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No. 12-1371

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES ALVIN CASTLEMAN,

Respondent.

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

BRIEF FOR THE CHILDREN'S DEFENSE FUND AND THE AMERICAN ACADEMY OF PEDIATRICS AS *AMICI CURIAE* SUPPORTING PETITIONER

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STATEMENTS OF INTEREST[1]

The Children's Defense Fund and the American Academy of Pediatrics respectfully submit this brief as *amici curiae*.

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in letters lodged with the Clerk.

Children's Defense Fund

The Children's Defense Fund (CDF) is a non-profit organization that for four decades has pursued a healthy start, a head start, a fair start, and a safe start for every child. In its work to keep children safe, it advocates for an end to both family violence and gun violence and their impact on children.

For more than 20 years, CDF has published an annual report, *Protect Children Not Guns.* It highlights recent reliable national and state data on gun violence in America to educate the public and policymakers about steps they can take to protect children from violence.

CDF has previously filed briefs amicus curiae in cases involving the interpretation of federal laws that have a direct impact on the lives of children, including *Florida* v. *United States Dep't of Health and Human Servs.*, 132 S. Ct. 2566 (2012); *District of Columbia* v. *Heller*, 554 U.S. 570 (2008); and *Washington State Dep't of Social and Health Servs.* v. *Guardianship Estate of Danny Keffeler*, 537 U.S. 371 (2003).

American Academy of Pediatrics

Founded in 1930, the American Academy of Pediatrics (AAP) is a national, non-profit organization dedicated to furthering the interests of children's health. Since AAP's inception, its membership has grown from 60 pediatricians to over 60,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 80 years, AAP has become a powerful voice for children's health through education, research, advocacy, and the provision of expert professional advice. AAP

works with federal, state and local governments, health care providers, and parents on behalf of America's children. The Academy has issued policy statements regarding keeping children safe from gun violence and the effects of intimate partner violence on children.

SUMMARY OF ARGUMENT

Domestic violence is a pervasive national problem, with hundreds of thousands of incidents of abuse reported annually. Tennessee, the Respondent's home state, has one of the highest rates of domestic violence in the country, reporting 82,000 incidents of domestic violence in 2012 alone. Children are far too often the silent victims of these crimes, experiencing not only physical harm, but psychological harm as well.

The effects of domestic violence are exacerbated, often fatally, when a gun is added to the fray. A gun increases the likelihood of domestic homicide. It also contributes to nonfatal domestic abuse: access to a firearm magnifies abusers' abilities to control others in the household and enhances the physical and psychological effects experienced by victims, namely intimate partners and children.

Congress enacted the Lautenberg Amendment, codified at 18 U.S.C. § 922(g)(9), to counteract this violence by preventing the perpetrators of these crimes, often habitual offenders, from possessing firearms. The Sixth Circuit's decision in the case below undermines the Amendment's disarmament goal. The court's ruling, if upheld, could result in the re-arming of thousands of domestic violence abusers,

placing children and other family members directly in harm's way.

The appellate court's interpretation of Supreme Court precedent and Congressional intent is deeply flawed. By reading into the definition of "misdemeanor crime of domestic violence" a requirement of "violent force," the Sixth Circuit misapplied this Court's holding in *Johnson* v. *United States*, 559 U.S. 133 (2010), a case concerning the definition of a more severe category of crimes—specifically "violent felon[ies]." The Sixth Circuit's decision also renders the Lautenberg Amendment a dead letter in approximately half of the states in the nation, where the underlying state criminal statutes do not specify the degree of force required to be convicted of a crime of domestic violence. And the Sixth Circuit's holding undercuts the clear purpose of the Amendment: to disarm those convicted of domestic violence crimes.

The Sixth Circuit's decision should be reversed.

ARGUMENT

I. DOMESTIC VIOLENCE IS EXACERBATED WHEN ABUSERS HAVE ACCESS TO FIREARMS.

The federal Gun Control Act of 1968 prohibits convicted felons from possessing firearms. *See United States* v. *Hayes*, 555 U.S. 415, 418 (2009). The 1996 Lautenberg Amendment expanded the 1968 Act's prohibition to individuals "convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). The statute defines a "misdemeanor crime of domestic violence" as an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. [18 U.S.C. § 921(a)(33)(A).]

By removing guns from the hands of domestic violence perpetrators, the Lautenberg Amendment sought to address and remedy a pervasive national problem: the use of guns in domestic violence.

Each year in the United States, approximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner.[2] In Tennessee alone—the state where this case arose—there were over 82,000 victims of domestic violence just last year.[3]

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[2] Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, Nat'l Inst. of Justice & Ctrs. for Disease Control & Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Intimate Partner Violence Against Women: Findings from the National Violence Against Women Survey*, at iv (2000), *available at* http://www.ojp.usdoj.gov/nij/pubs-sum/183781.htm.

[3] Tenn. Bureau of Investigations, *Crime in Tennessee 2012*, at 50 (2012), *available at* http://www.tbi.tn.gov/tn_crime_stats/publications/2012%20Crime%20in%20Tennessee%20Final.pdf.

Children are the silent, common victims of domestic violence: one national survey found that nearly twenty percent of children in the United States are exposed to physical violence between parents during their lifetime.[4] To begin with, unmarried women with children suffer abuse at the hands of their intimate partners at a rate more than six times higher than unmarried women with no children, and more than *ten* times higher than married women with children.[5] An estimated 15.5 million children living in married or cohabitating households are exposed to domestic violence each year in the United States, and about seven million of them live in homes where the domestic violence is severe.[6]

Violence between domestic partners also significantly increases the risk that a child will be subjected to abuse or neglect as well.[7] The co-

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[4] Sherry Hamby *et al.*, U.S. Dep't of Justice, Office of Justice Programs, *Children's Exposure to Intimate Partner Violence and Other Family Violence*, at 6 (2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232272.pdf.

[5] Shannon Catalano, U.S. Dep't of Justice, Office of Justice Programs, *Intimate Partner Violence, 1993-2010*, at 7 (2012), *available at* http://www.bjs.gov/content/pub/pdf/ipv9310.pdf.

[6] Renee McDonald *et al.*, *Estimating the Number of American Children Living in Partner-Violent Families*, 20 J. of Family Psychology 137, 139 (2006), *available at* http://smu.edu/experts/study-documents/family-violence-study-may2006.pdf.

[7] Children's Defense Fund Ohio, *Children Who Witness Domestic Violence*, at 2 (Oct. 2009), *available at*

occurrence of child abuse and intimate partner violence is well documented; studies have shown that in "30% to 60% of families in which either child maltreatment or [intimate partner violence] is occurring, the other form of violence also is being perpetrated."[8] Even when children are not physically harmed by domestic abuse, they risk having lasting psychological harm from their exposure to unsafe family situations.[9] Indeed, children *indirectly* exposed to domestic violence face some of the same behavioral and emotional problems as children who themselves are physically abused.[10] Both groups may suffer from lasting behavioral and physical health complications, including anxiety, depression,

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https://www.childrensdefense.org/ohio (children in households where domestic violence occurs are 1500% more likely to experience abuse or neglect than the national average).

[8] Jonathan D. Thackeray *et al.*, *Intimate Partner Violence: The Role of the Pediatrician*, 125 Pediatrics 1094, 1095 (2010), *available at* http://pediatrics.aappublications.org/content/125/5/1094.full.html [hereinafter "*Role of the Pediatrician*"].

[9] *See id.* ("Children of abused caregivers demonstrate significantly more internalizing behaviors, including anxiety, depression, withdrawal, and somatic complaints, as well as externalizing behaviors, including attention problems, aggressive behavior, and rule-breaking actions, than do children of nonabused caregivers. * * * Stress and anxiety can persist long after the trauma of [intimate partner violence] exposure.")

[10] Unicef, *Behind Closed Doors: The Impact of Domestic Violence on Children*, at 3 (2006), *available at* http://www.unicef.org/protection/files/BehindClosedDoors.pdf [hereinafter "*Behind Closed Doors*"].

violence against peers, and learning disabilities.[11] And the effects of violence in the home are felt right away: even infants and small children exposed to such violence may suffer so much emotional distress that it can harm brain development and impair cognitive and sensory growth.[12] "Abuse during pregnancy has been associated with several poor health outcomes for [infants], including preterm labor, low birth weight, intracranial injury, and neonatal death."[13]

Violence between domestic partners, or against the children in those homes, too often escalates to the worst outcome imaginable. Between 1980 and 2008, 28.7% of homicide victims were killed by a spouse, an intimate partner, or another family member.[14]

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[11] David Finkelhor *et al.*, U.S. Dep't of Justice, Office of Justice Programs, *Children's Exposure to Violence: A Comprehensive National Survey,* at 2 (2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/227744.pdf; R. Lundy Bancroft, *et al.*, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics 38-39 (Claire M. Renzetti & Jeffrey L. Edleson eds., 2d ed. 2002).

[12] *Behind Closed Doors*, *supra* n.10, at 7 (behavior problems among infants as a result of exposure to domestic violence can include "excessive irritability, sleep problems, emotional distress, fear of being alone, immature behavior, and problems with toilet training and language development").

[13] *Role of the Pediatrician*, *supra* n.8, at 1095.

[14] Alexia Cooper & Erica L. Smith, U.S. Dep't of Justice, Office of Justice Programs, *Homicide Trends in the United States, 1980-2008, Annual Rates for 2009 and 2010,* at 16–17 (2011), *available at* http://www.bjs.gov/

During that same period, 49.4% of homicide victims were killed by other acquaintances.[15] Pregnant and recently pregnant women are more likely to be victims of homicide than to die of any other cause.[16] And an estimated 750 children were killed by domestic abusers in 2011.[17] Ninety percent of children killed during a domestic dispute are under the age of ten; fifty-six percent are less than two years old.[18]

The weapon of choice for domestic abusers? Often, a gun. In homes where domestic violence already exists, the presence of a gun magnifies the risk of homicide six-fold.[19] "[W]omen who were threatened

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content/pub/pdf/htus8008.pdf [hereinafter "*Homicide Trends*"].

[15] *Id.*

[16] Isabelle L. Horon & Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality - Maryland, 1993–1998*, 11 JAMA 1455, 1457 (2011).

[17] Child Welfare Information Gateway, *Child Abuse and Neglect Fatalities 2011: Statistics and Interventions,* at 2, 5 (2013), *available at* https://www.childwelfare.gov/pubs/factsheets/fatality.pdf. Parents were responsible for 78.3% of child abuse or neglect fatalities. *Id.* at 5.

[18] Sibnath Deb, Children in Agony: A Source Book 7 (Sibnath Deb ed. 2006) (citing Fla. Governor's Task Force on Domestic & Sexual Violence, *Florida Mortality Review Project*, at 51, tbl. 28 (1997)).

[19] Jacquelyn C. Campbell *et al.*, *Assessing Risk Factors for Intimate Partner Homicide*, at 16 *in* U.S. Dep't of Justice, Nat'l Institute of Justice, *Intimate Partner Homicide* (2003), *available at* https://www.ncjrs.gov/pdffiles1/jr000250.pdf.

or assaulted with a gun or other weapon were 20 times more likely than other women to be murdered. Women whose partners threatened them with murder were 15 times more likely than other women to be killed."[20] Guns are used more than any other weapon when women are killed by their intimate partners.[21] Between 1980 and 2000, sixty to seventy percent of the incidents of domestic abuse that resulted in the death of an intimate partner involved a firearm.[22] And even when it is not used to kill, a gun wielded by a domestic abuser increases the frequency of ongoing, nonfatal domestic abuse by increasing the abuser's ability to control a victim; the ever-present threat of gun violence makes it more difficult for victims to leave their abusers.[23]

Gun violence in the home has lasting detrimental effects on children, placing their mental and physical welfare at risk. As one report chillingly put it:

> Visions of children attempting to intervene to protect their mother from a perpetrator's assault and in doing so being struck themselves, crawling along the floor with the

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[20] *Id.*

[21] Susan B. Sorenson, *Firearm Use in Intimate Partner Violence: A Brief Overview*, 30 *Evaluation Review* 229, 232-33 (2006) ("Women are more than twice as likely to be shot by their male intimate as they are to be shot, stabbed, strangled, bludgeoned, or killed in any other way by a stranger.").

[22] Emily F. Rothman *et al.*, *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. Am. Med. Women's Ass'n 62, 62 (2005).

[23] Sorenson, *supra* n.21, at 235.

> lights out for fear of being seen through a window by a mother's ex-boyfriend, leaving bicycles "just so" in front of an entry door in order to detect whether the perpetrator had entered the home while they were gone, all painted an extraordinarily troubling picture of the terror that permeates every aspect of these young lives.[24]

Children exposed, even indirectly, to gun violence may experience both long- and short-term psychological trauma, which in turn is linked to, among other things, withdrawal from society, sleep disruption, trouble concentrating in the classroom, high levels of anger, and juvenile delinquency.[25] Children who witness domestic disputes involving a weapon that result in injuries are even more likely to experience post-traumatic stress disorder symptoms.[26] One

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[24] Hennepin Cnty. Domestic Fatality Review Pilot Project, *2002 Annual Report*, at 24 (2002), *available at* http://www.amatteroflifeanddeath.org/wp-content/uploads/2011/04/112799246Domestic_Fatality_Review_Pilot_Project_Report.pdf [hereinafter "*Fatality Review Project*"].

[25] *Role of the Pediatrician*, *supra* n.8, at 1095; James Garbarino *et al.*, *Mitigating the Effects of Gun Violence on Children and Youth*, *in* 12 *The Future of Children*: *Children, Youth and Gun Violence* 73, 74 (2002); Karen Slovak & Mark Singer, *Gun Violence Exposure and Trauma Among Rural Youth*, 16 Violence and Victims 389, 394-97 (2001).

[26] John Fantuzzo & Rachel Fusco, *Children's Direct Sensory Exposure to Substantiated Domestic Violence Crimes,* 22 Violence & Victims 158, 167 (2007); Garbarino, *supra* n.25, at 75-76.

study, for example, found significantly higher risks of behavior problems among children whose parents use—or threaten to use—guns or knives during a marital dispute, when compared to children who witness domestic violence not involving weapons.[27] Children exposed to domestic violence involving weapons also have an increased risk of committing violent offenses themselves.[28] And children who lose a parent to domestic homicide often may be placed in foster homes or left to be raised by older siblings, receiving little if any counseling or support.[29]

The anecdotes are regular and relentless:

On September 19 of this year, in the small town of Santa Fe, Tennessee, a man shot and killed his wife before turning the gun on himself. The couple's three children were at home. Before the murder-suicide, police "had been called to the [home] multiple times for domestic situations."[30]

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[27] Ernest N. Jouriles *et al.*, *Knives, Guns, and Interparent Violence: Relations with Child Behavior Problems*, 12 J. of Family Psychology 178, 190-192 (1998).

[28] *Id.* at 180; *see* Steve Spaccarelli *et al.*, *Exposure to Serious Family Violence Among Incarcerated Boys: Its Association With Violent Offending and Potential Mediating Variables*, 10 Violence and Victims 163, 174 (1995).

[29] *See, e.g.*, *Fatality Review Project*, *supra* n.24, at 24.

[30] Josh DeVine, *Maury County couple dead in apparent murder-suicide*, WSMV.com (Oct. 4, 2013, 9:27 AM), http://www.wsmv.com/story/23483959/police-man-shoots-wife-in-apparent-murder-suicide.

On September 4 of this year, a Nashville, Tennessee, man shot his estranged ex-girlfriend (and the mother of his child) at her workplace before killing himself. The victim had previously gotten an order of protection against the shooter.[31]

On May 11 of this year, a man shot and killed a woman, severely injured his girlfriend, and then killed himself in a domestic dispute in a home in Huntsville, Alabama. Two children, a toddler and a preschooler, were present in the home during the ordeal. When interviewed, a neighbor reported that police "were called repeatedly over the past year or two to settle domestic disturbances involving the [shooter]."[32]

In January of this year, a Kalamazoo, Michigan, man shot and injured his girlfriend after striking her with his gun. It was his second domestic violence offense.[33]

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[31] Julia Bruck, *Tennessee ranks among worst states for domestic violence*, WSMV.com (Sept. 20, 2013, 10:53 PM), http://www.wsmv.com/story/23365563/tennessee-ranks-among-worst-states-for-domestic-violence.

[32] Paul Huggins, *Third Huntsville shooting victim clinging to life; neighbors say couple had pattern of domestic violence*, Blog.al.com (May 12, 2013, 6:14 PM), http://blog.al.com/breaking/2013/05/third_huntsville_shooting_vict.html.

[33] Rosemary Parker, *Kalamazoo man charged with domestic violence following girlfriend's shooting*, MLive.com (Jan. 7, 2013, 4:36 PM), http://www.mlive.com/news/kalamazoo/index.ssf/2013/01/kalamazoo_man_charged_with_dom.html.

In December 2012, a man shot and killed his girlfriend as she boarded a bus in Washington, D.C with the couple's one-year-old daughter in her arms. The child was injured, but survived.[34]

In November 2012, a man in Smyrna, Tennessee, shot and killed his ex-girlfriend and then turned the gun on her mother, critically injuring her in the process. Prior to the shooting, the slain victim filed an assault report with Smyrna Police and obtained an order of protection against the shooter. The couple had a young child together.[35]

In February 2011, a man in Mobile, Alabama, shot his seventeen-year-old son during an argument at their home. The shooter had an extensive criminal history, including an arrest for attempted murder.[36]

In August 2011, a man shot and killed his girlfriend before taking his own life outside of Oswego, Illinois. Three children were present in the home during the ordeal. The couple had a well-

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[34] Pamela Brown & Jennifer Donelan, *Selina Brown killed, child shot on Metrobus in SE*, WJLA.com (Dec. 9, 2012, 8:45 PM), http://www.wjla.com/articles/2012/12/woman-child-shot-on-se-metrobus-woman-dies-82910.html.

[35] *Man Pleads Guilty to Killing Ex-Girlfriend, Injuring Her Mother*, Newchannel5.com (Nov. 13, 2012, 3:05 PM), http://www.newschannel5.com/story/20086231/man-pleads-guilty-to-killing-ex-girfriend-injuring-her-mother.

[36] Derica Williams, *Father has history of domestic violence*, Fox10tv.com (Feb. 4, 2011, 4:05 PM), http://www.fox10tv.com/news/father-has-history-of-domestic-violence.

documented history of domestic violence. Months before the fatal shooting, the assailant was arrested for allegedly hitting the victim in the face, "grabbing her by the hair, and slamming her head to the ground."[37]

In July 2010, a man in Gaston County, North Carolina, shot his pregnant girlfriend and their three children before turning the gun on himself. Only the couple's seven-year-old daughter survived. Prior to the incident, the shooter's girlfriend had sought, and been awarded, an order of protection. In her application, she wrote that the shooter had "threatened to kill [her] many times * * *, and that [h]e stomped [her] to the ground * * * hitting and kicking [her]."[38] Two of the couple's children witnessed those incidents. Their mother's application for protection reported: "My 3 and 4-year-old children were screaming 'Stop Daddy, don't hurt mommy.' "[39]

In May 2010, a man shot and killed his two sons, ages four and seven, near Athens, Georgia. Prior to the shooting, the abuser repeatedly threatened the boys' mother—who had filed several domestic-

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[37] Erin Sauder, *Court Records Detail Domestic Violence Leading Up to Murder-Suicide*, Oswego.patch.com (Aug. 17, 2011, 8:45 PM), http://oswego.patch.com/groups/police-and-fire/p/two-dead-in-oswego-in-apparent-murder-suicide.

[38] Heath Hannon, *et al.*, *Father in murder-suicide had a second family, police say*, WBTV.com (Aug. 13, 2010, 10:52 PM), http://www.wbtv.com/story/12783855/father-in-murder-suicide-had-a-second-family-police-say (internal quotations omitted).

[39] *Id.*

violence complaints against him—and had previously been arrested for aggravated stalking for contacting the mother in violation of a court protective order.[40]

In April 2009, a man shot and killed his five children in a mobile home park in Pierce County, Washington. The children ranged in age from seven through sixteen. Following the shooting, neighbors reported that they often heard "family arguments," and the father "screaming and yelling at the children."[41]

This sad recitation could go on for volumes. The Lautenberg Amendment was designed to contribute to a solution to this persistent problem. Prohibiting someone convicted of a misdemeanor domestic-violence charge from owning a gun reduces the chances for fatal and non-fatal injuries during domestic disputes. It eliminates the abuser's ability to use a firearm to control or terrorize his family.[42] The

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[40] Merritt Melancon, *Experts: No way to know why father snapped, killed kids Domestic violence questions*, Online Athens (May 10, 2010), http://onlineathens.com/stories/051010/new_636981968.shtml.

[41] Seattle Times Staff, *Five children slain in Graham-area home*, The Seattle Times (Apr. 5, 2009, 1:11 PM), http://seattletimes.com/html/localnews/2008986370_websixdead04m.html.

[42] *See* Fed. Bureau of Investigation, *Federal Denials, Reasons Why the NICS Section Denies*, *Nov. 30, 1998 – Oct. 31, 2013*, http://www.fbi.gov/about-us/cjis/nics/reports/denials_110813.pdf (last visited Nov. 21, 2013) (stating that from November 1998 – October 2013, 105,755 firearm sales have been denied because the purchaser had been convicted of a misdemeanor crime of domestic violence) [hereinafter "*Federal Denials*"].

Lautenberg Amendment also has been linked to a reduced risk of gun-related crimes and violent crimes.[43] Laws prohibiting abusers subject to restraining orders from purchasing firearms result in a statistically significant reduction in rates of homicide of women by their intimate partners.[44] More specifically, cities in states with such restrictions had *nineteen percent* fewer intimate partner homicides and *twenty-five percent* fewer intimate partner homicides with guns.[45] And individuals who attempted, but were denied, purchase of a firearm were much less likely than those who purchased a firearm to be arrested for a new crime involving guns or violence.[46]

Denying past abusers the ability to purchase guns also is common sense, given the high risk of recidivism among abusers. Most female victims of domes-

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[43] Garen J. Wintemute *et al.*, Violent Prevention Research Program, *Effectiveness of Denial of Handgun Purchase by Violence Misdemeanants*, at 41-42 (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/197063.pdf.

[44] Ctr. for Gun Policy & Research, John Hopkins Bloomberg School of Public Health, *Intimate Partner Violence and Firearms* (2012), *available at* http://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/IPV_Guns.pdf.

[45] Ctr. for Gun Policy & Research, John Hopkins Bloomberg School of Public Health, *Reducing Gun Violence in America Informing Policy with Evidence and Analysis*, at 57 (2013), *available at http://jhupress.files.wordpress.com/2013/01/1421411113_updf.pdf.*

[46] Wintemute, *supra* n.43, at 43-44;

tic violence have previously been assaulted by the same abuser.[47] One study found that forty-one percent of domestic violence victims reported re-assault within a thirty-month period.[48] And abuse tends to become more violent and frequent over time.[49]

By preventing individuals with a history of domestic violence from owning a gun, the Lautenberg Amendment reduces the likelihood that pervasive domestic violence will escalate to murder. The Sixth Circuit's ruling, however, permits thousands of convicted abusers to arm themselves[50], placing their partners and children at greater risk of personal or emotional injury, or worse.

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[47] Catalano, *supra* n.5, at 4; *see Role of the Pediatrician*, *supra* n. 8, at 1095 ("Many [victims of domestic violence] are victimized more than once, which raises estimates of event incidence to approximately 4.8 million women and 2.9 million men assaulted annually in the United States.").

[48] Edward Gondolf, *A 30-Month Follow-Up of Court-Referred Batterers in Four Cities*, 44 Int'l J. of Offender Therapy and Comparative Criminology 111 (2000).

[49] Nat'l Crim. Justice Reference Serv., U.S. Dep't of Justice, *Family Violence*, https://www.ncjrs.gov/spotlight/family_violence/summary.html (last visited Nov. 11, 2013).

[50] *See Federal Denials*, *supra* n. 42.

II. THE SIXTH CIRCUIT'S DECISION DISREGARDS THE STATUTE'S TEXT AND PURPOSE.

The Sixth Circuit held that the "use or attempted use of physical force" element in the Lautenberg Amendment's definition of "misdemeanor crime of domestic violence" requires "*violent* force." Pet. App. at 6a-10a. That holding disregards both the text and purpose of the governing statute.

A. Section 921(a)(33)(A)(ii) Does Not Require "Violent" Force.

To reach its conclusion that the Lautenberg Amendment required a showing of "violent force" before a domestic abuser was subject to the statute's gun prohibition, the Sixth Circuit compared the statutory definition of "misdemeanor crime of domestic violence" found in the Lautenberg Amendment with statutory definitions in two other provisions: "crime of violence" in 18 U.S.C. § 16(a), and "violent felony" in 18 U.S.C. § 924(e)(2)(B)(i). Pet. App. 6a-7a. Finding the language of the three provisions "nearly identical," the court concluded that Congress intended the three different provisions to "capture offenses criminalizing identical degrees of force." *Id.*

The court's analysis focused primarily on this Court's decision in *Johnson* v. *United States.* Interpreting 18 U.S.C. § 924(e)(2)(B)(i)'s definition of "violent felony," the Court held that the phrase "physical force" in the definition constituted "violent force"—that is, "force capable of causing physical pain or injury to another person." 559 U.S. at 140. From this starting point, the Sixth Circuit below concluded that the "physical force" language used in

Section 921(a)'s definition of "misdemeanor crime of domestic violence" similarly required force that rose to the level of "violent force * * * capable of causing physical pain or injury to another person." Pet. App. 6a-10a (quoting *Johnson*, 559 U.S. at 140).

But the whole reason the *Johnson* Court focused on "violent force" in the first place is that the question presented there concerned the definition of "*violent felony*." *Johnson*, 559 U.S. at 140. The *Johnson* Court thus concluded that the statute required it to look further beyond the common-law interpretation of "force,"—an element the Court explained was "satisfied by even the slightest offensive touching," *id.* at 139—and instead examine the heightened concept of "violent force." *Id.* at 140. This Court was persuaded that Congress' selection of the phrase "violent felony" itself had a "connotation of strong physical force" above the common-law definition, *id.* at 140-141, and rejected the notion that "Congress would select as a term of art defining 'violent felony' a phrase that the common law gave peculiar meaning only in its definition of a misdemeanor." *Id.* at 141. This Court noted that the "attachment" of "violent" and "felony" creates a particular and unique phrase, warranting a higher force definition. *Id.* at 140.

The *Johnson* Court thus made clear throughout that it was examining "the statutory category of 'violent felonies,'" not misdemeanors for which the common-law concept of force traditionally was applied and intended. *Id.* at 140. And to bring the point home, the *Johnson* Court expressly *declined to extend its holding to misdemeanor domestic-violence crimes*. As it explained, "[w]e have interpreted the

phrase 'physical force' only in the context of a statutory definition of 'violent felony.' We do not decide that the phrase has the same meaning in the context of defining a misdemeanor crime of domestic violence." *Johnson,* 559 U.S. at 143-144; *see also United States* v. *Booker*, 644 F.3d 12, 18 (1st Cir. 2011) (noting that the *Johnson* "Court expressly rejected the suggestion that its analysis * * * would have any effect on interpretation of [18 U.S.C.] § 922(g)(9)").

Johnson thus provides an easy roadmap for reversal here. For unlike the statutory scenario presented in *Johnson*, the term "misdemeanor crime of domestic violence" warrants application of the common-law concept of "force"—not the heightened definition found in the "violent felony" statute. The statutory definition of "misdemeanor crime of domestic violence" tracks the common law definition of battery, defined as the "intentional application of unlawful force against the person of another." *Johnson*, 559 U.S. at 139. And "force," as used there and as noted above, encompassed "even the slightest offensive touching." *Id.* Departures from common-law definitions are appropriate only where "that meaning does not fit" and "produce[s] nonsense." *Id.* at 139-140 (quoting *Gonzales* v. *Oregon*, 547 U.S. 243, 282 (2006) (Scalia, J., dissenting)). No such "nonsense" exists here; the common-law definition plainly slots right in. *Id.*

It also makes plain sense. The perpetrators to which the language of § 922(g)(9) is directed are "routinely prosecuted under generally applicable assault or battery laws," *Hayes*, 555 U.S. at 427, crimes that generally embody the level of force contemplated under common law and are generally

categorized as misdemeanors. *See Johnson*, 559 U.S. at 141. Therefore, the "significant" reason for breaking from the common-law definition in *Johnson*—that the common-law definition was not designed for violent felonies—simply does not exist here. *Id.*; *see also* Pet. App. at 24a (McKeague, J., dissenting) (making the same point); *United States* v. *Nason*, 269 F.3d 10, 16 (1st Cir. 2001) ("we must read the unqualified use of the term 'physical force' in section 922(g)(9) as a clear signal of Congress's intent that section 922(g)(9) encompass misdemeanor crimes involving all types of physical force").

Concluding, as the Sixth Circuit did, that the phrase "use of physical force" in § 921(a)(33)(A)(ii) means "violent force," because the phrasing of the statute is similar to the language used in 18 U.S.C. § 924(e)(2)(B)(i), ignores another important difference between the two statutes: they aim to address different wrongs. As the First Circuit explained,

> There are sound reasons to decline to interpret the two statutes in tandem. To be sure, [§ 924(e)(2)(B)(i)] and § 922(g)(9) are both animated by a protective rationale * * * . However, the statutes address significantly different threats. Whereas [§ 924(e)(2)(B)(i)] seeks to protect society at large from a diffuse risk of injury or fatality at the hands of armed, recidivist felons, § 922(g)(9) addresses an acute risk to an identifiable class of victims—those in a relationship with a perpetrator of domestic violence. [*Booker,* 644 F.3d at 20-21.]

The Court should decline to read into § 922(g)(9) language that does not appear in the statute and that would significantly undermine the statute's purpose.

B. The Sixth Circuit Failed To Consider The Practical Effect Of Its Ruling When Construing The Statute.

The practical impacts of the Sixth Circuit's decision are grave—which should have further informed its statutory analysis.

Simply put, the Sixth Circuit's interpretation of "use of physical force," if adopted nationwide, leaves thousands upon thousands of individuals convicted of domestic assault in legal possession of firearms. *See Johnson*, 559 U.S. at 153 (Alito, J., dissenting) (observing that "if the Court's interpretation of the term 'physical force' in [§ 924(e)(2)(B)(i)] is applied to § 922(g)(9), a great many persons convicted for serious spousal or child abuse will be allowed to possess firearms"). The domestic violence laws of nearly *half* the states do not specify degrees of force. *See id.*; *see also United States* v. *White*, 606 F.3d 144, 146 (4th Cir. 2010) (noting that defendant "contended that as Virginia uses the common law definition of battery, the elements of that crime could not meet the statutory definition of 'misdemeanor crime of domestic violence' "). Many abusers thus would not be subject to § 922(g)(9)'s gun prohibition simply because the statute under which they were convicted did not happen to label or categorize the force they used against their victims.

Take, for example, *United States* v. *Griffith*, 455 F.3d 1339 (11th Cir. 2006). Griffith was convicted

under a Georgia battery statute of making "contact of an insulting and provoking nature to Delores Griffith, his wife, by hitting her * * *" and making "contact of an insulting and provoking nature to Delores Griffith, his wife, by dragging her across the floor." *Id.* at 1340. Griffith argued that he was not subject to Section 922(g)(9)'s prohibition because the Georgia battery statute required only " 'physical *contact* of an insulting or provoking nature,' " not "physical *force*." *Id.* at 1341 (quoting Ga. Code Ann. § 16-5-23(a)(1)) (emphasis added). The Eleventh Circuit rejected Griffith's argument. As the court of appeals explained, adopting it would lead to an "absurd" result, having "little or no basis in the real world," and one "at war with common sense." *Griffith*, 445 F.3d at 1345. That absurd and nonsensical result is the one the Sixth Circuit reached, and the one on review now.

Take, for another analogous example, the case of *Flores* v. *Ashcroft,* 350 F.3d 666 (7th Cir. 2003). There, the majority held that a statute requiring removal for any immigrant convicted of a "crime of domestic violence," 8 U.S.C. § 1227(a)(2)(E), did not apply to the defendant, because his domestic violence conviction was under an Indiana battery statute that covered "any touching." 350 F.3d at 669-670. Concurring, Judge Evans observed that the panel's conclusion, although legally accurate, was "divorced from common sense. * * * Flores actually beat his wife—after violating a restraining order based on at least one prior beating—and got a one-year prison sentence for doing so." *Id.* at 672 (Evans, J., concurring).

Courts routinely decline to interpret statutes in ways that would severely cripple their practical effect. *United States* v. *Hayes* itself is instructive. The *Hayes* Court considered whether § 922(g)(9) required the predicate misdemeanor to identify a domestic relationship as an element of the crime. 555 U.S. at 418. This Court rejected that contention. As it explained, "[p]ractical considerations strongly support" the reading the Court adopted, because "[c]onstruing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute * * * would frustrate Congress' manifest purpose," and would lead to the section being " 'a dead letter' in some two-thirds of the States from the very moment of its enactment." *Id.* at 426-427. *See also Nason*, 269 F.3d at 16 ("[F]rom a policy perspective, proscribing gun possession by individuals convicted of misdemeanor crimes characterized by the application of physical force advances Congress's evident purpose—curbing the escalating societal problems associated with domestic violence.")

And in *Dickerson* v. *New Banner Institute, Inc.*, a case involving a prior iteration of the Gun Control Act of 1968, the Court explained that " '[in] the absence of a plain indication to the contrary, * * * it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law,' " since federal statutes of national application would be impaired if state law controlled jurisdiction by jurisdiction. 460 U.S. 103, 119-120 (1983) (quoting *NLRB* v. *Natural Gas Util. Dist.*, 402 U.S. 600, 603 (1971)), *superseded by statute on other grounds*, Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101, 100 Stat. 449, 449-451 (1986).

The Sixth Circuit's statutory interpretation runs up against both of these strong cautions. If the Sixth Circuit's decision is affirmed, the practical effect this Court cautioned against in *Hayes* will come to roost with full force. And the statute will inexorably be dependent on state law—and thus all but a dead letter in nearly half the states. *See* Pet. App. at 31a-32a (McKeague, J., dissenting). Children and their caregivers in, among other states, Tennessee, Georgia[51], California[52], Maine[53], Indiana[54], and Florida,[55] will remain largely unprotected even from abusers *already convicted* of domestic violence, all because of

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[51] Ga. Code Ann. § 16-5-23(a) (2011) ("A person commits the offense of simple battery when he or she either: (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or (2) Intentionally causes physical harm to another").

[52] Cal. Penal Code § 242 (West 1872) ("A battery is any willful and unlawful use of force or violence upon the person of another.")

[53] Me. Rev. Stat. Ann. tit. 17-A, § 207(1)(a) (2005) ("A person is guilty of assault if: A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person.").

[54] Ind. Code. Ann. § 35-42-2-1(1)(a) (West 2007) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor.").

[55] Fla. Stat. Ann. § 784.03(1)(a) (West 2001) ("The offense of battery occurs when a person: 1. Actually and intentionally touches or strikes another person against the will of the other; or 2. Intentionally causes bodily harm to another person.").

the vagaries of the state statutes under which those individuals were convicted.

A federal statute's ability to protect children and their caregivers from domestic abuse involving firearms should not turn on those happenstances. The established common-law construction of the statutory language, bolstered by forceful practical considerations, counsels otherwise.

C. Upholding the Appellate Court's Decision Would Be Contrary to Congressional Intent.

The legislative history of § 922(g)(9) provides further evidence in favor of rejecting the Sixth Circuit's legal interpretation.

Faced with compelling evidence that gun possession by perpetrators of domestic violence yields chilling results, Congress enacted § 922(g)(9) to keep firearms out of the hands of domestic abusers—full stop. As Senator Lautenberg, the amendment's sponsor, explained, "for many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life and death."[56] Representative Woolsey similarly emphasized that the amendment was "simple": "Wife-beaters, child abusers, and other domestic violence offenders should not have access to a gun. Period."[57]

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[56] 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg).

[57] 142 Cong. Rec. 18,544 (1996) (statement of Rep. Woolsey).

Focused on "zero tolerance when it comes to guns" and the national epidemic of "domestic violence,"[58] Congress did not intend for the Lautenberg Amendment's application to be limited to those few states whose misdemeanor statutes mimic the wording of the federal provision. Quite the contrary, in fact: in enacting the Lautenberg Amendment, Congress was focused on *closing* a nationwide "loophole"; at that time, a person convicted of a crime involving domestic violence could, "in over 30 states," still obtain a firearm, as the crimes under which these abusers were convicted—often lesser misdemeanors—did not fall within the purview of federal gun control laws. Section 922(g)(9) was designed to close this gap, broadening the convictions that in turn would subject the perpetrator to gun ownership restrictions.[59] The Lautenberg Amendment thus was designed to look "to the type of crime, rather than the classification of the conviction," in determining whether the

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[58] 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg).

[59] *See* 142 Cong. Rec. 22,985 (1996) (statement of Sen. Lautenberg) ("[M]any people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies."); 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein) (noting that "plea bargains often result in misdemeanor convictions for what are really felony crimes."); 142 Cong. Rec. 22,987 (1996) (statement of Sen. Lautenberg) ("The underlying problem is, in this country of ours, that domestic violence, no matter how severe the beating, is often dismissed as a squabble.").

convicted misdemeanant should have access to guns.[60] As Senator Lautenberg put it:

> In over 30 States, even today, beating your wife or your child is a misdemeanor. * * * Two-thirds of domestic violence murders involve firearms. In 150,000 cases of * * * spousal abuse, a gun is present. * * * There is no reason for someone who beats their wi[fe] or abuses their children to own a gun. When you combine wife beaters and guns, the end result is more death.[61]

Congress' intent that the Lautenberg Amendment apply broadly is further evidenced by the fact that the language of the statute was amended before its passage to incorporate an *expanded* definition of "covered crimes." Several proposed modifications had attempted to limit the amendment's application, for example, "only to crimes against intimate partners"; only to offenders "who had been notified [of the prohibition against purchasing guns] when they originally were charged"; or only to "offenders who had been entitled to a jury trial."[62] Each of those narrowing proposals was rejected in favor of the current language—language viewed by the bill's

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[60] 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein), *see* 142 Cong. Rec. 22,986 (1996) (statement of Sen. Lautenberg) ("The amendment says: Abuse your wife, lose your gun; beat your child, lose your gun; assault your ex-wife, lose your gun; no ifs, ands, or buts.").

[61] 142 Cong. Rec. 22,985, 22,986 (1996).

[62] 142 Cong. Rec. 26,675 (1996) (statement of Sen. Lautenberg).

sponsor as "more precise, and probably broader."[63] As Senator Lautenberg put it, it was Congress's "hope that the enforcement of the law will be as rigid as the law very simply defines it. If you beat your wife, if you beat your child, if you abuse your family and you are convicted, even of a misdemeanor, you have no right to possess a gun. That is the way it ought to be."[64] Senator Feinstein echoed that purpose, observing that the statute's broad language will ensure that "[f]ewer abusers will have guns, and fewer of the abused will wake up each morning wondering whether they will live through the day."[65]

The Lautenberg Amendment was intended to target "[d]omestic violence, no matter how it is labeled."[66] The Sixth Circuit's decision undermines Congress's intent. It should be reversed.

* * *

The Lautenberg Amendment was passed to take guns out of the hands of misdemeanant domestic abusers. The Sixth Circuit's decision puts guns back in the hands of misdemeanant domestic abusers. The decision disregards the statute's text, it disre-

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[63] *Id.*

[64] 142 Cong. Rec. 26,676 (1996) (statement of Sen. Lautenberg).

[65] 142 Cong. Rec. 22,988 (1996) (statement of Sen. Feinstein).

[66] 142 Cong. Rec. 22,986 (1996) (statement of Sen. Lautenberg).

gards the statute's purpose, and it disregards all common sense. It should be reversed.

CONCLUSION

For the foregoing reasons, and those in the United States' brief, the decision below should be reversed.

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