No. 13-7120

In the Supreme Court of the United States

SAMUEL JAMES JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's prior felony conviction under Minnesota law for possession of a short-barreled shotgun is a "violent felony" under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations and guidelines:

Statutes, regulations and guidelines—Continued: Page

Statutes, regulations and guidelines—Continued: Page

Statutes, regulations and guidelines—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is not published in the *Federal Reporter* but is reprinted in 526 Fed. Appx. 708.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2013. The petition for a writ of certiorari was filed on October 28, 2013, and was granted on April 21, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to this brief. App., *infra*, at 2a-32a.

STATEMENT

Following a guilty plea in the United States District Court for the District of Minnesota, petitioner was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 180 months of imprisonment under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A7.

1. a. A shotgun is a shoulder-fired long gun that is typically used to fire a cluster of pellets called "shot" made from lead or other material. See generally Vincent J.M. Di Maio, M.D., *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic Techniques* 163-182 (1985) (Di Maio). The pellets are packed into the front of a cartridge called a "shell." See *id.* at 170 (illustration). The rear area of the shell contains gunpowder that ignites when the firing pin of the shotgun strikes the shell's primer. The resulting explosion propels the shot pellets down the barrel of the gun and out of the muzzle. See Michael Bussard, *Ammo Encyclopedia* 177-178 (2008) (Bussard). Unlike rifles or ordinary handguns, which fire single bullets and have "rifled" (grooved) barrels that cause the bullets to spin, increasing accuracy, a shotgun is smooth-bored. Di Maio 163. As a result, the pellets shoot forth in a spread pattern. See Bussard 192-193; Fig. 1, App., *infra*, 1a.

The velocity (and hence distance traveled) of individual pellets fired from a shotgun is less than that of a bullet fired from a similarly powerful rifle. See Bussard 192-193. But at relatively short distances, a shotgun's spread discharge is more likely to hit a small or moving target than a single bullet, and the target can be hit by numerous individual pellets across its body. See James M. Wilson, M.D., *Shotgun Ballistics and Shotgun Injuries* (*Trauma Rounds – San Francisco General Hospital*), 129 Western J. Med. 151-152 (Aug. 1978) (Wilson). And when a target is shot at very close range, the pellets are still clustered together when they make contact, producing a wide cavity in the target. Di Maio 195. Many shotguns have a "choke," which narrows the barrel at a point near the muzzle, thereby causing the pellets to remain clustered together for a longer distance and extending the gun's effective range. See Bussard 194, 221-222.

Shotguns were originally used primarily for hunting, as they still are today, because the spread discharge makes the weapon effective at hitting elusive game like birds and deer—thus, small pellets are called "birdshot," while larger pellets are called "buckshot." See Thomas F. Swearengen, *The World's Fighting Shotguns* 1 (1978) (Swearengen). Shotguns' military use emerged during the Civil War, when Confederate soldiers brought the weapons into battle. See *id.* at 5-6. Cavalrymen would often saw down the barrel to make the guns easier to fire from horseback. See *id.* at 6. In World War I, U.S. soldiers used shortened shotguns to attack enemy trenches and machinegun nests. See *id.* at 9.

During the Prohibition Era, the "short-barreled" or "sawed-off" shotgun, which provides the same explosive discharge as a regular shotgun but can be more easily concealed and handled in close quarters, became the weapon of choice for gangsters and bank robbers, along with machineguns. See Swearengen 11-12; see also Lee Kennett & James LaVerne Anderson, *The Gun in America* 202-203 (1975). Al Capone's men used two sawed-off shotguns and two machineguns to execute the members of a rival gang in the Valentine's Day Massacre of 1929. See *7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms*, N.Y. Times, Feb. 15, 1929, at A1. Chicago union leader Wild Bill Rooney was gunned down in the street in 1931 by a "sawed-off shotgun [that] was pointed through a rear window" of an automobile. *Union Boss Slain by Gang in Chicago*, N.Y. Times, Mar. 20, 1931, at 52. And when Clyde Barrow and Bonnie Parker were ambushed and killed by the police in 1934, officers found Barrow "clutching a sawed-off shotgun in one hand." *Barrow and Woman are Slain by Police in Louisiana Trap*, N.Y. Times, May 24, 1934, at A1.

b. In 1934, Congress responded to "[t]he growing frequency of crimes of violence in which people are killed or injured by the use of dangerous weapons" by enacting the National Firearms Act (NFA), ch. 757, 48 Stat. 1236. H.R. Rep. No. 1780, 73d Cong., 2d Sess. 1 (1934) (NFA House Report); see S. Rep. No. 1444, 73d Cong., 2d Sess. 1 (1934) (NFA Senate Report) (same). The NFA reflects the belief that "while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law

officer should have a machine gun or sawed-off shotgun." NFA House Report 1. The statute aims to prevent criminals from acquiring short-barreled shotguns, machineguns, and other weapons with no ordinary private uses by requiring, under threat of criminal penalty, that anyone who wishes to take possession of such a weapon register it with the federal government and pay a tax.

As amended and recodified,[1] the NFA regulates "firearm[s]" under a specialized definition that covers particularly dangerous items, including "a shotgun having a barrel or barrels of less than 18 inches in length" as well as "a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length." 26 U.S.C. 5845(a)(1) and (2); see 26 U.S.C. 5845(d) (definition of "shotgun"). The statute also includes within its specialized definition of "firearm" short-barreled rifles, machineguns, silencers, and "destructive device[s]"—a category that includes grenades, rockets, missiles, and other explosives designed for use as a weapon. 26 U.S.C. 5845(a)-(c) and (f).

Under the NFA and implementing regulations of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), in order to transfer a so-called "NFA firearm" to an individual, the transferor must submit an application to the ATF that includes the "fingerprints and [the] photograph" of the transferee, as well as the weapon's serial number. 26 U.S.C. 5812(a),

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[1] See National Firearms Act Amendments of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1227-1235 (26 U.S.C. 5801-5872 (1970)).

5842(a), 5845(j); 27 C.F.R. 479.84-479.86.[2] A state or local law-enforcement official must certify that the fingerprints and photograph belong to the transferee and that the official "has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes." 27 C.F.R. 479.85. Upon receipt of an application, the ATF examines criminal records, including the National Instant Criminal Background Check System, to determine whether "the transfer, receipt, or possession of a firearm would place the transferee in violation of law." 27 C.F.R. 479.86. If it would—for example, because the transferee is a felon, see 18 U.S.C. 922(g)(1)—the ATF must deny the application. 26 U.S.C. 5812(a); 27 C.F.R. 479.86. Similar registration requirements apply to an individual who seeks permission to convert a regular shotgun into a short-barreled shotgun (although background checks are not required by regulation). See 26 U.S.C. 5821-5822, 5845(i); 27 C.F.R. 479.62-479.65.[3] The statute also requires manufactur-

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[2] As originally enacted, the NFA lodged implementation authority in the Secretary of the Treasury. See §§ 1(j), 12, 48 Stat. 1237, 1240. The ATF, which was established as an independent bureau within the Treasury Department in 1972, was transferred, along with its NFA functions, to the Department of Justice by the Homeland Security Act of 2002. See Pub. L. No. 107-296, § 1111(a)(1) and (c)(1), 116 Stat. 2274, 2275.

[3] In the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102, 100 Stat. 453, Congress generally prohibited the transfer or possession of machineguns. See 18 U.S.C. 922(*o*). Accordingly, the ATF will not register a machinegun unless it falls within an exception to the ban (such as for weapons lawfully possessed before the effective date of the prohibition). See 27 C.F.R. 479.105.

ers, importers, and dealers of covered firearms to register with the ATF. See 26 U.S.C. 5802, 5845(k)-(m).

The ATF maintains a "central registry of all [NFA] firearms in the United States which are not in the possession or under the control of the United States," called the National Firearms Registration and Transfer Record. 26 U.S.C. 5841(a). That database contains, among other information, the name and address of any person entitled to possess a particular firearm. 27 C.F.R. 479.101(a)(3).

The NFA makes it a criminal offense, punishable by up to ten years in prison, to possess an NFA firearm made or transferred in violation of the statute. See 26 U.S.C. 5861(b)-(d), 5871. Conviction requires proof that the individual "knew the weapon he possessed had the characteristics that brought it within the statutory definition" of an NFA firearm. *Staples* v. *United States*, 511 U.S. 600, 602, 619 (1994). In *United States* v. *Miller*, 307 U.S. 174 (1939), this Court upheld against a Second Amendment challenge the NFA's criminal prohibition on the possession of unregistered short-barreled shotguns. *Id.* at 178. That constitutional guarantee, the Court has explained, "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *District of Columbia* v. *Heller*, 554 U.S. 570, 625 (2008).

c. Congress has also imposed other restrictions on short-barreled shotguns. In the Omnibus Crime Control and Safe Streets of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 229, Congress prohibited anyone other than a licensed importer, manufacturer, dealer, or collector from transporting a short-barreled shotgun

in interstate commerce unless the transport is "specifically authorized by the Attorney General consistent with public safety and necessity." 18 U.S.C. 922(a)(4); see 27 C.F.R. 478.28; see also 18 U.S.C. 922(b)(4). And in the Crime Control Act of 1990, Pub. L. No. 101-647, § 1101, 104 Stat. 4829, Congress amended the criminal provision prohibiting the use or carrying of a weapon during and in relation to violent crimes and serious drug offenses to impose greater penalties if the weapon involved is a short-barreled shotgun. See 18 U.S.C. 924(c)(1)(B)(i).

d. Twenty-eight States have effectively incorporated the NFA into their own law by criminally prohibiting the possession of short-barreled shotguns not registered with the federal government (and, in some jurisdictions, local authorities).[4] Valid registration is

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[4] See Ala. Code 13A-11-62(5), 13A-11-63(a) (LexisNexis 2005 & Supp. 2013); Alaska Stat. § 11.61.200(a)(3), (h) and (i) (2012); Ariz. Rev. Stat. §§ 13-3101(8)(a)(iv), 13-3102(A), (C)(4) and (L) (2005 & Supp. 2013); Ark. Code §§ 5-1-102(20), 5-73-104(a)(3) and (c)(3) (2005 & Supp. 2013) (permitting possession "as authorized by law"); Colo. Rev. Stat. §§ 18-12-101(1)(i), 18-12-102(1), (3) and (5) (2013); Conn. Gen. Stat. Ann. §§ 53a-3(17) and (19), 53a-211 (West 2012 & Supp. 2014); Fla. Stat. Ann. §§ 790.001(10), 790.221 (West 2007); Ga. Code Ann. §§ 16-11-121(5), 16-11-122, 16-11-123, 16-11-124(4) (2011); Kan. Stat. Ann. § 21-6301(a)(5), (b)(2), (d) and (h) (2011); La. Rev. Stat. Ann. §§ 40:1781(3), 40:1785, 40:1791 (2008 & Supp. 2014); Md. Code Ann. Crim. Law §§ 4-201(g), Pub. Safety 5-203(a)(2) and (c) (2012); Mass. Gen. Laws 140 § 121; 269 § 10(c) (2014); Mich. Comp. Laws Ann. §§ 750.222(i), 750.224b(1)-(4) (West Supp. 2014); Neb. Rev. Stat. Ann. §§ 28-1201(10), 28-1203 (Lexis Nexis 2009); N.C. Gen. Stat. §14.288.8(a), (b)(5), (c)(3) and (d) (2013); N.D. Cent. Code §§ 62.1-01-01.13, 62.1-02-03 (2010); Nev. Rev. Stat. Ann. § 202.275(1), (2)(b) and (3)(b) (LexisNexis 2009); Ohio Rev. Code Ann. §§ 2923.11(F) and (K)(1), 2923.17(A), (C)(5) and (D) (LexisNexis 2010 & Supp. 2014); Okla. Stat. Ann.

often established as an affirmative defense. In addition, 11 States and the District of Columbia have banned possession of the weapons outright.[5] The state statutes typically define a short-barreled shotgun identically or very similarly to the short-barreled shotguns regulated by the NFA, and many include exceptions for law-enforcement personnel and for curios and antiques.[6]

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§ 1289.18(A), (C) and (D) (West 2012); Or. Rev. Stat. §§ 166.210(12), 166.272(1), (2) and (4) (2013); 18 Pa. Cons. Stat. Ann. §§ 908(a), (b)(1) and (c) (West Supp. 2014); S.C. Code Ann. §§ 16-23-210(b), 16-23-230, 16-23-250 (2003); S.D. Codified Laws §§ 22-1-2(8) and (46), 22-14-6 (2006); Tenn. Code Ann. §§ 39-17-1301(15), 39-17-1302(a)(4), (b)(7) and (d)(2) (2010); Tex. Penal Code Ann. §§ 46.01(10), 46.05(a)(3), (c) and (e) (West Supp. 2014); Va. Code Ann. §§ 18.2-299, 18.2-300, 18.2-303.1 (2014); Wash. Rev. Code Ann. §§ 9.41.010(2), 9.41.190(1), (2) and (5) (West 2010 & Supp. 2014); Wis. Stat. Ann. § 941.28(1)(c) and (2)-(4) (West 2005).

[5] See Cal. Penal Code §§ 17180, 33210, 33215 (West 2012); D.C. Code §§ 7-2501.01(15), 22-4514(a) and (c) (LexisNexis 2001); Del. Code Ann. tit. 11, § 1444 (2008); Haw. Rev. Stat. Ann. § 134-8(a) and (d) (LexisNexis 2013); 720 Ill. Comp. Stat. Ann. 5/24-1(a)(7)(ii) and (b) (West 2010); Ind. Code Ann. §§ 35-47.1-10, 35-47-5-4.1(a) (LexisNexis 2009); Iowa Code Ann. §§ 724.1.2, 724.3 (West 2014); Minn. Stat. Ann. §§ 609.67.1(c), 609.67.2 (West 2009); Mo. Stat. §§ 571.010(17), 571.020.1(6)(b), 571.020.3 (West 2014); N.J. Stat. Ann. §§ 2C:39-1(*o*), 2C:39-3(b) (2012); N.Y. Penal Law §§ 265.00(3), 265.01-b (McKinney Supp. 2014); R.I. Gen. Laws §§ 11-47-2(1), 11-47-8(b) (2012).

[6] Idaho, Kentucky, Maine, Mississippi, New Hampshire, New Mexico, Utah, Vermont, West Virginia, and Wyoming have no general bar on possession. Montana prohibits the possession of a shotgun modified to have a short barrel that has not been federally registered, but not a short-barreled shotgun originally manufactured as such. See Mont. Code Ann. § 45-8-340(1)(b), (c), (3)(f) and (4) (2013).

Despite these legal restrictions, short-barreled shotguns are still employed in robberies, gang violence, drug trafficking, organized crime, and isolated atrocities. See note 14, *infra* (citing examples from case law).

2. Petitioner is a convicted felon who came to the FBI's attention in 2010 through his involvement with an organization called the National Socialist Movement, which advocates white-supremacist views and violence against minority groups. Pet. App. A2; Revised Presentence Investigation Report (PSR) ¶ 5. The FBI believed that petitioner's organization was mobilizing to engage in domestic terrorism. Pet. App. A2; PSR ¶ 5. In June 2010, petitioner left the National Socialist Movement to found the Aryan Liberation Movement, which he planned to support by counterfeiting United States currency. Pet. App. A2; PSR ¶¶ 6, 11. Throughout 2010, a confidential source and an undercover FBI agent were in regular contact with petitioner. PSR ¶¶ 5-6.

In November 2010, petitioner revealed to the confidential source and undercover agent that he had manufactured napalm, other explosives, and silencers for the Aryan Liberation Movement. Pet. App. A2; PSR ¶ 9. Petitioner also showed the undercover officer his AK-47 rifle and a large cache of ammunition. Pet. App. A2; PSR ¶ 9. In December 2010, petitioner acquired a .22 caliber semiautomatic assault rifle and a .45 caliber semiautomatic handgun. Pet. App. A2; PSR ¶ 10. Throughout 2011, petitioner's comments about using violence to advance his cause escalated. PSR ¶ 15. He discussed various attacks he might plan on targets in Minnesota, including attacks "against individuals identified as 'liberals'"; attacks against

"progressive bookstores"; and an attack on the Mexican consulate in St. Paul in May 2012. PSR ¶ 16.

In April 2012, law-enforcement authorities arrested petitioner. Pet. App. A2. At the time of his arrest, he admitted that he possessed an AK-47 rifle and a .22 caliber semiautomatic handgun. PSR ¶ 17.

3. Petitioner was indicted in the United States District Court for the District of Minnesota on four counts of possession of a firearm by a convicted felon and two counts of possession of ammunition by a convicted felon, all in violation of 18 U.S.C. 922(g)(1). Indictment 1-6. The government contended that the ACCA applies to petitioner. The ACCA provides for a mandatory minimum sentence of 15 years of imprisonment for any defendant convicted of being a felon in possession of a firearm who has "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). It defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The government argued that petitioner has at least three prior convictions that qualify as "violent felon[ies]." Indictment 1-6; see PSR ¶ 34.

Petitioner pleaded guilty to one count of possession of a firearm by a convicted felon in exchange for the dismissal of the other counts of the indictment. Pet. App. A3. In his plea agreement, petitioner reserved the right to "challenge the applicability of the ACCA." *Ibid.* (quoting agreement).

At sentencing, the district court concluded that three of petitioner's prior Minnesota convictions—for robbery, attempted robbery, and, as relevant here, unlawful possession of a short-barreled shotgun—qualify as violent felonies under the ACCA. See Pet. App. A4. The court therefore sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. *Id.* at B2-B3.

4. The court of appeals affirmed. Pet. App. A1-A7. The court held that the unlawful possession of a short-barreled shotgun is a "violent felony" under the ACCA because the offense "involves conduct that presents a serious potential risk of physical injury to another." *Id.* at A5-A6 (quoting 18 U.S.C. 924(e)(2)(B)(ii)). The court of appeals relied on its prior decision in *United States* v. *Lillard*, 685 F.3d 773 (2012), cert. denied 133 S. Ct. 1242 (2013), which had explained that "[s]hort shotguns are inherently dangerous because they are not useful except for violent and criminal purposes." *Id.* at 776-777 (internal citations and quotation marks omitted).

SUMMARY OF ARGUMENT

The ACCA defines "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). To

determine whether an offense falls under the "residual clause" of that definition, a court must ascertain "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James* v. *United States*, 550 U.S. 192, 208 (2007). Petitioner's conviction for unlawful possession of a short-barreled shotgun meets that standard.

A. In the ordinary case, unlawful possession of a short-barreled shotgun presents a tremendous risk of physical injury to other people. That conclusion follows from two propositions long recognized by this Court, lower courts, Congress, and state legislatures.

First, short-barreled shotguns are "weapons not typically possessed by law-abiding citizens for lawful purposes." *District of Columbia* v. *Heller*, 554 U.S. 570, 625 (2008). Rather, in the ordinary case, a short-barreled shotgun is possessed in connection with criminal activity, such as bank robbery, drug dealing, gang violence, or terrorism. And even if that were in doubt, it is beyond question that the ordinary case of *unlawful* possession, which excludes individuals who have registered the weapon with the federal government, is possession in connection with serious crimes. That is the basic premise of the NFA and parallel state laws.

Second, when an individual possesses an exceptionally dangerous yet concealable firearm during the commission of a crime, the chance that an ensuing confrontation—with victims, bystanders, rivals, or the police—will result in death or serious injury increases significantly. A short-barreled shotgun is a readily concealable, easily maneuvered firearm capable of inflicting catastrophic injury in close quarters and wounding multiple victims with each pull of the trig-

ger. The heightened risk posed by the weapon in criminal encounters is the very reason that Congress has imposed enhanced penalties on those who bring short-barreled shotguns to drug deals and violent crimes. 18 U.S.C. 924(c)(1)(B)(i). That risk of violent confrontation and deadly injuries is comparable to the risks posed by the enumerated offenses.

B. Petitioner errs in contending that possession offenses are categorically excluded from the residual clause, no matter how lethal the object possessed. His principal argument—that possession itself is not violent—misunderstands the residual clause and this Court's cases. The relevant question is whether the offense conduct, in the ordinary case, gives rise to a serious potential risk of physical injury. That requires a practical analysis of the circumstances and behavior that ordinarily attend the offense; the mere fact that the offense can be completed without a potential risk of violence does not remove it from the ambit of the residual clause. See *James*, 550 U.S. at 208. Here, the ordinary case is the possession of a short-barreled shotgun in connection with criminal activity, and such possession invariably increases the chance that someone will be maimed or killed in a confrontation.

Petitioner also argues that because none of the enumerated offenses is a possession offense, no possession offense falls under the residual clause. This Court rejected a structurally identical argument in holding that attempted burglary qualifies despite the fact that no enumerated offense is an attempt offense. See *James*, 550 U.S. at 199-200. Petitioner is likewise wrong in contending that the classification of certain possession offenses as violent felonies renders super-

fluous the inclusion of the unlawful "use of explosives" among the enumerated offenses. That generic offense covers the unlawful use of all explosives, including ordinary industrial explosives like TNT, whereas the residual clause encompasses the unlawful possession of particularly dangerous explosives—*i.e.*, those regulated by the NFA because they are designed as weapons.

C. This Court has indicated that "strict liability, negligence, and recklessness crimes" may not fall under the residual clause even if they present a serious potential risk of physical injury to another. *Sykes* v. *United States*, 131 S. Ct. 2267, 2275-2276 (2011). Unlawful possession of a short-barreled shotgun under Minnesota law is not such a crime, so this case presents no occasion to consider how far that "addition to the statutory text" extends. *Id.* at 2275. To the extent this Court asks more broadly whether the offense is similar to the enumerated offenses in its "purposeful, violent, and aggressive" nature, *ibid.*, unlawfully arming oneself with a concealable, devastatingly dangerous weapon with no recognized lawful use fits that description if anything does.

ARGUMENT

THE UNLAWFUL POSSESSION OF A SHORT-BARRELED SHOTGUN IS A VIOLENT FELONY

The ACCA defines a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). This Court has interpreted the "residual clause" of

that provision to require a "categorical approach" to ascertaining whether a particular predicate offense presents the requisite risk. *Sykes* v. *United States*, 131 S. Ct. 2267, 2272 (2011) (citation omitted). Under that approach, this Court "look[s] only to the fact of conviction and the statutory definition of the prior offense, and do[es] not generally consider the particular facts disclosed by the record of conviction." *Ibid.* (citation omitted).

Once the Court identifies the statutory definition of the predicate offense, "the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *James* v. *United States*, 550 U.S. 192, 208 (2007) (emphasis added). The categorical approach to the residual clause does not, in other words, "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *Ibid.* And the "potential risk" required is far from "metaphysical certainty." *Id.* at 207. As this Court has explained, by modifying the word "risk" with "potential," "Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty." *Id.* at 207-208.

This Court has relied principally on its own "commonsense conclusion" about whether a particular offense poses a serious potential risk of physical injury to others. *Sykes*, 131 S. Ct. at 2274. It has sought "guidance in making this determination" from the level of risk posed by the enumerated offenses of burglary, arson, extortion, and the use of explosives, *id.* at 2273, while acknowledging that "[n]othing in the

language of § 924(e)(2)(B)(ii) rules out the possibility that an offense may present 'a serious risk of physical injury to another' without presenting as great a risk as any of the enumerated offenses," *James*, 550 U.S. at 209.

Under that framework, the unlawful possession of a short-barreled shotgun creates a "serious potential risk of physical injury to another." In the ordinary case, that weapon is unlawfully possessed in connection with serious criminal activity, and its presence at the scene of a crime drastically increases the chance that someone will be seriously hurt or killed. Accordingly, petitioner's conviction qualifies as a violent felony under the ACCA.

A. An Individual's Unlawful Possession Of A Short-Barreled Shotgun Tremendously Increases The Risk That He Will Kill Or Injure Other People During A Confrontation

That the unlawful possession of a short-barreled shotgun presents a serious potential risk of physical injury to other people follows ineluctably from two propositions that have long been confirmed by this Court, lower courts, Congress, and state legislatures: *first*, that those who illegally arm themselves with a short-barreled shotgun are overwhelmingly likely to engage in criminal activity with the weapon, and *second*, that the possession of a short-barreled shotgun during the commission of a serious crime significantly increases the risk that someone will be injured or killed in a confrontation with the possessor.

1. The ordinary case of unlawful possession of a short-barreled shotgun is possession in connection with violent crimes or other serious offenses

A person who unlawfully possesses a short-barreled shotgun is likely to engage in serious, dangerous crimes with the weapon, such as armed robbery, narcotics trafficking, gang violence, terrorism, or mass violence, or to sell the weapon to others who intend to commit such offenses. For that reason, the ordinary case of unlawful possession of a short-barreled shotgun is possession in connection with violent crimes and other serious offenses.

a. Short-barreled shotguns are typically used for unlawful purposes

For eight decades, this Court and lower courts have recognized that "short-barreled shotguns" are "not typically possessed by law-abiding citizens for lawful purposes." *District of Columbia* v. *Heller*, 554 U.S. 570, 625 (2008). That understanding is correct. A short-barreled shotgun's unique combination of characteristics renders it inappropriate for lawful private uses like self-defense and hunting, but lethally effective for criminal purposes.

i. Any shotgun, regardless of barrel length, "can inflict indiscriminate carnage" in close quarters. *United States* v. *Vincent*, 575 F.3d 820, 826 (8th Cir. 2009), cert. denied, 560 U.S. 927 (2010). A short-range shotgun blast will produce a catastrophic injury that can obliterate a victim's internal organs and cause immense blood loss. See pp. 32-33, *infra*. Longer-range shots, in which the pellets separate before impact, are likely to inflict multiple wounds across the victim's body, including his eyes, and may injure multiple people. But a bank robber or a drug dealer could

not easily carry a full-length shotgun to a crime scene without being observed by law-enforcement officers or concerned members of the public or alerting victims that they should flee; a full-length shotgun is difficult to maneuver in close quarters like hallways and alleys; and a fugitive stopped on the highway would have difficulty pointing a full-length shotgun at a patrolwoman's face before she could take cover or draw her weapon.

Not so with a short-barreled shotgun. It can be tucked into an overcoat, hidden in a small bag, or stored under a car seat, much like a handgun, and then retrieved and fired in an instant. And the shorter barrel makes the weapon easier to maneuver in tight confines. A short-barreled shotgun can be fired with one hand, for example, and rapidly redirected at additional victims. It is therefore more effective than a full-length shotgun for attacking multiple targets, hitting targets while running through a building, or firing from a moving vehicle. See Fig. 2, App., *infra*, 1a (photograph of sawed-off shotgun sold to undercover officer); Fig. 3, App., *infra*, 1a (comparison of short-barreled shotgun with full-length shotgun).

In light of those advantages, this Court and lower courts have long concluded that, in the ordinary case, a short-barreled shotgun is possessed in connection with criminal activities, not lawful behavior such as home defense or hunting. Indeed, this Court has held that, precisely because the weapons are "not typically possessed by law-abiding citizens for lawful purposes," they are not among the class of arms encompassed by the Second Amendment. *Heller*, 554 U.S. at 625. Echoing that view, the majority of courts of appeals with criminal jurisdiction have determined

that "[s]awed-off shotguns are inherently dangerous and lack usefulness except for violent and criminal purposes." *Vincent*, 575 F.3d at 825; cf. *James*, 550 U.S. at 204 & n.3.[7]

As this Court explained in *Heller*, a short-barreled shotgun is not designed for self-defense. 554 U.S. at 624-625. A homeowner does not need a concealable shotgun to protect her family and property. Unlike pistols and long guns, such weapons have never been in common use for personal defense by law-abiding citizens. Likewise, "[p]eople do not shorten their shotguns to hunt or shoot skeet." *United States* v. *Upton*, 512 F.3d 394, 404 (7th Cir.), cert. denied, 555

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[7] See *United States* v. *Fortes*, 141 F.3d 1, 6-8 (1st Cir.), cert. denied, 524 U.S. 961 (1998); *United States* v. *Ruggles*, 70 F.3d 262, 266 (2d Cir. 1995), cert. denied, 516 U.S. 1182 (1996); *United States* v. *Reed*, 935 F.2d 641, 643 (4th Cir.) (per curiam), cert. denied, 502 U.S. 960 (1991); *United States* v. *Serna*, 309 F.3d 859, 863-864 (5th Cir. 2002), cert. denied, 537 U.S. 1221 (2003); *United States* v. *Brazeau*, 237 F.3d 842, 844-845 (7th Cir. 2001); *United States* v. *Dunn*, 946 F.2d 615, 621 (9th Cir.), cert. denied, 502 U.S. 950 (1991); *United States* v. *McGill*, 618 F.3d 1273, 1275 n.4, 1277-1279 & n.8 (11th Cir. 2010) (per curiam); see also *United States* v. *Mobley*, 956 F.2d 450, 453-454 (3d Cir. 1992) ("Altered firearms, for example sawed-off shotguns, have few legitimate uses, and have most probably been altered to conceal or magnify their deadly potential.") (internal citation and quotation marks omitted); *United States* v. *Truitt*, 521 F.2d 1174, 1177 (6th Cir. 1975) ("[I]ts lawful possession is, in ordinary experience, rare indeed. There is very little legitimate use for such a weapon."); *United States* v. *Naugle*, 997 F.2d 819, 823 (10th Cir.) ("Although sawed-off shotguns may be legally possessed, that is the rare case."), cert. denied, 510 U.S. 997 (1993); *United States* v. *Mayo*, 498 F.2d 713, 718 (D.C. Cir. 1974) ("[A] sawed-off shotgun is a highly dangerous weapon, the possession of which would rarely be an innocent act."); accord, *e.g.*, *Commonwealth* v. *Alvarado*, 693 N.E.2d 131, 134 (Mass. 1998).

U.S. 830 (2008), overruled on other grounds by *United States* v. *Miller*, 721 F.3d 435 (7th Cir. 2013). As one National Rifle Association expert put it, "[y]ou don't shoot game from a car." *People* v. *Cortez*, 442 N.Y.S.2d 873, 875 (N.Y. Sup. Ct. 1981).

Rather, an individual shortens a barrel in order to convert the weapon from a tool designed for killing game in unpopulated, natural settings, to an implement intended for indiscriminate murder, maiming, and intimidation on urban streets and in buildings. For that reason, this Court has attributed to the ownership of a short-barreled shotgun the same "quasi-suspect character" as the ownership of grenades, machineguns, and artillery pieces, in that any reasonable person would know that they are not ordinary weapons fit for civilian use. *Staples* v. *United States*, 511 U.S. 600, 611-612 (1994).

Short-barreled shotguns do have legitimate roles in law enforcement and warfare. During armed raids, officers or soldiers can use them to blow the locks off doors, allowing others to rush in. See *Army Field Manual* 3.06-11, § 3-20 (Feb. 28, 2002) (describing shotgun breach techniques); see, *e.g.*, Remington Model 870 Police Breacher System (11.5-inch barrel).[8] In fact, it appears likely that a substantial number of federally registered short-barreled shotguns are registered to state and local law-enforcement agencies.[9]

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[8] www.remingtonle.com/shotguns/870breacher.htm.

[9] According to the ATF's internal records, of the approximately 140,000 short-barreled shotguns federally registered through July 2014 (some of which may have been destroyed since they were registered), nearly 86,000 were registered using ATF Form 5, which pertains to certain tax-exempt transfers. The most common Form 5 tax-exempt transfer is from a federally licensed manufac-

Shotguns can also be an important tool in military combat. See Swearengen v. But private citizens do not execute search warrants, capture fugitives, or battle insurgents.

ii. The longstanding judicial view that short-barreled shotguns are primarily weapons of crime comports with decades of federal and state legislation. Congress enacted the NFA in 1934 because it was concerned with the "growing frequency of crimes of violence in which people are killed or injured" with short-barreled shotguns and machineguns. NFA House Report 1; see NFA Senate Report 1-2. Congress believed that "there is no reason why anyone except a law officer should" possess those weapons. NFA House Report 1; see NFA Senate Report 2. As the United States explained in defending the constitutionality of the NFA's application to short-barreled shotguns shortly after its enactment, "[t]he firearms referred to in the National Firearms Act, i. e., sawed-off shotguns, sawed-off rifles, and machine guns, clearly have no legitimate use in the hands of private individuals but, on the contrary, frequently constitute the arsenal of the gangster and the desperado." U.S.

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turer, dealer, or importer to a governmental entity. See 26 U.S.C. 5852(a), 5853(a); 27 C.F.R. 479.89, 479.90. That form is also used, however, to transfer firearms *from* governmental entities to others, to transfer unserviceable curios, and to transfer weapons to a lawful heir, so the exact number of weapons registered to governmental entities under Form 5 is not clear. In addition, approximately 8750 weapons were registered using Form 10, which applies only to governmental entities who acquire short-barreled shotguns through forfeiture, abandonment, and other means. And almost 13,000 short-barreled shotguns are registered under Form 2 or Form 3, which apply only to federally licensed manufacturers, dealers, and importers.

Br. at 5, *United States* v. *Miller*, 307 U.S. 174 (1939) (No. 696).

Legislation enacted after the original NFA continued to embody the view that short-barreled shotguns are primarily weapons of crime. In 1952, Congress expanded the NFA to apply to individuals who personally convert a full shotgun into a short-barreled shotgun. See Act of May 21, 1952, ch. 320, § 1, 66 Stat. 87 (26 U.S.C. 2734 (1952)). In closing that loophole in the original statute, Congress reaffirmed that "machine guns and sawed-off guns" are "the type of firearms commonly used by the gangster element." S. Rep. No. 1495, 82d Cong., 2d Sess. 1 (1952). Indeed, the congressional committee reports explained that by 1952, "the sawed-off shotgun ha[d] become the favorite offensive weapon of such criminals," in part because they could make the "vicious weapons" at home. *Id.* at 2; see H.R. Rep. No. 1714, 82d Cong., 2d Sess. 1-2 (1952) (same); see also S. Rep. No. 1622, 83d Cong., 2d Sess. 558 (1954) (describing "double-barrel sawed-off shotgun" as a "gangster-type gun"). And in enacting the National Firearms Act Amendments of 1968, Pub. L. No. 90-618, § 201, 82 Stat. 1226, Congress continued to recognize that the "National Firearms Act covers gangster-type weapons such as * * * sawed-off shotguns." H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 34 (1968). The Congress that enacted the ACCA's residual clause 18 years later surely understood the intrinsic association between short-barreled shotguns and criminal activity. See Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207-39.

Likewise, the 39 state legislatures that have fortified the federal scheme with state-level prohibitions

imposing significant prison time have undoubtedly "recogni[zed] that persons who possess [short-barreled shotguns] are ordinarily persons who intend to use them in violent and dangerous enterprises." *People* v. *Satchell*, 489 P.2d 1361, 1371 (Cal. 1971) (en banc) (discussing legislative purpose of California ban), overruled on other grounds by *People* v. *Flood*, 957 P.2d 869 (Cal. 1998); see *People* v. *Williams*, 915 N.E.2d 815, 820 (Ill. App. Ct. 2009) ("The legislature has determined that * * * sawed-off shotguns are so inherently dangerous to human life that they constitute a sufficient hazard to society to justify their prohibition. * * * [T]hey are deemed to be contraband *per se*, having no legitimate purpose."), appeal denied, 924 N.E.2d 460 (Ill. 2010) (Tbl.). Although petitioner touts Michigan's recent statutory amendment, which permits possession of a federally registered weapon, it is revealing that the legislature still believed the weapons sufficiently dangerous in 2014 to impose up to a five-year sentence for unlawful possession. Mich. Comp. Laws Ann. § 750.224b(2) (West Supp. 2014). And the Minnesota statute of conviction here was enacted because the legislature concluded that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever[;] [i]t's not used for hunting[;] [i]t's not used for marksmanship; [i]t's simply a weapon of crime." *State* v. *Ellenberger*, 543 N.W.2d 673, 676 (Minn. Ct. App. 1996) (citation omitted).

b. Individuals who take possession of short-barreled shotguns in violation of law are overwhelmingly likely to intend to use the weapons in crime

Even if this Court, lower courts, Congress, and state legislatures have all been mistaken that short-barreled shotguns are "not typically possessed by law-

abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, it is not subject to doubt that short-barreled shotguns possessed *unlawfully* are typically possessed in connection with other unlawful activity. And that is the relevant comparison for ACCA purposes, because lawful possession does not result in a felony conviction.

i. As petitioner explains, the majority of States permit the possession of a short-barreled shotgun if it is registered in accordance with NFA requirements. See notes 4-6, *supra*. That registration process requires a criminal background check and the submission of fingerprints and a picture verified by a state or local official. See pp. 5-7, *supra*. Some States, like Minnesota, prohibit the possession of short-barreled shotguns altogether (with exceptions for law-enforcement officers). In those States, the weapon cannot be lawfully registered with the federal government, and a registered weapon may not be transferred into the State from elsewhere. Thus, it is very unlikely that a person who possesses a short-barreled shotgun in conformity with federal registration requirements would be convicted of a state possession offense.

Accordingly, in assessing the likelihood that the *unlawful* possession of a short-barreled shotgun will occur in connection with serious criminal activity, a court must exclude all individuals who have disclosed their identity to the government, submitted to a criminal background check, and received approval of their application. That includes state and local law-enforcement officers as well as collectors and enthusiasts who lawfully build personal collections of firearms.

The remaining individuals are those who have taken possession of a short-barreled shotgun without disclosing their photograph and fingerprints to the government and without submitting to a criminal background check, or those who have elected to make or take possession of the weapon despite the fact that their registration applications were denied—which would happen if, for example, they are felons. The members of that cohort are overwhelming likely to possess the weapon in connection with criminal activities. Ordinary collectors and enthusiasts do not stockpile firearms illegally—particularly a class of "quasi-suspect" arms that any lawful dealer or manufacturer knows must be registered with the government before it can be sold. *Staples*, 511 U.S. at 611-612. Even the few who believe that a short-barreled shotgun is appropriate for self-defense or hunting are likely to acquire or make the weapon in compliance with law. See *United States* v. *Dunn*, 946 F.2d 615, 621 (9th Cir. 1991), cert. denied, 502 U.S. 950 (1991). It is primarily wrongdoers who will assume possession of the weapon illegally.

That is, in fact, the central logic behind the NFA's criminal prohibitions. As Attorney General Cummings told Congress in advocating for passage of the law, the basic "point" of the statute is that criminals, unlike law-abiding citizens, are not likely "to comply with this law" because one would not "expect the underworld to be going around giving their fingerprints and getting permits to carry these weapons." *National Firearms Act: Hearings on H.R. 9066 Before the House Comm. on Ways and Means*, 73d Cong., 2d Sess. 22 (1934). The statute, in other words, rests on the "reasonabl[e] presum[ption] that a person found in

possession of an unregistered machinegun or sawed-off shotgun intend[s] to use it for criminal purposes." *Staples*, 511 U.S. at 627 (Stevens, J., dissenting). For the ACCA analysis, that means that those who *unlawfully* possess short-barreled shotguns are particularly likely to possess the weapon for use in criminal activities.

That does not mean that the possession of any weapon in violation of law is likely to occur in connection with criminal activities. As this Court made clear in *Staples*, unlike "certain categories of guns" such as "machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation," other types of firearms have "traditionally been widely accepted as lawful possessions." 511 U.S. at 611-612. Possession of those sorts of traditional self-defense and hunting weapons may be restricted to certain persons because of potential risks of misuse, see *Barrett* v. *United States*, 423 U.S. 212, 218 (1976), and may be subject to state licensing regimes. But the violation of such requirements does not inherently and obviously suggest a criminal design.[10] In contrast,

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[10] In *United States* v. *Doe*, 960 F.2d 221 (1st Cir. 1992), the First Circuit, in an opinion by then-Chief Judge Breyer, held that possession of a firearm by a felon does not qualify as a "violent felony" under the ACCA. The court explained that it is difficult "to imagine [the requisite] risk of physical harm often accompanying the conduct that normally constitutes firearm possession." *Id.* at 224-225. For the reasons discussed above, the conduct that normally attends possession of a short-barreled shotgun significantly differs from the conduct that normally attends possession of firearms in common use for lawful purposes like self-defense and hunting. Moreover, *Doe* placed weight on the Sentencing Commission's judgment to exclude felon-in-possession crimes from its parallel definition of "crimes of violence," *id.* at 225, but the Sentencing

short-barreled shotguns have long been predominantly associated with law-breaking and violence and are pervasively regulated precisely because of their inherent danger. Because of the gun's intrinsic connection to acts of violence and intimidation, its unlawful possession is a powerful indication that the possessor intends to use it in connection with criminal activity.

ii. Petitioner draws a different conclusion from the NFA's registration scheme and parallel state statutes. According to him, that legislative approach indicates that legislators do not believe that short-barreled shotguns are particularly dangerous, since otherwise they would have "prohibit[ed] [them] outright." Pet. Br. 9.

That contention ignores the longstanding view of legislatures and courts that these weapons have no ordinary private uses other than crime. See pp. 19-24, *supra*. The fact that Congress and many States have adopted an approach that allows individuals to possess short-barreled shotguns (or, for that matter, grenade launchers and artillery pieces) if properly registered does not reflect the view that the weapons have legitimate private uses. Rather, it shows that Congress and the States believe that the steps required for registration, including the submission of a photograph and fingerprints, sufficiently mitigate the risk that a registrant will use the weapon to commit a crime. That tailored approach only makes it more likely that those who *unlawfully* possess short-barreled shotguns intend to use them for illegal ends.

Commission has determined that possession of a short-barreled shotgun is a crime of violence. See p. 35, *infra*.

c. Petitioner has provided no reason to doubt the traditional view that short-barreled shotguns are primarily implements of crime

Petitioner offers no empirical support for his contention that the traditional association between short-barreled shotguns and crime is "based upon dated beliefs about their use by 'gangsters.'" See Pet. Br. 16, 39-42.

i. Petitioner acknowledges that nationwide statistics specific to short-barreled shotguns do not exist. But he believes that the fact that handguns are the most commonly employed weapon in violent crime undermines the traditional view of short-barreled shotguns. See Pet. Br. 37-39. That does not follow. Ordinary handguns "traditionally have been widely accepted as lawful possessions," *Staples*, 511 U.S. at 612, and are not subject to the NFA's pervasive regulation. They are therefore far more readily available. It is thus no wonder that they are used in more crimes than short-barreled shotguns—or machineguns, grenade launchers, or rockets. That does not support the view that short-barreled shotguns are typically used for lawful purposes. Under petitioner's reasoning, possession of ordinary explosives would be deemed more closely associated with terrorism than possession of a biological weapon because terrorists more often detonate bombs than engage in bioterrorism.

If anything, the fact that crimes involving short-barreled shotguns are not as common as crimes involving handguns demonstrates that the NFA and other laws are working to prevent criminals from taking possession of these inherently dangerous weapons. But that success should not lead to the conclusion that the weapons are now benign.

ii. Aside from his reliance on handgun statistics, petitioner cites (Br. 21 & n.5) cases in which a person was prosecuted for unlawful possession of a short-barreled shotgun that was "possessed at home or in a closet or a locked gun cabinet" to suggest that the weapon is not uniquely associated with crime. Of course, criminals do not carry their weapons at all times, so it is no surprise that the police often find them in house searches. But in any event, the cases that petitioner has identified only verify the intrinsic connection between short-barreled shotguns and crime. In one case, the defendant stole the weapon from his mother's boyfriend, put on a black mask, and robbed a man at gunpoint, threatening to "do you here." *State* v. *Beavers*, 912 A.2d 1105, 1107-1108 (Conn. App. Ct.), certification denied, 918 A.2d 276 (Conn. 2007). In another, the police found a sawed-off shotgun when they arrested the defendant for a prior assault. See *People* v. *Etcheverry*, 347 N.E.2d 654, 655-656 (N.Y. 1976). It is telling that these are among the most sympathetic examples of unlawful possession of a short-barreled shotgun that petitioner has located.[11]

Petitioner has, in fact, cited only a single case involving a non-criminal use of a short-barreled shotgun.[12] In *United States* v. *Hammond*, No. 90-30333,

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[11] One case petitioner cites was a civil action, see *Boston Hous. Auth.* v. *Guirola*, 575 N.E.2d 1100, 1101 (Mass. 1991), and the other resulted in an acquittal on the possession counts, see *State* v. *Guerra*, 562 N.W.2d 10, 12 (Minn. Ct. App. 1997). Neither is relevant to the typical criminal conviction.

[12] *United States* v. *White Buffalo*, 10 F.3d 575, 576 (8th Cir. 1993) (cited Pet. Br. 40), involved a short-barreled .22 caliber rifle, not a short-barreled shotgun.

1991 WL 103450 (9th Cir. June 11, 1991), the defendant, who lived in "a cedar log cabin without electricity in the rural woods of Idaho," claimed that he had used the weapon "to kill a number of grouse for eating." *Id.* at *1 (cited Pet. Br. 40). There is no reason to believe that a backwoodsman's grouse-hunting represents the typical case of possession of a short-barreled shotgun. See note 14, *infra* (citing examples of the weapon's use from reported decisions). Rather, the typical offender looks more like petitioner: a violent felon who sought to stockpile a cache of dangerous weapons and planned to use them to intimidate and terrorize others. See PSR ¶¶ 4-18, 40-46.

2. The possession of a short-barreled shotgun in the commission of a crime significantly increases the risk that somebody will be seriously hurt or killed

For the foregoing reasons, "in the ordinary case," *James*, 550 U.S. at 208, a short-barreled shotgun is unlawfully possessed for use in a crime—as an implement of assault, intimidation, protection, and evasion from arrest. Accordingly, in assessing whether the offense "presents a serious potential risk of physical injury to another," the "proper inquiry" is whether *that* sort of possession presents a serious potential risk that someone will be physically injured. *Ibid.* It does.

a. Short-barreled shotguns are lethally dangerous when possessed during criminal confrontations

The presence of a short-barreled shotgun at the scene of a crime significantly increases the chance that someone will be hurt or killed.

i. The unique combination of characteristics of a short-barreled shotgun make it an inherently danger-

ous weapon likely to cause serious injury and death when wielded in criminal confrontations.

First, short-barreled shotguns pack the same devastating impact as ordinary shotguns. When fired "[a]t close range, the shotgun is the most formidable and destructive of all small arms." Di Maio 182; see *Ellenberger*, 543 N.W.2d at 677 ("[A]t short range, a sawed-off shotgun is probably at least as vicious as a machine gun.") (quoting legislative history of Minnesota statute). "No other weapon, military or civilian, fires a single round that launches a swarm of submissiles toward an intended target." Swearengen v. Contact and close-range shots—in which the pellets remain clumped together as they enter the body—can "result in pulpification of organs" due to the immense gas pressure released. Di Maio 199. Shots fired within nine feet of the victim "usually cause massive local destruction." Wilson 153-154. As the range increases, and the pellets enter the body separately, the "wounds produced will resemble those from a low-velocity handgun bullet"—that is, the victim will be in essence struck with multiple low-velocity bullets at once. Di Maio 199-200; see Fig. 1, App., *infra*, 1a. Part of the reason for the devastating effect of short-barreled shotguns is that "[u]nlike rifle bullets * * * shotgun pellets rarely exit the body," with the result that "all the kinetic energy is transferred to the body as wounding effects." Di Maio 183.

At greater distances, a single shotgun blast has the potential to hit multiple victims, whether intended or not, and to be accurate in hitting a moving target even if the shooter lacks great aim. According to one study, when fired from 30 yards away, the shot spread will range between 27 and 44 inches, depending on the

choke. Brian J. Heard, *Handbook of Firearms and Ballistics: Examining and Interpreting Forensic Evidence* 176 (1997) (Heard). Even at very long distances, where the pellets have lost substantial velocity, a significant chance still exists that a person's eye will be hit by a pellet—over 50% at 15 to 40 yards away. See William F. Varr III, *Shotgun Eye Injuries: Ocular Risk and Eye Protection Efficacy*, 99 Ophthamology 869 (June 1992).[13] In short, "[n]o other weapon can demonstrate a first-round hit probability and a single-round lethality that even approaches that possessed by the shotgun." Swearengen v.

Second, the concealability of a short-barreled shotgun makes it less likely that targets, bystanders, or security personnel will notice that an individual has carried a shotgun into a building or to the scene of a criminal transaction. Intended victims may not know to take cover or run away until it is too late. Rivals or Good Samaritans are more likely to confront the possessor if they do not know that he has a powerful weapon concealed in his coat or bag. Thus, the weapon's size as compared to a similarly powerful full-length shotgun increases the risk that its possession during criminal activity will result in death or injury.

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[13] Many believe that a short-barreled shotgun produces a wider spread of shot than a regular shotgun. Some studies examining that issue have found such an effect, while others have produced inconclusive results or found no effect. See, *e.g.*, Heard 177; Michael S. Ward et al., *Sawed-off Shotgun, the Effect of Barrel Length on Shot Pattern Size*, 45 AFTE Journal 40 (Winter 2013); Di Maio 203. Removing the choke on a shotgun increases the spread. See *Cortez*, 442 N.Y.S.2d at 875. But because the choke is located at the muzzle end of the barrel, removing the choke does not necessarily mean that the modified weapon would be short enough to meet the NFA's definition of a "firearm."

Third, the fact that a short-barreled shotgun can be more easily aimed and handled than a larger gun, and is lighter to carry, increases the chance that a shooter will be able to hit multiple targets in close quarters. It also enables the possessor to do other things—drive a car, open a door, hold a bag of drugs, or call a getaway car on his cell phone—while brandishing or firing. That increases the chance that the possessor will fire off more rounds during a confrontation.

ii. The unique danger posed by short-barreled shotguns—immense lethality combined with concealabilty and maneveurability—is recognized in the text of the NFA. In addition to short-barreled shotguns and rifles, machineguns, and other highly dangerous arms and explosives, the NFA applies to any other weapon "capable of being concealed on the person from which a shot can be discharged through the energy of an explosive" (excluding rifled pistols and revolvers) and any smooth-bored pistol or revolver designed to fire a shotgun shell. 26 U.S.C. 5845(a) and (e); see NFA § 1(a), 48 Stat. 1236. That catchall category is designed to capture weapons with the same signature characteristics of short-barreled shotguns even if they otherwise fall outside the statutory definition. That demonstrates Congress's determination that packing the explosive power of a shotgun into an easily concealable weapon poses a special danger that neither ordinary shotguns nor ordinary handguns do.

The same legislative judgment is reflected in the Crime Control Act of 1990, which amended 18 U.S.C. 924(c) to subject individuals to heightened penalties when they bring a short-barreled shotgun to a drug deal or a violent crime. Section 924(c) generally prohibits the use or carrying of a firearm during and in

relation to a violent crime or drug-trafficking offense (and, as amended in 1998, a firearm's possession in furtherance of such a crime). The provision's "basic purpose" is "to combat the 'dangerous combination' of 'drugs [or violent crimes] and guns.'" *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (citation omitted). The 1990 amendment doubled the penalty—ten years instead of five years—"if the firearm possessed by a person convicted of a violation of this section * * * is a * * * short-barreled shotgun" (among other weapons). 18 U.S.C. 924(c)(1)(A) and (B)(i). That additional penalty embodies the view that combining a short-barreled shotgun with serious criminal activity presents an even greater risk of violence than other armed offenses.

iii. The Sentencing Commission has also concluded that the possession of a short-barreled shotgun creates a serious potential risk of physical injury. The Commission has determined that the term "crime of violence" under the career offender guideline, which has nearly the same definition as "violent felony" under the ACCA, includes the possession of a short-barreled shotgun or another firearm covered by the NFA. See Sentencing Guidelines App. C, Amend. 674 (effective Nov. 1, 2004); see Sentencing Guidelines § 4B1.2, comment. (n.1). Given that "'[t]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between' a particular offense and 'the likelihood of accompanying violence,'" that determination is "further evidence" that the offense poses an inherent risk of violence. *James*, 550 U.S. at

206-207 (quoting *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (Breyer, C.J.)).

iv. As petitioner acknowledges (Br. 37), empirical studies quantifying the risk of serious injury or death created by the presence of a short-barreled shotgun at the scene of a crime do not exist. But any objective review of innumerable reported incidents in which the weapon has been possessed in the commission of crimes confirms the longstanding view of Congress and the courts that the weapon is inherently dangerous in a way that ordinary firearms are not: Short-barreled shotguns can impose catastrophic injury at close range, can hit multiple people with sprays of shot, including unintended bystanders, and can be easily concealed and rapidly redirected.

The special lethality of the weapon is illustrated in everyday criminal prosecutions in state and federal courts involving the infliction of horrific close-range wounds, the injury or killing of multiple individuals in rapid succession, accidental or unplanned shootings in the course of confrontations, and deadly attacks on police officers.[14] The weapon has also been employed

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[14] See, *e.g.*, *State* v. *Meikle*, 79 A.3d 129, 131 (Conn. App. Ct. 2013) (per curiam); *Fisher* v. *State*, 359 S.W.3d 113, 115-117 (Mo. Ct. App. 2011); *Hammond* v. *Hall*, 586 F.3d 1289, 1297-1298, 1301-1302, 1304, 1310-1311 (11th Cir. 2009), cert. denied, 131 S. Ct. 917 (2011); *Lewis* v. *Curry*, No. C 06-1727, 2008 WL 2128139, at *1 (N.D. Cal. May 20, 2008); *People* v. *Barbosa*, No. F051824, 2008 WL 1961158, at *2-*3 (Cal. Ct. App. May 7, 2008); *Murray* v. *Schriro*, No. CV-99-1812, 2008 WL 1701404, at *28 (D. Ariz. 2008), aff'd, 745 F.3d 984 (9th Cir. 2014); *People* v. *Thompson*, 853 N.E.2d 378, 382-385 (Ill. 2006), cert. denied, 549 U.S. 1254 (2007); *State* v. *Carter*, 114 S.W.3d 895, 899, 901 (Tenn. 2003), cert. denied, 541 U.S. 1221 (2004); *Dennis* v. *Mitchell*, 354 F.3d 511, 515 (6th Cir. 2003), cert. denied, 541 U.S. 1068 (2004); *States* v. *Trevino*, 980

in some of the most notorious instances of mass violence in recent memory. In preparing for their attack on Columbine High School, Dylan Klebold and Eric Harris personally "sawed the barrels off [two] shotguns for concealment" and loaded them with buckshot. Dave Cullen, *Columbine* 33 (2009) (Cullen); see *The Report of Governor Bill Owens' Columbine Review Commission* 23 n.58 (May 2001) (*Columbine Report*);[15] see also Tom Kenworthy, USA Today, *Video Shows Columbine Gunmen Laughing During Target Practice* (Oct. 22, 2003) (reproducing photograph of Klebold with sawed-off shotgun).[16] As they approached the school, they hid the shotguns from the view of students and teachers in duffel bags. Cullen 46; see *Columbine Report* 26. And last year, a mentally disturbed man concealed in a backpack a Remington 870 shotgun that he had personally cut down with a hacksaw, walked past security at the Washington Navy Yard, and murdered twelve people. See FBI, *Photo Gallery: Navy Yard Shootings*;[17] Metropolitan

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P.2d 552, 554-555 (Idaho 1999); *People* v. *Hope*, 658 N.E.2d 391, 395 (Ill. 1995), cert. denied, 517 U.S. 1223 (1996); *State* v. *Rose*, 548 A.2d 1058, 1065-1066 (N.J. 1988); *State* v. *Fusak*, No. 86-2093-CR, 1987 WL 267599, at *1-*3 (Wis. Ct. App.), review denied, 416 N.W.2d 297 (1987); *People* v. *Walker*, 483 N.E.2d 301, 303 (Ill. App. Ct. 1985); *Williams* v. *Maggio*, 679 F.2d 381, 383 (5th Cir. 1982), cert. denied, 463 U.S. 1214 (1983); *State* v. *Amerson*, 518 S.W.2d 29, 30-31 (Mo. 1975).

[15] www.state.co.us/columbine/Columbine_20Report_WEB.pdf.

[16] http://usatoday30.usatoday.com/news/nation/2003-10-22-columbine-gunmen_x.htm.

[17] www.fbi.gov/news/navy-yard-shootings-investigation/image/photo-gallery-navy-yard-shootings.

Police Dept., *After Action Report, Washington Navy Yard, September 16, 2013*, at 9 (July 2014).[18]

Petitioner is thus wrong in asserting that the widespread belief among Americans that short-barreled shotguns are especially dangerous is outdated and exaggerated. They are terribly dangerous. Given the physical characteristics of the weapon, the countless examples of its use in case law and news reports, and the serious concerns that have led generations of lawmakers to regulate them pervasively, it is inarguable that their possession during a criminal encounter substantially increases the chance of death or grievous physical injury.

b. The risk posed by short-barreled shotguns is similar to the risks posed by the enumerated offenses

In determining whether an offense qualifies as a "violent felony" under the ACCA's residual clause, this Court has sought guidance in the level and kind of risk posed by the enumerated offenses. In *Sykes*, for example, the Court analyzed the types of risk presented by arson and burglary and found that they were similar, in a general sense, to the risk posed by vehicular flight from an officer. Like arson, the Court explained, vehicular flight demonstrates "a lack of concern for the safety of property and persons of pedestrians and other drivers" and creates the risk that officers will "use force to bring [the driver] within their custody." 131 S. Ct. at 2273. Likewise, the Court found that vehicular flight is similar to burglary in its likelihood of provoking a violent confrontation,

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[18] http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20AAR_Navy%20Yard_07-11-14.pdf.

because the act "dares, and in a typical case requires, the officer to give chase." *Ibid.*

The illegal possession of a short-barreled shotgun presents those risks—the danger of a violent confrontation and the disregard for the safety of others—to an even greater degree. It also presents a risk similar to extortion because the weapon's mere presence conveys an implicit threat of violence.

i. As discussed, in the typical case of *unlawful* possession of a short-barreled shotgun, the weapon is intended for use in criminal activity, as a means of assault or intimidation. When serious criminal activity is afoot, a risk of confrontation—with targets, bystanders, rivals, or law-enforcement officers—is always a possibility; indeed, it is often the purpose of the offense. And for the reasons discussed above, when one person is armed with a concealable, immensely destructive weapon, the possibility that the confrontation will turn deadly increases tremendously.

Even where the possessor is not observed committing an offense with the weapon, because of the grave threat that a short-barreled shotgun poses to public safety, officers who observe a person in possession of that weapon, or receive a report that a person has one illegally, will often "deem themselves duty bound" to approach the individual and attempt to disarm him. *Sykes*, 131 S. Ct. at 2273. That confrontation will be fraught with the potential for serious violence to a far greater extent than the average burglary arrest because the suspect will be armed with an inherently dangerous weapon capable of quickly ending the lives of multiple officers.

In assessing the risk posed by a particular offense, moreover, this Court has focused on the individuals

actually *convicted* of the crime. In *James*, in considering the offense of attempted burglary, the Court explained that the "ACCA only concerns that subset of attempted burglaries where the offender has been apprehended, prosecuted, and convicted." 550 U.S. at 204. The Court explained that the attempted burglaries that result in convictions would "typically occur when the attempt is thwarted by some outside intervenor." *Ibid.*

Here, possessors of short-barreled shotguns who are actually convicted of the offense are especially likely to have engaged in a confrontation with police or others at a time when they were holding the weapon or had it close at hand, either in the course of using it to commit a crime or during a home or vehicle search. Such offenders may or may not be "significantly more likely than others to attack" police when confronted. *Chambers* v. *United States*, 555 U.S. 122, 128-129 (2009). But if they do choose to resist, they have at their disposal the means to inflict horrific harm on the duty-bound officers.

ii. The possession of a short-barreled shotgun, like arson and the illegal use of explosives, also demonstrates an extreme disregard for the safety and well-being of other people because of its destructive potential. As courts have long recognized, equipping oneself with that weapon rather than more conventional means of self-defense demonstrates a willingness to inflict "indiscriminate carnage" in the event of a confrontation. *Vincent*, 575 F.3d at 826. And even the accidental discharge of a shotgun can have far more devastating consequences than a misfired pistol.

Although statistics specific to short-barreled shotguns do not exist, shotguns as a class, when used in

crimes, have caused far more deaths and injuries than arson and the use of explosives combined. See *Sykes*, 131 S. Ct. at 2274-2275. From 2008 through 2012, shotguns were used to commit 1896 homicides in the United States. See FBI, *Expanded Homicide Data Table 8* (2012).[19] By comparison, 31 victims were killed with explosives and 422 were killed with fire during the same time frame. *Ibid.* And in 2012, explosives and fire offenses resulted in up to 404 injuries, while offenses involving shotguns resulted in over 1100. FBI, *Type of Injury by Type of Weapons/Force Involved* (2012).[20]

iii. While none of the enumerated offenses precisely corresponds to unlawful possession of a short-barreled shotgun, the offense poses dangers similar to that of extortion, which, even defined unduly narrowly, includes the serious risk of physical injury created by a threat of violence to the victim's person or property and the possibility that ignoring the threat will provoke an attack. See *Begay* v. *United States*, 553 U.S. 137, 145 (2008); see also *James*, 550 U.S. at 208-210 (providing example of extortion through nonviolent blackmail and stating that narrower interpretation seems "entirely novel"). A similarly menacing message is conveyed to a victim, gang rivals, law-enforcement officers, and the public at large by an individual's unlawful possession of a short-barreled shotgun, which is "an ominous threat in and [of] it-

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[19] www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2008-2012.xls.

[20] http://www.fbi.gov/about-us/cjis/ucr/nibrs/2012/table-pdfs/type-of-injury-by-type-of-weapon-force-involved-2012.

self." *United States* v. *McKinney*, 477 F.2d 1184, 1186 (D.C. Cir. 1973) (per curiam).

Even if petitioner were correct that the popular imagination has exaggerated the danger of the weapon, he does not deny that it is "notoriously associated * * * with crime," such that anyone "who watches television or reads newspapers would know the reputation of the weapon." *United States* v. *Shaw*, 670 F.3d 360, 368-369 (1st Cir. 2012) (Boudin, J., concurring). Unlike firearms "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, the possession of a short-barreled shotgun contains an implicit threat of violence, as extortion often does, backed up by an exceptionally violent means of carrying it out.

* * * * *

The "ordinary case" of the unlawful possession of a short-barreled shotgun is possession in connection with serious crimes, and such possession amplifies the risk that someone will be killed or grievously wounded in a confrontation with the possessor. That risk is substantial; it is comparable to the risks posed by the enumerated offenses; and it has been recognized and acted upon by the Nation's elected representatives for decades.

B. The ACCA's Residual Clause Does Not Categorically Exclude Possession Offenses

Petitioner' principal argument, made in three different ways, is that the ACCA's residual clause inherently excludes possession offenses. See Pet. Br. 15-25, 29-42. That argument rests on a significant misunderstanding of this Court's decisions interpreting the ACCA's residual clause and should be rejected.

1. Petitioner first argues that "[b]y its very nature, the crime of possessing a short-barreled weapon requires possession and nothing more" and does not require that the "shotgun be used in or possessed during another crime." Pet. Br. 19, 21. It is true that the elements required to complete the offense of possession of a short-barreled shotgun do not *necessitate* a risk of physical injury. But the same is true of burglary, arson, extortion, and the unlawful use of explosives. There is no requirement, for example, that an extortionist follow through on a threat. The statute's focus is risk, not inevitability. For that reason, the "proper inquiry" under the residual clause is "whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another," not whether it always does. *James*, 550 U.S. at 208 (emphasis added).

Petitioner's basic error is his contention that, in assessing risk, a court may not consider "what additional conduct might occur" beyond the actions necessary to satisfy the elements of the offense. Pet. Br. 19; see Pet. Br. 44 (discussing similar reasoning of Sixth Circuit). Consideration of what additional conduct might attend the offense—a confrontation between a homeowner and an attempted burglar, for example, or the accidental death of a pedestrian during a vehicular flight—is the principal thrust of the residual-clause risk analysis. Tellingly, none of the cases that petitioner relies on for his argument involved the residual clause. See *id.* at 19-20 (citing *Taylor* v. *United States*, 495 U.S. 575, 600-601 (1990); *Johnson* v. *United States*, 559 U.S. 133, 137 (2010); and *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013)). Those cases establish only that to determine whether a state-law offense

meets the generic definition of an enumerated offense (*e.g.*, burglary), or has a particular element under clause (i) of Section 924(e)(2)(B), a court "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 20 (quoting *Moncrieffe*, 133 S. Ct. at 1684) (citation and internal quotation marks omitted).

But the residual clause demands a different analysis. A court must conduct a practical assessment of whether the conduct involved in the commission of the state-law offense typically entails a potential risk of violence, which in turn requires consideration of the circumstances and behavior that ordinarily attend the offense. See *James*, 550 U.S. at 207-209. Contrary to petitioner's evident understanding, a court need not find that "every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *Id.* at 208. Thus, as the Court explained in *James* in the context of attempted burglary, "[o]ne could, of course, imagine a situation in which attempted burglary might not pose a realistic risk of confrontation or injury to another—for example, a break-in of an unoccupied structure located far off the beaten path and away from any potential intervenors." *Id.* at 207. But the mere fact that the offense could, as a logical matter, be committed in a non-risky way does not remove it from the ambit of the residual clause if it ordinarily creates a serious potential risk of injury.

For the reasons discussed above, in the ordinary case the unlawful possession of a short-barreled shotgun is committed in connection with serious crimes,

where the weapon serves to intimidate victims through the threat of catastrophic injury and is concealed to avoid detection by the authorities and members of the public. A person who unlawfully takes possession of a short-barreled shotgun is likely to use it in multiple crimes, and the risk that it will eventually contribute to violence is quite high.

2. Petitioner next argues that "the enumerated offenses all involve active felonies and none criminalizes mere possession of an object" and therefore that "[p]ossession is so unlike these action-based felonies that it cannot be described as 'similar in kind.'" Pet. Br. 22. This Court rejected a structurally identical argument in *James*. The defendant there argued that the ACCA "categorically exclude[s] attempt offenses from the scope of the residual provision" because "the 'common attribute' of the offenses specifically enumerated in clause (ii) * * * is that they are all completed offenses." 550 U.S. at 198-199. The Court explained, however, that "the most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives use * * * is that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury." *Ibid.*

That analysis defeats petitioner's argument that the absence of an expressly enumerated possession offense means that possession offenses are categorically excluded from the residual clause. As this Court has made clear, a predicate crime need not be precisely similar to the enumerated crimes across every conceivable dimension, but instead generally need only be "*similar in risk* to the listed crimes." *Sykes*, 131

S. Ct. at 2276 (emphasis added); see *Chambers*, 555 U.S. at 128-129; *James*, 550 U.S. at 199-200; accord *Begay*, 553 U.S. at 150-153 (Scalia, J., concurring in the judgment). The whole purpose of the clause is to capture offenses that are different from the enumerated offenses except insofar as they present a similar risk. For the reasons discussed above, the unlawful possession of a short-barreled shotgun is similar in risk to the enumerated crimes.

This Court has imposed one extra-textual limitation on the residual clause: that at least some offenses "akin to strict liability, negligence, and recklessness" crimes are not covered. *Sykes*, 131 S. Ct. at 2276. For the reasons discussed in Section C below, that limitation does not apply here. And it would be inadvisable to establish any new extra-textual limitation on the residual clause for offenses that are not, in petitioner's terminology, sufficiently "action-based." Pet. Br. 22. Shielding recidivist felons who illegally equip themselves with inherently dangerous firearms from the ACCA's heightened penalties, on the ground that they were arrested before they could use the weapons, would frustrate the statute's basic purpose of keeping weapons out of the hands of dangerous people.[21]

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[21] Amici curiae contend that possession does not involve "conduct" within the meaning of the residual clause. See Br. of Gun Owners of Am., Inc. et al. 8-9. Possession requires action to exercise dominion over an object, either actually or constructively, such as by exercising exclusive control over the area where the object is located. See *State* v. *Denison*, 607 N.W.2d 796, 799-800 (Minn. Ct. App. 2000). Congress would likely be surprised to learn that the numerous federal possession offenses, such as possession of a controlled substance with intent to distribute it, involve no conduct whatsoever. See *Moncrieffe*, 133 S. Ct. at 1685 (discussing "conduct criminalized" by federal possession offense).

3. Finally, petitioner argues that if possession of a short-barreled shotgun qualifies as a violent felony under the residual clause, it "would functionally erase the term 'use' from the phrase 'use of explosives'" in the enumerated crimes. Pet. Br. 24. Petitioner's argument rests on an erroneous premise: that if the unlawful possession of a short-barreled shotgun is a violent felony, then the unlawful possession of *any* explosive would also qualify as a violent felony. That does not logically follow from the government's position, just as it does not follow that the unlawful possession of *any* firearm is a violent felony, see pp. 27-28, *supra*. Rather, what distinguishes short-barreled shotguns, as well as the types of explosives covered by the NFA, from other firearms and explosives is that they are inherently dangerous and are principally used by private citizens for criminal activities. The NFA expressly excludes from its definition of "destructive device" "any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; * * * or any other device which the Secretary finds is not likely to be used as a weapon." 26 U.S.C. 5845(f).

The unlawful possession of explosives that fall outside the NFA's definition of destructive devices—*i.e.*, those explosives not designed primarily for use as a weapon—would not necessarily be encompassed by the ACCA's residual clause. The reason that short-barreled shotguns are covered by that clause is that they are weapons primarily designed for criminal use, and so in the ordinary case their possession creates a serious potential risk of physical injury. That analysis

would not apply to explosives with lawful industrial uses, such as TNT, even though an individual might unlawfully possess those explosives by failing to comply with regulatory requirements. See *e.g.*, Cal. Health & Safety Code §§ 12000 *et seq.*; cf. 18 U.S.C. 841(c) and (d), 842 (federal licensing requirements for dealing, importing, and manufacturing "explosive materials").

In contrast, the enumerated offense of the unlawful "use of explosives" includes the illegal use of *any* explosives, even those with ordinary commercial and industrial applications. Thus, no redundancy is created by interpreting the residual clause to encompass the possession of particularly dangerous firearms and explosive weaponry.

C. The Unlawful Possession Of A Short-Barreled Shotgun Under Minnesota Law Is Not A Strict-Liability, Negligence, Or Recklessness Crime

In *Begay*, *supra*, this Court concluded that some offenses that may fall within the plain terms of the ACCA's residual clause because of the risk they pose nevertheless should be excluded from its scope because they are "simply too unlike the provision's listed examples for us to believe that Congress intended the provision to cover [them]." 553 U.S. at 142. That limitation has no application here.

1. *Begay* held that drunk driving is not a violent felony under the ACCA. 553 U.S. at 139. The Court concluded that to fall under the ACCA's residual clause, an offense must involve "purposeful, violent, and aggressive conduct." *Id.* at 145. It explained that each of the enumerated offenses involves that kind of conduct and that "such crimes are characteristic of the armed career criminal, the eponym of the statute."

Id. at 144-145 (citation and internal quotation marks omitted). Because drunk-driving offenses "are, or are most nearly comparable to, crimes that impose strict liability, [thereby] criminalizing conduct in respect to which the offender need not have had any criminal intent at all," the Court held that such offenses did not meet the "purposeful, violent, and aggressive" requirement. *Id.* at 145.

In *Sykes*, *supra*, this Court explained that the "purposeful, violent, and aggressive" formulation is "an addition to the statutory text," which expressly speaks only in terms of the risk posed by an offense. 131 S. Ct. at 2275. The Court further explained that the "formulation was used in [*Begay*] to explain the result" in a case that "involved a crime akin to strict liability, negligence, and recklessness crimes." *Id.* at 2276. In contrast, the crime at issue in *Sykes*, vehicular flight from officers, required that "[v]iolators * * * act 'knowingly or intentionally,'" which this Court described as "a stringent *mens rea* requirement." *Id.* at 2275 (citation omitted). The Court therefore found that it was "not a strict liability, negligence, or recklessness crime." *Id.* at 2276. Because the crime was "similar in risk to the listed crimes," the Court held that it fell within the residual clause without inquiring whether it otherwise could be deemed "purposeful, violent, and aggressive." *Id.* at 2275-2276.

Thus, although *Sykes* "did not overrule *Begay*" (Pet. Br. 18 n.4), it clarified that the "purposeful, violent, and aggressive" criterion is limited to offenses lacking a degree of *mens rea*. Here, the unlawful possession of a short-barreled shotgun under Minnesota law is not akin to a "strict liability, negligence, or

recklessness" crime. The Minnesota statute of conviction prohibits "own[ing], possess[ing], or operat[ing] * * * a short-barreled shotgun," without specifying a level of *mens rea*. Minn. Stat. Ann. § 609.67(2) (West 2009). In *State* v. *Ndikum*, 815 N.W.2d 816 (Minn. 2012), the Minnesota Supreme Court interpreted a similar offense (possession of a pistol in public, Minn. Stat. Ann. § 624.714(1a) (West 2009)), to require the government to prove that the defendant knew that he possessed a pistol. 815 N.W.2d at 822. In so holding, it closely followed this Court's analysis in *Staples*, *supra*, which held that knowledge of the characteristics of a machinegun is an element of the NFA possession offense, 26 U.S.C. 5861(d), despite the statute's failure to specify a *mens rea*. Echoing *Staples*'s reasoning, the Minnesota Supreme Court concluded that "[b]ased on the strength of the common law rule requiring a mens rea element in every crime, * * * statutory silence is typically insufficient to dispense with mens rea." 815 N.W.2d at 818.[22] And it found significant that the offense carried a "felony-level punishment," which was "simply incompatible with the theory" that it should be deemed a strict-liability offense. *Id.* at 822.

Given those principles, there is little question that the statute of conviction here, which is also silent as to *mens rea* and carries felony-level punishment (up to five years in prison), requires that the defendant knew that he possessed a short-barreled shotgun. That is the conclusion reached by the one Minnesota appellate court to consider the question, which explained that the statute requires that the defendant "*knowingly*

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[22] Petitioner thus errs (Br. 31) as a matter of Minnesota law in drawing the opposite inference from the statute's silence.

possessed the sawed-off shotgun." *State* v. *Salyers*, 842 N.W.2d 28, 34-35 (Minn. Ct. App. 2014) (emphasis added) (citing *Ndikum*'s *mens rea* holding).

Petitioner does not dispute that conclusion. But he contends (Pet. 30-32) that in 2007, when he was convicted, the offense was "almost certainly * * * essentially one of strict liability." Petitioner does not point to any judicial interpretation of the statute suggesting that it was a strict-liability crime at the time of his conviction. Because he pleaded guilty to the possession offense, see PSR ¶ 45, there can be no claim that the jury was misinstructed on the knowledge element, and in any event an error in jury instructions would not be relevant under the categorical approach. Petitioner relies (Br. 32) on the omission of the knowledge element in pattern jury instructions in 2007. In Minnesota courts, however, "jury instruction guides are instructive, but not precedential or binding." *State* v. *Kelley*, 734 N.W.2d 689, 695 (Minn. Ct. App. 2007).

Accordingly, unlike a strict-liability, negligence, or recklessness offense, the Minnesota statute of conviction contains the "conventional *mens rea* element" for statutory crimes. *Staples*, 511 U.S. at 605.

2. In any event, even if knowledge of the characteristics of the weapon were not required, that would not take the offense outside the scope of the ACCA's residual clause. A state legislature could reasonably conclude that the length of a barrel is such a visually apparent feature of a weapon that the government should not be required to prove beyond a reasonable doubt that a possessor had the requisite knowledge. Particularly given that it is "hardly onerous" for an individual to "measur[e] the length of the barrel[]" of

an obviously short shotgun to ensure that it meets legal requirements, a state legislature could sensibly find it inequitable for "'the owner of a sawed-off shotgun to be criminally liable if he knew its barrel was 17.5 inches long but not if he mistakenly believed the same gun had an 18–inch barrel.'" *State* v. *Watterson*, 679 S.E.2d 897, 903-904 (N.C. Ct. App. 2009) (quoting *Staples*, 511 U.S. at 634 (Stevens, J., dissenting)).

That legislative judgment would not make the offense akin to a strict-liability offense in the same sense as drunk driving. Conviction would still require proof that the defendant was "aware of [the sawed-off shotgun's] presence and [had] both the power and intent to control its disposition or use." *Watterson*, 679 S.E.2d at 900 (emphases omitted; brackets in original). The *Begay* formulation was crafted in an effort to discern "a prior crime's relevance to the possibility of future danger with a gun," 553 U.S. at 146, and possession of a short-barreled shotgun bears a high relevance to future danger even if the state legislature has chosen to presume knowledge of barrel length. The offense of intentionally arming oneself with a dangerous weapon should not be excluded from the ACCA's ambit simply to account for the remote case in which an unwitting felon honestly believed that an obviously short weapon met legal requirements.

3. As discussed, *Sykes* clarified that *Begay*'s formulation was meant to exclude offenses akin to strict-liability, negligence, and recklessness crimes. But even if this Court were to inquire into whether the unlawful possession of a short-barreled shotgun is "purposeful, violent, and aggressive" in some broader sense, the offense would qualify as a violent felony. It is not the sort of crime "that involves risk of injury

but not aggression or violence." *Sykes*, 131 S. Ct. at 2289 n.1 (Kagan, J., dissenting). The risk presented is that a confrontation will occur in the course of the possession and that the possessor of the short-barreled shotgun will use it against another human being. And even putting aside that basic risk of actual violence, the possession of a weapon used predominantly for violent purposes is inherently aggressive, conveying an implicit threat of violence to anyone who encounters the possessor. See pp. 41-42, *supra*. In petitioner's phrasing, the act of unlawfully equipping oneself with a short-barreled shotgun or another inherently dangerous weapon is at least as "intentional and provocative" as attempted burglary or vehicular flight. Pet. Br. 14-15.

Petitioner argues (Br. 25-29) that the unlawful possession of a short-barreled shotgun is different in kind from the enumerated offenses because the conduct is lawful in most States if conducted in conformity with regulatory requirements. That argument rests on the erroneous premise that all of the enumerated offenses concern conduct that is "*per se* criminalized." *Id.* at 29. The use of explosives is pervasively regulated by States and municipalities, and the same detonation may be lawful or unlawful depending on whether a person has obtained regulatory permission. See, *e.g.*, Cal. Health & Safety Code §§ 12000 *et seq.*; Fla. Stat. Ann. §§ 552.081 *et seq.*; N.Y. Lab. Law §§ 450 *et seq.*; Ohio Rev. Code Ann. §§ 2923.11(K)(3), 2923.17, 2923.18 (LexisNexis 2010 & Supp. 2014); Tex. Loc. Gov't Code Ann. §§ 235.001 *et seq.* But context matters. A person who uses explosives without permission, or equips himself with a short-barreled shotgun, artillery piece, or grenade launcher without regulato-

ry approval, is very differently positioned than the person who has properly notified authorities about what he is doing.

In short, it is difficult to believe that Congress would have been more concerned with the felon who had committed three burglaries than the felon who had illegally armed himself with a concealable firearm that has no recognized lawful use for private citizens, but that is extremely effective at killing and maiming human beings. As between the two, the latter is more clearly "the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 553 U.S. at 146.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

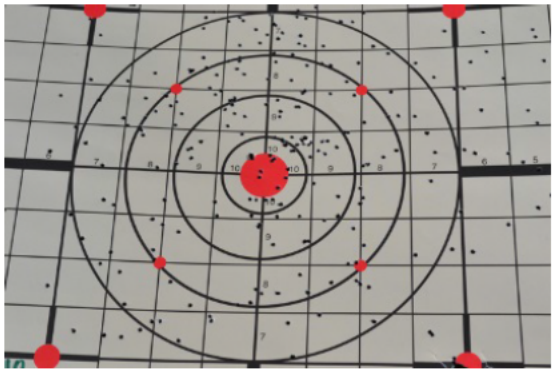

Figure 1: Shot spread patterns of birdshot from 30 feet. See Kyle Wintersteen, ***Buckshot vs. Birdshot***, Shooting Illustrated Magazine (Nov. 15, 2012), http://www.shootingillustrated.com/article.php?id=26973.

Figure 2: Sawed-off shotgun purchased by undercover officer. Pretrial Memo. in Supp. of Detention, Docket entry No. 4, Ex. B, ***United States*** v. ***Lupoi et al.***, No. 14-cr-42 (E.D.N.Y. Feb. 11, 2014).

Figure 3: Full-length shotgun compared with short-barreled shotgun. (ATF file photo.)

1. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

(a) It shall be unlawful—

* * * * *

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

* * * * *

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the li-

censee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his rec-

ords, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

(*o*)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

* * * * *

2. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who,

during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or prop-

erty of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * * * *

3. 26 U.S.C. 5812 provides:

Transfers

(a) Application

A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form;

(3) the transferee is identified in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary may by regulations prescribe; and (6) the application form shows that the Secretary has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession

The transferee of a firearm shall not take possession of the firearm unless the Secretary has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

4. 26 U.S.C. 5822 provides:

Making

No person shall make a firearm unless he has (a) filed with the Secretary a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application form in such manner as the Secretary may by regulations prescribe; (d) identified himself in the application

form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the Secretary to make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

5. 26 U.S.C. 5841 provides:

Registration of firearms

(a) Central registry

The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered

Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this Act

A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968[2] shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration

A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary upon request.

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[2] So in original. See References in Text notes below.

6. 26 U.S.C. 5845 provides:

Definitions

For the purpose of this chapter—

(a) Firearm

The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun

The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts de-

signed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle

The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(d) Shotgun

The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

(e) Any other weapon

The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in

length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

(f) Destructive device

The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the

Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

(g) Antique firearm

The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(h) Unserviceable firearm

The term "unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.

(i) Make

The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

(j) Transfer

The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

(k) Dealer

The term "dealer" means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans.

(*l*) Importer

The term "importer" means any person who is engaged in the business of importing or bringing firearms into the United States.

(m) Manufacturer

The term "manufacturer" means any person who is engaged in the business of manufacturing firearms.

7. 27 C.F.R. 478.28 provides:

Transportation of destructive devices and certain firearms.

(a) The Director may authorize a person to transport in interstate or foreign commerce any destructive device, machine gun, short-barreled shotgun, or short-barreled rifle, if he finds that such transportation is reasonably necessary and is consistent with public safety and applicable State and local law. A person

who desires to transport in interstate or foreign commerce any such device or weapon shall submit a written request so to do, in duplicate, to the Director. The request shall contain:

(1) A complete description and identification of the device or weapon to be transported;

(2) A statement whether such transportation involves a transfer of title;

(3) The need for such transportation;

(4) The approximate date such transportation is to take place;

(5) The present location of such device or weapon and the place to which it is to be transported;

(6) The mode of transportation to be used (including, if by common or contract carrier, the name and address of such carrier); and

(7) Evidence that the transportation or possession of such device or weapon is not inconsistent with the laws at the place of destination.

(b) No person shall transport any destructive device, machine gun, short-barreled shotgun, or short-barreled rifle in interstate or foreign commerce under the provisions of this section until he has received specific authorization so to do from the Director. Authorization granted under this section does not carry or import relief from any other statutory or regulatory provision relating to firearms.

(c) This section shall not be construed as requiring licensees to obtain authorization to transport destruc-

tive devices, machine guns, short-barreled shotguns, and short-barreled rifles in interstate or foreign commerce: *Provided,* That in the case of a licensed importer, licensed manufacturer, or licensed dealer, such a licensee is qualified under the National Firearms Act (see also Part 479 of this chapter) and this part to engage in the business with respect to the device or weapon to be transported, and that in the case of a licensed collector, the device or weapon to be transported is a curio or relic.

8. 27 C.F.R. 479.62 provides:

Application to make.

No person shall make a firearm unless the person has filed with the Director a written application on Form 1 (Firearms), Application to Make and Register a Firearm, in duplicate, executed under the penalties of perjury, to make and register the firearm and has received the approval of the Director to make the firearm which approval shall effectuate registration of the weapon to the applicant. The application shall identify the firearm to be made by serial number, type, model, caliber or gauge, length of barrel, other marks of identification, and the name and address of original manufacturer (if the applicant is not the original manufacturer). The applicant must be identified on the Form 1 (Firearms) by name and address and, if other than a natural person, the name and address of the principal officer or authorized representative and the employer identification number and, if an individual, the identification must include the date and place of

birth and the information prescribed in § 479.63. Each applicant shall identify the Federal firearms license and special (occupational) tax stamp issued to the applicant, if any. The applicant shall also show required information evidencing that making or possession of the firearm would not be in violation of law. If the making is taxable, a remittance in the amount of $200 shall be submitted with the application in accordance with the instructions on the form. If the making is taxable and the application is approved, the Director will affix a National Firearms Act stamp to the original application in the space provided therefor and properly cancel the stamp (see § 479.67). The approved application will be returned to the applicant. If the making of the firearm is tax exempt under this part, an explanation of the basis of the exemption shall be attached to the Form 1 (Firearms).

9. 27 C.F.R. 479.63 provides:

Identification of applicant.

If the applicant is an individual, the applicant shall securely attach to each copy of the Form 1 (Firearms), in the space provided on the form, a photograph of the applicant 2 x 2 inches in size, clearly showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application. The applicant shall attach two properly completed FBI Forms FD-258 (Fingerprint Card) to the application. The fingerprints must be clear for

accurate classification and should be taken by someone properly equipped to take them. A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 1 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that possession of the firearm by the maker would be in violation of State or local law or that the maker will use the firearm for other than lawful purposes.

10. 27 C.F.R. 479.64 provides:

Procedure for approval of application.

The application to make a firearm, Form 1 (Firearms), must be forwarded directly, in duplicate, by the maker of the firearm to the Director in accordance with the instructions on the form. The Director will consider the application for approval or disapproval. If the application is approved, the Director will return the original thereof to the maker of the firearm and retain the duplicate. Upon receipt of the approved application, the maker is authorized to make the firearm described therein. The maker of the firearm shall not, under any circumstances, make the firearm until the application, satisfactorily executed, has been forwarded to the Director and has been approved and returned by the Director with the National Firearms

Act stamp affixed. If the application is disapproved, the original Form 1 (Firearms) and the remittance submitted by the applicant for the purchase of the stamp will be returned to the applicant with the reason for disapproval stated on the form.

11. 27 C.F.R. 479.65 provides:

Denial of application.

An application to make a firearm shall not be approved by the Director if the making or possession of the firearm would place the person making the firearm in violation of law.

12. 27 C.F.R. 479.84 provides:

Application to transfer.

Except as otherwise provided in this subpart, no firearm may be transferred in the United States unless an application, Form 4 (Firearms), Application for Transfer and Registration of Firearm, in duplicate, executed under the penalties of perjury to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The application, Form 4 (Firearms), shall be filed by the transferor and shall identify the firearm to be transferred by type; serial number; name and address of the manufacturer and importer, if known; model; caliber, gauge or size; in the case of a short-barreled shotgun or a short-barreled rifle, the length of the barrel; in the case of a weapon made from a rifle or shotgun, the overall length of the weapon and the length of the barrel; and

any other identifying marks on the firearm. In the event the firearm does not bear a serial number, the applicant shall obtain a serial number from the Regional director (compliance) and shall stamp (impress) or otherwise conspicuously place such serial number on the firearm in a manner not susceptible of being readily obliterated, altered or removed. The application, Form 4 (Firearms), shall identify the transferor by name and address; shall identify the transferor's Federal firearms license and special (occupational) Chapter tax stamp, if any; and if the transferor is other than a natural person, shall show the title or status of the person executing the application. The application also shall identify the transferee by name and address, and, if the transferee is a natural person not qualified as a manufacturer, importer or dealer under this part, he shall be further identified in the manner prescribed in § 479.85. The application also shall identify the special (occupational) tax stamp and Federal firearms license of the transferee, if any. Any tax payable on the transfer must be represented by an adhesive stamp of proper denomination being affixed to the application, Form 4 (Firearms), properly cancelled.

13. 27 C.F.R. 479.85 provides:

Identification of transferee.

If the transferee is an individual, such person shall securely attach to each copy of the application, Form 4 (Firearms), in the space provided on the form, a photograph of the applicant 2 x 2 inches in size, clearly

showing a full front view of the features of the applicant with head bare, with the distance from the top of the head to the point of the chin approximately 1¼ inches, and which shall have been taken within 1 year prior to the date of the application. The transferee shall attach two properly completed FBI Forms FD–258 (Fingerprint Card) to the application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. A certificate of the local chief of police, sheriff of the county, head of the State police, State or local district attorney or prosecutor, or such other person whose certificate may in a particular case be acceptable to the Director, shall be completed on each copy of the Form 4 (Firearms). The certificate shall state that the certifying official is satisfied that the fingerprints and photograph accompanying the application are those of the applicant and that the certifying official has no information indicating that the receipt or possession of the firearm would place the transferee in violation of State or local law or that the transferee will use the firearm for other than lawful purposes.

14. 27 C.F.R. 479.86 provides:

Action on application.

The Director will consider a completed and properly executed application, Form 4 (Firearms), to transfer a firearm. If the application is approved, the Director will affix the appropriate National Firearms Act stamp, cancel it, and return the original application showing approval to the transferor who may then

transfer the firearm to the transferee along with the approved application. The approval of an application, Form 4 (Firearms), by the Director will effectuate registration of the firearm to the transferee. The transferee shall not take possession of a firearm until the application, Form 4 (Firearms), for the transfer filed by the transferor has been approved by the Director and registration of the firearm is effectuated to the transferee. The transferee shall retain the approved application as proof that the firearm described therein is registered to the transferee, and shall make the approved Form 4 (Firearms) available to any ATF officer on request. If the application, Form 4 (Firearms), to transfer a firearm is disapproved by the Director, the original application and the remittance for purchase of the stamp will be returned to the transferor with reasons for the disapproval stated on the application. An application, Form 4 (Firearms), to transfer a firearm shall be denied if the transfer, receipt, or possession of a firearm would place the transferee in violation of law. In addition to any other records checks that may be conducted to determine whether the transfer, receipt, or possession of a firearm would place the transferee in violation of law, the Director shall contact the National Instant Criminal Background Check System.

15. 27 C.F.R. 479.101 provides:

Registration of firearms.

(a) The Director shall maintain a central registry of all firearms in the United States which are not in the

possession of or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record and shall include:

(1) Identification of the firearm as required by this part;

(2) Date of registration; and

(3) Identification and address of person entitled to possession of the firearm as required by this part.

(b) Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes in the manner prescribed by this part. Each firearm transferred shall be registered to the transferee by the transferor in the manner prescribed by this part. No firearm may be registered by a person unlawfully in possession of the firearm except during an amnesty period established under section 207 of the Gun Control Act of 1968 (82 Stat. 1235).

(c) A person shown as possessing firearms by the records maintained by the Director pursuant to the National Firearms Act (26 U.S.C. Chapter 53) in force on October 31, 1968, shall be considered to have registered the firearms in his possession which are disclosed by that record as being in his possession on October 31, 1968.

(d) The National Firearms Registration and Transfer Record shall include firearms registered to the possessors thereof under the provisions of section 207 of the Gun Control Act of 1968.

(e) A person possessing a firearm registered to him shall retain proof of registration which shall be made available to any ATF officer upon request.

(f) A firearm not identified as required by this part shall not be registered.

16. Minn. Stat. § 609.67 (2007) provides:

MACHINE GUNS AND SHORT-BARRELED SHOTGUNS.

Subdivision 1. **Definitions.** (a) "Machine gun" means any firearm designed to discharge, or capable of discharging automatically more than once by a single function of the trigger.

(b) "Shotgun" means a weapon designed, redesigned, made or remade which is intended to be fired from the shoulder and uses the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(c) "Short-barreled shotgun" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun if such weapon as modified has an overall length less than 26 inches.

(d) "Trigger activator" means a removable manual or power driven trigger activating device constructed and designed so that, when attached to a firearm, the rate at which the trigger may be pulled increases and the rate of fire of the firearm increases to that of a machine gun.

(e) "Machine gun conversion kit" means any part or combination of parts designed and intended for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled, but does not include a spare or replacement part for a machine gun that is possessed lawfully under section 609.67, subdivision 3.

Subd. 2. **Acts prohibited.** Except as otherwise provided herein, whoever owns, possesses, or operates a machine gun, any trigger activator or machine gun conversion kit, or a short-barreled shotgun may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Subd. 3. **Uses permitted.** The following persons may own or possess a machine gun or short-barreled shotgun provided the provisions of subdivision 4 are complied with:

(1) law enforcement officers for use in the course of their duties;

(2) chief executive officers of correctional facilities and other personnel thereof authorized by them and persons in charge of other institutions for the retention of persons convicted or accused of crime, for use in the course of their duties;

(3) persons possessing machine guns or short-barreled shotguns which, although designed as weapons, have been determined by the superintendent of the Bureau of Criminal Apprehension or the superintendent's delegate by reason of the date of manufacture, value, design or other characteristics to be pri-

marily collector's items, relics, museum pieces or objects of curiosity, ornaments or keepsakes, and are not likely to be used as weapons;

(4) manufacturers of ammunition who possess and use machine guns for the sole purpose of testing ammunition manufactured for sale to federal and state agencies or political subdivisions;

(5) dealers and manufacturers who are federally licensed to buy and sell, or manufacture machine guns or short-barreled shotguns and who either use the machine guns or short-barreled shotguns in peace officer training under courses approved by the Board of Peace Officer Standards and Training, or are engaged in the sale of machine guns or short-barreled shotguns to federal and state agencies or political subdivisions; and

(6) persons employed by the Minnesota National Guard as security guards, for use in accordance with applicable federal military regulations.

Subd. 4. **Report required.** (a) A person owning or possessing a machine gun or short-barreled shotgun as authorized by subdivision 3, clause (1), (2), (3), or (4) shall, within ten days after acquiring such ownership or possession, file a written report with the Bureau of Criminal Apprehension, showing the person's name and address; the person's official title and position, if any; a description of the machine gun or short-barreled shotgun sufficient to enable identification thereof; the purpose for which it is owned or possessed; and such further information as the bureau may reasonably require.

(b) A dealer or manufacturer owning or having a machine gun or short-barreled shotgun as authorized by subdivision 3, clause (5) shall, by the tenth day of each month, file a written report with the Bureau of Criminal Apprehension showing the name and address of the dealer or manufacturer and the serial number of each machine gun or short-barreled shotgun acquired or manufactured during the previous month.

Subd. 5. **Exceptions.** This section does not apply to members of the armed services of either the United States or the state of Minnesota for use in the course of their duties or to security guards employed by the Minnesota National Guard for use in accordance with applicable federal military regulations.

Subd. 6. **Preemption.** Laws 1977, chapter 255, supersedes all local ordinances, rules and regulations.