supremacy Clause cannot "be deployed ... to elevate abstract and unenacted legislative desires above state law"). 587 U.S. at 642. There is nothing in §922(g)(9), or this Court's decision in *Hayes*, which authorizes a federal court to retry a *sui generis* state domestic violence offense conviction, based on a dating relationship that was not covered under federal law at the time.

The evidence here shows that petitioner's Montana PFMA conviction offense involved a "dating" relationship between two teenagers (aged 17 and 19); a relationship that was not covered under §922(g)(9) until 2022, some nine years after

petitioner's state conviction was entered. Nor does this Court's decision in *Hayes* alter this conclusion. Especially considering the fundamental legal principle that federal jurisdiction is carefully guarded against expansion by judicial interpretation:

> The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them.
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> *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

Since Montana PFMA contained the relationship element of "dating" in 2013 and petitioner was arrested and convicted of his Montana PFMA on that basis, the fact that Congress did not add "dating" until enactment of the BSCA, at a minimum, retroactively clarifies that petitioner is not now, nor has he ever been, a prohibited person under §922(g)(9). Given that federal courts are empowered to determine jurisdiction at any time it is important to consider that subject matter jurisdiction over criminal cases in federal court is carefully circumscribed by 18 USC §3231:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

According to this Court, "the office of the second sentence [set forth in §3231] is merely to limit the effect of the jurisdictional grant of the first sentence . . .". *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 501, n.10 (1956). Hence, under *Feola*, *Torres*, and *Bond*, Count I should have been dismissed for lack of subject matter jurisdiction, and petitioner should have been acquitted on Counts II, III, and IV, because dating was the basis for the relationship element, which was not a federal crime. *See, again, United States v. Davis*, 417 U.S. 333, 346-347 (1974) (conviction and punishment for an act the law does not make criminal is a complete miscarriage of justice).

2. The proper analytic approach and its timing.

There are four different approaches to determine if a prior state conviction triggers a federal consequence. The first, and perhaps the most common methodology, is the "categorical approach". Under this approach the court determines only whether a particular defendant was convicted under a state criminal statute that categorically matches a generic federal offense, without considering the particular facts supporting the defendant's state conviction. *See e.g., Taylor v. United States*, 495 U.S. 575 (1990). A second and close cousin of the categorical approach is the modified categorical approach, which authorizes the court to consult a narrow class of documents such as the charging documents, the plea agreement, and plea hearing transcript, if any. However, police reports and victim statements

are generally off limits here and cannot be consulted. *See Shepard v. United States*, 544 U.S. 13 (2005).

The Court recognized yet a third approach in *Nijhawan v. Holder*, 557 U.S. 29 (2009), called the circumstance-specific approach which applies when the underlying federal statute refers to specific circumstances rather than generic crimes. Under this method, the court is authorized to look beyond the elements of the prior state conviction and consider the "facts and circumstances underlying an offender's *conviction*". *Nijhawan, supra,* 557 U.S. at 34 (emphasis added).

And a fourth way a court can discern the nature of a prior conviction is by applying collateral estoppel, issue preclusion rules arising under the Double Jeopardy Clause contained in the Fifth Amendment to the United States Constitution. *See Ashe v. Swenson*, 397 U.S. 436 (1970) (Double Jeopardy Clause incorporates collateral estoppel as a constitutional requirement).

As this menu of analytic approaches suggests, in descending order each one expands the content of the data set above it, allowing for consideration of additional material in order to determine the nature of a prior conviction. Thus, facts cannot be considered under a straight categorical approach; but a narrow list of documents can be consulted in order to apply the modified categorical approach, involving relevant factual matters. And so on until the Court reaches the circumstance specific

approach, or double jeopardy/issue preclusion rules, which allow consideration of material, the categorical/modified approach would not tolerate.

This paradigm highlights an important issue in this case. Namely, if relationship elements are present in the state domestic assault statute of conviction, whether the Court's decision in *Hayes* authorizes re-litigation of the state predicate conviction. Even where the state predicate domestic relationship of conviction (here "dating") was not within the orbit of §922(g)(9) federal firearms ban at the time the state predicate conviction was entered. In *Hayes* the dissenters predicted that the "practical difficulties and potential unfairness of a factual approach are daunting". *Hayes*, 555 U.S. at 436. To which the majority replied:

> 9. Generally, as in this case, it would entail no " 'elaborate factfinding process,' " cf. post, at 1092, to determine whether the victim of a violent assault was the perpetrator's "current or former spouse" or bore one of the other domestic relationships specified in § 921(a)(33)(A)(ii) to the perpetrator.
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> 555 U.S. at 428, fn. 9.

Assuming without conceding that the Court's decision in *Hayes* requires application of the circumstance specific approach, we submit that application of that approach should nevertheless be determined early in the proceeding and before trial by using all of the analytic modalities discussed above. In other words, unlike *Hayes*, the situation here reflects a state domestic violence statute does contain relationship elements, which implicates the categorical approach. Furthermore,

relevant court records show that the domestic relationship was of a "boyfriend-girlfriend" nature between non-cohabitating teenagers, supporting application of the modified categorical approach. And finally, the i) police report governing petitioner's arrest (App. D., p. 449); ii) the victim's statement (App. C., p. 265, 268); and iii) trial testimony from the arresting officer (App. D., p. 468), and the Justice of the Peace (App. D., pp. 487-488) who took petitioner's guilty plea, all reflect a "dating" relationship. Which bears on application of the circumstance specific approach. *See e.g., Bogle v. Garland*, 21 F.4th 637, 648-649 (9th Cir. 2021) (police report can be considered in application of circumstances specific approach); *Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015) (illustrating in an immigration context how various approaches can apply to identify the nature of a misdemeanor crime of domestic violence under *Hayes* and *Nijhawan*).

In summary, none of the various approaches outlined above required a trial to determine jurisdiction or the nature of the relationship in this case. On this point, consider that in *Nijhawan v. Holder* the government assured the Court in its merits brief that application of the circumstance specific approach would not involve re-litigation of the prior conviction itself:

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> . . . The Attorney General cautioned in *Silva-Trevino* that "allowing inquiry beyond the record of conviction does not mean that the parties would be free to present 'any and all evidence bearing on an alien's conduct leading to the conviction.' " 24 I. & N. Dec. at 703.
>
> Rather, "[t]he sole purpose of the [circumstance specific] inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself." *Ibid* .; see also *Babaisakov*, 24 I. & N. Dec. at 321.[13]
>
> . . .
>
> [13] The Attorney General and the Board have thus indicated their awareness of, and intention to avoid, the problem of readjudicating guilt—a problem petitioner stresses (Br. 20, 47), but which simply does not arise in this case.
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> Brief of Respondent, pp. 43-44,
> *Nijhawan v. Holder*, No. 08-495
> (footnote included).

3. Judicial estoppel/due process notice.

Petitioner disclosed to the government that he had been successfully vetted to possess firearms on five previous occasions under the NICS (App. C, p. 215-249). The government reacted by moving to preclude petitioner's Notice of Defenses (App. C, p. 197, ECF Nos. 36 and 37); and further by charging petitioner for lying on the NICS ATF 4473 Forms, by failing to identify himself as a domestic violence misdemeanant (App. C, p. 250-253). However, under 18 USC §922(t)(2)(C), there was no way to reconsider the materials that the government examined during those background checks, which leads to petitioner's argument here.

Petitioner was, of course, presumed innocent. *Coffin v. United States*, 156 U.S. 432, 460 (1895) (presumption of innocence is evidence in favor of the accused). Considering that there was no way for the government to re-examine the materials the government consulted to authorize petitioner to proceed with those five firearms transactions, the United States should have been estopped from proceeding with the false statement counts brought under 18 USC §922(a)(6). This Court defines the doctrine of judicial estoppel as a party taking a position on one phase of the case but then attempting to rely on a contradictory argument to prevail in another phase of the case. *New Hampshire v. Maine*, 532 U.S. 742 (2001). Here, the government reversed its position in the following manner.

First, it failed to allege a specific relationship in any of the three indictments it brought against petitioner (App. C, 211-214, 250-253).

Second, it disputed the conclusion reached on the five previous NICS checks where petitioner was authorized to proceed with the transactions and to possess firearms.

Third, through its internal plea agreement procedure, the government chose to admit with unmistakable clarity that petitioner was in a "dating" relationship at the time of his Montana PFMA conviction. Claiming that its plea agreement offer was the most favorable disposition of the case; and asking the district court to ensure that

petitioner had been notified of the proposed plea agreement, which the district court declined to do. (App. C, pp. 329-330).

The government's admission that petitioner's PFMA was based on a dating relationship also required that this case be dismissed because the admission contradicted the government's spousal theory at trial. The extent to which an admission binds the government depends on the context, the nature of the admission, and whether it was made intentionally or by mistake. Here, the admission comes after petitioner has been cleared on five occasions to possess firearms; and in the context of a plea agreement offer, which the government urged was the best way for petitioner to resolve his case: plead guilty to what was not a crime, to avoid the risk of conviction for a crime petitioner did not commit. The nature of the government's admission clarifies in straightforward fashion that petitioner's PFMA was based on a dating context, which was not a relationship within the federal firearms ban until June 25, 2022. And here, again, it is important to stress that the government never alleged a relationship element in any of its three indictments.

This last point is important because under Rule 12(b)(1) of the Federal Rules of Criminal Procedure, a party can raise by pretrial motion "any defense, objection, or request that the court can determine without a trial on the merits" (App. D, p. 604). The government's admission before trial that the relationship was "dating" meant that petitioner was never a prohibited person under the pre-2022 version of

§922(g)(9). *See e.g., Oscanyan v. Arms Company*, 103 U.S. 261, 263 (1881) ("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.") In other words, there were no facts to find at trial, since the government admitted that the relationship was dating and not "an offense against the United States" at the time of its commission.

Furthermore, the very possibility that petitioner's domestic violence conviction arose from a dating context generated reasonable doubt sufficient to acquit petitioner of all charges. Consider Justice Gorsuch's view when writing for the Tenth Circuit as a Circuit Judge:

> ... where ..."the evidence ... gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, we must reverse the conviction, as under these circumstances a reasonable jury *must necessarily entertain* a reasonable doubt.
>
> *United States v. Lovern*, 590 F.3d 1095, 1107 (10th Cir. 2009).

Other circuit courts agree:

- *United States v. Andujar*, 49 F.3d 16, 20 (1st Cir. 1995);
- *United States v. Caseer*, 399 F.3d 828, 840 (6th Cir. 2005);
- *United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010);
- *United States v. Wright*, 835 F.2d 1245, 1249 n. 1 (8th Cir. 1987); and
- *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).

Under this Court's decision in *Jackson v. Virginia*, 443 U.S. 407 (1979), "the question whether the trier of fact has power to make a finding of guilt requires a

binary response: Either the trier of fact has power as a matter of law or it does not". *Schlup v. Delo*, 513 U.S. 298, 330 (1995). And just like petitioner's jurisdictional claim, the Ninth Circuit failed to address this issue concerning the government's plea agreement admission. Despite the fact that we argued the issue extensively in both petitioner's opening and reply briefing in that court (App. D, pp. 557-593). Given this Court's recent jurisprudence involving plea agreements, *see Lafler v. Cooper*, 566 U.S. 156 (2012) and *Missouri v. Frye*, 566 U.S. 134 (2012), this important issue merits review by this Court. Whether the government should be held accountable for its plea agreement admission, which took petitioner completely out of reach of the §922(g)(9) firearms ban.

CONCLUSION

WHEREFORE, petitioner prays the Court will either GVR this case for the Ninth Circuit to consider the jurisdiction and/or the plea agreement issues in the first instance; or grant this petition and set the case down for full briefing and argument.

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RESPECTFULLY SUBMITTED this 16th day of May, 2025.

/s/ Michael Donahoe
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2024

MICHAEL BLAKE DeFRANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 7,602 words, excluding the parts of the document that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 16th day of May, 2025.

RESPECTFULLY SUBMITTED,

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